



Judiciary in the shadow of consecutive mandates

© C D T - C e n t a r z a
d e m o k r a t s k u t r a n z i c i j u
P o d g o r i c a ,
2 0 2 0 . . g o d i n e



8 1 0 0 0 P o d g o r i c a , C r n a G o r a
+ 3 8 2 2 0 0 3 3 1 2 2 7
M o s k o v s k a 1 5 3 ,
c d t m n @ t t - c c o m . m e
w w w . c d t m n . o r g



© Mitchell Luo



Although judicial reform has been one of the positively evaluated reform processes, the stagnation or setback in achieving its key goals has been evident in recent years.

The average rating of the current state of affairs in the judiciary, according to the experts who participated in our research, is 2.73 on a scale of one to five. This result represents a step backwards compared to the previous year when the average rating was 2.91.

Despite having received better legal and by-law solutions in the most sensitive points of the reform during the first stages of the process, there were no satisfactory steps forward. Thus, the results of the new system of election of judges, strengthening of disciplinary accountability, a code of ethics, application of the principle of random assignment of cases, rationalization of the judicial network and other important topics of this reform remained very limited.

While the European Commission and the non-governmental sector warn that the judiciary reform has not produced the desired results,¹ there is no critical attitude to the existing problems in Government documents.² The new Judicial Reform Strategy is characterized by a repetition of the same strategic goals, and the positive effects of the previous period are predominantly based on the adoption of laws and planning documents, whose implementation is still pending.

Instead of showing efficiency and determination in addressing key issues, it seems that the Government, in this area, is testing in public the options to annul the effects of the previous reform. At the same time, the European Commission points out that it is important that this annulment does not happen. In addition, there are problems in functioning of the Judicial and Prosecutorial Councils, as well as with regard to further increase in transparency.

Although reform activities have focused on building trust in the judiciary, public opinion polls indicate that there have been no positive developments in this area.³



¹ Antena M, The reform of the judiciary did not fully produce the desired results [Reforma pravosuđa nije dala u potpunosti željene rezultate], 7 October 2019. Available at: <https://www.antenam.net/drustvo/135358-cemi-reforma-pravosuđa-nije-dala-u-potpunosti-željene-rezultate>

² Analysis of the legislative framework and the effects of its implementation, Ministry of Justice, March 2018.

³ Opinion polls, trust in the judiciary - December 2016 - 42.6%, December 2017 - 43.7%, December 2018 42.5%, December 2019 - 41.9% - CEDEM

Reform without discontinuity

⁴ Article 124 paragraph 5 of the Constitution reads: „The same person may be elected the president of the Supreme Court no more than two times.“

⁵ Slobodna Evropa: Third round of Vesna Medenica [Treći krug Vesne Medenice], 18 July 2019. Available at: <https://www.slobodnaevropa.org/a/medenicin-tre%24%87i-krug-/30063060.html>

⁶ GRECO, Council of Europe, COE Second Compliance Report Montenegro, IV evaluation round, December 2019.

Re-election of the President of the Supreme Court has opened a sharp public debate over the constitutionality of her third term.⁴ A significant part of the expert public challenged the constitutionality of this election, although the Judicial Council unanimously rendered this decision.

This further strengthens the views that Montenegro has a serious problem in functioning of the rule of law.⁵ The Council of Europe is of a similar opinion, and it expressed concern about this interpretation of the Constitution and the Law by the Judicial Council⁶, with regard to the renewal of mandate of the President of the Supreme Court and the presidents of the six courts above the prescribed limit.⁷

In the opinion of our experts, apart from over-concentration of powers in the same hands, by extending the mandate of the presidents elected under the old normative solutions the meaning of constitutional and legislative changes is also lost.

Independence only in theory

⁷ The Judicial Council has decided to re-elect the presidents of the six courts, although they have previously been elected at least twice as presidents of the same courts (presidents of the courts in Rozaje and Kotor even five to seven times).

⁸ GRECO, Council of Europe, COE Second Compliance Report Montenegro, IV evaluation round, December 2019.

⁹ The members of the Council from among reputable lawyers were not elected after two public announcements and four votes in the Parliament. The Committee on Comprehensive Reform of Electoral and Other Legislation has not proposed a solution to this problem within the set deadlines.

According to our experts, the Judicial Council has unfortunately never become an independent and impartial body willing to objectively elect judges, although this was one of the key goals of the reform. The Council of Europe also considers that their recommendations have not been met with regard to strengthening the Judicial Council's independence and independence against undue political influence.⁸

The current legal framework does not provide sufficient guarantees of independence and impartiality of members of the Judicial and Prosecutorial Councils from among reputable lawyers, which has led to the fact that part of their composition consists of former members of political parties and executive power authorities.

