

RULE OF LAW CHECKLIST FOR MONTENEGRO

Rule of Law Programme South East Europe of the Konrad-Adenauer-Stiftung & Centre for Democracy and Human Rights



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Podgorica, September 2020

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Konrad-Adenauer-Stiftung e.V.
Rule of Law Programme South East Europe
5 Franzelarilor Street, Sector 2
RO-020785 Bucharest, Romania
Tel.: +40 21 302 02 63
Fax: +40 21 323 31 27
Email: office.rspsoe@kas.de
Website: www.kas.de/rspoe

Centre for Democracy and Human Rights (CEDEM)
Baku Street 74, III/6 Podgorica, Montenegro
Tel.: +382 20 234 114
Fax: +382 20 234 114
Email: info@cedem.me
Website: www.cedem.me

Authors

Ms Ana Raičević, Lawyer and Legal Analyst
Mr Milorad Marković, Legal Expert

Editor

Ms Milena Bešić, Director, CEDEM

Concept, Framework Methodology and Coordination

Dr. Mahir Muharemović,
Research Associate of the Rule of Law Programme South East
Europe, Konrad Adenauer - Stiftung

Design and print:

Brain d.o.o., Podgorica

Circulation:

100

List of abbreviations

CoE – Council of Europe

CCJE - Consultative Council of European Judges

ECHR – European Convention on Human Rights

ECtHR - European Court of Human Rights

EU – European Union

LEA – Law Enforcement Agency

NATO - North Atlantic Treaty Organization

OSCE – Organization for Security and Cooperation in Europe

SDG - Sustainable Development Goals

SSPO – Special State Prosecution Office

TEU - Treaty on European Union

UN – United Nations

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FOREWORD

Rule of Law is a political ideal how good government should function. In its core, the idea bears the principle of the limitation of arbitrary power. Only when power is limited accountability, human rights, democracy and the common good have their place in governmental affairs. This limitation is accomplished by law and all actions of the State are guided and constrained by the law. To be more concrete, the arbitrariness of individuals in power is limited by the reason of law.

Modern democracies would not function if there was no framework who lays down the basic rules on which a society can build on. As the World Justice Project notes, “[w]here the rule of law is weak, medicines fail to reach health facilities, criminal violence goes unchecked, laws are applied unequally across societies, and foreign investments are held back”¹

The Rule of Law is not a mere idea that is self-fulfilling. It is build on two key pillars: The first pillar is the general acceptance in a society that the law applies equally to all its member nevertheless of the amount of power an individual holds. The second pillar, and perhaps more important one since it directly influences society, are strong and capable

¹ World Justice Project. The World Justice Project Rule of Law Index 2014. Available at: http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

institutions that uphold the law. This is also the reason why this analysis will focus on institutions and their capacities and willingness to act in accordance with the law and to implement it.

Having in mind the foresaid, we are not interested in an analysis that will merely use a normative approach as most of the law in the South East Europe Region is formally aligned with the highest standards of RoL. This said, that is also the reason we do not use indicators that contain values such as equality of law, non-discrimination etc. since those values are mostly (normatively) build in the legal systems of the countries of the South East Europe Region. More substantially important is if the laws that enshrine those values are respected in practice. So, we are interested in the "Rule of Law in Action".

Hartmut Rank, LL. M.

Director

Dr. Mahir Muharemović

Research Associate and Project Coordinator

*Rule of Law Programme South East Europe of the
Konrad Adenauer Stiftung*

*„We are all servants of the laws
in order that we may be free.“*

Cicero (106 BCE - 43 BCE)

INTRODUCTION

The rule of law is an important objective for citizens and governments all around the globe. As per the United Nations system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights standards.² For this reason, rule of law-based society is considered as an outcome of the UN 2030 Agenda and Sustainable Development Goals (SDGs).

According to the Council of Europe, Rule of Law represents one of the “three principles which form the basis of genuine democracy” together with individual freedom and political liberty.³ The European Commission also recalls that the „principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional systems” as indicated by the Preambles to the Treaty on European Union and the Charter of Fundamental Rights of the EU.⁴

² <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

³ *Statute of the Council of Europe*, ETS No.001, London, 05/05/1949, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001>

⁴ Communication from the Commission to the European Parliament and the Council: *A new EU Framework to strengthen the Rule of Law*/ COM/2014/0158 final/, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158&from=EN>

This principle requires clarity about fundamental social and legal values, but also measures to ensure adherence to the supremacy of the law, equality before the law, accountability, separation of powers, participation in decision-making and avoidance of arbitrariness. In the moments of crisis, such as the current one caused by COVID-19 outbreak, rule of law values become more meaningful, as citizens demand transparent, fair and accountable emergency responses from the public institutions.

Since its establishment, Centre for Democracy and Human Rights (CEDEM) has been focused on the establishment of the rule of law in the country, strongly advocating legal reforms and building capacities of public sector and civil society to embrace and uphold the rule of law values. Konrad Adenauer Foundation has long been one of the key partners of CEDEM in implementing these tasks and bringing the country closer to the ideal of a rule-of-law-based society.

This assessment report has been prepared by CEDEM, as part of the overall initiative implemented by the Rule of Law Programme for South – East Europe (KAS RoLP SEE) in regards of the Venice Commission’s Rule of Law Checklist. It offers an in-depth functional assessment of several country-specific indicators which provide for better understanding of the state of rule of law in the country and its influence on day-to-day lives of its citizens.

METHODOLOGY

The assessment methodology is based on the **Rule of Law Checklist** of the **Venice Commission**,⁵ which has been adapted by **KAS RoLP SEE** in order to allow for systematic assessment of fundamental rule of law pillars in those countries covered by the said Rule of Law Programme of KAS. Since the rule of law is notoriously difficult to define,⁶ the most effective way of approaching it is to examine a set of outcomes that it brings to societies, including just laws, accessible justice, and open and accountable government.

The checklist is comprised of **12 indicators**,⁷ grouped by **KAS RoLP SEE into 3 categories** which facilitate a consistent understanding of the Rule of Law notion in Montenegro: Compliance with the Law (I); Independence of Judiciary (II) and Absence of Corruption (III). They are mainly directed at assessing legal safeguards and indicating how rule of law principles are embedded in the country's legislation. As proper implementation of laws is crucial for Montenegro, **the checklist also includes several complementary ben-**

5 https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

6 According to *thin rule of law definition*, laws must merely comply with formal rules in order to be valid, irrespective of their content; a repressive regime could meet rule of law under this definition. Substantive or *thick definition* judges both the content and the form of law, requiring substantive rights to be recognised, Lord Tom Bingham: *The Rule of Law*, Allen Lane, 2010, op.cit. p. 66–67.

7 The indicator No. 3: *Do people resort to violence to redress personal grievances?* (Compliance with the Law) is not included in the checklist, due to lack of available data to measure its achievement.

chmarks for assessing practical application of rule of law principles, to the extent possible.

The purpose of such methodology was twofold: a) to assess the current state of play regarding the Rule of Law in Montenegro, for the purpose of identifying and analysing main shortcomings and constraints related to selected indicators; b) to contribute to shaping policy options for tackling these shortcomings through on-going reform processes. To certain extent, CEDEM also sought to evaluate the way the legal system responded to COVID-19 crisis which has opened many controversies from the rule of law standpoint.

