

CEDEM

Centar za demokratiju i ljudska prava

Center for Democracy and Human Rights

Krusevac 0 A-I-2, III/48; 81000 Podgorica, Montenegro

Tel. ++381-81-205280; fax ++381-81-234368;

e-mail: cedem@cg.yu; www.cedem.cg.yu;

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. 22 (June 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. 22 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, June 2004

PARTIES AND PARTITOCRACY TENDENCIES

Ph. D. Veselin Pavićević

WEAKENING OF PARTITOCRACY? - From imperative toward free mandate -

At the middle of this year, Montenegrin Constitutional Court outlawed, after ten years of practice, provision of Electoral Law that in reality gave rights of disposal with parliamentary mandates to political parties rather than to MPs. Thus, we are formally faced with reintroduction of **so called free mandate** into our electoral system, which means that further legal implementation of **so called imperative mandate** ceases to exist.

Different interpretations of legal character and status of MPs mandate, divides Montenegrin electoral legislature in three phases.

First phase lasted since introduction of competitive electoral system (1990) until inauguration of Montenegrin Constitution from 1992. This phase is characteristic because of so-called **recall** category which legislator emphasizes so much that it was put it into the basic act ("Law on Election and Recall of Members of Parliament"¹) and dedicates entire chapter (chapter VIII, article 102-109). Category of "recall" was never applied in practice and this fact led to its cancellation just before the Constitution from October 1992 was adopted.

Free mandate was introduced in Constitution from year 1992, only after amendments on article 79 of Proposal of Montenegrin Constitution, which were submitted by Peoples Democratic Party. Text of amendment went: "People's representative represents all citizens, freely interprets their interests, decides and votes according to his convictions, cannot receive imperative instructions and cannot be recalled." Accepting basic idea of this amendment, Parliament adopted the Constitution which, in article 77 paragraph 3 guarantees that MP "**decides and votes according to his own believes and cannot be recalled**", then in article 79 paragraph 2 guarantees that "MP cannot bear responsibility for speech or vote in the Parliament."

It is obvious that framer of constitution submitted to liberal notion of MP mandate, according to which, MPs are representatives of the entire nation and not electoral constituencies in which they were elected or special groups of electors that elected them. Although in mentioned explanation it is not explicitly stated, it is obvious that theoretical elaboration lies on foundations of famous speech that **E. Burk** gave to Bristol voters in 1776. Imagined as 'keeper' of the **common wealth**, MP entering into Parliament has no obligation to represent special interests, and he is responsible only to his own conscience.

New electoral legislature is adjusted to Constitutional definition of MP's mandate. Recall from previous electoral legislature is changed by cessation of MP's mandate. This legal solution regulates cases and conditions of cessation of MP's mandate, **according to definition of free mandate.**"²

¹ "Official Gazette" of Montenegro, no. 36/90, from October 3rd 1990

² Excerpts from comments of article 104 of Law of election of MPs: Electoral Law with comments, NU "Official Gazette" of Montenegro, Podgorica, 1992., page. 87.

This phase lasted since October 1992 until May 1995 when we had amendments on electoral law; except usual reasons for losing MP status, known in comparative electoral legislature and stated in article 10,³ paragraph 7, of positive Montenegrin Electoral Law the category "cessation of membership in political party" was added. Reason for this was the case of one opposition MP who started to behave in line with inaugurated category of free mandate.⁴

Parties, as proposers and creators of electoral system in this way have determined not only protection but also the very *character of MP mandate* because they in fact reinstalled, this time through "back door" the *recall*. This fact couldn't be denied although in parliamentary session we heard arguments that MP is elected from electoral list determined by party and thus the voter gives his vote to that list and not to individual on that list so that in this case we are not dealing with classic recall but cessation of mandate. This argumentation was put in place because recall means sanction pronounced against the will of the one these sanctions relates to, while cessation of mandate is matter of legal capacity (qualification for election) that is passive voter legitimacy which besides objective facts (age, working capability etc) encompasses and voluntary resignation.

Newly adopted legal solution was supposed to sanction two different situations. First, when MP voluntary leaves the party from which electoral list he was elected and second, when MP loses membership in the party because he is expelled from it. However, speaking of general norm we still lack necessary precise explanations.

Instead of representing stabile democratic institution, electoral system once again served as mean for *one-time-use for managing conflicts*. Although, even then it was clear that new regulation is, from formal and logical point of view, contrary to constitutional definition of MPs mandate. However, this norm will be in effect until the most recent decision of Constitutional Court.⁵

³ Text of quoted norm goes as follows:

MP's mandate cease to exist prior expiring date in following cases:

- 1) Due to resignation;
- 2) If he is sentenced to prison for duration not less then six month or if he is sentenced for criminal act that makes him unsuitable for performing this duty;
- 3) If he is sentenced to business incapability;
- 4) If one of the cases of incompatibility of his function with other function determined by Law occurs;
- 5) By cessation of Montenegrin that is Yugoslav citizenship;
- 6) In case of death;
- 7) By cessation of membership in the party from which electoral list he has been elected;
- 8) If the party from which electoral list he has been elected is banned.

MP's mandate cease to exist on the day that case from paragraph 1 of this article occurs. Cessation of mandate is evidenced by authorized parliament on the first session after receiving notification about reasons for cessation of MP's mandate. MP whose mandate has been canceled according to article 1 paragraph 4) of this article remains on the electoral list and can obtain MP status once again in accordance with this law.

⁴ It was the case of member of Liberal Union Miodragu Vlahoviću. Formal proposer of this legal initiative was than opposition Peoples Party. Although representative of governing party (at the time it was united DPS) warned that it would be more correct to make changes and amendments of

electoral law on the eve of new elections and not during the mandate, Parliament, with exception of SDP members, unanimously voted for this law. However, our impression is that members of from governing party were the most pleased with this solution. Because in this way opposition provided them with 'alibi' for their behaviour in the Parliament that was called because of them- DPS voting machine.

We should keep in mind that the same Court once before (during 1996) debated about this issue and reached decision contrary to actual one.

Second phase is marked by legally- technical unsuccessful attempts to reach compromise between classical liberal interpretation of MP's mandate freedom and imperative practice in contemporary "party states", to make MP's freedom relative, that is to limit it by party will and discipline when voting.

Third phase is yet to start by finding solutions that will, within correct legal form, abandon traditional dichotomy division of mandates on free and imperative ones. One of the ways to do it is introduction of category of **general** that is **loosely tied mandate**. This solution is proposed because practice unambiguously imposes the need to protect the interest of the party as one of the key factors in electoral process. The right of the parties to expel the member who is breaching party principles and (or) with his conduct puts party reputation on line can't be objected and this right is written in statutes not just of almost all political parties but other voluntary membership organizations as well. However, the fact remains that party leaderships tend to **abuse** this right. Therefore, after the decision of Constitutional Court, Montenegrin legislators are facing obligation to find compromise solution.

There are several ways to determine the principle of general that is loosely tied mandate. Here we are going to make some **recommendations** regarding this issue.

It was noticed that in Montenegrin electoral system there is one *very undemocratic provision regarding distribution of mandates* and OSCE/ODIHR rightfully pointed to it in its critical analysis of August 9th 2002. ("Legal analysis of changes and amendments of electoral legislature") We are talking about provision according to which half of MPs mandates won by party list are distributed according to sequence of candidates on that list while the second half is determined by submitter of that list (party) regardless the sequence of candidates on the list.

The right of list submitter to select half of the MPs, from that list at will **once the elections are over**, represents breach of elementary democratic norms because it questions the right of citizens to elect for themselves their political representatives. Having this in mind, Montenegrin electoral system, according to decision of German Federal Court adopted at the middle of last century, can be considered to be **indirect** and not direct **proportional system**. In the opinion of that court, direct elections are the one where MPs mandates are distributed, after the voting, automatically without interference of the "third party". However, if there is "third party" involved in distribution, after the voting, elections are considered indirect. In indirect proportional system such as in Montenegro, political party or more precisely its leadership got even greater power, then the one they usually have in direct proportional system.

In other words, through existing type of electoral list and posting the name of the party and not the name of the candidate from electoral list on the ballot, legislator, for the voter, intended just a role of legitimacy provider to, in advance formed will of party leadership for which list he votes. So the basic difference compared to previous one-party system is that instead of one, there are several party oligarchies, which are decisively influencing personal composition of representative power, so now we have "monism within pluralism".

