



Centar za građansko obrazovanje  
Centre for civic education

## TO THE CONSTITUTIONAL COURT OF MONTENEGRO

Based on Article 150, paragraph 1 related to Article 149 paragraph 1 item 1 of the Constitution of Montenegro and article 44 of the Law on the Constitutional Court we submit the following

### INITIATIVE

For the review of constitutionality of Article 71, 72, and 80 to 93 of the Law on Misdemeanors published in the "Official Gazette of Montenegro" no. 25/94, and 48/99 of 12 September 1999 regarding application of Article 242 and 244 of the Law on Misdemeanors published in the Official Gazette of Montenegro, no. 01/11 of 11/01/2011, 06/11 of 25.01.2011, 39/11 of 04.08.2011.

### Justification:

The above provisions of the Law on Misdemeanors are unconstitutional due to the fact that they are applied in relation to the new Law on Misdemeanors and other laws that prescribe penal responsibility in a way that violates the rights of citizens guaranteed by the Constitution.

In 2011 Parliament of Montenegro adopted the new Law on Misdemeanors, which introduced a new formulation and system of sanctions for misdemeanors, compared to the earlier Law on Misdemeanors of 1994.

However, the new law does not determine the method of organization and jurisdiction of courts in misdemeanor proceedings. It is anticipated that until the new Law enters into force, the distribution of responsibilities will apply as under the previous law, which remains operational until the new law takes effect.

**This solution, which has been effective for more than a year, violates the Constitution of Montenegro. Thousands of citizens who were called before the court for a misdemeanor have been judged by the executive branch, i.e. judges appointed by the executive power, the Government of Montenegro.**



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Violation of Article 32 of the Constitution:

*Everyone has the right to a fair and public hearing within reasonable time by an independent and impartial court established by law.*

...

**According to information from the website of the Ministry of Justice:**

*With the new Law on Misdemeanors significant changes were introduced, one of which is:*

*- responsibility for decision on misdemeanor cases is transferred to the courts. In the interim period the authority will rest with the district authorities and the Council for Misdemeanors<sup>1</sup>.*

...

Article 81 Paragraph 1 of the Law on Misdemeanors (Official Gazette of Montenegro, number 48/99):

**"The President and Judges of the Council and district offices for misdemeanors are appointed by the Government, upon consultation with the Minister of Justice, pursuant to a public announcement."**

which is contrary to Article 125 paragraph 1 of the Constitution:

"The Judge and President of the Court is appointed and dismissed by the Judicial Council."

...

Article 82 of the Law on Misdemeanors (Official Gazette of Montenegro, number 48/99):

***The President, Judges and Judges of the district offices for misdemeanors are appointed for a term of five years and may be reappointed.***

which is contrary to Article 121 paragraph 1 of the Constitution:

***The judicial function is permanent***

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<sup>1</sup> Information from the website of the Ministry of Justice, the "Reform of the misdemeanor system", see [http://www.pravda.gov.me/rubrike/Reforma\\_preksajnog\\_sistema/111251/Reforma-preksajnog-sistema-u-Crnoj-Gori.html](http://www.pravda.gov.me/rubrike/Reforma_preksajnog_sistema/111251/Reforma-preksajnog-sistema-u-Crnoj-Gori.html)



Article 93 paragraph 1 of the Law on Misdemeanors (Official Gazette of Montenegro, number 48/99) and Article 92 paragraphs 1 and 2 of the Law on Misdemeanors (Official Gazette of Montenegro, number 29/94):

***The decision on the assignment of judges to another district office for misdemeanors shall be made by the President of the Council.***

***A judge of a district office for misdemeanors may be temporarily assigned to another district authority, by their consent, for a period not exceeding six months in a year.***

***A judge of a district office for misdemeanors may be temporarily assigned to another district authority, without their consent, for a period not exceeding two months in a year.***

which is contrary to Article 121 of the Constitution:

***A judge cannot be transferred or assigned to another court against his or her will, except by the Judicial Council in the case of reorganization of the courts.***

...

