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**The Constitutional Court of Montenegro
Ustavni sud Crne Gore**

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MONTENEGRO

CONSTITUTIONAL COURT

ANSWERS TO THE QUESTIONNAIRE FOR THE XVI CONGRESS OF THE
CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

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“Cooperation of Constitutional Courts in Europe – Current Situation and
Perspectives”

Podgorica, November 2013

I. CONSTITUTIONAL COURTS BETWEEN CONSTITUTIONAL LAW AND EUROPEAN LAW

1. Is the Constitutional Court of Montenegro obliged by law to consider European law in the performance of its tasks?

Constitutional Court works by the provisions of the Constitution¹ and the Law on the Constitutional Court of Montenegro².

The articles 17 and 56 of the Law stipulate that rights and freedoms are to be exercised on the basis of the Constitution and ratified international agreements and that everyone is entitled to appeal to international organizations for the protection of their rights and freedoms enshrined in the Constitution. The Constitution also stipulates that courts are to deliver justice on the basis of laws and ratified and published international agreements³.

Montenegro does not have a law that binds the Constitutional Court to apply European law in exercising its jurisdiction. Consequently, Constitutional Court is not formally and legally bound to apply *acquis communautaire* in its work as Montenegro has not yet become a member to the EU.

2. Are there any examples of references to international sources of law, such as:

2.1. European Convention on Human Rights

2.2. Charter of Fundamental Rights of the European Union (EU Charter)

2.3. Other instruments of international law at European level

2.4. Other instruments of international law at international level.

Montenegro became the 47th member state to the Council of Europe on 11. March 2007⁴.

Pursuant to the Resolution of the Committee of Ministers of the Council of Europe from its session 994 held on 9th May 2007,⁵ Montenegro is considered a member state effectively as of 6th June 2006 i.e. as of the day of when it declared its independence. When depositing ratification documents for the

¹ Promulgated on 22 October 2007

² „Official Gazette of Montenegro“, No. 64/08., 46/13. i 51/13.

³ Article 118.

⁴ Council of Europe. Members, <http://www.coe.int/lportal/web/coe-portal/country/montenegro?dynLink=true&layoutId=157&dlgroupId=10226&fromArticleId=> (access on 12.6.2011.).

⁵ Committee of Ministers' Resolution CM/Res(2007)7 of 9 May 2007 read: Given the declaration of succession of the Republic of Montenegro, by letter dated June 6, 2006, the agreements to which the State Union of Serbia and Montenegro was a party or of which it was a signatory, confirmed by letter dated 23 March 2007 and the decision of the Committee of Ministers that the Republic of Montenegro, with retroactive effect from June 6, 2006, the date of declaration of succession, Party to the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols Nos. 1, 4, 6, 7, 12, 13 and 14, and the European Convention on the Suppression of Terrorism. "

Convention on 3 March 2004, Montenegro also deposited its declaration in relation to Article 57 of the Convention and the reservations in relation to Articles 5 and 6 of the Convention.

However, the European Court of Human Rights established somewhat different temporal jurisdiction of the Convention for Montenegro as for *ratione temporis and ratione personae*. Namely in the case *Bijelić versus Montenegro and Serbia* (judgment dated 28 April 2009, application No. 11890/05)⁶, the European Court established that the temporal jurisdiction of the Convention as regards Montenegro started running as of 3 March 2004 i.e. the day of the ratification of the Convention by former state union Serbia and Montenegro.

In this way the Convention's application and, therewith the jurisdiction of the European Court of Human Rights *vis-a-vis* Montenegro started running retroactively as of 3 March 2004, instead of the date when it acceded to the Council of Europe i.e. 11 May 2007 whereby the Constitutional Court of Montenegro got an extraordinary task - review of compatibility of legal order of Montenegro for that period.

The European Convention, as a ratified international agreement together with the principle of democracy, rule of law and free elections are integral part of national legal setup whereby the Convention has direct applicability and, pursuant to the Constitution, in hierarchy of legislation it comes above other laws.

Rights and freedoms as laid down by the European Convention for Human Rights and Fundamental Freedoms and its protocols are directly applicable if they are at odds with national legislation.

Constitution of Montenegro of 2007, stipulated for the first time that: „The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation“⁷.

Also in its part pertaining to constitutionality and legality, the Constitution stipulates that laws have to be in conformity with the Constitution and confirmed international agreements, and other regulations

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

⁷ 0 “Lastly, given the fact that the impugned proceedings have been solely within the competence of the Montenegrin authorities, the Court, without prejudging the merits of the case, finds the applicants’ complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto. For the same reason, however, their complaints in respect of Serbia are incompatible *ratione personae*, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.. Source: Supreme Court of Montenegro,-[http:// www.vrhsudcg.gov.me/LinkClick.aspx?fileticket=-TfzryLFPZE%3D&tabid=82&mid=498](http://www.vrhsudcg.gov.me/LinkClick.aspx?fileticket=-TfzryLFPZE%3D&tabid=82&mid=498) (last visited: 12. 6. 2011.).

