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## **Public discussion on Draft Constitution of Montenegro**

### **A proposal to the Constitutional Committee of the Constituent Assembly of the Republic of Montenegro**

**Protection of human rights and fundamental freedoms (the right to effective remedy); Legislation related to human rights and fundamental freedoms; Restriction of human rights and fundamental freedoms; List of human rights and fundamental freedoms; The right to freedom of religion or belief; The right to cultural heritage; The right to language identity; etc.**

**1. The right to effective remedy.** The Montenegrin Helsinki Committee for Human Rights continued its work on the analysis of the Draft Constitution within the public discussion that is in progress and made suggestions to the Constitutional Committee of the Constituent Assembly of Montenegro, paying special attention to the need that Montenegrin constitution has solutions that provide conditions for real enjoyment of human rights in Montenegro. For something like this it is not sufficient for Montenegro only to prescribe certain human rights or fundamental freedoms or to take care that international documents are directly implemented. In order to enjoy these rights and freedom in Montenegro as a modern state, it is necessary that there is effective remedy, as one of the most important preconditions for something like this. An efficient remedy, in case there is an infringement of a human right or a fundamental freedom, ought to provide “return to the previous condition” and/or compensation of damage.

2. The Draft Constitution of Montenegro does not contain at all a provision on the right of a citizen to effective remedy in order to protect human rights and fundamental freedoms. Paragraph 1, article 6 of the Draft Constitution prescribes that “Montenegro guarantees and protects human rights and freedoms”, and Article 17 that “Everybody has a right to equal protection of their rights and freedoms”. It is not sufficient and it is less than what was guaranteed by the provisions of article 17, paragraph 1 of the Constitution of Montenegro from 1992 (“Everybody has the right to equal protection of their rights and freedoms in the proceedings defined by law”).

**3. The Montenegrin Helsinki Committee proposes to the Constitutional Committee to amend the text of the Draft Constitution by an explicit provision on the right of a citizen to an effective remedy which will be available, which will not require big expenses for a citizen and which will not be obviously hopeless in advance.**

**4. The Montenegrin Helsinki Committee also suggests to the Constitutional Committee to include a provision in the Draft Constitution that would enable Montenegrin citizens to bring special charges in order to exercise their human rights in such cases where a state body has not passed a formal act (a suit before passing a formal act). The Montenegrin Helsinki Committee also asks the Constitutional Committee to create a possibility for citizens (by amending the text of the Draft Constitution) to use a suit also known as “habeas corpus” which can immediately challenge the legality of every factual deprivation of liberty.**

**5. Direct constitutional regulation of human rights and fundamental freedoms and legislation related to it.** The provisions of article 15 of the Draft Constitution prescribe that the law, pursuant to the Constitution, shall regulate: “1) manner for the exercise of human rights and freedoms when it is necessary for their exercise and the manner for the exercise of minority rights”. This is, first of all, contradictory to the provisions of article 16, paragraph 1 of the Draft Constitution which prescribe: “Rights and freedom shall be exercised on the grounds of the Constitution”. Secondly, the quoted provision from the article 15 of the Draft Constitution undermines the very principles of the human rights system, whose key link is direct constitutional regulation of human rights and fundamental freedoms. The sense of direct regulation of rights and freedoms is a clear definition of their nature and status and clear definition of their content in the Constitution itself.

Making the principles of direct constitutional regulation of rights and freedoms operational means the following: The content of rights and freedoms is entirely regulated by the Constitution, taking, as a starting point, international documents on human rights. A possibility of redefining constitutionally guaranteed freedoms and rights by laws must be absolutely excluded by the Constitution. The state must oblige not to pass any law which will deprive someone of or restrict someone’s rights and fundamental freedoms guaranteed by the Constitution. The competence of legislators that refers to human rights must be restrictive. The force of the Constitution must be out of the reach of a legislator. If, however, a legislator has some competence here, then the constitution has to define the content of the legal matter, its scope and limits of legal definition of rights and freedoms.

