



STATE OF MONTENEGRO

CONSTITUTIONAL COURT

**XIX CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS**  
(Chisinau, 21–24 May 2024)

**Subject:** Forms and limits of judicial restraint: The case of constitutional courts

*NATIONAL REPORT ON THE QUESTIONNAIRE FOR XIX CONGRESS OF THE CONFERENCE  
OF EUROPEAN CONSTITUTIONAL COURTS*

**I. Matters not subject to judicial decision and intensity of restraint**

*1. What does the term “judicial restraint” encompass in your jurisdiction?*

The concept of “judicial restraint” in the jurisdiction of the Constitutional Court of Montenegro (hereinafter: the Constitutional Court) is viewed through its position, role and powers in the public system, which are determined, first of all, by the provisions of the Constitution of Montenegro<sup>1</sup> (hereinafter: the Constitution) and Amendments I to XVI to the Constitution<sup>2</sup>, i.e. the fact that the Constitutional Court acts “only” within the competences stipulated by the provisions of the mentioned regulations.

In this regard, in part six, the Constitution regulates, among other, the competences, the decision-making method and the effect of the decisions of the Constitutional Court, while Amendments no. XV and XVI of the Constitution regulate, among other, the composition, conditions for election, and term of office of the Constitutional Court judges.

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<sup>1</sup> “Official Gazette of Montenegro”, number 1/07.

<sup>2</sup> “Official Gazette of Montenegro”, number 38/13.

In this regard, the Constitutional Court is in charge of the protection of constitutionality and legality, preserving the legality of the functioning of the legal order in Montenegro, and it is the supreme institution ruling on constitutional and political disputes through the application of law, and by acting and fulfilling the role assigned to it by the Constitution, it influences the stability of the entire community. The Constitutional Court decides on disputed issues within its competences by interpreting constitutional norms, materialized through the constitutional court decisions, which are binding and enforceable for everyone. It is this unique, stabilizing role that reflects the special character of the Constitutional Court, as the only body that has the authority to subject the decisions of the legislative, executive and judicial powers to the law, i.e. to assess their acts in relation to the constitutional requirements and values established by the Constitution.

Specifically, in accordance with the provisions of Article 149 of the Constitution, the Constitutional Court:

- 1) decides on the conformity of laws with the Constitution and confirmed and published international agreements;
- 2) decides on the conformity of other regulations and general acts with the Constitution and the law;
- 3) decides on constitutional appeal due to the violation of human rights and freedoms guaranteed by the Constitution, after all other effective legal remedies have been exhausted;
- 4) decides whether the President of Montenegro has violated the Constitution;
- 5) decides on conflict of jurisdiction between courts and other state authorities, between state authorities and local self-government authorities and between the authorities of local self-government units;
- 6) decides on prohibition of work of a political party or a non-governmental organization;
- 7) decides in electoral disputes and disputes related to the referendum, which are not within the jurisdiction of other courts;
- 8) decides on conformity with the Constitution of the measures and actions of state authorities taken during the state of war and the state of emergency;
- 9) performs other tasks stipulated by the Constitution.

When it comes to the jurisdiction of the Constitutional Court regarding the review of the constitutionality and legality of regulations (conformity of laws with the Constitution and confirmed and published international treaties, or conformity of other regulations and general acts with the Constitution and the law), the Constitution stipulates that any person may file an initiative to start the procedure for the review of constitutionality and legality, and that the procedure before the Constitutional Court for the review of constitutionality and legality may be initiated, by way of petition, by an "ordinary" court, another state authority, a local self-government authority, and by five Members of the Parliament, as well as the Constitutional Court itself, and in terms of jurisdiction of the Constitutional Court to decide on constitutional appeals, Amendment XV to the Constitution specifies that the Constitutional Court decides on a constitutional appeal in a panel composed of three judges, which may only decide unanimously and in full composition, and in the event that unanimity is not reached, the constitutional appeal is decided upon by majority vote of all judges.

According to the Law on the Constitutional Court of Montenegro<sup>3</sup>, the Constitutional Court decides on issues within its jurisdiction at a session of all judges, and at a session of a panel composed of three judges when deciding on a constitutional appeal; it holds regular expert meetings on cases within its jurisdiction, which, in addition to judges, may be attended by the Secretary General and Constitutional Court advisers, as well as collegiums of judges where more important issues related to the functioning, administration and international cooperation of the Constitutional Court are discussed.

