

DEMOCRACY AND HUMAN RIGHTS

LONG ROAD TO JUSTICE

Reform of judiciary in Montenegro

**Vladimir Vučković, Mira Popović,
Siniša Gazivoda**
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The deeply politicized judiciary was not ready for the reform that would give a measurable track record besides the legal acts, but also disrupt some of the existing monopolies of power.



EU external incentives have resulted in a mixed impact on judicial reform in Montenegro.



Despite some progress, Montenegro failed to achieve credible and sustainable results in the reform of the judiciary during the pre-accession phase of negotiations.

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Centar za građansko obrazovanje
Centre for Civic Education

The views and opinions in this analysis „Long road to justice – Reform of judiciary in Montenegro“ are partially expressed in the “EU’s Failure in Europeanizing Montenegro”, doctoral thesis of the main author, defended at Masaryk University in 2018.

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Summary

After eight years of accession negotiations with the EU, the judiciary is positioned as one of the key obstacles and there are no indications in which manner and how quickly the situation in this area will improve.

The Constitution prescribes that the Parliament elect the Supreme State Prosecutor and four members of the Judicial Council (from among eminent lawyers) by a 2/3 majority of votes of all MPs (55 MPs) in the first round of voting, and a three-thirds majority (49 MPs) in the second round. This majority remains unattainable for a long time period, which reflects on the ongoing interim state in the prosecution, and the questionable legitimacy and legality of the work of the current composition of the Judicial Council, some of whose members have long expired.

Since October 2019, the head of the Supreme State Prosecutor's Office has been the Acting Supreme State Prosecutor, and out of 15 basic and high prosecutor's offices, 11 of them are in the interim state, including those working for the largest number of citizens (Higher State Prosecutor's Office in Podgorica and Basic State Prosecutor's Office in Podgorica).

The problems in the judiciary are explicitly indicated by the European Commission, but this is not accompanied by a sense of responsibility in the judiciary itself, as evidenced, inter alia, by the repeatedly highlighted multiple, unconstitutional and illegal mandates of the President of the Supreme Court and many other courts.

There are very high expectations regarding the judiciary, as the third branch of government, in addition to the legislative and executive branches in the ongoing process of negotiations with the European Union. This refers in particular to the obligations arising from Chapter 23, which, along with Chapter 24, represents the starting and ending point of Montenegro's negotiations with the EU, but also of the overall reform processes in the country.

However, the reluctance of decision-makers at the political level in Montenegro, but also lack of independence of the judiciary from political leaders and related impacts, along with the inconsistency of the EU in insisting on meeting the benchmarks that reform the judiciary has led to stagnation and in some respects regression in Montenegrin judicial reform.

It remains to be seen whether the new parliamentary composition will have the capacity for dialogue to find a widely acceptable solution for the new Supreme State Prosecutor and for new members of the Judicial Council elected among eminent lawyers. It also remains to be seen whether the judiciary has well understood the previous messages from the EU and the burden that some of their leaders represent for the further Europeanization of Montenegro, i.e. whether some of them will withdraw and whether others will change the current approach to make justice attainable within the Montenegrin framework for all those seeking it through the judicial system. Montenegro's path to the EU will significantly depend on the speed and quality of these processes, but also on the overall process of establishing a functional rule of law in the country.

METHODOLOGICAL FRAMEWORK

After the restoration of independence, the key political goal proclaimed by Montenegro refers to the process of Europeanization and democratization, the success of which should be confirmed by its full European Union membership.

In this context, the new EU negotiating approach towards Montenegro is particularly important, focusing on the rule of law through Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security), and the judicial reform within these chapters, as to make it one of the pillars of society. Even eight years since the beginning of negotiations, this remains one of the most challenging areas in which limited progress has been made.

As in previous papers from this edition, three forms of adoption of European rules and norms are taken, which is correspondent to different levels of institutionalization of the EU political criteria:

- 1) *Verbal* – i.e. rhetorical endorsement of the EU rules and norms by internal decision-makers;
- 2) *Legislative* - a process in which the government attempts to pass legislation or establish a formal institutional framework in line with the EU rules;
- 3) *Substantive* - which refers to the implementation process and in which European rules and norms are transposed, adhered to, and finally enforced at the domestic level.¹

Based on their combination, with a use of this dual methodological approach of the two-way process (“top-down” and “bottom-up” dimensions²) while monitoring the effects of change through practical aspects, provides an assessment of the effectiveness of the EU’s transformative power on internal political change in Montenegro.

EU accession process is never simple or straightforward because it requires serious internal changes and depends on several interrelated factors and dimensions. Therefore, benchmarks are set to serve to enable gradualness and efficiency, but also to monitor the path of progress or stagnation.

1 Arolda Elbasani, *Europeanization Travels to the Western Balkans: Enlargement Strategy, Domestic Obstacles and Diverging Reforms*, Routledge, Abingdon, 2013.

2 T. Börzel, ‘Member states responses to Europeanization,’ *Journal of Common Market Studies*, 40 (2), 2002, p. 193-214.

A RETROSPECTIVE THROUGH THE EU PERSPECTIVE

Reflecting on the period since the restoration of independence, when the state's efforts to effectively enter the EU integration process as soon as possible begin to intensify, it can be said that this initial legislative activity has brought certain positive assessments by the European Commission. However, numerous and chronic problems within the judiciary have survived to this day as a reflection of inappropriate political and related influences on this branch of government. Therefore, external pressures aimed at improving the situation in the field of justice have not achieved significant success except in the legislative part.

