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## **TRANSITION IN MONTENEGRO**

- Party and partitocracy tendencies-***
- Obstacles of establishing TV - public service-***
- Reform of the public administration-***
- Anti-corruption-***
- Obstacles to free enterprise-***

*Report No. 21 ( March 2004)*

## On This Report

One of the main strategic objectives of the CEDEM is to monitor and analyse the transition process in Montenegro and state its opinion thereof on the basis of analysis as presented in public reports and thereupon influence public opinion. After the parliamentary elections in Montenegro held in May 1998, the CEDEM decided to observe Montenegrin transition, besides other elements of Montenegrin society, in terms of the legislation (the process of passing laws and the parliamentary proceedings), media and privatisation analysis. Since then, we have published reports titled "*Transition in Montenegro: Legislation, Media and Privatisation*". In 1999, 2000, 2001, 2002 and 2003 we published four quarterly reports respectively, and the last one of four always represents a kind of conclusion about the trends in the previous year. The same project is being modified and widened in the year 2004. In regard to the previous period we shall be dealing with more issues with somewhat changed content

Since they cover an alive and uncertain process, the reports are greatly conditioned by the time and circumstances. They contain evaluations of events and processes the way we see them, striving to be as objective as possible.

Report No. 21 has been made by the CEDEM analytical team: *Veselin Pavicevic, Ph.D.*, Professor at the Faculty of Law in Podgorica (*Parties and partitocracy tendencies*), *Drasko Djuranovic*, journalist of the weekly paper "Monitor" (*Obstacles of establishing TV - public service*), *Milan Markovic, Ph.D.*, Professor at the Faculty of Law in Podgorica (*Reform of the public administration*), *Dragan Prlja, Dr.* (*Anticorruption*) and *Rade Bojovic*, legal councilors (*Obstacles to free enterprise*). The coordinator in charge of the project and of the analytical team is *Srdjan Darmanovic, Dr.*, the CEDEM's director.

The Project "*Transition in Montenegro: Party and partitocracy tendencies, Obstacles of establishing TV - public service, Reform of the public administration, Anticorruption and Obstacles to free enterprise*" has this year, too, been supported by the famous American non-government organization *National Endowment for Democracy (NED)* from Washington, D.C. Apart from gratitude for support, the CEDEM wants to express its high appreciation of the fact that the five - year cooperation with the NED, initiated at this project, continues and widens.

Podgorica, April 2004

## PARTIES AND PARTITOCRACY TENDENCIES

*Ph. D. Veselin Pavićević*

### Parliament as victim of party games

Although main role of parliament, in modern democratic societies, is to pass laws and decisions, appoint and dissolve the Government that is to control the work of Government and administration in Montenegrin case we should pay attention to remaining two roles which represents classical definition of this institution's roles<sup>1</sup>. In political community such as Montenegrin one, MPs providing education and informing citizens about the role and work of this institution represents very important segment in affirmation process of new democratic political culture. That applies especially on position and role of parliament in development of stabile democratic order.

This is very important because of fact that Montenegrin society is deeply divided and that is reflected in homogenization of its political community. Basic lines of division are regarding Montenegrin statehood and Montenegrin national issue. These issues are not finalized, even in constitutional sense and that fact represents key problem. It is not easy to find democratic solution for these problems, as democracy is not universal and all-efficient cure for all social diseases. This is especially true in society suffering from certain identity crises.

Split society with heterogeneous political culture, in many aspects recognized as society of "traditional (hierarchical) sensibility" (**Wildavsky**); inexistence of basic consensus regarding statehood issue; low level of social and economic development; civil society in cradle; hypertrophy of politics often and systematically manifesting bad sides of politicize politics (**Sartori**); distrust of institutions- all this, singularly or together constituted and still do ambient in which parliamentary process is developing in Montenegro. The only necessary precondition met so far, for development of modern, parliamentary democracy society, is existence of political parties. Having that in mind their role and responsibility for direction, dynamics and development of this process are of primary significance. Analyzing work of Montenegrin Parliament in period 1992-2001<sup>2</sup> we came to few general conclusions:

- Development of parliamentary democracy in Montenegro is being conducted parallel with process of intensive and radical re-definition of self-awareness regarding ethnic identity of most numerous group within Montenegrin population. This consequently manifested trough specific ideological program- identifications<sup>3</sup>. This is key reason way parliament is most often just a mirror reflecting deep divisions within Montenegrin political tissue and roles that government and opposition, by definition, have in highest representative bodies are not adequate;
- *Parliament is primarily instrument of political propaganda* and only after that- body creating legal order in Montenegro. Almost all-working time in parliament is used for fierce clashes in order to differentiate public opinion upon basic lines of division. All parliamentary structures are using this institution for propaganda;
- Strict control of their representatives in parliament is often only chance for party "machine" to function without bigger breakdowns, as in past period. This

unavoidably leads to “loosing perception of parliament as center of political decision” and that consequently “accelerates process of ever growing divisions on politically active and passive citizens” (**Held**). Parties, or better say, party oligarchies at the same time are trying to make an impression on public opinion that they are mature and strong organizations which always knows what is to be done in politics. However, that is sometimes done for reasons of self- legitimizing, often and sometimes-radical turnovers regarding political program and ideas based upon parties received confidence of voters and entered in the parliament. Although “organizing chaotic public opinion” is customary game of political parties, such changes and turnovers will be unpunished in future until voters start to react in *new way during election game*, that is until parliamentary struggle is conducted in *more regular conditions*;

- *Under more regular conditions of parliamentary struggle* we mean clear and precise definition of power relations, not only between parties in the parliament but first of all between certain branches of government. We should keep in mind that importance of defining those things goes beyond “pure” politics and, as some comparative studies on economic reforms in so called new democracies confirm, has consolidating effect on process of projected reforms. “... If democracy need to be consolidated, that is, if all political forces learn how to organize their demands and conflicts within democratic institutions, than those institutions must play significant role in shaping and conducting policy that is influencing life conditions<sup>4</sup>”;
- Unlike previous practice of unsuccessful attempts to limit and control one branch of government in respect to other branch of government, what represents biggest obstacle in process of forming and affirming parliamentary activity in Montenegro, in time, thanks to opposition of course, we have certain progress in that area. Public element of parliamentary work can be recognized in public influencing changes in behavior both within executive power and judiciary. At the same time, efforts of opposition to affirm control function of parliament is rarely interpreted by majority as “interference” of parliament in jurisdiction of executive power and judiciary;
- As the time passes by, dominant form of parliamentary work, from political culture point of view, can be seen as significant improvement regarding period of total (often arrogantly demonstrated) domination of one party in Montenegro (domination period of united DPS). However, some participants of parliamentary struggle in Montenegro very often see their position and role as legitimate “right” to discredit personalities of their political opponents. This is, of course is solely Montenegrin characteristic but its influence in Montenegro is significantly bigger because of re-traditional process in culture, and therefore it should be dealt as latent source of possible conflicts. In any case in Montenegrin parliament we have a lot of politicize of moral and moralization of politics and that is, in words of contemporary theoretician of federalism and liberal democracy, **Hermann Lubbe**, extremely damaging for very democracy.

Although remarks made here are regarding work of Montenegrin parliament since first multiparty elections (December 9<sup>th</sup> 1990) to its fifth convocation (May 24<sup>th</sup> 2001) most of them can be linked even for following period. However, in the meantime, other things happened that might significantly influence reputation and authority of this institution, primarily in the eyes of those which sovereign will is represented in this parliament.

***Confidence in Parliament - comparative review of data from researches of political public opinion in Montenegro<sup>5</sup>:***

Parliament convocation	Time of research	Confidence in Parliament				
		Non	Small	Neutral	Medium	High
<b>FOURTH</b> 15.06.1998./ 24.05.2001.	DECEMBER 1999.	19.1	15.8	12.0	30.1	23.0
	APRIL 2000.	15.5	18.0	11.8	31.6	23.1
	AUGUST 2000.	18.7	17.0	9.3	26.2	28.8
	OCTOBER 2000.	15.7	15.3	12.2	29.2	27.6
	APRIL 2001.	19.2	18.6	16.2	28.1	17.9
<b>FIFTH</b> 24.05.2001 / 05.11.2002	JUNE 2001.	28.3	26.3	11.6	19.6	13.4
	JANUARY 2002.	27.4	25.9	15.1	21.3	10.3
	APRIL 2002.	34.0	23.0	15.6	17.8	7.2
	SEPTEMBER 2002.	34.9	25.0	11.9	14.2	9.4
	DECEMBER 2002.	25.9	19.1	9.8	23.3	16.4
<b>SIXTH</b> 05.11. 2002. - ?	JANUARY 2003.	30.9	21.5	9.1	21.8	11.6
	APRIL 2003.	29.7	24.3	9.4	22.1	9.7
	SEPTEMBER 2003.	41.6	22.5	8.9	17.3	7.0
	DECEMBER 2003.	40.2	22.6	10.7	17.3	7.4

As most important reasons, for abrupt fall of public opinion confidence in parliament during actual and previous parliament convocation are:

- (1) Result of extraordinary parliamentary elections /April 2001/ demanded redistribution of existing political and institutional power. Unsuccessful coalition interactions of potential partners trying to form a Government caused long and unexplainable dragging out of forming a parliament;
- (2) After ten years of multiparty system and four parliamentary electoral cycles, creation of minority government was limited both in program of work and time. Parliament could have used that opportunity to accelerate necessary democratic reforms and development of legal order, but instead its power was exhausted in attempts to de-legitimize Government formed by two parties (DPS and SDP) that in coalition obtained majority of votes at the election;
- (3) It was not unexpected therefore that minority Government was deprived of support (by LSCG). Actions of newly created parliamentary majority (SNP, NS, SNS and LSCG) especially regarding legislative preparations for new

extraordinary elections /October 2002/ pointed without any doubt that they were ready to use this institution for one-time use;

(4) After losing elections previous parliamentary majority, instead of delegitimizing newly formed majority Government focused its activity on parliamentary obstruction. While one part of opposition never even entered parliament (LSCG) the other part (SNP, NS, SNS) only waited for opportunity (interruption of obligatory TV broadcasts of parliamentary sessions) to boycott parliament. With decision to boycott parliament and all parliamentary bodies (May 27<sup>th</sup> 2003) opposition announced activities to be realized “out of parliament, united and organized”. By signing *Declaration of joint activity* (July 22<sup>nd</sup> 2003) opposition announced strategic direction of their actions and one of them was formal obligation to permanent boycott of parliament. Promoter and most rhetorical advocate of this idea is NS and closest to it regarding boycott of parliament LSCG. Instead of TV broadcasts as condition for return to parliament the issue of whole institutional activity of opposition<sup>6</sup> is opened. Politics without alternative slowly started coming back to Montenegro when it seemed that such practice was over with when S. Milosevic fell from power;

(5) Boycott in question shouldn't be seen only as relation of parties toward parliament as institution but also as mean for deepening basic lines of division in our political tissue. Opposition parties, in this way, are contributing to survival of existing pluralism of identities or rather condition – shortage of we-consciousness. One can't develop democratic political community unless one is prepared to accept common rules of the game as obligatory for all sides in case of defeat. If not “... Democratic consensus is endangered in its essence... because willingness to accept being outvoted represents elementary awareness of common belonging.<sup>7</sup>”;

(6) Based on previous statement one can draw conclusion that in this case we are dealing with ignoring institution of democratic elections. Not respecting their outcome, parties (in this case opposition ones) are actually de-legitimizing values that they rhetorically support. Montenegrin parties according to their behavior, reminds us of stock companies whose leadership, unless they possess and control majority of stocks, see parliamentary institution as imposed and one where they are forced to be by chance of circumstances. How otherwise interpret fact that toughness of attitude to permanently abandon parliament has become measure of consistency and principles in communication within and between opposition parties.

### **Recommendations:**

(a) In order that parliament could fulfill its role and enjoy reputation belonging to it, responsibility is not, of course only on opposition. Creation of confidence into most important institution of representative democracy is reciprocally linked to its efficiency as well as efficiency of other institutions within the system. Having that in mind we are not surprised by presented mood of public opinion, as for some time now, this mood is directed toward some kind of resignation that is result of incapability of most important institutions to efficiently solve urgent social problems and to convince citizens that their standard of living and chances for social promotion will improve in conceivable time period. Instead, citizens see politics as **partiotocracy game** and institutions as inefficient.

Regarding this statement the fact is that in time we have de-legitimization of such behavior. Regular researches of political public opinion in Montenegro, conducted by CEDEM, are confirming this:

***Support to opposition boycott of parliament:***

<i>Position</i>	June 2003	September 2003	December 2003	April 2004
Yes	45.4	27.0	24.3	26.1
No	38.2	44.8	42.5	47.3
Doesn't have opinion on that	16.4	28.2	33.2	26.6

(b) Increasing efficiency of parliamentary work in situation of opposition boycott is possible if there is readiness of parliamentary majority to accelerate process of law adoption as well as other regulations that are part of necessary legislative reform. Having that in mind it seems irresponsible that two ruling parties, for months now, are “testing” how firm is position of the other regarding Police Law and Intelligence Service Law. In this way they are all sending a message to voters that certain political subjects that received their votes do not respect democratic institution of elections and others that re- distribution of power and personal understanding of power are insurmountable problems. If they continue with this practice there is danger that mood of public opinion is moving toward something that might be called “tired accustomedness”.

(c) Instead of irresponsible opposition, although there is no substitute for it, in legislative process services of competent NGOs and specialized international organizations should be used. Such practice, although not very frequent, is not uncommon to Montenegrin parliament. One of the first acts to be adopted in these circumstances is new Operating Procedure of the very parliament.

(d) Finally, in order to change image in public opinion about parliament as institution representing extended arm of parties leadership (“reduced institution” V. Goati) and thus its inferior role regarding parties it is necessary to reform current electoral legislation. In fact it is necessary to provide informative precondition in order that elections and electoral system could become stabile institutions and not as it is the case so far, means for one-time managing of conflicts.

1 Classic definitions of parliamentary function was made in 1867 in W. Begehot *The English Constitution*. These definitions proscribed: 1. Election of prime minister and Government (*elective function*) 2. Expression of people's opinion on public affairs (*expressive function*) 3. Educating people (*teaching function*) 4. Informing people (*informing function*) 5. Passing Laws (*legislative function*).

2. See more in: O. Popovic- Obradovic, M. Sukovic, V. Pavicevic: “Parliamentary practice in Montenegro”, Podgorica, SoCEN, 2002, pages 175-240

3. About meaning and influences of marked lines of division upon actual Montenegrin political configuration see more in: “Montenegrin public opinion 2000”, CEDEM- Podgorica, report no. 1- January 2000 and no. 2 April 2000

4. <sup>1</sup> L. C. Bresser - Pereira, J. M. Maravall & A. Przeworski, *Economic Reforms in New Democracies: A Social-democratic Approach*, Cambridge, New York, 1993, pages 215-216 (According: J. Vjatr, "Dangers of Parliamentary practice in Poland" in: "Post-communism and power", Yugoslav Association for Political Sciences- School of Political Sciences, Belgrade, 1996, page332)

5. Interpreted data represents part of results from public opinion research conducted in that period and realized by CEDEM, that is specialized agency DAMAR from Podgorica. Missing percentage up to 100% relates to interviewee who didn't want to answer the question regarding confidence in Montenegrin parliament.

6. In the meantime, public found out that primary reason was not the only one and exclusive reason behind the boycott. Even when final goal was made public- change of power through extraordinary elections- it was stressed the demand for prime minister and president of strongest party to resign and leave politics. Various reasons were used to justify such demands. First it was alleged involvement of prime minister in illegal business with cigarettes and then also alleged involvement in well known sex- trafficking case that is still present on Montenegrin political scene.

7. About problems of pluralism and identity see more in P. G. Kielmansegg: *How much pluralism can democracy endure*, Belgrade, Gledista, no. 3-4 1991



## **OBSTACLES OF ESTABLISHING TV - PUBLIC SERVICE**

*Drasko Djuranovic*

### **Reform on installments**

*Law was adopted long time ago as well as numerous legal and organizational acts; new management team started working; representatives both of parties in power and opposition claim they want changes... Still transformation of state run radio-television into public service is practically at the very beginning*

Story about different state television, about media company that is not simply government tool for controlling and directing its subjects is story ongoing since the beginning of multiparty system in Montenegro.

At the beginning of 90<sup>th</sup> Montenegro was practically in media gloom: one state run newspaper, one state run radio and one state run television. Only when multiparty system was introduced different projects of private, local and national media started to evolve. That was indication of changes on media scene. And really: 2004 in Montenegro, state with merely 700 000 residents there are four daily newspapers, seven televisions covering the whole territory of Montenegro, more than 13 local (town) media companies as well as numerous magazines and periodicals... Despite al this, Montenegro is still at the beginning of media reforms and very far from transformation of state run media into public service.

First steps, in order to change the television, were taken in 1997 when Montenegrin leadership, at the time, started fight against Milosevic's regime: that is when television opened itself to other agencies, information weren't coming from one center any more. Even more important: management team of Montenegrin Radio and Television (RTV) at the time, stopped usage of hate talk that was so frequently used by state television. That enabled, for the first time, serious demonstration of differentiated reporting on various topics on channels of state television and radio.

### **Legal framework of changes**

Almost all formal- legal conditions for transformation of state run television and radio into public service are met. Law on Public Service was adopted last year and after that, according to regulations of that law, adequate managing bodies were formed- Executive Board and Program Council of Montenegrin RTV. At the middle of last year managerial staff of RTV was also elected: director and program director, and that completed formation of team that can conduct reforms.

Changes went slowly but still they were important, at least in area of self-regulation. Within Montenegrin RTV necessary reform acts were adopted: Montenegrin RTV Statute, Program Principles and Professional Standards as well as other important norms and program acts that are within authority of RTV Council. Within these changes we have Montenegrin RTV Ethical Code, which is being prepared in cooperation with Media Institute as well as program orientation and annual plan and work scheme. As planed, these documents shall be adopted within Montenegrin RTV by the end of May

(this year). It is important to say that elections for executive bodies that govern Montenegrin RTV- members of Executive Board and Council- were done in accordance with proscribed procedure, what means that numerous social, NGO and professional journalistic organizations conducted widespread propaganda and nominations for members of Montenegrin TV managerial team. Therefore it can be concluded that both, Executive Board and Council, were elected regarding necessity for reforms of state run electronic media.