**From all these reasons the Montenegrin Helsinki Committee suggests to the Constitutional Committee a fundamental redefinition of provisions from Article 15 of the Draft Constitution.**

**6. Restrictions of human rights and fundamental freedoms.** The Constitution ought to be a guarantee, not a restriction of human rights and fundamental freedoms. Restriction is an exception to the general rule of a guarantee of rights and freedoms. Restriction can be only restrictive and must be included in the Constitution itself. The provisions of the Draft Constitution that regulate the issue of restrictions of human rights and fundamental freedoms are not in conformity with provisions of the Covenant on Civil and Political rights and European Convention on Protection of Human Rights and Fundamental Freedoms (Article 4 of CCPR and article 15 of EC).

7. According to international standards restrictions can be introduced only by law (general legal norm) which must be “understandable”, which means that everyone who is interested can be informed about the existing restrictions. Also according to international standards (see relevant verdicts of European Court of Human Rights – Sunday Times vs. United Kingdom, for example) the manner of restrictions must be predictable, i.e. the regulation must be clear and understandable enough to those to whom it may refer, so that they can adjust their behaviour. It is the spirit of the rule of law principle. Acting in accordance with these principles the European Court of human rights does not even accept the traditional rule ignorantia legis neminem excusat (not knowing the law does not excuse anybody) etc.

**8. The Montenegrin Helsinki Committee requires that the Constitutional Committee redefines provisions on restrictions of human rights and fundamental freedoms (provisions from articles 21, 22 of the Draft Constitution and others) in accordance with international standards from international documents and precedents of European Court of Human Rights.**

**9. List of human rights and fundamental freedoms.** The Draft Constitution of Montenegro does not contain a complete list of internationally recognised human rights and fundamental freedoms. Besides, some of the rights and freedoms that the Constitution recognises do not have an adequate and precise definition (their nature, status, content etc are not precisely determined or defined). Some of the very important rights are missing: prohibition of slavery; the right to education of trade unions; the right to petition; the right to independent and impartial court; the right to peaceful enjoyment of property; the right to cultural heritage; the right to choose sexual orientation; the right to participate in the administration of community and participation in public affairs; the right to free participation in the cultural life of a community; etc.

10. The Draft Constitution does not contain the list of rights of minority, national, ethnic and other communities.

**11. The Montenegrin Helsinki Committee requests that the Constitutional Committee amends the Draft Constitution by including provisions on human rights and fundamental freedoms that are missing. The Committee suggests that the future Constitution of Montenegro contains a complete list of human rights and fundamental freedoms, including the list of minority rights by including all the rights and freedoms known and recognised by different international and regional documents on human rights. Besides, the Montenegrin Helsinki Committee also requests that the Constitutional Committee amends those provisions on human rights and fundamental freedoms from the Draft Constitution that are not in complete conformity with international standards. The Montenegrin Helsinki Committee suggests that the Constitutional Committee uses for this purpose the provisions from different international (universal and regional) documents on human rights, not only from those that are legally binding (International Covenant**

**on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, European Convention on Protection of Human Rights and Fundamental Freedoms etc.) but also from those that for member states constitute only political obligation (different documents created within OSCE, particularly those created within “Human Dimension”, etc.).**

**12. The right to freedom of religion or belief.** The fight for the freedom of thought was, first of all, fought in religion sphere. It is, however, wrong to reduce this freedom only to freedom of religion. Article 18 of the International Covenant on Civil and Political Rights, as well as article 9 of European Convention on Protection of Human Rights and Fundamental Freedoms define that everybody has the right to freedom of thought, conscience and religion. This freedom is broad and of absolute character, regardless of the content of thoughts and can not be limited in any way. The restrictions may be imposed only when we speak about its public manifestation. The provisions of Article 18 of the International Covenant on Civil and Political Rights deserve to be quoted as some of the most complete and best formulated among numerous international documents related to this issue:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”.