Thus, since 2006, the issue of judicial reform and harmonization of the legislative framework has been raised, which is also mentioned in the then European Commission (EC) progress reports, but also in other strategic documents issued by the EC. As early as 2007, this led to some progress. Namely, the Strategy for the Reform of the Judiciary 2007-2012 set several priorities related to the establishment of a system of transparent employment and promotion based on objectively measurable criteria. This was strengthened by the adoption of the Action Plan for Implementation of the Strategy for the Reform of the Judiciary 2007-2012.

To limit the political influence on the judiciary, a new Constitution of Montenegro was adopted in October 2007. The new constitutional provisions aimed to reduce political influence in the judiciary by transferring the appointment and dismissal of judges and other related matters to the jurisdiction of the Judicial Council. Besides, the basic organizational units in the judiciary have been further developed. In that year, a law that regulates the salaries and other incomes of judicial officeholders and the rules of procedure of the state prosecutor's office was also adopted that year.

Also, in the same year, the Law on the Judicial Council was passed, which additionally regulated the manner of election of the Judicial Council members, chosen amongst judges. The first members of the new Judicial Council were elected in April 2008, and the new Prosecutorial Council in August 2008. The Judicial and Prosecutorial Councils have taken certain steps to establish clearer criteria for the appointment, dismissal, evaluation, promotion and disciplinary proceedings of judges and prosecutors through their rules of procedure.

During 2008, the Law on Courts and the Law on Public Prosecution Service were amended, but this did not lead to a framework that ensures independence from politics, which is stated in EU documents when Montenegro submitted its application for EU membership, i.e. in the annual 2008 EC progress report on Montenegro, which was accompanied by the EU Enlargement Strategy and Main Challenges 2008-2009. These documents noted the initiated activities, but also pointed out the upcoming challenges in achieving efficient implementation of judicial reform, especially in terms of independence, accountability and efficiency, noting that there has been no real progress in liberating the judiciary from political interference.

The European Commission also warns in 2009: *"Serious concerns regarding the independence of judges and prosecutors persist. Scope for political influence exerted on the prosecution exists through the appointment of the Prosecutorial Council by Parliament and the Parliament's powers to appoint and dismiss the state prosecutors. The unclear division of responsibility for supervision of the courts between the Ministry of Justice and the Judicial Council, the participation of the Minister of Justice as a member of the Judicial Council and the election and dismissal of the president of the Judicial Council by Parliament, constitute further causes for concern regarding the independence of the judiciary."*³

Throughout 2010 and 2011, the EC continued to express concerns about many issues, mainly in the areas of judicial accountability and the efficiency of the judicial system. The Action Plan for Monitoring Implementation of Recommendations given in the European Commission's Opinion, adopted by Montenegro in February 2011, also addresses these issues.

In 2011, the Law on State Prosecutor's Office was amended, as well as the Rules of procedure of the Judicial and Prosecutorial Council to further improve the system of appointing members of the Judicial Council chosen among judges, procedures for nominating candidates for President of the Supreme Court, procedures for the promotion of judges, etc. Interventions in the Rules of Procedure of the Prosecutorial Council went in a similar direction. All this

³ European Commission, Montenegro Progress Report 2009, p. 11

leads to certain changes, but the EC remains concerned about the judiciary independence in terms of political influence, especially regarding the election of the President of the Supreme Court and the Supreme State Prosecutor by a majority in the Parliament, as well as the appointment of judges of the Constitutional Court in parliamentary procedure. One of the novelties is the limitation of the mandate of the Supreme State Prosecutor and the heads of state prosecutor's offices to five years.

However, the very initial phase indicates that the EU's efforts to encourage a framework that would ensure the independence of the judiciary have failed, both in terms of depoliticization, budget independence and raising the level of accountability and efficiency of the judiciary. Consequently, all this harmed the overall development of the functional rule of law in Montenegro.

Therefore, it is not surprising that since the opening of EU negotiations in June 2012, in addition to the lessons the EU has learned from the accession of the latest member states, the approach was changed and Chapters 23 and 24 were set as those in which the negotiation should start and end. The so-called Screening process, that preceded the opening of negotiations, brought a comprehensive review of the judicial system in Montenegro, which states the expressed will of Montenegro to implement reform in this field, but also some serious problems that must be resolved.

In this regard, the 2012 EC Progress Report on Montenegro provides more concrete recommendations and assessment of the judicial system, noting that further efforts should be *"focus on setting up a single, country-wide recruitment system for judges and prosecutors, based on transparent and objective criteria."*⁴ In addition, the EC states that the criteria for the promotion of judges and prosecutors were not in line with European standards due to insufficient clarity and objectivity, emphasizing the need for the periodic professional evaluation of the performance of judges and prosecutors. Finally, the EC draws attention to the need to strengthen the Judicial and Prosecutorial Council through improving administrative capacity and budget allocations.

In the following years, the EC will point out the inadequacies of the judicial system, especially with regard to the responsibility of judicial office holders and anti-corruption mechanisms, which would, for example, include the verification of property records of judges and prosecutors. In addition, the need to improve the Codes of Ethics for judges and prosecutors, as well as publishing the decisions of disciplinary commissions, is emphasized. Brussels also called for the abolition of the professional immunity of judges and prosecutors so that they can be held responsible for violations of the Criminal Code.

⁴ European Commission, Montenegro Progress Report 2012, p. 45

The need to rationalize the network of courts, which is enormous for the size of Montenegro, the transparency of the work of the Judicial Council, but also the administrative and financial strengthening of judicial bodies, as well as the capacity of judicial office holders through training, is emphasized as well.