⁷ Article 9.

shall be in conformity with the Constitution and law⁸. The competence of the Constitutional Court in respect of abstract control was expanded to cover review of compliance of law with the Constitution and confirmed international agreements⁹.

3. Are there any specific provisions of constitutional law imposing a legal obligation on the Constitutional Court of Montenegro (hereinafter: CCMNE) to consider decisions by the European courts of justice?

There are neither provisions of the Constitution nor laws that impose the obligation to consider decisions of the European courts of justice.

4. Is the jurisprudence of the CCMNE influenced in practice by the jurisprudence of European courts of justice?

There is no direct influence. However the CCMNE follows the case law in the part deemed relevant for the cases it considers.

5. Does the CCMNE in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

Yes. Depending on jurisdiction, CCMNE regularly refers to the jurisprudence of European Court of human Rights (hereinafter referred to as the ECHR), however it has never referred to the European Court of Justice (hereinafter: ECJ) because Montenegro is not a member of the EU.

CCMNE performs two major functions of constitutional judiciary: protection of constitutionality and serving as the guarantor of protection of human rights and freedoms.

In its practice so far, the CCMNE has applied international legal acts, the European Convention of Human Rights and legal positions of the ECHR in two different ways:

1. direct application of relevant provisions of international legal acts and the Convention interpreted in compliance with genuine interpretation of the ECHR, and
2. accepting interpretation of the contents and scope of certain legal principles and institutes in the way that the ECHR interpreted the Convention in its jurisprudence.

The case law of the European Court of Human Rights was used by the CCMNE for some decisions pertaining to the abstract control of constitutionality and legality¹⁰ when the court invoked the

⁸ Article 145 of the Constitution.

⁹ Article 149, paragraph 1, item 1 of the Constitution.

¹⁰ **ABSTRACT CONTROL**

Example 1.- Decision U.No.67/09 from 17. July 2009- review of constitutionality of the provisions in Articles 3 and 5 of the Law on the Amendments and Supplements of the Law on Strike (»Official Gazette of Montenegro«, No. 49/08.), the Constitutional Court found that

interpretation of the ECHR as a constitutional interpretation and within it develops practice of application of the Convention principles (rule of law, proportionality, prohibition of discrimination, equality, fundamental rights and freedoms, minority rights ...).

6. Are there any examples of divergences in decisions taken by the CCMNE and the European courts of justice?

„ (...) The quoted provisions of the European Convention of Human Rights and Fundamental Freedoms are interpreted to mean that regulating the way in which right to peaceful assembly and association with others is the exclusive competence of the state and that national legislation is to regulate the way in which those rights are to be exercised, however it does not pre-empt the option for armed forces, police or state administration to legitimately limit it for the sake of protection of public interest.

If interests of citizens, national security, security of persons and property or functioning of authorities would in that way be jeopardized. This is confirmed in the European Social Charter too as it provided for the right to go on strike, considering the obligations stipulated by national legislation and collective agreements – that internal legislation shall determine conditions and scope of application of the right to strike by employees of army, police and state authorities, and the provision in Article 8, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights prescribes that right to go on strike is recognized within the remit of law of each respective country, while Article 8, paragraph 2 stipulates that it should not prevent the imposition of lawful restrictions on the exercise of this right by members of the armed forces, police or the administration of the state. Starting from the quoted constitutional norms, the CCMNE found that the contested legislative provisions were not in compliance with the CCMNE and with the ECHR. Namely, by prescribing possibility to restrict right to strike to certain categories of employees and with that the legislator stayed within the scope of competence as prescribed by the Constitution and the ECHR - as the scope of limitation commiserates with the objective that the restriction thereof sought to achieve. ...“.

Example 2.-- Decision U. No.111/08 from 28 January 2010- review of constitutionality of the provisions of Article 8, paragraph 1, item 6 of the Montenegrin Citizenship Act (»Official Gazette of Montenegro«, No.13/08) , CCMNE found that:

„...According to the general practice developed through the case law of the European Court of Human Rights, discrimination is considered a different treatment of the same or similar cases when there is no reasonable or justifiable reason or if there is no legitimate aim that is sought to be achieved or there is no reasonable relationship of proportionality between the means employed and aims sought to be realized. Hence the case law of the European Court and the practice of the UN Human Rights Committee, advise the examination of discriminatory character of a physical or factual act to be made in two stages: examination of existence of different regulation or procedure towards persons in the same or similar situations and the existence of possible objective and reasonable justification for such a difference. The contested provision of the Act thereof, as the CCMNE ruled, neither have the quoted discriminatory limitation vis-à-vis the Constitution of Montenegro, nor to the interpretation of the limitations laid down by the European Court for Human Rights because it does not make differentiation according to the personal traits of persons that apply for Montenegrin citizenship, and neither it does on the basis of the language they speak.....“.

