



REPORT

ON THE MONITORING OF COURT PROCEEDINGS AND NEEDS
ASSESSMENT OF MONTENEGRIN JUDICIARY WITH REGARD TO THE
PROTECTION OF HUMAN RIGHTS AND APPLICATION OF STANDARDS
FROM THE EUROPEAN CONVENTION AND PRACTICE OF THE
EUROPEAN COURT OF HUMAN RIGHTS



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June, 2023, Podgorica

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**** All expressions used in this report, which have a gender meaning, regardless of whether they are used in the masculine or feminine gender, shall include both masculine and feminine genders respectively.*

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INTRODUCTION

An independent judiciary is the foundation of any stable democracy, so in order to preserve justice and other values of a modern democratic society, it is necessary for citizens, as the main link in democratic processes, to have confidence in the bodies that are guardians of justice. Unfortunately, the widespread negative perception of the judicial system threatens to jeopardise independence, legitimacy, and functionality of the judicial system, not only in Montenegro, but also in the entire Western Balkans.

For example, the “Political Public Opinion of Montenegro” survey, conducted by the Center for Democracy and Human Rights (hereinafter referred to as the “CEDEM”) in May 2023 on a representative¹ sample of all adult citizens of Montenegro, indicated that still not even half of them believe in the judiciary - 42.4% of them have mostly and great confidence in the judiciary in Montenegro, while 45.6% of them have mostly and great confidence in the State Prosecutor’s Office of Montenegro.

This is just one of the many studies that show that, in order to preserve democracy, it is necessary to oppose the trend of increasing alienation of the judiciary from society, which is felt in the entire region of the Western Balkans, including in Montenegro. Along the way, direct courtroom experience can help break down prejudices and bring society and the judiciary closer together. That is why we believe that the principle of a public trial has a huge potential for changing the citizens’ perception of the Montenegrin judiciary, and for changes in the quality of the trial.

On the one hand, citizens, by their presence in the courtroom, in the capacity of the lay public, can exercise social control over the way in which justice is administered, as well as become familiar with the functioning model of the judicial system, and with the way in which human rights are protected before judicial authorities in the country. On the other hand, the monitoring of the trial by the expert public and its constructive conclusions about where and what room for improvement can resonate loudly and be a significant guiding star in the process of further strengthening the judiciary in the country.

¹ All research results in the Montenegrin language are available at: <https://www.cedem.me/istrazivanje/objavljeni-rezultati-istrazivanja-politickog-javnog-mnjenja-2/>. The results in English can be found at: <https://www.cedem.me/en/news/results-of-the-survey-on-political-public-opinion-in-montenegro-2/>.

Based on these ideas, it is clear that non-governmental organizations, through the process of monitoring and constructive criticism of trials, can contribute to ensuring the quality, efficiency and transparency of the work of judicial bodies in Montenegro, and to improving the application of the European Convention on Human Rights (hereinafter referred to as the: "ECHR") in the Montenegrin judiciary, which will ultimately improve the quality of human rights protection in the country.

With this goal in mind, CEDEM, as a widely recognized organization that has been successfully operating for decades with the vision of contributing to a strong participatory democracy in Montenegro, integrated into the European Union and fully committed to European values, conducted a process of monitoring trials in the field of human rights, which lasted 12 months (from June 15, 2022 to June 15, 2023), which is the subject of this report and whose conclusions will be presented on the following pages.

At the very beginning of the trial monitoring process, a survey was conducted under the name "Assessment of the needs of the Montenegrin judiciary in the field of human rights protection, application of the ECHR and the practice of the European Court of Human Rights (hereinafter referred to as the "ECtHR"). The research was conducted with the following aim, based on the views of judiciary representatives in Montenegro: 1) to assess the situation in the country when it comes to respect and protection of human rights; 2) to analyse the role of judiciary in achieving progress in the area of respect and protection of human rights in Montenegro; 3) to evaluate the knowledge of the ECHR and the practice of the ECtHR by holders of judicial functions in Montenegro; and 4) to provide recommendations for removing identified obstacles and implementing measures for improvement in the subject area.

In addition to the methodology by which the trials were monitored, which will be explained on the following pages, the results of this research served as a basis for monitoring trials in specific cases of human rights violations, because through the monitoring process, among other things, we tried to once again examine their grounding. The research played a key role in our work because it provided a basis for understanding the state of human rights in Montenegro, identifying shortcomings, and proposing measures to eliminate them directly from the perspective of the holders of judicial functions in Montenegro. Their views expressed in the results of the research were checked "on the ground", during the process of trial

monitoring, and their consistency with the conclusions defined as a result of the trial monitoring process will be discussed in this report.

Therefore, we will start the report by presenting the results of the aforementioned research, and then we will present the conclusions reached during the process of monitoring trials in cases related to human rights violations, which was conducted based on a predefined methodological framework. At the very end of the Report, we will propose recommendations for strengthening the role of the judiciary in improving the situation in Montenegro in the area of respect and protection of human rights and freedoms, which were formulated based on the conclusions reached, both through research and on the basis of the twelve-month trial monitoring process.

However, before we begin the elaboration on the assessment of the needs of the Montenegrin judiciary, it is important for us to note once again that all expressions used in this report, which have a gender meaning, regardless of whether they are used in the masculine or feminine gender, include both masculine and feminine respectively.

Authors of the Report
Andrea Mićanović
and Jovan Jablan

NEEDS ASSESSMENT OF THE MONTENEGRIN JUDICIARY

In the period from May 1 to June 1, 2022, CEDEM has conducted a study entitled “Assessment of the needs of the Montenegrin judiciary in the field of human rights protection, application of the European Convention on Human Rights and the practice of the European Court of Human Rights”.

The research was carried out within the project “Diagnosis and Therapy of Freedom of Expression, Hate Speech and Ethnic Tensions”, financed by the Delegation of the European Union to Montenegro through the European Instrument for Democracy and Human Rights, and which CEDEM implements in partnership with the Media Institute of Montenegro and UL info. The research was implemented with the aim to:

1. Assess the situation in Montenegro when it comes to respect and protection of human rights;
2. Analyse the role of the judiciary in achieving progress in respect and protection of human rights in Montenegro;
3. Evaluate the knowledge of the ECHR and the practice of the ECtHR by the holders of judicial functions in Montenegro, and that
4. Provide recommendations for removing identified obstacles and implementing measures for improvement in the subject area.

The methodology by which the research was conducted was developed by Prof. Miloš Bešić, PhD, Chief Methodologist of CEDEM. According to the methodology, for the purposes of this research, in the mentioned period, three focus groups were conducted in which the participants were judges and state prosecutors, and then a questionnaire that, in addition to judges and state prosecutors, included advisers in courts and state prosecutors’ offices. We decided to include them in the research, because we believed that, bearing in mind the importance of their role in the Montenegrin justice system, their observations and recommendations could be of great importance when assessing the needs that are the subject of this research.

The focus groups were moderated by Valentina Pavličić, the representative of Montenegro before the ECtHR.

1. Methodological framework

As already mentioned, for the purposes of this research, three focus groups were conducted, one in each Montenegrin region. Participants of the focus groups were judges and state prosecutors in basic courts and basic state prosecutor's offices. The focus groups included 13 participants, including 7 judges and 6 state prosecutors. Each focus group lasted between 60 and 90 minutes, and the discussion among the participants was recorded by audio devices, in order to convey the views expressed in the text of this report as authentically as possible. Based on audio recordings, transcripts of focus group discussions were made (after which the audio recordings were completely destroyed), which served as empirical content that was the subject of analysis.

In addition to the focus groups, an anonymous questionnaire was distributed as well, which was disseminated to judges and advisers in the basic, higher and appellate courts of Montenegro, and especially to state prosecutors and advisers in the basic and higher state prosecutor's offices in Montenegro. The structure of the respondents is as follows:

- The questionnaire intended for the judiciary was completed by 70 judges and advisors in courts aged between 28 and 62, from all basic and higher courts, as well as the Appellate Court of Montenegro, which means that the research covers every municipality in Montenegro where the aforementioned courts exist. Among the respondents, there are 65 representatives of basic courts, one representative each from both higher courts and 4 representatives of the Appellate Court of Montenegro. Finally, out of 70 respondents, 43 (61.4%) are judges, and 27 (38.6%) are advisors in courts.

- The questionnaire intended for state prosecutor's offices was completed by 38 state prosecutors and advisors in state prosecutor's offices aged 29 to 64, from all basic and higher state prosecutor's offices, which indicates that the survey covers every municipality in Montenegro where the aforementioned state prosecutor's offices exist. Among the respondents, 21 are representatives of basic state prosecutor's offices, and 17 are representatives of higher state prosecutor's offices. Finally, out of 38 respondents, 26 (68.4%) are state prosecutors, and 12 (31.6%) are advisors in state prosecutor's offices.

2. Assessment of the situation in Montenegro in the area of respect and protection of human rights

During the research, at the very beginning respondents were asked in the questionnaire what is their first association when they hear the term “human rights”. Among the most frequently highlighted associations were ECHR, ECtHR, democracy, freedom, rule of law, Ombudsperson, and human being. Nevertheless, 13% of the total number of respondents, including judges and advisers in courts, and state prosecutors and advisers in state prosecutions, associate the term “human rights” with something negative, which ultimately indicates that the situation in the area of respect and protection of human rights in Montenegro is not at an enviable level.

Among such associations, “violation” and “endangered” were repeated. One respondent answered that his first association with human rights is the hope that one day they will truly become universal, implying that they are not currently enjoyed by all of us equally, regardless of citizenship, sex, gender, sexual orientation, cultural and ethnic background, political or other opinion and other diversity. Another respondent mentioned “the West and prosperity” as an association, which indicates that the term human rights is still associated with the developed West, and is not specific to the underdeveloped East. The third respondent pointed out that when she hears the term “human rights” she immediately thinks: “Here comes work!”, and two respondents stated that they have “no association at all” when they encounter the term human rights.

