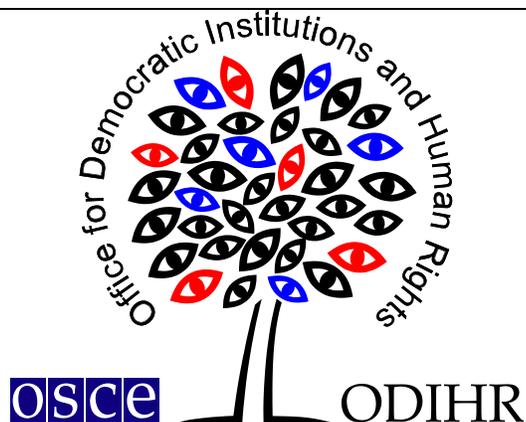


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Final Comments on the Draft Constitution of Montenegro

based on an unofficial English translation of the draft

These Comments have been prepared based also on the comments provided by Professor .Marek Zubik (Deputy Head, Department of Preliminary Control of Applications and Constitutional Complaints, Constitutional Tribunal of Republic of Poland)

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1. INTRODUCTION

- 1. These Comments have been prepared at the request of the OSCE Mission to Montenegro, in order to assist the authorities of the Republic of Montenegro in the drafting of a Constitution as a newly independent State.*
- 2. Based on the results of a referendum held on 21 May 2006, Montenegro declared independence on 3 June 2006. On 22 June, Montenegro joined the OSCE as its 56th participating State and on 28 June became the 192nd member state of the United Nations. Its accession to the Council of Europe as its 47th member state took place on 11 May 2007.*
- 3. In September 2006, an “expert version” of a new Constitution was presented by a Council for Constitutional Affairs specifically convened for the purpose of drafting this document, which was then to serve as the starting point for elaborating the draft Constitution. On 3 March, the draft Constitution was finalized by the Constitutional Committee of the Parliament and submitted on 26 March 2007 to the plenary session of the Parliament. On 2 April, this draft was endorsed by the Parliament as the official Draft of the Constitution. A public debate was declared open as of the following day, for a period expiring on 28 May.*
- 4. The Draft contains 146 articles, out of which 14 have not garnered consensus support, which is reflected in the submission of 28 alternative texts in respect of the said articles.*
- 5. The analysis and recommendations contained in the present comments have been coordinated with the Opinion of the Venice Commission on the same Draft Constitution. The OSCE ODIHR comments shall be viewed as complementary to the latter opinion, in that they do not cover all of the issues and provisions addressed in the Opinion of the Venice Commission. The OSCE ODIHR hereby expresses its full support for the recommendations and conclusions contained in the Opinion of the Venice Commission.*

2. SCOPE OF REVIEW

7. These Comments intend to (a) assess the compliance of selected Articles of the draft constitution (hereinafter referred to as the “Draft” or “Draft Constitution”) with international law, international best practices and European constitutional heritage as well as OSCE human dimension commitments; and (b) propose recommendations considering the relevant international standards.
9. These Comments do not purport to provide a comprehensive review nor do they attempt to assess the Draft Constitution beyond the provisions affected by the articles under review. However, considering that some of the draft amendments have implications beyond the Articles affected by the changes proposed, it was deemed necessary to include comments on other provisions not directly affected by the draft amendments. Still, such instances are very limited and specifically mentioned in the text of the Comments.
8. The understanding that there is a great degree of flexibility with regard to the level of specificity of constitutional provisions is fundamental to this analysis and is reflected throughout.
10. Absence of comment on a specific provision cannot be interpreted to imply that the provision in question is consistent with the view of OSCE ODIHR.
11. The Comments are based on an unofficial translation of the text of the Draft Constitution and inaccuracies in interpretation may occur as a result.

3. ANALYSIS AND RECOMMENDATIONS

Article 6¹

12. While the express prohibition of discrimination by Article 6 is certainly welcome, the inclusion of the prohibition of discrimination as a clause under a more general article rather than as a separate article raises a concern that it may be misinterpreted as not according non-discrimination the same level of importance as other fundamental human rights and liberties. It is therefore recommended that a specific article prohibiting discrimination be introduced in the text. Furthermore, this paragraph may need to be merged with the provisions laying down the principles of equality before the law and equal protection of rights and freedoms (Article 16, paragraph 2 and Article 17).

Article 8

13. The first paragraph (first sentence) of the Article seeks to express the legal order of Montenegro, however, unless by reason of translation, the reference to the legal order of Montenegro being “single” is not clear. It may be considered for this article to simply articulate that Montenegro is “a democratic State governed by the rule of law”, while

¹ See also comments to Article 16.

explaining the legal and constitutional order in Article 133. The second paragraph of Article 8 seeks to express the supremacy of international treaties and agreements over domestic laws, in the case of conflict. This paragraph is welcomed.

