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Evaluation of Montenegro's
progress in fulfilling political
criteria with the EU:

A judiciary sentenced to enduring political games

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**A judiciary
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Is the judiciary a priority?

The expose of Prime Minister Krivokapić rightfully identifies independence, professionalism, efficiency and responsibility of the judiciary as highly problematic areas, emphasising that the functionality of the judiciary is one of the focus points of the current Government's policy.¹ However, in the past 10 months, judicial reform has not been a priority for the parliamentary majority and not enough has been done to address the issues highlighted in our previous report.

In the context of legislation, amendments to the Law on the State Prosecutor's Office have been adopted, thereby enabling amendments to the composition of the Prosecutorial Council. Given the ample room that the new legislative solution leaves for political influence on the Prosecutor's Office, this piece of regulation is yet to pass the test of practical application. One thing is certain, this law delayed the urgency of dialogue and agreement on the status of the Supreme State Prosecutor because his acting status may be prolonged indefinitely, which further renders pointless constitutional changes that require a qualified majority to elect holders of the highest judicial office. In his expose, the Prime Minister also underlined that the former convocation of the Parliament had failed to provide a qualified majority for critical appointments in the judicial system, which in turn resulted in key functions in the system being performed in the acting status, leaving space for potential abuse.²

However, the first year of operations of the current convocation of the Parliament, similarly to the previous one, has not been marked by an effort to initiate dialogue between parties sitting in the Parliament on resolving these and other important issues that require a qualified support. This is an example of continuation of the trend of marginalising the Parliament, which should be the central forum for transparent political dialogue, rather than behind-the-scenes agreements between parties and other interest groups. A year into the change of the Government, we do not have any of the judicial institutions, the election of which requires dialogue and compromise between the ruling majority and the opposition - the Judicial Council, the Supreme State Prosecutor, and a fully comprised Constitutional Court.

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¹ Expose of the Prime Minister Designate prof. Zdravko Krivokapić, PhD, for the composition of the 42nd Government of Montenegro, presented to the Parliament of Montenegro <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/22/2386-13978-00-33-20-1-1.pdf>

² Expose of the Prime Minister Designate prof. Zdravko Krivokapić, PhD, for the composition of the 42nd Government of Montenegro, presented to the Parliament of Montenegro <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/22/2386-13978-00-33-20-1-1.pdf>

In the eyes of the Montenegrin public, judges and prosecutors are at the top of the list of corrupt public servants and officials, surpassed only by customs officers. According to a survey conducted by the regional anticorruption network SELDI, 61.8% of citizens believe that almost every or the vast majority of judges are involved in corruption, and 60.8% believe the same for almost every or the vast majority of prosecutors. Compared to 2016, as many as 17.1% more respondents estimate a higher level of corruption among judges, and 18.9% more respondents estimate the same among prosecutors. The European Commission, in its latest progress report on Montenegro, published after the completion of this research, stated that no progress had been made in the field of justice; that the implementation of key judicial reforms was stagnant; and that the judiciary and Prosecutor's Office remained vulnerable to political interference.³

The average score for the current situation in the judiciary, according to the experts who took part in our research, is 2.68 on a scale of one to five.

Does a solution to these blockages exist?

At the beginning of 2021, a group of MPs proposed amendments to the Law on the State Prosecutor's Office, and a new draft Law on the Prosecutor's Office for Organised Crime. This process was meant to be a blitzkrieg operation, in which the laws would be adopted as a matter of urgency, curtailing public debate, consultation with the prosecution or international partners⁴. Two of the most sweeping changes envisaged by the proposals include a change in the composition of the Prosecutorial Council, and the replacement of the Special State Prosecutor's Office with a new institution, the Prosecutor's Office for Organised Crime, with essentially the same competencies and structure, but a newly appointed head.