All mentioned documents were done in cooperation and monitoring of international community expert- bodies that are in charge of monitoring and helping implementation of state media reforms. Analyzes of these documents tells us that we are dealing with reform orientated principles and rules guiding future work of state run electronic media. Furthermore, different representatives of various journalistic associations and media companies formed working group in charge of implementation. Those are necessary preconditions for transition of state run electronic media in Montenegro. Still, two years after formal start of transformation, reform of state media is still at beginning phase: except formal- legal assumptions there is little else visible done within Montenegrin RTV. Although many are talking about changes and acceleration of reform of state run electronic media, Coordination Board of, project organizational changes, hasn't been formed yet. Also, first steps taken by new management marked the start of political crises in Montenegro. One of the first decisions of newly appointed Council of Montenegrin RTV was to rescind channel 3 and interrupt transmitting parliamentary sessions. Those acts provoked harsh reaction of Montenegrin opposition, which used interruption of transmitting parliamentary sessions to abandon parliament. It should be said that Montenegrin RTV Council's decision was in accordance with new Law and that opposition reaction was reckless.

Maybe- in the common interest- they could have waited with decision to stop transmitting parliamentary sessions, delay it until the scheme of reporting from the parliament is completed. This way opposition wouldn't have reason for leaving parliament. Thus we have a Montenegrin paradox: first move to reform state television and radio has caused serious political clashes in Montenegro.

### **Identification of problems and obstruction to changes**

Mastodon called "state television and radio" practically hasn't been touched: even today that is company in serious debts, surplus of employees and it vegetate, most of the time, with small amount of programs.

There four main points in resisting changes:

a) Resistance within the house. There are no exact data on surplus of employees in Montenegrin RTV. Television and radio were, for long time and constantly, "filled" with personnel sent by politically powerful and influential people. This was usually, kind of social mechanism in practice, for taking care of people, or better says politically obedient ones that were rewarded for their diligent party- work with job in RTV. When they were employing these people nobody paid attention, whether new employee has professional qualifications for the job or is there already such professional profile employed in RTV and so on.

It's no wonder than that media company with 900 employees, except news program practically doesn't have production in areas such as education, documentaries, drama and other programs! Having that in mind and comparing it with number of employees and program volume in other countries we estimate that some 400 persons (!)

in radio and television are surplus employees. At the same time it is evident lack of professionally -theoretically and technically educated professionals within Montenegrin RTV. That paradox – surplus of employees and lack of capable professionals- causes and will continue to cause considerable tensions within this state media company. This means that new management will be forced to employ certain number of capable professionals while at the same time dismiss from the job or in some other way dispose of burden of couple hundred surplus employees. Therefore it is normal that bigger part of RTV employees fear changes and in reality- not openly but behind management's back- opposes reforms that might bring them into the street. This is significant limiting factor within this media company.

b) Resistance from the government. Ruling coalition – under pressure from international community but also under internal pressure from NGO sector and media- formally renounced monopoly over state media. Once, at the beginning of 1990 it was sufficient that Montenegrin president publicly reprimand work of editor in chief of state media (Momir Bulatovic against editor of state radio Danilo Burzan) and that editor would be dismissed immediately. Compared to those times, actual ruling coalition doesn't have possibility to directly “run things around here” regarding state media. Electoral procedure for members of Executive Board was conducted with respect to idea that various social structures provide representatives in executive bodies of Montenegrin RTV with tendency that NGO sector plays decisive role. Still, composition of Montenegrin RTV Council even Executive Board, points to conclusion that parties in power managed- through their lobbying channels- to have certain influence through people close to them or people who were in certain positions thanks to influence of ruling parties. In this way government can pretty much influence decisions of Council or Executive Board and that shows desire of ruling coalition to see state media as an extension of government. This also represents another obstruction to real changes.

c) Resistance from opposition. All opposition parties without exception greeted adoption of reform laws on transformation of state media into public service. With good reason: after years of government domination over state media, finally there was possibility for state media to reflect more objective picture of reality. However, things opposition did (both coalition “Together for Changes”, Liberal Union of Montenegro as well as other opposition parties) points to fact that there is no clear understanding yet of what public service really means, within this political group. Numerous public announcements of opposition parties demonstrated this - state media were criticize when they didn't pay full attention to opposition activities. This attitude was crucial even when they were abandoning parliament although management of Montenegrin RTV promised to cover objectively all happenings and completely cover all parliamentary activities. Still that didn't have any influence on opposition to change its decision and abandon parliament. Thus opposition confirmed that they, just as Montenegrin government, see public service only as service mechanism for promotion of their parties' positions and their political ideas. With such positions opposition parties are not supporting efforts to transform state media.

All this points to key obstruction in implementing idea of public service. Overview of positions within Montenegro points to conclusion that there is no political consensus necessary for reform of state media.

d) Lack of fresh capital. Special problem in transformation is lack of money. According to available information Montenegrin RTV had previous debts piled up and that complicates situation even further. Recognized surplus of employees must be provided for in order to avoid social unrests within company that might slow down rhythm of changes. That means providing big amount of money for these surplus

employees. Additional modernization of Montenegrin RTV is also needed although some progress has been made in that area in past two years (thanks to foreign donations).

However it is extremely difficult to turn over night, old state media companies that were based on budget donations, into market orientated and successful news companies. That requires first of all long - term investment in marketing and management team that would be capable to ensure incomes for peaceful transition, money for urgent investment in technology and perhaps most important, money for employing professional staff or scholarship for already employed.

### **Recommendations**

This mixture of political, social and financial obstructions represents big obstacle to transition of state media into public service. Process is at the very beginning and only first reform step has been taken- adoption of number of media laws and election of management. Next step - implementation of media laws must be accelerated during 2004 and especially 2005. First thing that needs to be done, as precondition to recovery and change of state media company, is financial stability. Decision to increase price of television subscription (it is collected via phone bills) must be judged - although unpopular - as efficient mechanisms of collecting money needed for investments. Next step might be in direction of dealing with existing debt of Montenegrin RTV. New management team didn't create this problem but they will unfortunately face its consequences - growing non-liquidity because of previous debts. Therefore state must help management teams of Radio and Television to deal with these debts in order to enable their functioning.

Part of future public service programs - especially educative, cultural and scientific program- must be partially financed by Montenegrin state because these programs would advertise national and historical heritage and cultural treasure of Montenegro. Financing, or rather partially financing programs from areas of science, education and culture would positively influence quality of those programs. Of course that wouldn't be classical budget financing but rather contracts of sponsorship depending of project which management of television or radio proposes. According to our information international community, during 2004, will continue to provide donations from time to time to projects of state media companies. Because of previous experiences it is necessary to strictly monitor donated money and to insist on investments in technology and education of employees.

It would be good to consider introducing some kind of monitor- watch dog- informal body formed by influential representatives of NGO sector. This body would conduct additional pressure on those who create transformation policy of state media.

Financial injection and other mentioned measures would create bases for realization of reforms and transition of state media into public service and finally create national consensus (minimum of political will) necessary for reforms in this area.

# REFORM OF THE PUBLIC ADMINISTRATION

*Ph.D. Milan Markovic*

## **Position, importance and starting experiences of first Ombudsman in Montenegro**

### **I Introduction**

*Montenegrin Government has adopted in March 2003 “Strategy of administrative reform in Montenegro” that represents strategic document in this area. Strategy defines mainstream, volume, areas and other important elements of future administrative reform.*

We are currently in the first phase of administrative reform in Montenegro lasting from 2002 to 2004. Second phase is predicted from 2004 to 2006 and third from 2007 to 2009. One of the instruments of administrative reform and institutional form of protection of human rights is ombudsman.

Democratic character of Montenegrin government obviously demands introduction of significant control institutions, firmly built into national legal system, financially and technically independent, whose presence and engagement shall enable real and concrete public responsibility as corner stone of democracy. Of course it is understandable that formal introduction of such institution doesn't mean that government is democratic one but still points out to further democratization of government by very existence of these and similar control institutions.

Law on Protector of Human Rights and Freedoms was adopted on July 8<sup>th</sup> 2003 and by this act Montenegro joined number of modern organized and democratic countries that have such institution. Protector of Human Rights and Freedoms, as expert-professional, legal and democratic institution introduced into Montenegrin legal system, represents precondition and way to ensure efficient and quality institutional protection of human rights and freedoms and in consequence to that enforcement of state of law based on principles of rule of law.

Simultaneously, introduction of this institution is significant also because Montenegrin legislature is obliged to harmonize with legislature of European Union and international standards in area of human rights and freedoms. Contemporary state systems can't be regarded as complete and balanced without Protector of Human Rights and Freedoms.

### **II Mission and functions of Ombudsman**

Protector of Human Rights and Freedoms is independent in his work. He protects human rights and freedoms guaranteed by Montenegrin Constitution, laws, ratified international agreements on human rights and generally accepted rules of international law when those rights and freedoms are breached by act, doing or absence of action of state bodies, local authorities and public services or other public authorities. Therefore, protector deals with general issues of importance for protection and development of human rights and freedoms and also establishes cooperation with adequate organizations

and institutions dealing with human rights and freedoms. He can also start initiative for changing or amending certain regulations so that they can be in accordance with internationally recognized standards in area of human rights and freedoms as well as propose that procedure is started at Montenegrin Constitutional Court for evaluation of legality of regulations and general acts regarding human rights.

