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**INPUTS OF MONTENEGRIN NGOs TO EC MONITORING REPORT:**

- 1. HUMAN RIGHTS**
- 2. NEW CONSTITUTION OF MONTENEGRO**
- 3. JUDICIARY**
- 4. ROMA**
- 5. MEDIA**

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## **Part 1:**

# **HUMAN RIGHTS AND PROTECTION OF MINORITY RIGHTS IN MONTENEGRO<sup>1</sup>**

### **General overview**

For Montenegro, last year was marked by the post-referendum debate on further directions of development, with marked political and social polarization. Although the results of the referendum clearly determined new state organization, a certain number of political players continued with the campaign of questioning state status from the perspective of affiliation with a certain political structure, their actions, at the same time, characterized by a strong national stance. On the other hand, it became evident that very little attention was devoted, in the approach to restoring state status, to organization of the very state machinery for taking over a number of functions of a sovereign state, assuming that the process would be easier to implement in an independent state.

In this situation, there were contradicting views concerning further integration processes and internal reorganization of the state, although in the process preceding the referendum, almost all political structures rather explicitly declared support to Euro-Atlantic integrations, which would provide them with a better positioning for their own activity. On the national level, the outstanding issue of constitutional arrangement with all the characteristics of a rather heterogeneous political community, where it is difficult to come to a common position (or interest) regarding any political or social issue. Thus some of the key issues, such as establishment of new state organization or reforms of certain branches of power remained on the margins of the conflict concerning issues that were definitely – without any intention to underrate their relevance for the stability of the state - of lesser importance, such as state symbols, language or religion.

This perception of the situation caused the delay in the adoption of the new Constitution, which resulted in further complication of the political processes in the country. Namely, there was no broad consensus on the new constitutional arrangement from the start; the consensus was not possible until the adoption of the Constitution. Broad discussion concerning the form and contents of the Constitution was reduced to the work of the parliamentary committee that was supposed to provide satisfactory answers to all controversial issues. Information concerning the substance of constitutional provisions was lacking during this stage, which later affected the quality of some of the provisions, especially concerning the accomplished level of implementation of human rights. However, the constitutional provision on the supremacy of international law in relation to the exercise of human rights and freedoms, together with membership in international organizations, make it possible to compensate for this deficiency in the Constitution by the procedures for protection of human rights before national institutions, and in particular through the judicial system.

Similarly to the global context concerning human rights, the level of protection of economic, social and cultural rights in Montenegro is far below that pertaining to political and civil rights, although, at least at the level of declarative statement, they are not considered less important in view of the rights and responsibilities undertaken in international agreements.

The system of human rights in Montenegro is not characterized by mass or systematic infringement. Still, it is indisputable that a large number of actions or omissions to act by state authorities may be identified as infringement of human rights; at the same time, with the progress of democratization

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<sup>1</sup> This part of the report is prepared by Sinisa Bjekovic, NGO “Center for Human and Minority Rights”

this has stagnated in some areas, while in others (abuse of police powers, freedom of expression, protection of privacy) it still seems very present.

In addition to the general attitude to human rights, it is necessary to mention some social problems that represent an obstacle to the respect for and enjoyment of human rights in general. These would primarily include the evident problems in the implementation of the concept of equality before the law, the problem of corruption, which has been stated on several occasions, and violent behavior, which is more a feature that pertains to the overall society than the state itself and its machinery. Though we can say that a lot has been done to establish institutional protection and prosecution of perpetrators in relation to the issue of torture, corruption remains a serious challenge, especially if we bear in mind that some of its forms are deeply rooted in the mindset of the population (privileges due to family relations, protectionism etc.). Therefore, on the sociological plane, corruption is frequently perceived only as giving or accepting bribe, which is but a segment of the range of activities where this phenomenon may be identified. Another serious problem is that corruption is clearly recognized in media reports, but there is no serious action of competent state authorities to prevent or punish such behavior.

The statements presented above generate a further serious problem concerning equality before the law, considering that some individuals are privileged (which is a problem particularly present in the construction industry) and free of any accountability, while in other cases (especially involving those referred to as small investors) very rigorous actions are applied, including demolition of objects.

In addition to this, the few cases of corruption that are processed by the courts or the prosecution are infinitely delayed by the competent authorities or resolved in favour of the persons against whom criminal complaints are filed. It should be underlined that police authorities are most active in combating this, along with the NGOs (especially NGO MANS), but that their efforts are mainly annulled in further processing of these cases. Unlike them, numerous inspections that belong to executive power are just passive observers of the developments that fall under their competences. The public gets the impression that these are mainly cases or persons closely linked with the government, which has been indicated by a number of NGOs and individuals for a long time. Some NGOs and political organizations stated the passive attitude of the prosecution and the courts as an obstruction, which makes a logical conclusion in a country where corruption is a prominent problem - as assessed in a number of surveys and reports – but with a tendency of poor repression in the domain of prosecution and sanctioning.

An important fact concerning the given period of time are approaches to integration processes and membership in international and regional organizations, as a pillar around which reform processes are organized, to the same extent as signing the Stability and Association Agreement which, besides its practical value, is an important motivating factor of both the government and the citizens in internal processes.

## **Access to justice and human rights institutions**

### ***Constitutional protection***

It has already been stated that the procedure of adopting the Constitution was quite lengthy, due to a lack of compromise on certain status issues. However, the scant information that reached the public devoted very little attention to the safeguards pertaining to the system of human rights. These were frequently highlighted in the active approach of some NGOs (primarily the NGO Action for Human Rights) and the suggestions provided by the Venice Commission, but without response.

The key provision dealing with constitutional safeguards for protection of human rights and freedoms is contained in Article 17, which stipulates that the rights and freedoms are exercised

based on the Constitution and ratified international agreements, thus expanding the safeguard contained in Article 19 of the Constitution stipulating the supremacy of international law over Montenegrin legislation, but not national law in entirety.

The concept of constitutional complaint is incorporated in this Constitution as well; the procedural prerequisites for the functioning of the Constitutional Court of Montenegro as competent for processing constitutional complaints were left to be regulated by the new Law on Constitutional Court. With regard to the substantive law contents of protected rights, the Constitution refers to the system of human rights and freedoms guaranteed by the Constitution. This legal remedy is available to the parties whose right was infringed, after exhausting all effective legal remedies in the national legal system. This provision provides the Constitutional Court with a completely new position in the sense of substantive law competence, which was previously not the case in the technical sense. Likewise, it is very important to state the need to give a precise definition of the nature of the Constitutional Court's judgment on determining infringement of a right guaranteed under the Constitution and ratified and published international agreements in relation to final judgments of ordinary courts. Evaluation of its efficiency and effectiveness in the national legal system will depend mainly on this fact, in the sense of the case-law of the European Court of Human Rights.

The legislative framework in Montenegro is undergoing a period of dynamic reforms; it is possible to state, in general terms that laws are being harmonized with human rights standards, but the same statement does not apply to enforcement of the given laws. Besides the problem of insufficient expertise and lack of professional literature (including the case-law of international courts and quasi-judicial instances), there is an evident lack of information on the ratified and published agreements in the implementation of international standards, considering the lack of an adequate and publicly available documentation database in Montenegro.

### ***The Ombudsman in Montenegro***

The Ombudsman institution was established by law in 2003. In 2007, the Ombudsman handled 647 files, 448 of them from that year. 403 complaints were resolved, 110 out of them from 2006. Besides domicile population, the Ombudsman was addressed by other countries' nationals (16 from Serbia, 1 from Bosnia and Herzegovina and 1 from Croatia).<sup>2</sup> Out of the total number of complaints resolved in 2007, 34.9 % were rejected due to a lack of procedural prerequisites for the procedure, whereas no infringement of rights was deemed in 36.26 % of processed files. Infringement of rights was deemed for one half of the number of files; following intervention of the Ombudsman, most of the infringements were amended, while in 13 cases recommendations to eliminate infringement were forwarded to competent institutions. Majority of complaints referred to infringement of procedural rights before the courts, i.e. unreasonable length of procedure – under the law, the only matter that the Ombudsman is competent for.

Besides judicial institutions, most complaints concerned the work of public administration authorities, which is logical if we bear in mind the still high level of centralization of administrative affairs within the competences of public administration. In addition to these authorities, a number of complaints concerned organizations that execute public authority (institutions and companies). Only 39 complaints were made against local government authorities in 2007; however, it is necessary to note that there was a backlog of 20 files from 2006 – more than the number of files received in the current 2007.