The process of urgent adoption of the laws was interrupted due to negative public and diplomatic reactions, and the documents were subsequently sent to the Venice Commission for review. The opinion provided by the Venice Commission contained numerous remarks on the content of the proposal and the absence of public debate⁵. Upon receiving the opinion, the ruling coalition withdrew plans for adoption of the Law on the Prosecutor's Office for

³ European Commission, Montenegro Report 2021, https://ec.europa.eu/neighbourhood-enlargement/montenegro-report-2021_en

⁴ Biljana Matijašević i Miloš Rudović, "Nije traženo mišljenje Venecijanske komisije", 16.02.2021, Vijesti.me, <https://www.vijesti.me/vijesti/politika/512813/nije-trazeno-misljenje-venecijanske-komisije>

⁵ CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, adopted by the Venice Commission at its 126 plenary session (online, 19-20 March 2021)

Organised Crime, which would abolish the Special State Prosecutor's Office. Amendments to the Law on the State Prosecutor's Office have also undergone redrafting. A certain type of public debate was held as a result of external pressure, but it was not followed by an elaboration or a report on the acceptance / non-acceptance of any proposals for amendments.

In its opinion on the amended proposals, the Venice Commission commended the progress and alignment with some of the recommendations provided in the original report. However, concerns about the politicisation of the Prosecutorial Council remained. The Commission praised all improvements related to the prevention of conflicts of interest and the election of a representative from the NGO sector as a member of the Prosecutorial Council, but with the assessment that it would still be insufficient to completely eliminate the risks of politicisation, inherent in appointments by a simple majority.⁶

Mechanisms for removing blockages must be established, but only through a consultative process and the pursuit of a broad consensus. The blockage can by no means serve as an excuse to continue with politicisation of the judiciary.

The acting status – the road to new uncertainties

Amendments to the Law on the State Prosecutor's Office⁷ induced changes to the structure of the Prosecutorial Council, which elects the acting Supreme State Prosecutor, the Special Prosecutor and other prosecutors. In the former structure, representatives of the prosecution comprised the majority in the Council. At present, the balance has shifted in favour of eminent lawyers and NGO representatives, elected by the Parliament by a simple majority, and Government representatives.

In August 2021, the Speaker of the Parliament announced a new Prosecutorial Council⁸, albeit with a reduced membership. Only four members elected by the Conference of State Prosecutors and a representative of the Ministry of Justice were admitted. Again, the Parliament did not perform its task in electing eminent lawyers, not even by a simple majority. The parties of the ruling coalition have engaged in episodes of mutual accusations over the fa-

6 CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 10 May 2021, endorsed by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021)

7 Zakon o državnom tužilaštvu („Službeni list Crne Gore“ br. 11/15, 42/15, 80/17, 10/18, 76/20 i 59/21)

8 Biljana Nikolić, “Bečić proglasio novi Tužilački savjet”, 05.08.2021, Vijesti.me, <https://www.vijesti.me/vijesti/politika/561119/becic-proglasio-novi-tuzilacki-savjet>

failure to elect the Prosecutorial Council, and attempts at politicisation. At the time of publishing this report, a political consensus has not yet been reached. The Judicial Council is also operating with an incomplete composition, and there is no indication that this issue will be resolved in the foreseeable future, since it requires an agreement between the ruling majority and the opposition, which is currently not on the table. The mandate of the Judicial Council expired in October 2018, when the Government, instead of initiating an open political dialogue to find candidates who have broad political support, overcame this problem with legislative amendments to allow extension of the mandate of candidates from the lines of eminent lawyers.⁹ Following the resignation of a member of the Council of Eminent Lawyers, President of the Judicial Council, in December 2019, the Council elected a President of the Council with a temporary term, pending announcement of new members of the Judicial Council from the lines of eminent lawyers.¹⁰ In October 2021, a Working Group was formed to draft the Law on Amendments to the Law on the Judicial Council and Judges.¹¹

The Judicial Council elects the President of the Supreme Court, another position which is currently performed in an acting status. The long-serving president of the Supreme Court resigned at the very end of 2020. In 2019, she was elected to this position for the third time, which provoked sharp criticism from the public, as well as international institutions. The Council of Europe¹² and the European Commission¹³ expressed concerns over the interpretation of the Constitution provided by the Judicial Council to justify the appointment. The limitation in appointments to a maximum of two terms was introduced in the Constitution in order to prevent an excessive concentration of power in the judiciary, and by extending that limitation, the constitutional norm was rendered pointless. Three public calls for the election of the President of the Supreme Court failed because either there were no registered candidates, or none of the applicants received the necessary two-thirds support from the General Session of the Supreme Court. The fourth public call was published in July 2021, but the decision will have to wait for a quorum, which will only be available once vacancies in the Supreme Court are filled.¹⁴