The Law on the Constitutional Court of Montenegro also stipulates that in the procedure for review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, the Constitutional Court is not limited by the petition or initiative. The same Law stipulates that in the constitutional appeal procedure, the Constitutional Court decides on the violation of human rights or freedoms guaranteed by the Constitution stated in the constitutional appeal. The Law on the Constitutional Court of Montenegro specifies that the Constitutional Court itself may initiate the procedure for review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, in particular when: the question is raised during the constitutional appeal procedure as to the conformity of the law with the Constitution and confirmed and published international treaties, or the conformity of other regulations and general acts with the Constitution and the law on the basis of which the individual act that is the subject of a constitutional appeal was adopted; or the question is raised in the course of the procedure for review of the conformity of laws with the Constitution and confirmed and published international agreements, or of other regulations and general acts with the Constitution and the law, as to the constitutionality or legality of other provisions or other regulations related to the provisions that are the subject of review.

Given that the decisions of the Constitutional Court, i.e. the positions on certain issues expressed therein, are binding on everyone, including state authorities, state administration bodies, local self-government authorities, i.e. local administrations, legal entities and other entities exercising public authority, the Constitutional Court of Montenegro ensures that its decisions, i.e. constitutional case law, are transparent, principled and well-reasoned, and that any change in case law, if needed, is based on convincing arguments, all with the aim of preserving legal certainty, as one of the fundamental elements of the rule of law. In this regard, in accordance with the Constitution, the Law on the Constitutional Court of Montenegro and the Rules of Procedure of the Constitutional Court of Montenegro<sup>4</sup>, the Constitutional Court: publishes its decisions and rulings in the Official Gazette of Montenegro, and on the Constitutional Court website (<http://www.ustavisudcg.co.me/>); adopts the annual report on the work of the Court, which is published on its website<sup>5</sup>; allows the presence of

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<sup>3</sup> "Official Gazette of Montenegro", number 11/15.

<sup>4</sup> "Official Gazette of Montenegro", no. 7/16 and 95/23.

<sup>5</sup> The annual report includes, among other: an overview of received, resolved and unresolved cases in the reporting period by classification codes; the structure of received cases by jurisdiction; an overview of pending cases at the end of the reporting period by case classification codes and by year; an overview of the Court's decision-making process within its jurisdiction; information on court work in panels; an overview of decisions upholding constitutional appeals; information on violated rights in decisions upholding constitutional appeals; violations of constitutional and convention rights stated by the appellants in constitutional appeals in the cases decided by the court in the reporting year; overview of decisions rejecting constitutional appeals; overview of ongoing cases received in the reporting year and passed on from earlier years, etc.

representatives of the media at the Constitutional Court sessions and public hearings in the Constitutional Court; publishes constitutional court case law and relevant information on the Constitutional Court website; issues collections of relevant decisions and rulings of the Constitutional Court; issues other publications about the Constitutional Court work and activities and the development of the constitutional judiciary in Montenegro; makes announcements to the media, holds conferences for media representatives; appoints a public relations advisor; hires experts in relevant fields to provide expert opinions; participates in professional conferences to share experiences on constitutional case law, and other forms of cooperation between constitutional courts and other courts that perform the function of constitutional courts; cooperates with international organizations, constitutional courts of European and other countries and with the European Court of Human Rights in Strasbourg; prepares regular reports on constitutional case law for the Bulletin - the official publication of the Council of Europe Commission for Democracy through Law (Venice Commission); etc.

Furthermore, in order to strengthen the independence of judges (and therefore the Constitutional Court itself), to have effective participation in examining cases, providing broader arguments and encouraging dialogue about the positions of the Constitutional Court expressed in its decisions, the Law on the Constitutional Court of Montenegro allows every judge to give a separate opinion (concurring and dissenting) in a case, and such opinion, together with the relevant decision, must be published on the Constitutional Court website, and may also be published in the Official Gazette of Montenegro together with the relevant decision, if so requested by the judge who issued the opinion and if the judges at the session declare so.

*2. Is there a spectrum (range) of restraint for your court? Are there any “forbidden” areas or established zones of legal non-responsibility for your court or issues that are not subject to judicial decision (for example, issues that cause moral controversy, issues that are politically sensitive, cause controversy in society, refer to the allocation of scarce resources, have significant financial implications for the government, etc.).*

See the answer to the first question.