5Debate preceded Court decision and in that debate as experts Ph.D. .Srđan Darmanović, director of CEDEM and author of this text participated.

Elimination of this weakness is possible through obligation of electoral list submitter to distribute the mandates according to sequence on the list, or enable the voters to make changes for themselves in the offered list of candidates. However, as in this period of development of electoral system, introduction of preferential voting could lead to undesirable consequences (increasing number of invalid ballots); projected effects can be reached by giving the voter right to give his vote to specific candidate within offered party list (**unblocked tied list**) and not as predicted by positive norm- the entire list only.

Within proposed variant of electoral list and type of voting (**combination of ordinal and categorical voting**) final sequence of proposed candidates within the list is determined by number of obtained votes per candidate and not by, in advance expressed will of party leadership. Besides mentioned, there are others, in our opinion, not less important reasons because of which it is desirable to make these changes in Montenegrin electoral system and those are:

(1) This would open democratization process within the parties and, as there is no “democracy without democrats” there is also no democratic order without democratic parties; process of democratization is reflected in reduction of leadership power to be able to reward the obedient and not of principle and renowned party members;

(2) In the existing circumstances, those that are determining final sequence of candidates on the electoral list are exposed to temptation of “offering places in Parliament on sale”; in time of abrupt divisions within society on majority of poor and minority of suddenly and mysteriously rich individuals it is not hard to guess who has the interest for this solution that is who is the one capable of “buying” MP mandate; time before the elections is turning into period of active functioning of ‘political stock exchange’ where price of single MP mandate is formed far from the “public eyes” and far from any rules;⁶

(3) Proposed change of list type and way of voting pre- election party life is becoming more dynamic in way that pretenders for MP after the creation and posting of party list, not unlike current practice, during election campaign must permanently contact electorate if they want to accomplish their goal;

(4) After the elections, candidate knows exactly his “political weight”; individual engagement of candidates in electoral campaign, besides resulting in greater participation of voters at elections, which represents big plus, will also influence their knowledge and political skills necessary for work in the parliament and voters can then, evaluate and give their judgment at the next elections, and

(5) Candidate elected by direct voting and not by votes given to the list (when voter is marking the top of the ballot, so called case of *de tête*), unless he previously signed blank resignation, would manage his own mandate. This will create conditions for political engagement of bigger number of personalities with moral integrity, because without such personalities every politics, sooner or latter turns into Machiavellian skill. Such individuals should provide for moral tissue of democratic institutions so that they wouldn’t be just lifeless formal- legal skeleton.

⁶ Such a practice wouldn’t be our invention. Saying “money is mothers milk for politics” is not without bases. Thus, for example R. Levinson-Morris (Money in Politics, "Kosmos", Belgrade, 1934 page 70-71) mentions one very unusual but illustrative example of money abuse in the elections. The night before elections for Reichstag 1928 there was following announcement in one Dresden newspapers:

"Party is offering Parliamentary carrier for loan of at least 5 000 marks to be spent for electoral purpose. Offers under number I/18148 to Adre Kompt."

Levinson has discovered that kind offer was coming from small group proudly called "Culturally- Advanced Party" whose founder explained to interested people that this money is simply a mean fro interested parties to realize their goals through politics that is through things that MP mandate offers. In our circumstances this means entering into relatively small circle of people which enjoy certain kind of immunity in case they commit criminal act for which the sentence would be up to 5 years in prison.

Finally, changes in voting method that is type of electoral list, are preconditions for expected changes in voters attitude and evaluation of political parties effects to which they gave their limited confidence. Anyway, democracy cannot function if everybody is indifferent to the issue of who shall win at the elections. We are talking about maturation process of citizens democratic conscience and political culture because "the old" society cannot be turned into new one over night by decrees. Until social creations are not crystallized, they do not stand a chance of acting as recognizable social force with articulated interests and demands; capability of social groups to articulate clearly their interests is precondition for limiting party influence and in the absence of that limitation, party leadership are acting at will what results in unpredictability of political process... while, as Weslawski says, ... democracy is functioning without proper infrastructure...

OBSTACLES OF ESTABLISHING TV - PUBLIC SERVICE

Drasko Djuranovic

State against its television

Instead of helping the metamorphosis of national television into public service, state has brought Montenegrin Radio and Television (RTCG) on a brink of existence by reducing the amount of money from the budget aimed at television and because of irregular collection of payments from subscription.

During last week of June, management and employees at RTCG heard a news that shook them profoundly - they were left without a single stabile source of financing: Montenegrin Constitutional Court proclaimed as unconstitutional the model of charging for radio and TV subscription through phone bills.

Court has ruled that collecting payments for radio and TV subscription through phone bills- without prior check whether person or legal entity has radio or TV- puts in inferior position those who pay for phone bill but don't have radio or TV. Therefore, Constitutional Court recommendation was that only those for whom it is determined to possess radio or TV should pay subscription for radio and TV.

Legal framework of changes

Request for, Constitutional Court assessment of these provisions within the Law on radio-diffusion, came from Socialist Peoples Party, Peoples Party and one person-journalist, Čedomir Liješević. Court has mostly rejected their initiatives except mentioned fragment on constitutionality of method of collecting payments for radio-TV subscription.

This will certainly create great problems for management team of RTCG. According to current practice, established by Law on Radio-Diffusion and conducted by Agency for Radio-Diffusion, some kind of selection was made: approximately 1000 citizens were relieved from paying subscription because it was established that they don't possess nether radio nor TV. However, it seems that this selection wasn't good enough or sufficient. Now, after decision of Constitutional Court, current method of collecting subscription will have to be canceled.

Decision of Constitutional Court won't have far reaching political consequences but primarily economic ones: according to acting director of RTCG, Radovan Miljanić, his company was put into a kind of financial vacume thanks to this decision of Constitutional Courte, and it is practicaly at the brink of endurance. This is demonstrated through 'regular' payment of salaries: at the end of June employees of RTCG received salary for March! With this dynamic of paying people's salaries it is hard to expect big changes regarding creating interesting radio or TV program. Although, at the end of the year there will be two years since adoption of Law on Public Emitters, Montenegrin Radio and TV are at the very beginning of the process. In fact, first normative-institutional phase of transformation is ended:

- Normative acts were adopted (Statute of RTCG, Program principles and professional standards)
- Management bodies are elected (Council of RTCG, Administrative board, executive and program directors)

However, it became clear that creating solid legal framework for changes does not guarantee fast and proper transformation of RTCG from state owned company to public service. It is obvious that much more effort will be needed, not only by employees and management of this company but also by the state administration and international community.

Without proper normative and efficient managerial bodies, essential transformation of state ran Radio and TV cannot begin.

Decision of Constitutional Court, to a certain point, disrupted good legal solution and now we are faced with task of finding- in accordance with Montenegrin Constitution and laws- fast and efficient way of collecting payments for public media service.

Identification of problems and obstruction to changes

The main obstruction to foreseen changes lies in behavior and actions taken by the state. Instead of helping the metamorphosis of state TV and Radio into public service, the state has brought RTCG to a very brink of existence by reducing the amount of money given from the budget and irregular payments based on subscription.

Already mentioned decision of Constitutional Court will create strategic problem: how to find a solution that ensures stabile money flow into empty accounts of state media institutions?

Even with current mechanisms we had a lot of problems: during first six months of this year Agency for Radio-Diffusion has paid hardly 50% of money on account of radio and TV subscription. We all know that subscription is paid through payment of phone bills to TELECOM, so it is unclear why is the state so slow with payments (TELECOM is state owned company) if we know that phone bills must be paid 30 days from receiving the bill at latest. According to dynamic of payments RTCG should receive 450 000 euros monthly. According to our findings monthly payment from TELECOM never got even close to this sum. Whether somebody, in the meantime, illegally redistributed subscription money- it is unclear and no official investigation has been initiated.

This example is just one of state obstructions in financial area.

How state views public media in long term it is shown by reductions in the budget. Montenegrin Government had predicted 2.600.000 euros for financing of public service. However, when at the middle of the year Montenegrin Government decided to save costs and reduce budget it started from amount foreseen for state media.

Instead of predicted 2.600.000 euros Montenegrin Government will give to state Radio and TV during 2004

-one million euros less! This clearly demonstrates state interest for fast and efficient transformation of state media into public service.