Example 3. - Decision U-I No. 27/10, 30/10 and 34/10, 24 March 2011, review of constitutionality of the provisions of Article 11 of the General Law on Education (»Official Gazette of the Republic of Montenegro«, No.64/02, 31/05 and 49/07 and »Official Gazette of Montenegro«, No.45/10), the CCMNE ruled that: „In Montenegro, rights and freedoms are exercised on the basis of the Constitution, confirmed international agreements and generally accepted rules of international law and the laws. In this concrete case, the contested, different treatment i.e. prescribing the obligation that in the municipalities within which the majority or significant part of the population is composed of the members of national and ethnic groups, the teaching shall be delivered in the language of those national or ethnic groups. According to the explicit constitutional norm (Article 8, paragraph 2) Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination as they put them in more favorable position. Considering that members of national and ethnic minorities are different than majority population a consistent application of the principle of equality would put them into unequal position in this concrete case. The contested legislative provision, the CCMNE found, is in compliance with the quoted provision of Article 3, paragraph 1 of the Framework Convention for the Protection of National Minorities that prescribes that persons belonging to national minorities have right to choose to be treated or not to be treated as such, as well as with the provisions of Articles 1 and 2 of the European Charter of Regional and Minority Languages that defines territorial and minority languages i.e. establish obligation of member states to apply this act...“.

The CCMNE has always worked on harmonizing its practice with the requirements of the Convention, even in the time prior to the ratification of the Convention and prior to the introduction of the jurisdiction of the ECHR vis a vis Montenegro.

Its court practice in handing down decisions, particularly in the procedure deciding about constitutional complaint, the CCMNE bases its decisions on the case law and standards of the European Court of Human Rights¹¹ (without prejudice if that is the case of approval, revocation or dismissal).

Example 4 - Decision U No. 90-08 and 96-08 from 18 July 2013 – constitutional review of the provision of Article 230, paragraph 2 of the Criminal Procedure Law (“Official Gazette of the Republic of Montenegro”, No. 71/03 and 47/06) the CCMNE ruled that the provision of Article 230, paragraph 2 of the Law thereof in the part that reads: ” request from a legal person delivering telecommunication services to establish identity of telecommunication addresses which were online at the certain moment”, at the time when it was in force was not in conformity with the Constitution of Montenegro:

„1.14.3. Considering the police, as an agency of the state, can conduct its special investigative measures in pre trial proceedings without prior approval of the court, the CCMNE ruled that the contested part of Article 230, paragraph 2 of the Law infringes upon inviolability of the right to confidentiality of telephone conversation (without insight into content) , confidentiality of communication between users of telecommunication networks guaranteed by Article 42, paragraph 1 of the Constitution and it enables “interference by a public authority with the exercise of this right” to privacy, contrary to the provisions of Article 8, paragraph 2 of the European Convention.

1.15. Besides that, the CCMNE found that the contested provision infringes on the inviolability of rights to confidential telephone conversations, not only concerning persons for “who” there is a “reasonable doubt” (..), but also, indirectly, every third person (who is not under secret surveillance measures) with whom that person makes phone contact.

1.15.1. European Court defined an approach concerning access to evidence after the application of special means of investigation (phone tapping), in its case *Kruslin versus France*¹¹. Criminal division of the Cassation Court in Toulouse (in 1985), charged the applicant thereof (for aiding and abetting a murder, aggravated theft and attempted aggravated theft)¹¹, on the basis of indirect evidence (recorded phone conversations in relation to criminal proceedings from the case against other person). The European Court ruled:

“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 (art. 8-2) 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 (art. 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.”

1.16. Starting from the arguments set forth hereinabove, the Constitutional Court established that police without an appropriate court decision has no right to obtain data from the sphere of private communications from telecommunication operators concerning users of their services that are not under measures of secret surveillance (third persons), of communication made and time of making the call as it is an integral element of the confidentiality of communication by phone and therefore the contested provision of the law is not in compliance of Article 42 of the Constitution on this reasoning too.