We continued the examination of respondents’ attitudes regarding the situation in Montenegro regarding respect for human rights with the following question: How would you generally rate respect for human rights in Montenegro? Although the largest number of judges and advisers in courts, and state prosecutors and advisers in state prosecutions answered with “mostly good” (79 respondents, i.e. 73.1%), the fact that 25 answered with “mostly bad” is not negligible either. (23.1%) of the total number of respondents, especially bearing in mind that the respondents were persons who professionally deal with the protection of human rights on a daily basis, so any signal from their side that something is wrong in this area should be taken very seriously.

Furthermore, in order to examine the views of respondents regarding the state of human rights in Montenegro, both in the questionnaire and during the focus groups, we asked them which human rights are most threatened in Montenegro, and we provide an overview of their answers below.

2.1. The most endangered human rights in Montenegro

In this regard, the views of the judges and court advisors included in the questionnaire fully correspond to the views of state prosecutors and advisors in the state prosecutor’s offices surveyed in the same way. As many as 33 (47.1%) of the surveyed judges and advisers in the courts, and 20 (50.2%) of the surveyed state prosecutors and advisers in the state prosecutor’s offices believe that the most endangered human right in Montenegro is the right to private and family life from Article 8 of the ECHR. Furthermore, according to the views of both, the second most threatened right in Montenegro is the right to freedom of expression from Article 10 of the ECHR, the third right to a fair trial regulated by Article 6 of the ECHR and the fourth right to freedom and security from Article 5 of the ECHR.

Chart 1 - In your opinion, which human rights are most threatened in Montenegro (Results obtained by a questionnaire for judges and advisors in the courts)

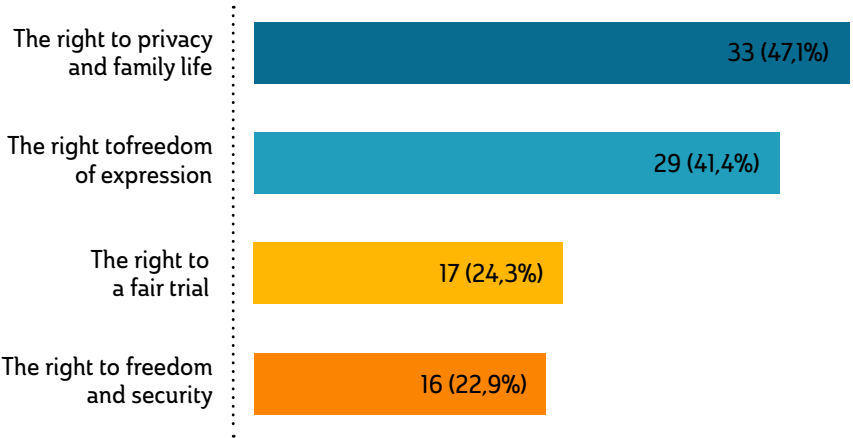
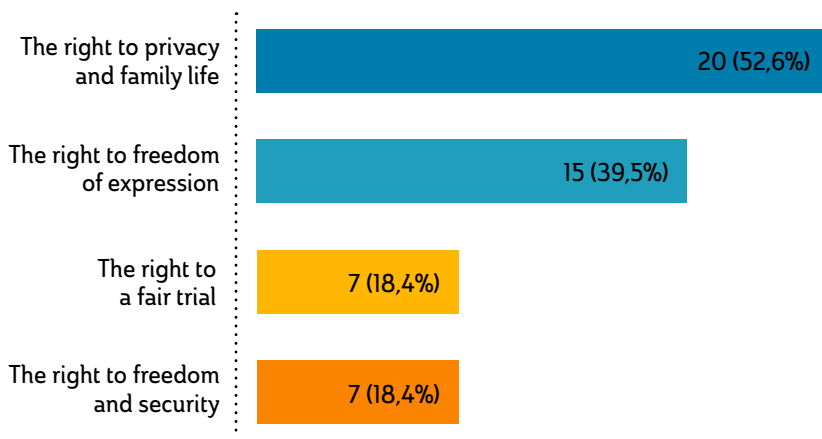


Chart 2 - In your opinion, which human rights are most threatened in Montenegro? (Results obtained by a questionnaire for state prosecutors and advisors in state prosecutor's offices)



Focus group participants, on the other hand, are of the opinion that the most endangered human right in Montenegro is the right to a fair trial (Article 6 of the ECHR), and that the right to access the court, the right to a trial within a reasonable time, and the right to a trial within a reasonable time are often violated, the right to a reasoned judgement, all of which are guaranteed precisely within Article 6 of the ECHR.

2.1.1. Violation of the right to a fair trial referred to in Article 6 of the ECHR

The participants of the focus groups, as just said, pointed out how many segments of violation of the right to a fair trial. First, they pointed out that citizens' right to access the court is often violated due to inadequate infrastructure in Montenegrin courts, and the lack of digital literacy of judges.

“ As funny as it may sound, we should start with the technical stuff. I judge on the fourth floor, and the court does not have an elevator, and that automatically violates the right of access to the court for persons with disabilities, the elderly, or anyone who is unable, for one reason or another, to use the stairs.

- *Believe me that the judges are not even digitally literate, that is many*
- *do not know how to use an e-mail. A large number of submissions are*
- *submitted online, which then means that a judge who does not know*
- *how to use an e-mail violates the right to access the court of that citizen*
- *who tried to access the court in that way.*

In addition, they pointed to the frequent practice of making unreasoned court decisions, which in the end also leads to a violation of the right to a fair trial, and which, as they state, is the result of the lack of professional knowledge and professional capacities of a certain number of judges.

- “ *I am personally a party to the proceedings and I have personally experienced that the court gave me a decision that does not have any explanation. To make matters worse, the decision was confirmed by the instance higher court, and even the highest court in the country, and it did not contain an elementary explanation or review of my statements. In addition, the decision contained statements that absolutely do not correspond to what I stated in my documents.*

Also, the participants of the focus groups stated that the courts and state prosecutor's offices are overloaded, which leads to prolongation of the procedure and the violation of the right to a trial within a reasonable time. When asked to identify the causes of overload, focus group participants gave several answers. First, they pointed out that one of the key problems is that there is a lack of personnel capacity in the courts and state prosecutor's offices, i.e. the fact that not all the positions provided for by the regulations have been filled.

For example, the Decision on the number of state prosecutors (“Official Gazette of the Republic of Montenegro”, no. 21/15 and 13/18), which determined the number of state prosecutors based on the Rulebook on framework work standards for determining the required number of state prosecutors and civil servants and of employees in the State Prosecutor's Office (“Official Gazette of Montenegro”, no. 17/15), it is planned that the apparatus of the State Prosecutor's Office of Montenegro will number 133 state prosecutors (including heads of state prosecution offices). However, the data that CEDEM received from the Prosecutor's Council of Montenegro on the basis of a request for free access to information show that on July 29, 2022, 105 state prosecutors were employed in the State Prosecutor's Office of Montenegro (28 less than expected in order to update and quality work of the State Prosecutor's Office).

As another reason for overload of judges and state prosecutors in Montenegro, respondents state that advisors are “unusable in most cases”, mostly because their work is not subject to any control by judges and state prosecutors.

“ The control of their work is performed out only in terms of the number of cases they solve. I have only been working as the advisor for 6 months, and I know that advisors report on their work monthly, and only on the number of cases they have resolved. It means that this advisor is absolutely not worried about whether I will entrust him with solving a complicated or simple case. Given that we judges do not in any way influence the assessment of the advisors’ work, it often does not even matter to them whether we think they do their job well or poorly and thus become qualitatively unusable. If my opinion had an impact on his progress, I’m sure that things would be different.

Thirdly, the problem of overload, according to the participants of the focus groups, also arises due to the fact that the institute of alternative dispute resolution has not yet taken root in Montenegro. As they state, cases are referred to the Centre for Alternative Dispute Resolution (hereinafter referred to as the “CARD”) on a pro forma basis, and rarely any of them are actually resolved in the CARD. They further identify as a problem that the employees of the CARD are not necessarily lawyers, but individuals of various professions, who often do not even possess basic legal knowledge, and as a result, this institution has no reputation and the parties do not have confidence in the method of alternative dispute resolution, so all their disputes are settled before the court.

And the last, the participants of the focus groups state that the overload also occurs due to the inexperience and unprofessionalism of the third parties with whom the holders of judicial functions cooperate when performing their work tasks. For example, they stated that “a great deal of ignorance, inexperience and superficiality is noticeable in the work of court experts, which leads to a large number of additions and corrections to their findings and opinions and ultimately contributes to the violation of the right of the party in the proceedings to a trial within a reasonable time.” In addition, the participants of the focus groups stated that the quality of cooperation with the Post of Montenegro is not at an enviable level, because it does not provide the service of delivering summons and submissions in an adequate manner, which makes it difficult for the judges to provide the conditions for holding the hearing and leads to the delay of the procedure.

2.2. Key problems that negatively affect the state of human rights in Montenegro

After giving their assessment of the situation in Montenegro when it comes to the respect and protection of human rights, respondents in the questionnaire and focus group participants were asked to determine the key problems and factors that negatively affect development in this area. In this regard, the largest numbers of respondents from Montenegrin courts are of the opinion that the key problem is that media in Montenegro are not sufficiently sensitive when it comes to human rights and hinder, and even prevent, the process of protecting human rights in the country. This is the opinion of 35 (50%) of the interviewed representatives of the courts, with which 20 (52.6%) of the respondents from the state prosecutor's offices agree. Nevertheless, the representatives of the state prosecutor's offices (25 of them, i.e. 65.8%) point out the fact that citizens do not know their rights, nor the way in which they can achieve their protection, as a key problem. 33 (47.1%) of the surveyed judges and advisers in courts and 7 (18.4%) of the surveyed state prosecutors and advisers in state prosecutor's offices think that the key problem is that the institutions in Montenegro are weak and do not enjoy trust.