Law on Misdemeanors of 2011 defines personal liability in a manner inconsistent with the procedure for appointment of the judges for misdemeanors (they are appointed by the Government of Montenegro), as evidenced by Article 11 - the meaning of the term:

***„Specific terms used under this Law shall be defined as follows:***

- 1) a convict is a person who is found guilty of a misdemeanor by a final court verdict;***
- 2) a penalized person is a person who received a final and actionable verdict for a misdemeanor and was pronounced a sanction.***
- (2) The terms legal person and responsible person has the meaning defined under art 4 par 1 point 1 and 2 of the Law on responsibility of legal persons for criminal offences.***
- (3) The terms responsible person when that person is an employee of public authorities, government bodies, local self government and local government, military officer and perpetrator have the meaning defined under article 142, paragraph 3 and 10 of the Penal Code.”***

The terms "convict", "verdict", "guilty", "penalized", "sanction", "defendant" demonstrate that the intention of the legislator to have the Law on Misdemeanors enforced by judges, i.e. specialized Courts for Misdemeanors, as is defined by the Art. 242 of this law:



***"From the day this law enters into force, first instance proceedings and trials for offences under jurisdiction of the Courts of first instance shall be transferred to the district offices for misdemeanors, as defined by Article 71 of the Law on Misdemeanors ("Official Gazette of Montenegro", no. 25/94 and 48/99). Appeals will be handled by the Council for misdemeanors of Montenegro, until the law is adopted that defines organization and jurisdiction of courts in charge of misdemeanor proceedings."***

A year after the adoption of the Law on Misdemeanors the jurisdiction and organization of courts in charge of misdemeanor proceedings is still not regulated, so the trials are conducted in front of judges appointed by the Government of Montenegro.

...

Violation of Art. 118 paragraph 1 of the Constitution:

The Court is autonomous and independent.

...

The submitter of the initiative offers the Court the following with information provided by the Government of Montenegro - Ministry of Justice - submitted to the Parliament of Montenegro in the ***"Report on the implementation of the reform of the system of misdemeanors"***<sup>2</sup>

This official document states the following:

***"Until the final stage of the proceedings, the process against misdemeanors is being conducted before bodies which, according to the European Court of Human Rights, do not have the attributes of independent and impartial courts, as the manner of appointment of judges in the district offices for misdemeanors and the Council for misdemeanors, i.e. the appointment of authorized officers in state and local government in charge of implementing Law on misdemeanors, is incompatible with the right to independent and impartial trial under Article 6 of the Convention"***.

***"When it deposited the instrument of ratification of the Convention, the former State Union of Serbia and Montenegro included a reservation on the application of Article 6 Paragraph 1 of the Law on Misdemeanors of the Republic of Serbia and the Law on Misdemeanors of Montenegro. The Convention itself provides this opportunity in Article 57, which states that when signing this Convention or when depositing its instrument of ratification the state can***

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[http://www.skupstina.me/cms/site\\_data/SKUPSTINA\\_CRNE\\_GORE/ZAKONI/INFORMACIJA%20o%20prekrasajima%20852.pdf](http://www.skupstina.me/cms/site_data/SKUPSTINA_CRNE_GORE/ZAKONI/INFORMACIJA%20o%20prekrasajima%20852.pdf)



***place a reservation on the specific provisions of the Convention to the extent that an existing law which applies on its territory is not in conformity with the provision. "***

Since the state itself, namely the Government and the Parliament of Montenegro, placed the reservation on the application of Article 6 of the European Convention on Misdemeanors, it is clear that the European Court of Human Rights could not rule on the violation of rights guaranteed by this article.

However, as the authorities cannot place a reservation on the Constitution, the supreme law of Montenegro, which clearly states that **"Everyone has the right to fair and public hearing within reasonable time by an independent and impartial court, established by law,"** it is enough that the court declares the challenged provisions of the Law on Misdemeanors as unconstitutional.

The submitter of the initiative highlights the followings statement by the Ministry of Justice from the above document:

***"In Montenegro, independence of the court is guaranteed in the case criminal and civil proceedings, which also envisage the possibility of exemption, but that is not the case with misdemeanor proceedings. The key problem here is that in Montenegro misdemeanor proceedings are not conducted solely and exclusively by the courts, but also by executive authorities, regional authorities and councils".<sup>3</sup>***

...

Art. 9 of the Constitution guarantees that ratified and published international treaties and generally accepted rules of international law ... take precedence over domestic law and are directly applicable when they regulate relations differently from the internal legislation. This is enough for the Constitutional Court to declare the challenged provisions unconstitutional.

Article 6 Paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

***In the determination of his/her civil rights and obligations or of any criminal charge against, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.***

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<sup>3</sup> A study prepared under the auspices of the Council of Europe "Compatibility of Montenegrin legislation with the provisions of the European Convention on Human Rights" (as in "Report on the implementation of the reform of the offences system")



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It has been clearly demonstrated above that this right has been violated in the moment when other authorities took over the proceedings for misdemeanors from the courts, and assumed competencies which can only be assumed by a regular court (established by the Law on Courts), and in which only a judge elected in accordance with the Constitution can pronounce a verdict, i.e. the process cannot be conducted by a judge appointed by the Government. The logical conclusion is that these are not independent tribunals, as required by the European Convention for the protection of human rights and fundamental freedoms (the same right is guaranteed by the Constitution of Montenegro).