1.17. Accepting dynamic and evolutive interpretation of “criminal” provisions of the Constitution that would accommodate the fact the circumstances change and the need to continuously improve Montenegrin criminal procedure legislation in compliance with relevant European legal standards and modern criminal policy whose aims are continuously harmonized with changes at national, regional and (European) global level, the CCMNE found that the contested provisions of Article 230, paragraph 2 of the Law were not in conformity with Article 42 of the Constitution and with Article 8 of the ECHR at given time.

¹¹ **PROCEDURE CONCERNING CONSTITUTIONAL COMPLAINT:**

I. Article 5, paragraph 3 of the ECHR

Example 1 - Decision UŽ-III No. 348/11 from 20 June 2011 - (reasonable suspicion as a basis for extending pretrial detention).

The CCMNE approved the constitutional complaint:

"8. European Court for Human Rights in the judgment for the case *W. v. Switzerland* dated 26 November 1992 laid out its legal § that Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Therefore, it is necessary to specify in the decision ordering the extension of pre-trial detentions – as a statutory measure of deprivation of fundamental human right to freedom before the final verdict on the detainee's guilt – competent court is obliged to quote and fully explain relevant and sufficient reasons on the basis of which further extension of pre-trial detention can be considered justifiable and necessary. The Court is obliged to carefully examine if extension of detention is justifiable considering the circumstances of each specific case and in each concrete case it should establish and quote further statutory grounds for detention, and explain in detail the reasons for which it considers the purpose for ordering extension of detention legal and legitimate and valid.

The CCMNE refers to the legal position of the European Court of Human Rights and the position of the Court regarding the application of Article 5, paragraph 3 of the ECHR. The CCMNE invokes the fact that the § of the European Court was that reasonable suspicion, no matter how serious a crime committed, after lapse of time is not sufficient legal basis per se for extending the detention. The Court took a stand in the judgment in case: *Kemmache v. France* from 21 October 1991 by giving the following position that: when an arrest concerns a person who has committed an offence, persistence of that suspicion after a certain lapse of time, no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings. This legal § was also laid down in the case: *Nikolova v. Bulgaria* from 5 March 1999 and in many other judgments."

II. Article 6, Paragraph 1 of the ECHR

Example 2- Decision UŽ-III No. 263/10, dated 18 June 2013 - (arbitrary application of material right). The CCMNE adopted the constitutional complaint thereof:

"8. The CCMNE indicates to the case law of the European Court of Human Rights and the CCMNE which took the § that these respective courts do not review the conclusions of the regular court as for the facts and application of material law (ECHR in *Pronina versus Ukraine* – Admissibility br. 63566/00 from 18. June 2006), save for the cases in which rulings of the courts of lower instance infringed on constitutional rights or ignored them or if the application of a law was arbitrary or discriminatory, provided that procedural rights were violated (right to a fair trial, right to access to court, right to effective legal remedy etc.)."

Example 3 - Decision UŽ - III No. 617/11 from 12 January 2012 - (impartiality of the court). The CCMNE approved the constitutional complaint:

"11..The Constitutional Court stresses that the existence of the procedure for ensuring impartiality of the court, i.e. the rules regarding the procedure of withdrawal of a judge from the case in certain cases, is a relevant factor that has to be taken into consideration. The ECHR case law indicates that the existence of these rules in the law manifests the intention of the national legislature to eliminate reasonable doubt in the impartiality of court or judge i.e. it sought to ensure impartiality through the elimination of the causes that concern. In compliance with the above, the omission to apply provisions of withdrawal of a judge could mean that the procedure was conducted by a court whose impartiality could be questioned (ECHR, *Mežnarić versus Croatia*, No.71615/01 §27, judgment from 15 July 2005). The impartiality, in the spirit of Article 6, paragraph 1 must be determined according to a subjective test where regard must be had to the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (*Mežnarić*, paragraph 29)."

Example 4 - Decision UŽ-III No. 451/10, 18 July 2013 - (principle of legal certainty). The CCMNE adopted the constitutional complaint:

"8... Constitutional Court stresses the position taken by the ECHR in the case 48101/07 from 1 July 2010, §44. Irrespective of these considerations, the Court reiterates that one of the fundamental aspects of the rule of law is the principle of legal certainty, a principle which is implied in the Convention (see *Beian v. Romania (no. 1)*, no. 30658/05, § 39, ECHR 2007-XIII (extracts)). Conflicting decisions in similar cases stemming from the same court which, in addition, is the court of last resort in the matter, may, in the absence of a mechanism which ensures consistency, breach that principle and thereby undermine public confidence in the judiciary (see, for example, *Beian*, cited above, §§ 36-39; *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009; and *Lordan Lordanov and Others v. Bulgaria*, no. 23530/02, §§ 47-53, 2 July 2009).