*3. Are there factors that determine when and how your court should exercise restraint (for example, what falls within the domain of culture and conditions in your country; the historical experience of your country; the absolute or qualified character of the fundamental rights in question; the merits of the case that was brought before the court; whether the issue that the case essentially comes down to implies a change in social conditions and attitudes)?*

The Constitutional Court of Montenegro acts in accordance with the relevant provisions of the Constitution of Montenegro and the Law on the Constitutional Court, whereby the culture and

conditions in our country, historical experiences, the character of fundamental rights and other factors are taken into account depending on the circumstances of the specific case.

*4. Are there situations in which your court exercised restraint because it did not have institutional jurisdiction or appropriate expertise?*

The Constitutional Court of Montenegro has had situations in which it did not have institutional jurisdiction, and it has not had situations where it declared itself without jurisdiction because of a lack of appropriate expertise.

*5. Were there any cases in which your court exercised restraint because there was a risk of judicial error?*

No.

*6. Are there any cases in which your court exercised restraint by referring to the institutional or democratic legitimacy of the decision-making entity?*

The Constitutional Court of Montenegro has never exercised restraint in a case due to the institutional or democratic legitimacy of the decision-making entity.

*7. "The more a specific regulation relates to a broader social policy issue, the less likely the court is to intervene." Is the stated thesis an applicable standard for your court? Does your court agree with the concept that decisions on political issues should be made through democratic processes, because courts are not elected in elections and lack a democratic mandate to decide on political issues?*

The Constitution of Montenegro and the Law on the Constitutional Court of Montenegro stipulate the jurisdiction and procedure of handling cases by the Constitutional Court, and the Constitutional Court acts accordingly.

*8. Does your court accept the general principle of restraint in ruling on matters related to penal philosophy and penal policy?*

No.

*9. There may be limited circumstances where the authorities are not in a position to disclose certain information to the court, particularly in the context of national security, where classified intelligence is involved. Has your court been in position to exercise restraint on the grounds of national security?*

In its work, the Constitutional Court of Montenegro has not had cases where it exercised restraint on the basis of national security, nor were there any circumstances where the authorities withheld information from the aspect of national security.

*10. Given that the constitutional courts have the role of guardians of the constitution, should they interfere more strongly in the domain of politics (apply stricter supervision, i.e. control) when the authorities are passive towards the introduction of reforms that are in line with rights?*

No. The Constitutional Court of Montenegro acts in accordance with its competences, stipulated by the Constitution of Montenegro and the Law on the Constitutional Court.

## **II. Decision-making entity**

*11. Does your court show more restraint towards an act of parliament than towards a decision of the executive power? Does the restraint exercised by your court differ depending on the degree of democratic responsibility of the original decision-making entity?*

It follows from the Constitution that: power in Montenegro is organized according to the principle of division of power into legislative, executive and judicial; the legislative power is exercised by the Parliament of Montenegro, the executive power by the Government of Montenegro, the judicial power by courts, and constitutionality and legality are protected by the Constitutional Court, i.e. the Constitutional Court was established as a special authority (body), separated from other authorities (it is outside the government structure based on the “tripartition of power” (legislative, executive and judicial)), which protects constitutionality and legality, i.e. the constitutional legal order and human rights and freedoms guaranteed by the Constitution, and the Constitutional Court does not exercise any restraint towards an act depending on whether it was passed by the executive, legislative or judicial authorities.

The number of cases handled by the Constitutional Court depends on the dynamics of their inflow, and statistical reports on the work of the Constitutional Court are prepared for each calendar year. Cases received at the Constitutional Court are distributed to the judge rapporteur and the constitutional court advisor according to the order of receipt and the type of constitutional court proceedings, the type of contested acts and the alphabetical order of the last name of the judge, i.e. the constitutional court advisor, on the day of receipt at the Constitutional Court, in accordance with

the provisions of Article 49, paragraphs 1 and 3 of the Rules of Procedure of the Constitutional Court of Montenegro. According to the provisions of Article 53 of the Rules of Procedure of the Constitutional Court of Montenegro, the Constitutional Court examines cases according to the order in which they are received. In exceptional cases, the Constitutional Court examines the following types of cases as priority:

1. cases for which a special time limit is prescribed by law, within which the Constitutional Court must examine and decide on the case;

2. cases related to deciding on issues of special importance for the protection of the rights and freedoms of citizens;

3. cases related to the rights of the child;

4. cases related to violation of personal dignity, deprivation of liberty, detention and respect for person (Articles 28, 29, 30 and 31 of the Constitution), i.e. violation of the right to life, the prohibition of torture, the prohibition of slavery and forced labour, and the right to liberty and security (Articles 2, 3, 4, and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms);

5. cases in which the conditions for issuing an interim order to suspend the execution of an individual act or action are met, and

6. other cases, as decided by the Constitutional Court.