Article 9

14. Second paragraph is redundant, in that it states an obvious, self-explanatory principle.

Article 11

15. The usefulness or “added value” of paragraph 1 is questionable. A similar formulation may be found in constitutions of other countries, but in these cases it is used in relation to the protection of the rights and interests of citizens living abroad specifically. This additional component however would not have added value to the provision either. On the contrary, it has often been deemed ambiguous because of possible misinterpretations.
16. Alternatively, given the greater importance of such specifications in the context of state succession, it would be worth considering inserting a paragraph stating that conditions under which the citizenship of Montenegro is acquired, lost or recovered, shall be regulated by law. Similarly, it would be advisable to indicate under this article that no one may be deprived of his or her citizenship against his/her will.

Article 15

17. It is proposed paragraph 1 of Article 15 be reworded. In the current wording it suggests that the exercise of human rights and freedoms is ‘regulated’ by law, whereas, laws should only stipulate permissible restrictions to the free exercise of rights and freedoms. The Draft Constitution is recommended to guarantee and expressly state that rights and freedoms may be freely exercised and cannot be restricted *unless* such restrictions are prescribed by law, made for a legitimate purpose and are necessary in a democratic society. If however, the paragraph were to be reworded in the above described manner, it would overlap with Article 21; therefore the possibility of its deletion may be considered.
19. Paragraph 2 of Article 15 is unclear, in particular the words “the procedure before the authorities if so required for their operation”. Furthermore, paragraph 4 of the Article suggest that the list of areas that may be covered by legislation is not exhaustive, leaving an open catalogue of possibilities. Indeed it is acceptable that matters of interest of the State should be regulated by law, however, the purpose of stating it in the Constitution is not clear. It may be considered to include an article in the Constitution which would clearly state the sources of law of the State, which would be the Constitution, acts of parliament (legislation), ratified international agreements, etc.

Article 16

20. The article overlaps to a certain extent with the non-discrimination clause of Article 6. It is recommended that all language concerning the prohibition of discrimination be extracted from the provisions of Articles 6 and 16 and a separate article prohibiting

discrimination be introduced.

Article 18

21. The scope of this provision should be further delineated. It should first be brought in line with Article 13 ECHR, and paragraph 13.9 of the OSCE Concluding Document of Vienna² by adding the term “effective” to “legal redress”. Furthermore, the article may specifically state that everyone has the right to an “effective” remedy in the case that his or her constitutional rights and freedoms (contained in Part II of the Constitution) have been infringed. It might be considered to extend the scope of the procedural guarantee afforded under that provision to the availability of full information about such remedies to those who claim that their constitutional rights and freedoms have been violated³.

Article 19

22. The right to legal aid is specified in this Article is welcomed. However, it ought to be noted that Article 6 paragraph 3, ECHR⁴, requires legal assistance to be provided in cases where the accused has no means to pay for a lawyer and when the interests of justice so require. It may also be considered to include a reference that the technicalities of provision of legal aid will be regulated by law.

Article 21

23. The article as it stands now does not comply with the relevant international standards which require that any permissible restriction on human rights or freedoms be not only lawful (i.e. “*provided by law*”) but also legitimate (i.e. aimed to achieve clearly enumerated legitimate aims) and “*necessary in a democratic society*.”⁵ It has been interpreted by the European Court of Human Rights as requiring proportionality with regard to the stated legitimate aim. The “necessity” requirement is further detailed by the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (hereinafter referred to as “the Siracusa Principles”) as implying that “*the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim.*”⁶
24. It is recommended that Article 21 be revised to include the reference to legitimate aims and the requirement that any interference with the right or freedom be necessary and

² Third Follow-up Meeting, 19 January 1989.

³ Para 13.9, OSCE Concluding Document of Vienna: [in this context, they [participating States] will: (...) *ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated*”.

⁴ European Convention on Human Rights and Fundamental Freedoms, Rome 1950.

⁵ *See e.g.* the International Covenant on Civil and Political Rights (ICCPR) Articles 12(3), 18(3), 19(3), 21, 22(2), as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Articles 8(2), 9(2), 10(2), 11(2).

⁶ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Part I A (10). Fulltext version of the Principles is available at <http://www.legislationline.org/legislation.php?tid=219&lid=7155&less=false>.

strictly proportionate to the stated legitimate aim.