Apart this function, Protector has far grater mission and that is to create awareness and atmosphere about the need for providing principles of rule of law; complete and consistent protection of citizens' rights and freedoms and in general -creation of atmosphere of legal security for citizens; legal and impartial work of all public bodies at which citizens are realizing their rights, freedoms, obligations and legal interests.

He doesn't have right to repeal or revoke acts of administration or other public bodies and services but he can influence their work pointing to mistakes, committed misuses, injustices, unsuitability or incomprehension of their decisions. He can inform Parliament and general public about his findings, positions and opinions and that in turn brings to realization of transparency in work of public administration and other public bodies and services regarding Parliament, Government, public and citizens.

Montenegrin Parliament elects Protector (Mr. Sefko Crnovrsanin, ex judge of Montenegrin Supreme and Constitutional Court was elected in October as first Montenegrin Protector of Human Rights and Freedoms) upon proposal of authorized parliamentary body by majority of total number of MPs. To be qualified for election candidate for Protector of Human rights and Freedoms has to be Montenegrin citizens with university degree, experience in area of human rights and freedoms and high personal and professional authority.

Protector has at least one deputy (so far one deputy was elected, expert associate of Montenegrin Constitutional Court, Mr. Budimir Scepanovic) and Parliament decides on number of deputies upon proposal of Protector. It should be mentioned that, according to Law, one of the deputies deals with protection of minority rights. Deputy does work within jurisdiction of Protector.

Mandate of Protector and deputy is six years and after that they can be reelected once again. Office of the Protector started working officially on December 10<sup>th</sup> 2003, on world day of human rights and freedoms. At the beginning this institution had certain organizational problems<sup>1</sup> but they were overcome pretty fast.

Expert service (hasn't been completed yet) has 12 permanent employees (10 of them with university degree) and 5 part time employees (two of them university degree lawyers). Structure of employees is multiethnic.

Protector's deputy, secretary and advisers come from different institutions (judicial bodies, attorney office, ministries, Academy of Science) what means that intention was to have well trained Expert service, having in mind tasks and authorizations facing such institution.

In order to educate and inform the staff with experiences of similar institutions in the region, with financial help of foreign organizations<sup>2</sup>, employees of Protector Office visited Slovenia, Bulgaria and Albania. New visit to Slovenia is planed as well as visit to Greek Ombudsman.

In order to perform its basic mission, and that is protection of human rights and freedoms, it is foreseen that proceedings at Protector are free of charge. He can be approached by anyone who thinks that by act, doing or absence of action from the part of government his human rights and freedoms were violated. Protector can be approached by individual, organization, association as well as by MPs. In complaint to Protector one should write the name of body to which complaint is addressed, description of violation of human rights and freedoms, facts and circumstances supporting the complaint, data on

already used legal means, personal name and address of complainant. Complaint can be made orally and minutes can be taken by Protector.

Complaint is made within one year from violation of human rights and freedoms that is from the day one finds out about the violation. In extreme cases Protector can act even beyond this period.

Complainant doesn't have to exhaust all legal means in order to turn to Protector if he thinks this to be more efficient. However, Protector can ask the complainant, before he acts upon complaint, to exhaust other legal means in order to eliminate the violation complainant is complaining about.

It is important to say that even arrested and imprisoned persons can submit complaints as everybody else. Protector can deal with such cases upon his own initiative. Arrested or imprisoned persons have right to submit complaint in sealed envelope. Written complaint received from arrested or imprisoned person is immediately forwarded to Protector, unwritten and unopened and the Protector's answers to that person are treated in the same way.

When acting upon complaint, Protector can, for the sake of establishing facts, examine every individual, as expert or witness, ask for information and inspect all papers and other documents of corresponding bodies regardless of level of secrecy. Also, without prior warning, Protector can inspect facilities where arrested or imprisoned persons are held and witness their examination or talk with them without presence of official personnel.

After acting upon complaint Protector gives final opinion containing: "finding whether, in which way and to what extent violation of human rights and freedoms of complainant had occurred, recommendations what should be done in order to eliminate violation as well as time limit within state bodies must act. State body to which complaint is referring is obligated to provide report to Protector, within time limit he determines, about actions taken regarding fulfillment of recommendations given in final opinion". If state body doesn't act upon recommendation, Protector can address public, immediate superior body, submit special report about that or recommend to superior body to start disciplinary proceedings as well as initiate proceedings for releasing from position official person whose actions caused violation of human rights and freedoms.

### **III First experiences of Ombudsman**

More than 200 complaints (written) have been submitted to Ombudsman so far and some twenty calls daily are received from citizens asking for help from this institution. Protector and his associates receive from 5 to 10 persons each day.

These data tells us that establishment of institution - Protector of Human Rights and Freedoms - was justified. Citizens are hoping that this institution will significantly contribute to establishment of rule of law and democratic society as well as to improvement and protection of human rights and freedoms in Montenegro.

The biggest part of complaints is regarding citizens' dissatisfaction of courts (decisions, non-implementation of those decisions and also dragging out judicial proceedings). Citizens are also complaining about labor regulations, social and retirement care, housing problems, work of certain ministries, violation of environmental regulations, urbanism and spatial planning, work of local authorities. Few complaints were made by arrested persons and persons serving jail sentences. Several citizens of neighboring countries also addressed Protector asking for help in achieving certain rights

in their own countries. Part of complaints was related to violations made before Law on Protector of Human Rights and Freedoms went into effect.

Expert service already processed over 100 complaints. Few recommendations were given also. Bigger part of received complaints was not submitted in proscribed form and doesn't contain necessary data - based upon which, eventually, adequate proceedings could be taken. Therefore Service is informing citizens once in a while about proper form of addressing this institution and also about their competences. Communication with state bodies that citizens are complaining about is, for bigger part, good. State bodies are supplying Protector's office with requested statements in time.

Protector submits annual report about his work that must be accessible to public, to Montenegrin Parliament. In this report he specifically informs Parliament with statistical data of all cases he acted upon, gives general estimate of state of human rights and freedoms in Montenegro as well as recommendations and measures he proposes so that stated shortages could be eliminated. Protector can also submit special report if he thinks necessary.

Protector and his deputies are obligated to preserve secrecy of information or personal data, which they obtain by doing their duty. This obligation remains even after active service.

### **Recommendations**

- From the work done so far we can conclude that citizens are not well informed about tasks and competences of this institution. They usually see it as court of last resort that can alter decisions and acts of state bodies, as well as sort of citizen's lawyer. Having that in mind action should be taken to inform and educate (through media, expert lectures, creation of informative materials) citizens about competences of Protector of Human Rights and Freedoms. Part of such campaign could be realized within so called "Ombudsman's days" which are predicted in law and their purpose is to inform citizens in Montenegrin municipalities and receive complaints from them.
- Some expert lecture should be held for state and local authorities employees with goal to speed up complaint procedure upon Protector's requests in protecting citizens' rights. Expert lectures should be held in prisons also.
- Public campaigns in mass media are of great importance (radio, TV and daily newspapers) to present to citizens in clear way Ombudsman institution and benefits citizens can have regarding realization of their rights through this institution.
- Regarding Ombudsman institution one of special priorities is realization of regional cooperation between Ombudsman offices by eventual signing of cooperation protocol. This would enable quality exchange of information and experiences necessary for successful work of Ombudsman institution.
- Another important thing in enforcing ombudsman institution is providing support from domestic and foreign experts in the field of protection of human rights.



- Ensuring stable and regular funds for Ombudsman office is also priority especially having in mind that relatively independent position of this institution is *conditio sine qua non* of effective functioning of ombudsman.

### **Fusnote**

1. Facilities for the work of Protector were provided by Montenegrin Government (a house is rented), and equipment (office furniture, PC and etc.) was financed by European Agency for Reconstruction.
2. Professional training for the staff is being helped by OSCE office in Montenegro.

## **ANTICORRUPTION**

*Dr Dragan Prlja*

### **Public procurement as part of anticorruption system in Montenegro**

#### **Introduction**

Within reform processes linked to change of Montenegrin legislature in second part of year 2000 preparations for adoption of new Public Procurement Law have started. Government of Montenegro has formed an expert team made from foreign experts, domestic experts and representatives of state. During January of 2001 text of Public Procurement Law was prepared as well as Rules on Public Procurement and Forms on Public Procurement. Draft of this Law entered parliamentary procedure in 2001 and was adopted and published in “Official Bulletin of Republic of Montenegro”, no. 40/2001. This was the first in line of anticorruption laws adopted in Montenegro.

The importance of adopting this Law in 2001 was indeed great. Efficiency of public Procurement represents fundamental base for success of market economy and also represents bases for creation of long- term economic growth, opening of new jobs, better development of business, creation of competitive market that in the end is supposed to enable receiving “best value for money”. Well-guided policy of public Procurement can result in big savings for public funds and in consequence savings for tax payers. Apart from these very important benefits, good public Procurement system also provides fair and transparent procedure of public Procurement that results in reduction of corruption and protection of bidders’ rights. The whole system of public Procurement must insure that best offer really wins during competition under fair and equal terms. If we remind ourselves that until August 2001 there was no Public Procurement Law in Montenegro and that press wrote very often about numerous misuses in the process of public procurement we may state that, for fight against corruption in Montenegro it is very important to establish national system of public procurement in accordance with highest world standards.