In support of this fact, the European Court of Human Rights pronounced the following ruling in the case of "Lauko against Slovakia":

*The European Court recalled that the individual's right to be heard in front of an independent tribunal is an essential component of the right to a fair trial, which is one of the fundamental rights in a democratic society. To determine whether a body can be considered "independent" it is necessary to examine the manner of appointment of its members and the length of their term, then the existence of protection from external pressures and, finally, the question of whether this authority gives the impression of independence.*

*In this case, the European Court noted that the Office of Local and provincial governing bodies is controlled by the government. The appointment of employees is under the control of administrative authorities, there is no protection from external pressures, or appearance of independence and it is clear that these bodies cannot be considered independent of the government. The European Court noted that although the competence of administrative authorities to decide on violations by itself is not contrary to the Convention, individuals must have the right to examine this decision by an independent court that provides guarantees in accordance with Article 6. In this case Lauko did not have this possibility and therefore the European Court concluded that Article 6 of the Convention was violated.*

In support of this initiative, the submitter further reports the judgment of the European Court of Human Rights in the case of "Ozturk against Germany," according to which:

*"... This norm is not directed towards a specific group of people with special status in the manner characteristic of disciplinary norms, but to all citizens in their role as drivers, she prescribes certain behavior and sets requirements in anticipation of the sanction of the criminal character.*

*.. it would be contrary to the object and purpose of Article 6, which guarantees "everyone charged with a criminal offense" the right to a court and to a fair trial, if the state were able to isolate the whole category of offenses covered by this section solely because regarding to them, it is of little importance. "*



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*The European Court invoked to its earlier practice that for the purposes of Article 6 "charge" may in general be defined as "the official notification given to an individual by the competent authorities of the allegations that the person has committed a crime" even though "in some cases it may take the form of other measures that indicate such allegation and which likewise significantly affect the position of the suspect".*

*Entrusting the prosecution and punishment for a misdemeanor offense to administrative authorities is not inconsistent with the Convention, provided that the person in question has the ability to appeal and to take on any decision that is made against him before the court that provides the guarantees under Article 6 of the Convention.*

According to the Law on Misdemeanors, judges may impose a prison sentence of up to 60 days (Article 23, paragraph 1), which makes it clear that their role (of the authority for misdemeanors) is de facto that of a court, and not merely a of a disciplinary body, on which the European Court of Human rights and Freedoms says the following: "...considering the nature and severity of the penalty. If the sentence in question involves deprivation of liberty, it generally makes it a criminal norm, not a disciplinary one. This is so because of the seriousness of what is at stake for the individual (in this case the loss of freedom), and the importance the Court attaches to the respect of liberty of all persons." (See Engel and Others v. the Netherlands, 08.06.1976.)

...

Further, the submitter offers the overview of some powers of a judge in the Office/Council for Misdemeanors:

Also under the jurisdiction of the Office for Misdemeanors, i.e. the judges of these bodies, as well as under the Council for Misdemeanors as the body responsible for higher instance proceedings, are the offences covered by the **Law on Protection from Domestic Violence**, under whose provisions they may impose protective measures, including a measure which obliges the perpetrator to undergo a treatment against addiction up to a period of two years (Art.26 paragraph 3 in conjunction with Article 24, paragraph 2).

As these measures are imposed by the Office for Misdemeanors, whose judges are appointed by the Government, citizen's right to a trial in front of an independent court is violated.

The procedure for determining and implementing protective measures also implements the provisions of laws which regulate the work of law enforcement bodies, felony proceedings, prosecution, criminal sanctions and their implementation and enforcement, unless the law stipulates otherwise (Article 35 of the Law on Protection from Domestic Violence), which



clearly grants the offices for misdemeanors (Article 71 Official Gazette br.48/99) competences of the regular courts.

Art. 48 Paragraph 1 of the Law on Misdemeanors *"The Court may expel from the territory of Montenegro a foreigner who has committed a misdemeanors due to which his or her further sojourn in the country is deemed undesirable, up to the period of one year"*, which indicates that the Law should be implemented by a Court, not a disciplinary body with judges appointed by the government, the highest executive power.