Second important problem is piled debts and number of employees- for which state bears main guilt. True but still unbelievable: during handing over of "safe keys" that is taking over of RTCG by new bodies of public service (Administrative board, executive directors and Council of RTCG) proper hand over was not conducted. As they didn't made report of state of the company when new management was "taking over" there was no way to find out true balance between incomes and expenditures.

The situation wasn't better even when, at the middle of the year, old director of RTCG Vučinić simply escaped to diplomatic service of the State Union. Report on performed activities or financial situation wasn't submitted to Administrative board then. New director, that is acting director Miljanić could only conclude that things are looking very bad: total debts of RTCG, according to current calculations, are approximately 6,5 million euros and RTCG employs 1004 employees. Those are very heavy burdens and it is hard to expect that management of this company- however capable- will be able to deal with such a big problems. This is especially true in case if reduction of available funds continues thanks to decision of Constitutional Court.

Still, Statute of RTCG foresees eight ways, mechanisms, and sources of financing for this company: 1) TV subscription, 2) tax on car- radios, 3) production and broadcast of advertisements, 4) production and sale of audio-visual works, 5) sponsorship of programs, 6) organizing concerts, 7) from the state budget, 8) other sources of financing.

Although variety of financing sources is visible, it is important to say that in total sum of necessary funds (approximately 550.000.000 euros only for gross salaries of employees) subscription money covers 80%! It is therefore, necessary to ensure undisturbed influx of subscription money because that is precondition for survival of RTCG, but we should pay attention to other sources of financing as well.

Just to illustrate difficulties in conducting business we will tell you about pro-invoice for covering Olympic Games in Athens. For broadcast rights, for operative expenses and stay of small team of 30 people in Athens RTCG will have to pay around 300 000 euros. Otherwise, RTCG will be the only European state TV that won't be covering the Olympics!

Sings of improvement and quality

Despite numerous financial and technical problems, it seems that RTCG management team, together with teams from Administrative board and RTCG Council, editorial team and new general director is ready to accept the challenge of turning state media company into public service.

Some changes in RTCG programs induce to this kind of conclusion.

In main RTCG, news shows we recognized balanced approach: parties in power are not privileged any more; journalists of radio and TV are trying to provide the public with realistic insight of everyday events in the society. It is evident that focus is slowly shifting to everyday life- issues.

Diversification of programs has significantly increased. At the end of March Montenegrin Television started broadcasting (once a month) show dedicated to Roma population. Since May, they started with educational program: 90 minutes of quality program broadcasted, each day demonstrates readiness of editorial team to expand content of programs.

Even overview of “Program Principles and Professional Standards of Public Radio-Diffusion Services of Montenegrin Radio and Television” –documents that represents ethical codex of these media companies- points to fact that both Radio and Television have taken big steps toward free journalism.

“Realization of RTCG role is based on general principles of public service such as universality, diversity, independence, and recognizable identity. Montenegrin Radio and Television, as public radio-diffusion services must be available to entire population. They must address entire population regardless of social position or incomes. Universal availability means that listeners and viewers can both, receive programs on the whole of Montenegrin territory, and be able to understand and follow them.”

Quoted passages are from document “Program Principles...” and they are clearly demonstrating turning point in behavior of state media companies but also demonstrating high ethical criteria which journalists of Radio and Television must stick to.

However, we ask ourselves, whether these standards are set too high or if they are too idealistic: very few European or world media companies would endure test of working under RTCG standards in everyday practice.

Recommendations

Montenegrin public emitter is obviously at the crossroads. Formally and legally, transformation into public service has started but in reality- state electronic media is suffering hardship especially in area of financing.

Nobody in Montenegro, especially not the founder of Montenegrin Radio and Television - the state of Montenegro- shouldn't deny proper interest for this institution, nor should it try to reduce its responsibility for part of the problems (financial and political) that RTCG has to deal with.

State is obligated to such approach even by international documents such as Prague Resolution of Ministerial Conference of Council of Europe. A resolution emphasis that all member states (Montenegro together with Serbia is member of Council

of Europe) “accept obligation to guarantee stabile and adequate financial means to public electronic media necessary for fulfillment of their tasks”. In this document it is explicitly said that “member states will sustain and if needed establish adequate and stabile financial framework that will guarantee to public electronic media funds necessary for fulfillment of their tasks.”

a) Therefore, in period to come, state of Montenegro must help in financial consolidation of RTCG. Maybe not in paying huge, multimillion debt, but surely in finding solutions that would solve, in adequate way the issue of Radio and TV subscription.

b) In addition, maybe the decision to lay off several hundreds surplus employees from RTCG should be reconsidered. It is evident that 1004 employees represent heavy burden for survival of RTCG, but express lay off of big number of people- the number talked about is 450- might have negative effects. First, it will affect the motivation of remaining employees that will be scared of further rigorous restrictions and be concentrated only to ensure they are not fired as well. This suggestion, however, does not mean giving up rationalization but simply creation of long- term plan of new organization and systematization of jobs that will suit new demands and expectations. Thus, at least three- year- plan for reduction of personnel should be made and not just fire people within 12 months. This will create suitable work atmosphere even in changed working conditions.

c) Within necessary changes, it should be reconsidered even very different engagement of international community. So far, representatives of international community were focused on helping creation of strategic documents and establishment of new management structure. It is obvious that less attention was paid to technical equipment and financial recovery of RTCG, help in modernizing management and especially marketing service. Having this in mind, I think that some kind of donor conference should be organized to help the transformation of RTCG. The benefit would be double: additional attention as well as funds for recovery and transformation of RTCG in public service would be obtained. It is clear that without financial injection nobody should count on fast and efficient changes.

If destiny of RTCG is placed solely in hands of its employees, if representatives of Montenegrin state and international community distance themselves from this problem, then, in circumstances of severe shortage of funds, some radical changes within RTCG –especially for better- are not likely.

REFORM OF THE PUBLIC ADMINISTRATION

Ph.D. Milan Markovic

ETHICS AND ETHICAL CODEX IN ADMINISTRATION NECESSITY OF ADOPTING ETHICAL CODEX IN MONTENEGRO

OPENING REMARKS

In every country administration plays significant role and performs a lot of duties and tasks aiming to realize existential and development goals of the society so that “direct implications of administration activities have great effect”.¹ As we all know administration is not an isolated entity within society. Many social reforms have administrative implications; many administrative reforms also have social repercussion. This means that administration is dependable on social factors but at the same time it influences, by solving actual and future problems, the design of society’s future. Administration is not, any more, simple instrument for preserving public policy but also a guide for solving and introducing economic, technological, political, and social changes. Therefore, even in administration, which conducts everyday contacts with citizens, administration personnel must be the agents of change regarding bureaucratic method of solving tasks, so that we would reach, in all its levels, understanding of “ethical considerations” and realization of “intensive ethical dialog with citizens”.

Historically, all ethics, no doubt about it, starts with religion, claims Karl Popper.² In ancient Greek philosophy, ethics represented basic area of philosophy and politics (Plato divided philosophy on three sciences: physic, ethics, and logic) and later they were tied to idealistic and normative philosophy (B. Spinoza, Ethics)

We will not endure in details with historical issues of this complex phenomenon of ethics, but we shall point out to few definitions of this “area of human dignity”.

Ethics is science about moral and ethos, asserts Vuko Pavićević.³ Firdus Džinić is of the same opinion when he says: “while moral is certain phenomenon and practice of social life, ethics is science about moral”.⁴ Furthermore, it is “philosophic science about moral. Its subject is research of moral, moral relation between: men and men, men and society, and men with himself; men’s practice of evaluating people (including himself) as good and bad as diligent and lazy”.⁵

Karl Popper thinks differently. He thinks that ethics is not a science because there is no “rational scientific bases of ethics”. There is an only ethical base of science and rationalism.⁶

Radomir Lukić speaks about normative ethics -“we understand as discipline that formulates ideal moral (or moral’s ideal) ...”⁷ Z. Tomić is in favor of introducing ethics at Law School as separate subject although ethics is present in evry discipline.⁸

D. E. Moor had interesting opinion on ethics. He says: “I use it to encompass the research which in any case cannot be called differently but: general research of what is good”.⁹ J. Đorđević noticed that ethics is used as synonym for moral and even more

often as sum of those behaviors and attitudes expressing moral principles, defined at the same time as ethical principles".¹⁰

Howard Has and Bob Tamarckin see in ethics theory of human behavior, study of moral values, and they stress that there is no single ethical standard, "because each philosopher decides for its own".¹¹ According to Pusić, ethics is sum of rules regulating human behavior in their mutual relations and which are characterized by great level of internationalization, that is individual has adopted them to such extent that he sees them as his own autonomous principles.¹²

In most of the cases, ethics relates to choice between what is good or bad, regular or irregular. In ethical theory, as Jong S. Jun noticed, first you define 'good' and than proper action is the one leading to achieving that good. Ethics is about moral duty and obligation. "Synonym for ethical is moral."¹³

Dragoljub Kavran, State administration in time that comes, Legal life, no. 9, Belgrade, 1995, page 666.