Article 22

25. The article does not specify what would constitute an “emergency,” nor does it delineate the procedural requirements whereby the State may derogate from rights and freedoms. No reference is made to Articles 121 and 122 of the Draft which address the state of war and state of emergency specifically.
26. It is essential that this provision indicates that the imposition of a state of public emergency “*must be proclaimed officially, publicly, and in accordance with the provisions laid down by law*”⁷. And that measures derogating from constitutional rights and freedoms must be “*limited to the extent strictly required by the exigencies of the situation*”⁸. The latter concept may be clarified in the light of the Siracusa Principles which provide that States may take such derogation measures only “*when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation.*” “*A threat to the life of the nation*” is further defined as “*one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.*” The Siracusa Principles specifically mention that “[i]nternal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4 [ICCPR].”

Article 23

27. The express and unequivocal abolition of death penalty under all circumstances is welcome.

Article 25

28. The article to a certain extent duplicates other provisions of the Draft, as well as conflates several different rights. Thus, certain aspects of “*dignity and security of person*” are addressed by Articles 26, 27 and 28. “*Inviolability of physical and mental integrity*” is also to some extent dealt with by Article 28. The right to privacy is guaranteed by Articles 37 and 38 of the Draft.
29. It is therefore recommended that Article 25 be revised to draw clearer separation lines between the different rights it aims to protect as well as to ensure better coordination and consistency with other relevant provisions of the Draft, notably Articles 26, 27, 28, 37 and 38. The structure of the European Convention of Human Rights could be followed.

Article 26

⁷ Document of the Copenhagen Meeting of the Conference on the human dimension of the CSCE, 29 June 1990, paragraph 25.2.

⁸ *Id.* Paragraph 25.3.

30. In line with the Article 5 paragraph 1 of the ECHR, this article is proposed to include wording that would specify that any deprivation of liberty is possible only through a procedure established by law.
31. Additionally to the above, it would be beneficial for the last sentence of the Article, which states that ‘unlawful deprivation of liberty shall be punishable’, to include an obligation to immediately release persons from detention, in case it is (the detention) found to be unlawful. Furthermore, in accordance with Article 5 paragraph 5 of the ECHR, Article 26 of the Draft Constitution may include the right to compensation of persons who have been unlawfully deprived of their liberty, as required by Article 3 of Protocol No.7 of the ECHR, or cross referenced with the right to compensation by the State as expressed in Article 35 of the Draft Constitution.

Article 27

32. Article 27 may benefit by an addition of the possibility to be released on bail, in the circumstances specified in law.

Article 28

33. In accordance with Article 3 of the ECHR and Article 7 of the ICCPR, this Article is recommended to include an express prohibition of inhumane and degrading treatment. This prohibition should apply to any person, in absolute terms, even though it is obviously particularly relevant in the case of persons who are deprived of liberty or whose liberty has been restricted. Furthermore, further to Article 2 paragraph 2 of the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, which states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”, it may be considered to include a specific cross reference to Articles 22, 121 and 122 of the Constitution.

Article 29

34. The inclusion of an article on the right to a fair trial is welcomed. However, it may be considered to supplement the article by adding the wording which is reflected in Article 6 of the ECHR, which speaks of both civil rights and obligations as well as in the case of criminal charges laid against the individual. Furthermore, although the article rightly states that judgments should be public, it is recommended to also permit exceptions to the public nature of the trial itself or the publication of the judgment as stated in Article 6 paragraph 1 of the ECHR.

Article 30 and 31

35. These articles correctly reflect the requirement of no punishment without law, which is laid down in Article 7 of the ECHR and is welcomed.

Article 32

36. The article establishes the presumption of innocence. This is the fundamental principle according to which any criminal trial may be taken, and in light of European jurisprudence, this presumption must be present from the moment of arrest of a suspect, until the moment that the accused is indeed proven to be guilty beyond any reasonable doubt. It is welcomed that this provision is included and further suggested to be supplemented to state the level of doubt as "reasonable".

Article 33

37. The article is welcomed and recommended to specifically include that no one shall be tried, nor convicted twice for the same act. This would bring the article into line with Article 4 of Protocol Number 7 of the ECHR as well as, Article 14 paragraph 7 of the ICCPR.

Article 34

38. This article establishes one of the aspects of the right to a fair trial, that being the right to a defence attorney, as spelled out in Article 6 paragraph 3(c), of the ECHR. The right to legal assistance has already been demarcated by the draft Constitution, and may be amalgamated in this article. However, just as Article 6 of the ECHR, so too Article 14 of the International Covenant on Civil and Political Rights⁹ (hereinafter "ICCPR"), establish a number of other safeguards which are crucial to ensuring the fairness of a trial for anyone charged with a criminal offence. These are minimum guarantees laid down in the international standards, and are recommended to be added in the Draft Constitution. These minimum guarantees include, to be informed promptly of the nature of the offence and accusation, in a language that one understands, and to have adequate time and facilities to prepare one's defence, to examine or have examined witnesses against him or her and on one's behalf under the same conditions as witnesses against him or her and to have free interpretation if one cannot understand or speak the language used in court.