One respondent stated that the key problem is that "politicians interfere every day in what is not their competence, including in the performance of the judicial/prosecutor function", thereby referring to the problem of violation of the principle of independence of the judiciary in Montenegro. This is significant, especially if it is taken into account that all members of the focus groups agree with this statement. Therefore, they believe that one of the key problems in the area of respect and protection of human rights in Montenegro is that the judiciary is not independent and free political influence. They stated that nepotism and corruption are very present in the Montenegrin judiciary and prosecutor's office, which, in their opinion, is best seen through the composition and way of functioning of the Judicial Council.

- “ It is a public open secret that the representatives in the Judicial Council are chosen based on acquaintances, and not based on the quality and expertise of the candidates.
- I know a candidate who was the first on the list for the Judicial Council twice and was not elected. Candidates numbered 4 and 6 were elected. The Judicial Council is a crown institution that should serve as an example to all, and not be a breeding ground for nepotism and corruption.

Furthermore, 5 (7.1%) of the surveyed judges and advisers in the courts believe that one of the key problems is that the holders of judicial positions in Montenegro do not possess sufficient knowledge of human rights, and this position is supported by 3 (7.9%) questioned the representative of the State Prosecutor's Office. Ten (77%) focus group participants believe that the poor situation in Montenegro in the field of human rights can be attributed precisely to the lack of capacity of the holders of judicial functions. Their (lack of) knowledge of the ECHR and the practice of the ECtHR will be discussed a little later, and here it is important to mention the following:

When asked to clarify the finding that the holders of judicial positions do not have enough necessary capacities, the focus group participants, among other things, pointed out that the problem is that "judges and state prosecutors, unfortunately, are very often individuals without personal and professional integrity, who they are not ready to stand up against injustice, and they should be the first to do so."

“ Many of them do not have the capacity to perform the functions of judges or prosecutors, and the biggest problem is that judges and prosecutors do not have an opinion and do not want to express what they think. What are they afraid of? They always tell us: "Keep a low profile!". We follow the line of least resistance - at work, in life, in everything... We all get along and if someone gets a little too far - it's immediately a problem. Among the judges, an autistic caste has been created that is silent even when something directly concerns them. I'm sorry to say this, because I'm a judge myself, but that's how it is... Not to mention the fact that, in general, no one asks us anything.

They add to that that the holders of judicial positions in Montenegro are very demotivated for several reasons. First, they do not feel that their opinion is of any importance to those who create and implement the reform processes of the Montenegrin judiciary, and in this sense they point out that either they were not asked when some (important) decision for the judiciary in our country should be made, or they were asked pro forma. Also, the participants of the focus groups who represented the Montenegrin judiciary, point out that the Association of Judges of Montenegro is not functional and does not adequately represent the interests of judges.

“ No one asks us for our opinion, and even when they do, they turn a deaf ear to our criticism and suggestions. For example, I don't remember that we, as first-instance judges who are «on the front line» and the first to apply procedural matters, have ever been invited by anyone to participate in the work of a working group working on amendments to, say, the Law on Civil

- *Procedure or any other of the law. Our everyday experiences can be very*
- *important for improving the normative framework. No one can know bet-*
- *ter than we do what changes and additions to the legislation we need and*
- *what the Montenegrin judiciary generally needs.*

Secondly, they stated that judges and state prosecutors often don't have dignified life, which not only demotivates those already in that position to perform their work tasks carefully, responsibly and professionally, but also demotivates good students and high-quality young staff to opt for a judge's or prosecutor's profession.

Here, first of all, we mean that the salaries of holders of judicial positions in Montenegro are not high enough for them to be able to provide themselves with a comfortable and dignified life. It also refers to the working conditions that are not worthy of the professional prestige that should be enjoyed by those who perform the functions of judges and prosecutors (the infrastructure in courts and state prosecutor's offices is very poor the spatial capacities are extremely small, courts and prosecutor's offices are usually not accessible to persons with disabilities or other persons who for a certain reason cannot use stairs and the like).

The respondents covered by the questionnaire also agree with the above, who mentioned this problem very often in the answer to the last question in the questionnaire, which was an open-ended question: *Is there anything else that you think can be useful to us when assessing the needs of the judiciary that we carry out? Please specify.*

- “ *Nowadays being a judge is a luxury. Fortunately, I have a good family*
- *situation, so my parents can help. However, I am the father of three children*
- *and I should not allow that I am not able to support them, and the fact is*
- *that I do not have enough with my income alone. The sad point is that I*
- *would never be a judge if my parents could not support me financially.*
- *Imagine that judges who commute every day, because they are on*
- *duty in another municipality, are not paid travel expenses. Fuel must*
- *be reimbursed to commuting judges, because otherwise, when the*
- *money they spend on the fuel is deducted, they are practically working*
- *for a consultant's salary. We do not have the basic conditions for work,*
- *starting from the fact that we often lack office supplies, to the fact that*
- *the space in our offices is too small to accommodate parties, witnesses*
- *and everyone else with whom we have to communicate on a daily basis*

- *Without improving the financial position of judges, there is no advancement.*
- *We know what the public's perception is about our earnings, even though they are on average 1,000.00 euros. The workload of all judges in basic courts is extremely high, with a norm of 300 cases, and we always have more cases to work on. Also, we are the only employees in the state administration who do not have the right to overtime, although absolutely all judges work overtime on weekends and holidays, and to make the irony even greater - we decide on overtime for every citizen of this country. The constitution forbids us to engage in any other activity, and we have no right to the costs of rent, fuel, daily wages, so we have colleagues who pay for apartments for 350 and more euros, and then the question arises as to what these people work for, are they satisfied, etc*

And thirdly, what demotivates the holders of judicial functions in their work is the fact that, especially recently, a negative image of the Montenegrin judiciary as a whole is created in the eyes of the public, based on certain examples, which makes it impossible for those who conscientiously and professionally perform their duties work to come to the fore and contributes to the increase in the degree of distrust of citizens in the Montenegrin judiciary, which ultimately results in a negative situation in the field of human rights due to the fact that citizens stop seeking judicial assistance when their rights are threatened or violated. To clarify - the respondents believe that the (artificial) creation of a negative image of the judiciary, which is often not a mirror of reality, only contributes to the withdrawal of those who do their job properly, or that they themselves contribute to such an image becoming a reality.

Respondents included in this research for “artificially creating a negative image of the judiciary” mostly blame media and “their constant need for non-constructive criticism, and the effort to denigrate every segment of the state apparatus for the sake of greater readership, not realizing that in the long term and at the level of the individual and society as a whole does not bring any good”. This should not be surprising taking into account the previously presented data that we obtained, which indicated that the judiciary representatives, whom we examined in large numbers, recognize the insensitivity of media to the issue of human rights as a key problem in the field of human rights and freedoms in Montenegro.

Finally, as one of the key problems for the negative situation in the field of human rights in Montenegro, the respondents identify the inconsistency in judicial practice, which ultimately creates legal uncertainty, and the inconsistency of our judicial practice with the standards of the ECHR and the

practice of the ECtHR, which they believe is to the greatest extent measures the consequences of the passivity of the Supreme Court of Montenegro and ignorance of international standards in the field of human rights and freedoms by those responsible for unifying judicial practice both in the Supreme Court of Montenegro and in lower courts.

The respondents, who were included in the questionnaire, after defining the key problems, were asked what they see as the responsibility of the judiciary/prosecutor's office for negative evaluations of the state of human rights in Montenegro. Respondents from Montenegrin courts to the greatest extent (44 respondents, i.e. 62.9%) believe that the Montenegrin judiciary is responsible for the reason that there are not enough judges and advisers in the courts to provide citizens with adequate protection of their rights and freedoms. The lack of human resources, which was already discussed earlier, is also recognized by 25 (65.8%) state prosecutors and advisers in state prosecutor's offices as the reason why the judiciary "failed". In addition, both the representatives of the courts and respondents from the state prosecutor's offices who filled out the questionnaire believe that the responsibility of the judiciary is also reflected in the fact that judges and advisers in the court, as well as state prosecutors and advisers in the state prosecutor's offices, are not sufficiently aware of the issue of human rights and their role in their protection. This is the opinion of 19 (27.1%) interviewed judiciary representatives and 5 (13.2%) respondents from state prosecutor's offices. Some of them add that judges and state prosecutors, as well as advisers in courts and state prosecutor's offices, do not have enough knowledge and personal capacity to provide adequate protection of human rights. This is what 6 (8.6%) respondents from the courts and 8 (21.1%) interviewed representatives of the state prosecutions have stated. That the improvement of the knowledge of the holders of judicial positions in the field of human rights should be worked very intensively in the coming period is shown by the answers to several questions that we tried to examine how well the respondents know the ECHR and standards from the practice of the ECtHR, which we will present below.

2.3. (Lack of) knowledge of the ECHR and the practice of the ECtHR

In this part of the research, the judges and advisors in the courts who were included in the questionnaire answered the question to what extent, in general, the judges and advisors in the courts were familiar with the ECHR as follows: 48 (68.8%) respondents answered with “mostly”, 14 (20%) with “to a great extent”, 6 (8.6%) with “to a small extent”, and 1 respondent answered with “almost not at all”. The interviewed representatives of basic and higher state prosecutor’s offices answered in a similar way: 22 (57.9%) of the respondents answered with “mainly”, 13 (34.2%) with “largely”, and 3 (7.9%) with “to a small extent”.