In finding sources for the indicators, the Constitution has been taken as the highest-ranking source of law, followed by laws and bylaws, as well as reports of international organizations (CEPEJ, GRECO and European Commission). Relevant information has been also collected through Supreme State Prosecution Annual Reports,⁸ NGOs reports and requests for free access to information. For public perception of corruption surveys conducted by Centre for Civil Education and Centre for Monitoring and Research in March 2020 have been used⁹. For indicators relating to the practice, Government's and judicial decisions; NGO monitoring reports and available court files have been used.

The assessment is intended for a broad audience that includes policy makers, civil society, academia, citizens, and legal professionals, in order to help identify key strengths and weaknesses of the current rule of law system in Montenegro, as well as to streamline policy options and guide further research efforts to strengthen the rule of law in the country.

⁸ https://tuzilastvo.me/static/drtz/doc/IZVJESTAJ__O_RADU_TUZILAC-KOG_SAVJETA_I_DRZAVNOG_TUZILASTVA_ZA_2019_GODINU.pdf

⁹ <http://media.cgo-ccc.org/2020/03/CGO-CEMI-Percepcija-korupcije-u-Crnoj-Gori-2020.pdf>

EXECUTIVE SUMMARY

In Montenegro, a consensus exists on the core Rule of Law elements, including legality and legal certainty; equality before law; independence and impartiality of judiciary and respect for human rights. Rule of Law principle is proclaimed one of the key legislation reform objectives and one of the substantive requirements in the process of the country's accession to the European Union.¹⁰ However, despite comprehensive political, legislative reforms, coupled with institutional capacity-building, a gap remains between the rule of law *de jure* and rule of law *de facto*, meaning that in practice many rule of law provisions are not effectively guaranteed, respected or dutifully monitored. Such situation hinders imperative issues in society, such as conformity with law, equal access to justice or prevention and suppression of corruption.

Overall, standards are not met on the sufficient constitutional and legal guarantees for the independence of individual judges. The legal framework guaranteeing the independence of the judiciary exists, however, the courts and the prosecution are still perceived as vulnerable to political interference. Public administration is not acting in a fully proactive and accountable manner resulting in citizens' satisfaction with public policies' outcomes.

Challenges remain with regard to consolidation of track records in fighting high-level corruption. Although corrup-

¹⁰ Respect for the rule of law is a precondition for EU membership pursuant to Article 49 of TEU.

tion-related offenses are explicitly or implicitly (such as inexplicable wealth) punishable by imprisonment and/or fines, the delineation of these offenses should be clearly addressed in law and followed by a coherent penal policy. To achieve more tangible results, strategic rethinking about the existing system for fighting corruption is needed. State authorities need to focus more to the pre-investigation phase as crucial for evidence gathering and convictions. Specialisation in this field is also required and closely linked to further capacity building within police and state prosecution service.

COVID-19 pandemic has created additional challenges in rule of law area and contributed to certain objective delays in reform agenda, as indicated by the recent Non-paper on Chapters 23 and 24 published in June 2020.¹¹ During COVID-19 crisis, several breaches of rule of law principles have been noticed, including in relation to the right to privacy, freedom of movement and anti-discrimination, which have all threatened to supersede the Rule of Law concept in the country. Namely, Rule of Law itself did not present a major constraint on the flexibility of state action in face of COVID-19. However, it seemed that public institutions have been prone to more peremptory and less procedurally laborious actions. Also, the Government attempted to lay down specific rules to govern COVID – 19 crises, some of which suspended ordinary civil liberties and reportedly authorized widespread discretion on the part of some government officials. At the same time, the response from the Parliament was largely missing, while judicial instances acted with delays.

¹¹ European Commission: *Non-paper on the state of play regarding Chapters 23 and 24 for Montenegro*, Brussels, 11 June 2020, page 2, available at: <https://europeanwesternbalkans.com/2020/06/15/ec-non-papers-note-pressures-on-judiciary-and-media-in-serbia-and-montenegro/>

RULE OF LAW BACKGROUND IN MONTENEGRO

Montenegro is a European and Mediterranean country, settled in the Balkan Peninsula. With a total land of 13,812 square kilometres, it borders Bosnia-Herzegovina to the northwest, Serbia to the northeast, Kosovo to the east, Albania to the southeast, the Adriatic Sea to the southwest and Croatia to the west. With the population of 620,079 (according to 2011 census), Montenegro is a multi-ethnic state whose national composition is made of several ethnic groups - Montenegrins, Serbs, Albanians, Bosnians, Croats, Muslims and Roma.

According to 2007 Constitution which was adopted after the renewal of the country's independence in 2006, Montenegro is a civic, democratic, ecological and rule of law-based state of social justice. Montenegro is a member of the UN, NATO, the World Trade Organization, the Organization for Security and Co-operation in Europe and the Council of Europe. The accession negotiations with the EU started in 2012. Since then, relations among Montenegro and EU have been steadily improving - during the eight-year negotiation process, 33 chapters have been opened, 3 of which are provisionally closed. However, the pace of negotiations has slowed: in the last two years, Montenegro has managed to open only four chapters without closing any. This has raised the questi-

on of whether the EU has silently activated the *balance clause* which enables it to slow down the accession process if the rule of law reforms are not satisfactory implemented.

In its recent country report, the EU recalled that active and constructive participation by all parties is required to enhance parliamentary accountability, oversight of the executive, democratic scrutiny and better quality of the legislation.¹² Progress towards meeting the interim benchmarks in chapters 23 and 24 is therefore considered crucial for the overall progress in negotiations. Main issues are still related to the effects of political influence on decision-making processes and to the questionable institutional efficiency in many rule of law areas. Nonetheless, public's view about the rule of law meaning remains perplexed.

Additionally, Montenegro has problems with a fragmented political scene that is polarised and lacks genuine political dialogue. The situation has deteriorated in 2019 due to non-participation of the opposition in the work of Parliament (due to the "envelop affair" on party's financing). The ineffective response by the Government evoked peaceful protests which dissipated in June 2019. As of late December 2019, the newly adopted Law on Religion sparked a series of new large protest marches across the country as well as road blockades. Demonstrations continued in 2020 in the form of peaceful protest walks. Consequently, decline in democratic traces has been observed. In 2020, Montenegro has been categorized as a Transitional or Hybrid regime, having received a Democracy Percentage of 48 out of 100 (*0 equals least democratic and 100 most democratic*).¹³ Parliamentary elections have been held on 30 August, in the atmosphere of deep political and social divisions which will be shaping the post-electoral political life in Montenegro, including the transition of power to the opposition that won the majority of seats in the Parliament.

¹² European Commission Staff Working Document, *Montenegro 2019 Report, Communication on EU Enlargement Policy*, [COM(2019) 260 final], page 3, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-montenegro-report.pdf>

¹³ Freedom House, *Nations in Transit 2020 - Montenegro Report*, <https://freedomhouse.org/country/montenegro/nations-transit/2020>

COMPLIANCE WITH THE LAW I

INDICATOR
PARTIALLY
ACHIEVED



The most important demand of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc* or purely discretionary manner. Rule of Law is epitomized by a stable constitution which comprises formal rules by which the governing powers are limited under the law and which are “often a very imperfect formulation of principles which people can better honour in action than express in words” (Hayek 1973: 118).¹⁴ Under such a context, compliance in law refers to the obedience of a particular law or rule or acting in accordance with constitutional and institutional agreements.

According to Article 11 of the Constitution of Montenegro¹⁵, the government is threefold in its character: legislative, executive and judicial – each of which should not usurp the other two. This division of power rests upon check and balance principle, which in a much broader sense, also includes non-governmental checks on the government’s power, by free and independent press or civil society organisations. The separation of judicial power from executive and legislative authority is especially important (Montesquieu 1748: Bk. 11, Ch. 6).¹⁶ Within certain constitutional limits, the judicial branch has the power to independently review the acts of the legislative and executive branch.