13. The Draft Constitution of Montenegro, in provisions of the articles 13, 43 and 44 contains some solutions relevant to the right to freedom of religion or belief. These provisions, however, are not sufficient, not complete or precise; they are not in conformity with international standards formulated in different international documents (universal or regional) related to human rights and fundamental freedoms. These provisions are not at the level of standards contained in the precedents of the European Court of Human Rights.

**14. The Montenegrin Helsinki Committee requests that the Constitutional Committee reformulates and amends the quoted provisions of the Draft**

**Constitution by harmonizing them with international standards from universal and regional documents on human rights and fundamental freedoms, from the precedents of the European Court of Human Rights as well as from the documents of OSCE.**

**In its constitution Montenegro must be defined as a secular state. The Constitution ought to prohibit passing of laws or other regulations on establishment of state religion, as well as to prohibit every church, religious community or organization in the territory of Montenegro to be given or recognized the position or rights that could mean a privileged position compared to others.**

The latest idea is necessary in order to eliminate cases, as the case that there is now regarding Serbian Orthodox Church to which the government, according to its own confession, provided a privileged position and “special legal capacity” although there is no constitutional or legal ground for this. The government, thus, did not require from Serbian Orthodox Church to register at the body in charge, in spite of the fact that the law prescribes obligatory registration for all in the same way, at the same government body, according to the same procedure and without making any exceptions / differences about it.

**15. It is necessary to make amendments to the Draft Constitution by inserting a new article that would provide that, in an appropriate legal form, a distinction is made between the new situation (reestablishment of Montenegrin independence from Serbia and the beginning of the process of real transition in Montenegro) and the former non-democratic orders (systems, i.e. regimes). This provision ought to contain a solution that would be a basis for correction of injustice and serious human rights abuses committed by different regimes in the past starting in 1918 (the day of illegal and illegitimate abolishing of the state of Montenegro). This would create the ground to annul a decree of Regent Aleksandar Karadjordjevic from 1920 which abolished Montenegrin autocephalous Orthodox church and which has produced human rights abuses to the freedom of religion or belief and the right to cultural heritage for a large number of Montenegrin citizens.**

**Such amendment would be in conformity with recommendation from the seminar of experts of CSCE on democratic institutions, Oslo, 1991.**

**16. The Right to cultural Heritage.** The provisions of article 70 of the Draft Constitution of Montenegro prescribe that the state and everybody else is obliged to protect natural and cultural heritage. This is not sufficient and it is not on the level of international standards.

The Montenegrin Helsinki Committee requires that the Constitutional Committee, in its further work, takes into account the importance that the international community gives to the protection of cultural heritage as well as what character it gives to civil rights regarding cultural heritage. Related to this, the Montenegrin Helsinki Committee would like to remind that the representatives of ICOMOS (International Council on Monuments and Sites), on September 11<sup>th</sup> in Stockholm, signed a declaration that confirms that the right to cultural heritage is an integral part of the corpus defined as human rights and

fundamental freedoms. Meeting in Stockholm on the celebration of 50<sup>th</sup> anniversary of Universal Declaration of Human Rights, ICOMOS stressed the importance of the Declaration, particularly its recognition of the right of every person to participate freely in the life of a community.

According to the adopted Declaration it was said that the right to cultural heritage (as a special human right) also means duties and responsibilities of individuals and communities as well as institutions and states. To protect this right today means to preserve the rights of future generations such as:

- the right to authentic testimony on cultural heritage that is respected as an expression of one's cultural identity within a community;
- the right to better understanding of one's own heritage and the heritage of others;
- the right to wise and adequate use of heritage;
- the right to participation in decision making that refers to heritage and cultural values that this heritage embodies;
- the right to form an association for protection and promotion of cultural heritage.

ICOMOS considers that these rights must be respected in order to make cultural diversity even greater.