9 Biljana Papović, *Judiciary in the Shadow of Consecutive Mandates*, 2020, Center for Democratic Transition, https://www.cdtmn.org/wp-content/uploads/2020/05/01_CGRPravosudje_policy-CGR_1-4-20.pdf

10 MINA News, "Vesna Simović Zvicer izabrana za predsjednicu Sudskog savjeta", 24.12.2019, *Vijesti.me*, <https://www.vijesti.me/vijesti/drustvo/415271/vesna-simovic-zvicer-izabrana-za-predsjednicu-sudskog-savjeta>

11 M.K, "Vesković izabrana za članicu radne grupe za izradu dopuna Zakona o Sudskom savjetu i sudijama", 07.10.2021, *Vijesti.me*, <https://www.vijesti.me/vijesti/drustvo/569779/veskovic-izabrana-za-clanicu-radne-grupe-za-izradu-dopuna-zakona-o-sudskom-savjetu-i-sudijama>

12 GRECO, Council of Europe, COE Second Compliance Report of Fourth Evaluation Round on Montenegro, December 2019.

13 European Commission, *Montenegro Report 2020*, https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/montenegro_report_2020.pdf

14 Biljana Nikolić, "Daleko je do fotelje šefa pravosuđa", 01.09.2021, *Vijesti.me*, <https://www.vijesti.me>

The Constitutional Court also functions with a reduced number of judges, given that judges are elected by a two-thirds majority. As a result of two judges retiring, this court now has five of the planned seven members. In the meantime, the third judge has met the conditions for retirement,¹⁵ which we expect will create numerous delays and issues in the protection of constitutionality and legality and constitutional rights, bearing in mind that the Constitutional Court decides by a majority vote of all judges.

Strengthening independence or continuing political control?

According to our experts, there has been no progress in relieving political influence in the judiciary. However, only practical implementation will show whether the new measures will lead to improvements or further setbacks compared to previous efforts in judicial reforms.

New decisions in relation to the composition of the Prosecutorial Council, according to which members outside the prosecution have a decision-making majority, are not aligned with efforts to strengthen the legitimacy and independence of the prosecution. The fact that they are elected by the Parliament, by a simple majority, leaves ample room for instrumentalisation of the prosecution and open political influence.

Therefore, despite all political labelling, it is perfectly legitimate to ask the question of whether the latest amendments to the law constitute a formalisation of the previous Government's poor practice and the constant effort to keep the judicial system under undue political influence.

Is it a means to increasing the vulnerability of the prosecution to political influence, which was one of the key points of criticism in the EU's last year's progress report on Montenegro?

At the beginning of August 2021, the Judicial Council noted the termination of the judicial function for a number of judges from the Supreme and Lower Courts, referring to judges who have met the conditions for retirement, pursuant to Article 121 of the Constitution of Montenegro, and Article 17 of the Law on Pension and Disability Insurance.¹⁶ However, obtaining the right to

[me/vijesti/drustvo/564526/daleko-je-do-fotelje-sefa-pravosudja](https://www.vijesti.me/vijesti/drustvo/564526/daleko-je-do-fotelje-sefa-pravosudja)

15 Biljana Matijašević, "Jonica: Ustavni sud prekršio zakon", 13.10.2021, [Vijesti.me, https://www.vijesti.me/vijesti/politika/570593/jonica-ustavni-sud-prekrasio-zakon](https://www.vijesti.me/vijesti/politika/570593/jonica-ustavni-sud-prekrasio-zakon)