However, it is important to note that these answers are not in agreement with the answers to the following questions, which we tried to check how well judges, state prosecutors, and advisors in the Montenegrin judiciary really know the ECHR and the standards of ECtHR practice. Namely, the respondents were asked to state whether they are familiar with several basic concepts from the field of European human rights law, namely the concept of 1) relative human rights, 2) the three-part test related to the application of the ECHR and 3) the doctrine margin of appreciation. The responses are presented in the charts below.

Chart 3 - Are you familiar with the concept of relative human rights?
(Results obtained by a questionnaire for judges and advisors in the courts)

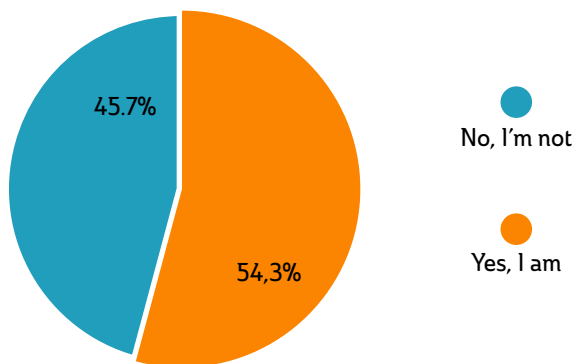
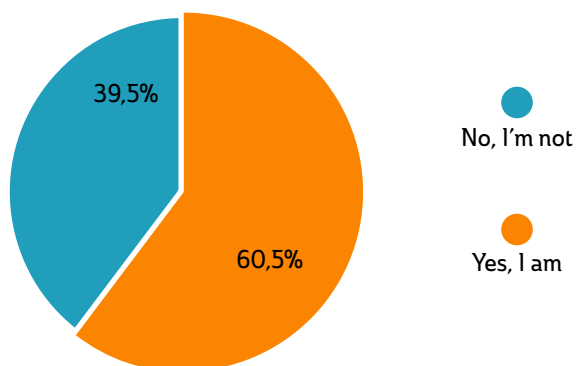


Chart 4 - Are you familiar with the concept of relative human rights?
(Results obtained by a questionnaire for state prosecutors and advisors in state prosecutor's offices)



Charts no. 3 and 4 show that 32 (45.7%) of the questioned judges and advisors in the courts, and 15 (39.5%) of the questioned state prosecutors and advisors in the state prosecutor's offices do not know the concept of relative human rights. There is a reason to pose question as to whether relative human rights in Montenegro are adequately protected within the framework of the judiciary, especially if the data from graph no. 5 and 6, which are presented below, and which indicate that the majority of respondents do not know the concept of a three-part test related to the application of the ECHR, and the adequacy of the protection of this type of human rights depends on its correct application. The results of the research, which were obtained through a questionnaire, show that 40 (57.1%) of the judiciary representatives and 24 (63.2%) of the representatives of the state prosecutor's offices do not know the so-called a three-part test based on which it is assessed whether the restriction of the rights guaranteed by Articles 8-11 of the ECHR (relative human rights) was 1) legal, 2) proportionate and 3) necessary in a democratic society.

It is also important to note that respondents who answered positively to this question were asked to give a definition of the three-part test, i.e. to explain exactly what it means and when it is applied. As many as 10 respondents, judiciary representatives and prosecution, answered incorrectly, which means that actually 74 respondents out of the total number of respondents do not know the standard of the three-part test, which is 68.5% of the total number of representatives of the Montenegrin judiciary.

Chart 5 - Are you familiar with the three-part test related to the application of the ECHR? (Results obtained by a questionnaire for judges and advisors in the courts)

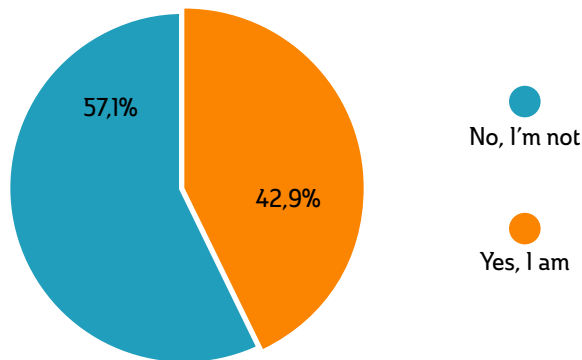
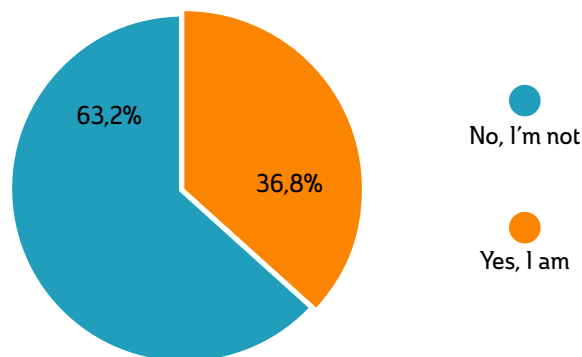
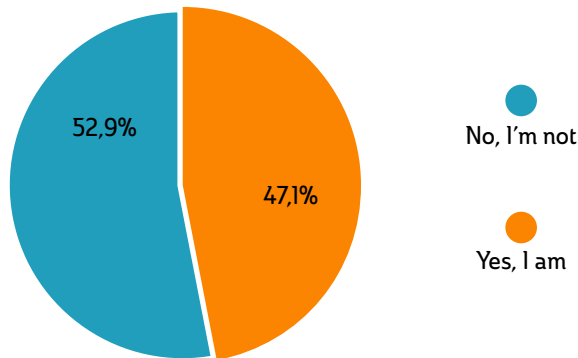


Chart 6 - Are you familiar with the three-part test related to the application of the ECHR? (Results obtained by a questionnaire for state prosecutors and advisors in state prosecutor's offices)

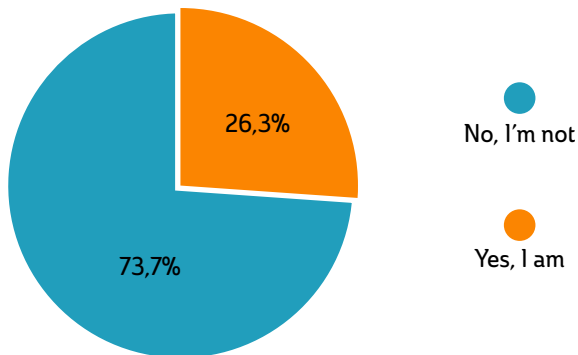


Finally, no less worrying are the answers to the question of whether the respondents know the doctrine of the margin of appreciation (discretion), which showed that this doctrine is not close to the vast majority of the interviewed judiciary representatives. Namely, 37 (52.9%) of the interviewed judiciary representatives and 28 (73.7%) of the interviewed representatives of the prosecution responded “No, I am not”. However, just as in the answer to the previous question, there were many who answered with “Yes, I am”, and when asked to explain the mentioned term, they did not give the correct answer. There were 20 respondents, which means that 85 respondents do not know about the margin of discretion doctrine, which is 78.7% of the total number of judiciary representatives in Montenegro.

Graph 7 - Are you familiar with the doctrine margin of appreciation (discretion)? *(Results obtained by a questionnaire for judges and advisors in the courts)*



Graph 8 - Are you familiar with the doctrine margin of appreciation (discretion)? *(Results obtained by a questionnaire for state prosecutors and advisors in state prosecutor's offices)*



In the end, by means of a questionnaire, we tried to examine how much judges, state prosecutors and advisors in courts and state prosecutor's offices, in general, refer to the provisions of the ECHR and decisions of the ECtHR in their work.

In general, the interviewed representatives of the Montenegrin judiciary believe that judges and advisors in courts consult and refer to standards from European human rights law - occasionally, often or always when possible. In this sense, 59 of them (84.3%) believe that judges consult the decisions of the ECtHR in their work, and 58 of them (82.3%) point out that consulting the practice of the

ECtHR is also practiced by advisers in courts. When it comes to referring to the provisions of the ECtHR, 57 of them (81.4%) believe that judges do so, and 60 (85.7%) believe that the advisers in the courts also refer to the provisions of the ECtHR in their work.

The situation is similar when it comes to state prosecutors and advisers in state prosecution offices. Namely, the interviewed representatives of the Montenegrin prosecutor's office, in general, also believe that state prosecutors and advisers in state prosecutor's offices consult and refer to standards from European human rights law occasionally, often, or always when possible. In this regard, 37 of them (97.3%) believe that state prosecutors consult the decisions of the ECtHR in their work, and 35 of them (92.1%) point out that consulting the practice of the ECtHR is also practiced by advisers in the state prosecutor's offices. When it comes to referring to the provisions of the ECHR, 36 of them (94.7%) believe that the state prosecutors do so, and 34 (89.5%) believe that the advisers in the state prosecutor's offices also refer to the provisions of the ECHR in their work.

The focus group participants think in a similar way as the respondents who were covered by the questionnaire. Namely, they confirm that judges, state prosecutors, and advisers in courts and state prosecutor's offices have little knowledge of the provisions of the ECHR and standards from the practice of the ECtHR, and in this sense, intensive work should be done to strengthen their capacities. Asked to explain why this is so, they once again pointed out the reason for the overload and stated that judges, state prosecutors and advisers in the judiciary do not have time to improve (in this field).

“ *We are overloaded. It has become normal for a judge to work in the afternoon, on weekends, on holidays, and they tell us: “That’s the kind of work it is.” We function like a machine and it is impossible to work with such a large number of subjects. Sometimes they send us the judgement of the ECtHR and you know when I will read it? Sometime before bedtime, if I manage to take a look and see if it’s current for me or not. In any case, I will have it at the back of my mind.* ”

These data indicate that much more needs to be done in the field of application of European human rights law standards by those who protect human rights within the Montenegrin judiciary, so this issue will be in particular focus in a special chapter of the Report, in which recommendations will be presented for overcoming the identified obstacles, all with the aim of improving the functioning of the Montenegrin judiciary and the protection of human rights and freedoms provided to citizens within its framework.