Karl Popper, Open society, and its enemies, Belgrade, 1993, page 101.

Vuko Pavićević, Bases of ethics, Belgrade, 1974, page 6.

Firdus Džinić, Ethics, Belgrade, 1995, page 34.

Sociological lexicon, Belgrade, 1982, page 171.

Karl Popper, Open society, and its enemies, II, Belgrade, 1993, page 286.

PUBLIC SERVANT AND ETHICAL CODEX

Public servant as authorized representative of the state, by performing his duties and tasks embodied in administration regulations, realizes public interest. Public interest or public welfare is therefore, closely linked with administrative decisions because it gives them guidance and meaning in everything they do. As this relation includes moral duty and obligation of public servants, it also includes ethics. Thus, ethics became crucial for entire domain of activities of public servant.

This means, as renowned authors stress that: "Classical model of public administration has ethics (Plant 1983), although it is often more tacit than expressed.... Within the language of academic moral philosophy it ethics is basically utilitarian or consequentiality system. It has definition of 'good' although this definition is provisory".¹⁴

Professional vocation of administrative personnel and administration as "highly demanding job" through which biggest number of human freedoms and rights is realized, and as morally responsible institution - administration demands presence of adequate (high) ethical codex within". We are, of course, dealing with normative system that is not created all of sudden, is not formed by mere codification but it is a system of certain rules- rules of certain professions' members behavior (in this case administrative staff) while performing their jobs. These rules are shaped through many years of empirical practice and they are not envisaged as static but as in constant development, following social development dynamics and process of humanization of relations within society".¹⁵

Governments of many countries very often had established ethical codex, which are specifying standards of administrative personnel moral behavior. Ethical codex and other organizational means represent objective criteria that are established to monitor usage and misuse of duties and obligations of administrative personnel. They represent, first of all, passive way of assessing people's moral judgments and thus they also represent legalistic approach.¹⁶

Thus, in USA, since the "Watergate" - June 1972 - over 40 states as well as Government and USA Congress adopted ethical codex for government employees.

Contemporary Ethical codex for state employees is still not created or adopted in Montenegro. We had “old” workers ethics codex in the administration (from days of self-management socialism)¹⁷, the new one we haven’t adopted yet. Necessity for adopting Ethical codex is obvious and that is stressed in Proposal Model of Ethical Codex of State employees and appointees, from September 2003 ¹⁸ and in this proposal, among other things is said that: “ethical codex is aiming not just to systemize rules of moral norms in performing administrative duties that are obligatory for state employees, but to enforce, encourage and affirm public consciousness about promoting ethical values of individual and society as whole, which is supposed to be dam to social erosion of behavior”.

Very often ethical codexes of administrative employees are unclear. For example, Ethical Committee of American Society of public Administration (ASPA) adopted ethical codex for public administrators that contains many ambiguous terms and claims so its application, as Jong S. Jun points out, can be difficult if not impossible. "Most of administrative codex leaves too much space for ambiguities and doubt in specific situations; too often they don't manage to satisfy our expectations regarding moral behavior of public administrators". ¹⁹

Radomir D. Lukić, Sociology of morals, Belgrade, 1976, page 47.

Zoran Tomić, Ethics of administrative workers (round table), Naša zakonitost, Zagreb, 1981 no. 7-8, page 23

D. E. Moor, Ethical principles, Belgrade, 1963, page 8.

Jovan Djordjević, Ethics, politics and law, Archive for legal and social sciences, Belgrade, 1978, no 2, page 181.

See: Howard G. Haas, Bob Tamarkin: Leader in each of us: Sure way to discover yourself, Belgrade, 1995, page 137-152.

E.Pusić, Ethics of administrative workers (theses), Naša zakonitost, Zagreb, 1981, no. 6, page 102;

E. Pusić, Administration science, Zagreb, 1985, page 240-248.

Jong S. Jun, Public Administration and Problem Solving, California, 1986, str. 275.

Charles J. Fox, Hugh T. Miller, Postmodern Public Administration; Toward Discourse, California – London – New Delhi, 1995, page 21.

In our legal system government bodies are obligated to provide to citizens: undisturbed realization of their rights and obligations; necessary data and information; legal help; cooperation with citizens; respect of human personality and still to preserve the reputation of government body; consider complaints, petitions, and suggestions submitted by citizens. These are examples where administrative employees have to pay full attention to ethical aspects while performing their duty and they have to do it during entire working time.

RECOMMENDATIONS

- Administration reform, which is often controversial and problematic, besides legitimacy, simplification, and productivity etc. must provide client's satisfaction, equality, as well as high ethical codex.
- Establishment of ethical codex, as sum of highest moral standards in performing administrative duties, and as legal effort, represents first step toward prevention of unethical behavior of administrative employees. In majority of undeveloped countries, this is one the most important means for control of corruption within government. As we said, ethics is of great importance for activities of public servants within administration because it is in their nature to realize public

interest. Therefore, in order to realize public interest it is necessary that administration act in accordance with ethical principles. This is very important because through administration work bigger part of human rights and freedoms are realized. Because of this fact, it is necessary to establish high ethical codex for administrative employees. According to Law on State Employees and Appointees ("Official Gazette of Montenegro", no. 27/04 from 28.04.2004.) that will go into effect on October 1st 2004, in article 6 (employees' ethics) prescribes obligation of state employee and appointee sticks to Ethical codex of state employees and

- appointees when performing his duties. Ethical codex is consisted of objective criteria, created with goal to monitor activities of public servants.
- Ethical codex must be clear, and precise and not leave space to ambiguities in order to avoid its "creative reading" with aim to evade the rules.

Peter Kobe, Contribution to debate on ethics and law, Archive for legal and social sciences, Belgrade, 1978, no. 2, page 213

Jong S. Jun, quotation, page 213

Administrative Workers Ethical Codex in Socialist Federative Republic of Yugoslavia, adopted 27. September 1984, by (ex) Yugoslav Association for Legal and Social Sciences and Practice; Legal Thought, Sarajevo, 1985, no. 1-2, page 105-110.

Ivan Krkeljić, Stanica – Lola Popović, Čedomir Bogićević, Ethical codex of State Employees (proposal model), Action: network of Montenegrin NGOs, Podgorica, 2003, page 5

Jong S. Jun, quotation, page 281

I.Krkeljić, S-L.Popović, Č.Bogićević, quotations, page 26

- In certain administrative areas (example customs, health care, education...) special ethical codex would be created, but they would have to be in harmony with (general) Ethical codex.
- Also it must be stressed, as precondition for effective implementation of this codex, "the obligation of state bodies and bearer of administrative power to provide fair economic, social and status evaluation of position and status of public employees as precondition for realization of higher standard of living. Without realization of these preconditions, ethical codex can be discredited and its implementation pure illusion". ²⁰
- Administration employees must be honest, competent, and ethical in his everyday work. Therefore, human resources for administration in Montenegro should be consisted of employees who are there because of "right" and not "wrong" reasons. You are entering into public sector because of right reasons, stresses Robert B. Denhardt, if you want to contribute solving social problems, promotion of democratic values and ethical standards, and if concept of providing services is your passion. You are entering into public sector because of wrong reasons if you see that as public boasting and recognition of your achievements, search for material or financial benefits for your hard work, or expectations to met powerful people and change the world according to your plan. ²¹
- Administration should represent highly moral institution and its employees must demonstrate high standards of behavior. Good, fair, just, responsible, conscientious, human, equally, honestly, professional... must become synonyms for daily engagement of administration. Thus, we reduce traditional disbelieve of

citizens toward administration, especially state administration in which actions they see “activities that result very often in problems and rarely in benefits”, and at the same time it is expected that when employees apply more human attitude toward citizens, that will rise citizens’ awareness and consequently citizens would become more responsible, active, and cooperative.