The EC analyses in more detail, and in 2013 it points to the *"problem regarding the efficiency of disciplinary proceedings initiated against judges"*, emphasizing that *"the disciplinary system needs to be improved to fully comply with the principles of legality and proportionality and to reduce discretion in the application of disciplinary rules"*⁵, but recalling the backlog of cases, the length of trials, as well as the execution of decisions. Similar observations are repeated in the EC reports from 2014, 2015 and 2016, which mostly state limited progress only in the part of the legislative framework, and the emphasis is on already chronic problems in practice. At the same time, it was evident that Montenegrin decision-makers are reluctant to address these problems and that decide to do so to the extent that they consider it painless in terms of jeopardizing certain monopolies of power.

Consequently, the EC reports on Montenegro from 2018, 2019 and 2020 state that the Montenegrin judicial system is *"moderately prepared and that significant work is needed to further improve the existing situation."*

In the 2018 Report, the EC expresses expectations that the then-innovative way of employing judges and prosecutors will lead to better results. However, it quickly turned out that this was unrealistic in the Montenegrin context, and the EC 2019 Report warns that the work of the Judicial and Prosecutorial Council are not at a satisfactory level, especially in terms of transparency. It is important to point out that the report also states that *"Constitutional and legal guarantees ensuring judicial independence are in place, but the judiciary is still perceived as vulnerable to political interference. A firmer political commitment is needed to ensure the full independence of Montenegro's justice system."*⁶ This confirms that the key problem is the practice, i.e. the implementation of legislation and strategic documents that were part of judicial reform. Furthermore, this is underlined by the Non-paper on the state of play regarding Chapters 23 and 24 for Montenegro of June 2020: *"legal framework guaranteeing the independence of the judiciary exists, however, the judiciary and the prosecution are still perceived as vulnerable to political interference."*⁷

⁵ European Commission, Montenegro Progress Report 2013, p. 36

⁶ European Commission, Country Report for Montenegro for 2019, p. 16

⁷ Non-Paper on the state of play in Chapters 23 and 24 for Montenegro, June 2020, p. 2

Finally, the 2020 EC Report on Montenegro again points to the problem with controversial appointments of holders of certain positions in the judiciary, and directly raising concern about the third term of the Supreme Court President Vesna Medenica, whose unconstitutionality and illegality was timely warned by civil society organizations, giving their opinion even after that election⁸ but also by the EC through its other documents after the election was conducted. The EC states that *"The decision of the Judicial Council to re-appoint seven court presidents, including the President of the Supreme Court, for at least a third term raises serious concerns over the Judicial Council's interpretation of the letter and the spirit of the Constitutional and legal framework, which limits those appointments to maximum two terms to prevent over-concentration of power within the judiciary. It is not in line with GRECO recommendations on the independence of the judiciary, which Montenegro is expected to comply with, in order not to reverse earlier achievements in the judicial reform"*⁹. The EC also questions the scope of official statistics *"Statistical information on the performance of the judicial system is not systematically analysed, nor used for management and policy-making purposes."*¹⁰

It should be noted that the tone and depth of the EC report changed as they went deeper into certain issues as the negotiation process progressed. Gradually, there were very harsh assessments in 2020 because it was clear that specific recommendations repeated by the EC (such as rationalization of the judicial network, deleting the provision that the Minister of Justice is automatically a member of the Judicial Council, strengthening judicial inspection, etc.) were not taken seriously. All this was supposed to act as a warning to the Montenegrin authorities, both in the judiciary and in other (in)formal centres from which decisions are made.

Prior to the annual EC reports, Montenegro has, in recent years, received several so-called unofficial Non papers on the state of play regarding Chapters 23 and 24 for Montenegro, which analysed the situation in these areas in detail and should have also been a warning for the authorities that they are not going in the right direction. These documents were essentially ignored by the authorities, and there were examples of questioning the expertise and objectivity of the EC by Montenegrin officials who thought that they

could minimize criticism from the EC. The fact that the entire process is regressing illustrates the message from one of these recent documents: *"It remains important that Montenegro does not go back in judicial reform and continue to record results, especially in the fight against corruption, while ensuring the true independence of all institutions"*.¹¹ There is also an additional insistence on the need to achieve financial independence of the judiciary, which would mean budgetary and financial management at both central and lower levels, which in the current situation is partly in the hands of the executive branch, which makes judicial independence directly impossible.

8 <http://cgo-cce.org/en/2019/05/31/pismo-11-nvo-u-vezi-sa-odlucivanjem-o-prijavama-kandidatkinje-za-izbor-na-funkciju-predsjednika-vrhovnog-suda-i-kandidata-za-izbor-na-funkcije-predsjednika-osnovnih-sudova-u-podgorici-baru-plavu-ro/#.YAYnvS2ZN0s>, <http://cgo-cce.org/en/2019/07/17/treci-izbor-medenice-grubo-krsenje-ustava/#.YAYnOS2ZOgQ>

9 European Commission, Report for Montenegro for 2020, p. 5

10 European Commission, Report for Montenegro for 2019, p. 18

11 Non-Paper on the State of Play in Chapters 23 and 24 for Montenegro, June 2020, p. 1

CAPTURED JUDICIARY UNPREPARED FOR REFORM AND STRENGTHENED WITH INCONSISTENCY OF THE EU

A review of judicial reform through the pre-accession and post-negotiation phases indicates a visible change in the approach of the European Union. Namely, in the first phase, the EU paid particular attention to this issue, and consequently, Montenegro recorded certain results, primarily in terms of improving the strategic and legislative framework.