Public procurement cover acquisition of goods and services by public institutions. In countries of European Union public procurement represents even more than 30% of public expenses, that is to say more billions of euros. There are no very precise data in Montenegro on the whole amount of money spent for public procurement in previous years, but it is assumed that we are dealing with approximately 20% of Montenegrin budget.

In the previous period, when system of public procurement in Montenegro has been built, since the adoption of Public Procurement Law in 2001, some advantages and disadvantages of certain elements of this system have occurred: legislature framework, institutional framework, training, transparency, protection of bidders’ rights, control functions and international cooperation.

## **Legislative framework**

Public Procurement legislative framework in Montenegro encompasses: Public Procurement Law, Regulation on setting financial amounts and time limits that are applied when implementing methods for public acquisition activities, Commission for Public Procurement Rules and forms, as well as other regulations regulating certain issues from the area of public procurement.

Montenegrin Public Procurement Law is divided in 20 chapters: Introduction, Definition and principles, Notification for submitting offers, Documents and auction, Instructions to bidders, Submission of offers, Investigation, evaluation and comparison, Award of contracts, Acquiring consulting services, Officials for public Procurement, Directory for Procurement, Ad- hoc managing unit, Commission for awarding contracts, Impartiality, Rules and Forms, Transparency, Public infrastructure, Disputes, Illegal activities and Final regulations. It is important to notice that regulative accompanying the Law is very detailed one and contains some 400 pages of texts and forms. Practice has shown that this regulative is too huge and detailed and therefore inadequate to circumstances influencing application of the Montenegrin Public Procurement Law so that forms have to be urgently reduced and clarified in order to be useful in practice.

Anticorruption measures in Montenegrin Public Procurement Law are defined in chapter 16 “Transparency” and in chapter 19 “Illegal activities”.

Chapter 16 of Montenegrin Public Acquisition Law titled “Transparency” in articles 65-72 defines situations of unlawful influence, conflict of interests, obligation to give solemn statement and respect ethical code, give statement on property possession, obligation of publicly informing about contracts, obligation to run archive of public procurement, obligation on availability of public procurement archive to any interested person, obligation of Public Procurement Commission to control and prepare annual report that is submitted to Montenegrin parliament.

Chapter 19 of Montenegrin Public Procurement Law titled “Illegal activities” is defining anticorruption measures, that is to say defining prohibited behavior within activities of public acquisition. As prohibited behavior it is consider following: reaching agreement on fraud and market control, limiting the competition, fraud when making an offer, bribe. This chapter foresees possibility of anonymous phone calls to special anticorruption phone line. State attorney is in charge of bringing the charges in cases the Public Procurement Law is breached. Administrative and civic responsibility is proscribed for each individual that breaches the Montenegrin Public Procurement Law or other regulations adopted on bases of this Law.

At the meeting on September 7<sup>th</sup> 2001, Montenegrin Government has passed Regulation on establishing amounts and time limits that are applied in implementation of methods for public Procurement activities (“Official Bulletin of Montenegro” no. 48/2001). This regulation regulates in details time limits within certain procedures during public Procurement process as well as financial amounts determining what activities in specific public acquisition cases shall be applied (“Official Bulletin of Montenegro” no. 23/2003).

Montenegrin parliament had adopted on June 19<sup>th</sup> 2002 Law on Changes and Amendments of Criminal Law of Montenegro (“Official Bulletin of Montenegro” no. 30/2002). Within these changes and amendments a new crime act was introduced- “corruption in public procurement”.

Implementation of Public Procurement Law had a number of shortages in legislative area and especially in area defining status of Commission for Public

Procurement regarding a part defining protection of bidders' rights. Because of the necessity to get rid of these shortages and to improve legislative regulations in the field of public procurement Ministry of Finance on 29.07.2003 had formed working group with task to prepare draft of Law on Changes and Amendments of Public Procurement Law. At the beginning of 2004 this working group has prepared draft of Law on Changes and Amendments of Public Procurement Law. This draft, with more than 70 articles significantly changes and improves existing Public Procurement Law especially in domain of: conditions bidders are obliged to fulfill, proofs bidders have to submit, time limit in which bids have to be open, methods and criteria for evaluating and comparing bids, planning competitions, officials of public procurement, status, structure and competences of Commission for public Procurement, control of public procurement, protection of bidders' rights and public interest and penal regulations.

Montenegrin public is demanding ever more that new Public Procurement Law should be prepared in order to remove shortages from the existing one and also to improve the very system of public Procurement. These are, of course justified demands, because there is a need in all countries in transition to harmonize system of public procurement with international regulations and experiences acquired in years of practice. An often change of regulations in this field is kind of rule in almost all countries in transition.

### **Institutional framework**

Institutional framework of Public Procurement system in Montenegro consists, first of all from Montenegrin Commission for Public Procurement and from officials for public procurement in public institutions. Montenegrin Government established Commission for Public Procurement on September 28<sup>th</sup> 2001 as body in charge of supervising and developing public Procurement system. At the first meeting of the Commission, held on November 1<sup>st</sup> 2001 a set of rules and forms, necessary for functioning of public Procurement system in Montenegro, was verified. President of the Commission resigned on November 3<sup>rd</sup> 2001. Montenegrin Government had appointed Mr. Niko Nikcevic, retired judge of Montenegrin Supreme Court, for new president of the Commission for Public Procurement on November 9<sup>th</sup> 2001. In November 2001 Montenegrin Commission for Public Procurement in cooperation with "Official Bulletin of Montenegro" had published a book "Public Procurement Law with commentary" and after that also rules and forms for public Procurement on CD.

On November 29<sup>th</sup> 2001, in the presence of Montenegrin president, president of Constitutional Court and president of Supreme Court, president of Commission for Public Procurement and 56 employees of public procurement agency gave solemn statements about their property. In December 2001, Montenegrin Government provided office for Commission for Public Procurement and Department for Procurement furnished that office. Government also provided funding from budget reserves, necessary for functioning of Commission for Public Procurement as well as funds for acquisition of computer equipment necessary for the work of the Commission. Until October 2003 according to data of Montenegrin Ministry of Justice there were 164 officials in charge of public Procurement so that meant that most of public institutions in Montenegro had appointed officials for public procurement.

Although it seems that institutional framework for public procurement system is complete by creation of Montenegrin Commission for Public Procurement and appointments of officials for public procurement in public institutions we may say that

their status is not adequately regulated and that fact poses big obstacle for efficient functioning of public procurement system in Montenegro.

Changes and amendments- draft of Public Procurement Law, foresees more precise definition of status and competences of Commission for Public Procurement and officials for public procurement.

If the new Public Procurement Law is to be adopted special attention should be paid to regulating key questions regarding legislative framework of public procurement in Montenegro.

## **Training**

Very important segment, significantly influencing implementation of Public Procurement Law is training both officials for public procurement and representatives of bidders.

Montenegrin Commission for Public Procurement in cooperation with Institute for Comparative Law of Law School and KPMG/Barents during 2002 had organized 14 training courses for officials for public procurement and 409 persons had completed that training what significantly influenced beginning of implementation of Public Procurement Law.

Problem with training occurred because Commission for Public Procurement wasn't capable nor professionally or financially to continue with these courses for training public officials and representatives of bidders. In practice public officials and representatives of bidders were forced to search for answers by phone, e-mail or personally from employees of the Commission for Public Procurement or even from members of the Commission. All this disabled normal work of the Montenegrin Commission for Public Procurement.

After changing and amending Public Procurement Law or after adoption of new Public Procurement Law, it would be necessary to organize a series of courses and workshops that will enable adequate training of officials for public procurement and representatives of bidders. In this way implementation of the Public Procurement Law could be significantly improved.

## **Transparency**

Commission for Public Procurement on February 13<sup>th</sup> 2002 had put its own web-presentation ([www.nabavka.cg.yu](http://www.nabavka.cg.yu)) and took responsibility to announce tenders of public institutions on this web-site on which, up to now there were more than 1000 tenders announced. Web site is upgraded daily and there you can find current legislature: text of the Law, regulations, all forms, all rules, directives of European Union, ongoing and archived tenders, reports, questions and answers, useful links, list of employees in public Procurement, list of signed contracts, etc.

We should praise Commission for Public Procurement for making a positive move by changing regulation 7 (2), which obliges all public institutions to announce their tenders on web site [www.nabavka.cg.yu](http://www.nabavka.cg.yu) by E- mailing announcement on Commissions' address [nabavka@cg.yu](mailto:nabavka@cg.yu). This way Commission can influence changes in announcements even before they are put on web so that they are in accordance with Public Procurement Law and also significant savings for national budget have been made because there is no need to pay announcements to daily press.

Unfortunately decisions that Commission is making upon various complaints from bidders are still not accessible via web- site and in order to work more transparently Commission should edit even these decisions on the web site.

Commission for Public Procurement has held only few press conferences so far and that should be done in the future also with aim to increase transparency of its work.

### **Protection of the bidders' rights**

Protection of the bidders' rights in existing Public Procurement Law is regulated in article 79. As this article doesn't determine time limit for submitting complaint or appeal, Commission for Public Procurement, with aim to protect bidders' rights, created a rule of public procurement no. 79 in which determines time limit for submitting complaint to 8 days, submitting appeal 8 days and submitting charges 30 days.

This article doesn't define whether decision of Commission for Public Procurement upon appeals is definite one, so Commission for Public Procurement in decisions already made- states that those decisions are definite and that for abolishing those decisions charges can be brought at Montenegrin Supreme Court within 30 days from receiving decision.

