



Centar za građansko obrazovanje  
Centre for Civic Education



THREE YEARS OF VIOLATIONS OF THE CONSTITUTION:  
**WHO IS RESPONSIBLE?**

Podgorica, 2014





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## Summary

Centre for Civic Education (CCE), within a subprogramme *Equal Opportunities*, has filed an *Initiative to review the constitutionality of certain provisions of the Law on Misdemeanors* to the Constitutional Court of Montenegro almost two years ago, assessing that they violate constitutionally guaranteed rights of citizens of Montenegro.

Constitutional Court has not made a decision up to this date, allowing thousands of our citizens to be put in a position of inequality before the law, while the governing structures were left with uncontrolled mechanism of abuse.

## Introduction

Centre for Civic Education (CCE) has, on 19 September 2012, filed to the Constitutional Court of Montenegro an ***Initiative to review 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 from 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 from 4 August 2011. ***The aforementioned provisions of the Law on Misdemeanors are unconstitutional***, since they are being applied in relation to the new Law on Misdemeanors and other laws that prescribe misdemeanor charges in a manner that violates the constitutionally guaranteed rights of citizens.

Initiative of CCE covers the period from 1 September 2011 and onwards, namely the period in which judges who were selected based on the still valid regulations of the old Law on Misdemeanors, are applying provisions of the new Law on Misdemeanors, in which the *concept of misdemeanor is brought closer to the concept of the offense*, and is definitely to the utmost separated from the administration. It is clear, from all of this, that it cannot be acted and decided upon the same by judges who were appointed by the Government i.e. the executive authority.

Namely, the Parliament of Montenegro has, in 2011, adopted a new Law on Misdemeanors, which introduced new instruments and

sanctions in the system of criminal liability, but this new law has not provided a method of organization and jurisdiction of courts for conducting misdemeanor proceedings. It has only provided that until the start of application of this Law, method of organization and jurisdiction of the authority for misdemeanors will be applied according to provisions of the old Law, which shall remain in force until the start of the application of the new one. **With such a bad solution, which is in force for nearly three years, the Constitution of Montenegro was violated, because for thousands of citizens verdicts were pronounced by the body of executive authority**, namely judges, who were elected and dismissed by the executive authority i.e. the Government of Montenegro, not a body of judicial authority. Given that the imposed sentences are not only of a significant financial scale, but also include deprivation of liberty and referral to psychiatric treatment, **it is undisputable that this is an Initiative which is of public interest and certainly an extremely important legal issue.**

The only feedback information related to this issue, CCE has received from the Ministry of Justice, which has informed CCE that it has directed an opinion to the Government about the Initiative on 7 February 2013, based on which the Government has adopted a Conclusion on 21 February 2013, and submitted to the Constitutional Court a Request that before making a decision on the constitutionality and legality of the Law on Misdemeanors *they should stop the proceeding until the adoption of the Law, which will regulate the organization and jurisdiction of courts for conducting the misdemeanor proceedings*. It is obvious that by the Constitutional Court's failure to decide at the request of the Government the public interest has been endangered, and the fact that the Constitutional Court, in the past two years, has not responded to either one letter of CCE, of which the last petitions and urgencies were filed in 2014, namely in the mandate of the new Constitutional Court (on 20 January 2014 and on 14 May 2014), may imply that even this *composition of the Constitutional Court is under strong influence of the executive authority*.





What does the Constitution  
prescribe, and what is the  
Montenegrin practice?

Article 32 of the Constitution of Montenegro clearly prescribes that ***“Everyone has the right to a fair and public trial within a reasonable time before an independent, impartial court established by the law”***. However, the *Ministry of Justice has placing itself above the constitutional norm* and states, on its website, that the new Law on Misdemeanors has introduced significant innovations, and that “the matter jurisdiction to decide in misdemeanor cases is transferred to courts, and that in the ***transitional period the matter jurisdiction for misdemeanors lies within branch authorities and the Council for Misdemeanors***”<sup>1</sup>. In this manner, the Ministry of Justice openly “temporarily” suspends the Constitution in this area, and acknowledges the unconstitutionality of the Law on Misdemeanors. An additional concern is produced by the facts that there is awareness of the consequences that this produces in relation to interests of citizens, that the so-called “transitional” period lasts three years already and that there is no fundamental will to change the existing situation.