MONITORING OF COURT PROCEEDINGS

The results of the presented research played a key role in the further process of monitoring of trials, serving as a basis for understanding the state of human rights in Montenegro, identifying shortcomings, and proposing measures to eliminate them directly from the perspective of the holders of judicial functions in Montenegro. Their views expressed in the results of the research were checked “on the ground” during the process of monitoring the trial, and their concordance with the conclusions defined as a result of the process of monitoring court proceedings in the field of human rights violations that we conducted, will be discussed in this Report.

1. Methodological Framework

The monitoring of trials was implemented over a period of 12 months (from June 15, 2022 to June 15, 2023), according to the methodology jointly developed by Milan Antonijević, lawyer and human rights activist from Serbia, and Andrea Mićanović, program manager in CEDEM and teaching associate at the Faculty of Legal Sciences, University of Donja Gorica. As part of the methodology, a questionnaire was developed, which is attached to this publication, and which we used as monitors during the trial monitoring process to take notes after each attended hearing in the cases included in the monitoring.

1.1. Scope of cases and criteria for their selection

At the very beginning of the development of the methodology, the intention was to focus on the monitoring of trials that are very narrowly concerned exclusively with the protection of freedom of expression referred to in Article 10 of the ECHR. However, preliminary research during development of the methodology showed that there are not many such cases before the courts in Montenegro, which would significantly limit the scope of the monitoring process and jeopardize the quality of conclusions, which is why it was decided to extend the application of the methodology to trials related to Article 14 of the ECHR which guarantees protection against discrimination. Therefore, the trial monitoring process was done in cases related to:

- **Article 10 of the ECHR:** Freedom of expression;
- **Article 14 of the ECHR:** Prohibition of discrimination;

The above means that when selecting the cases to monitor we took care that they can be linked to some of the mentioned members of the ECHR. In addition, it is understood that in every case they have monitored, without exception, we were also concerned with the consistent application of Articles 5 and 6 of the ECHR, which stipulate the right to freedom and security, and the right to a fair trial and provide important procedural legal guarantees to all who are subject to jurisdiction ECHR contracting parties.

A total of 12 civil court proceedings before the Basic Court in Podgorica were monitored, and during the analysis and formulation of conclusions, 3 civil court proceedings before the Basic Court in Bar, which were legally concluded before the start of monitoring, were taken into account. All cases concerned Articles 10 and 14 of the ECHR - freedom of expression and prohibition of discrimination.

1.1.1. Memorandum on Cooperation with the Supreme Court of Montenegro

In order to lay solid foundations for the implementation of trial monitoring, CEDEM has initiated the signing of a Memorandum of cooperation with the Supreme Court of Montenegro. The memorandum was signed on May 26, 2022 in the premises of the Court, and the signatory parties agreed to take all necessary measures to implement monitoring, which aims to improve the judicial system in Montenegro in the area of human rights protection and the application of the ECHR and the practice of the ECtHR, as well as strengthening the capacity of employees in Montenegrin courts in the field of human rights protection. With this Memorandum, the Supreme Court of Montenegro was obliged to:

- a) Inform the courts about the concluded Memorandum and the activities that CEDEM employees will undertake in accordance with it;
- b) Encourage court presidents to enable CEDEM employees unhindered access to public trials, in accordance with spatial possibilities;
- c) support activities of CEDEM in order to monitor access to files of closed cases with the prior request of CEDEM and the approval of the competent court, except for those whose availability is limited by regulations; and

- d) Take other necessary actions in accordance with the defined scope of cooperation.

After signing the Memorandum, CEDEM has sent an official letter to the addresses of three courts in Montenegro (the Basic Court in Bar, the Basic Court in Podgorica and the Basic Court in Pljevlja) with a request for a meeting with the presidents of those courts, in order to announce the monitoring of the trial, and the mapping of cases that are in operation, and which are interesting from the aspect of the methodology developed for monitoring purposes (see Chapter II 1.1).

Considering that in the initial communication with the presidents of the aforementioned courts, we came to the conclusion that there are not many active cases related to the articles of the ECHR of interest from the aspect of the methodology in question, we decided to extend the monitoring process to the last 5 years (from 2017 onwards) legally concluded cases in connection with those articles, since we considered that an insight into the files of such cases could be of importance to us in reaching conclusions about the extent to which the standards from the ECHR and the practice of the ECtHR are applied in the Montenegrin judiciary on the occasion of the violation of human rights.

In this regard, as part of the letters sent to the aforementioned courts after the initial meetings, we have asked the following:

- a) How many civil cases there were before the subject court that have been legally resolved or are still in the decision-making process, and in connection with the violation of the following provisions:
- Article 10 of the European Convention on Human Rights (ECHR) and/or corresponding Articles 47, 49, 50 and 51 of the Constitution of Montenegro;
 - Article 14 of the ECHR and/or the corresponding Article 8 of the Constitution of Montenegro;
 - Article 2 and Article 3 of the Law on Prohibition of Discrimination (Official Gazette of Montenegro, No. 46/2010, 40/2011 - other laws, 18/2014 and 42/2017);
 - Article 9a of the Law on Prohibition of Discrimination;
 - Article 2 of the Law on Media ("Official Gazette of Montenegro", No. 82/2020)?

b) What are the cases (number of cases, parties)?

c) How many criminal cases are before the Basic Court in Bijelo Polje that have been legally resolved or are still in the decision-making process, based on the following provisions:

- Article 158 of the Criminal Code of Montenegro (“Official Gazette of Montenegro”, no. 070/03, 013/04, 047/06 and “Official Gazette of Montenegro”, no. 040/08, 025/10, 073/10, 032 /11, 064/11, 040/13, 056/13, 014/15, 042/15, 058/15, 044/17, 049/18, 003/20);
- Article 159 of the Criminal Code of Montenegro;
- Article 160 of the Criminal Code of Montenegro;
- Article 178 of the Criminal Code of Montenegro;
- Article 199 of the Criminal Code of Montenegro;
- Article 370 of the Criminal Code of Montenegro;
- Article 443 of the Criminal Code of Montenegro?

d) What are the cases (number of cases, parties)?

This query related to the period from 2017 until the moment of its referral to the relevant courts.

As mentioned, a total of 12 ongoing civil court proceedings before the Basic Court in Podgorica were monitored, and during the analysis and formulation of the final conclusions, 3 legally concluded civil court proceedings before the Basic Court in Bar were also taken into account.

1.2. Objectives of Trial Monitoring

During the process of monitoring court proceedings in the area of human rights violations, we were guided by the following objectives:

A. Increasing Citizens' Trust in the Judiciary

Earlier, we have pointed out that the “Political Public Opinion of Montenegro” survey, conducted by the Center for Democracy and Human Rights in May 2023 on a representative sample of all adult citizens of Montenegro, indicated that still not even half of the citizens of our country believes in the judiciary - 42.4% of them have mostly and great confidence in the judiciary in Montenegro, while 45.6% of them have mostly and great confidence in the State Prosecutor's Office of Montenegro.

The data were even worse in December 2021 (prior to the development of the relevant methodology for trial monitoring) when the same research was conducted². The results of the “Political Public Opinion” then showed that only 27.8% of Montenegrin citizens have mostly and great confidence in the judiciary in Montenegro, while 21.8% of them have mostly and great confidence in the State Prosecutor's Office of Montenegro.

Considering the presented, and not encouraging percentages, it is obvious that it is necessary to invest more intensively in establishing a closer relationship between the citizens on the one hand, and the Montenegrin judiciary on the other. Therefore, believing that the basic democratic right to public trials has a huge potential for changing the public's perception of the judiciary, but also for essential changes in the quality of trials and bringing them closer to the full protection of citizens' human rights, the stated goal was the pivot of all efforts invested in the trial monitoring process, which will the results to be presented in this Report.

B. Opening the Judiciary to the Public

This objective is closely related to the previous one and can be understood as a prerequisite for its fulfilment. In other words, in order to increase citizens' confidence in the Montenegrin judiciary, it is necessary for it to be transparent, i.e. open to the public. One of the ways to achieve this is precisely through the presence of the (expert) public at the trials, and their critical review in relation to what they witness in the courtroom.

² All research results in the Montenegrin language are available at: https://www.cedem.me/wp-content/uploads/2022/02/Prezentacija-decembar-2021_FINAL_compressed.pdf. The results in English can be found at: <https://www.cedem.me/wp-content/uploads/2022/02/Pol-Public-Opinion-MNE-Dec-2021.pdf>.

C. Support to Citizens in Exercising their Human Rights before the Court

Objective of the process of monitoring trials in the field of human rights that we have conducted was, just like the needs assessment that was discussed earlier, to improve the application of the ECHR in the Montenegrin judiciary, and to improve the quality of human rights protection by the judicial authorities in Montenegro.

D. Making Recommendations for Improving the Quality of Trials

The process of monitoring trials in the field of human rights was, quite naturally, aimed at giving recommendations for improving the quality of trials, from the aspect of standards in the field of human rights at the level of the ECHR and the practice of the ECtHR.

1.3. Trial Monitoring Principles

Monitoring of the trial took place in accordance with the stated principles:

A. Objectivity

The monitor's opinion and behaviour in the courtroom or during inspection of the case files was at all times impartial and based on facts obtained through official communication with judicial authorities or observation.

B. Analyticity

All findings from the trial monitoring process were assessed thoroughly and analytically, and conclusions were made only after collecting all facts and carefully summarizing all observations.