In this way Commission for Public Procurement has protected public interest or legal interest of participants in public auction.

As in existing Public Procurement Law there no money penalties for committed breaches of Law, Montenegrin Parliament aiming to increase efficacy of fight against corruption adopted on June 19<sup>th</sup> 2002 Law on Changes and Amendments of Criminal Law of Montenegro ("Official Bulletin of Montenegro" no. 30/2002). With these changes and amendments a new criminal act "corruption in public procurement" was established. Article 229 of the Montenegrin Law on Changes and Amendments of Criminal Law goes: "Who, using its position in the process of public procurement or process of selecting contractor or service provider, gains benefit for himself or other shall be punished with sentence of three months to six years in jail". If gained benefit is of huge amount perpetrator can receive sentence even up to ten years in jail. In this way precise criminal responsibility for corruption in area of public procurement was introduced. Two year of practical application of this Public Procurement Law apart number of positive effects has shown also number of shortages that must be eliminated as fast as possible. Working group of Montenegrin Government has prepared draft version of Changes and Amendments of Public Procurement Law that would ease, when adopted, the implementation of current law and remove legal loopholes and controversy in certain articles.

In this proposal the process of revision and protection of bidders' rights is regulated in special chapter and to great degree in accordance with EU directives. Working group considered that at the moment there was no need to adopt law on revision of public procurement procedure because proposed solution is almost identical to Serbian Public Procurement Law as well as to solutions from proposal for Law on Changes and Amendments of Serbia's Public Procurement Law.

In this proposal we have regulations regarding violations and money penalties for companies and responsible persons so with these regulations of Montenegrin Law on Changes and Amendments of Criminal Law the system of public Procurement in Montenegro shall be complete and functional one.

Although with legal loopholes, limited financial means and only one employee, Commission since its beginnings was dealing timely with appeals, performing other duties proscribed by law and even providing legal opinions.

In 2002 Commission held 60 sessions and produced 361 legal opinions. Apart from this, legal advises were given by phone on daily basis- explanations to bidders and other persons interested in procedure of public procurement.

During 2002 Commission examined 35 complaints, accepted 20 of them as reasonable and suggested adequate measures to be taken in order to correct the situation, rejected 15 of them. At the same period 4 legal disputes were brought against the Commission at Montenegrin Supreme Court but all for appeals were rejected as unsubstantiated. Commission also in 2002 have examined separately, reported cases of illegal and poor management in 10 cases and proposed measures for correction by ordering to purchasers to repeat procedure of public procurement.

In year 2003, until December 24<sup>th</sup>, 53 complaints were made, 25 of them were accepted, 28 rejected. During same period 12 disputes against Commission were brought, in 4 cases charges were rejected, 1 case was terminated because prosecutor informed court that he was retiring charges, while 7 cases are still ongoing.

### **Control function**

Public institutions are obliged to inform Commission for Public Procurement periodically about realized public procurement and major signed contracts. Commission is obliged to inform Montenegrin Parliament at least once a year after it collects statistical data and analyze accidentally chosen number of public procurement. In order to prepare annual report Commission had collected statistical data to identify biggest contractors, to develop mechanisms for collection of such statistical data, to make first analysis on effects that implementation of Public Procurement Law has in Montenegro.

According to first annual report on public procurement in Montenegro for 2002 it was spent 150 million euros for public procurement. This data shows that we are dealing with very high percentage of budget spent for public procurement.

Unfortunately while working on first annual report two big problems occurred. First, this reports were hard to collect because, even if warned for several times, certain number of institutions didn't submit annual reports on realized public procurement. Second problem is although Commission delivered annual report for 2002 both Government and Montenegrin Parliament, this report was not put onto parliamentary agenda, was not discussed or adopted.

### **International cooperation**

Commission for Public Procurement has cooperation with representatives of World Bank, experts for public procurement from Sweden and representatives of Office for Public Procurement and Revision Commission of Slovenia.

During 2002 delegation of Commission spent 4 days in Slovenia and Slovenian Government covered costs of this trip.

Montenegrin system of public procurement was presented at two international conferences in Belgrade and Portoroz. US-AID experts gave special help and continuous one in preparations of legislature and implementation of this legislature.

A number of foreign organizations' representatives (OESC, SIDA etc) expressed interest to help the work of Montenegrin Commission for Public Procurement.

Better international cooperation can certainly contribute to quality development of public procurement system in Montenegro and also to more efficient fight against corruption in this area.

### **Recommendations**

- During two year implementation period of Public Procurement Law, practice has shown that apart number of positive effects such as, precise definition of responsibility for lacks in the procedure of public procurement, monitoring process done by Commission for Public Procurement, sending annual report on public procurement to Montenegrin Parliament, significant savings when acquiring something, higher level of transparency and competitiveness, practice also showed number of shortages that must be eliminated as soon as possible in order to have more efficient fight against corruption in this area.
- Anticorruption measures, or established obligations in chapters 16 and 19 of Public Procurement Law are not supported by adequate regulations on violations and money penalties in order to punish more efficiently those who violate Public Procurement Law. In this area there is need for Public Procurement Law to be changed and amended or this issue should be adequately regulated with new Public Procurement Law. Money penalties, which should be used when sentencing state employees who breaches Public Procurement Law, should be defined clearly.
- Within anticorruption measures Public Procurement Law proscribed in article 81 establishment of phone number for anticorruption that citizens could use anonymously to point to state attorney perpetrators of criminal activities. Two years since adoption of Public Procurement Law this phone number hasn't been established and that should have been done immediately after adoption of the Law.
- Number of public institutions is not delivering to Commission data on mayor signed contracts on procurement made through their annual reports and thus directly breaching principles of transparency and obligation established by Public Procurement Law of Montenegro.
- Certain number of public institutions hasn't chosen official for public procurement yet nor did they authorize other public institution to make public procurement in their name and thus directly breaching article 52 of Public Procurement Law. It is necessary therefore to clearly define the responsibility of managers of these institutions for not choosing officials for public procurement by changes and amendments of Public Procurement Law or by passing a new Public Procurement Law.
- Current practice of implementing Public Procurement Law has shown that forms for procedure of public procurement should be simplified and also that manual



with practical examples- typical procedure when acquiring merchandise, services, contracts should be printed. This is competence of Commission and it should make necessary revision of forms and rules and also publish the manual with practical examples.

- Further education is precondition for successful functioning of the public procurement system in Montenegro so new training courses and workshops should be organized not only for public employees but also for representatives of bidders.
- Commission for Public Procurement doesn't have adequate working conditions. It has no adequate office or means to conduct its job. Montenegrin Government should provide Commission for Public Procurement adequate working conditions and this was also the conclusion written in report of World Bank from June 2002.
- Implementation of this system for past two years has shown some of its shortages and possibilities for improvement so bigger number of this shortages should be eliminated by adoption either changes and amendments to Public Procurement Law or adoption of new Public Procurement Law in order to bring closer Montenegrin public acquisition system to world standards and to make another significant step in fight against corruption.

# OBSTACLES TO FREE ENTERPRISE

*Rade Bojovic*

## Reform of business legislature

### I Constitutional- legal framework

#### 1. Constitution as guarantee of economic liberties and rights

Actual Montenegrin Constitution<sup>1</sup>, in article 47, guarantees liberty of earning and liberty of entrepreneurship while at the same time prohibiting creation or encouragement of monopoly position and obstruction of market economy. Also, Constitutional Chart<sup>2</sup> of state union of Serbia and Montenegro accentuate determination for market economy based upon free entrepreneurship, competition, liberal foreign trade and protection of property<sup>3</sup>.

Stressing promotion and protection of market economy and free entrepreneurship the highest constitutional-legal acts represent basic system- guarantee for development of internal economic liberties and competitive business. That also means establishment of anti-monopoly economic system. However, having in mind destructive trends in the last decade and Montenegrin economic inheritance<sup>4</sup> there is no doubt that economic reality is still far from proclaimed constitutional goals. Factually and formally abandoning the concept of socialist economy that was focused on protection of ideological type of property (social property) was not an easy and fast process. Although ex social companies were transformed into semi- state owned ones (mixed) companies in Montenegro still, some 40% of ex social capital hasn't been privatized yet<sup>5</sup>.

Direct result of this situation is slowed down development of free entrepreneurship and repression of private property. Of course all this obstructs development of liberal political spirit and influences difficult institutionalization of democratic political system. Collective understanding of economy influenced creation of autocratic political consciousness what can be easily recognize even today in unwillingness of bigger part of work force to accept entrepreneurial initiative as their business choice<sup>6</sup>.

Also, harmonization of business regulative with actual constitutional solutions, in the last decade, was painstaking and controversial process. Reform of business legislature is still not a completed process although much has been done compared to beginning of 1990. Creation of quality business regulative in correlation with other relevant legal areas will demand, regarding many aspects, great efforts and dedication in establishing free market based on openness, competition and private property.

#### 2. Montenegrin economic sovereignty

Montenegrin state, after signing Belgrade Agreement<sup>7</sup> and adoption of Constitutional Chart, has formally<sup>8</sup> taken over all key economic functions. Although in Montenegro we still have nominal and antedated constitutional framework<sup>9</sup>, numerous legal and sub-legal solutions in area of business have contributed in reaching high degree of economic sovereignty. At the same time, although Constitutional Chart predicts

harmonization of economic systems<sup>10</sup> of Serbia and Montenegro in reality there are significant differences and recognizable specific characteristics that are drifting apart already promoted economic orientations of member states.<sup>11</sup>

Except credit and institutional relations with other countries<sup>12</sup>, encouragement of open business between Serbia and Montenegro and authorizations in domain of small number of issues important for economy<sup>13</sup>, all other relevant economic functions are within authority of Montenegro<sup>14</sup>.