At the same time, by the Law on Misdemeanors “The President and judges of the Council and branch authorities for misdemeanors are appointed by the Government, with the prior approval of the Minister of Justice, on the basis of public advertising”, which is contrary to Article 125 Paragraph 1 of the Constitution, which states ***“The judge and the President of the Court are elected and dismissed by the Judicial Council”***. That the scope for inappropriate influence of the executive authority is huge in relation to those who are currently deciding on the Law on Misdemeanors, imposing not only often enormously high fines, but also prison sentences, is also indicated by discrepancies between the mandates. Thus, ***“The President and judges of the Council and branch authorities for misdemeanors shall be appointed for a term of five years and shall be eligible for re-appointment”*** (Article 81 of the Law on Misdemeanors), while under the Article 121, paragraph 1 of the

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<sup>1</sup> Information from the website of Ministry of Justice, section „Reform of the system of misdemeanor“, 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)

Constitution, ***“The judicial duty is permanent”***. Finally, the judges who judge according to the Law on Misdemeanors, in accordance with the Article 93 paragraph 1 of this Law, can be, based on the decision of the President, referred to the work to another branch authority, for six months during one year with the consent and even for two months without consent! On the other hand, Article 121 of the Constitution is explicit in the norm: ***“The judge shall not be transferred or sent to another court against his/her will, except by the decision of the Judicial Council in case of reorganization of courts.”*** In a nutshell, those who administer justice according to the Law on Misdemeanors do not have a legal framework in which they can exercise their independence in their work.

According to the aforementioned, in the Montenegrin reality remains effective the principle “Judge sues you, judge judges you”, which consequently leads to legal uncertainty, since constitutional rights of thousands of our citizens were violated and they were brought into a position of inequality before the law - because they are not being judged by the courts but the branch authorities and the Council for Misdemeanors, namely a body of executive authority!

Since this so-called “transitional” period lasts for three years already, it is clear that we have a **systematic violation of the rights of citizens**, since the promised matter jurisdiction in misdemeanor cases is lacking, and numerous citizens in that period were and will be damaged, and deprived of the right to fair and public trial within a reasonable time before an independent, impartial Court established by law.

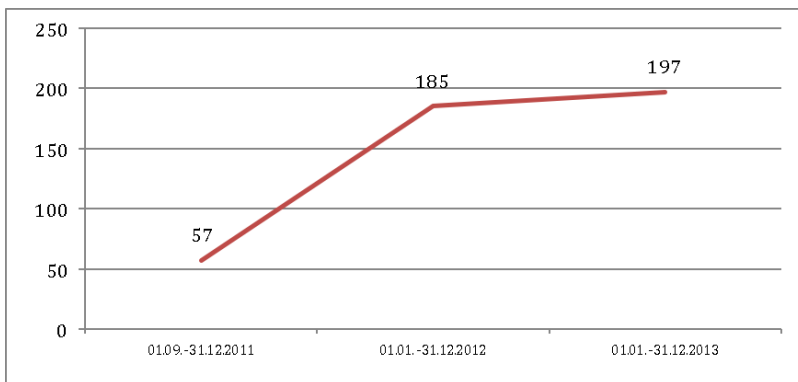


How many citizens of Montenegro  
were unconstitutionally  
sent to prison?

The rights of citizens of Montenegro are drastically being violated by this “silence” of the Constitutional Court and non-interference in their own jurisdiction.

This is also indicated by the fact that in the past three years of the so-called “transitional” period, according to data from the Register of fines, which generates final court decisions for persons, **for even 439 persons a prison sentence was rendered** in cases based on disturbing the peace and order (173) and domestic violence (266). All these penalties are final.

It is a disturbing trend of increase of pronouncing prison sentences in this period:



*Graph 1: Cross section of final sentences of imprisonment imposed under the Law on Misdemeanors (data that was submitted to CCE by the Ministry of Justice of Montenegro)*

These prison sentences, which are usually the most severe sanctions in our legal system, have not been made before the court established by law - but before the body of executive authority! By the fact that executive authorities, and not a judicial authority (meaning without a court decision), have sent 439 persons to prison, one of the basic human rights - the right to freedom has been endangered since these persons have not had an independent and impartial trial, and thus the Constitution of Montenegro has been crudely violated.