According to the position of the ECHR, that the Constitutional Court supports, the Court notes that whilst certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, is based on a network of trial and appeal courts with authority over a certain territory, in the cases at hand the conflicting interpretations stemmed from the same jurisdiction in case of applications lodged by several persons in the identical situation results in continuous insecurity and that leads to reduced trust in judiciary, and that is one of the essential components of state based on the rule of law (see ECHR -

Vinčić and others versus Serbia, judgment from 2 March 2010, paragraph 56). Then, The role of a higher court in a Contracting Party is precisely to resolve conflicts of jurisprudence, avoid divergences and ensure uniform application of law (see Vusić versus Croatia, application No. 48101/07, judgment from 1 October 2010, § 45; Zielinski and Pradal and Gonzales and others versus France (GZ), No. 24846/94 and 34165/96 from 34173/96, § 59 1999-VII)."

Example 5 - Decision UŽ-III No. 233/10, 27 November 2012 – constitutional complaint (right to access to court). The Constitutional Court approved constitutional complaint:

"8. Fairness of the proceedings is ascertained on the basis of the proceedings considered as a whole (ECHR, Barbera, Messeque and Jabardo vs Spain, judgment from 6 December 1988, Series A, No. 146, position 68). A flaw in one part of proceedings can be challenged and rectified in the other, subsequent stage. Right to a fair proceeding binds the court to present to the parties concerned the availability of effective legal remedy. A flaw in one part of the proceedings can be contested and rectified in the next part of the proceedings. Fair trial principle, also, requires courts to refer to a certain legal norm because legal basis for the judgment must not be arbitrary i.e. unrelated to the concrete case."

III. Article 6. Paragraph 2 if the Convention indicate

Example 6 - Decision UŽ-III No. 464/11, 10 October 2011 – constitutional complaint (presumption of innocence). The CCMNE approved the constitutional complaint:

"10... However, the Constitutional Court indicates that the jurisprudence of the European Court of Human Rights regarding presumption of innocence, as one aspect of the right to a fair trial (Article 6, paragraph 2 of the European Convention) is violated if court ruling concerning the applicant reflects the stand that s/he is guilty without having proven his/her guilt in compliance with law, and especially if s/he did not have right to defense.(attorney). Presumption of innocence in criminal case is applied on the whole proceedings, and not only on the merits of indictment (judgment in case Minelli versus Switzerland dated 25 from March 1983, Series A No. 62, § 30, Sekanin versus Austriae from 25 August 1993, Series A Br.266-A and judgment Allenet de Ribemont versus France from 10 February 1995, Series A No.308). ECHR in the case Matijašević versus Serbia (application No.23037/04) specified that as noted repeatedly in this Court's case-law, Article 6 § 2 governs criminal proceedings in their entirety "irrespective of the outcome of the prosecution"; that there is a fundamental distinction to be made between a statement that someone is merely *suspected* of having committed a crime and a clear judicial declaration, in the absence of a final conviction, that the individual *has committed* the crime in question."

Example 7 – Decision UŽ-III No. 30/11 from 10 March 2011, (it is not related to ascertaining civil right of applicant who has filed constitutional complaint but about right to criminally prosecute other persons for a certain criminal offence). CCMNE has dismissed the constitutional complaint:

„...that the applicant who submitted the constitutional complaint, as a damaged party, contested the criminal prosecution against other persons i.e. claimed that that specific case is not the one in which civil rights of the applicant are determined but about the right to criminally prosecute other persons for the purpose of punishing them for a certain criminal offence. According to the case law of the ECHR, in principle, the European Convention is not applicable to those cases (the decision of the former European Commission of Human Rights in the case Helmers versus Sweden from 9 May 1989, application No. 1186/85), and the protection in criminal matters is guaranteed only to a person against whom the court “ascertains” (...) admissibility of any criminal charge, and that only that person can be considered a victim in keeping with the provisions of Article 6 of the European Convention ... The contested decision of the Appellate Court of Montenegro, the Constitutional Court found, is a procedural solution that the court found met conditions for conducting investigation after a private prosecution filed by the damaged party – private prosecutor and stated by the Decision of the first instance court, and that act does not have the status of individual legal act that is eligible for the constitutional court review ...“

IV. Article 10 of the Convention

Example 8. UŽ-III No. 87/09, 19 January 2012, (freedom of expression). The CCMNE approved the constitutional complaint:

“ It is in the first place for the national authorities to assess whether there is a “pressing social need” for a restriction on freedom of expression and, in making that assessment, they enjoy a certain margin of appreciation (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-...). In cases concerning the press, the State’s margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. The Court’s task in exercising its supervisory function is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, pp. 25-26, § 52; *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II); the Court observes that in previous cases it has found the generally offensive expressions “idiot” and “fascist” to be acceptable criticism in certain circumstances (see *Oberschlick v. Austria* (no. 2), judgment of 1 July 1997, *Bodrožić versus Serbia*, judgment of 2 June 2009, application 32550/05, §51.”