Following the expiration of the term of office of the Judicial Council in October 2018, the Government has overcome this problem by legislative changes that allowed for the extension of mandate, instead of launching an open political dialogue to find candidates with broad political support. This, according to our experts, has made senseless the constitutional tendencies to strengthen the independence of the courts. Due to the non-election of council members and protests against the status quo, the President of the Judicial Council resigned, so at present this body operates in an incomplete composition.⁹

¹⁰ Pažin: Trust in the prosecution at an unacceptably low level [Pažin: Povjerenje u tužilaštvo na nedopustivo niskom nivou], CDM, 28 October 2019. Available at: <https://m.cdm.me/politika/pazin-povjerenje-u-tuzilastvo-na-nedopustivo-niskom-nivou/>

¹¹ Principal legal position of the Supreme Court of Montenegro of 27 June 2019.

■

■

Defense of the Parliament through a principled legal position

■

¹² Parliament's decisions on the dismissal of Irena Radovic (Central Bank of Montenegro), Nikola Vukcevic (RTCG Council), Vanja Calovic Markovic (Council of the Agency for Prevention of Corruption), Darko Ivanovic (Council of the Agency for Electronic Media)

¹³ Vijesti.me, Rule of law more important than Vesna Medenica's opinion [Vladavina prava važnija od mišljenja Vesne Medenice], 28 September 2019. Available at: <https://www.vijesti.me/vijesti/ekonomija/vladavina-prava-vaznija-od-misljenja-vesne-medenice>
HRA: Basic Court in Podgorica has declared itself not competent [Osnovni sud u PG se oglasio nenadležnim], Available at: <http://www.hracion.org/2019/11/05/osnovni-sud-u-podgorici-se-oglasio-nenadleznim-za-slucaj-gorana-durovica-protiv-skupstine-crne-gore/>

■

The new law, and the old practices of electing judges

¹⁴ One of the candidates filed a lawsuit against the Judicial Council, seeking the annulment of the decision to elect ten candidates for judges of the Basic Court of June 2018 (decision 01-3828 / 18-2 of 18 June 2018). Available at: <https://www.dan.co.me/?nivo=3&datum=2019-12-25&rubrika=Drustvo&clanak=726799&najdatum=2019-12-24>
A candidate initiated an administrative dispute against the decision of the Judicial Council on the election of judges of the Administrative Court. - Available at: <https://www.vijesti.me/vijesti/drustvo/medenica-negira-uticaj-premierova-sestra-tuzila-sudski-savjet>
Judge of the Basic Court in Kotor, Predrag Krstonijevic, filed a lawsuit with the Administrative Court against the Judicial Council over the unlawful election of judge Branko Vuckovic for the eighth term. - Vijesti: Vuckovic is not like Vujanovic, Available at: <https://www.vijesti.me/vijesti/drustvo/upravnom-sudu-izbor-sudija-nije-hitan>
<https://www.vijesti.me/vijesti/politika/vuckovic-nije-kao-vujanovic>

The situation with the Supreme State Prosecutor's Office is similar, since the mandate of the Chief Prosecutor has expired, and this function is now performed by an acting position. Our political elites, like in the case of the Judicial Council, have not tried to reach a compromise solution for the election of prosecutors through an open dialogue.

In the meantime, there were open messages from the Minister of Justice that independence of the prosecution should be restricted and brought closer to the executive power.¹⁰

The public has recognized the influence of politics in the previous period also in court decisions. The principled legal position of the Supreme Court¹¹ according to which decisions of the Parliament cannot be challenged in an administrative dispute or in civil proceedings, provoked particularly strong reactions. The civil sector and the public believe that the ultimate intention was to prevent the courts from questioning the legality of the Parliament's decisions to eliminate opponents of the ruling party from state bodies and councils.¹² This has led to the situation that judges act differently in the same matter.¹³

This legal position of the Supreme Court was joined by the Parliament of Montenegro, and according to them, the legality of the Parliament's decisions cannot be questioned, nor is there an effective remedy against these decisions in the Montenegrin system.

Although the new legal solutions were aimed at improving the system of election of judges, part of the public, but also candidates for judges, believe that there was not much progress in practice.

The process of election of judges is continually accompanied by allegations of bias, conflict of interest, and inconsistent application of legal criteria. There have been numerous cases of contestation of the competition both by the participants in the competition,¹⁴ and by the civil sector¹⁵, and the judicial authorities' response to these reports has been assessed as scrupulous and irresponsible. The European Commission is also persistently pointing to the remaining challenges regarding the transparent merit-based election of judges.¹⁶

The system of election of prosecutors, on the other hand, is not colored by similar affairs. In the opinion of our experts, it is carried out mainly in accordance with the set plan¹⁷ and is characterized by equal treatment of candidates, following the prescribed guidelines.