As stated earlier, grounds for complaints against courts mainly concern unreasonable length of procedure, whereas complaints against state authorities concern "silence of administration", that is failure to act. The Ombudsman had contact with 3,212 citizens in total.

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<sup>2</sup> 2007 Ombudsman's Performance Report, <http://www.ombudsman.cg.yu>

With regard to the substance of the infringed right, we need to state the predominance of property rights i.e. the right to peaceful enjoyment of property. In addition to this, complaints referred to protection of rights of individuals deprived of liberty (in detention or during police custody), torture by abuse of official powers and cases dating from the times of conflicts in the region, with state authorities or para-military units in the 90s suspected as perpetrators. A number of complaints concerned infringement of the right to healthy environment, employment rights and pension-disability insurance, infringement of the right in the course of the procedure to obtain citizenship, which was characteristic for the individuals who had the status of refugees or displaced persons.

The facts presented above lead to the conclusion that the institution has been recognized as a form of protection of human rights in the country; however, we still do not have a clear picture of its institutional strength concerning effective and efficient protection of human rights, even more so considering that its decisions do not have suspensive action. With regard to internal institutional and organizational capacity, we need to say that it is far from what the institution would need to possess, which requires a responsible and honest approach of the state in strengthening the institution and enhancing its capacity. This is particularly valid if we consider that nucleus of control over implementation of some important international agreements is established within this institution, such as the Optional Protocol to the UN Convention on the Prohibition of Torture and other Inhuman and Degrading Treatment and Punishment.

### ***Institutions of judicial power and court protection***

A radical reform was implemented in 2007 concerning the constitutional status and operation of judicial power in Montenegro. Most objections were provided in regard to the election of top holders of judicial office, with the assumption that the political factor predominated in the election of all other judicial offices. This conclusion was derived based on the current social framework, although the very procedure of election was not a lonely case in comparative practice. Another important reform change is reflected in the judicial power being concentrated within its institutions and the election of holders of judicial office being transferred from the parliament to a new body – the Judicial Council.

National Judicial Reform Strategy was adopted in mid-2007, together with the Action Plan for its implementation. These are strategic papers that contain the directions of development of the organizational structure of judicial power, as well as a series of legislative and institutional measures for its improvement and elimination of obstacles to efficient and timely justice, which is a uniform fundamental requirement on the national and international level. In addition to organizational regulations, these papers envisage adoption of a set of procedural and substantive law regulations that provide a new method of regulation of certain areas (criminal law, juvenile justice, international cooperation in criminal and civil matters etc.).

In the sphere of enhancing the capacity of the judiciary, the emphasis was placed on further education and training of holders of judicial office, as well as better financial situation in this branch of power. In the practical sense, implementation of these measures started in 2007, but most activity, that is completion of systemic regulations and institution building, is expected to take place in the course of the forthcoming two years.

From the perspective of the role of judiciary in protecting human rights and freedoms in Montenegro, in particular the implementation of international standards, we need to state a slow pace of progress. Although there are examples of implementation of international agreements in case-law, it is evident that they are still holding to the previous concept of formal application of regulations and domestic legislation, rather than applying a system based on the law derived from the European Convention or other international agreements. This assessment may be made after

reviewing certain court judgments where, regardless of the merits, the substantive law grounds contained in international standards is lacking, meagerly explained or not adhered to at all.

Concerning implementation of existing regulations, it is necessary to point out lack of appropriate institutional framework for some concepts (e.g. execution of correctional measures for juveniles or the measure of referral to mandatory medical treatment of addiction), while there are cases where some concepts are used very rarely (guarantee as a form of securing the presence of the defendant etc). With respect to juveniles, the increase in juvenile delinquency in underdeveloped regions should be noted, as seen in the official report on the performance of courts for 2006. Together with other sociological reasons, this calls for adoption of a special law on juvenile justice; the Judicial Reform Strategy envisages this to happen in the forthcoming year.

In the organizational sense, in spite of numerous attempts, misdemeanor instances have still not undergone reform, so that their position is not compatible with the requirements of tribunal standards as indicated by the case-law of the European Court of Human Rights. Likewise, the very fact of constitutional reform requires additional intervention of the legislator aimed at harmonization with the highest constitutional act.

The process of European integrations accelerated the judicial reform in the manner that the government is required to design, by means of internal plans, harmonization of national legal system with EU law, as one of the goals of the accession process. At this stage, this is one of the major challenges in Montenegro, considering modest financial capacity and deficit in human resources. It is evident that elimination of the given obstacles must be sought in external arrangements and provision of expert assistance, with a clear indication of the reason for provision of such assistance. The aim should be creation of own human resource capacity in the long term perspective, rather than *ad hoc* initiatives to meet temporary and formal needs.

Access to justice remains questionable from the perspective of those who do not have the capacity to ask for the effectuation of their rights in court. The provision in Article 21 of the Constitution guarantees legal aid, stipulating that anyone is entitled to legal aid provided by law practice, as an independent and autonomous profession, and other services. Furthermore, the law allows for legal aid free of charge.

Although legal aid services are partly established at the level of local government authorities, their scope of work is limited and their capacities rather modest. Likewise, there are no clear criteria that this concept relies on and that enable its application free of charge. Law practice, as a segment of judiciary in the broad sense, apply relatively high tariffs that may be the cause of the abstinence of parties from court procedures, along with the amount of court fees relevant to the value of the dispute.

Finally, the overwhelming workload and case backlog remain a burden on the work of courts, regardless of continuous attempts to reduce the backlog and raise court promptness to the required level.

In conclusion, we should state as a very important finding the OBLIGATION to strengthen the capacity of the Ministry of Justice, which has a critical mission in the reform process along with the supervision of implementation of individual laws. This body needs to be raised to a considerably higher level in the institutional and technical sense and personnel-wise, given that it has shown evident readiness and political determination to tackle the requirements of integration processes in a responsible manner.

## **General principle of non-discrimination**

The constitutional guarantee and the legislation in Montenegro stipulate a general prohibition of discrimination on any ground. Practically all systemic laws include such a provision, which is binding for all legally obliged legal and physical persons. At the level of criminal law protection, there are also sanctions for discriminatory treatment.

Reality is rather different and is often reflected on the political or sociological plane; however, no cases of accountability for this wrongful action have been recorded. It is possible to say that drastic cases of discrimination on the grounds of ethnicity or religion simply remained outside the sphere of interest of competent institutions. Also, the political factors that, at the level of declarative statements, advocate compliance with the principle of equality have not made a significant contribution, as concluded based on mere analysis of their gender or ethnic structure. The syndrome of discrimination on the grounds of political affiliation is still present, especially in the context of taking up certain social positions or functions.

The conclusion with regard to discrimination on the grounds of ethnicity is derived from the constitutional principle of proportional representation of ethnic groups in state authorities, which has not been observed. However, in some fields this principle needs to be considered also from the professional perspective, that is the requirements concerning professional qualifications and eligibility to engage in a certain profession (courts, prosecution). It is the responsibility of the state to create the conditions in the given fields, that is professions, for recruitment of staff from minority ethnic groups, which would generate a double benefit - the concept of proportional representation of ethnic groups and additional trust among these groups in the work of state authorities. This approach was designed in the development of the National Strategy of Minority Policy (draft completed) that involved, besides state administration also the civil (academic and NGO) sector. Its adoption would fulfill the legal obligation of the state, at the same time providing full legitimacy to the partnership between the government and the civil sector in determining the strategic directions of combatting this form of discrimination in the society.

## **Right to life**

The conventional approach in respecting this right implies the states' obligation to refrain from any action that challenges physical integrity, i.e. life of any person under its jurisdiction. However, development of international law and changes in the social context impose on the state a positive obligation to create the conditions and take action to minimise the risk for the life and health of people. This includes protection from dangerous substances and any other harmful actions that may directly or indirectly cause a person's death.

Years from introduction of the ban on carrying firearms, the situation in this area stabilised to a considerable extent, although violent behaviour accompanied by use of dangerous and explosive substances remains a serious problem. According to police sources of information, a lot has been done recently to identify the perpetrators of these offences, but there is still evident tension concerning some recent events and a number of unresolved murder cases that still burden the everyday political and social context in Montenegro. The situation is further complicated by attacks on some public figures (especially from the media) and death threats associated with major social events.