Article 35

39. This article precisely reflects the requirement of entitlement to damages in the event that a person is wrongfully convicted or deprived of liberty, as required by Article 3 of Protocol No 7 of the ECHR.

Article 36

40. It is recommended that this article be amended to state that freedom of movement may only be restricted by law, instead of the enumeration of an exhaustive list of cases in which freedom of movement may be restricted. The restriction by law would be as stated in Article 2 paragraph 3 of Protocol No 4 of the ECHR, which establishes that the

⁹ International Covenant on Civil and Political Rights, 1966

permissible restrictions on the freedom of movement are those "necessary in a democratic society in the interests of national security or safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health and morals, or for the protection of rights and freedoms of others." Furthermore, in accordance with Article 12 paragraph 3 of the ICCPR¹⁰ on the freedom of movement, the permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of freedom of movement, and must be governed by the requirement of necessity provided for in the Article and by the need for consistency with the other rights recognized in the Covenant.¹¹

Article 38

41. The article does not clearly state the scope and grounds for permissible restrictions.
42. It is recommended that Article 38 be complemented with the requirement that any interference with the right to respect for one's correspondence be permissible only where lawful, legitimate and necessary in a democratic society.

Article 39

43. It is welcome that the article sets forth the two key principles relating to the protection of personal data: the use limitation principle (the data should not be used in a way incompatible with these specified and legitimate purposes) and the openness and individual participation principle (the data subject should have access to his or her data file and the right to remedy where his or her request for the rectification of data is not complied with). It is suggested that Article 39 be expanded to provide for the collection limitation principle (i.e. that the personal data should be obtained fairly and lawfully) and the purpose specification principle (the data should be stored for specified and legitimate purposes). The latter principle is an important complementary principle to that of the use limitation. It may however be deemed more appropriate to have these principles reflected in ordinary legislation.

Article 41

44. The words "with residence in Montenegro" in paragraph 1 would need to be clarified. The clarification could be achieved by adding the words "under such conditions as are prescribed by law or regulations".
45. As to the right to vote, a residence requirement – in the sense of *habitual* residence – is not *per se* an unreasonable or arbitrary requirement.¹² There is no uniform State practice in this regard with countries that do not impose any residence requirement (for example, the United Kingdom, Ireland, Cyprus, Finland, Italy, France, Greece, Poland, the Netherlands, the Czech Republic, Spain, Portugal, Estonia, Latvia, Croatia, Moldova,

¹⁰ "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

¹¹ Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999)

¹² see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI)

Switzerland, Austria and Turkey) and other States imposing such a requirement for presidential elections (for example, Germany, Bulgaria, “the former Yugoslav Republic of Macedonia”, Azerbaijan, Albania and Russia) or parliamentary elections (Malta and Iceland – presidential systems; Liechtenstein, Belgium, Luxembourg, Denmark, Norway and Sweden – non-presidential systems) or for both types of election (for example, Hungary, Slovakia, Armenia, Romania, Georgia, Lithuania and Ukraine). Furthermore, the European Court of Human Rights has held that a residence requirement for voting may be justified on a wide range of grounds¹³. As to the right to stand for elections, the Court accepts that stricter requirements may be imposed on the eligibility to stand for election to parliament. Arguably, this requirement may be deemed appropriate to enable candidates to acquire sufficient knowledge of the issues associated with the national parliament’s tasks.

46. However, any such limitation to either the right to vote or the right to stand for elections or to both may not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; they should be imposed in pursuit of a legitimate aim; and the means employed should not be disproportionate. It would certainly be problematic if these rights could be subject to a residence requirement stated in such broad and unqualified terms. It is therefore essential that the constitutional norm here include a generic reference to the relevant legislation laying down the details of the requirements.
47. Another option that could be cumulated with the recommendation made above would be to insert a paragraph stating that the rights to vote and to stand for elections can only be restricted on grounds and in a manner stipulated by law.