**For the fact that 439 persons in Montenegro were sent to prison in an unconstitutional manner no one has yet claimed responsibility!**

*The consequences are irreparable* because if the Constitutional Court declares the disputed provisions on the appointment of judges as unconstitutional, for those persons who are in prison or psychiatric institution, or have already been in these institutions according to the imposed sanction/measure, it will not be possible to make restitution in terms of detention time of these persons.

However, although CCE stated all this in its Initiative in 2012 and subsequent urgings, namely the proposals for making a priority decision in accordance with Article 50 of the Rules of Constitutional Court of Montenegro, *the Constitutional Court up to this day ignores this issue of indisputable public interest.*

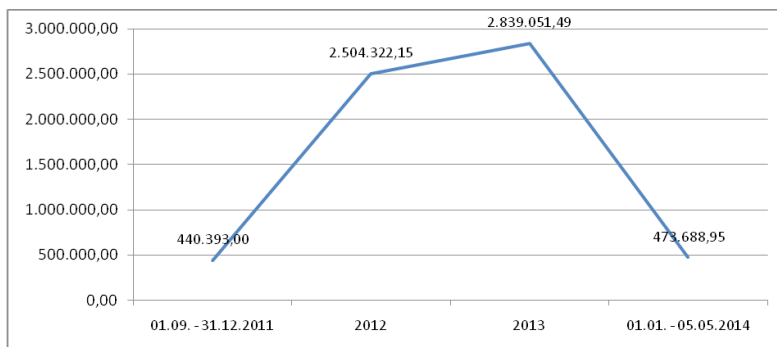




Why does the Montenegrin  
government deliberately extends  
violation of the Constitution?

The motive of the Government of Montenegro to maintain this state of injustice for broad public of citizens of Montenegro is also in terms of money, which also shows an increasing tendency.

In the period from 1 September 2011 to 5 May 2014, a total of 6 275 455.59 EUR was charged from fines and costs of misdemeanor proceedings imposed by decisions of the branch authorities for misdemeanors and Council for Misdemeanors of Montenegro, whereas the data for 2014 is related only to the period from 1 January 2014 to 5 May 2014, and the trend indicates that even this year, especially after the summer season, that figure will be higher than the last year.



Graph 2: Final prison sentences imposed since the day of the application of the Law on Misdemeanors 1 September 2014 to 5 May 2014 (data submitted to the CCE by the Council for Misdemeanors)

Additionally, during the collection and processing of data, the CCE has found that the records of the competent authorities differ.

For example, the Ministry of Justice has published in the media on 10 September 2012 that only for one year since the beginning of the implementation of the new Law an income of 4 516 171 EUR<sup>2</sup> was realized, which does not coincide with the records of the Council for Misdemeanors. CCE sought from the Ministry of Justice on 8 May 2014 an explanation and clarification of the differences in the figures contained in the Register of fines and publicly disclosed information about the collection of fines from that period. In response submitted

<sup>2</sup> <http://www.vijesti.me/vijesti/gradani-prekrsaje-platili-4-5-miliona-eura-clanak-91038>

to CCE by the Ministry of Justice was stated that the difference relates to total revenue of the state budget on the basis of collected fines of all bodies of state administration for the specified period, namely this is a total amount both on the basis of misdemeanor decisions made by the misdemeanor bodies through the Register of fines and on the basis of misdemeanor orders of all bodies of state administration and public institutions that flow into the budget.

Article 50 of the Law on Misdemeanors provides basis of confiscation of proceeds, but the branch authorities and the Council for Misdemeanors through practice in a very small and almost insignificant number of cases deprives of proceeds. However, that precise information can not be reached, because in the final budget of Montenegro in the indicated years the data on income arising from fines and confiscated proceeds is merged on the basis of all applicable laws that have this type of sanction, which prevents obtaining information about the final payment for these penalties for individual items, and solely for the Law on Misdemeanor.