Although there was a certain degree of cooperation between the victims and the police, there has been no success in discovering the perpetrators; depending on the party presenting the facts, this is further explained by the inertness of police authorities or by the conspiracy and level of organisation in the execution of these offences, as well as lack of substantial evidence when there are other grounds for suspicion. According to official statistics, all ten perpetrators of the criminal

offence of murder in 2007 were discovered; for 6 of these acts the perpetrator was an unidentified person at the time of the act.

A number of unresolved murder cases and violent behaviour still remain. The public was particularly disturbed by the murder of the member of police Srđan Vojičić, official escort to the well-known Montenegrin writer Jevrem Brković (the attack and murder coincided with the publication of a book that hinted to some public figures), and the murder of the senior police officer Slavoljub Šćekić – court proceedings against the group charged with this offence are ongoing. In the meantime, the public was informed about a physical assault on the manager of "Vijesti" daily newspaper and death threats to Aleksandar Zeković, researcher of human rights infringements and member of the Council for Civil Control of the Work of Police. Also, there was an assault on the former editor of the public media in Berane, Tufik Softić, and an assault on Slobodan Pejović, a retired police officer in Herceg Novi, who is considered a witness in the cases of deportation of Bosniacs in Montenegro during early 90s.

After years of passive attitude, procedures were initiated to determine the accountability of certain members of military troops suspected of having murdered, in separate actions, 15 civilians at Kaluđerski laz near Rožaje, between March and June 1999.

A particular problem in Montenegro is road safety risk and high fatality of traffic accidents. Although police preventative measures at times bordered on the legally prescribed powers, it is evident that they need to be provided special importance and incentive, considering that victims are mainly young people. All the circumstances indicate the need for a broader action involving other state authorities, primarily the need to control the operation of catering establishments (alcohol consumption being a frequent cause) and particularly strengthening road infrastructure, as one of serious risk factors.

Lastly - although this refers to economic, cultural and social rights - the attention of the public was drawn to a number of instances of workers being killed during construction works, due to work safety deficiencies. There is no information at this point with regard to possible accountability, although it is stipulated in the labour and criminal legislation.

### **Prohibition of torture and cruel and inhuman treatment and punishment**

Police authorities' actions still attract particular attention of the public and professional institutions concerning the application of coercive methods and other forms of execution of powers. Besides several cases mentioned in previous reports, there are frequent incidents when participants – police officers – act outside legally defined boundaries. This problem is addressed by a number of institutions: the Council for Civil Control of Police Work, Internal Control and Disciplinary Prosecutor of the Police Department, Committee for Monitoring the Police Code of Ethics and the NGO sector. It is a fact that in most cases of police torture the perpetrators are dealt disciplinary sanctions (internal control performance particularly efficient) and that other institutions identify these incidents in the course of their work and demand accountability. However, a relatively small number of cases result in perpetrators being prosecuted and punished, or sometimes the procedures are unreasonably lengthy.

The public is aware of majority of these cases - some of them involved brutal and disproportionate use of force - where state authorities often relativised the consequences or equated the victims with the perpetrators. It is of interest that a number of incidents occurred in public places, which particularly results in deterioration of police reputation. The measures implemented by the police to overcome this problem by punishing the perpetrators are indisputable, but they are sometimes selective and do not match the degree of torture. In addition to continuous education and training of the police, it seems indispensable to carry out a rigorous selection within educational institutions

(especially the Police Academy) and education of future members of community police in order to minimise these phenomena.

Montenegrin public is informed about the incidents that occurred during sports events, when police officers were declared accountable for disproportionate use of force. This referred particularly to the football match between Budućnost and Hajduk (Croatia), when groups of supporters of some other teams outside the country were involved in mass riots. After the arrests there were complaints of police torture; however, in spite of the efforts of the Council for Civil Control of the Police to investigate the case, there was no adequate cooperation with the persons who either participated or in their subsequent statements indicated the possibility of police torture. The assessment made by the official police authorities was that the procedure had been entirely professional and lawful, preventing unwelcome consequences of a larger scale.

Concerning placement and treatment of persons with mental disabilities and persons addicted to drugs, it is necessary to state that the institutions possess poor financial and accommodation capacity, which leads to the conclusion that their treatment must improve. The first institutional placement, i.e. a facility for accommodation of such persons was built in the vicinity of the capital as a result of the initiative of the Municipal Office for Combating Drug Addiction. The attitude to this category of people was inappropriate, since they were either neglected or treated in institutions for placement of mentally disabled persons.

Conditions for accommodation of detained persons or persons serving a prison sentence still are subject to special attention; the impression is that things are moving forward, although this problem is also associated with the ever more evident problem of accommodation capacity. Particular attention in civil sector activities as well as in the work of international organizations was devoted to custody premises in police stations – most objections referred to this and, according to allegations of detainees, repression was frequently applied without any legal grounds.

### **Prohibition of slavery and forced labor**

There is no indication of the presence of this problem or its posing a serious threat to the fundamental human rights and their protection. Individual cases were identified and sanctioned (forced detainment and sexual exploitation in a catering establishment), though all relevant actors warn that Montenegro is a transit country - therefore international and particularly regional cooperation should be strengthened.

NGOs concerned with protecting the rights of the child indicate a specific form of forced labour among Roma children and the problem of begging, which notably escalated following the influx of displaced persons from Kosovo.

### **Right to freedom and security**

Having placed particular emphasis in the previous reports on the problem of detention, seen more as a sanction than a measure to secure the presence of the defendant, we should state that this concept is used to a lesser extent than before. What remains, however, is the problem of police custody, used to keep a person in the police by the deadline defined by the law and followed by bringing them before the competent investigative judge. Instances of detention without an order or opportunity to file a complaint were recorded in this vacuum. Although relatively short intervals of time are concerned, this objection may be addressed both to the police and judicial institutions.

Criminal Procedure Code recognises other concepts of securing the defendant's presence, such as guarantee or supervision measures - such as prohibition against leaving the place of residence, prohibition against visiting a place or area, requiring the defendant to occasionally report to a

certain state authority, prohibition against meeting certain individuals, temporary passport confiscation - and it is still unclear why these are not used much more frequently in case-law. This would result in a more restrictive application of the concept of detention, which would be pronounced only in extraordinary cases, as stipulated by the law.

The issue of length of detention coincides also with the duration of investigation and certain investigative practices, which is particularly important considering that some investigations are too lengthy and that no investigative actions are performed over a longer period in the interim, although the law calls for urgent action in such cases.

After several years of implementation of new criminal legislation, amendments were introduced concerning the length of detention, especially for juvenile persons during the stage of preparatory procedure. Lack of correctional facilities for enforcement of disciplinary measures represents a special problem, as does lack of institutional capacity in the sphere of juvenile justice. The process of transformation of the existing institution, which was unsuitable for placement of juvenile persons, started last year.

### **Right to a fair and just trial**

Excessive workload and considerable backlog in Montenegrin courts remain key features of the work of courts, especially those in the capital, due to the size of population and the very fact that it hosts major state institutions and that it is also the seat of public administration.

Most complaints concerning the performance of courts refer to unreasonable length of procedures and some stages where, in the opinion of the parties, significant infringement of the right to a fair trial take place. Notwithstanding the objective or subjective deficiencies, this is a systemic flaw that is, at this stage, responsibility of the state. Besides the Judicial Reform Strategy, which specifically addresses this problem, additional guarantee was included in the Law on Protection of the Right to Trial within a Reasonable Time with two key concepts – control request to accelerate the procedure and action for compensation of mental injury caused by unreasonable length. It should be stated that legislation to date included mechanisms for accelerating the procedure and taking certain actions to overcome this problem, but that they were rarely or never used.

After identifying the subjective weaknesses and taking actions against some judicial officials, the General Programme was adopted in order to resolve the issue of backlog; a pilot project on efficient dealing with backlog in some courts was implemented. Following several periodical controls conducted by the Supreme Court, guidelines for operation were adopted and court presidents asked to engage more in monitoring the work and analyzing the performance of courts and each individual judge. The announcement made by the new Chief Justice was unusual in the Montenegrin context, as she publicly called for urgent conclusion of cases concerning criminal offences that contain elements of corruption.

Considering case complexity, rather large substantive jurisdiction and long parliamentary obstruction of the election of judges, majority of complaints about too lengthy court procedures naturally referred to court activities in the sphere of civil law; this was also included in Montenegrin Ombudsman's report. According to the official Report on the Performance of Courts in Montenegro at the end of 2006, there were 11,751 civil cases from that and the previous years, whereas there were over 14,000 new cases. According to unofficial data for 2007, 12,566 of civil cases remained unsolved, matching the inflow of new cases for the given year. The statistics presented leads to the conclusion that there was an increase in the number of unsolved cases (backlog) compared to the year before, 2006.<sup>3</sup>

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<sup>3</sup> Data refers to the number of cases in basic courts.