ANTICORRUPTION

Dr Dragan Prlja

PREVENTING CONFLICT OF PUBLIC AND PRIVATE INTEREST AS PART OF ANTICORRUPTION SYSTEM IN MONTENEGRO

INTRODUCTION

Montenegrin society is at the beginning stages of fight against corruption. There are several very important anti-corruption laws that must be adopted and afterward consistently applied within this fight against corruption. Among anticorruption laws, we can surely include Conflict of Interests Law, which ensures prevention of conflict between public and private interests of public officials.

Conflict of interest exists when public official puts private interest before public one that is when he makes a decision that is not based on objective and independent assessment and thus endangers public interest. Therefore, it is extremely important that legal regulations clearly determine guiding principles in cases when conflict of interests occurs but also that regulations clearly determine mechanisms that will enable solving of these conflicts of interests.

On insistence of international community and because of obvious need of countries in transition most of the countries of western Balkan have adopted laws ensuring prevention of conflict of interests by public officials.

Croatian parliament adopted ‘Law on Conflict of Interests in Conduct of Public Officials’ in 2003. Law contains 23 articles and it defines that conflict of interests is situation when private interests of officials are contrary to public interest or when private interest influences or may influence impartiality of officials in performing public duties. The Law prohibits putting private interests before public interests. Law also defines the term public official, conduct principles of public officials, what are persons connected to public official, and how public officials should act when they have dilemma whether conflict of interests exists or not. It is defined precisely what is conduct unbecoming to public officials. Obligation of public officials to report on their property status is introduced. Special part of the Law regulates acceptance of gifts, performing other activities by public officials, membership in trade companies, steering committees, and supervisory boards. It is specifically prohibited that public officials are members of steering committees or supervisory boards of trade companies. Obligation of public officials to report every income they make besides their salaries is also defined as well as prohibition to receive expenses compensation from foreign country, international organization or international association. Obligations to report eventual influences on

impartiality of public official as well as duration of obligations prescribed by Law are also defined. In order to implement the Law special body is formed and its members are chosen by Croatian parliament on suggestion of Committee for Selection, Appointments, and Administrative Affairs, for duration of 7 years and Law determines competences of this body as well as procedure before this body. Law also prescribes punitive sanctions for breach of regulations.

Serbian parliament, on April 24th year 2004 adopted 'Law on Prevention of Conflict of Interests While Performing Public Duty'. This Law defines that conflict of public and private interest exists when official has private interest that is influencing or may influence the way he performs his duty. Law relates to all officials – state, provincial, and municipal, town, and that of city of Belgrade. It is foreseen that parliamentary committee should be formed in order to solve problems regarding conflict of interest and to take care about implementation of regulations, which anticipate even moral sanctions- example, public announcement of recommendation to dissolve appointed, or elected official. Politicians elected in direct elections are faced with “un-public” warning or with public announcement if they violate the Law. Official, appointed by body that is directly elected by citizens, is given public recommendation to submit resignation. Law also allows for other public duties or other jobs to be performed, but forbidden actions of officials are clearly defined. Law regulates registration of property and acceptance of gifts. Official can accept gift only to a certain (small) value. They cannot accept gifts in money or papers of value. State committee, consisting of nine members, is in charge of solving conflicts of interests- three members are proposed by Serbia's Supreme Court, one by Lawyers' Chamber and five members are appointed by Parliament but they are chosen among many candidates proposed by Serbian Academy of Art and Science.

BACKGROUND OF PASSING LAW ON CONFLICT OF INTERESTS IN MONTENEGRO

Montenegrin Government has reached Conclusion on July 6th 2001 according to which, members of Government and heads of administrative bodies and organizations cannot perform function of president or member of steering or supervisory committee in any company or public institution during their mandate. The same conclusion also applies for family members (first line of blood kinship) of members of Government and persons appointed by the Government. In introductory remarks of this conclusion it was said that these issues will be defined comprehensively and in details during creation of Law on Conflict of Interests whose adoption was expected somewhere at the end of 2001.

During 2001 several NGOs: Center for Transition, Association of Lawyers and Committee for Human Rights, according to agreement reached on regional meeting of Stability Pact held in Cavtat that same year, had prepared working version -Proposal of Conflict of Interests Law for Montenegro. This working version of Proposal was discussed on round table held 10-11 December 2001 in Podgorica. Round table was organized by Agency for Anticorruption Initiative of Montenegro OSCE/ODIHR, ABA/CEELI, and Center for Transition. After very successful round table with participation of big number of domestic and foreign experts public was reminded once again, of necessity for adoption of Law on Conflict of Interests. During first three months of 2002 working group, formed by Montenegrin Government Agency for Anticorruption Initiative prepared Proposal of Law on Conflict of Interests and sent it to Montenegrin Government for adoption. Base of this proposal was in fact working version of Proposal

of Law on Conflict of Interests prepared by NGO sector. Montenegrin Government, on session held July 5th 2002 adopted Proposal of Law on Conflict of Interests and sent it to Parliament. After almost two years of waiting, on session held April 21st 2004 Law on Conflict of Interests was adopted with 38 votes for and one restrained, but Montenegrin president didn't ratify it, that is he didn't proclaimed this Law, but instead asked the Parliament to reconsider this Law once again. Montenegrin Parliament reconsidered this Law once again but, according to constitution, it did not have possibilities for amending the Law. Thus, Parliament voted again on the same proposal and with 28 votes for, 4 against and 6 restrained adopted Law on Conflict of Interests on June 16th 2004. However, Parliament also adopted proposal that, as soon as possible, parliamentary working group is to be formed in order to prepare changes and amendments of Law on Conflict of Interests or to prepare proposal for new Law on Conflict of Interests. In this way, by the very act of adoption of Law on Conflict of Interests it was concluded that the Law was no good and that it need to be changed maybe even replaced by the new law. Therefore, we must conclude that last four years were not sufficient to prepare adequate legal proposal in this area and that procedure of passing adequate Law on Conflict of Interests in Montenegro will continue even in this year. This, of course, shows lack of political will and readiness to regulate this field in adequate way and in accordance with accepted international standards.

LAW ON CONFLICT OF INTERESTS

Law on Conflict of Interests adopted in Montenegrin Parliament on June 16th 2004 defines issues of existence and ways of preventing conflict of public and private interests. Law on Conflict of Interests relates to public officials and persons related to them and by this Law officials are considered to be persons elected or appointed by the Montenegrin Parliament or appointed by Montenegrin Government or elected/appointed by local government. For these public officials it is prohibited to put private interest before public interest in a way that might influence performance of their public duties.

Within the definitions (article 4 Law on Conflict of Interests) it is defined what is conflict of interests and what are related persons, what is gift of higher value, and what is service. Conflict of Interests is defined as conflict, which exists when public official puts private interest before public interest in order to obtain material benefits or privileges for him or for, with him, related persons. Related persons are defined as relatives of public official, marital, or illegitimate partner, adopted child, but also other persons with whom the official has personal or business relationship. For definition of a gift, following formulation is used: money, papers of value, or other things that are received or given and which value overcomes the amount of 50 euros. Service is defined as action that creates conditions for obtaining benefit.

Article 5 of Law on Conflict of Interests prescribes that public official is prohibited to: receive gifts of higher value, benefits or services; provides privileges to citizens based on political or other preferences, origin, personal, family or relatives ties and; influence the process of public acquisitions.

Public official is obligated, if he suspects, to report conflict of interest to Commission for establishing the existence of conflict of interests, according to article 6 of this Law.

Article 7 of Law on Conflict of Interests defines duty of public official to, without hesitation, informs the Commission on influence or illegal action done against him while performing his public duty. This article also defines actions that Commission must take in

case of doubt that influence or illegal action has characteristic of criminal act, and report such a case to State Attorney.

Article 8 of Law on Conflict of Interests defines submitting report on incomes and property of public official, its marital partner or illegitimate partner or children and within 15 days from the day, he took public office. Public official is obligated to inform the Commission about every change in property in amount bigger than 2000 euros within 15 days from the day the change occurred. Article 9 defines precisely the way report, which public official submits, should be filled in and it is left to the Commission to establish true content of that report.