However, the fact that these figures are quite high may indicate that the level of payment on this basis is quite effective, and that in some years exceeds planned revenues:

Year	Budget line	Other revenues	Planned revenues	Realized revenues
2011	7152	Fines and confiscated proceeds	8.333.380,37€	7.094.815,51€
2012	7152	Fines and confiscated proceeds	7.220.074,40€	8.748.262,11€
2013	7152	Fines and confiscated proceeds	8.511.345,52€	Unknown

*Table 1: Data from the Law on the final budget of Montenegro for 2011 and 2012. Data for 2013 are not yet available in the same form*

*Note: The calculation of funds refers to income on the basis of sanctions of all applicable laws and not just the LoM.*

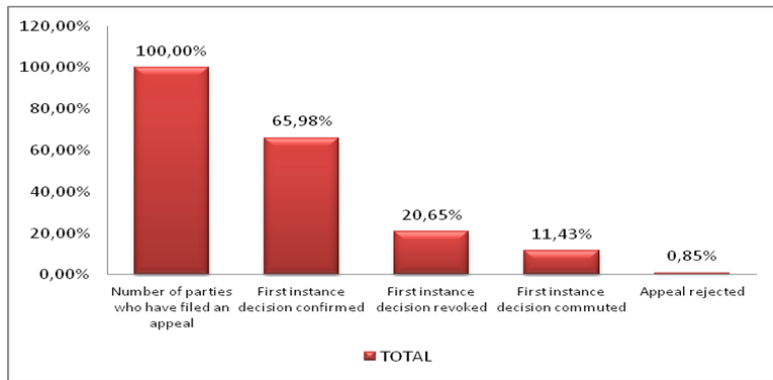
Ultimately, the Government of Montenegro from the date of implementation of the Law on Misdemeanors until the beginning of May 2014 had earned, 6,275,455.59 EUR, solely on the basis of collected fines from misdemeanor proceedings of the body for misdemeanors.



What are the chances of  
Montenegrin citizens  
who file a complaint?

When it comes to the process of appeal with the body for misdemeanors during the period from 1 September 2012 to 5 May 2014 the Council for Misdemeanors, as the second instance body has received 7,146 cases involving **8,592 parties who have appealed**. There are no records on the number of complaints that were rejected by the first-instance body (branch authorities for misdemeanors) because they were incomplete or untimely, but it can be assumed that the number of complaints is much higher if those that did not meet the formal requirements for decision-making by the Council for Misdemeanors are calculated too.

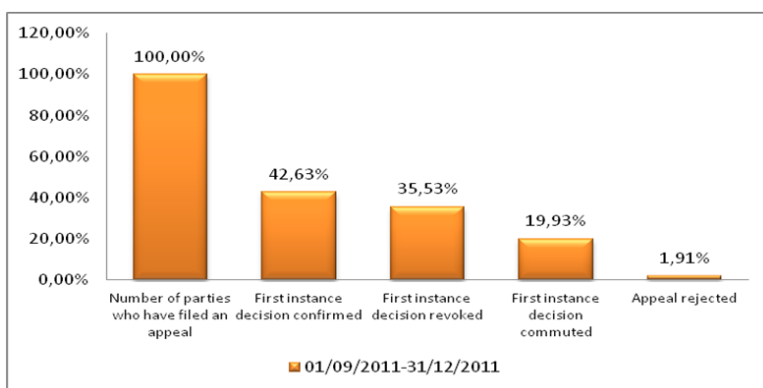
Of the total number of complaints that have been considered, namely of 8,592 complaints, in **even 5,669 cases the first-instance decision was confirmed** (65.98%), in 1,774 cases (20.65%) the first instance decision was abolished which means that it went into repeated procedure with an uncertain outcome, and in only 982 cases (11.43%) that decision was commuted, while 73 complaints were completely rejected (0.85%).