If a participant in the proceedings submits a petition for priority examination of the case, the Constitutional Court decides on that petition when proposed by the judge-rapporteur.

In connection with the above, for example, in 2020, among other, the Constitutional Court decided in 14 cases requesting review of the constitutionality of the provisions of the law and in 11 cases requesting review of the constitutionality and legality of the provisions of the regulations, where legislators are part of the executive branch.

**12. What weight does your court give to legislative history? What legal significance should a parliamentary debate have for judicial review of conformity from the point of view of human rights, and should there be any significance at all?**

The Constitutional Court looked at the term “parliamentary debate” through the procedure of passing a law in relation to which, in certain stages, the debate is held in the Parliament of Montenegro. In this regard, according to the Constitution of Montenegro, the legislative power in Montenegro is exercised by the Parliament. It is reflected in the adoption of laws regulating:

1) the manner of exercise of human rights and liberties, when this is necessary for their exercise;

2) the manner of exercise of the special minority rights;

3) the manner of establishment, organization and competences of the authorities and the procedure before those authorities, if so required for their operation;

4) the system of local self-government;

5) other matters of interest for Montenegro.

The Constitution and Amendments I to XVI to the Constitution stipulate that the right to propose laws and other acts belongs to the Government and a Member of the Parliament, and to six thousand voters, through the Member of the Parliament they authorized, and specify the quorum for

holding a session of the Parliament and the number of votes of Members of the Parliament needed to pass a law, depending on the matter regulated therein. Detailed procedure for passing laws is regulated by the Rules of Procedure of the Parliament of Montenegro<sup>6</sup> stipulating, among other: that the procedure for passing laws is initiated by submitting a proposal for the law; that the proposal for the law is submitted in the form in which the law is passed and must be explained and in writing; that the explanation of the proposed law contains: the constitutional basis referred to in Article 16 of the Constitution to regulate the issues that are the subject of the proposed law; the reasons for passing the law; conformity with the European Union *acquis* and confirmed international conventions; explanation of basic legal principles; assessment of financial resources for the enforcement of the law; public interest for which retroactive effect is proposed, if the proposed law contains provisions for which retroactive effect is foreseen and the text of the provisions of the law to be changed, if a law on amendments is proposed; that the proposal for the law is considered first in the Parliamentary committees (first reading), and then it is considered and debated at the sessions of the Parliament, in the procedure of general debate on the proposal for the law (second reading), the procedure of detailed debate on the proposal for the law (third reading) and after the detailed debate is completed, the voting is done on the amendments that are not an integral part of the proposal for the law (if any), and then on the proposal for the law as a whole.

In this regard, we should note that the Constitutional Court was established as a special authority, separated from other powers (legislative, executive and judicial), which protects constitutionality and legality, i.e. the constitutional legal order and human rights and freedoms guaranteed by the Constitution, and in accordance with the provisions of Article 149 paragraph 1 item 1 of the Constitution it has the exclusive role and powers of the so-called “negative legislator”, i.e. it has jurisdiction only for the review of the conformity of the specific legal solution with the relevant provisions of the Constitution and confirmed and published international treaties.

Furthermore, in relation to the review of the constitutionality of certain provisions of laws that have retroactive effect, i.e. provisions of laws introducing certain restrictions on human rights and freedoms, in addition to other elements, the Constitutional Court takes into account whether the provisions with retroactive effect, i.e. provisions restricting certain human rights and freedoms, strive for a legitimate goal, i.e. are “in the service” of public interest. Also, the question of the formal constitutionality of a law, i.e. the procedure for its enactment, may be raised before the Constitutional Court, in which case the Constitutional Court, in the process of formal legal assessment of such a law, determines whether the conditions regarding the required number of Members of the Parliament have been met in the process of passing that law for quorum and decision-making, in accordance with the provisions of the Constitution and Amendments I to XVI to the Constitution. The Constitutional Court dealt with this issue in the following cases: U-I br. 31/10, of 26 January 2011, U-I br. 37/15, of 24 February 2017, U-I br. 14/17 and 18/17, of 30 October 2018, U-I br. 13/22, 14/22 and 16/22 of 28 July 2022, etc.