- **Supremacy of Law**

Supremacy of the Law requires both citizens and institutions to be subject to standing laws of a country. In addition, the domestic legal system ensures the supremacy of and alignment with ratified international treaties and international customary law. According to Article 9 of the Constitution of Montenegro, international laws take precedence over the Constitution and may be directly

¹⁴ Hayek, F.A.: *Rules and Order, Volume 1 of Law, Legislation and Liberty*, 1973, Chicago: University of Chicago Press

¹⁵ “Official Gazette of Montenegro”, No. 1/2007, 38/2013 - Amendments I - XVI

¹⁶ Montesquieu, C: *The Spirit of the Laws*, A. Cohler, C. Miller, and H. Stone (eds.), 1748, Cambridge: Cambridge University Press, 1989.

applied, if regulating certain issues differently than domestic legislation. This is especially important when knowing that Montenegro is a state party to almost all international and/or regional treaties and human rights covenants¹⁷

Montenegro is a country with very productive legislation, aimed at introducing EU Acquis and international standards into the national legal system.¹⁸ There are clear legal rules on law-making procedure and powers of the Executive; however, the supremacy of the legislative branch is not fully secured in practice. Although the Constitution proclaims a Parliamentary sovereignty, the Government is considered to be the *main legislator*, as parliamentary committees provide mostly unanimous support to draft legislation proposed by the executive. Despite increased number of its staff, Parliament's capacity to scrutinise proposed legislation for compliance with EU *acquis* remains low.

In addition, the proposed legislation is sometimes not adequately justified or debated. Although a decree on public consultations¹⁹ was adopted in July 2018, extending the scope of public consultations to both the draft laws and national strategies, a number of policies affecting citizens' rights were adopted without prior public consultations due to wide interpretation of statutory exceptions from the obligation to hold public consultations, such as the draft amendments to the laws on expropriation, on state symbols and statehood day, and on public peace and

17 http://www.mvp.gov.me/rubrike/multilateralinodnosi/SE/Spisak_potpisanih_i_ratifikovanih_konvencija_SE/

18 In 2019, the Parliament adopted 97 laws – 42 laws and 35 amendments to the laws (compared to 83 laws adopted in 2018), as well as 62 decisions, 31 conclusions, and 2 other acts, what makes 192 legal acts in total, Parliament of Montenegro: *Annual Report for 2019*, Podgorica, 2020, pages 13 and 14, http://www.skupstina.me/images/dokumenti/izvjestaji-o-radul/izvje%C5%Altaj_o_radu_Skup%C5%Altine_Crne_Gore_za_2019_godinu.pdf

19 Decree on the appointment of representatives of non-governmental organizations to the working bodies of state administration institutions and on the conduct of public hearings in the preparation of laws and strategies („Official Gazette of Montenegro,” No. 41/18)

order. In 2018, 27 legislative acts out of 198 (13.6 % of the total), were adopted via extraordinary procedures.²⁰

Although the control of the executive branch has been strengthened in recent years, through institutes of parliamentary consultative/control hearings, the results are still not effective enough. In 2018, only 4 control hearings were held and the number of consultative hearings decreased significantly (30 in 2018, compared to 43 in 2017). Administrative data collection and its systematic use for the purpose of policy & law-making require improvements.²¹

- **Conformity with Law**

According to Article 145 of the Constitution, the law must be in accordance with the Constitution and ratified international treaties, and other regulations must be in accordance with the Constitution and the laws. The Article 148 stipulates that individual legal act must be in accordance with the law, as well as all acts of the Government. The constitutionality and legality are protected by the Constitutional Court of Montenegro.

According to Article 149 of the Constitution, the Constitutional Court decides, *inter alia*: 1) on the conformity of laws with the Constitution and ratified and published international agreements; 2) on the conformity of other regulations and general acts with the Constitution and the law; 3) on a constitutional complaint for violation of human rights and freedoms guaranteed by the Constitution, after the exhaustion of all effective legal remedies; 4) whether the President of Montenegro has violated the Constitution; 5) on conflicts of jurisdiction between courts and other state bodies, between state bodies and bodies of local self-government units and between bodies of local self-government units; 6) on the conformity with the Constitution of measu-

²⁰ European Commission Staff Working Document, *Montenegro 2019 Report*, Communication on EU Enlargement Policy, [COM(2019) 260 final], pages 7 and 8.

²¹ *Ibid*, page 12.

res and actions of state bodies taken during a state of war and emergency.

If during the procedure for assessing constitutionality and legality the regulation ceased to be valid, and the consequences of its application have not been eliminated, the Constitutional Court determines whether that regulation was in accordance with the Constitution and notifies the Parliament about the observed phenomena of unconstitutionality and illegality. Anyone can take the initiative to initiate proceedings to review constitutionality and legality. Proceedings before the Constitutional Court for the assessment of constitutionality and legality may be initiated by a court, another state body, a local self-government body and five deputies (Article 150 of the Constitution). The Constitutional Court may itself initiate proceedings to review constitutionality and legality. The decision of the Constitutional Court is binding and enforceable. Execution of the decision of the Constitutional Court, when necessary, is provided by the Government.

The most recent example of non-conformity of the Government's acts and decisions with the constitutional and legal provisions is the publication of the list of Montenegrin nationals put into self-isolation based on the decision of the National Coordination Body for Infectious Diseases of the Government of Montenegro.²²

In case U-II No. 22/20, the Constitutional Court, by a majority vote, issued a Decision on initiating proceedings to review the constitutionality and legality of the Decision of the National Coordination Body for Infectious Diseases on Disclosure of the Name of a Person in Self-Isolation, No.

²² The Government's NCT believed that public disclosure of the personal name and place of residence of persons in self-isolation would significantly contribute to improving compliance with self-isolation measures, all for the protection of public health. Therefore, they asked for the opinion of the Agency for Personal Data Protection and free access to information, which gave the green light for that. The government published the list on its website and regularly updated it with new data, and then removed it, <https://senat.me/spisak-samoizolacija-vlada-crne-gore/>

8-501 / 20-129, of March 21, 2020 and the Decision on rejecting the proposal to suspend the execution of disputed actions taken on the basis of that act.²³

The majority of judges of the Constitutional Court agreed that the publication of personal data on persons in self-isolation created a precondition for their stigmatization, and it was assessed that such a procedure could deter those who needed medical help from seeking it. The Constitution itself delineates the possible derogation of rights under emergency circumstances, but with the full respect of fundamental freedoms being inalienable. The fact that the citizens whose data were published did not give permission for that was also problematic from the Constitutional Court's standpoint. However, the Court has waited unjustifiably long to reach a final decision and did not respond timely in terms of issuing a temporary measure to suspend further circulation of citizens' personal data.²⁴

- **Accountability of civil servants before the law and prevention of impunity**

As regards the responsibility of public officials for the obedience of laws and other regulations, main concerns are related to the lack of responsibility of civil servants for alleged and/or proven torture and other human rights violations, which denies the rule of law. These concerns have been raised by domestic NGOs,²⁵ as well as by the

23 IV Session of the Constitutional Court of Montenegro, held on 29 May 2020, <http://www.ustavnisud.me/ustavnisud/objava/blog/7/objava/68-saopstenje-sa-iv-sjednice-ustavnog-suda-crne-gore>

24 The publication of the said list led to further misuse of personal data, as an application that measured the distance of self-isolated persons was later created: <https://fosmedia.me/infos/drustvo/provjerite-udaljenost-od-osoba-koje-su-u-samoizolaciji>.