Graph 3: Deciding on appeal before the Council for Misdemeanors (data that is submitted to CCE by the Council for Misdemeanors)

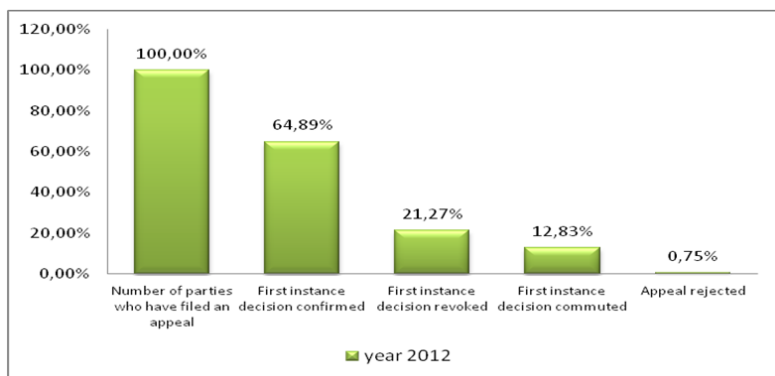
The fact that most of the decisions are being confirmed or just returned to repeated procedure by abolition, which means that although insubstantiality of punishment has been found it does not guarantee that party in the dispute will be entirely freed, brings concern. When these figures are analyzed per year, there is noticeable a tendency by which **the percentage of certified verdicts is rising dramatically**.

Thus, in **2011**, in the period since the beginning of application of the law until the end of the year (from 1 September 2011 until 31 December 2011) in 412 received cases 577 parties have filed a complaint, and the first instance decision was confirmed in 246 cases (**42.63%**), the first instance decision was abolished in 205 cases (35.53%), the first instance decision was commuted in 115 cases (19.93%) and in 11 (1.91%) the appeal was dismissed.



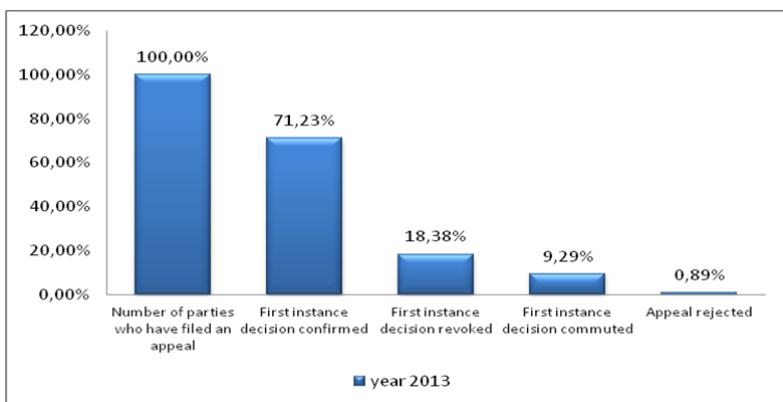
*Graph 4: Decision on appeal proceedings before the Council for Misdemeanors for 2011 (data that was submitted to CCE by the Council for Misdemeanors)*

In 2012, the numbers are significantly altered, and in 2,969 cases that were received, 3,461 parties have filed a complaint and even 2,246 first instance decisions were confirmed (64.89%), 736 abolished (21.27%), in 444 cases the decision was commuted (12.83%), and the appeal was rejected in 26 cases (0.75%).



Graph 5: Deciding on appeal proceedings before the Council for Misdemeanors for 2012  
(data that is submitted to CCE by the Council for Misdemeanors)

The tendency of confirming the first instance decisions is also growing enormously in **2013**. Within the 2,911 cases, 3,597 parties have filed a complaint, of which there is a record of 2,562 confirmed first instance decision (**71.23%**), 661 first-instance decisions abolished (18:38%), 334 commuted (29.9%), and 32 appeals rejected (0.89%).

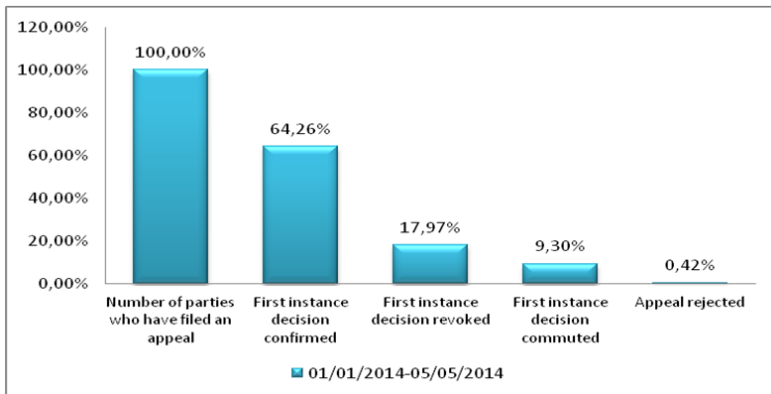


Graph 6: Decision on appeal proceedings before the Council for Misdemeanors for 2013  
(data that is submitted to CCE by the Council for Misdemeanors)