**17. The Montenegrin Helsinki Committee suggests that the Constitutional Committee, in the part that contains the list of human rights and fundamental freedoms, includes provisions about the right of a citizen to cultural heritage (with clear and complete content of this right) as a separate human right, to include a mechanism to monitor exercising of this right and also to include legal protection of the right to tangible and intangible cultural heritage in the content of these provisions i.e. to include a precise mechanism for protection of cultural heritage from intentional and every other destruction. Besides, the Constitution must have solutions that ought to provide every citizen of Montenegro equal and undisturbed access to cultural heritage of Montenegro without discrimination on any ground, as well as to provide solutions that will define any attempt of any other state to claim cultural heritage of Montenegro, or a part of it, or acceptance of this by any state official of Montenegro, as an act contrary to the Constitution.**

18. The problem of protection of cultural heritage of Montenegro from attempts to be usurped by some of the neighboring states has recently become a burning issue. A case of recent intervention by the president of Serbia Mr Boris Tadic that had a character of unauthorized involvement in internal affairs of Montenegro, related to cultural heritage of Montenegro of sacral / Orthodox character, shows how serious this problem is. According to the media that reported about a part of the statement from the office of president of Serbia, Mr Boris Tadic requested from the president of Montenegro, Filip Vujanovic that Montenegro protects Serbian Orthodox Church and its property in the territory of the Republic of Montenegro from the "requests and activities" of Montenegrin citizens of Montenegrin nationality and Montenegrin Orthodox Church, who have been asking for the reestablishment of their illegally and illegitimately abolished rights. The citizens and the public were deprived of complete and accurate

information about it, whether there was an exchange of diplomatic notes, whether the president of the Republic of Montenegro gave or promised certain concessions to a part of Montenegrin cultural heritage or something else. These and some other problems as well, come from some decisions that different state and political bodies of the Kingdom of Serbs, Croats and Slovenians (later, Kingdom of Yugoslavia) made after the First World War, among which was very frequently quoted decree of Regent Aleksandar Karadjordjevic from 1920. By this decree, apart from other things, autocephalous Montenegrin church was abolished, a single big Serbian Orthodox Church was established etc. Based on this decree, Serbian Orthodox Church established a factual possession (although not being an owner of it) of Montenegrin cultural heritage of sacral / Orthodox character. Serbian Orthodox Church treats this heritage exclusively as the heritage of ethnic Serbs. Serbian Orthodox Church in Serbia (according to Serbian law) has a character of a state church (Serbian Orthodox Church and the state of Serbia are connected, not only by law and factually, but also by the constitution of Serbian Orthodox Church whose regulations define certain rights of Serbian authorities / the Government of Serbia, i.e. certain defined obligation of Serbian Orthodox Church to the government of Serbia about some church issues, including those that by its nature and character belong to the exclusive domain of internal and autonomous issues of the church itself. Such case is with the election of the Patriarch of Serbian Orthodox Church prescribed by the constitution of Serbian Orthodox Church, for example.). The government of Serbia, it seems, uses this as a base to claim sacral heritage of Orthodox character in the territory of Montenegro, and, by doing so, to get involved in internal issues of Montenegro etc.

**The Constitution of Montenegro must provide complete protection of cultural heritage of Montenegro (in accordance with international standards, particularly the standards created within UNESCO), including protection from claims by other states, it must also provide the right of all the citizens to cultural heritage and the right to access to this heritage without any discrimination by national, ethnic, religious or any other criteria.**

19. The right to language identity. Language is one of the elements of intangible cultural heritage and as such, it plays an important role in the society. Language is also one of the elements of ethnic and national identity and one of the elements of making difference between social communities and their culture, and at the same time a factor that influences the study of other cultures, the dialogue between them and their becoming closer. Having in mind the importance of language for cultural-sociological identity of people (human beings) and the development of the society, it is necessary to take certain measures to protect the language. Within UNESCO a large number of international instruments that deal with the issue of language and its protection have been adopted, the most important of which are the Convention on the Protection of Intangible Cultural Heritage, Declaration on Cultural Diversity and Convention on the Promotion and Protection of the Diversity of Cultural Expressions.