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<sup>6</sup> “Official Gazette of the Republic of Montenegro”, no. 51/06 and 66/06, and “Official Gazette of Montenegro”, no. 88/09, 80/10, 39/11, 25/12, 49/13, 42/15, 52/17, 17/18 and 47/19.



**13.** *Does your court check whether the decision-making entity justified and explained its decision or whether this decision is identical to the one that your court would have made if it itself, by any chance, was the decision-making entity?*

The actions of the Constitutional Court of Montenegro are not comparable to the actions of any other state decision-making authority, nor does it act as a court of last (third or fourth) instance. The Constitutional Court, in constitutional appeal proceedings, examines whether human rights guaranteed by the Constitution of Montenegro and the European Convention for the Protection of Human Rights and Fundamental Freedoms in proceedings before courts of general and special jurisdiction have been violated, examining, among other, the reasoning of the court decision in those proceedings, as part of the right to a fair trial – the right to a reasoned court decision, in accordance with the standards of the right to a fair trial.

**14.** *Does your court exercise restraint depending on the extent to which a given decision or measure was preceded by a thorough examination of compliance with fundamental rights? How deep should the legislator's analysis be for your court to ultimately give that analysis certain weight?*

The Constitutional Court of Montenegro acts in accordance with the competences and procedures regulated by the Constitution of Montenegro and the Law on the Constitutional Court, regardless of the depth and breadth of the preliminary examination of compliance with fundamental rights.

**15.** *Does your court analyse whether opposing views were fully represented in the parliamentary debate when a measure was adopted? Is it enough to conduct an extensive debate on the general features of a particular regulation or must the focus be clearly indicated and placed on the implications of the regulation?*

As stated in previous answers, in the area of abstract control of constitutionality and legality, the Constitutional Court is authorized to review the conformity of laws with the Constitution and confirmed and published international treaties, i.e. the conformity of other regulations and general acts with the Constitution and the law, and this is the framework of its actions in the sense of the provisions of Article 149, items 1 and 2 of the Constitution.

**16.** *Does the fact that a certain decision was made by the legislator or, on the other hand, that the decision itself resulted from the process of public consultation or public discussion, have evidentiary weight on the basis of which it is possible to determine the democratic legitimacy of the decision?*

The provision of Article 149, item 2 of the Constitution defines the jurisdiction of the Constitutional Court to decide on the conformity of other regulations and general acts (by-laws) with the Constitution and the law. The principle of conformity of legal regulations (Article 145 of the Constitution) implies that by-laws are enacted on the basis of normatively established authority of the entity passing the act. According to the Constitution, the Government has the general authority to

enact regulations (for the implementation of laws), and administrative bodies, local self-governments or other legal entities have such authority when, on certain issues, they are authorized to do so by law. In other words, the law must be the basis for the adoption of by-laws and it includes only what follows from the legal norm and is not expressly regulated therein. In the process of reviewing the conformity of such a regulation with the Constitution and the law, the Constitutional Court examines whether the contested act was passed by an authorized body, whether the body passing the act had the legal authority to do so (legal basis) and whether the regulation corresponds in its content, purpose and scope to the framework set by the law.

In accordance with the above, the Constitutional Court may examine whether the procedure for the adoption of a by-law was followed, i.e. whether a public hearing was conducted for the act, if it is prescribed as mandatory in the adoption procedure. The Constitutional Court dealt with this issue in the following cases: U-II br. 2/14, of 30 June 2015, U-II br. 42/14, of 18 November 2015, U-II br. 33/14, of 28 December 2015, U-II br. 17/14, of 4 October 2016, U-II br. 25/15, of 4 October 2016, U-II br. 10/16, of 4 October 2016, etc.

### **III. Scope of rights, legality and proportionality**

*17. Has your court ever refrained from making a decision at the stage of defining a right, giving importance to the government's definition of the right or applying that definition to the facts?*