25 In a joint statement, a group of NGOs and civic activists - Human Rights Action (HRA), Network for Affirmation of Non-Governmental Sector (MANS), Civic Alliance, Women's Rights Centre, LGBT Forum Progress and (Ex) President of the Council for Civil Control of Police Aleksandar Zeković pointed out serious delays in investigations into the torture, including in the case of Milorad Martinović and in the case of violations of human rights of Aleksandar Zeković by a police officer who has never been investigated and punished: <https://www.paragraf.me/dnevne-vijesti/10122015/10122015-vijest3.html>.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

One of the most pronounced cases of reported impunity of civil servants refers to beating of Mr Milorad Mijo Martinovic and other citizens during city protest in the aftermath of 2015 elections for which only three police officers were convicted in final - the ex-chief of the Special Anti-Terrorist Unit (who was sentenced up to 5 months and brought back to the police service) and 2 members of this Unit, both sentenced to minimal penalty of one year and 5 months of imprisonment.²⁶ Other pronounced cases include beating of 30 prisoners in the Administration for the Execution of Criminal Sanctions (UIKS) by a special police intervention unit on 1 September 2005, for which no effective investigations has been conducted, nor for the torture of the late Aleksandar Pejanovic in the Police Directorate building in Podgorica, in October 2008.²⁷

The CPT report on Montenegro in 2013²⁸ identified police stations and prisons as potential black spots in the torture and ill-treatment of persons deprived of their liberty.²⁹ In its report from 2019, CPT recalled that persons deprived of their liberty in Montenegro still run an appreciable risk of being ill-trea-

²⁶ <https://m.cdm.me/hronika/saj-ovcima-za-prebijanje-martinovica-17-pet-mje-seci-zatvora/>, <https://m.cdm.me/hronika/ljeskovic-i-banovic-udaljeni-iz-saj-a/>

²⁷ Allegedly, members of the special intervention unit of the police brutally beat late Aleksandar Pejanović on two occasions while he was detained at the police station in Podgorica, from 31 October to 2 November 2008. Court experts found 19 severe and light bodily injuries all over Pejanović's body. Police officer Goran Stankovic, who testified that the beating took place was granted asylum in Luxembourg for the security reasons. Pejanovic was killed in May 2011, by the police officer Zoran Bulatović who was convicted and sentenced to 13 years of imprisonment. In 2016, the investigation for beating of Pejanovic in 2008 was reopened for the third time: <https://www.hraction.org/2016/07/08/872016-hra-povodom-otvaranja-nove-istra-ge-o-prebijanju-aleksandra-pejanovica-2008-godine/>

²⁸ Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013, Strasbourg, CPT/Inf (2014) 16, 22 May 2014: <https://rm.coe.int/1680697756>

²⁹ <https://www.paragraf.me/dnevne-vijesti/10122015/10122015-vijest3.html>

ted by the police and that the police senior management must tackle this phenomenon through better training activities and improved oversight. CPT also indicated that prosecutors need to conduct more thorough investigations into cases of alleged ill-treatment by police officers. Concerning the concrete case of alleged police ill-treatment during mass protests in Podgorica in October 2015 (*Milorad Martinovic and others*), CPT concluded that the failure of the authorities to implement previous recommendations (such as the requirement for members of police to wear a clearly visible identification number), resulted in a number of members of the Special Anti-Terrorist Unit not being prosecuted despite inflicting severe injuries on a number of persons.³⁰

- **Enforcement of judicial decisions and Government's regulations**

Productive legislation, such as Montenegro, may constitute, by itself, an obstacle for the implementation. Despite the fact that Montenegrin criminal legislation encompasses a criminal offences *Omission to Enforce a Judicial Decision* (Article 395)³¹ which is applied to a public official or a responsible officer who refuses to enforce a final and enforceable judicial decision³² and is punishable by a fine or

30 Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 16 October 2017, CPT/Inf (2019) 2, Strasbourg, 7 February 2019, <https://rm.coe.int/1680925987>

31 Criminal Code of Montenegro ("Official Gazette of the Republic Montenegro", No. 70/2003, 13/2004 47/2006 and "Official Gazette of Montenegro", No. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017, 49/2018, 3/2020)

32 Recently, the Supreme Court of Montenegro upheld the judgement of the High Court in Podgorica acquitting former Kolašin Mayor Ms Željka Vuksanović of the charge of committing the crime of non-execution of a court decision. Vuksanovic was previously sentenced to three months' probation, by the first instance judgement of the Basic Court in Kolašin, for not executing the judgement of the Administrative Court of Montenegro of 23 January 2018, which obliged the Secretariat for Spatial Planning, Housing and Environmental Protection of the Kolašin municipality to return Mr Dragoljub Bukilić to work and to assign him to a job that corresponds to his education and work experience. As explained by the High Court in Podgorica, according to the Law on Local Self-Government, the mayor has

a prison term up to two years, according to some available data collected couple of years ago, around 15% of total judicial decisions remained non-executed.³³ By far the largest number of unexecuted court decisions referred to unpaid electricity, water and telephone services – some 157 thousand court judgements, as well as to alimony and custody of the child.³⁴

Since then, Montenegro introduced some changes to the enforcement policies and procedures.³⁵ With the aim of enhancing the enforcement of court decisions, the Law amending the Law on Non-Contentious Procedure,³⁶ was adopted and put into force in May 2015, introducing mandatory jurisdiction of notaries as court commissioners with the aim to make the proceedings more efficient. Amendments to the Law on Civil Procedure in 2015 introduced new institutes such as “extraordinary audit” and “decision on the basis of a sample”, and avoided stalling of the procedure by multiple rescinding of decisions by courts of second instance introducing mandatory judgment on merits by a court of second instance.

Following the reform of the enforcement legislation, public bailiffs system was introduced as well.³⁷ The main reason for abandoning the concept of court enforcement was primarily inefficiency due to the large number of pending

the rights and obligations of the employer can be responsible only for the execution of judgements related to his/her own jurisdiction: <https://www.pobjeda.me/clanak/zeljka-vuksanovic-oslobodena-optuzbi-za-neizvršavanje-sudske-odluke>

33 <https://www.portalanalitika.me/clanak/114724--markovic-preko-15-hiljada-pravosnaznih-sudskih-odluka-nije-izvršeno>

34 <https://www.vijesti.me/vijesti/drustvo/322350/sudske-presude-i-njihovo-izvršavanje-statistika-besudne-zemlje>

35 State is a respondent in most cases constituting courts workload. Before domestic courts in 2018, Protector of the State financial interests was involved in 21 363 civil, administrative and other cases. Most of the litigations concerned the implementation of Labour law.

36 “Official Gazette of the Republic of Montenegro”, No. 27/2006 and “Official Gazette of Montenegro”, No. 20/2015, 75/2018 and 67/2019

37 The Directorate for civil legislation and supervision within the Ministry of Justice is in charge of control of the work of public bailiffs and notaries.

cases. Public bailiffs perform their function professionally and independently in line with the Law on Public Bailiffs.³⁸ The legality of their work is reviewed in the procedure before the competent courts. Also, Ministry of Justice performs supervision over the work of public bailiffs, while the Chamber of Public Bailiffs, as a professional association of all public bailiffs, takes care of the legality of work by dealing with complaints from parties or third parties as well as through internal controls.