That also means total autonomy in area of business legislature and business development. This fact influenced dynamic reforms in area of business legislature as well as implementation of numerous solutions encouraging concept of free entrepreneurship and affirmation of private property.

## **II Legislative changes**

### **1. Start of the reforms (1998-2001)**

Break up with constitutional order of Federal Republic of Yugoslavia (1998) caused radical discontinuity in certain economic areas. Introduction of German mark as legal currency<sup>15</sup> marked the start of big changes in financial regulative area so that during 2000 Montenegro obtained proper regulations in banking domain. Law on Central Bank of Montenegro was adopted as well as Bank Law. A little bit later Law on Bankruptcy and Liquidation of Banks was adopted. This made autonomous banking system complete and that was further emphasized by acceptance of euro as official currency in Montenegro. Banking system reform encouraged restructuring of banks, stabilization and strengthening of banking businesses and without any doubt accelerated privatization and foreign investments in banking sector<sup>16</sup>. Parallel with transformation of banking sector process of establishing market of capital and stock- exchange business started in Montenegro. During year 2000 Law on Papers of Value was adopted and followed by development of institutional framework for stock- exchange business in Montenegro<sup>17</sup>.

Montenegrin Government accelerated process of price liberalization during this period so that by 2001 managed almost entirely to introduce system of free price formation except in case of few strategic goods and services<sup>18</sup>. Also during year 2000 Montenegro took over authorization in the field of foreign investments, insurance and foreign trade<sup>19</sup>. Apart changes directly influencing establishment of free market economy and development of business at the end of 2001 a new package of tax laws, that significantly changed Montenegrin fiscal system, was adopted<sup>20</sup>.

In that period, in accordance with Law on entrepreneurs, some 5000 small businessman operated, while 16 000 companies (approximately 15 000 of them private companies) operated in accordance with federal Company Law expecting adequate legal transformation in accordance with first Montenegrin Company Law.

Finally, start of business reforms at the end of 2001 encompassed some 30% of relevant regulative although implementation of new solutions was never above 20%. Complex job of establishing autonomous economic order and shaping up its own business system had just begun while necessary parliamentary activity went on in difficult political circumstances<sup>21</sup> and with obvious managerial mistakes<sup>22</sup>.

### **2. Acceleration of reforms (2002-2004)**

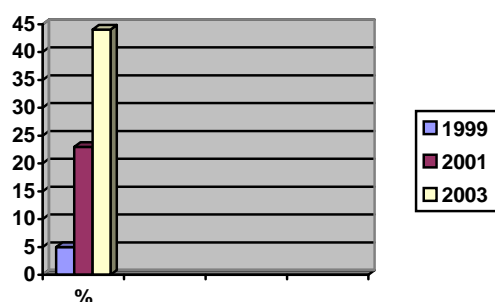
In the last two years economic reforms<sup>23</sup> (with focus on new business regulative) were significantly accelerated and beginning of 2004 marked realistic step forward in this field. Approximately 55% of relevant regulative is already reformed and for the most part harmonized with directives of European Union and international standards, while implementation level of new legal solutions also rose.

During 2002 new Company Law was adopted<sup>24</sup>. This Law served as base for transformation of legal subjects and entrepreneurs and status of companies and individual businessman was defined upon this new bases<sup>25</sup>. At the same time Company Insolvency Law was adopted and some 3500 bankruptcy and liquidation cases were started. Law regulating participation of private sector in providing public services (regulating concession rights) was also adopted as well as Accounting and Revision Law that, for the first time, introduced international accounting standards and enabled harmonization of Montenegrin business practices with international rules.

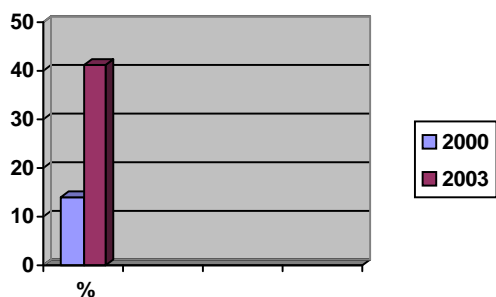
Numerous laws were adopted in so called sector- business areas (Hunting Law, Fishing Law, Veterinary Medicine Law, Law on Forests, Railroad Law, Telecommunication Law, Energy Law, Tourism Law, Tourist Organizations Law, Building Ground Law, Construction Law) what marked beginning of modernization process of normative framework within domain of various business activities.

At the same time Government announced adoption of certain number of important laws that were so far substituted with sub- legal acts or rarely implemented federal laws (Foreign Trade Law, Free Business Zones Law, Gambling Law, Antimonopoly Law). However there are still numerous relevant acts yet to be adopted and also there is a need for correction of certain reform laws as well. It is important to state that in previous period number of other laws, from different areas, were adopted and they all had one thing in common and that is direct influence on quality and development of business and entrepreneurship in Montenegro<sup>26</sup>.

## 2.2. Graphic display showing dynamics of business regulative reform



## 2.3. Graphic display showing dynamics of regulations that have direct influence on business



### III Reach and quality of the reforms

Although reform of business regulative had encompassed so far over 50% of system and sub-system laws<sup>27</sup> as well as numerous sub-legal regulations, generally speaking the whole dynamics of transformation and implementation of legislature is not satisfactory. If we have in mind that reform process started six years ago, although followed by serious political obstacles, it is realistic to say that speed of adopting and implementing necessary regulative hasn't reached needed level. Although institutionalization of new business framework is half way it is necessary to enforce legislative dynamics and specially accelerate quality implementation of new legal solutions. In previous period three Montenegrin Governments, with mixed results<sup>28</sup>, conducted business legislature reform. Unlike previous two, actual Montenegrin Government has stabile coalition and majority, which, apart all problems and deficiencies had strengthened reform process<sup>29</sup>. Estimates based upon newly prepared laws<sup>30</sup> and planned activities till the end of 2004 tells us that it is realistic to expect acceleration in shaping of new business system and completion of whole process. Therefore, responsibility of actual parliamentary majority and Government is difficult one, not only because of the facts that they proclaimed economic growth based on development of free entrepreneurship but also because the destiny of national economy directly depends on creation of business environment that will encourage domestic business and attract foreign investors<sup>31</sup>.

Regarding quality of reforms conducted so far (bearing in mind declared targets<sup>32</sup>) there is no doubt that progress has been made but also deficiencies and shortages remain. Regulative in so-called sector-areas<sup>33</sup> represents big progress although greater part of new regulations are far from full implementation so we still lack expected results. Still new regulations, mostly in accordance with international standards in various fields, offer a chance to modernize business practice and also to improve state of national economy through coming reorganization of certain areas and implementation of new legal framework. However, some of these regulations are controversial<sup>34</sup> and contested by experts so they will need to be upgraded and changed. On the other hand some laws of special significance for regulating and developing certain economy areas are still not adopted (Tobacco Law, Traffic Safety Law, Road Law, Transportation Law, Trade Law, Antimonopoly Law etc). Especially big problem is inexistence of Antimonopoly Law which adoption must be priority in order to prevent negative trends in certain business areas (trade, financial services etc) and without which there is no competition in the market.

Laws adopted in area of bylaws and organization of companies brought significant changes in this field. Administrative and money obstacles<sup>35</sup>, that were present in previous law are eliminated, central register of companies is introduced, legal relations at some business entities are regulated in details (stock companies), internal relations are liberalized but also sanctions for eventual breach of law strengthened while the role and importance of judicial bodies<sup>36</sup> in domain of trade law is enforced. New Bankruptcy Law defines in details bankruptcy and liquidation of companies and entrepreneurs and at the same time protects interest of creditors through norms that enable starting bankruptcy proceedings even in cases of very small debts<sup>37</sup>. Special law enables participation of private sector in providing public services and that is supposed to encourage private business initiative in order to take over and provide for these services. It is obvious that new laws regulating legal status, range of activities and liquidation of companies have opened new possibilities for more simple way of starting a business, more relaxed regulation of internal relations as well as more efficient bankruptcy processes. However we still have obvious deficiencies regarding status regulative. First of all, there is still no law regulating legal position of so called non-business subjects (social activities) although we have considerable potential for creation of profitable businesses exactly in this area. Secondly, there is still no Law on Business Associations, which would finally introduce unique rules for all business associations and thus eliminate inherited system privileges<sup>38</sup>.

Regarding laws regulating business with other countries there are obvious deficiencies. Except Foreign Investments Law which biggest deficiency is insufficient stimulation of foreign investors, Foreign Trade Law and Foreign Exchange Transactions Law as well as Free Zones Law are still not adopted. What is important regarding this area and what represents positive step is establishment of National Customs System (Customs Law, Customs Service Law) although establishment of efficient, capable and uncorrupted customs apparatus represents difficult task.