Poor working conditions

¹⁵ Non-governmental organizations Human Rights Action (HRA), Network for Affirmation of NGO Sector (MANS) and Institute Alternative (IA) submitted on 13 September 2019 to the Special State Prosecutor's Office a criminal complaint against the President of the Judicial Council and members of the Judicial Council for abuse of office, misconduct, unlawful influence and violation of equality when interviewing candidates for judges. This complaint was dismissed without the special prosecutor's reasoning.

The courts and the prosecution have long warned of poor working conditions and lack of premises, but the Government has no interest in greater infrastructural investments in the judiciary.¹⁸ However, for years, the Government approves a smaller budget than that proposed by the Judicial and Prosecutorial Councils. In the opinion of international experts, this does not ensure the necessary compliance with European Union standards.¹⁹

Poor accountability control

¹⁶ European Commission Working Paper on Chapters 23 and 24 in Montenegro, November 2019.

¹⁷ Plan of vacant prosecutorial posts, Prosecutorial Council

¹⁸ RTCG: Stankovic: Prosecutors have nowhere to work [Stankovic: Tužiocima nemaju gdje da rade], 5 March 2017. Available at: <http://www.rtcg.me/vijesti/drustvo/158398/tuziocima-nemaju-gdje-da-rade.html>
Fos Media: Medenica: It is time for Montenegro to have the palaces of justice [Medenica: Došlo je vrijeme da i Crna Gora ima palate pravde], 23.04.2019. Available at: <https://fosmedia.me/infos/drustvo/medenica-doslo-je-vrijeme-da-i-crna-gora-ima-palatu-pravde>

¹⁹ Judicial Infrastructure Assessment in Montenegro, January 2019. EUROLII.

Although there are formal mechanisms for filing complaints on the work of judges, there are frequent accusations of the public that the accountability system is not objective and that rarely a complaint results in a sanction.²⁰ The problem pointed out by the NGO sector is that only judges or prosecutors against whom proceedings have been instituted have the right to appeal against decisions of the Code of Ethics Commissions, but not the petitioners. This did not ensure control of the work of these commissions.²¹

The European Commission's conclusion is that Case-law, both on disciplinary accountability and violating the code of ethics, remains to be developed.²² The Council of Europe has identified problems in the disciplinary framework for judges, in terms of efficiency and objectivity. On the other hand, the improvement of the disciplinary framework for prosecutors has been positively rated.²³

Slow justice

²⁰ Dan, 330 complaints on the work of judges [Na rad sudija 330 žalbe], 19 August 2019. Available at: <https://www.dan.co.me/?nivo=3&rubrika=Hronika&clanak=709094&datum=2019-08-19>

²¹ Civic Alliance, Report on the Implementation of the Code of Ethics for Judges, Prosecutors and Police, November 2017.

²² European Commission Working Paper on Chapters 23 and 24 in Montenegro, November 2019

²³ GRECO, Council of Europe, COE Second Compliance Report Montenegro, IV evaluation round, December 2019.

²⁴ CEMI/CEDEM: Right to a Trial within a Reasonable Time, October 2019.

A reasonable trial period is not characteristic of our court system. The number of pending court cases is worryingly high.²⁴ This violates the principle of legal certainty and affects the fairness of court proceedings. Legal protection, before the European Court of Human Rights, is mainly sought precisely because of the length of court proceedings.²⁵ The number of judgments of the European Court finding a violation of the right to a trial within a reasonable time is equally high.²⁶

In the last five years in which the constitutional appeal is used as a mechanism to protect the right to a trial within a reasonable time, the number of constitutional appeals as well as pending cases before the Constitutional Court has increased rapidly.²⁷ Instead of solving one problem, we have just raised the new issue of the lack of effective remedies for the length of the proceedings before the Constitutional Court.²⁸

²⁵ Out of the 54 petitions in 2018, as many as 37 refer to the unreasonable length of domestic court proceedings and 4 to the length of court enforcement proceedings.

State bodies that do not respect a reasonable trial and trial duration, on a continuous basis, do not bear responsibility for damage to the state budget.²⁹

Efficiency on hold

²⁶ A violation of the right to a trial within a reasonable time was found in 7 of the 11 judgments in 2018.

²⁷ When looking at the trends, we notice that the number of pending cases within the Constitutional Court has increased sharply from 1431 pending cases in 2016, 1404 in 2017 to 2492 in 2018.

²⁸ We already have proceedings before the European Court of Justice against Montenegro for violating the right to a trial within a reasonable time and before the Constitutional Court.