Example 9 - Decision UŽ-III No. 203/10, 18 July 2013 – constitutional complaint (freedom of expression). The CCMNE accepted the constitutional complaint:

"7...In its decisions, the ECHR has established a hierarchy of values protecting Article 10 of the European Convention through awarding different degree of protection to different categories of expression. Within that hierarchy, commentary on public matters given by public figures or media constitute the most protected forms of expression. As often quoted, freedom of expression enshrined in Article 10 of the European Convention represents one of the essential foundations of a democratic society and, pursuant to Article 2, it does not apply only to "information" or "ideas" that are taken or considered as insulting, but also to something that is insulting, shocking or upsetting. The Court reminds that it has to analyze if impugned expressions are relevant for someone's private life or someone's behavior in official capacity (Dalban versus Romania, No.28114/95, §50). The ECHR in cases Lepojić versus Serbia (13909/05 from 6 November 2007, § 73 i 75) and Šabanović versus Montenegro and Serbia (5995/06 dated 31 May 2011, §36). As for the limitations of acceptable criticism- the higher you are wider is the limit and criticism particularly if an official acts in his/her official capacity compared to private persons. (see. Thoma versus Luxembourg, No. 38432/97, § 47, ECHR 2001-III. Pedersen and Baadsgaard versus Denmark, No. 49017/99, § 80)."

VI. Article 1 PROTOCOL No.1 to the Convention

Example 10 - Decision UŽ-III No. 314/10, 21 November 2012 (right to a peaceful enjoyment of possessions). The CCMNE approved the constitutional complaint:

"6... that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (ECHR, Former King of Greece and others versus Greece (GC) No. 25701/94, § 79 and 82, ECHR 2000-XII) and the legitimate goal should be pursued in "in the public interest".

Suspension of pension to the applicant by the Republican Pension Insurance Fund is an interference into peaceful enjoyment of possessions (ECHR judgment in case Lakićević and others versus Montenegro and Serbia, applications No. 27458/06, 37205/06, 37207/06 i 33604/07 from 13 December 2011)."

Example 11- Decision UŽ-III 82/10, 8 Jul 2010, the CCMNE turned down the constitutional complaint:

„...According to the jurisprudence of the European Court of Human Rights it is not necessary to have national legislation recognizing relevant interest, such as right to possession. The concept of property, in the spirit of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1, Protocol 1 to the Convention) is autonomous and implies exercise of a right by national legislation in order to be considered as such by the Convention. Only the right to possessions is guaranteed, and not right to acquire possessions *inter vivos* or *mortis causa*. Consequently, right to possessions from Article 1, Protocol 1 guarantees right to acquire possessions (ECHR, Van der Mussele versus Belgium, judgment from 23 November 1983, Series A, No. 70, § 48), nor state should be limited for having to regulate conditions with its laws to enable certain people to enjoy certain property rights. »Legitimate expectation« to any »possessions« or »assets«, consequently, have to be determined by statutory provision or legal act that has valid legal basis pertaining to property rights. (Peter Gratzinger and Eva Gratzingerova versus Czech Republic, ECHR judgment dated 10 July 2002, No. 39794/98, §69). The prerequisite for the consideration of the applicant's claims in relation to violation of the right to possessions is to determine if the applicant had "possessions" at all in the meaning of the Article 1, Protocol 1. In concrete case, the Constitutional Court found that the applicant's "possessions" was actually his "legitimate expectation" to acquire right to title on impugned property. Consequently, the applicant's "legitimate expectation" could be considered possessions provided that he acquires legitimate legal title in the spirit of the Convention in the court proceeding or some other proceeding...the court proceeding did not decide about the applicant's property rights and, consequently, his constitutional right could not have been infringed upon. Also, according to the Constitutional Court's ruling about the contested judgments, provisions of the Article 1 of the Protocol 1 of the Convention were not violated either since the applicant did not acquire right to property in the meaning of the pertaining provision of the Convention..“.