2. Conclusions

Based on the trial monitoring process we have reached several conclusions, which fully correspond to those conclusions that arose as a result of the assessment of the needs of the Montenegrin judiciary in the field of human rights protection, application of the ECHR and the practice of the ECtHR, which was discussed in the first part of the Report.

Namely, the monitoring process indicated the following:

1. Within the Montenegrin judiciary there is an evident need to strengthen expert and professional capacities in terms of knowledge and application of standards from the ECHR and the practice of the ECtHR;
2. Within the Montenegrin judiciary there is an evident need to strengthen the culture of application of the ECHR and the practice of the ECtHR when working on a case;
3. Very often the right of Montenegrin citizens to a trial within a reasonable time is violated;
4. The right to access the court is very often not exercised by persons with disabilities, due to the inaccessible infrastructure in Montenegrin judicial facilities, which is due to the lack of adjusted information and documentation.

2.1. (Lack of) knowledge of the ECHR and the practice of the ECtHR

During the trial monitoring process, as just mentioned, it was noticed that it is necessary to improve expert and professional capacities of judges and their advisers in terms of knowledge and application of standards from the ECHR and ECtHR practice. This conclusion will be supported by the analysis of the results of the monitoring process from the aspect of the two Articles of the ECHR that were in our focus.

Article 10 - Freedom of Expression

Article 10 of the ECHR stipulates:

“ *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of

- *the reputation or rights of others, for preventing the disclosure of*
- *information received in confidence, or for maintaining the authority*
- *and impartiality of the judiciary*³.

The ECtHR has emphasized the exceptional importance of this article, on several locations, and which is not limited to “information” or “ideas” that are well received or considered inoffensive or that leave people indifferent. On the contrary, this Article also includes “information” or “ideas” that have the potential to offend, shock or disturb. It is precisely such demands regarding pluralism, tolerance, and width of views that are of essential importance for the stability of a “democratic society”.

It is important to point out that this in no way implies that Article 10 of the ECHR provides protection to hate speech or expression that has the sole purpose of insulting an individual or a certain group in society. On the contrary, such speech will never be covered by the protection of Article 10 of the ECHR, nor will it be considered admissible according to the practice of the ECtHR.

As for the Article 10 of the ECHR and its application in the judiciary of Montenegro, we came to several conclusions following the cases related to its protection, which directly related to the alleged violation of honour, reputation and dignity, and which imply the existence of the flip side of freedom of expression from Article 10 of the ECHR - hate speech.

First, in most of the cases we followed, the judges did not refer to ECtHR practice, nor did they point to important aspects of convention law regarding freedom of expression in their judgements or during the court proceedings that preceded them. On the other hand, it is important to point out that in certain cases (which, admittedly, were in the minority) the judges in question showed considerable knowledge of the content and meaning of the ECHR, and the practice of the ECtHR, which they confirmed with thorough and legitimate argumentation in their judgements and during the conduct of the proceedings, but also with an enviable level of nomotechnical ability that contained the context of convention law.

Secondly, prosecutors’ and defendants’ attorneys refer to convention law and the practice of the ECtHR in their work to a much greater extent than judges, pointing out to the court the relevance of certain interpretations of the

³ The text of the ECHR available at: https://www.echr.coe.int/documents/d/echr/convention_eng.

⁴ Valentina Pavličić, Nikolina Katić (2022), Guidelines and review of selected case law of the European Court of Human Rights in relation to Article 10 of the European Convention on Human Rights, CEDEM, Podgorica, pg. 10. Publication available at: <https://www.cedem.me/wp-content/uploads/2022/03/Prirucnik-odabrane-sudske-prakse-FIN.pdf>.

ECHR and/or judgements of the ECtHR, which is commendable from the point of view of the protection of all rights from the ECHR within the framework of the judiciary of Montenegro, including the right to freedom of expression.

Thirdly, our experience in courtrooms has shown that in not infrequent cases, public figures appear as prosecutors or defendants in cases regarding alleged violation of honour, reputation and dignity, of which the largest number when it comes to monitoring cases concerning the protection of freedom of expression. This fact, in accordance with the standards of ECtHR practice regarding the application of the ECHR, implies a new dimension of judging in cases regarding Article 10 of the ECHR, as pointed out by the acting judge in one of the monitored cases.

In that case, which can be seen as an example of good practice in application of standards from the ECHR and the practice of the ECtHR by the acting judge, a lawsuit was filed for violation of honour, reputation and dignity, in which the prosecutor's attorney referred to Article 10 of the ECHR, explaining that freedom of expression does not represent an absolute human right, but on the contrary - it is limited precisely to protect the reputation and personal rights of other persons. In this case, taking into account the circumstances, context, content, and weight of the words, as well as the plaintiff's social and family status, the defendant's expression had to be limited by the plaintiff's right to, as the attorney states, personal welfare. According to the statements of the plaintiff's attorney in the filed lawsuit, the defendant clearly crossed the line, because it is obvious that in his spoken words the conditions for compensation for damage due to the violation of honour, reputation, and dignity were acquired. Specifically, during a television programme, the defendant declared for the plaintiff that he is one of the leaders of a certain criminal organization, based on which the plaintiff filed a lawsuit.

The defendant, in his response to the lawsuit and during the hearing, through his attorney, stated that he is a member of the Parliament of Montenegro and that he makes his statements in media (including in a specific TV programme) in connection with the performance of his Parliamentary function, as well as his political function, by which he implied to communicate his views by presenting information aimed at protecting the public interest, which falls under the scope of freedom of expression in the sense of Article 10 of the ECHR.

In the specific case, therefore, it was a conflict of two rights - the right to honour, reputation and dignity of the plaintiff and the right to freedom of expression of the defendant.

In the judgement in the specific case, the judge primarily referred to relevant documents of international law, such as the Universal Declaration of Human Rights, after which he also referred to Article 10 of the ECHR. After the introductory considerations, he first examined whether the litigants are public figures in the context of Article 10 of the ECHR, after which he also took into account the so-called a three-part test which, in order to assess the permissibility of the organization of relative human rights (in the specific case the right to freedom of expression), foresees giving answers to the following questions: 1) Is the interference with the relevant relative right (in the specific case the right to freedom of expression) according to the law?; 2) Does it pursue a legitimate goal?; 3) Is it necessary in a democratic society? In its arguments, the court states that the plaintiff's aspiration is directed towards a legitimate goal, because it is based on the protection of honour, reputation and dignity, while regarding the interference, i.e. limiting the freedom of expression, it declares negatively in the form of the necessity of such action in a democratic society. The court is of the opinion that state interference would not be necessary in a democratic society, that is, it would not be proportionate to the goal being pursued. The adjective "necessary", in the context of Article 10 paragraph 2 of the ECHR, implies the existence of an "urgent social need", and an urgent social need is, according to the opinion of the acting court, a debate in a democratic society, bearing in mind the specific moment in which the defendant acted politically, the context current social situations, the circumstances of the television show, but also all the factors that are necessary for the three-part test to be performed in a valid manner.

The court argues its views in this case by referring to the practice of the ECtHR, where it cites several judgements that can be directly or indirectly connected to the case in question, that is, with which a legitimate analogy can be made on the basis of which an objective conclusion can be reached. For example, the Court states that it is true that the term "organized criminal group" was used by the defendant during the television programme, but it also states that according to the ECHR, as well as the practice of the ECHR, "information" or "ideas" that offend are also protected. , shock or disturb. The court, furthermore, states that the existence of such an understanding in terms of pluralism, tolerance, and width of views, without which there is no essential "democratic society", is necessary.

Without going into the merits of the court decision in question, the acting judge showed that he takes into account the importance of applying the ECHR and standards from the practice of the ECtHR, and that he understands the necessity of interpreting the ECHR as a living instrument. However, our

experience during monitoring the trial indicates that, in the mentioned context (with regard to the application of standards from the ECHR and the practice of the ECtHR within the Montenegrin judiciary), the presented case is a rare example of good practice when dealing with cases related to the protection of Article 10 of the ECHR, as well as others guaranteed human rights.

The conclusion is, therefore, that within the Montenegrin judiciary, there is an evident 1) need to strengthen professional and professional capacities in terms of knowledge of the standards from the ECHR and the practice of the ECtHR, and 2) the need to strengthen the culture of their application when dealing with cases regarding the protection of human rights guaranteed by the ECHR, which would ultimately contribute to the quality of judicial decision-making and a better guarantee and respect for human rights.

Article 14 - Prohibition of Discrimination

Article 14 of the ECHR stipulates:

“ *The enjoyment of the rights and freedoms provided for in this Convention is ensured without discrimination on any basis, such as sex, race, skin colour, language, religion, political or other opinion, national or social origin, connection with a national minority, property status, birth or other status.*

Article 14, prescribed in this way, aims to prohibit discrimination with regard to the fact that all rights and freedoms provided for in the Convention are ensured without any discrimination or exceptions based on various factors such as sex, race, skin colour, language, religion, political or other opinion, national or social origin, connection with a certain national minority, property status, birth, etc. Also, it is of great importance to note that, although Article 14 of the ECHR is prescribed as an independent and independent article, its field of application must almost always be linked to another right guaranteed under another Article of the ECHR.

In one of the cases that were the subject of monitoring within this project, the existence of discrimination based on political opinion, that is, belonging to a political party, and in connection with the right to work, was questioned. The prosecutor, who was the only one with a different political affiliation compared to the other candidates, applied for a job in the state administration, which he did not get after the competition ended, and based on which he claimed before the court that he was a victim of discrimination based on his political affiliation.