The Constitutional Court of Montenegro does not have the jurisdiction to carry out preventive control of constitutionality, which would allow it to eliminate possible unconstitutionality in the process of adopting regulations or defining rights. Therefore, the Constitutional Court of Montenegro can react only upon the submitted petition for the review of the conformity of the adopted law with the Constitution and confirmed and published international treaties and the petition for the review of the conformity of other adopted regulation and general act with the Constitution and the law. Also, proceedings before the Constitutional Court may be initiated by an initiative to start proceedings for the review of conformity of laws with the Constitution and confirmed and published international treaties, and by an initiative to start proceedings for the review of conformity of other regulations and general acts with the Constitution and the law, as well as by an initiative to start proceedings for the review of conformity with the Constitution of measures and actions of state authorities undertaken during wartime and state of emergency. When it comes to individual cases, brought on the basis of a defined right on the basis of the adopted law, such issues are resolved in the constitutional appeal procedure due to the violation of human rights and freedoms guaranteed by the Constitution. Therefore, both within the abstract jurisdiction and the jurisdiction upon constitutional appeal, the Constitutional Court of Montenegro decides on the basis of the Constitution of Montenegro, its own case law and the case law of the European Court of Human Rights.

*18. Does the nature of applicable rights affect the extent of restraint? Does your court consider that some rights or some aspects of rights are more important than others and therefore deserve more rigorous scrutiny?*

The only “division” that could be made based on the case law of the Constitutional Court of Montenegro is the “division” into absolute rights and rights that can be limited by law only when this is necessary in a democratic society. Namely, as already stated, in the case law of the Constitutional Court of Montenegro, there is generally no “policy” of refraining from decision-making, and we cannot speak of refraining from decision-making when basic human rights are in question either. The Rules of Procedure of the Constitutional Court of Montenegro define consideration of cases in the order in which they are received, as well as exceptions to such treatment, when certain types of cases are considered as priority. Pursuant to Article 53 of the Rules of Procedure of the Constitutional Court of Montenegro:

(1) The Constitutional Court considers cases according to the order in which they are received.

(2) In exceptional cases, the Constitutional Court considers the following types of cases as priority:

1. cases for which a special time limit is prescribed by law, within which the Constitutional Court must consider and decide on the case;

2. cases related to deciding on issues of special importance for the protection of the rights and freedoms of citizens;

3. cases related to the rights of the child;

4. cases related to violation of personal dignity, deprivation of liberty, detention and respect for person (Articles 28, 29, 30, 31 of the Constitution), i.e. violation of the right to life, the prohibition of torture, prohibition of slavery and forced labour and the right to liberty and security (Articles 2, 3, 4, and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms);

5. cases in which the conditions for issuing an interim order to suspend the execution of an individual act or action are met, and

6. other cases, as decided by the Constitutional Court.

(3) If a participant in the procedure submits a petition for priority consideration of the case, the Constitutional Court decides on that petition when proposed by the judge rapporteur.

**19.** *Do you have a certain scale of clarity when examining the constitutionality of a law? How do you decide how clear a law is? When do you apply the principle *In claris non fit interpretatio* (“Where everyone understands equally, there is no need for interpreter”)?*

The clarity of a law or any other regulation, where the Constitutional Court is responsible for reviewing the constitutionality, i.e. constitutionality and legality, is an integral part of the principle of the rule of law (Article 1, paragraph 2 of the Constitution), as the highest value of the constitutional order of Montenegro. A regulation must be clear and precise in accordance with the particularity of the matter that it normatively regulates, thus preventing any arbitrariness in the interpretation and application of the regulation, i.e. eliminating any uncertainty of the addressees of the legal norm regarding the final effect of the provisions that are directly applied to them. The requirements of legal certainty and the rule of law, referred to in the provisions of Article 1, paragraph 2 of the Constitution, require that the legal norm be available to the addressees and predictable for them, i.e. be such that they can actually and specifically know their rights and obligations in order to act accordingly. The

addressees of the legal norm cannot actually and specifically know their rights and duties, and predict the consequences of their behaviour if the legal norm is not sufficiently specific and precise.

In order to determine whether a certain provision of a law or other regulation meets the requirements for specificity and precision of a legal norm, the Constitutional Court starts from its linguistic, systematic, objective or teleological interpretation, and from the criteria of the European Court of Human Rights for the fulfilment of the “standard of legality”, established in its extensive case law<sup>7</sup>.

**20. *What is the intensity of your court’s review when the legitimate aim test is applied?***

There are not many decisions the case law of the Constitutional Court of Montenegro where the Constitutional Court found that there was no legitimate aim that is in the public interest for the type of imposed restriction. The final assessment of the Constitutional Court is given mainly in the phase of proportionality examination.

**21. *What proportionality test does your court apply? Does your court apply all phases of the “classic” proportionality test (i.e., suitability, necessity, and proportionality in the strict sense)?***

The Constitutional Court of Montenegro applies the proportionality test, referring to the criteria established in the case law of the European Court of Human Rights.