These changes have resulted in a significant reduction in number of enforcement cases with courts, and in an increase of efficiency in resolving of such cases compared to the previous period.³⁹ The Annual Report of the Chamber of Public Bailiffs for 2019 presents the following data:⁴⁰

Total number of enforcement cases	Total number of enforced cases	Total number of non-enforced cases	Amount of costs of public bailiffs	Ratio*
62114	22335	39779	3,751,846.04	32,77%

The average duration of enforcement proceedings which are based upon enforcement documents is 18 days.⁴¹ The enforcement of administrative decisions has been fostered as well – in 2019, public administrative bodies resolved 2 and a half million (2,610,695.00) administrative cases at the central and local level. The percentage of administrative cases resolved within the legal deadline at the central level was 97%, while at the local level this percentage is as high as 99%.⁴²

38 "Official Gazette of Montenegro", No. 61/2011, 22/2017

39 Strategy for the Reform of Judiciary in Montenegro 2019 – 2022, page 13.
40 <https://www.javni-izvrsitelji.me/images/2020/Izve%C5%Altaj%20za%202019.godinu.pdf>

41 Ministry of Justice: Analysis of the effectiveness of the enforcement system's functioning (January 2019 - December 2019), page 3, available at: <http://www.mpa.gov.me/biblioteka>

42 <http://www.gov.me/vijesti/227237/Saopstenje-sa-177-sjednice-Vlade-Crne-Gore.html>

However, despite obvious improvements in increasing the number of enforcement cases, the ratio between the inflow and outflow of cases is still relatively low. Also, the system of an effective monitoring of public bailiffs' work is yet to be established, through adequate storing and processing of statistical data on execution process and efficiency of public bailiffs' work, in accordance with the guidelines of CEPEJ, which should provide for measurement of cost recovery rates and the length of enforcement proceedings.⁴³ In addition, changes in the legal framework are needed, since the current legislation does not authorize the public bailiff to examine the authenticity of documents submitted to him for execution, but the bailiff should notice whether the document is forged or not.

In addition to courts and public bailiffs, the Ombudsman of Montenegro also has an important role in ensuring compliance with the law and fostering the execution of court decisions by governmental officers. In one illustrative case presented herein, the complainants addressed the Ombudsman's Office in 2017 for violation of his right to compensation for unpaid salaries (77 monthly salaries for the period 1 January 1997 until 1 June 2003) which has been confirmed by several enforceable court decisions of the Basic Court in Podgorica which remained non-executed by the Government of Montenegro⁴⁴ at the time of the complaint. In his opinion, the Ombudsman reiterated that the principle of urgency in enforcement and bankruptcy proceedings is prescribed by national legislation. The Ombudsman also determined that the complainants' right to peaceful enjoyment of property under Article 1 of Protocol 1 European Convention of Human Rights has been violated due to non-execution of the said court decisions.⁴⁵

⁴³ Human Rights Action/Centre for Monitoring and Research: *Public Bailiffs in Montenegro*, Podgorica, 2017, page 31, http://www.hraction.org/wp-content/uploads/CeMI_javniizvrsitelj_analiza.pdf

⁴⁴ The complainants were ex-employees of the state-owned company "Radoje Dakic" from Podgorica.

⁴⁵ https://www.ombudsman.co.me/docs/1516092069_18122017-preporuka-b.pdf

Previously, in the case *Mijanović v. Montenegro* which is to be applied *mutatis mutandis* to the above case, the ECtHR took the same legal position regarding the interpretation of the violation of the Convention, according to which the final court decisions in rule of law countries cannot remain non-executed to the detriment of one party, rendered irrelevant or unduly delayed. On the contrary, the State has an obligation to develop a system of execution of judgments, which is effective both in law and in practice, and to ensure the effective participation of your entire apparatus.⁴⁶

When it comes to the procedure of execution of judgments passed by the European Court, there are no cases of Montenegro that are under the “enhanced” procedure, which is used when the Committee notices some special problems within the legal order of a state. All passed judgments are executed within the prescribed deadlines. When it comes to older judgments, with the exception of the case *Siništaj and Others v. Montenegro*, all cases were successfully closed. This is especially important when knowing that Montenegro holds a record among CoE countries according to the index of submitted petitions per 100 000 inhabitants which was 6.86 in 2019 (index in CoE member states on average: 0,53⁴⁷).

According to Montenegro Agent before the European Court of Human Rights, there is a need to keep paying special attention to the procedure of execution of European judgments, since its overall significance for the national legal system remains unknown. Namely, the degree of understanding of the competent state authorities on the significance of this enforcement procedure is still at the satisfactory level, as institutions in practice often submit to Montenegro Agent incomplete and inconsistent information regarding the enforcement.⁴⁸

⁴⁶ *Mijanović v. Montenegro*, application No. 19580/06, judgment made on 17 September 2013

⁴⁷ *Montenegro Agent before the European Court of Human Rights: Annual Report for 2019*, Podgorica, June 2020, pages 17 and 43, available at: <http://www.gov.me/biblioteka/izvjestaji?pagerIndex=2>

⁴⁸ *Ibid*, pages 64 and 65.

- **Harmonization of judicial practice**

Transparency and harmonized judicial practice have a major impact to the public trust in the rule of law. The most important role in making the judicial practice uniform in Montenegro was given to the Supreme Court within the constitutional provision to ensure a uniform implementation of laws by courts. The Supreme Court achieves this function by giving legal opinions on controversial legal matters that arise in judicial practice. For this purpose, within the Supreme Court of Montenegro two departments have been established - the Department of Judicial Practice and Legal Informatics, and the Department for Monitoring the Jurisprudence of the European Court of Human Rights and European Union Law. The Department of Judicial Practice collects relevant decisions for the judicial practice, classifies, analyses, updates and stores them in an electronic database. It also studies judicial practices and draws up proposals to be presented to judges to make judicial practice more uniform.

The later Department plays a key role in the promotion of the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court's jurisprudence.⁴⁹ In the previous period, this Department undertook many activities that improved the knowledge about the Convention and increased the number of decisions by national courts that applied the principles and positions that the European Court developed in its practice. Reports have been prepared on the application of the European Convention in the practice of the Supreme Court of Montenegro as well as on the judgments of the European Court in relation to Montenegro. In these documents, the Supreme Court of Montenegro for the first time dealt with

⁴⁹ Domestic authorities are required to follow and apply the case law of the European Court of Human Rights concerning other states as this case law gives a clearer meaning to certain norms of the Convention, in order to make them practical and effective.

the conduct of national courts in this sense, comparing it with the practices of the European Court, and analysing the ECtHR judgments against Montenegro where the violation of convention rights was established.⁵⁰

Also, monthly reports are being submitted to all judges of the Supreme Court, as well as to presidents of all courts, who are obliged to make them accessible to other judges. Reports contain a summary of cases as well as important matters discussed by the European Court.⁵¹ All decisions made by the European Court in relation to Montenegro are posted on the website of the Supreme Court, as well as in the regional database of judgments of the European Court of Human Rights for the Western Balkans.⁵²

In order to harmonise the national judicial practice with the European Court's practice, the Supreme Court became a member of the Superior Courts Network⁵³ in May 2017. The Network was established by the European Court in October 2015 with the aim of exchanging information between the highest national courts and the European Court.