The data for criminal cases is different, as backlog was reduced. (Unofficial) Statistics that raises potential concern concerns the large number of unsolved investigative cases at the end of 2006 and from previous years (1,743).<sup>4</sup>

Although some steps forward were made with regard to creation of financial conditions for the work of courts (reconstruction of buildings and purchase of equipment), the conditions of work of Montenegrin courts remain a problem. This refers to space, as well as other preconditions for regular work of courts such as lack of references, case-law and systemic communication with other authorities concerning the requirements of the procedure. In this regard, we can even say that there exists a form of open conflict that may be identified based on the statements made by representatives of top state and local government authorities. However, it is evident that these are also subjective weaknesses from the previous period that need to be eliminated by either the judiciary or the state, which is ultimately responsible for timely administration of justice.

Contrary to the financial-technical conditions, salaries of judges in Montenegrin courts increased considerably since September 2007 in comparison to all other state authorities, which may provide a special incentive and motivation not only to judges but also those who will assume that position in the future.

There were several objections concerning court independence and impartiality, referring to the influence of state institutions and individuals on court procedures; fiercest objections were stated concerning the delay in the procedures for damages in the cases of deportation of Bosniacs in early 90s and to the obstruction in prosecuting the accountable perpetrators. Serious reserves were stated with regard to the delay in procedures in cases of corruption that involved some public figures from the state system, as well as the influence of some individuals on the work and conduct of court, especially concerning timely scheduling of hearings compared to standard practice.

There is a distinct form of pressure of the public, especially the media, during court procedures. This often includes violation of the presumption of innocence of the persons involved in the procedure. Consequences of such behaviour last after the conclusion of court procedures, which further diminishes the reputation and importance of court in the community. Besides, an impression is created in the public that the outcome is determined in advance, which places a burden on the court and parties in the procedure and ultimately results in a rather risky habit of "commenting" court decisions often outside the limits of good taste, although some court judgments and especially their consistency are subject to discussion. This is largely a consequence of the lack of balanced case-law, which must represent the key task of the Supreme Court in the future.

### **Right to privacy**

The right to privacy is guaranteed by a set of constitutional norms – the terminology used is not in compliance with international standards, but together with them they provide sufficient guarantee for enjoyment of this right in the national legal regime in Montenegro. Full protection of this right and precise definition of the terms for its being guaranteed or restricted requires a special law, which has been in the pipeline for a while now; it was developed in cooperation with international experts and local civil sector. A new law was adopted in the domain of data secrecy, which is in many aspects a fundamental precondition for its coexistence with the Law on Protection of Personal Data and adequate exercise of these rights. In addition to the regulations mentioned, either effective or being developed, there is another law in Montenegro – though outdated - on publication of photos, letters, journals and phonograms. Although very important from the perspective of its contents, this Law is completely marginalised, with respect to state intervention as well as conduct of media and other relevant forms of information.

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<sup>4</sup> Ibid

Led by the ambition to secure financial benefit, the media frequently overstep the limit of their freedom and interfere with private lives of individuals, which may pose a serious risk not only to the protection of privacy but also to the reputation of journalism as a profession. This is particularly evident in court procedures, where the presumption of innocence is frequently infringed, and subsequent attempts to deny the information that had already been communicated in most cases go unnoticed and therefore with no effect. When providing such information, the sources include data held by official state authorities, although these are legally defined as confidential. A special problem in this regard are reports on court procedures, where the right to privacy is infringed even against the interests of juvenile persons.

A number of citizens and public figures expressed suspicions about being subject, due to their public activity, to a special regime of security services. The case of the member of the national Council for Civil Control of the Work of Police, Aleksandar Zeković, was of particular interest, as well as the audio recorded death threats; however, persons responsible for this have not been identified, despite very precise information and suspicions against a particular individual close to top police officials. The reason stated for failure of police investigation was lack of equipment, which was essentially denied only a few days later, when a blackmail case that contained similar characteristics concerning conspiracy was solved and presented in public.

### **Freedom of thought, conscience and religion**

A serious institutional conflict between orthodox churches is still present in Montenegro, currently expanding due to the initiation of dispute concerning ownership of the property in Montenegro. The government further complicated the situation in the 90s by changing the title holder in the land books (registering the Metropolitanate of Serbian Orthodox Church in Montenegro, and in some cases its prelates, without specific legal grounds). This fact caused annulment of these orders and restoration of the situation before the registration. This aggravated the divide between the two churches and their congregations. Montenegrin Orthodox Church in Montenegro, which claims centuries of heritage, believes that religious objects must be returned to citizens who built them, while the Metropolitanate of Montenegro and the Littoral of Serbian Orthodox Church claims to be the only legitimate and canonical orthodox church, therefore also claiming the right to religious identity and property owned by the church rather than the people.

Contrary to the expectations of both sides, the Constitution did not provide a solution to the religious conflict in the country, leaving the principle of secular organization and church being separate from the state. An additional problem is politicization of religious issues in everyday political life, with political parties, for the purpose of their own rating, often oriented toward instigating rather than overcoming the conflict. This is a characteristic of both the government and the opposition in Montenegro, in public addresses of some of their representatives.

In the given conflict, less attention is paid to some less numerous religious groups that voiced their discontent with their status in the recent years. With respect to the relationship between major religious groups (Roma Catholic, Islam and Orthodox) we can state that there is a general high degree of inter-religious harmony.

In addition to this, a number of attacks on religious objects were recorded, marked by religious hatred; however, these were sporadic incidents. The gravest problem recorded was the attack on the premises of the Islamic Congregation in Bar, further aggravated by the fact that it reoccurred several times and the perpetrators of this act of vandalism were not identified. A series of attacks on orthodox churches and their members was similar, but they were unanimously condemned by the whole Montenegrin public, which also confirmed the overall opinion on the urgent need for religious tolerance and confining the conflicts to institutional frameworks.

## Freedom of expression

Last year featured considerable changes in the sphere of media freedoms, the reasons boiling down to two main ones: 1) the profession is still exposed to serious threats to physical and psychological integrity of journalists and 2) free word is faced with serious threat of a growing number of court procedures claiming accountability of the media for publication of some information. It is true that there is a lot of speculation going on in the media unaccompanied by serious validation of allegations and less and less investigative journalism, but the amount of claims cannot be included under proportionate moral and material accountability for published information. Namely, charges against the media and accountable persons mainly asked compensation for mental injury in excessive amounts -considered excessive not only with regard to financial value but also from the perspective of case-law in national and international context.

It is extremely important to make a radical step forward in adoption of international standards (especially the case-law of the European Court), which has not been the practice in court procedures so far, with the exception of one case. The grounds for assessing the amount of claims are mainly contained in the psychological experience of the person that the information refers to, which relies on the case-to-case assessment of court experts in psychiatry. It is interesting that there is a different criterion if public figures are concerned, indicating that their psychological pain is more distinct. This attitude may be presented if material damage were concerned, but concerning mental injury, at least in Montenegro, there could not and should not be big differences, since honour and reputation are equally important to all, regardless of whether or not they have an important social position. The characteristic of such procedures is that they are mostly initiated by politicians or functionaries, while the issue is mostly related to their performance of their duties, although the overall context contains a strong note of privacy concerning events from their personal and family life and details related to their career. This is why it is going to be interesting to see the way domestic courts respond to the actions, since there is extensive case-law with standards of assessment of freedom of press, especially with regard to politicians who enjoy a lower degree of protection of the right to privacy whereas the line for civil servants is the same as for other citizens. Since some of the procedures were initiated by judicial officials, it is therefore necessary to bear in mind the European Convention standards concerning fundamental human rights and freedoms, though with regard to restrictions a much higher degree of protection of their authority and integrity is required.

Attacks on journalists were recorded in Podgorica (manager of daily paper "Vijesti" Ž. Ivanović) and Berane (journalist Tufik Softić). It is indicative for the former case that it targeted the accountable person in the daily paper that criticises the phenomena in the state from the aspect of unlawful events in state structures, as the victim of the attack stated himself; the motive for the latter case is rather unclear with regard to the cause and possible perpetrators.

Following numerous objections from the NGO sector, it seems that free access to information is winning the space for action against those state and local government authorities in possession of certain information. Unlike the initial period, mechanisms were established within government authorities for easier communication with the parties requesting access to information, although it is evident that the credit for this belongs primarily to the civil sector and the Administrative Court, which showed a considerable degree of efficiency in administrative disputes, deciding in most cases in favour of the party requesting information.