Also, significant increases in the budget allocated to the judiciary, and above all to the judiciary, have led to an improvement in the material status of employees in this branch of government. This was accompanied by investments of the EU and other donors in building adaptations, purchase of equipment, software, etc. Moreover, the establishment of the Judicial information system (PRIS) had a stimulating effect on resolving the backlog of cases, and the number of capacity building programmes for judicial officials grew. All this was aimed at initiating concrete changes in the most complicated areas of judicial reform, such as independence, impartiality and accountability.

One year upon the start of negotiations, an Action Plan for Chapter 23 (Judiciary and Fundamental Rights) was adopted, incorporating EU requirements in this area in line with the documents that preceded the process. Amongst the key ones are the need to strengthen the independence and accountability of the judiciary, the manner of selecting future judicial officials to be transparent and merit-based, and the system of promotion and periodic evaluation of judges and prosecutors through strengthening the evaluation system. Some of the activities of this Action Plan have led to the adoption of the Code of Ethics in the judiciary and the Prosecutor's Office.

However, numerous problems remain, especially those related to the inappropriate impact of politics on the judiciary, and this has not been adequately addressed through legislative changes.

One of the potential reasons for failure in terms of depoliticization and the establishment of accountability and independence of the judiciary lies in the fact that the EU itself has not been fully consistent in imposing external pressure to meet all indicators of judicial reform. At the same time, the positive effects of the EU can be noted in the efficiency and effectiveness of the judiciary. Therefore, it can justifiably be said that the EU's external incentives have resulted in a mixed impact on judicial reform in Montenegro.

The fundamental stumbling block to judicial reform lies in the EU's attempt to put pressure before the situation is realistically scanned. Namely, the deeply politicized judiciary was not ready for the reform that would give measurable results beyond the

legislative acts and disrupt some of the existing monopolies of power. Thus, the changes advocated by the EU led to the strengthening of the position of the governing structure at the state level, and Montenegro did not accept all the solutions imposed by the EU because the benefits of EU award would be far less than domestic adoption costs, that is, damage to the interests of the veto player.

The EU has neglected the existence of two important sets of obstacles. One represents strong veto players, developed clientelism, deep-rooted corruption in the judicial system, but also personal acquaintances that influence the decision-making process. On the other hand, there are weak institutions, the lack of administrative capacity and strong semi-authoritarian leaders who interfered in internal processes and dynamics, profoundly affecting the development of the judicial system, especially in terms of employment, responsibilities, etc.

This has caused Montenegro's failure to achieve credible and sustainable results in judicial reform during the pre-accession phase of negotiations, despite some progress. Nevertheless, the EU has granted Montenegro candidate status based on partial fulfillment of the criteria for judicial reform, with a plan to balance this during the negotiations through the benchmarks defined in Chapter 23 (Judiciary and Fundamental Rights).

Active legislative area (about 50 laws and bylaws have been adopted) and the establishment of numerous novel institutions have created the illusion of change, but the situation did not essentially improve within the system. In the beginning, the lack of political will shackle these changes, but also demonstrated how much influence politics has on the judiciary, which was especially visible in the part of making biased decisions in cases whose actors are close to the authorities.

Finally, the EU itself has not demonstrated a sufficiently (pro) active role. Conditionality had several characteristics during the monitoring process, which caused the undermining of the power of these mechanisms and reduced it to a mere technocratic repetition of recommendations without sanctions policies that would be applied when the undertaken obligations are not fulfilled. It can be assumed that the conditional inconsistency of the Union lies primarily in its internal and external political problems, including the economic and financial problems that the EU faced at the time, which resulted in a lack of interest in enlargement policy and credible fulfillment of EU political requirements. Finally, it had a negative effect on the countries that are in the accession process, including Montenegro.

CITIZENS DO NOT BELIEVE IN SELECTIVE JUSTICE

Findings of public opinion research indicate a problematic level of (dis)trust in the judiciary.

Namely, although public attitudes regarding trust in the current Montenegrin judicial system are divided, a slightly larger number of respondents state that they do not trust the judiciary, according to public opinion research on the transparency of the judiciary in Montenegro conducted by the Centre for Civic Education (CCE) in 2019¹².

The reasons for the expressed distrust, according to the respondents, are in the perceived presence of corruption, the influence of politics or politicians on the work of the judiciary and the lack of justice. Also, the length of the proceedings, poor personnel policy, selective launching proceedings by the Prosecutor's Office, conflict of interest, the bias of judges and inconsistency of court practice are stated.

Research trends indicate a generally lower level of trust in the judiciary and the Prosecutor's Office in comparison with numerous other institutions encompassed by the research. Citizens generally trust the judiciary more than the prosecution, with the note that almost half of the citizens do not trust any judicial institution at all.

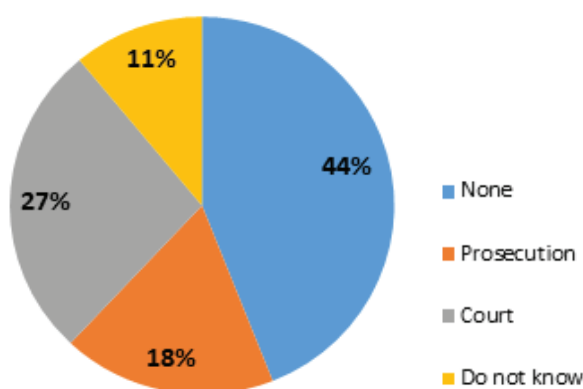


Chart 1: Which judicial institution do you trust the most?