Article 42

48. The Article is welcomed and may be expanded to include an obligation to ensure that women have the same rights in the family, political, social and economic sphere and that they have equal rights, regarding, amongst others, education, employment and promotion in employment as well as the right to equal compensation for work of similar value, the right to social security, and the right to hold public office.¹⁴

Article 43 and Article 44

49. Articles 43 (Freedom of Thought and Belief) and 44 (Freedom of Conscience and Religion) address two facets of the same internationally protected right – the right to freedom of thought, conscience and religion – and the rationale for their separation is

¹³ (1) the assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of, a country’s day-to-day problems; (2) the impracticality and sometimes undesirability (in some cases impossibility) of parliamentary candidates presenting the different electoral issues to citizens living abroad so as to secure the free expression of opinion; (3) the influence of resident citizens on the selection of candidates and on the formulation of their electoral programmes; and (4) the correlation between one’s right to vote in parliamentary elections and being directly affected by the acts of the political bodies so elected (see *Polacco and Garofalo v. Italy*, no. 23450/94, Commission decision of 15 September 1997, Decisions and Reports 90-A, referring to previous Commission case-law).

¹⁴ see for instance, Article 33 of the Constitution of the Republic of Poland, 1997.

unclear. In addition, Article 43 to a certain extent conflates freedom of thought with freedom of opinion and expression, which is covered by Article 45 of the Draft. At the same time, a number of key aspects of freedom of thought, conscience and religion such as freedom to have or to adopt a religion or belief of one's choice, and freedom to manifest one's religion or belief in worship, observance, practice and teaching, are not covered. Finally, it is not clear why the prohibition on coerced declaration of one's "*national origin*," albeit entirely legitimate, is grouped with the provisions concerning freedom of conscience and religion.

50. It is recommended that Articles 43 and 44 be merged insofar as they concern freedom of thought, conscience and religion, and the provisions of Article 43 concerning the right to hold and express opinions be moved under Article 45. It is also recommended that Articles 43 and 44 be further detailed to expressly guarantee freedom to have or to adopt a religion or belief of one's choice, and freedom to manifest one's religion or belief in worship, observance, practice and teaching.

Article 45

51. The article addresses only one facet of the internationally protected right to freedom of opinion and expression, and would benefit from expanding its scope through merging with relevant provisions of Article 43 on freedom of opinion. It would also benefit from clearly stating the specific meaning and content of freedom of expression in accordance with international norms. Finally, the article does not clearly state the scope and grounds for permissible restrictions.
52. It is recommended that Article 45 be expanded to cover freedom of opinion and incorporate the relevant provisions of Article 43 of the Draft. In addition, it could be considered to better specify the exact content and meaning of freedom of expression, in particular, through an express mention that it includes "*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*" Furthermore, it is recommended that Article 45 be complemented with the requirement that any interference with the freedom of opinion and expression be permissible only where lawful, legitimate and necessary in a democratic society.

Article 48

53. The specific language against hate speech is welcome.

Article 49

54. It is recommended that Article 49 be deleted as it duplicated the provisions of Article 45.

Article 50

55. The abolition of prior permission of public assemblies at the constitutional level is welcome. However, the mention of "*prior notification*" as an essential prerequisite for holding an assembly raises concerns. While it is entirely legitimate on the part of the

authorities to require that assembly organizers file a notice of intent prior to holding an assembly, this requirement should be included at the level of legislation rather than in the Constitution. There is a risk that this highly specific procedural requirement, when viewed in the context of constitutional provisions with their inherently lower level of specificity and detail, may be restrictively interpreted so that to ban all spontaneous assemblies regardless of whether or not these are peaceful in nature or of any valid justifications for not filing a notice of intent.

56. In addition, the article does not clearly state the scope and grounds for permissible restrictions.
57. It is recommended that the mention of “*prior notification*” as a prerequisite for conducting a public assembly be removed from the Draft. Finally, it is recommended that a requirement be added that any interference with freedom of peaceful assembly be permissible only where lawful, legitimate and necessary in a democratic society.

Articles 51, 52 and 53

58. The rationale for having separate articles on “Prohibition of Association” and on “Prohibition of Operation and Establishment” is unclear and indeed problematic as it skews the balance between the enjoyment of the freedom and the restrictions on its exercise in favour of the latter. The blanket prohibition on the participation by civil servants in activities of associations also appears excessive. Finally, the ban on political association by foreign nationals is vague and as such poses a risk of unduly restrictive interpretation. In particular, since the Draft leaves the notion of “political association” undefined, the provisions in question are likely to be interpreted so as to bar foreigners from participating in public life at a local level.
59. It is recommended that Articles 52 and 53 be merged with Article 51 to form a general article concerning freedom of association. The drafters may also consider removing the blanket ban on the participation by civil servants in activities of associations. Additionally, the meaning of “secret organizations” would need to be clarified. Finally, it is recommended that the ban on political association by foreign nationals be revisited and foreigners be allowed limited participation in public affairs (including participation in public life at a local level).