A specific problem appeared with regard to NGO sector participation in managing the national broadcasting service. According to the current legislation, members of the Council of National Television (TVCG) are nominated (among others) by civil sector organisations and the nominations approved by the parliament. After several nominations of civil sector candidates, the parliamentary

structure used its power to hinder their membership in the supervisory bodies of the public service. This is a serious blow to the system, evidently contrary to the goals of legal norm. Unfortunately, the intense response of the NGO sector did not produce any results and the parliament engaged in a fierce debate concerning the nature of NGO sector and its role in the society. So far, the debate has caused only damage to the two essentially separate structures – political and civil – since the arguments used rest on across-the-board condemnation, with no concrete evidence as to the reasons for the animosity of politics toward the civil sector.

### **Freedom of assembly and association**

Following the adoption of the new Law on Public Gatherings, no significant infringement of this right was recorded, though this is helped by the high level of citizens' awareness concerning the importance of this right and potential consequences. Another novelty in legislation was the Law on Prevention of Disorderly Conduct at Sports Stadiums that serves the purpose of preventing unwanted consequences and corresponds with the commitments made by many of the countries in the region. Unfortunately, disorder occurs during sports competitions, and the image created in the public refers more to overstepping of police powers than the actual problem of violence during sports events, as recognised by many countries in the region. This is not aimed at creating the impression that police authorities were always up to the task, but it is evident that they deal more with the consequences than the causes of these phenomena.

### **Right to peaceful enjoyment of property**

The right to peaceful enjoyment of property is particularly highlighted at this stage of transition in Montenegro. This refers especially to the regime of property rights established by the Law on Restitution of Property Rights and Compensation to Owners, which caused contradiction between rather heterogeneous interests in the state – from general development plans, free investment construction and citizens' rights to restitution of unjustly confiscated immovable property. In this situation, there are almost daily objections concerning illegal disposing and obstruction of the law by local government authorities at the expense of potential beneficiaries of this right. This refers especially to registering the encumbrance prohibiting disposing with property until the conclusion of the restitution procedure.

Even with administrative and court restrictions, this right is often denied and court judgments remain without any influence on the authorities or individuals applying managing authorities without any restrictions, including alienation of property. Amendments to the law introduced restructuring of the commissions for restitution of property or just compensation and organisation at the level of regional bodies. Majority of complaints referred to the work of these bodies in the previous period, and it is now certain that a number of cases will be processed before the European Court of Human Rights.

From the perspective of case-law in Montenegro, there were no instances of claiming the protection of rights under the European Convention on Human Rights and Fundamental Freedoms; there is no practice of citation of the European Court of Human Rights cases in the exposition of judgments in property disputes.

### **Economic and social rights**

With regard to economic and social rights, state authorities are exposed to the pressure of the fact that a large share of population is still below the statistical level of minimum requirements of living standard and the equally strong pressure concerning stable budget balance and reduction of budget expenditure. State authorities still allocate considerable amounts to social welfare, but with the high costs of living that does not meet minimum economic and social needs of the family.

Accelerated privatisation and consequences of social transition resulted in a surplus of workforce in the market, while the rights of employees are observed only in the public sector. A random glance at the service sector, working hours of shops and catering facilities (difficult to find in any European country) and working conditions will convince and average observer that legally prescribed labour conditions are not complied with. A number of employees are still working in the informal zone, and employers decide to provide insurance according to minimum legal requirements, regardless of the level of qualifications of the employees. In the context of employment in informal zone, the primary issue is a large number of workers from other countries – due to shortage of manpower and lower wages, they are more attractive to local employers. This is particularly valid for construction industry.

In the sphere of supervision of labour laws, the restrictive approach of inspections that supervise the work of employers is becoming more and more visible, while in the domain of certain social categories such as workplace safety and protection much more attention is paid to prevention than repression, generating modest results. It is of interest that discretionary actions of inspection postpone the deadlines for the employer to fulfill the obligations, which is justified by the need to foster entrepreneurship by facilitating their business activity. If this was really the aim, then it is not clear why laws were adopted or why their coming to force was not delayed until the moment when they would not "burden" the activity of employers.

With regard to the pension insurance sector and problem of failed adjustment of pensions – following court procedure, this was resolved by means of settlement made by the pensioners' association. The main item of the settlement is postponement of the deadline for fulfilling the obligations to several years, with periodical disbursements, which may discredit the settlement itself if we bear in mind the average age of the pensioners and life expectancy of the beneficiaries.

The past year featured a boom in foreign investments in real estate market, especially with regard to real estate situated in the coastal area. This brought positive short-term fiscal effects; however, at the same time, it affected the living standard of a large number of families in Montenegro, with the concurrent drastic rise in rents and in construction cost. Thus, the price of one square metre of a newly built flat in the centre of the capital is between 2,300 and 3,000 EUR or 40 - 55 minimum wages in the country. The same trend exists in the coastal region as well as in some other attractive tourist spots in the north. The prices in other regions are better, but still far from affordable for an average family.

Another important detail is the "sale" of the major natural resource – space in the coastal area – since real estate transactions were carried out without any control or strategy for utilisation of that space for the future development of Montenegro, especially if taken into account that the state has a vision of development by means of utilisation of tourism potential. The main obstacles to this concept remain unrealistic planning policy, unlimited and uncontrolled sale of national resources with no follow-up strategy, social situation of the population and vulnerable groups, lack of a stable market for Montenegrin strategic industrial and agricultural products and tourism services.

## **Education**

Education legislation has been reformed in correspondence with the requirements of a modern educational process. The problems are material conditions for process implementation and teachers adapting to the changes in educational cycle. Education quality assurance has been institutionalised and secondary education system is being adjusted to the needs of the society. .

The biggest expansion is recorded in higher education, with a number of private universities established in a relatively short time, enhancing the competition in this sphere of education. The

issue of quality of education remains open; the answer should be provided by the system by means of accreditation of these institutions. Key objections of the private sector in education concern the monopoly of state institutions, while state institutions point out lack of accreditation requirements that was tolerated at the time private universities were established.

**Human rights education** is obtaining a new profile and the course itself is slowly »winning« a place in universities and other educational institutions. Currently, topics from the domain of human rights are included in courses (civil education, basics of human rights and freedoms, philosophy) and formally taught at all levels of education, teaching staff provided by training the existing teachers or educating new ones.

### **Healthcare and social welfare**

Capacities of the healthcare system still do not meet the needs of the population, and the budgetary framework fails to meet all the needs. This is the reason why a large number of service beneficiaries turn to private practice, which is rather expensive and an additional cost on top of the required contribution defined by law. This feature is common across all branches of medicine as well as pharmacy, with a growing number of beneficiaries instructed to purchase medicine themselves, even during hospital treatment.

Reform of dental service generated much controversy, as the sector is entirely assigned to private practice (even primary care) without a projection of the consequences of such decision. Besides, a number of staff working in dental service were instructed to use their capacities in market competition. The kind and extent of changes to be generated by this reform remain to be observed; financial consequences are certain to ensue, affecting particularly the segment of population with least social protection.

### **Rights of ethnic groups (minorities)**

The constitutional framework for minority rights protection focuses on several key issues:

- Authentic political representation (electoral laws);
- Representation in state and local government authorities (regulations on public administration and local government, including legislation on civil servants and local government staff);
- Procedural rights (use of language and script in procedures before courts and other authorities in the regions with a significant share of minorities in the overall population);
- Special identity features (use of national symbols and celebration of national holidays );
- Issuance of official papers (entry using own language and script);
- Cultural features (incentive to rights with non-financial assistance from the state);
- Education (as a broader and internationally recognised standard) and schooling in minorities' languages (institutional approach and curricula contents);
- Information (within national public broadcasting services and media);
- Establishing contacts outside Montenegro (with citizens and associations that share the minorities' nationality and ethnicity, cultural-historical heritage and religious beliefs);
- Institutional organisation of bodies aimed at direct or indirect protection of minority rights.

Proportional representation of members of minorities in state services has not been achieved nor any thorough analysis conducted on the reasons and directions for possible improvement. Lack of records in the area of employment and labour in the given authorities prevents obtaining of inputs for a general analysis of this issue.