Article 10 of Law on Conflict of interests defines running Registry of reports on incomes and property of public official, his marital partner or illegitimate partner and children if they live within same household. Registry is published in media. This article prescribes obligation of the Commission to submit, without delay, data from Registry on demand of state body or local government body.

Article 11 of Law on Conflict of Interests defines what is considered as illegally acquired income or property and what actions Commission for establishment of conflict of interests in this case must undertake, that is Commission must inform State Attorney about illegally acquired income or property. Provisions within articles 12 and 13 of Law on Conflict of Interests relates to accepting and reporting about gifts of higher value, establishing value of gift and deadline for reporting particular gift.

Article 14 defines possibilities of public official to do other, while performing public duty, with necessary agreement of body which elected/appointed him, and prior assessment of the Commission for establishing conflict of interests that by doing this other job official does not creates conflict of interest. This article obligates public official to report to Commission about income acquired through this other job and prohibits him from, regarding his public duty, accepting compensation from other country or international organization or institution, except for travel and similar expenses.

Article 15 of Law on Conflict of Interests defines prohibition of public officials membership in companies or company bodies as well as obligation to transfer ownership rights within specific company, 15 days from the day official takes public office. Paragraph two of this article allows public officials to be members of one company, which is state- owned, that is owned by local government. Article 16 of Law on Conflict of Interests relates to more precise definition of membership in NGOs and other legal subjects that is Law allows membership in these organizations but not compensation rights except travel and similar expenses.

Article 17 of Law on Conflict of Interests defines establishment of Commission for establishing conflict of interests, as independent body that is founded by Parliament. Provisions within articles 18 and 19 define election and mandate of Commission members as well as Commission's competences. It is anticipated that Commission should have president and four members, to be elected by Parliament on proposal of authorized parliamentary body. Commission's members are elected on 5 years period with possibility of reelection. It is defined that Commission's president and members must be personalities who, thanks to their expert, professional and moral qualities, had proven their independence and conscientiousness. At least one Commission member must be lawyer with passed qualifying examination for judge. Authorized parliamentary body will determine compensation for Commission members. Commission competences are to determine facts and circumstances necessary for reaching decision, reaching explained decision on existence or inexistence of conflict of interests, determining value of gifts, running Registry of reports, making operating procedures and conducting other activities in accordance with the Law.

Article 20 of Law on Conflicts of Interests prescribes procedure at Commission that is article cites persons that can start initiative as well as actions of the Commission for establishing conflict of interest according to submitted reports.

Article 21 of Law on Conflict of Interests prescribes obligation of public official to make a statement regarding submitted written report, within 15 days, and in case he does not make a statement within necessary period Commission will make decision without his statement.

Article 22 of Law on Conflict of Interests defines actions by the Commission for establishing conflict of interests regarding dissolving of public official, that is eventual denunciation to State Attorney.

Article 23 of Law on Conflict of Interests prescribes provisions and use of Commissions funds.

Transparency of Commission's work is defined in article 24 of Law on Conflict of Interests. Decisions of Commission on existence of conflict of interest are submitted to media. Commission submits report to Montenegrin Parliament about its work when is needed but at least once a year.

Articles 25, 26 and 27 of Law on Conflict of Interests represents transitional and final provisions and they refer to 90 days period for establishment of Commission. These are 90 days within, rules, forms and operating procedures of Commission's work, as well as rights, obligations and responsibilities of public official which is performing public duty in time when this Law goes into effect, should be adopted.

Article 28 of Law on Conflict of Interests regulates going into effect of this Law.

CONCLUSION

Remarks made by NGO sector regarding this Law were related to circle of people encompassed by this Law, to transparency of work of Commission, to availability of public official tax report, to definition of gift, to content of report etc.

According to NGO representatives, circle of people encompassed by this Law on Conflict of Interests should be enlarged.

According to Center for Democratic Transition within Law on Conflict of Interests, it should have been prescribed that work of Commission is open for public and not just that Commission informs the public on its decisions. In addition, representatives of Center for Democratic Transition think that Commission shouldn't have the possibility to define the form of report that public official has to fulfill but elements of that form should have been defined within the Law on Conflict of Interests. Proposal of Center for Democratic Transition was to define more precisely term gift, compared to current definition in the Law on Conflict of Interests. Besides mentioned remarks by NGO sector it is very important to point to the period passed since Montenegrin Government proposed to adopt the Law on Conflict of Interests in the Montenegrin Parliament. This period is too long and that points to possible problems in implementation of adopted legal regulations.

In the adopted Law on Conflict of Interests, the most problematic article is 15th, which allows public officials to be members of one company owned by the state that is local government.

This article degrades the very essence of the Law, because one of the most important reasons for adopting this Law was to disable public official to be members of one or more steering committees of state owned companies to receive compensation for this membership and to endanger public officials' objectivity when deciding about companies

in which steering committees they sit. Decision of Montenegrin Government from 2001 prohibited membership of public officials in steering committees (although this decision was never respected in practice) thus the solutions within the Law on Conflict of Interests represent big step backward. The very adoption of Law on Conflict of Interests in Montenegrin Parliament represents important precondition for more efficient fight against corruption, but Law itself will not bring results. In order to experience positive effects of Law on Conflict of Interests it is necessary that:

- Authorized parliamentary body prepare proposal for membership of Commission, as soon as possible, keeping in mind that they are supposed to be persons of moral and professional integrity with knowledge necessary to implement Law on Conflict of Interests.
- Montenegrin Parliament timely (within legally prescribed 90 days) chooses members of Commission for establishing conflict of interests.
- Authorized body of Montenegrin Government prepares changes of article 15 of Law on Conflict of Interests, which will prohibit public officials to be members of steering committees of company owned by state or local government, as soon as possible.
- Montenegrin Government adopts changes of article 15 of Law on Conflict of Interests that prohibits public officials to be members of steering committees of companies owned by state or local governments, as soon as possible and to send it to Montenegrin Parliament for adoption.
- Montenegrin Parliament adopts changes of article 15 of Law on Conflict of Interests that prohibits public officials to be members of steering committees of companies owned by state or local governments.
- Commission for establishing conflict of interests timely (within legally prescribed period of 90 days) adopts rules, forms, and operating procedures of Commission, with emphasis that these must satisfy already established standards in this field.
- Authorized parliamentary body prepares compensation proposal for members of the Commission that will be adequate to their responsibility and importance of their work.
- Montenegrin Parliament and Government provides necessary space, technical and other financial resources so that we wouldn't be waiting another six or more months in order that Commission can start with its work.
- Prepare courses in which public officials would be informed in details with fulfillment of their new obligations regarding the Law on Conflict of Interests.
- In order to achieve greater transparency, prepare and develop mechanisms of informing the public on Commission's work.

- Organize public campaign of informing the public with legal solutions and necessity of consistent and efficient implementation of Law on Conflict of Interests.
- In monitoring and evaluating the start of implementation of Law on Conflict of Interests, besides public and expert circles include also NGOs, international organizations so that necessary corrections would be prepared in time and thus provide adequate results expected from implementation of this Law.

OBSTACLES TO FREE ENTERPRISE

Rade Bojovic

Tax framework for doing business in Montenegro

I Tax reform

In last couple of years, within transformation of economic system¹, Montenegrin government conducted huge fiscal and tax reform.² Budget³ system is changed and harmonized with international standards, and by the end of year, 2001 Parliament adopted number of key tax laws thus changing previous tax system and allowing normative harmonization of Montenegrin tax framework with solutions applied in European Union. Tax reform encompassed adoption of all relevant laws regulating taxation of goods and services, taxation of business subjects' profit, taxation of individuals and entrepreneurs, taxation of property sale and usage of property as well as conduct and functioning of tax authorities.³ At the same time, within social reforms, income taxes are changed and these taxes significantly influence employment policy and business ambitions of entrepreneurs⁴.