Data of the research indicated that when assessing individual segments of court work, it is striking that integrity and independence are the worst assessed even by 51% of citizens. This is followed by accessibility to citizens which is negatively

assessed by 49% of respondents, the efficiency with 48% negative grades, and justice and quality of work have 46% negative grades. In general, negative grades in each category dominate compared to positive ones, and this is especially visible in the part of the assessment of integrity.

When evaluating the work of the prosecution, citizens as the most negative aspect see integrity and independence, with 51% negative grades. A similar scale is in other categories, with 48% of negative grades for justice and accessibility and 46% negative grades for efficiency and quality of work. As in the case of courts, the prevailing negative over positive grades are in all aspects of work. This is further reflected in the average grades that are below 2.5.

Most citizens think that irregular actions are present within the Montenegrin judiciary. Thus corruption, the impact of politics on the judiciary and the prosecutor's office and the long duration of the proceedings emphasize two-thirds of respondents, and just a little less than that mention poor human resource and inadequate penal policy, as well as conflict of interest.

Interestingly, findings of the research indicated that citizens consider that the appearance of the representatives of the judiciary should be more frequent, i.e. as many as 80% of those who think that judges and prosecutors have to talk far more to the public, to explain their decisions and to give expert opinions.

Most of the respondents had a positive experience when it comes to the judge's behaviour towards them in the proceeding that is being conducted, assessing that the acting judge is kind and objective.

However, almost two-thirds of the citizens think that in practice judges and prosecutors are not subject to sanctions for acting beyond the code of ethics.

Finally, as many as three-fifths of citizens consider that the judiciary is not independent of the executive power.

Within the *Political Public Opinion*, conducted by CEDEM in August 2020, it was noted that the trust of citizens in the judiciary fell from 41.9% recorded in December 2019 to 39.7% in August 2020¹³. The decline is even more

¹² Public opinion survey on the transparency of judiciary, April 2019, <http://media.cgo-cce.org/2019/04/CGO-Transparentnost-pravosu%C4%91a-PPT-F.pdf>

¹³ CEDEM, Public Opinion Research, Political Public Opinion Poll, August 2020, <https://www.cedem.me/en/programmes/empirical-research/politacal-public-opinion/send/33-political-public-opinion/1976-political-public-opinion-poll-august-2020>

significant when compared to the findings from December 2018, i.e. the then 42.5% of those respondents who express some degree of trust in the judiciary. On the other hand, the Prosecutor's Office recorded increasing trust in August 2020 - 36.9% compared to 33.2% in December 2019¹⁴.

Public opinion research conducted by the Centre for Monitoring and Research (CeMI) also provides data indicating that citizens' trust in the judiciary system has declined. Namely, the research conducted in March 2020 shows that there has been a decline in trust in the judiciary, compared to the research conducted by CeMI in December 2017 - from 48% to 34%¹⁵.

Public opinion research conducted in 2017 by the World Bank included judges, prosecutors and lawyers as key actors in the judiciary. Amongst the factors causing the decline in trust of citizens and the business sector, they ranked four factors particularly high - sensationalist media reporting, different decisions for similar cases, the length of proceedings and inadequate penalties for corruption.

The perception of the representatives of the judiciary is completely different from the perception of citizens about the situation in the judiciary. For example, employees in the judiciary estimate that within this area the percentage of corruption is 1% or 2%, while 60% of citizens who have no experience with the judiciary and 56% of those who have experience with the judiciary note corruption in the judiciary and the percentage of business sector representatives is similar. It is also interesting that the research indicated that as many as 29% of lawyers identified corruption in the judiciary.

However, only one in ten citizens claim to have direct experience with corruption. Half of the citizens who confirmed that there is corruption in the judiciary based their opinion on other people's experiences, the media and other sources.

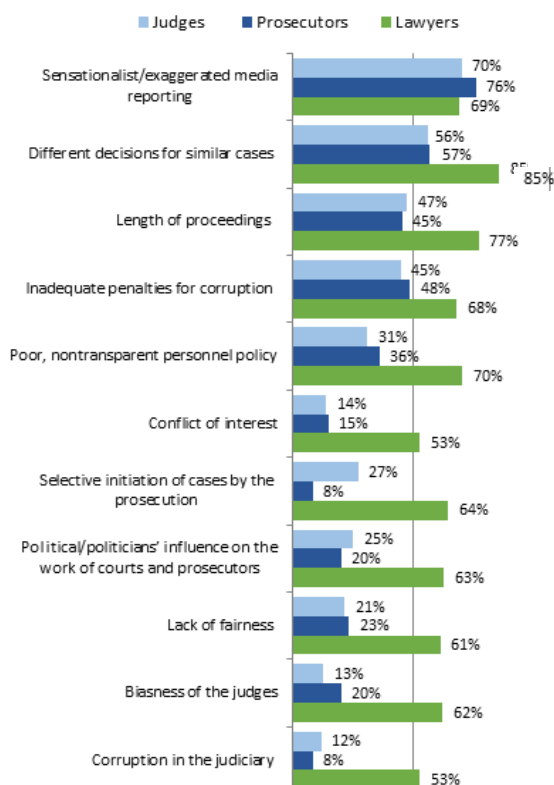


Chart 2. Perceptions of declining trust in the judiciary according to lawyers and representatives of the judiciary¹⁶

14 CEDEM, Public Opinion Research, Political Public Opinion Poll, July 2019, <https://www.cedem.me/en/programmes/empirical-research/politacal-public-opinion/send/33-political-public-opinion/1939-political-public-opinion-july-2019>

15 CeMI, Decline of citizens' trust in the electoral process, March 2020, <https://cemi.org.me/me/post/pad-povjerenja-gradana-u-pravosude-553>

16 Taken from the World Bank Public Opinion Survey, Montenegro – Experiences and Perceptions of Judicial Performance, December 2016 - January 2017, page 86

NEGLECTED GUIDELINES THAT CAN BRING ORDER INTO THE PROSECUTION

The policies of the work and activities of the state prosecutor's organization are not visible or are not created at all. Namely, statistical data obtained through making periodic work reports are not used for policymaking. Therefore, it is not delineated what are the long-term and short-term objectives that the prosecutor's organization wants to achieve, or how these objectives could be achieved.