Article 55

60. This article may be expanded to ensure that a person has the right to petition, submit proposals and complain to the organs of public administration not only in his or her own interest but also in the interest of other persons (with their consent). The right to petition should also be exercisable individually and in community with others.

Article 76

61. This article establishes the institution of the Ombudsperson and is recommended to be further supplemented. Although the more specific aspects of the mandate of the

Ombudsperson may be expressed in law (to which a reference may be made), the key framework within which the Ombudsperson is chosen (by Parliament), his or her term of office, the incompatibility of his or her office with other functions, the manner and conditions of removal from office, immunities possessed, the nature of independence of the office and powers of investigation of human rights violations, should all be explicitly outlined in this article of the Draft Constitution.

Article 123

62. Article 123 envisages a general guarantee of autonomy and independence of courts. It states also that courts are supposed to conform to the Constitution and laws as well as “confirmed and published” international agreements. This general principle carries with it a guarantee that the activity of judicial power should be based upon law, as opposed to political directives or decisions of the executive. Moreover, the Article institutes a general prohibition of establishing extraordinary and martial courts. Legal norms stemming from Article 123 should be considered as typical regulations for the judiciary in a democratic state governed by the rule of law. They proclaim the necessary independence of courts and, *inter alia*, by excluding the possibility to establish courts other than these expressly envisaged by the Constitution, they guarantee the separation of powers. Nonetheless, it is desirable to make the prohibition of establishing extraordinary courts more precise by including within the text of Article 123 the court-martial and extraordinary procedures. In its present wording Article 123 might be understood as permitting the establishment of such a procedure on the basis of the existing constitutional structure of the judiciary.

Article 124

63. Article 124 expresses the principle of collective nature of courts, i.e. the necessity of establishing adjudicating panels for the examination of a case, unless the law envisages another solution. Furthermore, the aforementioned Article anticipates the participation of lay-judges in the administration of justice – in cases enumerated within a law. This rule should be interpreted as the guarantee of the right to a fair trial, of the non-arbitrariness of legal procedure and of a wider social acceptance of courts by means of stipulating citizens’ participation in the administration of justice.

Article 125

64. This Article formulates the principle of publicity of trial, with the reservation consisting in the permissibility to exclude the public from hearing in particular cases. This solution does not give rise to major doubts and should be regarded as typical. Some doubts may appear only by reason of lack of definition of the procedures and situations in which the hearing may be closed for the public. Perhaps such a definition should be included within Article 125 of the Draft Constitution or, alternatively, it should be delegated to be defined within a law. In the light of the universally-accepted standards of a democratic state governed by the rule law, Article 125 might necessitate supplementation with the requirement that a verdict be rendered in public.

Article 126

65. Legal norms stemming from Article 126 are of great importance, owing to the fact that, by determining the position of judges, they are decisive for the factual independence and autonomy of judiciary. Particular prudence should be ensured in defining situations where a judge may be released from duty. In this aspect, the Constitution does not provide precise provisions and solutions. It only anticipates the possibility of releasing a judge from duty, *inter alia*, in cases of performing judicial duties in an unprofessional manner or not performing judicial duties in a satisfactory manner. Such imprecise provisions may give rise to doubts as regards their practical application. For this reason, one may consider making them more precise or introducing, within the Constitution, the authorization to define specific procedures in a law. The competence to release a judge from duty in cases anticipated in Article 126 also needs to be more precise. Analysis of Article 126, read in conjunction with Article 129, might lead to the conclusion that this competence is vested in the Parliament. That may lead to tensions between the legislature and the judiciary. In light of European standards, this solution seems to be controversial. It is worthy to consider vesting the exclusive competence in that sphere in courts or the Judicial Council. It is also indispensable to clearly define procedures for releasing Constitutional Court judges from duty and situations where such release may occur. These remarks concern, in particular, the initiating of a disciplinary procedure (who should do it and in what cases?), its course and adjudication-related competences. European standards in this field either reserve this competence for a disciplinary court (composed of judges) or they anticipate a procedure that involves Constitutional Court judges. Establishment of the judges' immunity is envisaged in Article 90. It is the same immunity that is granted for Members of Parliament, the Government and the President of Montenegro. Doubts arise with regard to the fact that the Constitution leaves the decision on the abrogation of immunity within the competence of the Parliament, as opposed to courts or Judicial Council. In practice, it might be tempting for the Parliament to attempt at exercising influence over judges by a threat of abrogation of immunity.