Due to the relatively stable security situation, Montenegro maintains sound inter-ethnic harmony and mutual tolerance. Still, new public opinion surveys indicate a growing ethnic distance toward

some ethnic groups, especially Albanians and Roma. Explanation should be sought in rooted prejudice and in the situation in the region (attitude towards the issue of Kosovo in the attitude of certain ethnic groups and political parties in Montenegro).

Majority of open issues related to minority rights concern political participation, education, preservation of identity, integration in society, use of official language and model of protection of guaranteed rights that will ensure their proper implementation in national and international law.

Currently, a number of laws stipulate, in general terms, the right to use of minority language in procedures before courts and state authorities, but there is no act that would further specify minority groups and languages entitled to equal use before the given instances according to territorial principle. At the level of local government, this issue has been relatively well resolved in the normative sense by means of adoption of statutory norms (municipal charters) regulating the right of members of minorities to official use of mother tongue.

Members of minorities are guaranteed the right to independent and free declaration of nationality, right to free choice and use of personal and family name and children's names, as well as the right to have those names entered in registers and personal documents in own language and script. Minorities and their members are entitled to use of their language and script.

In those local governments where members of minorities make up the majority or considerable share of population, according to the results of the last census (2003), the minority language is also in official use. Official use of minority language in this sense implies in particular the use of language in administrative and court procedures and in handling administrative or court procedures, when issuing public identification papers and keeping official records, on ballots and other election material and in the work of representative bodies.

Minorities and their members are provided freedom of information at the level of standards contained in international documents on human rights and freedoms. Members of minorities are entitled to free establishment of media and undisturbed work based on the freedom of expression of opinion, research, collection, dissemination, publication and reception of information, free access to all sources of information, protection of personality and dignity and free flow of information. Additional requests of minority communities focus on more programmes in minority languages on public broadcasting services and more influence on designing such programmes using established legal mechanisms.

There are two strategic provisions of the current law that regulate the issue of minority rights protection - the ones that deal with the obligation to adopt a strategy for minority policy as the main instrument for implementation of minority rights and the provisions that deal with establishment of minority councils as the most representative form of participation of minorities. Thus, a share of responsibility for implementation of minority rights will be transferred to ethnic communities themselves, since these bodies will enable direct control of legislative processes and the decision-making system, though institutionally they are not directly involved in the legislative process. Minority councils will propose candidates for different supervisory bodies and participate in the development of acts that elaborate the principles of minority policy.

Minority Policy Strategy is an extremely important instrument, as constitutional guarantees and legal assumptions mainly define general positions and obligations of the state. This paper is, to the highest degree possible, an operative platform for action of state and other authorities. The first draft of the Strategy was completed in late 2007 and was followed by a public debate aimed at improvement and advancement. Strong presence of the civil sector in its development was extremely important.

## Part II:

### NEW CONSTITUTION OF MONTENEGRO – HUMAN RIGHTS PROVISIONS AND GUARANTEES OF INDEPENDENCY OF JUDICIARY<sup>5</sup>

The new Constitution of Montenegro failed to attain the level of human rights guarantees previously provided by the Charter of Human and Minority Rights of Serbia and Montenegro (i.e. Small Charter) and provide for effective guarantees of independence of judiciary, as was promised to the Council of Europe.<sup>6</sup>

Montenegro was admitted to the Council of Europe in May 2007, the Constitution was adopted in October 2007 and the Venice Commission (V.C.)<sup>7</sup> assessed it generally positive, although the above mentioned requests were not fully incorporated and majority of the Commissions' recommendations were not respected.<sup>8</sup>

#### *Human Rights Guarantees*

Human rights guarantees are below the level of the Charter on Human and Minority Rights of the former State Union, as the Constitution resulted from a political compromise and the politicians' understanding of international human rights standards.

The Constitution omits: the right of *habeas corpus*, prohibition of imprisonment due to non-fulfillment of contractual obligations, prohibition of inhuman and degrading punishment, express guarantee of the right to life, full guarantees of the right to defense and fair trial in compliance with the European Convention of Human Rights, right to an *effective* legal remedy in case of breach of human rights, while it *guarantees* the right to compensation of damage caused by publication of incorrect information, in variance with the European standard of freedom of expression and the national Law on Obligations.<sup>9</sup>

Direct implementation of international human rights standards in Montenegro is provided, although with an unjustifiable restriction, as ratified international treaties and generally accepted principles of international law shall be applied directly only "in case of conflict with domestic legislation". The primacy of international standards has been provided in respect to "legislation" and not "law", which would comprise the Constitution and by-laws, and thus misunderstanding should be expected concerning obligatory implementation of international standards in the practice of courts and other state institutions. As an explicit instruction that ratified international human rights treaties should be applied in compliance with the practice of international bodies in charge of their interpretation has been omitted from the text of the Constitution adds to the expectancy of the problem of implementation of international human rights standards.

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<sup>5</sup> This part of the report is prepared by by Tea Gorjanc Prelevic, LL.M., NGO "Human Rights Action", [www.hraction.org](http://www.hraction.org)

<sup>6</sup> PACE, Opinion No. 261 (2007) Accession of the Republic of Montenegro to the Council of Europe

<sup>7</sup> *The European Commission for Democracy through Law* is the Commission's full title.

<sup>8</sup> According to assessment of the HRA working group, some 60% of recommendations were not accepted.

<sup>9</sup> For more details, see the *HRA Comments on the Guarantees of Human Rights and the Independence of the Judiciary in the new Constitution of Montenegro*, on [http://www.hraction.org/wp-content/uploads/hra\\_opinion\\_november\\_2007.pdf](http://www.hraction.org/wp-content/uploads/hra_opinion_november_2007.pdf).

Although special rights of identity protection and prohibition of assimilation “to minority nations and other minority, national and ethnic communities” have been guaranteed, the Constitution fails to define which one is to be regarded a minority nation or national minority in Montenegro.<sup>10</sup>

NGOs particularly criticized the removal from the Constitution of a formerly existing right of 6.000 citizens to file a legislative initiative to the Parliament. Citizens may now use such initiative only through an MP, which renders this right meaningless.

### *Independence of Judiciary*

Election of the President of the Supreme Court by simple majority vote in the Parliament, upon the joint proposal of the President of State, Speaker of the Parliament and Prime Minister, contravenes the principle of independence of judiciary and the request for avoidance of political influence from election of judges.<sup>11</sup>

The Parliament also elects by simple majority all state prosecutors, at the proposal of the Prosecutorial Council, and it elects members of this Council, what does not guarantee independence of the state prosecutor’s office.<sup>12</sup>

The new Constitution for the first time removed decision on the appointment and dismissal of judges from the competence of the Parliament and vested it in the reformed *Judicial Council*, a body consisting of ten members, four of whom are judges, elected by the Conference of Judges<sup>13</sup>, the fifth member is the President of the Supreme Court and other five members are the Minister of Justice, two MPs – from the ruling coalition and opposition parties and two distinguished lawyers appointed by the President of State.<sup>14</sup> The Bar Association, Faculty of Law and the Association of Jurists of Montenegro have been deprived by the reform of the entitlement to appoint their representatives to the Council, resulting in the weakened impact of the civic society on the work of this body.

The composition of the Council does not ensure its independence and autonomy nor does it safeguard against political influence, as it comprises three politicians, President of the Supreme Court who is proposed, elected and dismissed by politicians, and two lawyers opted for by the President of State.<sup>15</sup> The chairmanship of the Council entrusted *ex officio* to the President of the

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<sup>10</sup> The Preamble contains the statement that members of nations and national minorities who live in Montenegro are „Montenegrians, Serbs, Bosniaks, Albanians, Moslems, Croats and other“.

<sup>11</sup> The Venice Commission Opinion on the Constitution of Montenegro has also been rendered in that sense (see points 87-92). The Commission emphasized its understanding that the “political election” of the President of the Supreme Court reflected the will to ensure better accountability of the judiciary and considered it “a transitional solution”, encouraging Montenegrin authorities to ensure “that the election of the President of the Supreme Court and state prosecutors be carried out with the highest possible majority”. However, the former Supreme State Prosecutor V. Medenica was elected to the office of the President of the Supreme Court solely by the ruling coalition, whereas the opposition protested against the election by voting against her appointment and by boycotting the voting (*Vijesti, Dan*, 19 December 2007).

<sup>12</sup> “The prosecutorial system provided by the Constitution is therefore totally under the control of the ruling party or parties. This is not in conformity with the European standards.” Opinion of the V.C. on the Constitution of Montenegro, 2007, paras. 104, 105-111.