Although **2014** is not even halfway through, it can nevertheless be estimated that this tendency continues, especially after the

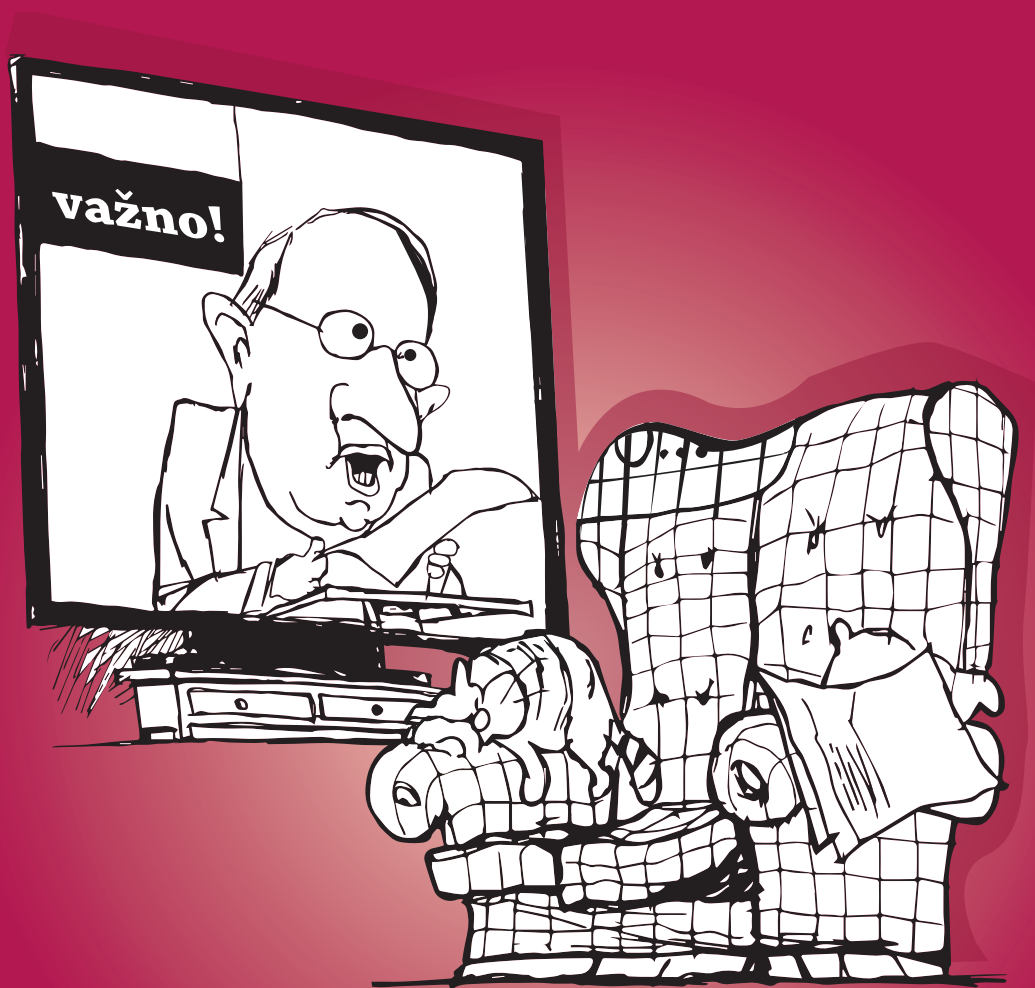


expected rapid growth of these decisions in the coming period and in terms of the summer season. Therefore, for now, in 854 received cases, 957 parties have filed a complaint, of which in 615 cases first instance decision was confirmed (**64.26%**), in 172 (17.97%) cases first instance decision was abolished, in 89 cases first instance decision was commuted (9.3%), while in 4 cases appeals were rejected (0.42%).