Article 127

66. In the draft, the *incompatibilitas* principle seems to forbid the judge to perform any professional activity apart from the judicial duty. It is a very restrictive interpretation of this principle since it e.g. restricts the possibility of academic work in colleges and universities, which is not incompatible with the principle of independence of judges.

Article 128

67. Establishing the Supreme Court without defining, even in general terms, its scope of competence may lead to practical controversies or even competence-related disputes both in the structure of public courts and among other branches of the judiciary, e.g. the Constitutional Court. On the condition that the scope of competence of the Supreme Court is clearly defined within a law, the supplementation of Article 128 of the Constitution is not indispensable.

Article 129

68. There are two alternative versions of Article 129. Including the judges' nomination and release from duty within the scope of competence of the Judicial Council seems to be a better solution, since it would guarantee the indispensable independence of judges from the Parliament. Mixed system according to which judges are nominated by the President, upon the recommendation of the Judicial Council, might be also taken into consideration.
69. As regards Presidents of courts, the term-of-office system of their appointment seems to be the most preferable. It may be advisable to also include the Judicial Council into the procedure of nomination, as an expert and independent entity. Presenting, by the Judicial Council, a double number of candidates to the Parliament or the President or vesting that Council with the competence to express binding objection against particular nominations may be also taken into account. In the present wording of Article 129, it is unclear whether the President of a court must be elected from among judges (which seems to be a common solution), or whether it is possible to nominate a person who is not a judge. The second solution might entail the danger of politicizing the function and of the lack of indispensable professionalism. One may also consider establishing judges' self-regulatory bodies which would be involved into the process of nominating Presidents of courts, in particular – the President of the Supreme Court. Experience has proven that, such solutions strengthen the independence and authority of the judiciary.

Article 130

70. The position of the Judicial Council, being the institution which guarantees the autonomy and independence of courts, should be independent from the legislative and the executive bodies. Thus, it is suggested to consider the establishment of the term-of-office system of appointing Judicial Council's members, along with restricting the possibility to dismiss them. It is also justified to keep the reservation according to which at least half of the members of the Judicial Council should be recruited from among judges, since it assures diversity within the Council.
71. Similarly to regulations concerning the nomination of judges and Presidents of courts, the participation of judicial self-regulatory bodies should also be taken into consideration within the procedure of nominating the members of the Council, e.g. by means of allowing the self-regulatory bodies to nominate a certain proportion of the Council. The proposal according to which the President of the Supreme Court is – automatically – the President of the Judicial Council is also acceptable, due to the requisite level of professionalism necessary.

Article 131

72. Article 131 guarantees the participation of the Judicial Council in preparing the courts' budget.

Article 132

73. In Article 132 the phrase "*State prosecutor shall discharge the duty on the basis of the Constitution, laws and confirmed international agreements*" gives rise to doubts. Namely, it is doubtful whether it is justified to incorporate within this Article the provision that the State prosecutor is subject to the Constitution, laws and international agreements. It is not clear what legal consequences may result from this phrase. It is also not clear whether this merely confirms the principle of legality of public authorities, or whether this means that the Prosecutor is not subject to legal acts other than those enumerated in Article 132.

Article 133

74. The article would benefit from a clear specification of the hierarchy of legal acts in the country. This would entail an enumeration of the order of importance of normative legal acts.

Article 134

75. This Article ensures that laws are published prior to publication and thus provides at least theoretically, access to law by citizens, which is a fundamental principle as expressed in OSCE commitments.¹⁵

Article 135

76. In prohibiting the retroactivity of laws, and in particular, criminal law, this article reaffirms the principle described in Article 7 of the ECHR and is welcomed.

Article 136

77. This seeks to ensure the conformity of administrative decisions, taken by organs of public administration, with the law. It may be improved by explicitly stating that all decisions which are delegated to organs of public administration must be based (delegated) in a legal act, and not merely conforming with laws in general. Furthermore, the article may be cross referenced with the Article 55 of the draft Constitution on the right of petition, in addition to the right of appeal to the courts, which is in line with OSCE commitments on effective remedies against administrative decisions.¹⁶

Article 137

78. Article 137 provides the broad scope of competence of the Constitutional Court, i.e.

¹⁵ Par 13.4 of the OSCE Vienna Document, 1989, states that participating States will "effectively ensure the right of the individual to know and act upon his rights and duties in this field [*of civil, political, economic, social, cultural and other human rights and fundamental freedoms*], and to that end publish and make accessible all laws, regulations and procedures relating to human rights and fundamental freedoms;"

¹⁶ Par.5.10 of the Copenhagen Document, 1990, states that "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;" and par 5.11 of the same document which states that "administrative decisions against a person must be fully justifiable and must as a rule indicate the remedies available."

examination of hierarchical conformity of legal norms (of all ranks in the hierarchical system of legal sources, as it would seem), constitutional complaint, expressing opinions on constitutional accountability of the President of Montenegro, resolving competence-related conflicts (also with regard to units of local self-governments), ruling on the prohibition of political parties functioning, adjudicating upon electoral complaints.