Despite these efforts, "Montenegrin courts do not cite the practice of the European Court of Human Rights often enough" so there is a need to continue with the education activities on the Convention and practices of the European Court of Human Rights.⁵⁴ The exception is the Constitutional Court which has already established

⁵⁰ Supreme Court of Montenegro, *Annual Report for 2019, Podgorica, February 2020*, https://sudovi.me/static/vrhs/doc/VRHOVNI_SUD_lzvjestaj_o_radu_2019.pdf

⁵¹ Ministry of Justice: *Strategy for the Reform of the Judiciary 2019 – 2022*, September 2019, page 57, available at: <http://www.mpa.gov.me/biblioteka/strategije>

⁵² <http://sudovi.me/vrhs/evropski-sud-esljp/odluke-protiv-crnegore/>, <http://www.ehrdatabase.org/Index>, <http://www.kzcg.gsv.gov.me>

⁵³ <https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c=>

⁵⁴ *Strategy for the Reform of the Judiciary 2019 – 2022*, op.cit. page 58.

a practice of citing the European Court in almost all its judgements, especially in relation with the violation of the right to liberty and security of person, right to fair trial, freedom of expression and through, etc.⁵⁵

⁵⁵ Please see the judgement U-III No. 26/20 from 17 January 2020, citing, inter alia, the cases Bouyid vs. Belgium, application No.23380/09, ECtHR 2015 and Saadi vs. United Kingdom, application No. 13229/03, ECtHR 2008, available at: <http://www.ustavisud.me/ustavisud/objava/blog/2/objava/17-praksa-ustavnog-suda-crne-gore>



INDEPENDENCE OF THE JUDICIARY II

INDICATOR
PARTIALLY
ACHIEVED



The independence of the judiciary is the backbone of the rule of law and is essential for the functioning of democracy. The independence of individual judges is protected by the independence of the judiciary as a whole. Back in 2010, the European Commission drew attention to the fact that independent, impartial and professional judiciary is the foundation of human rights protection, and recommended to Montenegro to strengthen the rule of law through a “depoliticized system of appointment of judicial and prosecutorial council members, as well as through strengthening the independence, autonomy, efficiency and accountability of judges and prosecutors.”⁵⁶

Montenegro has a multi-tiered judicial system, comprised of basic courts; high courts; the Commercial court; Administrative Court; Appellate Court and the Supreme Court, as a court of cassation. According to the Constitution, the judiciary is an independent branch of power. The Law on Courts enshrines this principle so that, in performing their duties, judges are bound to abide only by the Constitution, laws and international treaties. The Judicial and Prosecutorial Councils are key bodies in charge of managing the judicial system and the careers of judges and prosecutors. Their composition and procedures for appointing members are generally in line with European standards, but the transparency of their work should be significantly improved, especially by publishing in fully reasoned decisions on promotions, appointments and disciplinary proceedings, especially when bearing in mind that the procedures for the appointment and promotion of judges are key to protecting the independence of the judiciary.

- **Role and competencies of the Judicial and Prosecutorial Councils**

According to the Constitution of Montenegro, the Judicial Council is an autonomous and independent body, which ensures the independence and autonomy of courts and

⁵⁶ Opinion of the Commission on Montenegro’s application for membership in the European Union, presented in Brussels on 9 November 2010 by the Commissioner for Enlargement Stefan File, file:///C:/Users/owner/Downloads/Misljenje_Komisije_o_zajtjevu_Crne_Gore_za_clanstvo_u_EU.pdf

judges. The Judicial Council was first established in 2008 to assure the autonomy and independence of judiciary. Despite legislative changes made in 2013 and 2015, respectively, recurrent concerns of the Judicial Council's alleged politicisation remain. GRECO has also raised concerns in this sense, criticizing *ex officio* membership of the Minister of Justice, as well as the lack of transparent and objective criteria for selection on non-judicial members of the Council.⁵⁷ Also, the legislation does not prevent for the eminent lawyers in the Council to be elected among politicians or those who had previously held political office.⁵⁸

The Judicial Council has a president and nine members. The members of the Judicial Council are: President of the Supreme Court, four judges elected and dismissed by the Conference of Judges, taking into account equal representation of courts and judges, four eminent lawyers elected and dismissed by the Parliament, at the proposal of the competent parliamentary committee upon a public invitation, and the Minister of justice (who cannot be elected President of the Council).

The Law on the Judicial Council and Judges was amended in June 2018 by stipulating that: "the President and members of the Judicial Council from the ranks of eminent lawyers, whose term of office expires due to the expiration of the term for which they were elected, shall continue to serve until election and proclamation of new members of the Judicial Council from the ranks of eminent jurists."⁵⁹ This solution was supported by the Venice Commission, as the only way to avoid a blockage of the Judicial Council at

⁵⁷ GRECO, *Second Compliance Report of Fourth Evaluation Round on Montenegro*, February 2020, pages 4 and 5, <https://www.coe.int/en/web/greco/-/montenegro-publication-of-the-2nd-compliance-report-of-4th-evaluation-round>

⁵⁸ See the draft amendments to the Law on the Judicial Council and Judges proposed by the Human Rights Action, 20 January 2015, Podgorica: <http://www.hraction.org/wp-content/uploads/Predlog-amandmana-na-Predlog-zakona-o-Sudskom-savjetu.pdf>

⁵⁹ Article 139a, paragraph 1

the moment, given that it was not possible to secure the required majority.⁶⁰ Pursuant to the aforementioned amendments on 4 July 2018, a constitutive session of the Council was held, at which PhD Mladen Vukčević was elected President of the Council from among prominent members of eminent lawyers.

However, non-judicial members of Judicial Council from the rank of eminent lawyers have not been replaced after their term ended in July 2018, as the required two-third majority for that has not been reached in the Parliament. The President of the Council resigned in December 2019. After that, the Judicial Council appointed PhD Vesna Simović-Zvicer as the President, until the announcement of new members of the Judicial Council from the ranks of eminent lawyers. As legal amendments do not contain any deadline for that, it is possible to extend the mandate of existing members from the rank of eminent lawyers indefinitely.

Recently, the Judicial Council re-appointed five court presidents, including the Supreme Court's President who had been at the same place for more than ten years, in contrary to previous GRECO recommendations. Such situation reopened disputes over independence of judiciary and potential over-concentration of powers, which have been also noted in the most recent Non-paper published in June 2020. Additionally, President of the Supreme Court should not be a member of the Judicial Council, especially when bearing in mind that court presidents are responsible for the work of courts before the Judicial Council.

According to the Constitution of Montenegro, the Prosecutorial Council ensures the independence of the state prosecutor's office. The Supreme State Prosecutor presides over the Prosecutorial Council, except in disciplinary proceedings. In terms of competences, the Constitution stipula-

60 Opinion on the Draft Law on Amendments to the Law on the Judicial Council and Judges, Adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)015-e)

tes that the Prosecutorial Council determines the proposal for the election of the Supreme State Prosecutor, elects and dismisses heads of state prosecutor's offices and state prosecutors, determines the termination of the function of heads of state prosecutor's offices and state prosecutors, proposes to the Government on the work of the State Prosecutor's Office, as well as performs other tasks determined by law.