There is no doubt that tax reform significantly altered previous fiscal practice at the same time bringing new legal solutions (VAT), but also producing different effects- from obvious improvements to difficulties and shortcomings. Therefore, new fiscal system directly influenced entire business ambient in Montenegro. With introduction of new tax solutions, companies and entrepreneurs found themselves in new business situation. Part of these solutions had annulled some stimulations existing in previous legislature (exam. privileges regarding profit taxation of companies) but at the same time there was a controversial change of tax rates in area of turnover of goods and services. For example, *tax rate of services turnover is increased from 12% to 17% while tax rate regarding turnover of goods is reduced from 24% to 17%*. On the other hand with implementation of VAT, a more stimulus and better taxation system than previous one, came to life although we have some solutions that are inducing insolvency in economy and they represent bad example of favoring state fiscal interest.⁵

¹ Economic reforms in Montenegro encompassed, in last five years, all parts of economic system (fiscal, business regulations, particular economic fields, banking, stock exchange, privatization etc). Transformation of the economy represents a process that, of the whole of social reforms, made most substantial progress so that today we have some 70% of legislature reformed with high degree of implementation of new legal solutions. Still, Montenegrin economic reform results are not satisfactory and controversial economic balances are proof of that.

² Previous budget concept is transformed (treasury system is introduced) while at the end of year 2001 a set of laws was adopted that altered the profile of tax system.

³ Following package of tax laws was adopted: Law on VAT, Law on Consumption Tax, Law on Company Income Tax, Law on Income Tax, Law on Property Tax, Law on Property Sale Tax, and Law on Tax Administration.

⁴ Changes introduced in new Law on Retirement and Disability Insurance (Official Gazette of Montenegro no. 54/03, 39/04) foreseen total amount for tax rate of 21.6%. Employer pays 9,6% and employee 12%. New Law on Health Care Insurance (Off. Gazette of Montenegro no. 39/04) foreseen tax rate of 13,5% and employer pays 6%- employee 7,5%.

⁵ We are speaking about comprehensive model of taxation of imported but not sold goods and later on- slow return of realized tax credit to companies.

Comprehensive fiscal reform created new tax framework for doing business in Montenegro, imposing not just new solutions, with different consequences for business, but also opening a number of dilemmas which must reconcile real state needs with necessity for fast development of entrepreneurship and for attracting foreign investors.⁶ It is obvious that modernization, of tax system in Montenegro in circumstances of, still excessive black market economy⁷ and undeveloped regular market economy, is very significant for stimulating business projects and development of entrepreneurs' initiatives. Tax reform was realized in conditions of strong fiscal pressure on companies and entrepreneurs⁸ by the state⁹, so even in the initial phase of implementation of these solutions, it became very clear that in near future tax framework would have to be changed. The need for creation of stimulating tax system that is supposed to encourage business development in Montenegro must represent one of the long-term priorities of economic policy. This policy should be focused on creation of free market and giving a chance to private initiative. Current tax system should be redefined in this direction so that reformed tax system is, in long- term, attractive both for domestic and foreign investors.

II Taxation of business

1.1. Classification of taxes

Some ten -tax laws and forty bylaws are applied on business in Montenegro. Having in mind character of basic tax regulations, regulating different business practices it is possible to classify them roughly in following way:

I	First group – taxation of turnover of goods and services
1	VAT Law (Official Gazette of Montenegro no. 65/01, 38/02, 72/02, 21/03)
2	Consumption Law (Off. Gaz. of MN no. 65/01)
3	Tax Law on Turnover of Property (Off. Gaz. of MN no. 69/03)
4	Tax Law on turnover of used motor vehicles, vessels, and aircrafts (Off. Gaz. of MN no. 55/03)
5	Bylaw on preparing the VAT Law (Off. Gaz. of MN no. 65/02)
6	Bylaw on implementation of Consumption Law (Off. Gaz. of MN no. 18/02)
7	Bylaw on Flat Rate Taxation of Independent Activity Incomes (Off. Gaz. of MN no. 71/02)
8	Bylaw on Criteria and Methodology for Determining Market Value of Real Estate Property (Off. Gaz. of MN no. 23/03, 26/04)
II	Second group - taxation of capital and property
1	Company Income Tax Law (Off. Gaz. of MN no. 65/01)
2	Property Tax Law (Off. Gaz. of MN no. 65/01)
3	Tax Law on usage of passenger motor vehicles, vessels, and aircrafts (Off. Gaz. of MN no. 28/04, 37/04)
4	Bylaw on usage of tax relief- based on company income tax in insufficiently developed municipalities (Off. Gaz. of MN no. 3/03)
III	Third group – taxation of employees' earnings
1	Income Tax Law (Off. Gaz. of MN no. 65/01, 37/04)
2	Law on Retirement and Disabled Persons Insurance (Off. Gaz. of MN no. 54/03, 39/04)
3	Health Care Insurance Law (Off. Gaz. of MN no. 39/04)
4	General Collective Contract (Off. Gaz. of MN no. 1/04)
5	Bylaw on tax relief for newly employed (Off. Gaz. of MN no. 32/04)

⁶ All renowned international foundations and research institutions (exam. *The Heritage Foundation*), dealing with economic freedoms and condition assessment for development of free business, consider the issues of fiscal burden and tax framework are within ten key factors determining economic development (taxes, trade policy, business regulative, state interventionism, banking system, property rights, size of black market, monetary order etc.).

⁷ We have different public estimates that black market economy participates in Montenegrin GDP around 20-30% and in any case, this is very high rate with negative consequences on regular business and entire development of national economy.

⁸ There are some 12 000 entrepreneurs and 9 000 companies in Montenegro.

⁹ Approximately 38.000 employed persons in Montenegro receive salaries from the budget. State budget participates with 33% in total public expenditure, which comes to 55% of GDP (the rest of public expenditure goes on public social funds and 21 local self-government).

1.2. Turnover taxation of goods and services

Basic law that regulates tax position of company within trade of goods and services is VAT Law. With introduction of this law in domestic tax system, besides harmonization with international legal standards, we essentially got better and more contemporary way of taxation than before. Main characteristics of new taxation system, including advantages and disadvantages are:

- According to this law we tax turnover of goods and services through compensation, including imported products;
- Taxpayers are companies and individuals dealing with commercial businesses with goal to obtain profit;
- Tax is paid according to place where turnover of goods and services occurred;
- Tax is calculated at the delivery of goods or services;
- Regarding import of goods, tax is paid at entrance of goods into Montenegrin customs territory and this solution represents a big obstacle for importers as they are dealing with goods that are yet to be distributed on the market and payment of that merchandise represents business risk that in consequence influence insolvency of these importers and rises question of slow return of tax credits by the state;
- Tax base is compensation which taxpayer receives from buyer of his products or services;
- VAT is being paid at 17% rate, but we have exceptions where tax rate is 0%. Having in mind current rate of 17% and need for stimulating business in Montenegro we have dilemma whether to reduce this rate for two or more percentages in order to create more favorable ambient for companies in Montenegro;
- There is number of cases of tax relief regarding paying VAT on goods (tax relief in cases of so called strategic goods such as milk, bread, fat, sugar, medicines, educative books, press etc) or services from public interest (postal and telephone services, health care, TV subscription, NGO services, copyright, public utility services etc.);
- Turnover of goods and services is registered through obligatory issuing of fiscal bill;
- Calendar month is treated as period for tax calculation and tax is paid up to 15th of next month for previous one at latest;
- When paying VAT taxpayer reduces the amount of direct tax and calculate final amount of his tax obligation;
- In cases when taxpayer has annual turnover less than 18.000 euros he is not obliged to calculate VAT;
- In cases when exit tax is smaller than direct tax state is obliged to recognize that difference as tax credit for coming tax period or to return it in period not bigger than 90 days. The problem with this clause is too long period for return of funds what negatively influence solvency of companies;
- Taxpayer is obliged to run proper bookkeeping in order to pay VAT and to register VAT at tax authority.
- Law predicts high fines for tax violations (from 1.000 to 15.000 euros)
- VAT rate can be increased or decreased up to 15% each year when Montenegrin Budget Law is passed and this means that we have possibilities to change tax rate with goal to stimulate or additionally burden the business.

Besides VAT Law, turnover of goods and services is taxed by special Law on Consumption, as well as by regulations regarding taxation of turnover of real estate property and used vehicles. Consumption Law is applied only in cases regarding turnover of alcohol beverages, tobacco products, and oil and oil products and in these cases, measure unit/quantity of imported or produced merchandise is used as bases tax base. This Law treats only producers and traders of mentioned products and in technical-normative sense, follow solutions from VAT Law. Having in mind type of taxed products-Consumption Law represents bearable framework for excise taxpayers.