This stands in violation of Article 11 of the Constitution, which guarantees the division of powers, namely:

*"The government rests on the principle of division of powers into legislative, executive and judicial. Legislative power is exercised by the Parliament, executive power is exercised by the government, and the judicial by the court. "*

*The European Court is of the opinion that the court must be independent in relation to the executive and in relation to the parties in dispute. (See the Ringeisen v. Austria, July 16, 1971, st.95)*

...

The fact that the executive authority appoints members of the court is in itself not a violation of the Convention (see Campbell and Fell v. The United Kingdom, 28 June 1984, p. 79). In fact, to constitute a violation of Article 6, the applicant would have to demonstrate that the procedures for the appointment of judges are in general unsatisfactory or that the establishment of a court in question has been motivated by desire to influence the final outcome of the case (see Sand v. Austria, 15 DR 70, p.77).

Centre for Civic Education (CCE) is of the opinion that the above conditions of the European Court of Human Rights are met, confirming the presence of violation of the rights of citizens, because:

- 1) judges are appointed by the government, and at the same time there is
- 2) a motive that can be described as the desire of the government to influence the outcome of the case because *"the funds collected from fines imposed for violation are considered revenue of the State"* (Article 7), and shall be transferred the account of the Government of Montenegro, whose Ministry, on 10 September 2012, revealed that in the year since the implementation of the new Law on Misdemeanors the state collected € 4,516.171 in fines (report by daily "Vijesti", p.13 , under title "Misdemeanors yield 4.5 million euro", citing report by the Ministry of Justice).





...

On multiple occasions, chapters XVII (Misdemeanors proceedings), XVIII (security measures to ensure the presence of defendant and uninterrupted proceedings), XX (Agreement on the admission of guilt), XXI (Hearing), XXII (Court decision), XXIII (Appeal) XXIV (Extraordinary legal remedies) of the Law on Misdemeanors of 2011 stipulate the court as the authority in charge of conducting misdemeanor proceedings and taking procedural actions, not the Offices or the Council for Misdemeanors, whose judges are appointed by the Government, as defined by provisions of art. 71 and 72 of the Law on Misdemeanors (Official Gazette, no. 48/99) which remain in force to this date.

...

If the Misdemeanors court had been established as a regular court (with specific jurisdiction), recognized by the Law on Courts and the network of courts, with judges appointed by the Judicial Council, their work would could no means be considered unconstitutional. However, the Law on Misdemeanors is at present being implemented by judges appointed by the Government, and this represents a violation of the citizen's constitutional right to a trial by independent court, especially considering that other judges in Montenegro are appointed by the Judicial Council, a body recognized by the Constitution as the independent and autonomous authority which safeguards the autonomy and independence of courts and judges. (Article 126 of the Constitution)

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### **Irreparable damage ensuing from further application of the challenged provisions**

The initiative submitter believes that further application of the challenged provisions will inflict irreparable damage to the citizens who appear as defendants before the offices for misdemeanors, in violation of their constitutional right to trial by an independent court.

*The harmful consequence is that judges appointed by the executive power, the Government of Montenegro, will decide on their rights and obligations, including sentences of imprisonment. With regard to appeals against decisions of the first instance to the Council for Misdemeanors as the body immediately above district offices for misdemeanors, it is clear that their constitutionally guaranteed rights continue to be violated, due to the fact that the judges of the appellate authority are also appointed by the executive power, the Government of Montenegro.*

The status of the Offices for Misdemeanors should allow the courts responsible for misdemeanors to operate impartially and independently within the system of judicial power. This would eliminate the potential for a negative influence of the executive on the judges in



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misdemeanors proceedings, which would be an important contribution to establishment of the rule of law in Montenegro.

## **PROPOSAL**

In view of the above, the initiative submitter CCE proposes to the Constitutional Court to:

1. Accept this initiative and initiate proceedings to review constitutionality of the challenged provisions of Article 71.72 and 80 to 93 of the Law on Misdemeanors published in the "Official Gazette of Montenegro", Number 25/94, and 48/99 of 12.09.1999
2. Suspend execution of all actions taken on the basis of the Law on Misdemeanors and other laws which require misdemeanor proceedings which would be implemented by judges from the challenged provisions of Article 71.72 and 80 to 93 of the Law on Misdemeanors published in the "Official Gazette of Montenegro", Number 25/94, and 48/99 of 12.09.1999
3. Rule that the challenged provisions of Article 71.72 and 80 to 93 of the Law on Misdemeanors published in the "Official Gazette of Montenegro", Number 25/94, and 48/99 of 12.09.1999 are not in compliance with the Constitution of Montenegro and with the ratified international treaties which guarantee the right to trial by independent courts.

In Podgorica, September 18 2012

Initiative submitter

Danilo Ajković,

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