The Prosecutorial Council has a president and ten members. The President of the Prosecutorial Council is the Supreme State Prosecutor. The members of the Prosecutorial Council are: five state prosecutors who have a permanent position and at least five years of work experience in performing the prosecutorial function, of which four from the Supreme State Prosecutor's Office, the Special State Prosecutor's Office and higher state prosecutor's offices and one from the basic state prosecutor's offices elected and dismissed by the Conference of State Prosecutors; four eminent lawyers elected and dismissed by the Parliament of Montenegro, at the proposal of the competent working body; one representative of the Ministry of Justice, appointed by the Minister of Justice from among the employees of the Ministry of Justice. A state prosecutor whose work has been assessed as unsatisfactory or who has been subject to a disciplinary sanction may not be elected a member of the Prosecutorial Council. The composition of the Prosecutorial Council is announced by the President of Montenegro.⁶¹

Such composition of the Prosecutorial Council still retains the impression of political control and influence. Although the Venice Commission⁶² is of the opinion that the Supreme State Prosecutor may chair, *ex officio*, the Prosecutorial Council, except in disciplinary proceedings (Amendment XI to the Constitution of Montenegro), such soluti-

61 Article 18 of the Law on State Prosecution, "Official Gazette of Montenegro", No. 011/15, 042/15, 080/17, 010/18, 076/20

62 Opinion of the Venice Commission on the draft constitutional amendments, which refer to the judicial system of Montenegro, No. 677/2012, 17 December 2012, CDL-AD (2012) 024, paragraph 50

on is problematic in the local context, since the Supreme State Prosecutor is a person who is most responsible for the work of the prosecution. Ultimately, the Prosecutorial Council should supervise the work of the Supreme State Prosecutor's Office, so it is illogical for the Supreme State Prosecutor to participate in that supervision. In addition, the authority that the Supreme State Prosecutor has among other prosecutors may create a danger that the Council's opinions may be uncritically accepted by prosecutors, who are members of the council, in order not to be resented by the Supreme State Prosecutor.

Furthermore, there are no guarantees that half of the Council's members will not be politically engaged, because for four members who are not prosecutors, there is no such restriction (they are elected by politicians), while the representative of the Ministry of Justice comes from the executive branch of power.

Bearing in mind that it is crucial for the independence of the Council who will be its members outside the ranks of prosecutors, we believe that it should be ensured that members of the Prosecutorial Council who are not prosecutors are persons who are truly independent of political power or not politically engaged in any way. According to GRECO, operational arrangements to avoid an over-concentration of powers within the Council should be strengthened, and prosecutors further supported in their impartial acting.⁶³

- **Appointment of Judges and State Prosecutors**

The Judicial Council ensures the independence, autonomy, responsibility and professionalism of courts and judges.⁶⁴ Detailed provisions regarding the position and work of judges are contained in the Law on the Judicial Council and judges. The criteria for selecting a judge to be elected

⁶³ GRECO, *Second Compliance Report of Fourth Evaluation Round on Montenegro*, February 2020, page 6.

⁶⁴ Law on Judicial Council and Judges („Official Gazette of Montenegro“, No. 011/15, 028/15, 042/18, Article 2)

for the first time are: grade on a written test, i.e. grade on a bar exam in accordance with the law governing the taking of a bar exam and grade on an interview with a candidate (Article 48). The written test involves making a judgement and carries a total of 80 points (40 points per decision). In the interview, it is possible to achieve up to 20 points, and on that occasion, the motivation for working in court, communication, ability to make decisions and resolve conflicts and understanding the role of the judge in society are assessed. Both the Judicial Council and the Prosecutorial Council have adopted Guidelines for conducting interviews with candidates for election. The application of the guidelines is, however, important for the uniform treatment of candidates. In addition to the Guidelines, the Judicial Council has adopted Rules for the Evaluation of Judges and Court Presidents,⁶⁵ which contain criteria, sub-criteria and indicators for the evaluation of judges, which we consider a major step forward, reducing the possibility for an arbitrary evaluation.

A novelty in the Law on the Judicial Council and Judges is the initial training, which candidates for a judge are required to complete, and which consists of a theoretical and practical part which lasts 18 months. During the initial training, a candidate for a judge establishes employment in the Basic Court in Podgorica until the decision on selection is made. A candidate for a judge is entitled to a salary in the amount of 70% of the salary of a judge in the basic court. The candidate for a judge who has received a grade "satisfactory" at the initial training is being appointed a judge by the Judicial Council.

Whether these novelties will bring positive changes in practice remains to be seen. In general, it can be said that work is being done to establish increasing guarantees for the selection of the best candidates for judges, but there is still room for improvement when it comes to transparency and meritocracy of the appointment process, as already mentioned.

⁶⁵ "Official Gazette of Montenegro", No. 075/15

Concerning impartiality in decision making, judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. These guarantees are provided in the Law on the Judicial Council and judges, however, there is a space for improvement when it comes to ethical and disciplinary liability, especially in terms of proportionality and effectiveness of accountability mechanisms. Also, a proper mechanism for reporting on and addressing improper influence of judges is yet to be established. Judges on the other hand, have a passive attitude towards such initiatives.

The independence of the State Prosecution, as an autonomous public body which prosecutes the perpetrators of criminal offences, is enshrined in the Constitution and further guaranteed by the Law on State Prosecution. However, there are disputes about constitutional position and autonomy of the Prosecution service within the overall State structure. Similar concerns exist in relation to the composition and work of the Prosecutorial Council as an independent body entrusted with key responsibilities regarding the career of the prosecutorial corps, as enumerated in the Constitution.

Namely, the Supreme State Prosecutor who is elected by the Parliament, based on the Prosecutorial Council's proposal, presides over this Council, except when this body decides about disciplinary liability of prosecutors. Recently, the Council accepted the candidacy of the acting Supreme State Prosecutor despite corruption allegations raised against him by one of the prime suspects in many on-going investigations of the State Prosecution. The Secretary of the Supreme State Prosecutor's Office who is seen as one of the main associates of the Supreme State Prosecutor is formally charged based on those allegations. Still, the Council remained almost silent towards these allegations. Such an attitude has been considered controversial by citizens and

part of legal community, reopening questions about disputed independence of the prosecution and the Council itself.

According to the current constitutional provisions, the Supreme State Prosecutor is elected and dismissed by the Parliament, at the proposal of the Prosecutorial Council, by a two-thirds majority of members in the Parliament (MPs), upon a public call. If the candidate does not receive the required majority, the Parliament in the second round decides by a three-fifths majority of MPs, from among all candidates who meet the legal requirements.⁶⁶ It is also envisaged that the tasks of the State Prosecutor's Office are performed by the heads of prosecutor's offices and state prosecutors, whose function is permanent, except when the state prosecutor is elected for the first time, in which case his/her term is 4 years, while the Supreme State Prosecutor and heads of prosecution offices are elected for a term of 5 years.⁶⁷

Although this solutions is in line with the Venice Commission's recommendation regarding the appointment of the Supreme State Prosecutor, the grounds for his/her dismissal are not stipulated by the Constitution, although the Venice Commission advocated for that in its opinion of 24 June 2013. Also, the composition of the Prosecutorial Council and the manner of appointment of its members should have been prescribed by the Constitution, not by the law,⁶⁸ as recommended by the Venice Commission. Further, the Law on State Prosecution has not been amended to prescribe the manner of replacing its members if the Parliament fails to elect them, nor is it envisaged how their term of office would be extended.⁶⁹

66 Amendments III, IV and X to the Constitution, "Official Gazette of Montenegro", No. 38/ 2013-1

67 Amendment X to the Constitution of Montenegro (2013)

68 The Constitution, on the other hand, stipulates that heads of state prosecution office and state prosecutor are dismissed if sentenced to unconditional imprisonment by a final judgment - the termination of office and dismissal procedure are more closely prescribed by law.