**22. *Does your court go through each applicable segment of the proportionality test?***

The Constitutional Court of Montenegro, in principle, goes through each applicable segment of the proportionality test.

**23. *Are there cases where your court accepts that the measure in question satisfies one or more phases of the proportionality test even when there appears to be insufficient evidence to support this?***

We cannot say that there were cases in the previous case law of the Constitutional Court of Montenegro in which the Constitutional Court accepted that the measure in question satisfies one or more phases of the proportionality test even when, apparently, there is insufficient evidence to support this.

**24. *Was the introduction of proportionality test into the jurisprudence of your court accompanied by the strengthening of the doctrine of judicial restraint?***

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<sup>7</sup> *Sunday Times (No.1) v. United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74, *Malone v. United Kingdom*, Judgment of 2 August 1984, Application No. 8691/79, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, judgment of 7 June 2012, application number 38433/09, etc.

We do not see a connection between the introduction of the proportionality test in the jurisprudence of the Constitutional Court of Montenegro and possible strengthening of the doctrine of judicial restraint.

**25.** *Does the case law of the European Court of Human Rights (ECtHR) shape your court's approach to refraining from decision-making/intervention? Is the ECtHR's margin of appreciation doctrine the domestic equivalent of the discretion awarded by your court? If not, how often do issues related to the ECtHR's margin of appreciation overlap with issues of your court's restraint in similar cases?*

The case law of the European Court of Human Rights is of great importance for the decision-making of the Constitutional Court. However, this does not prevent the Constitutional Court from providing a wider scope of protection than that provided by the standards established by the case law of the European Court. In the constitutional appeal procedure, the Constitutional Court allows the enjoyment of the right to a fair trial and property right guaranteed by the Constitution of Montenegro, which is not the guarantee of the right to a fair trial and the right to property from the European Convention.

The jurisprudence of the European Court of Human Rights regarding the margin of appreciation available to countries on certain issues is essentially similar, if not equivalent, to the assessment of the Constitutional Court, when it comes to discretionary powers.

**26.** *Has the ECtHR condemned your country for your court's refraining from ruling or intervening in a case, judicial restraint from ruling, rendering it an ineffective remedy?*

The European Court of Human Rights has not condemned our country because the Constitutional Court of Montenegro refrained from making decisions in a case. We point out the position of the ECtHR that a constitutional appeal may in principle be considered an effective legal remedy of 20 March 2015, taken in the case of *Siništaj v. Montenegro* (judgment of 24 November 2015).

#### **IV. Other specifics**

**27.** *How often is the question of exercising restraint in making a decision in cases concerning human rights raised in cases decided by your court?*

In proceedings related to human rights and freedoms, the Constitutional Court acts in accordance with the Constitution of Montenegro, the Law on the Constitutional Court of Montenegro and the Rules of Procedure of the Constitutional Court of Montenegro.

**28.** *Has your court increasingly exercised restraint in making decisions or in intervening over time?*

The Constitutional Court of Montenegro has not exercised restraint in making decisions or in intervening at all.

**29. Does restraint as an attitude also depend on the workload of your court?**

The number of cases affects the length of proceedings before the Constitutional Court of Montenegro, but the Court makes efforts to act in accordance with the Law on the Constitutional Court of Montenegro and the Rules of Procedure of the Constitutional Court of Montenegro in all competences.

The burden of the Constitutional Court of Montenegro because of a large number of unresolved cases from earlier years may refer to the question of whether the Constitutional Court fulfils its role as a protector of constitutionality and legality and human rights and fundamental freedoms. This would require taking certain measures in order to make the Constitutional Court more efficient (the number of employees working on cases).

Therefore, despite a certain number of pending cases, the fulfilment of the role of the Constitutional Court is not called into question, since the Court has significantly reduced the backlog in the number of pending cases in the last two years.