In the first-instance judgement, the Court rejected the claim, which sought to establish that the defendant acted in a discriminatory manner towards the plaintiff during the selection of a person to perform a function in the state administration of Montenegro, finding that the defendant proved that in the specific case the plaintiff was not politically discriminated against, i.e. that political (non)affiliation had no influence during the implementation of the procedure and the selection of a candidate for a specific position, but that the candidate who achieved the highest number of points in the testing procedure provided for by law was chosen, and consequently the claim is unfounded.

In its judgement, the court refers to only one judgement of the ECtHR from 1990, on the basis of which it explains that the plaintiff must make it probable that he was discriminated against on a certain basis, and that the burden of proof is on the state regarding the existence of an objective and reasonable justification for his actions, that is, interference with a certain right. In other words, the state must prove that the discriminatory treatment has a legitimate goal, but also the existence of a relationship of proportionality between the means used and the goal to be achieved.

Also, the Court states in the judgement that the prosecutor made it likely that discrimination occurred, i.e. that he was treated less favourably than the elected candidate, and that the difference between them is political affiliation, i.e. not belonging to a certain political party in Montenegro, but that is, regardless of that, the commission that checked the candidate's ability established by law, i.e. without the influence of the political affiliation of its members and that, therefore, political affiliation was not important during the election to the position in question.

Such argumentation of the Court is clearly contradictory, given that it states that the Commission for the Verification of Candidates' Ability was established by law (and not on the basis of political affiliation) and that, accordingly, the political (non)affiliation of the plaintiff was not of importance when election to the position in question, which was stated by the High Court in its decision by which it annulled the first-instance verdict and sent the case back for a new decision. Such an attitude of the first instance court is, namely, opposed to the finding that the plaintiff made his position in which he was discriminated against probable, because if the Commission in question was established by law, then discrimination against the plaintiff cannot be made probable.

This and other cases related to Article 14 in which we monitored the actions of the courts, further strengthened our conclusion that within the Montenegrin judiciary it is necessary to continuously work on strengthening professional and professional capacities in terms of knowledge and application of standards from the ECHR and the practice of the ECtHR.

2.2. Violation of the Right to a Fair Trial

The right to a fair trial is prescribed by Article 6 of the ECHR, which stipulated:

- “*In determining civil rights and obligations or the merits of any criminal charge against him, everyone has the right to a fair trial and a public hearing within a reasonable time before an independent and impartial tribunal established by law.*” *The judgement is pronounced publicly, but journalists and the public can be excluded from all or part of the trial in the interest of morality, public order or national security in a democratic society, when the interests of minors or the protection of the private lives of the parties to the dispute so dictate, or when the court expressly deems it so necessary because in special circumstances publicity could harm the interests of justice.*
2. *Anyone accused of a criminal offense is presumed innocent until proven guilty by law.*
 3. *Anyone charged with a criminal offense shall have the following minimum rights:*
 - a. *to be informed immediately, in a language he understands, in detail about the nature and reason of the accusation against him;*
 - b. *to ensure him the time and conditions necessary for preparing the defence;*
 - c. *to defend himself or with the help of a lawyer he chooses or, if he does not have the means to pay for a lawyer, to get one free of charge, when the interests of justice dictate it;*
 - d. *to examine or request the examination of prosecution witnesses himself and to approve the presence and hearing of defence witnesses under conditions that also apply to prosecution witnesses;*
 - e. *to use the free assistance of an interpreter if he does not understand or speak the language used in the court.”*

Article 6 of the ECHR guarantees a number of procedural rights, of which the most significant aspects for this report are the right to a trial within a reasonable time and the right to access the court.

2.2.1. Violation of the Right to Trial within a Reasonable Time

The autonomous content of the right to a trial within a reasonable time in the context of the ECHR comes to the fore both in criminal cases and in litigation. Given that the ECHR does not provide detailed guidance on the legal standard to be used, when considering what can be considered a “reasonable “ time frame, this issue is decided on a case-by-case basis. In doing so, factors such as the complexity of the case, the nature of the procedure and the number of court instances that were involved, as well as the behaviour of the petitioner, the actions of the competent authorities and the importance of the contested case for the petitioner, are taken into account. The ECtHR considers these factors separately and then assesses whether there has been a disproportionate delay at a particular stage or throughout the proceedings⁵.

Analysing the complexity of the cases that were the subject of monitoring, the number of court instances that were involved in their resolution, as well as the number of postponed hearings in relation to those that were held, as well as other necessary factors, we came to the conclusion that, when taken into account all the shortcomings and problems mentioned in the first part of the research, the Montenegrin judiciary is still not at the level of the ECtHR standards in terms of respecting the right to a trial within a reasonable time.

A significant number of cases, taking into account all the above-mentioned factors, unjustifiably lasted (or continues) for several years. Taking into account the number of postponed hearings in relation to the number of held ones, in a certain part of the case; we observed a level of disproportionality that causes multi-year duration of court proceedings. For example, in one case, at the time of writing this report, there were eight held and eight postponed hearings, while in the other there were only six held and as many as thirteen postponed hearings. Again taking into account the aforementioned factors (the complexity of the case, the nature of the procedure and the number of court instances that were involved, as well as the behaviour of the petitioner, etc.), this ratio of held and postponed

⁵ Ana Nenezić, Ivan Vukčević MA (2019). Protection of the right to trial within a reasonable time, analysis of national legislation and practice - CEMI, Podgorica, pg. 14. Available at: <https://cemi.org.me/wp-content/uploads/2020/01/Pravo-na-sudjenje-u-razumnom-roku.pdf>

hearings is not in accordance with the principle of efficiency and economy of court proceedings, which is complementary to the right to a trial within a reasonable time from Article 6 of the ECHR.

The reasons for the delay of the procedure stem from several prominent problems from the beginning of this report, which, among others, point to the systemic shortcomings of the judiciary in terms of the overloading of judges with the number of cases, inadequate cooperation between the judiciary and third parties, such as representatives of the Post of Montenegro, but also court experts, due to whose inadequate findings, the procedure is often delayed and additional expertise is requested or new expertise is ordered, etc.

2.2.2. Violation of the Right of Access to Court for Persons with Disabilities

The right of access to court is guaranteed under Article 6 of the ECHR, and it implies that every person is guaranteed the right to address a court or tribunal in relation to any claim related to his civil rights and obligations. Although the right of access to the court is not specifically stated as such in Article 6 of the ECHR, it is the result of the jurisprudence of the ECtHR, without which the realization of other guarantees from the said provision would be impossible⁶.

Persons with disabilities have the right to access court and justice, just like all other persons. However, they often face obstacles and challenges that make it difficult or prevent the exercise of these rights. Reasons for these barriers may include lack of adaptation of judicial buildings and spaces, lack of accessible transportation options, lack of adapted information and documentation, lack of training of court staff on the needs and rights of persons with disabilities, etc.

These shortcomings were pointed out, for example, in the publication of the Association of the Blind of Montenegro entitled “Monitoring the accessibility of information, procedural adaptations and architectural accessibility of courts and prosecutor’s offices in Montenegro”, in which it is stated that no progress can be noted in relation to access to justice persons with disabilities in Montenegro, due to the fact that 1) courts

⁶ Miodrag N. Simović, Marina M. Simović, Vladimir M. Simović (2018). The right to access the court as an element of the right to a fair trial - International standards and practice of the Constitutional Court of Bosnia and Herzegovina, Annals of the Faculty of Law no. 22, Zenica, pg. 13. Available at: <https://www.prf.unze.ba/Docs/Anali/Anali22god11/1.pdf>.

and prosecutor's offices in Montenegro are architecturally inaccessible to persons with disabilities (for example, orientation plans and tactile guide paths that enable the independent movement of visually impaired persons are a rare occurrence in courts and prosecutor's offices in Montenegro), and because 2) information is generally not published in accessible formats, or even in electronic format⁷.

During the monitoring process, we noticed the same thing: In terms of access to court for people with disabilities in Montenegro, there are at least two obstacles: 1) infrastructure of courts and state prosecutors' offices, and 2) information and documentation issued within the Montenegrin judiciary are not adapted to the needs of people with disabilities.

In the context of the analysis within this chapter of the Report, it is also useful to consider the study of the Association of Youth with Handicaps of Montenegro entitled "Access to justice for persons with disabilities with special emphasis on procedural adaptations"⁸.

7 Association of the Blind of Montenegro (2023). Monitoring the accessibility of information, procedural adaptations and architectural accessibility of courts and prosecutor's offices in Montenegro. Available at: <https://ss-cg.org/?p=4272>.

8 Boris Marić, Marina Vujčić, Sergej Sekulović (2020). Access to justice for persons with disabilities with special emphasis on procedural adaptations, UMHCG, Podgorica. Available at: <https://umhcg.com/publikacije/>.

INSTEAD OF CONCLUSION: OBJECTIVES AND RECOMMENDATIONS FOR IMPROVEMENT

At the very end of this report, in accordance with the findings of the trial monitoring process and research on the needs of the Montenegrin judiciary that preceded it, and for the purpose of better transparency of recommendations for improving the work of the Montenegrin judiciary, we have formulated several objectives that should be in the focus of decision makers, civil society and all others who can contribute to strengthening the role of the judiciary in improving the situation in Montenegro in the area of respect and protection of human rights and freedoms. Those objectives are as follows:

1. Decrease workload of judges and state prosecutors;
2. Strengthen the professional and professional capacities of judiciary representatives ;
3. Influence to increase the level of motivation of judiciary representatives⁹;
4. Improve infrastructure in courts and state prosecutor's offices;
5. Eliminate negative impact of media on the work of the judiciary; and
6. Educate citizens about human rights and mechanisms of their protection;

In the following pages, instead of a conclusion, for each of the presented goals, recommendations for their achievement will be listed, which were recognized through the research on assessing the needs of the Montenegrin judiciary from the first part of this report, and during the trial monitoring process, including communication with the parties in the monitored proceedings..