New banking regulative is adopted and implemented and that in turn encouraged development of modern banking although even in this area we have problems, primarily regarding position of state in banking business (some banks are state's favorites) and quality of credit policies, which is very important for functioning and stimulating economy and entrepreneurship. Speaking of financial area a special problem is linked to further development of capital market (status and perspective of stock exchanges, brokers and trade with papers of value) that is to say re-institutionalization of privatization funds. Current problems and inexistence of some norms (we have frequent quarrels in public) are disabling development of more credible capital market than existing one.

Finally, reform process so far can be judged as not fast as it should be although adoption of new regulative is being accelerated while implementation is ongoing for some time. Also, not adopted legislature is directly influencing business environment in Montenegro. Establishment of new institutions and creation of new regulative will surely strengthen free entrepreneurship and gradual enforcement of market economy and fair competition. There is no doubt that private initiative is encouraged in Montenegro but problems<sup>39</sup> facing development of market economy are not being eliminated fast enough and in convincing manner. Therefore majority of actual and future businessman are expecting that reform of business system be conducted more accurately, efficiently, competently and with more concrete results. Government must focus its activities in this direction as well.

#### **IV Recommendations**

Evaluating reform of business legislative so far, and having in mind constitutional determinations and necessity for establishing open and competitive market economy we are pointing to following:

##### General recommendations

- It is necessary to accelerate reform process in order to be completed as soon as possible;
- Reexamination of actual regulative is necessary in order to eliminate controversial solutions;
- It is necessary to strengthen all public institutions upon which quality of economic system depends;
- It is necessary to create special business development strategy on national and local level that would include all relevant state institutions, local authorities, business associations, companies and NGOs.

##### Special recommendations

- In area of sector- business policies, except implementation of already adopted laws it is crucial to accelerate changes in area of trade and to adopt as soon as possible antimonopoly regulative;
- Adoption of Law on Business Associations as soon as possible in order to eliminate actual negative inheritance;
- It is necessary to complete in qualitative way system of doing business with other countries which is precondition for attracting foreign investors and creation of open economic system;
- Regarding civic- legal and fiscal regulative linked to development of entrepreneurship it is necessary to complete protection of property rights (especially intellectual rights) and private property and also introduce additional tax exemptions in order to encourage business activities;
- Education and training of public bodies and institutions from which quality and functioning of economy directly depends is of special importance;
- It is necessary to adopt comprehensive law on property and business insurance as well as fast adoption of remaining regulative regarding stock exchange businesses;

- It is necessary to establish comprehensive and uniform system - transparent monitoring of implementation of business legislature by authorized public institutions in order to monitor and encourage business and timely elimination of all deficiencies.

## FUSNOTE

1 Montenegrin Constitution was adopted October 12<sup>th</sup> , 1992.

2 Constitutional Chart was proclaimed February 4<sup>th</sup> 2003 by last session of Parliament of Federal Republic of Yugoslavia

3 Article 6 of Constitutional Chart

4 Even before dismantlement of Yugoslavia (1990) state and public economy were dominant in Montenegro. This economy in over 400 companies managed to realize GDP of 1,6 billions US \$. Montenegrin socialist economy had predominantly foreign exchange characteristics with negative trade balances within Yugoslavia and positive balances in trade with other countries (surplus in foreign trade was above 200 millions US \$). Disintegration of Yugoslav market, international trade blockade and domestic incompetence and corruption resulted in bankruptcy of bigger part of industrial and trade state- owned companies. Some estimates of economic experts shows that Montenegro, in period 1991-1998 through reduction of GDP lost 5 billions US \$. At the same time strengthening of private sector in period of political and economic destruction contributed to creation of monopolies in various areas (fro example trade with strategic and profitable goods, building sector, capital market etc).

5 Nominal value of remaining state (public) capital is 2 billion euros and state controlled companies are still providing for more than half of actual GDP (aluminum industry, electricity company, telecommunications etc). Privatization process is slow and inefficient anyway and also contested and followed by scandals so that contribution of this process to recovery of Montenegrin economy is far bellow needs and expectations.

6 More than half legally employed persons in Montenegro are occupying work places financed from budget or they work in public companies.

7 After intensive political pressure from Brussels, Belgrade Agreement was signed on March 14<sup>th</sup> 2002. Almost one year later Constitutional Chart on new state union (Serbia and Montenegro) was adopted based on that agreement and ex FR Yugoslavia cease to exist.

8 Process of economic independence was ongoing in Montenegro from 1998-2002 so Constitutional Chart only verified actual state.

9 Constitution from 1992 was adjusted to status of Montenegro as republic within FR Yugoslavia with very limited economic sovereignty. According to FR Yugoslavia Constitution all relevant economic areas (organization of companies, banking, foreign trade, foreign exchange transactions, monetary field, foreign investments, intellectual property,, basic property- legal relations, basis of tax policy etc) were authorization of federal bodies. Thus, Montenegro regarding economy policies entirely depended on will of official Serbia.

10 Article 6 of Constitutional Chart promoted concept of Serbian- Montenegrin common market and obligation to harmonize economic systems of Serbia and Montenegro.

11 Montenegrin economic system is more liberal and more open than Serbian one, which is more based on protectionism and restrictive measures in business area. Structure of natural resources, company heritage and geo-political position of Serbia and Montenegro directly influence different economic models that can't be harmonized without mutually damaging consequences.



12 Policy of taking credits from other countries and membership in international organizations is linked to state union as legally recognized international subject.

13 We are talking about authority of federal parliament in areas of: standardization, intellectual property, measures and precious metals and statistics.

14 Montenegro is today in charge of running monetary policy, tax policy, foreign investments, foreign trade, property and obligatory relations, organizations of companies, banking and stock exchange businesses etc.

German mark became official currency in 1998.

15 Since 1998 German mark became legal currency

16 New banks with 100% foreign capital were established (Euromarket bank, Opportunity bank) foreign capital was directly invested (Montenegrin Commercial bank), first total privatization of biggest Montenegrin bank was conducted (Montenegro bank).

17 Two stock exchanges were founded, broker houses, Commission for papers of value and Central Deposit Agency.

18 Approximately 98% prices are formed freely.

19 Special Law on Foreign Investments was adopted as well as regulations, regulating trade with other countries and issues like insurance of property and persons.

20 Following laws were adopted: Value Added Tax Law, Company Profit Tax Law, Real Estate Tax Law, Consumption Tax Law and Tax Administration Law.

21 Start of development of Montenegrin economic system as well as economic reforms were conducted in conditions of fier political and intelligence confrontation with regime of S. Milosevic. Donor support from international community in this period was of special significance and it came to around 800 millions of German marks.

22 We had lack of strategic approach to business legislature reform and also it was visible that public policy in this area wasn't conducted with serious engagement.

23 Government agenda of economic reforms emphasizes development of entrepreneurship, competition, investments, creating new jobs and elimination of black market.

24 Important stimulus for all potential businessmen was possibility to found a company with capital of just one euro.

25 Central Register was established in Podgorica and some 11 000 entrepreneurs and 9 000 different companies (stock companies, companies with limited responsibility, limited liability companies, partnership companies) were registered. However official data from 2003 (data on submitted annual financial reports) that there are no more than 6 500 active companies.

26 We are talking about following laws: Expropriation Law, Pawn Law, Money Laundering Law, Public Acquisitions Law, Customs Law, Real Estate Tax Law, Labor Law.

27 Bigger part of regulations was adopted in past two years.

28 It is obvious that reforms were accelerated during 2003 and first quarter of 2004. Also, Montenegrin Government, in the past year, managed to increase for 20% reforms in legislature as whole (political, economic and social system).

29 It is important to notice that Government has considerable expert and financial help of foreign and international organizations (US AID, European Agency for Reconstruction and Development, Council of Europe, UNDP etc). Domestic experts and representatives of NGO sector are taking part in process of preparing new laws although cooperation between Government and NGO sector is not what it should be.

30 Following laws are suppose to be considered soon: Foreign trade Law, Free Zone Law, Consumers' Protection Law, Investment Funds Law, Foreign Exchange Transactions Law.

31 Weakest point in Montenegrin reforms during past year was small amount of direct foreign investments which didn't passed above 35 millions euros.

32 New business regulative was promoted with aim to increase the number of entrepreneurs, companies and financial organizations, creation of fair competition, prevention of monopolies, stimulation of business and development of open market economy.

33 Regarding different economic areas: agriculture, forestry, industry, energy sector, transport, tourism, trade, ecology, and urbanism.

34 Example Law on Telecommunications.

35 Company Law enables starting simple business without significant investments and company is registered within four days.

36 Slow process of court decisions upon business disputes and bankruptcy cases lasting years had seriously discredited trade (business) courts and from their efficacy and credibility domestic economic system depends. Expert reports (World Bank for example) analyzing efficiency of our courts confirms that bankruptcy processes are lasting in average up to 7 years.

37 2 500 euros debt, with current technical conditions and preclusive time limits, is amount upon which bankruptcy process can be started.

Montenegrin Trade Chamber has privileged position regarding all other business associations in Montenegro and that represents remnant of past times and therefore unacceptable and unconstitutional favor of single business association regarding all other associations.

38 Montenegrin Trade Chamber has privileged position regarding all other business associations in Montenegro which is remnant of past times and unacceptable and unconstitutional promotion of single association in contrast to all other associations.

39 Special problem exists with local authorities, which are insufficiently engaged in eliminating administrative barriers on local level. In this respect all local authorities in Montenegro can be considered unfit to comprehend the importance of entrepreneurship and in taking their share of responsibility for encouragement of business on local level.