**30. Can your court base its decisions on arguments that the parties in the dispute did not present? Can your court requalify the presented arguments by classifying them under a different constitutional provision from the one invoked by the applicant (party)?**

The issue of dealing with arguments presented by the parties in a particular dispute before the Constitutional Court is regulated by the Law on the Constitutional Court of Montenegro. In that regard:

- in the procedure for reviewing the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, the Constitutional Court is not limited by the petition, or initiative (Article 59);
- in the procedure of deciding whether the President of Montenegro has violated the Constitution, the Constitutional Court is limited by the reasons from the petition (Article 82);
- a petition for deciding on a conflict of jurisdiction (between courts and other state authorities, between state authorities and authorities of local self-government units and between authorities of local self-government units) contains information about the petitioner, the name of the authorities between which there is a conflict of jurisdiction, the subject of the procedure, a detailed explanation of the facts and the circumstances of the case that led to a conflict of jurisdiction and the reasons why the authority is considered to have jurisdiction, or not to have jurisdiction to decide on the case. The petition is accompanied by documentation relevant for decision-making;
- the petition to ban the work of a political party or non-governmental organization must state the prohibited activity, i.e. the facts and circumstances of unconstitutional activity, which may be the reason for banning the work of a political party or non-governmental organization (Article 92);
- the appeal initiating an electoral dispute (election of councillors and Members of the Parliament and the election of the President of Montenegro) and a dispute related to the referendum

must contain reasons and evidence of the violation of voting rights during the election, i.e. the referendum (Article 98, paragraph 2, Article 104 paragraph 2, and Article 105 paragraph 2);

- the appeal initiating the procedure for deciding on the conformity with the Constitution of the measures and actions of state authorities undertaken during the state of war and state of emergency must be explained and must contain reasons and evidence of the unconstitutional restriction of the exercise of certain human rights and freedoms (Article 108, paragraph 5).

In accordance with the provision of Article 75 of the Law on the Constitutional Court of Montenegro, the Constitutional Court decides on the violation of human rights or freedoms guaranteed by the Constitution indicated in the constitutional appeal. This has been interpreted in the case law of the Constitutional Court so that the court is bound by the facts presented in the constitutional appeal, but not by their legal qualifications. Therefore, the Court may base its legal assessment of a constitutional appeal on a different provision of the Constitution and/or the Convention than the one referred to by the appellant. This approach is in conformity with the well-established case law of the ECtHR (*Akdeniz v. Turkey*, No. 25165/94, paragraph 88, 31 May 2005).

In addition to the above, the provisions of Article 60 of the Rules of Procedure of the Constitutional Court of Montenegro prescribe that, depending on the type of case, the proposal for a decision or ruling of the Constitutional Court should, as a rule, contain:

- (...);
- 4. the content of the filing;
- 5. the content of the response, or opinion;
- (...);
- 8. the established factual and legal circumstances in the matter;
- 9. provisions of the Constitution and laws on which the constitutional-legal solutions in the case are based;
- 10. the provisions of the international act regulating certain legal issues;
- 11. constitutional assessment of the contested act;
- 12. expert and other opinions, if they were obtained during the proceedings;
- 13. relevant case law of the Constitutional Court, comparative case law of constitutional courts in other countries and case law of the European Court of Human Rights;
- 14. a proposal to hold a public hearing, if the judge rapporteur believes that it should be held;
- (...);
- 21. other proposals of the judge rapporteur considered to be relevant to the case;
- 22. proposal of the judge rapporteur on the manner in which the case should be decided.

**31.** *Can your court expand the review of constitutionality so that it includes other legal provisions that have not been contested before it, but are related to the position of the appellant or petitioner?*

As stated in the previous answers – in the procedure for review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, the Constitutional Court is not limited by the petition, or the initiative, i.e. it can “extend the review” of the constitutionality, or the constitutionality and

legality of a legal provision or a provision of another document that is not covered by the submitted petition or initiative.

The Law on the Constitutional Court of Montenegro specifies that the Constitutional Court itself may initiate proceedings for the review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, in particular when: the question is raised in the course of the constitutional appeal procedure as to the conformity of the law with the Constitution and confirmed and published international treaties<sup>8</sup> or the conformity of other regulations and general acts with the Constitution and the law, on the basis of which the individual act that is the subject of a constitutional appeal was adopted; or the question is raised during the procedure for review of the conformity of laws with the Constitution and confirmed and published international agreements, or of other regulations and general acts with the Constitution and the law as to the constitutionality, i.e. the legality of other provisions or other regulations that are related to the provisions that are the subject of the review<sup>9</sup>.

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<sup>8</sup> This issue was dealt with by the Constitutional Court in the case designated as U-I br. 34/18, U-III br. 1970/18 and U-III br. 1987/18, of 12 December 2018 and 27 September 2019.

<sup>9</sup> The Constitutional Court dealt with this issue in the cases designated as U-II br. 71/18, of 28 February 2019, U-II br. 67/21 and 14/22, of 12 May 2022, etc.