<sup>13</sup> A fact that a wife of the president of State and vice-president of ruling DPS has been elected as a judge-member to the Council also does not contribute to the appearance of independence of the institution.

<sup>14</sup> Art. 127 of the Constitution of Montenegro.

<sup>15</sup> The V.C. took into consideration that “the Montenegrin political class is firmly convinced that acute problems relating to the effectiveness and impartiality of the judiciary can be overcome only through oversight of the judiciary by parliament”. With some minor remarks, the composition of the Judicial Council was appraised by the Commission as “a good balance among the judiciary and the political power”. (Opinion of the V.C., para. 94).

Supreme Court may endanger Council's supervision over the Supreme Court and cause adverse consequences of excessive concentration of powers with the President of the Supreme Court.<sup>16</sup>

### *Constitutional Court*

The Constitutional Court judges and chief justice are appointed by parliamentary majority on the proposal of the president of Montenegro, which ensures the exclusive influence of politics (ruling coalition parties) on the appointment of this court's judges and chief justice. The Constitutional Court jurisdiction over the protection of human rights in the last instance requested that the Constitutional Court judges appointment procedure is conducted observing the principle of exclusion of predominant influence of politics on the appointment of judges. Also ignored were the Venice Commission recommendations that a) the right to propose a candidate for a Constitutional Court judge should be entrusted to the Judicial Council, Parliament, and the president of the state; b) judges should be appointed by qualified majority in the Parliament (which would ensure the participation of the opposition in the decision making); and that c) the chief justice of the Constitutional Court should be elected by the judges from among themselves.<sup>17</sup>

The Constitution states that the Court decides on the constitutional appeal for violations of human rights and freedoms as guaranteed by the Constitution, after all effective legal remedies have previously been exhausted. The Constitutional Court Act, which has not been adopted yet, should envisage that this appeal may be also filed in cases when the legal remedy is not envisaged, as well as for violations of human rights not guaranteed by the Constitution but guaranteed by the ratified international agreement.

Anyone may provide incentive for initiation of a procedure before the Constitutional Court for the assessment of constitutionality and legality, but the procedure itself may only be initiated by the court, other state agency, a local government body and five members of parliament, while in the past this right had also been afforded to nongovernmental organizations.

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<sup>16</sup> Similarly, the V.C. Opinion of the Constitution of Montenegro (para. 96).

<sup>17</sup> Opinion of the Venice Commission on the Constitution of Montenegro, December 2007, 183-186.

### **Part III:**

## **JUDICIARY<sup>18</sup>**

The period of 2007 and early 2008 was marked by legislative activities that, with the adoption of the Constitution and the Law on Judicial Council, established a quality legal framework for independent judiciary. A Book of Rules concerning the work of the Judicial Council is expected to follow, to complement the legal framework for quality operation of the Council. The Book of Rules should contain the criteria for election and dismissal of judges. Lack of these criteria was a serious problem in the past, together with the fact that election of judges was a competence of the Parliament of Montenegro. Now, with this procedure entirely under the competences of the Judicial Council, endorsement and implementation of these criteria would significantly reduce the possibility for exertion of political or any other influence on the election of judges.

Due to the Judicial Council not being in place, a characteristic of the period considered in this report is that no judges were elected between 2 December 2006 and May 2008; at the same time, several judges left the profession, leaving a number of vacant positions. To show the impact of this on the work of courts, it suffices to say that majority of vacant positions were in Podgorica Basic Court, which also has the highest number of cases per judge (over 600) and the estimated annual quota of disposed cases of 180. It is easy to calculate the damage made to citizens awaiting justice, i.e. the number of citizens' problems that would have been resolved had the judges been timely elected. The decision to delegate a certain number of judges from the Basic Courts in the northern region that faced less backlog, to Podgorica Basic Court, in order to contribute to reducing the workload at this largest basic court in the country, can be stated as a positive example of efforts to solve this issue. Another example is delegating cases from Podgorica Court to courts in Kolasin, Danilovgrad and Cetinje, where an individual judge handles a smaller number of cases. This measure met with negative response from a certain number of lawyers, although it aimed to reduce the number of cases and thus also the length of proceedings, as one of the major problems in the functioning of Montenegrin judiciary.

With regard to the length of proceedings, it is necessary to mention that several round tables were organized in April and May 2008 to present the draft of the new Criminal Procedure Code. Its new provisions concerning the concept of prosecutorial investigation should result in accelerated and shorter criminal proceedings. However, it is already clear that successful implementation of this important Code, once it is adopted (planned for end of 2008) will depend on the capacity of the prosecution.

Concerning length of criminal proceedings, it is necessary to highlight a problem that was identified in the course of war crime investigations. The gravity of these crimes and the way they affected the victims' families and the people of Montenegro and the neighboring countries would call for an imperative requirement to complete investigations within legal timelines. It would be necessary to avoid any breach of the legal timeline in these cases. Legal timelines were exceeded in the investigation of cases 'Deportation of Muslims' and 'Kaludjerski laz'.

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<sup>18</sup> This part of the report is prepared by NGO Center for Democracy and Human Rights (CEDEM)

Opinion polls still indicate that the public does not have adequate trust in the judiciary. For citizens to gain trust in the independence and competence of the judiciary and its determination to address the problems in its own ranks, the efficiency with which the proceedings in the case of 'Embezzlement of a large amount of funds at the Supreme Court' are concluded will have a pattern-setting quality. Although investigation started as early as December 2006, it has not been completed to date. Citizens are rightly raising the issue of trust, since the case involves former employees of the Supreme Court, currently under investigation. Civil servants and executive power being linked to corruption and other criminal cases is no precedent in any state; however, the case that took place at the Supreme Court urges insistence on compliance with legal timelines and completion of investigation.

With regard to personnel, it poses a special concern that both judiciary and prosecution are faced with problems in obtaining quality applicants for the positions of judges and prosecutors. The problem is particularly evident in the northern and the southern part of the country, while the situation in the capital of Podgorica is somewhat better. If we consider that there are problems in the work of courts and prosecution, and therefore problems in implementation of the rule of law, then it is worrying that quality candidates do not show interest in these positions. Leading representatives of both judiciary and prosecution would need to develop and start implementing a plan that would specifically address this issue.

The considerable number of cases from the sphere of organized crime, with lengthy proceedings, calls for strengthening the capacity of both prosecution and judiciary. A decision to establish a special department for organized crime with the Higher Court in Podgorica was made in early May 2008. Activities of this department are anticipated with considerable interest. The very fact that judges who were members of panels on organized crime also used to try - in addition to those cases - other cases from the domain of "conventional" crime, indicates the excessive amount of workload and lack of time to be devoted exclusively to cases of organized crime. It is needless to say that, due to the manner of execution and criminal structures, court hearings and pleadings in these cases take a long time; therefore, establishment of a special department is a serious decision that deserves special attention in terms of monitoring and performance review.

## Part IV:

### ACCESS TO QUALITY EDUCATION FOR ROMA<sup>19</sup>

Even before the referendum that led to its independence in 2006, the Government of Montenegro adopted several policy documents referring to the education of Roma children. The Government has made serious efforts to understand and recognize the importance of education for Roma, implementing a project designed to integrate Roma children into the education system. Despite this unique initiative, many issues affecting access to and quality of education for Roma remain unresolved and in some cases overlooked by Government policy.

As a participant in the Decade of Roma Inclusion 2005–2015, Montenegro is part of a larger regional initiative to address the situation of Roma, and there are valuable lessons that Montenegro can pass on to the other participating states. However, there are still basic obstacles to improving education for Roma in Montenegro and barriers that the Government must take steps to eliminate.

Lack of data is a critical issue in Montenegro. The most common estimate of the total number of the Roma, Egyptian, and Ashkalia (RAE) population in Montenegro puts it at 20,000 people, including some 5,000 refugees from Kosovo. A distinct discrepancy between the official data on the Roma population and the data provided through surveys, official institutional registers and research analysis exists, however – fewer than 3,000 Roma were registered in the 2003 census. Almost half the number of school-age RAE children in Montenegro are refugees. Data regarding Roma participation and performance in education are very limited, and affected by the broader lack of information. This lack of reliable data, that could facilitate informed decision-making with regard to Roma policies in general and education-related programs more specifically, must be urgently addressed by the Government, as it seriously calls into question the accuracy of continuous monitoring and evaluation of Roma-related programs. Segregation has not officially been acknowledged in any Government documents, yet the high level of residential segregation in some areas is known to give rise to Roma-majority schools.