For example, when the Prosecutor's Office, when collecting and processing data, gets the information that the number of committing a certain criminal offense is increasing, a specific policy should be created about that information. More precisely, the Law on the State Prosecutor's Office envisages the possibility of giving mandatory instructions for work, which can be general and instructions to be followed in individual cases. The instructions of a general character, according to the legal authorization, are issued in writing by the Supreme State Prosecutor. This means that in the event of an increase in the number of crimes committed, the Supreme State Prosecutor may issue instructions that should lead to general and special prevention, i.e. that the individual who committed the crime will not repeat the crime in the future, as well as to influence other members of society not to commit crimes. In that context, the general instruction could refer to the intensification of the detection of the perpetrators of certain criminal offenses if they are unknown. If the perpetrators are known, the instruction could contain a note that state prosecutors in their closing arguments, after the evidentiary procedure, propose stricter sanctions to the court in certain criminal cases, all because in the analysis of statistics was noticed that there was an increase in the number of commitments of a specific crime. Over time, a stricter penal policy would be created, which could ultimately result in a decline in the number of committing a certain criminal offense.

However, in Montenegrin practice, it is unknown that the Supreme State Prosecutor used the possibility of giving mandatory instructions for work in this manner. If there were any, they necessarily had to be transparent and followed by a media campaign to achieve results.

As the institute of agreement on the admission of guilt is intensively used in certain competencies, according to publicly available information, the issuance of mandatory instructions for work in this area was also lacking. For

example, when it comes to crimes of high corruption, according to some opinions, agreement on the admission of guilt should not be concluded at all or should be concluded only exceptionally. In this way, the public would have the opportunity to attend a high-corruption trial, to have the opportunity to find out how public authority may have been abused, and to ultimately prevent potential perpetrators from committing these crimes.

When it comes to agreements on the admission of guilt, there is a possibility to issue a mandatory instruction regarding the limit to which the sanction is negotiated in the procedure of concluding the agreement. Namely, the Supreme State Prosecutor could issue an instruction not to conclude agreement on the admission of guilt for certain criminal offenses with a sanction that is below the legally prescribed minimum. Such a possibility should also be used to create a penal policy and to possibly deter perpetrators from committing criminal offences that are noted to be on the rise.

Mandatory instructions for work on agreements on the admission of guilt could also to equalize practice. This is particularly important because the public often criticizes the fact that different prosecutors or different prosecutors' offices conclude agreements on the admission of guilt based on different penal policies.

The coronavirus COVID-19 pandemic, for example, has caused a large number of proceedings for the criminal offense of Noncompliance with Health Regulations for the Suppression of Dangerous Communicable Disease under Article 287 of the Criminal Code of Montenegro. Since the beginning of the pandemic, there is no information that the Supreme State Prosecutor has officially issued any mandatory instructions for work in this regard. This has resulted in many different actions by state prosecutors for this crime in less than a year. For example, at one point, the Prosecution proposed to the court to order custody for any person for whom there is a reasonable suspicion that he/she committed this crime. Custody was not suggested if the suspect signed an agreement on the admission of guilt that would include the imposition of fines of € 1,000. In certain cases, that fine was much higher. Then, in one period, agreements on the admission of guilt were concluded for the same criminal offense with a fine of about € 800.

Also, one case provoked a public reaction, because it was decided to apply the institute of deferred prosecution, and for the suspect to pay the amount of € 500 to charity. It should be noted that the application of the institute of deferred prosecution leads to the rejection of the criminal charges and thus the person is not considered convicted, nor does the commission of the offence enter into his criminal records. Due to public pressure, the competent prosecutor's office withdrew its decision and abandoned the application of the institute of deferred criminal proceedings in this case. Later in the proceedings conducted for this criminal offense, however, the institute of deferred criminal prosecution was applied with the payment of even lower amounts to charity.

This example demonstrates the application of completely different penal policies that could have been prevented if the mandatory instructions for general action been issued.

One of the significant problems in the Prosecutor's Office arose due to the inadequately conducted evaluation procedure by the Prosecutorial Council. In the 2020 EC Report for Montenegro¹⁷ was noted that all evaluated prosecutors received an excellent grade. Such actions of the Prosecutorial Council jeopardise the competitiveness in the Prosecutor's Office. Namely, dedicated and diligent prosecutors have no motive for quality work since they are evaluated with the same grade as prosecutors who do not invest enviable effort in performing their function. On the other hand, state prosecutors whose work and work results could be much better, are not motivated to make additional effort because their existing work was rated excellent. This activity of the Prosecutorial Council also disabled the necessary distinction when promoting state prosecutors in relation to how their work has been previously assessed.