79. In some cases, the Constitution envisages the possibility to examine acts that have ceased to be valid. The constitutional review of a legal provision that ceased to be valid in the course of the procedure before the Constitutional Court is admissible only if the decision on the unconstitutionality would justify undertaking legal remedies aiming at the restitution of the consequences of its enforcement. It seems that such a decision would give basis for the State's liability for damage caused by the so-called normative unlawfulness. From this point of view, Article 137 should be regarded as a proper regulation that constitutes certain guarantee of a rational law-making.
80. It should be emphasized that such a broad scope of competence of the Constitutional Court grants that Court with an important position in the constitutional system of the State. In this context, it is crucial to assure full impartiality of judges and their professionalism.

Article 138

81. Within this Article, the Constitution institutes wide possibilities of initiating constitutional review of legal provisions. The first sentence of Article 138 is very vague. It is doubtful whether it should be understood as granting the initiative of control with the nature of *actio popularis* (by means of authorization of every person to initiate constitutional review), or whether the Constitution only anticipates the possibility for citizens to apply to entities enumerated in the second sentence, as opposed to applying directly to the Constitutional Court.
82. In the first case, it should be defined precisely whether or not the Article envisages unconditional (in the material sense) possibility of initiating hierarchical control of conformity of norms, or whether the Constitution anticipates such competence only when the case concerns citizens.
83. In the second case, one should define consequences of bringing a motion by a citizen, as it was mentioned in the first sentence. The question to be asked is, would such a motion entail that adequate bodies are obliged to initiate a procedure in the Court, or would it serve only as an advisory motion.
84. The Constitutional Court may initiate the review *ex officio*. By establishing a wide range of bodies entitled to initiate the constitutional review, the Article in question confirms the strong position of the Court in the constitutional system of the State.

Article 139 and 140

85. These provisions define the legal consequences of the decisions of the Constitutional

Court. It would be desirable to set the deadline within which the decisions should be published in the Official Journal, in order to prevent the executive bodies from manipulating the date of the Courts' decisions coming into force.

Article 141

86. Considering the broad scope of competence of the Constitutional Court and the judges' natural limitations, the fact that the Court is composed of only 7 judges may lead to the considerable prolongation of the time-frames for examining cases. Broadening of the Courts' composition could prevent overloading judges in situations where numerous subjects entitled to initiate constitutional review make use of this right. The possibility of re-election of a Constitutional Court's judge may lead to exerting political pressure on judges. It is inevitable that their judgments will concern Acts of Parliament and, subsequently, the same Parliament will decide on their re-election.
87. It is worth making reference to the mode of nominating judges, as defined in Article 87 of the Draft Constitution. This Article provides for the possibility of nominating and dismissing a judge by the Parliament. In the view of the Constitutional Court's competence – seems to be a controversial solution, since it favours electing the members of the Court on the basis of current political interest of the Parliament or exerting influence over the judges by the possibility of dismissing them.
88. The same problem concerns the President of the Constitutional Court. It seems justified to consider vesting the competence to appoint the President of the Court in the President of Montenegro or in the Parliament – upon the motion of Constitutional Court's judges. In order to ensure independence of judges, it is indispensable to take into consideration introducing a clear legal provision according to which the Parliament may dismiss the judge only in cases of e.g. conviction of a crime or other offences harmful to the dignity of the office (that are defined in Article 142 of the Constitution).
89. The judges of Constitutional Court are encompassed by the principle of *incompatibilitas*. In the version proposed in the draft Constitution, the aforementioned principle seems to forbid any professional activity of judges, apart from performing the judicial duties. It is a very restrictive interpretation of this principle since it e.g. restricts the possibility of academic work in colleges and universities. Pertinence of such an extensive restriction may give rise to doubts.

Article 142

90. Article 142 enumerates situations where a judge of the Constitutional Court shall be dismissed. However, it is not clear whether the right to dismiss a judge of the Court (anticipated in Article 87) should be limited only to cases defined in Article 142; in other words it is unclear whether this Article is based on the *numerus clausus* principle, or whether it constitutes a non-exhaustive list. For these reasons, it seems justifiable to make the procedure of dismissal more precise and to limit the list of situations where the Parliament may conduct such a procedure (see commentary to Article 141).

[END OF TEXT]