Roma are mentioned in a number of general policy documents, but the first policy to specifically target the issues facing Roma communities in Montenegro is the Decade Action Plan, adopted in 2005. The Roma Education Initiative Project (hereinafter referred to as REI) was undertaken in collaboration with international and local NGOs in 2003, to enhance both access to and quality of education for Roma in three localities. The project has since been taken over by the Roma Education Fund (REF) and may serve as a model for other countries.

The language barrier is viewed as one of the reasons for dropping out among Roma children and no relevant policies yet exist that would provide systematic and obligatory pre-school programs sensitive to the specific needs of Roma children. There are no Roma teachers, and case study research conducted for the purpose of OSI sponsored 2007 monitoring report “Equal Access to Quality Education for Roma” suggests that many teachers are reluctant to study Romanes. A very limited number of Roma teaching assistants have been working in the classrooms as part of the REI Project, although there has been a lack of clarity regarding their place in the school structure. Resolving this administrative issue should be a priority, as Roma assistants can effectively help to

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<sup>19</sup> This part of the report is done by Tamara Srzentic, Foundation Open Society Institute, Representative Office Montenegro

bring Roma children into school and succeed once there. Provisions have been made to supply Roma children with textbooks, but there are no materials specifically about Roma, and no materials in Romanes. REI Project (sponsored by the Roma Education Fund since 2005) has paid considerable attention to teacher training, introducing pedagogical practices recognizing specific features of the Roma culture and tradition, although bilingual techniques are not included in the available pre-service courses. As part of its efforts to be considered a candidate for EU membership, Montenegro has initiated a debate on anti-discrimination legislation, but at present no such law is in force.

Access to pre-school is limited by the shortage of places in available facilities. This shortfall disproportionately affects Roma children, as priority is given to families where both parents work, which is rare among Roma. The Ministry of Education and Science should take steps to revise this policy and ensure that Roma children, who could benefit greatly from the preparatory aspect of pre-school, are also among those allocated places. The costs associated with attending school are beyond what many Roma families can afford. There is no information suggesting that Roma children are placed in segregated classes in mainstream schools, although there are Roma-majority schools in areas where the population has a high proportion of Roma. Limited research has been conducted into whether Roma are overrepresented in special schools for children with intellectual disabilities, although this issue is addressed in the Decade Action Plan and recently adopted Strategy for the improvement of status of Roma in Montenegro<sup>20</sup>.

In general, schools in Montenegro suffer from poor infrastructure, but there is no information as to whether schools with a high proportion of Roma are in a worse condition. Data on Roma students' performance in school are available in the context of the REI Project, but they are not comprehensive. They do, however, indicate some improvements in school success among Roma. A mechanism for measuring the achievements of Roma children, notwithstanding the improvements, needs to be established, such as standardized testing as a part of the national testing system.

Extensive reform of the curriculum is underway in Montenegro, but the impact of these changes on education for Roma is unclear. The Ministry of Education and Science should conduct monitoring to assess the extent to which reforms are improving the quality of education for Roma specifically. The REI Project also focuses on training teachers in differentiated techniques, which should have longer-term effects benefiting Roma and all students. A lack of real communication and cooperation between Roma communities and schools is a serious obstacle to improving education for Roma; the REI has made efforts to better involve Roma parents in the daily work of the schools, but this seems also as a longer-term process that should be monitored. School inspections are conducted under the auspices of several authorities as a result of the ongoing education reform process. The challenges of their new role notwithstanding, the various inspectors must provide substantive and continuous support and feedback to the teachers engaged in the Roma-related initiatives. Furthermore, new reform institutions need to further build their capacities that will guarantee high-quality education for Roma children.

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<sup>20</sup> Adopted by the Government of Montenegro in November 2007.

## **Part V:**

### **MEDIA<sup>21</sup>**

With the 2006 independence, by removing external factors that jeopardised political and democratic processes, the Montenegrin State had the chance to focus on its internal processes. Even before independence, Montenegro introduced a distinctly liberal concept of media regulation. Legislation was designed with the aim of completely separating and protecting the media from politics. It also gave a major role to civil society groups, which responded disappointingly by trying to manipulate the nomination of RTCG Council members. Politicians, meanwhile, have been trying in the past two years to regain control over the public service broadcasters through Parliament. These developments suggest that the Law on PSB should be amended to clarify the roles of both civil society and Parliament. Currently, the law leaves excessive room for interpretation and manipulation.

The latest signals from Parliament do not bode well. In March 2008, MPs adopted rules on presenting presidential candidates on TVCG. These rules had hitherto been adopted by the RTCG Council, which is currently incomplete because Parliament blocked the nomination of new members. This has opened the way for Parliament to meddle in the editorial policy of RTCG. On the other hand, RTCG's funding has partly stopped because there is no entity to collect the licence fee. The Government is pumping money into RTCG to keep it going, but a solution to this problem that would ensure RTCG's independence is urgently needed, and has yet to be found.

Commercial broadcasters are to a great extent independent, but poor finances jeopardise their activity and prospects. The entry of large media companies onto the market, combined with the launch of cable TV, further worsened the financial health of the local broadcasters. Unless steps are taken to protect broadcasters that produce programme content from Montenegro, such production will be marginal. The Broadcasting Agency could oblige broadcasters to channel their licence fee revenue exclusively into producing programmes of local interest.

The independent broadcasting regulator, the Broadcasting Agency, has been assessed more than once as one of the best in the region.<sup>22</sup> However, the latest draft of the Law on Electronic Communications envisages merging this body with the technical regulator, the Agency for Telecommunications. So far, the two regulators have cooperated efficiently. Electronic communications are one of the fastest developing markets in Montenegro. The Ministry of Transport and Telecommunications, which prepared the Law on Electronic Communications, offered no clear reason for merging the two regulators. This casts doubt on its intentions. It is also unacceptable to put the future regulator under Government control, as the draft law envisages. A legal framework for the introduction of digital broadcasting is now desperately needed.

## **Recommendations:**

### **1 Media policy**

#### *Legislation*

1. Parliament should amend the Law on Public Service Broadcasting (PSB) to clarify the roles of Parliament and civil society in the governance of RTCG, with the overriding aim of ensuring the broadcaster's independence.

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<sup>21</sup> This part of the report is done by Ranko Vujovic, Union of Independent Electronic Media (UNEM)

<sup>22</sup> EC Montenegro Progress Report 2007, *op. cit.*

2. Parliament should amend the Broadcasting Law and the Law on PSB where they have not proven to be workable. The amendments should clarify or clearly define issues such as the appointment of the RTCG Council and Parliament's role in this process, the accountability and remuneration of RTCG Council members, the internal mechanisms of control and accountability in RTCG, and the distribution of licence fee money among commercial and local public broadcasters.

3. Parliament should adopt legislation to regulate cross-ownership and media concentration.

#### *Digitalisation*

4. The Government should adopt the Law on Digitalisation as soon as possible. Parliament should adopt new legislation or amend the Broadcasting Law to create a legal framework for the transition to digital broadcasting.

### **2 Regulatory bodies**

5. Parliament should ensure in future legislation that the independence and efficiency of the Broadcasting Agency are preserved. If there is no real need to merge the technical regulator and the Broadcasting Agency, Parliament should drop this stipulation from the Law on Electronic Communications.

6. The Broadcasting Agency should adopt secondary legislation on programming quotas deriving from the ECTT.

### **3 Public broadcasting services**

7. The Government, in cooperation with the Broadcasting Agency and RTCG, should urgently solve the problem of licence fee collection by signing as soon as possible a contract with Electric Power Company of Montenegro.

8. Parliament should appoint the remaining members of the RTCG Council in order to ensure the functioning of RTCG.

9. The RTCG Council should make its work as transparent and accountable to the public as possible by publishing all of its reports on the Internet.

10. RTCG should order the Commission for Petitions and Complaints of listeners and viewers and the Commission for monitoring programmes on the languages of ethnic minorities to start working.

11. The RTCG Council, management and journalists should adopt and implement an editorial policy based on greater objectivity in reporting.

### **4 Commercial broadcasters**

12. The Broadcasting Agency should continue to create conditions for providing electronic media pluralism within the given legal framework by, for example, obliging commercial broadcasters that receive the 10 per cent share of the licence fee revenues to use this money to produce local content.

13. The Journalism Self-regulatory Body should continue to monitor the work of commercial broadcasters and promote professional standards.

14. The Journalism Self-regulatory Body should be strengthened and funding for its work must be found. The funding could include a mix of contributions, from the media, the Ministry of Culture and donors.

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