¹⁷ European Commission, Country Report on Montenegro for 2020

TEMPORARY BUT LASTING SOLUTIONS IN THE COURT SYSTEM

It is noticeable that some courts are continuously and significantly more burdened with the number of cases compared to other courts of the same rank. It has become common practice to periodically delegate cases from one court to another. For example, cases are usually delegated at the request of the Basic Court in Podgorica, so the Supreme Court of Montenegro determines the basic courts in Nikšić, Kolašin, Danilovgrad or Cetinje due to the overburdening of that court in a certain number of cases.

This practice makes it difficult for the parties to participate in the proceedings. Namely, if the case was initiated before the Basic Court in Podgorica, the participants in the procedure, as well as witnesses are from Podgorica, it is very difficult for them if the case is delegated to the Basic Court in Kolasin, which is about 70 kilometres from Podgorica. Thus, the parties and their proxies, and witnesses, if any, spend unplanned time on a trip to court and return to their place of residence or work, and it can be said with certainty that the costs of the proceedings are multiplied.

It should be borne in mind that in some proceedings it is necessary to perform the action of the court on the spot, so it is clear that in such a case this action should be performed in another city, which again affects the procedural economy and occupancy of the human resources of the court.

The fact that this practice has been present for many years indicates that finding a permanent solution is necessary. Namely, if one court, for example the Basic Court in Podgorica, is continuously burdened with a large number of cases which jeopardizes efficient proceedings, it is necessary to find a way to increase the personnel capacity of the court to solve such a problem permanently.

In recent years, there has been a trend of applying alternative ways of resolving cases, i.e. attempts to resolve certain types of cases peacefully. The introduction of new and amendments to existing regulations established the obligation of the parties to try to resolve the dispute in a peaceful manner before initiating court proceedings. The Civil Section of the Supreme Court of Montenegro has taken a position (Su.VI no. 67/20) according to which it is necessary to dismiss a lawsuit if it is initiated on certain issues from the Labour Law or the Law on Civil Servants and State Employees if no peaceful settlement of the dispute has been previously attempted.

In this regard, it would be valuable to make an analysis of the percentage of disputes that are successfully resolved in the procedures of peaceful settlement of disputes and whether this novelty has achieved the set results. Several practicing lawyers interviewed expressed doubts that the number of successfully resolved peaceful settlement procedures was not significant. They point out that it is, therefore, necessary to determine and examine the effects of the reform implemented in that area. As they claim, the effect is not achieved if the dominant percentage of these cases is still finally resolved in court. If these doubts are justified, it would mean that the consequence of the reform is a longer duration of resolving the disputed legal situation, because before the court procedure it is necessary to perform the procedures of peaceful settlement of disputes, which is essentially contrary to the spirit of reform.

Assessment of the impact of this reform is also necessary to examine whether the desired results have been achieved, and if not, what needs to be done further to achieve them.

STATE AUDIT INSTITUTION ALSO NOTES PROBLEMS IN THE COURT SYSTEM

In 2020, the State Audit Institution (SAI) published the Report on Financial Audit and Regularity Audit of the Operations of the Spending Unit Judiciary for 2019¹⁸, which gave a negative opinion on the regularity audit and a conditional opinion on the audit of the Annual Financial Report of the Spending Unit Judiciary for 2019.

A comprehensive review of the SAI report brings to light significant deficiencies in financial management that require accountability of all members of the Judicial Council, the Supreme, Appellate, Administrative and Commercial Courts, as well as higher courts in Podgorica and Bijelo Polje, but almost all basic courts because irregularities are not found in only two basic courts (Bijelo Polje and Berane). There are also irregularities in all misdemeanour courts. Given the lack of adequate reactions from the judiciary and the Prosecutor's Office, the Centre for Civic Education (CCE) submitted a criminal charge to the Prosecutor's Office to investigate whether such judicial activities contain elements of a criminal offense prosecuted ex officio.¹⁹

The SAI report indicates that the judiciary has not carried out all activities to establish a system of financial management and control, i.e. a whole set of documents in this area has not been adopted, nor has the implementation in various segments been monitored, including the control of the expenditure of funds allocated to the courts.

Irregularities in the inventory and records of fixed assets were also noted, including the fact that there is no list of the inventory of fixed assets nor does the judiciary provide analytical records of assets. Furthermore, a discrepancy was found between the data on the value of assets from the inventory lists and the Inventory Report.

The report also states that the judiciary ended 2018 with unpaid contributions for the employment for persons with disabilities from previous years of almost one million euros with other accompanying unpaid obligations for taxes and

contributions to benefits and all of that is not even stated in the outstanding liabilities report as of 31 December 2018.

Irregularities were also noticed in the control of treasury documentation, work contracts and temporary and occasional jobs, payment of compensation to members of the commissions of the Judicial Council, salary supplements based on readiness, duty and overtime work.

The delicate area of public procurement in the judiciary was not addressed with due care, so in the Report on performed public procurements and concluded public procurement contracts are included procurements in a smaller amount of almost € 160,000, i.e. almost € 210,000 if the procurements that are settled through the forced collection are taken into account. The electronic record of conducted public procurement procedures was also not done following the provisions of the then valid Law.

Also, one part of the expenditures was not accompanied by evidence that the performed contracted works or provided performed services, i.e. the payment was made based on incomplete documentation, which is contrary to the Instructions of the State Treasury.

The Judicial Council did not provide analytical records of revenues based on court fees, fines and proceedings costs, states SAI. The discrepancy between the data on these revenues provided by the Ministry of Finance and the data of the judiciary was also determined.