V. Article 13.

Example 12 - Decision UŽ-III No.12/09 from 30. September 2010, (right to use effective legal remedy. The CCMNE approved of the constitutional complaint:

„...Article 6 paragraph 1 of the European Convention in relation to civil proceedings guarantees that everyone has right to proceedings that s/he instituted or that was instituted against him to be administered within reasonable time, and primarily, that the disputed matter be examined by court (ECHR judgment, Ringeisen versus Austria from 16 July 1971, Series A No.13, page 45, § 95). Right to court does not mean only formal but also efficient access to court. In order to be an efficient body, authority has to deliver its function in a legitimate and effective way which depends on given circumstances of each case. The obligation to provide an efficient access to highest bodies is a vested duty or a positive obligation of the state (ECHR, judgment in Airey versus Ireland from 9 October 1979, Series A, No. 32, § 25). Value of the case thereof was determined at the final hearing and the court accepted and pronounced it the final judgment and it allowed ancillary remedy. The Constitutional Court found that the Supreme Court made its decision on admissibility of review based on excessive formalism in interpreting procedural prerequisites about the access to the Supreme Court as the supreme judicial authority. That excessive formalism primarily leads to violation of right to fair trial. The ECHR's constantly evolving jurisprudence says that applied limitations should be such as not to narrow the access to legal remedy that the applicant would be prevented or limited (judgment from 19.VI.2001 in case Kreuz

After the ECHR handed down the judgment in the case *Garzičić v. Montenegro*¹², the CCMNE has applied the position taken by that court according to which a party cannot bear consequences in cases for which review was refused as illegal (because court made omission in part that it has failed to summon the private prosecutor to give his value of the case considered)¹³.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the CCMNE taking into consideration its decisions?

The CCMNE has an independent mechanism for exercising its jurisdiction and that makes the court a discrete and different body than regular courts. All its decisions are final, they have universal validity and enforceability¹⁴, which means that there is no legal instrument or any means to contest in any way the decisions of the CCMNE, regardless of the impact on interests or values that the ruling concerned might have for any of the branches of power. In exercising its jurisdiction, the CCMNE, as an independent institution which applies norms and standards of the European Convention and other standards of international law pertaining to the protection of human rights and fundamental freedoms has become the strongest national mechanism for the protection of human rights and fundamental freedoms.

versus Poland; judgment from 23.XI.1993 in the case *Poitrimol versus France*; judgment from 14.XII.1999 in the case *Khalfaoui versus France*;] from 15.II.2000 in the case *Garcia Manibardo versus Spain*; judgment 6.XII.2001 in the case *Yagtzilar et. Al. versus Greece*). The legislator can limit right to legal remedy for the sake of the efficiency of justice, but any omission to duly implement legal remedy shall always mean infringement on somebody's access to legal remedy (judgment 12.VII.2001, *Prince Hans-Adam of Lichtenstein versus Germany*) or when restriction of his rights is not proportionate (judgment from 21.IX.2004 in case *Zwiazek Nauczycielstwa Polskiego versus Poland*; judgment from 31.VII.2001 in the case *Mortier versus France*) - this is the case that admissibility is interpreted in a "too formalistic" manner (judgment from 28.X.2003 in case *Stone Court Shipping Co. versus Spain*, judgment from 20.IV.2004 in the case *Bulena versus Czech*, judgment from 25.V.2004 in case *Kadlec and others versus Czech* from 27.V.2004, in the case *Boulo versus Greece*)....".

VI. Article 11 PROTOCOL , No. 1 to the Convention

Example 13 - Decision Už-III No. 314/10, 21 November 2012 (peaceful enjoyment of possessions). The CCMNE approved of the complaint:

"6...The first and foremost important requirement of the Article 1, Protocol 1 is that any interference of any state body into peaceful enjoyment of possessions should be based on law (ECHR, former king of Greece and others versus Greece (GC) No. 25701/94, 79 and 82, ECHR 2000-XII) and pursued in the „interest of public“.

Suspension of pension payment to the applicant by the Republican Pension Insurance Fund represents interference into his peaceful enjoyment of his possessions (ECHR's judgment in the case: *Lakičević and others versus Montenegro and Serbia*; and No.27458/06, 37205/06, 37207/06 i 33604/07, from 13 December 2011)."

¹² Decision from 21 September 2010 (Application No. 17931/07)

¹³ Decision Už-III No. 462/10, 24 March 2011 – constitutional complaint (right to access to court). The CCMNE accepted the constitutional complaint:

"7. Right to access to court is not an absolute right but it is subject to limitations which may not affect the very essence of the right and its legitimate aim – access to a legal remedy. Moreover, those limitations, according to the ECHR's jurisprudence, will be compatible with Article 6, paragraph 1 of the European Convention only if compatible with relevant national legislation and if they seek to attain legitimate goal and if there is a reasonable proportionality between the means used and aim that they sought to attain (ECHR, judgment in the case *Golder versus UK* from 21 February 1975, series A, No. 18 § 35; *Philis versus Greece*, judgment from 27 August 1991, series A, No. 209 § 59).