Basic international instruments, adopted within other international universal and regional organizations that deal with the issue of protection and promotion of elementary human

rights and freedoms, guarantee the right to language and the use of language and forbid discrimination based on language and also forbid language assimilation.

Besides, UNESCO, in cooperation with governments of some states, is constantly working on the development of national strategies for language preservation, and by doing this task it is working on the protection of cultural identity and cultural diversity as well.

20. Disintegration of former Socialist Federal Republic of Yugoslavia brought a lot of changes in the newly created states, including changes related to the right to one's own language, its use, preservation and protection. Besides, the previously "agreed" term Serbo-Croatian or Croatian-Serbian was abandoned as well as the linguistic standards "agreed" in Novi Sad in 1954. The members of different national and ethnic communities achieved the right to call the languages they speak their own names, i.e. the names of the newly created states and the right to preserve their own language characteristics. This right was also used by the state of Serbia so they called the official language in the Constitution by its own name – Serbian language.

This right has not been used only by Montenegro so far. This right is fiercely denied to Montenegrin citizens from various addresses, mostly from Serbia, but from Montenegro itself, as well as from some other places (the entity of Republic of Srpska, for example) etc. It is claimed that Serbian is spoken in the territory of Montenegro, that Montenegrins are Serbs etc.

The basis for denial of this right to Montenegro is political reasons, although there are sometimes attempts to mask them by the façade of alleged science. The meeting at Montenegrin Academy of Science held, with scandalous incidents, a few days ago is a proof for this. Unfortunately, in the Balkans (although not only here) language is often used as a means for achieving some other political and state aims but also for territorial pretensions, assimilation etc (including genocide and other crimes). This particularly refers to an attempt of the creation of Greater Serbia. The evidence is numerous. We will only quote some of those of program character. Thus, in the program work of a famous Serbian historian Vladimir Corovic called "Greater Serbia" (NARODNO DELO, Belgrade, 1924) on page 45 it says: "Philologically speaking, Vuk Karadzic supported Serbian thesis in his well-known and quoted article SERBS ALL AND EVERYWHERE, whose ideas were later worked out by his student Djuro Danicic. As a basis of his linguistic-ethnographic division Vuk took old borders, defined in 10<sup>th</sup> century by a Byzantine tsar Constantine Porfirogenet. According to these borders the Croats would be on their own land only in the area between the Sava and the Drava and in Bosnia from Vrbas, Jajce and Lijevno to the west to the Cetina. The linguistic standard to define nationality would be this one: "Serbs are shtokavians, Croats chakavians and Slovenians are kaykavians."

Similar political program and ideas can be found in the document called "A Word about Serbian language" by PhD Radmilo Marojevic and others. This program document was printed in huge circulation (at least 300,000) in Serbian and five foreign languages. Here is a quote from the text which Ivan Klajn wrote about "A Word" (1998). "A Word" teaches us that real Croats are chakavians, perhaps kaykavians... shtokavians are all



Serbs, but they can be “Serbs of Catholic religion” or “Serbs of Moslem religion”. Montenegrins? Montenegrins do not exist. All the achievements related to art, science and culture created in the area where shtolavian is spoken “must be considered an integral part of Serbian art, science and culture”.

H. Arendt also speaks about regressive nationalism based on romantic myths and dreams of states whose borders would match the scope of mother tongue (H. Arendt, *The Origins of Totalitarianism*, 1958).

21. Having in mind what was said above and some other arguments as well, the Montenegrin Helsinki Committee thinks that in the Draft Constitution of Montenegro the language must be called the name of the state of Montenegro – Montenegrin language, this being the most adequate solution. The Draft Constitution must contain obligatory guarantees to the minority members about the use of their own mother tongues, as official ones, according to customary conditions and criteria, as defined in international standards, as well as the guarantees for their other rights related to this issue.

Besides, the future Constitution must contain provisions with adequate guarantees that ought to ensure the right of citizens to preserve and promote Montenegrin language identity and the right to defense from language assimilation.

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