²⁹ Report of the Representative of Montenegro before the European Court of Human Rights in Strasbourg for 2018.

³⁰ A particular problem is the principle of random assignment of cases in small courts, which cannot be fully implemented in their current state.

³¹ 2019 Montenegro Report, European Commission, May 2019.

³² The mid-term plan of rationalization of the judicial network envisages legislative changes that would stipulate that the minimum number of judges for establishing a court be 4, no legal changes occurred during the validity of this planning document.

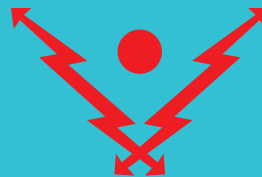
³³ A particular problem is the principle of random assignment of cases in small courts, which cannot be fully implemented in their current state.

³⁴ The mid-term plan of rationalization of the judicial network 2016-2019, Ministry of Justice, December 2016.

Previous activities on rationalization of the judicial network and relieving the courts of enforcement and inheritance proceedings have not significantly improved the efficiency of courts. The number of unresolved cases, with minimal improvements, remains high. Moreover, the absence of reliable court statistics makes it difficult to performing monitoring. An additional problem is an outdated information system that cannot be technically upgraded and development of a new one is delayed.³⁰

Montenegro did not create the preconditions for full implementation of the CEPEJ guidelines. Strengthening of alternative dispute resolution, which is still not systematically used and has a limited impact is in an indirect connection with the improvement of efficiency.³¹

There are no major developments in the area of rationalization of the judicial network. The minimum number of judges³² for establishing a court and functioning of the principle of random assignment of cases,³³ was determined by planning documents, but it was not put into practice.³⁴





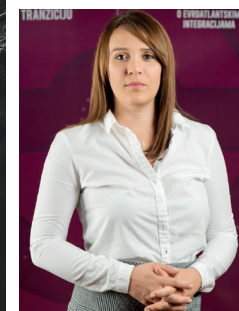
The research on the progress of countries of the region in meeting the political criteria for accession to the European Union (EU) is conducted with financial support from the **Balkan Democracy Fund** and the **Embassy of the Kingdom of Norway**, in collaboration with colleagues from the non-governmental organizations **CRTA** (Serbia), **Metamorphosis** (Macedonia) and **Zašto ne?** (Bosnia and Herzegovina).

A set of indicators is used to examine the quality of the strategic and legal framework, institutional and financial capacity, as well as the results achieved in six areas: elections, judiciary, fight against corruption and organized crime, media and public administration reform. The six areas are laid out in a topic per document model. Our analyses contain assessments of the fulfillment of the criteria that we have come up with by summarizing and articulating the views and evaluations of experts monitoring the quality of implementation of EU standards, as well as by analyzing the implemented normative and institutional reforms and their practical results.

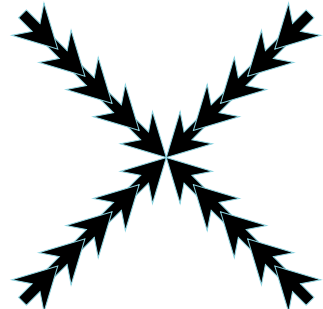
The first part of the research tackles the quality of public administration reform. We have been evaluating this area as based on **39 indicators**, alongside consultations held with five experts in the field.

We remain open to all suggestions, well-intentioned criticisms and discussions that may arise from our research. We are also ready to offer concrete solutions to all the issues we have labeled as problematic and thus contribute to this important reform.

We would like to express our sincere appreciation to the Balkan Democracy Fund and the Embassy of the Kingdom of Norway for their trust and financial support.



Biljana Papović
Deputy Executive
Director





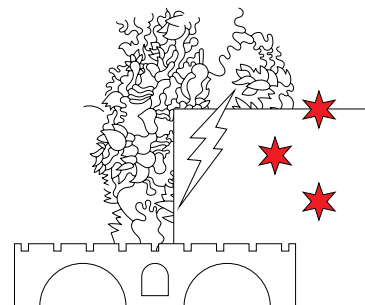
ROYAL NORWEGIAN EMBASSY

Belgrade

This project is financially supported by the Royal Norwegian Embassy in Belgrade www.norway.no/en/serbia

B | T | D The Balkan Trust
for Democracy

A PROJECT OF THE GERMAN MARSHALL FUND



Assessment of Montenegro's progress in meeting political criteria in negotiations with the EU | JUDICIARY IN THE SHADOW OF CONSECUTIVE MANDATES | Author: Bijana Pejović | illustrations and layout design: Dejan Batricević | CDT – Center for Democratic Transition | Moskovska 153, 81000 Podgorica, Montenegro | +382 20 331 227 | cdtmn@t-com.me | www.cdtmn.org