The SAI Report further states that almost four million were paid based on the decision on the execution of public enforcement officers through the Ministry of Finance, and an additional quarter of a million through the Judicial Council based on final court decisions, decisions of the Agency for Peaceful Settlement of Labour Disputes and decisions on the conducted inspection supervision of the Tax Administration, and these are linked to labour disputes and disputes related to the work that the judiciary has lost. There is only 42.56% of documentation for the payment of these obligations, i.e. for only € 1,811,521.06 there is adequate documentation, and there are indications that there may have been double payments under the same decision, which requires additional checks and determination of liability.

18 State Audit Institution, http://www.dri.co.me/1/index.php?option=com_k2&view=item&id=730:objavljen-izvještaj-o-finansijskoj-reviziji-i-reviziji-pravilnosti-poslovanja-potrošačke-jedinice-sudstvo-za-2019-godinu&lang=sr

19 CCE, Examination of the statements from SAI report on judiciary should be Prosecutions' priority, http://cgo-cce.org/en/2020/11/03/tuzilastvo-prioritetno-da-ispitana-vode-iz-izvjestaja-dri-o-sudstvu/#.X_7d4ehKjIU

The Judicial Council does not have data on the spending of funds transferred for bankruptcy proceedings to the account of the Commercial Court € 450,000.00, but this documentation is in the Commercial Court. Also, contracts on the business lease premises for the needs of the Judicial Council and the premises for the needs of the Basic Court of Kotor have not been certified by the competent authority, as prescribed by Article 639 of the Law of Obligations.

The fact that finances are being managed in this way in the judiciary, which received almost 33 million euros from the budget last year, underlines concerns about the state of affairs in that branch of government. That is why this SAI report is an additional alarm that things must change radically in the judiciary, and the first step would be the resignation of members of the Judicial Council, the entire management of this unit, but also the presidents of all courts where illegalities were found.

CHANGES START FROM HOME

Instead of being one of the pillars of the process of democratization and Europeanization, in the Montenegrin context, the judiciary has become an obstacle on the path to EU membership.

Part of the responsibility lies with political decision-makers, primarily deputies of the Parliament of Montenegro. They should finally elect new members of the Judicial Council among the prominent attorneys and thus break the questionable legitimacy of this issue. Also, the Parliament should elect the Supreme State Prosecutor and thus end the interim state of the Prosecutor's Office.

However, there are many other issues that can be addressed within the judiciary and the Prosecutor's Office, and this analysis emphasizes them because they are often neglected due to these bigger and more politically dependent steps.

Namely, to solve some of the accumulated problems in the judiciary, the statistical data obtained in the process of making periodic reports should be used by the judiciary to create labour policy.

The State Prosecutor's Office should implement the policy, *inter alia*, by issuing mandatory instructions for general work. Mandatory instructions for general work should be used to achieve special and general prevention by emphasizing the detection of unknown perpetrators of criminal offenses that record an increase, but also to request the imposition of a stricter sanction in criminal proceedings for criminal offenses that record an increase. Also, the mandatory guidelines for general work should establish criteria for concluding agreements on the admission of guilt to implement the policy, as well as to achieve uniform practice.

The evaluation of prosecutors should be performed legally, following international standards, to achieve an effect on the work and commitment of state prosecutors, but also to qualitatively reflect on the process of promotion of state prosecutors.

The overburdening of some courts with the number of cases should be taken into account when shaping the policy and judicial network, as well as when assessing whether it is necessary to increase or decrease the number of judges in certain courts.

The effects of the establishing mandatory attempt to resolve certain categories of cases through the peaceful settlement of the dispute should be analysed and it should be determined whether the planned goals have been achieved and whether it is necessary to make certain changes and corrections to the ongoing reform.

Finally, the GRECO recommendations addressed in December 2019²⁰ should be implemented, in particular in the part of strengthening the independence of the Judicial Council, which includes: abolishing the *ex-officio* participation of the Minister of Justice in the Council; providing for no less than half of the Council's membership to be composed of judges and electing a president who is a judge; establishing objective and measurable selection criteria for members of the Judicial Council among eminent lawyers (protection of impartiality). Also, there is a need to further develop the disciplinary framework for judges and to publish information on complaints received, disciplinary action taken, and sanctions applied against judges.

Overall, the degree of substantial judicial reform and measurable results in this area will crucially define Montenegro's future path to the EU, with the responsibility of both the EU, which must be more consistent in its conditionality policy, and Montenegrin decision-makers - both politically and in the judiciary.

²⁰ GRECO, Fourth Round Evaluation, Corruption prevention in respect of members of parliament, judges and prosecutors, Second Compliance Report Montenegro, December 2019, <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16807af20f>

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ABOUT THE AUTHORS

Dr Vladimir Vučković is a Programme associate at the Centre for Civic Education (CCE). Also, he is engaged as the lecturer at Masaryk University at the Department of International Relations and European Studies for subjects dealing with the EU, Enlargement policy and the Western Balkans.

Mira Popović is the Coordinator of the Democratization and Europeanization programme at the Centre for Civic Education (CCE).

Siniša Gazivoda is a lawyer.

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Responsible:
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Phone: + 381 11 3283 285
www.fes-serbia.org

To order publication:
info@fes-serbia.org

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LONG ROAD TO JUSTICE

Reform of judiciary in Montenegro



The tone of the EC report changed as the negotiation process progressed. It was clear that specific recommendations repeated by the EC were not taken seriously which was supposed to be a warning to the Montenegrin authorities, both in the judiciary and in other (in)formal centres from which decisions are made.



Findings of the public opinion research indicate a problematic level of (dis)trust in the judiciary.



Instead of being one of the pillars of the process of democratization and Europeanization, in the Montenegrin context, the judiciary has become an obstacle on the path to EU membership.

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