⁹ For the purposes of this part of the Needs Assessment, the term "judiciary representatives" refers to judges, state prosecutors and advisers in courts and state prosecutor's offices.

1. Decrease workload of judges and state prosecutors

It was identified that one of the key reasons for the inadequate protection of human rights within the Montenegrin judiciary is that judges and state prosecutors are overburdened, which very often leads to protracted proceedings and violations of Article 6 of the ECHR (right to a trial within a reasonable time), but also other human rights and freedoms whose protection is sought in the specific procedure. Also, their overload leads to the fact that they do not have enough time to dedicate themselves to each subject in a quality and efficient way. In relation to the causes of this problem, the corresponding obstacles are defined, namely:

1. Work intensively on filling the personnel capacities in the judiciary in accordance with the existing regulations;
2. Conduct a comprehensive analysis of the necessary staff in the judiciary and the State Prosecutor's Office of Montenegro and to adapt its findings to the regulations that define the scope of personnel capacities in the courts and state prosecutor's offices;
3. Involve in a formal sense judges and state prosecutors in the process of work control advisers in courts and state prosecutor's offices;
4. Create more effective ways to promote and educate citizens about alternative dispute resolution;
5. Revise the method of assigning cases to judges and state prosecutors in order to ensure their equal workload in a qualitative sense (equal workload in terms of the number of cases very often does not imply equality of judges and state prosecutors in terms of workload) and in this connection redefine the criteria in the Judicial Information System; and
6. Legalize delegation of the case by the acting court to another court with actual jurisdiction due to overload;

2. Strengthen expert and professional capacities of judiciary representatives

The lack of professional and professional capacities has been recognized as the reason why human rights protection is still not provided at a satisfactory level within the Montenegrin judiciary. Additionally, it was recorded that a considerable number of judiciary representatives do not have sufficient knowledge of the ECHR and the practice of the ECtHR. In this regard, the following is recommended:

1. Make changes to the procedures for the selection of judges and state prosecutors to ensure that only the best and those with integrity perform that function¹⁰ ;
2. Intensify trainings of judiciary representatives in the field of human rights, with a special focus on the ECHR and the practice of the ECtHR;
3. Conduct trainings for judiciary representatives in order to improve their soft skills¹¹ ; and
4. Establish specialized departments or appoint individual judges and state prosecutors who are specialized in the field of ECHR standards, so that they can provide assistance to other judiciary representatives when consulting and applying the ECHR and ECtHR practice in their work;

¹⁰ This means that it is not enough to take into account only the success in the bar exam, and ignore the success in school and university, as well as the candidate's CV.

¹¹ For example, the participants of the research on the needs of the Montenegrin judiciary stated that it is necessary to work on improving the digital literacy skills of the judiciary representatives.

3. Strengthen expert and professional capacities of judiciary representatives

Among the judiciary representatives, demotivation to work is noticeable, which has a negative impact on the field of human rights in Montenegro. Not only do judges in Montenegro have no conditions for an easy and dignified life, but, as we said, they do not feel that their opinion is of any importance to those who create and implement the reform processes of the Montenegrin judiciary, and in this sense they point out that they were not asked when some (important) decision needs to be made for the judiciary and prosecution in our country, or they were asked *pro forma*. In this regard, it is necessary to:

1. Improve the financial working conditions of judges and state prosecutors (increase salaries, pay transportation costs for those who commute, etc.);
2. Include judges and state prosecutors in working groups for amendments to existing legislative solutions;
3. Find mechanisms for direct involvement of judges and state prosecutors and in other processes of Montenegrin judicial reform; and
4. Work more intensively on the fight against nepotism and corruption in the judiciary;

4. Improve infrastructure in courts and state prosecutor's offices

The improvement of the infrastructure in the courts and state prosecutors' offices was also discussed, from two aspects: from the aspect of guaranteeing citizens the right to access the court and from the aspect of improving the working conditions of judges and state prosecutors, which can be linked to the aforementioned goal - objective C: *Influence the degree of increase in the motivation of judiciary representatives*. Accordingly, it is necessary to:

1. Adapt the infrastructure of courts and state prosecutor's offices to persons with disabilities and other persons who for any reason are unable to use the stairs;
2. Increase and improve spatial capacities in courts and state prosecutor's offices (offices of judges and state prosecutors lack space); and
3. Improve the infrastructure system and security of judicial facilities;

5. Eliminate negative impact of media on the work of the judiciary

It was identified that media is not sufficiently sensitized when it comes to human rights and hinders, and even makes impossible, the process of protecting human rights in the country. Also, the participants of the research on the needs of the Montenegrin judiciary believe that media in Montenegro show the need for non-constructive criticism every day, and they strive to "denigrate every segment of the state apparatus for the sake of greater readership, not realizing that this does not bring good in the long term and at the level of the individual and society as a whole, because in this way they contribute to reducing the degree of confidence of citizens in the system of protection of their rights in the judiciary". In this regard, it is necessary to:

1. Find mechanisms to strengthen the partnership between media and judiciary representatives; and
2. Work more intensively on educating media in the field of human rights, the basics of civil, criminal, misdemeanour and administrative procedures, principles of justice, etc.;

6. Educate citizens about human rights and mechanisms of their protection

Finally, the conclusion is that the inadequate situation in the field of human rights in Montenegro is also contributed by the fact that citizens are not sufficiently aware of the issue of human rights and the mechanisms of their protection, and in this regard, it is necessary to:

1. Introduce the concept of human rights through appropriate programs in preschool education;
2. Redefine primary and secondary education programs so that they deal more directly with the concept of human rights; and
3. Outside the sphere of formal education, work more intensively on educating citizens in the field of human rights, the basics of litigation, criminal, misdemeanour and administrative procedures, etc.

ANNEX



ANNEX 1: FORM FOR TRIAL MONITORING IN THE LITIGATION PROCEDURE

A. BASIC INFORMATION

Case number:

Date and time of hearing (for ongoing trials):

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Date and time of inspection of the case file (for cases in which a final judgment has already been passed):

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1. Jurisdiction:

2. Is the court accessible to people with disabilities?

YES

NO

PARTIALLY

Explanation:

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3. Basic information about the plaintiff:

4. Basis for initiating the procedure (specify the Articles of law referred to by the plaintiff):

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5. Briefly describe the course of the procedure:

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B. OBSERVATIONS ON THE PROCESS SEGMENTS OF THE TRIAL

This part of the form is primarily applicable when monitoring ongoing trials, although it can also be used when analysing the conducted court proceedings in a case that has been legally resolved.

6. Is the single judge (that is, the court panel in cases provided for by law) prepared for the trial in question?

YES NO PARTIALLY

Explanation:

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7. Are the hearings in the case scheduled taking into account the Council of Europe standard on trial within a reasonable time?

YES NO

Explanation:

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8. If the trial was postponed, were the reasons for the postponement explained?

YES NO

If yes, state reasons:

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9. Is the judge aware of the presence of the public?

YES NO

10. Indicate whether the judge asked the observers to identify themselves, whether there was visible opposition to the presence of the public on the part of the judge, the parties or their representatives, and other similar details?

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11. Did the plaintiff and/or their representative and the judge, or the defendant and/or their representative and the judge, remain behind closed doors in the courtroom at some point (during the break, before or after the trial)?

YES NO

12. If YES, please explain

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13. State the claim and the plaintiff's basic argumentation:

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14. State the basic information about the witnesses, as well as on whose proposal their hearing was approved by the court, and briefly explain their argumentation and give an assessment of the quality of their testimony.

Also, list the witnesses whose hearing the court refused, as well as the reasoning for such a decision:

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15. State whether the acting court conducted an expert opinion, and if so, explain what type of expert opinion it is, on whose proposal the court approved the expert opinion, and briefly explain the expert's arguments and give an assessment of the quality of the expert opinion.

Also, state the expert investigation/s that the court refused to perform:

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16. List other evidence that were presented during the procedure, the facts established by them, and give an assessment of the quality of their implementation:

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17. Were there any changes regarding the acting judge or members of the judicial panel:

YES NO

If so, describe whether they affected the course of the procedure, when they occurred and whether they were reasoned?

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18. The acting judge (i.e. the acting court panel in cases provided for by law) was:

- a) Completely unbiased
- b) Mostly unbiased
- c) Mainly biased
- d) Completely biased

Explanation:

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19. Explain whether there were equal opportunities for the plaintiff and the defendant to present their arguments:

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20. Describe the position of the prosecutor during the trial (pay particular attention to the address of the acting judge or court panel, (representative) of the defendant to the plaintiff, and possibly leading to specific answers, not mentioning human rights violations and the like):

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21. State and explain other procedural irregularities that have been observed and explain them, especially in relation to the standards referred to in Article 6 of the ECHR and the practice of the ECtHR (for example: the public was excluded from the main hearing, contrary to the law; the proceedings are led by a judge who must be excluded by the law; etc.):

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C. OBSERVATIONS REGARDING THE JUDGEMENT

This part of the form is applicable not only when following trials that ended with a final judgment but also when following ongoing trials during which a judgment was passed, but has not yet become final.

22. Does the judgement contain all the prescribed elements in a formal sense?

YES NO

If NO, please explain:

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23. State the disposition of the judgement and outline the argumentation of the acting judge, i.e. of the court panel in cases provided for by law:

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24. Evaluate and justify the compliance of the judgment with the standards of the ECHR and the practice of the ECtHR:

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25. State other significant observations regarding the decision on the merits (for example, the judgment in the specific case deviates from the judicial practice that is harmonized vertically, i.e. the legal positions and opinions of the Supreme Court of Montenegro, and/or horizontally, i.e. within individual courts, and Similarly):

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LITERATURE

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Projekat finansira
Evropska unija



Ministarstvo javne
uprave, digitalnog
društva i medija