Graph 6: Decision on appeal proceedings before the Council for Misdemeanors for 2014 (data that is submitted to CCE by the Council for Misdemeanors)

**These data indicate that chances of citizens to successfully challenge the first instance decision in a regular procedure are drastically being reduced, and the fact that by this, according to the Law on Misdemeanors, regular legal remedies are being fully exhausted, is an additional cause for concern.**



## CONCLUSIONS AND RECOMMENDATIONS:

- Citizens of Montenegro who have been in the last three years summoned before the authorities for misdemeanors have their constitutional rights been violated when it comes to the most severe penalties i.e. prison sentences because they did not have impartial trial before a Court established by law;
- The fact that the Constitutional Court did not take into consideration the priority of this Initiative, shows that it is obviously burdened by political influence from the executive authorities, as it does not act in accordance to the public interest, whereby it is also placed in a position of direct violator of the Constitution;
- The Government of Montenegro, which has submitted a request to the Constitutional Court to stop with the decision-making process on the Initiative, also should have suspended implementation of individual actions and decisions that have been undertaken on the basis of the Law on Misdemeanors and other laws which stipulate responsibility for misdemeanors, and by which act judges of the disputed provisions of Article 71, 72 and 80 to 93 of the Law on Misdemeanors published in the “Official Gazette of the Republic of Montenegro”, no. 25/94, and 48/99 from 9 December 1999;
- The Government of Montenegro, using its influence on the judicial authorities, which is intolerable, for almost three years unconstitutionally deprives citizens of Montenegro of liberty and collects considerably high income for the Budget, and the fact that this item is planned in even higher amount in the Law on Budget for 2014 indicates that it has no intention to remise itself of income even at the cost of continuation of violation of the Constitution;
- Unconstitutional application of the Law on Misdemeanors brings all citizens of Montenegro in a state of legal uncertainty, and gives to the Government additional undue mechanisms that are subject to various forms of abuse;
- The Government has no political will to resolve this issue in the public interest, and the Constitutional Court is burdened

with political influence and has no strength to make decisions in this matter in accordance with the Constitution.

- It is necessary an urgent implementation of planned reforms in the misdemeanor system and adoption of the Law on Misdemeanor Courts by which the matter jurisdiction for deciding in misdemeanor cases would be transferred to the specialized courts of special jurisdiction, and judges would be chosen in accordance with the Constitution. In this manner, existing Law on Misdemeanors could finally be applied to the manner prescribed in the Constitution;
- It is necessary to change the Strategy for reform of misdemeanor system in Montenegro, which provides that *“matter jurisdiction for misdemeanors passes to the ordinary courts of general jurisdiction”*. Namely, this approach is perhaps in the financial and organizational sense more economical, but not more effective since it would lead to unnecessary burdening of regular courts, inefficiency during acting under the Law on Misdemeanors and overall inconsistency of the misdemeanor procedure that should be prompt and prioritized;
- Record of revenues on the basis of the Law on Misdemeanors must be conducted in a more transparent and systematic manner. Specifically, in the Register of fines, income on the basis of Article 24, which relates to fines for misdemeanors must be separated, so that there would be available: data relating to the total amount on the basis of final decisions and data on the basis of sentences which proceedings are still in progress (This would mean that data would be entered in the Register immediately on the basis of the enacted decision while the period for appeal still lasts);
- Establish a unique Register at the level of the country of Montenegro in which all sentences on the basis of Article 24 of the Law on Misdemeanors are entered, namely all decisions made by branch authorities for misdemeanors and Council on Misdemeanors, as well as misdemeanor orders passed by the authorities of state administration and

public institutions, thus providing a unique data of amount of collected fines, less prone to manipulations by comparing several different registers, and the cross-section according to structure;

- In the Final Account of the Budget of Montenegro, revenue collection on the basis of collected fines should be clearly separated per items from revenues based on confiscated proceeds.