16 Release from the 16th session of the Judicial Council, 03/08/2021, <https://sudovi.me/sdsv/sadržaj/4jG6>

old-age retirement does not translate to the obligation to retire in Montenegro. Therefore, the aforementioned decision caused a degree of discontent. A group of judges has initiated constitutional and administrative disputes, demanding that this decision of the Council be annulled, stating that it is discriminatory, unconstitutional, illegal and contrary to the conventions and standards of the European Court of Human Rights. They claim that this decision discriminates against female judges, whose judicial functions, alongside their employment, have been terminated two years earlier than is the case for male judges. They also argue that it discriminates against male judges whose judicial functions have been terminated, one year earlier than is the case for other insured persons who, in accordance with the Labour Law, may perform professional activity up to the age of 67.¹⁷ Some judges have decided not to retire and will be entitled to a one-year allowance upon termination of office.¹⁸

Justice is slow, but (un)attainable?

The length of proceedings continues to be one of the issues plaguing the Montenegrin judicial system.

In 2020, 29.3% of the total number of cases remained outstanding in Montenegrin courts. The inflow of cases compared to the previous year dropped by 13.2%, and the number of concluded cases compared to the previous year dropped by 9.9%. The average number of outstanding cases per judge is 136 per year.¹⁹

In 2020, citizens filed 62 actions for fair redress for violation of the right to a trial within a reasonable time, of which 57 were concluded. In 2020, 12 control requests (requests for acceleration of proceedings) were submitted to the Supreme Court and all of them were resolved. A total of 38,100.00 EUR was awarded in the name of compensation for non-pecuniary damage in actions for fair redress. In 2020, that type of compensation amounted to 50,000.00 EUR.²⁰

Looking at last year's applications before the European Court of Human Rights, a violation of the duration of proceedings was found in seven out of ten

17 Mila Radulović, "Sudijske penzije pred Ustavnim i Upravnim sudom", 15.09.2021, <https://www.vijesti.me/vijesti/politika/566518/sudijske-penzije-pred-ustavnim-i-upravnim-sudom>

18 Release from the 17th session of the Judicial Council, 16/08/2021, <https://sudovi.me/sdsv/sadrzaj/QW5A>

19 Annual Report on the Work of the Judicial Council and Total Balance in the Judiciary for 2020, <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/161/2517-14381-00-72-21-5.pdf>

20 Ibid.

proceedings from Montenegro where some violation of the convention law was established.²¹

The role of advocacy as an independent and autonomous profession committed to provision of legal assistance is extremely important in achieving efficiency and quality of justice. In 2021, Montenegro's judiciary experienced a practical illustration of the need for such a system, when the Bar Association of Montenegro went on a general strike due to the conflict with the Government over tax laws. Looking at the numbers provided by the Judicial Council, in the period from the end of May to the end of July 2021, 21,992 hearings were scheduled. Out of that number, 14,991 were not held, 139 hearings were delayed indefinitely, a decision was reached in 1,151 cases, 440 hearings were held, 1,967 were held / delayed, 18 hearings were cancelled, the hearing was adjourned in 19 cases, the hearing was reopened in 3 cases, while 2,842 hearings were marked as scheduled. The degree to which this situation will affect delays in the processing of cases, and the right to a trial within a reasonable time remains to be seen in the annual statistics.

Methodology

We are conducting research on Montenegro's progress in meeting the political criteria on the road to the European Union (EU) with the financial support of the Balkan Fund for Democracy and the Embassy of the Kingdom of Norway. Using a set of indicators, we examine the quality of the strategic and legal framework, the institutional and material capacity, as well as the results achieved in six areas: elections, judiciary, fight against corruption and organised crime, media and public administration reform, each of which will be addressed in a separate paper. Our analyses contain assessments of the fulfilment of criteria, which we have devised by collecting and articulating the views and assessments of experts who monitor the quality of implementation of EU standards, as well as an analysis of normative and institutional reforms that have been implemented, and their practical results. This part of the research refers to the quality of judicial reform, an area that we assess on the basis of 43 indicators. We remain open to all suggestions, positive criticism and debate about our research. Additionally, we remain available to offer specific solutions to all the issues that we assess as problematic, and thus contribute to this important process of reform. We thank the Balkan Endowment for Democracy and the Embassy of the Kingdom of Norway for their trust and financial support.

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21 Annual Report 2020 of the European Court of Human Rights, Council of Europe, https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf



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