Consequently, the Constitutional Court took the position that the applicants should not suffer any detriment on account of the failure of the court to order to the applicants to pay for the difference between the court fees that they had paid and the fees that correspond to the established value of the considered claim (ECPHR's ruling in *Garzičić versus Montenegro*, application No.17931/07 dated 21 September 2010)."

¹⁴ Article 151, paragraph 2 and 3 of the Constitution.

Consequently, the decisions of the Constitutional Court of Montenegro have a direct effect in the legal system since its decisions in fact modify the legislation and create new legal rules in the constitutional system so that they are particularly binding for the national courts.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

The CCMNE has no information about that.

II. INTERACTION BETWEEN CONSTITUTIONAL COURTS

1. Does the CCMNE in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Yes. The CCMNE refers to the available and relevant jurisprudence of European courts, and most often to the jurisprudence of the Federal Constitutional Court of Germany¹⁵.

2. If so, does the CCMNE tend to primarily refer to jurisprudence from the same language area?

The experience and practice of constitutional courts from the same language area (region) are very important for the CCMNE to deliver on its function of deciding about constitutional complaints. The CCMNE uses web-sites, publications and direct contacts to follow the jurisprudence of the constitutional courts from the region, however it does not make direct reference to that jurisprudence.

3. In which fields of law (civil law, criminal law, public law) does the CCMNE refer to the jurisprudence of other European or non-European constitutional courts?

¹⁵ U-I No. 15/12 and 17/12 from 2 October 2012, abstract review of the constitutionality of the provisions 1, 3, 4, 5, 6, 7, 8, 11 and 20 of the Law on Fees for Access to Certain Services of Common Interest and Use of Tobacco Products and Electro – Acoustic Services („Official Gazette of Montenegro”, No. 28/12.):

"The legislator is bound by the principle of taxation justice, which follows from Article 3 paragraph 1 of the Basic Law (BVerfGE 13, 181 [202]). Every application of this norm of the Basic Law rests on a comparison of real life situations, which are not the same in all elements but always only in some. In principle it is the legislator who decides which elements are relevant for the real life situations that must be regulated so that they can be treated equally or unequally (...). When prescribing tax bases the legislator has a wide margin of appreciation. This freedom ends only at the point when the equal or unequal treatment of the factual conditions being regulated can no longer be connected with the view that includes an idea of justice, when, therefore, there is no obvious reason for the equal or unequal treatment. The Federal Constitutional Court examines only compliance with those external boundaries of the legislator's freedom (the prohibition of arbitrariness), but not also whether in the specific case the legislator found the most appropriate, most rational and most equitable solution." (BVerfGE 26, 302 (Einkommensteuergesetz) – ruling of the Second Senate of 9 July 1969 - 2 BvL 20/65, in the proceedings of reviewing § 23 para. 1 of the Income Tax Act in the version of 15 August 1961 /BGBl. I, s. 1254/) The answer to the question "where in details are the boundaries of what can be endured (*Grenze der Zumutbarkeit*) and to what measure is the owner unendurably affected (*in unzumutbarer Weise*) by a norm that is the subject of review, may remain open" (BVerfGE 100, 226 /Denkmalschutz/ - ruling of the First Senate of 2 March 1999 - 1 BvL 7/91, [93])."

In all fields of law, provided that the jurisprudence is relevant for a certain case.

4. Have decisions of the CCMNE noticeably influenced the jurisprudence of foreign constitutional courts?

The CCMNE has no discrete indications about the influence of its decisions on the jurisprudence of foreign constitutional courts.

5. Are there any forms of cooperation going beyond the mutual acknowledgment of court decisions?

Bilateral cooperation with constitutional courts, especially with constitutional courts from the region, enables cooperation and sharing of experience with other constitutional courts. The CCMNE also has a very good cooperation with the Venice Commission where Montenegro is an active member. The Court also has a very good and developed cooperation with the OSCE Mission to Montenegro and it is a member of the Conference of European Constitutional Courts and of the World Conference of Constitutional Judiciary. The Court representatives take part in conferences and other events organized by those bodies and organizations where they present the issues relevant for the competences of constitutional court. Apart from that, the CCMNE cooperates with several constitutional courts from Europe, on multilateral or bilateral level within the framework of international bodies and associations.

III. INTERACTIONS BETWEEN EUROPEAN COURTS IN THE JURISPRUDENCE OF CONSTITUTIONAL COURTS

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the ECHR have an impact on the jurisprudence of the CCMNE?

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the EU?

3. Do differences between the jurisprudence of the ECHR, on the one hand, and the Court of Justice of the EU, on the other, have an impact on the jurisprudence of the CCMNE?

Answer to 1, 2, and 3: The CCMNE has no indication of such impact.