**Finally, due to all consequences brought by unconstitutional application of the Law on Misdemeanors, responsibility of persons in the Government and the Constitutional Court should be determined, since in many cases irreparable consequences were made, which included violation of basic human rights of the citizens of Montenegro.**

**Appendix 1:** *The full text of the Initiative submitted to the Constitutional Court of Montenegro for review of the constitutionality of Articles 71, 72, and 80 - 93 of the Law on Misdemeanors published in the "Official Gazette of the Republic of Montenegro", no. 25/94, and 48/99 from 9 December 1999 in relation to the application of Article 242 and 244 of the Law on Misdemeanors published in the Official Gazette of Montenegro, no. 01/11 of 01.11.2011, 06/11 from 25 January 2011, 39/11 from 4 August 2011.*

## **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 4 August 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 misdemeanor 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 held accountable before the court have been judged by the executive branch, i.e. judges appointed by the executive power, the Government of Montenegro.**

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 transitional period the authority will rest with the branch authorities and the Council for Misdemeanors<sup>3</sup>.*

...

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

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3 Information from the website of the Ministry of Justice, the "Reform of the misdemeanor system", see [http://www.pravda.gov.me/rubrike/Reforma\\_prekrsajnog\\_sistema/111251/Reforma-prekrsajnog-sistema-u-Crnoj-Gori.html](http://www.pravda.gov.me/rubrike/Reforma_prekrsajnog_sistema/111251/Reforma-prekrsajnog-sistema-u-Crnoj-Gori.html)



**“The President and Judges of the Council and branch authorities 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 branch authorities 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.***

...

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 branch authority for misdemeanors shall be made by the President of the Council.***

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

***A judge of a branch authority for misdemeanors may be temporarily assigned to another branch 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 Criminal 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 the transferred to the branch authorities 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>4</sup>.

This official document states the following:

*“Until the final stage of the proceedings, the misdemeanor proceeding 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 branch authorities 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*

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<sup>4</sup> [http://www.skupstina.me/cms/site\\_data/SKUPSTINA\\_CRNE\\_GORE/ZAKONI/INFORMACIJA%20o%20prekrsajima%20852.pdf](http://www.skupstina.me/cms/site_data/SKUPSTINA_CRNE_GORE/ZAKONI/INFORMACIJA%20o%20prekrsajima%20852.pdf)

*this Convention or when depositing its instrument of ratification the state can 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 highest legal act of Montenegro, which clearly states that “*Everyone has the right to fair and public hearing within reasonable time before 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 following statements of the Ministry of Justice from the aforementioned document:

*“In Montenegro, independence of the court is guaranteed in the 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, branch authorities and councils”<sup>5</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

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<sup>5</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”)

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 before independent and impartial court established by law.***

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 courts, 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 before independent court 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 from 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 before 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 for disciplinary norms, but to all citizens in their role as drivers, it 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.”*

*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 Body/Council for Misdemeanors:

Also under the jurisdiction of the Bodies 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 which 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 relation with Article 24, paragraph 2).

As these measures are imposed by the body for misdemeanors,

whose judges are appointed by the Government, citizen's right to a trial before independent court is violated.

The procedure for determining and implementing protective measures also implements the provisions of laws which regulate the work and authorization of police, misdemeanor proceedings, prosecution, criminal sanctions and their implementation and enforcement, unless the law stipulates otherwise (Article 35 of the Law on Protection from Domestic Violence), thus it is clear that the bodies for misdemeanors (Article 71 Official Gazette br.48/99) have assumed competences of the regular courts that decide on responsibility of citizens.

Art. 48 Paragraph 1 of the Law on Misdemeanors ***“The Court may expel from the territory of Montenegro a foreigner who has committed a misdemeanor 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 authority 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). Namely, 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 desire of the government to influence the outcome of the case because “the funds collected from fines imposed for misdemeanor 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 Bodies 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 Court for Misdemeanors 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, work of those acting upon these issues would not 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 before 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)

...

**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 bodies for misdemeanors, in violation of their constitutional right to trial before 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 branch authorities for misdemeanors, it is clear that their constitutionally guaranteed rights continue to be violated, due to the fact that the judges of the second instance authority are also appointed by the executive power, the Government of Montenegro.*

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

## PROPOSAL

In accordance to the aforementioned, 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”, no. 25/94, and 48/99 from 12 September 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”, no. 25/94, and 48/99 from 12 September 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”, no. 25/94, and 48/99 from 12 September 1999 are not in compliance with the Constitution of Montenegro and with the ratified international treaties which guarantee the right to trial before independent courts.

In Podgorica, 18 September 2012

Initiative submitter  
Centre for Civic Education (CCE)