Speaking about taxation of turnover of real estate property following essential fiscal elements are applied:

Subject	Taxpayer	Tax base	Tax rate	Payment
▪ Property 1-land 2-construction object	▪ Owner of property	▪ Market value	2%	▪ 15 days from tax decision

This tax foresees number of exemption from taxation but those exemptions are not relevant for commercial businesses. In any case, companies, which buy and sell real estate, are paying tax at rate that can be judged as acceptable and rate that does not represent barrier for business in this area.

As far as used vehicles turnover is concerned, in Montenegro we have lex- specialis, which is applied exclusively on, buy and sell of used motor vehicles, vessels, and aircrafts. Here are the most important tax elements:

Subject	Taxpayer	Tax base	Tax rate	Payment
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▪ Used vehicles	▪ Buyer	▪ Market value	5%	▪ 15 days from the purchase day
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This law stimulates trade in the market of used vehicles.

1.3. Taxation of capital and property

There are several legal regulations, regulating taxation of earned capital (profit) and property. For further development of business, solutions within Company Income Law are very important. The way annual profit is taxed is of special interest for every participant in the market. In Montenegro we have applied following solutions:

Subject	Taxpayer	Tax base	Tax rate	Payment
▪ Realized annual profit	▪ Company	▪ Taxable profit	▪ Up to 100.000 euros – 15% ▪ Over 100.000 euros – 15.000 euros +20%	▪ Upon submission of annual financial balance

Although profit taxation includes a number of potential stimulations and tax relieves (exam. tax reduction because of investments in capital assets, three years tax exemption if one conducts business in undeveloped municipalities) current tax rate can be judged as insufficiently attractive for business initiative. Although we are dealing with tax rate that is, compared to others in Europe, one of the lowest, necessity for developing domestic business, demands serious reexamination of possible rate reduction, which represents realistic barrier regarding regional competitiveness and internal stimulation of entrepreneurship.

Speaking about taxation of property it is important to pay attention to two tax laws – one regulating taxation of real estate and second regulating taxation of transport vehicles. Here are those two laws:

1) Tax Law on Real Estate Property

Subject	Taxpayer	Tax base	Tax rate	Payment
▪ Real estate	▪ Owner	▪ Market value	0,08 – 0,80%	▪ Two annual installments

1) Law on Usage of Transport vehicles (automobiles /vessels/aircrafts)

Subject	Taxpayer	Tax base	Tax rate	Payment
▪ Objects within ownership	▪ Owner	▪ Cubic centimeters ▪ Size	▪ Automobiles: 15–500 euros ▪ Motorcycles: 10–200 euros ▪ Vessels: 5–400 euros ▪ Aircrafts: 1.000–5.000 euros	▪ Annually

Companies and entrepreneurs in possession of taxable property, according to these laws, pay taxes at rates and conditions that we might call reasonable and acceptable. In these cases, we cannot talk about tax burdens, which are unstimulating for owners of real estate property and other property.

1.4. Taxation of employees' incomes

For every company and entrepreneur it is very important to know under which conditions they can employ professional work force. The cost of each employee is of special significance when preparing business plans and creating business strategy. The height of employees' gross salaries and taxes on those salaries always represent tax and social burden for each employer. Therefore, we have following solutions in Montenegro:

1) Income Tax on company employees' salaries

Subject	Taxpayer	Tax base	Tax rate	Payment
Income	Company	Gross-salary	15% -23%	Monthly

2) Taxes and municipal tax on company employees' salaries

Type of tax	Taxpayer	Tax base	Total rate	Payment
For Retirement insurance	Company	Employee's gross-salary	21,6% ¹⁰	Monthly
Health care insurance	Company	Employer's gross-salary	13,5% ¹¹	Monthly
Tax for unemployment ¹²	Company	Employer's gross-salary	1%	Monthly
Tax for Union Fund ¹³	Company	Employer's gross-salary	0,2%	Monthly
Tax for solidarity housing building ¹⁴	Company	Employer's gross-salary	0,7%	Monthly
Tax for Montenegrin Trade Chamber ¹⁵	Company	Employer's gross-salary	0,32%	Monthly
Surtax on tax ¹⁶	Company	Tax on gross-salary	15%	Monthly

3) Time-limited tax relieves for newly employed ¹⁷

Duties	Payer	Base	Rate	Payment
Tax for retirement insurance	Company	Employer's gross-salary	12%	Monthly
Tax for health care insurance	Company	Employer's gross-salary	7,5%	Monthly
Tax for unemployment insurance	Company	Employer's gross-salary	0,5%	Monthly

As an overview of these issues, we can say that, apart solutions from bylaws regulating possibilities of benefits regarding employment, that is certainly good for business, actual tax burdens are too high and obviously represent barrier for more dynamic employment policy in Montenegro¹⁸. In circumstances when on one earned euro there is almost another euro going on tax and

¹⁰ Taxes for retirement insurance are paid according to Law on Retirement –Disabled Insurance (Off. Gazz. Of MN. No. 54/03, 39/04) and 9,6% is paid by employer and 12% by employee. In the mean time until December 1st 2004, corrective rate for employers of 10,8% will be applied.

¹¹ Health care insurance tax is being paid according to Health Care Insurance Law (Off. Gazz. Of MN no. 39/04) –employer pays 6% and employee 7,5%. In addition, until December 1st 2004 corrective rate of 6,5% was applied for employers.

¹² Tax is being paid with goal to insure people from unemployment and these funds belong to Montenegrin Employment Agency.

¹³ Tax for special Union fund is being paid based on General Collective Contract (Off. Gazz. Of MN no. 01/04) and certainly represents controversial solution having in mind that this Law breaches the principle of free associating of citizens and favors one Union organization.

¹⁴ These funds also, must be paid to special housing fund regardless from wishes of employers and therefore represent controversial legal solution.

¹⁵ Obligatory payments to Montenegrin Trade Chamber, as one of the business associations in Montenegro, against individual will of employers is unacceptable solution that- just as in case of Union- breaches constitutional and international principle of free associating of citizens.

¹⁶ Instead of previous so called public utility tax from 3%, according to Law on Financing of Local Governments (Off. Gazz. Of MN no. 42/03) municipal surtax on income of 15% is introduced and this law more or less kept previous tax burden.

¹⁷ Based on Bylaw on tax relieves for newly employed (Off. Gazz. Of MN no. 32/2004) employers- until the end of 2004- can use very stimulating tax solutions, which are proscribing tax exemption on gross salaries and significantly reducing total tax rate.

¹⁸ Government, at the end of June, has started implementing new tax policy in area of personal incomes, which is supposed to reduce fiscal burden up to 10% by the end of this year. This orientation is certainly positive but reduction percentage is not sufficient to significantly influence dynamics of employment and elimination of illegal job market. This is the reason why long term fiscal policy regarding personal incomes has to be focused on more radical reduction of tax burden – probably to the level that in structure of gross-incomes would be around 30%.

social obligations, it is not possible to expect significant reduction of formal unemployment and this, certainly, has multiple negative social and fiscal consequences. At the moment it is obvious that level of taxes and dues accompanying gross-salaries of employees represents limitation for business development and one of the most critical points in commercial activities taxation policy in Montenegro.

III Recommendations

Evaluating actual tax framework for business in Montenegro, especially within context of necessity for rapid enforcement of national economy, it is necessary, within reasonable period, to realize fiscal changes that will enable creation of stimulating conditions for development of business activities. Having this in mind, we propose following recommendations:

General recommendation

- It is necessary to reexamine total effects of tax reforms in order to remove present fiscal barriers and gradual creation of tax framework that will enable stronger and more dynamic business initiative.

Special recommendations

- When creating budget for fiscal year 2005 it is necessary to, reconsider possibility of reducing VAT rate in order to create additional conditions for elimination of black market economy and to increase the amount of money at disposal of economy.
- It is necessary to eliminate already detected problems in VAT implementation that are influencing solvency or at least representing very difficult problems for companies.
- It is necessary to reconsider appropriate changes in Company Income Tax Law and not just that part regarding tax rate but also part of missing stimuli for business beginners.
- It is necessary to endure in tax and dues reduction policy even regarding personal incomes because this represents one of the main stimuli for business in Montenegro. It is especially important to pay attention to controversial tax solutions from constitutional freedoms and international conventions point of view.
- Finally, it is necessary to make communication with tax authorities as simple as possible, transparent, and efficient.