69 The Law on the Judicial Council and Judges prescribes the extension of the mandate of its members, (Article 16b).

In August 2019, a public call for the election of the Supreme State Prosecutor was announced, however, as no application was received, the Prosecutorial Council appointed former Supreme Prosecutor as acting one, pursuant to Article 48 of the Law on State Prosecution⁷⁰ which stipulates that in cases of resignation or dismissal of the Supreme State Prosecutor, or the expire of his/her mandate, the Prosecutorial Council appoints the acting Supreme State Prosecutor from among the prosecutors from the Supreme State Prosecution Office. However, the Law on State Prosecution does not specify what happens in case that Supreme State Prosecutor is not elected, i.e. when a new competition should be launched.

The Law on State Prosecution prescribes general conditions, otherwise necessary for work in state bodies, namely the completion of the Faculty of Law VIII level of education qualification and passing the bar exam and special conditions for the election of the state prosecutor and the head of the state prosecutor's office. There is an exception to these provisions in the sense that heads of higher state prosecution offices or the Supreme State Prosecution Office, persons who have worked for at least 12 years as judges, state prosecutors, lawyers, notaries or professors of law may be appointed to that position.

The criteria for the selection of the state prosecutor who is appointed for the first time are: grade on the written test, i.e. grade on the bar exam in accordance with the law governing the bar exam and grade of the interview with the candidate (Article 59 of the Law on State Prosecution). The written test includes the preparation of an indictment act or another act from the competence of the state prosecutor's office and carries a total of 80 points (40 points per act). The written test is being made under a specific code. During the interview, it is possible to gather up to 20 points, and on that occasion, the motivation for work in the state prosecutor's office, communication, ability to make deci-

⁷⁰<https://www.paragraf.me/dnevne-vijesti/29082019/29082019-vijestl.html>

ons and resolve conflicts as well as understanding the role of the state prosecutor in society are assessed.

As in the case of candidates for judges, candidates for public prosecutor are required to complete an initial training consisting of a theoretical and a practical part and lasting 18 months. The candidate for state prosecutor establishes employment in the Basic State Prosecutor's Office for a certain period of time until the decision on selection is made. The candidate for state prosecutor is entitled to a salary in the amount of 70% of the salary of the state prosecutor in the basic state prosecutor's office.

Similar to the Judicial Council, the Prosecutorial Council has adopted Guidelines for conducting interviews with candidates for prosecutors, which is also being used for the prosecutors' promotion procedure. The application of the guidelines is important for the uniform treatment of candidates. In addition to the Guidelines, the Prosecutorial Council has adopted Rules for the Evaluation of State Prosecutors and Heads of State Prosecutor's Offices,⁷¹ which contain criteria, sub-criteria and indicators for evaluation and which we consider a major step forward.

- **Financing of judiciary**

Concerning financing of judiciary, comparable data by the Judicial and Prosecutorial Council indicate a slight upward trend in the amount of public funding aimed at judiciary. However, financial independence of judiciary is still limited and conditioned by the procedure of the clearance of budgetary funds, allocated to judiciary, by the Ministry of Finance. This is perceived as a factor that greatly hampers external financial independence of judiciary.

Funds for the work of the Judicial Council are provided for in the budget of Montenegro, which the Judicial Council has at its disposal. Financial resources for the work of the Judicial Council are provided within the section of the budget of

⁷¹ "Official Gazette of Montenegro", No. 1/2016 and 66/2016

Montenegro for the judiciary as a special program. The Judicial Council proposes a breakdown of the annual budget for the work of the Judicial Council. The Judicial Council submits the annual budget proposal to the Government of Montenegro.⁷² The President of the Judicial Council has the right to participate in parliamentary session at which the draft Judicial Council's budget is discussed. Financial resources for the work of courts are provided in the section of the budget for judiciary, divided per separate budgetary programs for each court individually. The Judicial Council submits the budget proposal to the Government of Montenegro.⁷³

Financial resources for the work of the State Prosecutor's Office and the Prosecutorial Council are provided in a special section of the budget of Montenegro. The Prosecutorial Council proposes a division of the annual budget for the work of each state prosecutor's office and the Prosecutorial Council. The Prosecutorial Council submits the annual budget proposal to the Government of Montenegro. The President of the Prosecutorial Council has the right to participate at the parliamentary session at which the budget proposal for the work of the State Prosecutor's Office and the Prosecutorial Council is discussed.⁷⁴

It is clear from the above provisions that the financial independence of the judiciary remains limited and conditioned by the procedure for the approval of budget funds allocated to the judiciary by the Ministry of Finance. Although there is a slight upward trend in the amount of public funds intended for the judiciary, this is perceived as a factor that greatly hinders the external financial independence of the judiciary.

As early as 2001, the Consultative Council of European Judges (CCJE) took the view that the financing of courts was closely linked to the question of the independence of

72 Law on the Judicial Council and Judges, Articles 6, 131 and 132

73 Law on Courts, "Official Gazette of Montenegro," No. 011/15, 076/20

74 Law on State Prosecution, Article 180

judges in terms of determining the conditions under which courts performed their functions.⁷⁵ The CCJE agrees that although court funding is part of the state budget, these funding should not be subject to political fluctuations. Although the level of resources a country can afford for its courts is a political decision, due diligence must be taken with respect to the separation of powers, to ensure that neither the executive nor the legislature are able to put any pressure on the judiciary in the budgeting process. Decisions on the allocation of funds to the courts must be therefore made with strict respect for the independence of the judiciary.

Through recommendations of Council of Europe and EU-ROL 2, the Judicial Council has started the process of improving financial management as well as capacities of the Council's Secretariat in the area of budget planning and execution, as well as human resources planning and capacity building. The control of the budget by courts as a preparation for the introduction of decentralized financial management in courts is envisaged by the Action Plan for the implementation of the Strategy for the Reform of Judiciary 2019-2022; the timeframe for the implementation of activity is 4th quarter of 2020.⁷⁶

Judges, heads of the state prosecutor's office and state prosecutors exercise the right to salary and other rights from work and on the basis of work, in accordance with the law. Namely, the largest share in the execution of the budget of the Judiciary has the expenditures for gross salaries, which make up as much as 68.97% of the total budget. Nevertheless, the question arises as to whether the salaries of judges / prosecutors are sufficient and in line with the judicial / prosecutorial vocation?

In the project implemented by CEDEM and Centre for Monitoring and Research, among other things, in-depth interviews were conducted with court presidents, judges of vario-

⁷⁵ Consultative Council of European Judges (CCJE) CCJE (2001) OP N ° 2, Strasbourg, 23 November 2001, <https://www.coe.int/en/web/ccje/home>

⁷⁶ Judicial Council: *Annual Report for 2019, Podgorica, 2020*, page 8, https://sudovi.me/static/sdsv/doc/FINAL_Godisnji_izvjestaj_2019-stampa.pdf

us courts, prosecutors, lawyers, representatives of the Judicial Council, the Ombudsman and others. They provided answers to various questions, including the following one: *Is the material status (position) of judges (prosecutors) at a satisfactory level and if not, do you think that this can affect the quality of work, but also the objectivity itself?*

The majority of respondents answered that the amount of salary is not at a satisfactory level, but considering a general standard of living, it can be acceptable. They further pointed out that in addition to low wages, much bigger problem is the fact that a large part of them have not resolved the housing issue, and not only in Podgorica. Most of them agreed that inadequate wages should not affect their quality of work and objectivity. It was also pointed out that “the judiciary does not have the opportunity that executive bodies are using, enabling themselves to raise the level of salaries up to 30% or 40% through bylaws. In this part, due attention must be taken and a certain standard of judge’s salary must be established. We need to have a built-in relationship to what a judge’s reputation means. We cannot allow for the salary of a judge in the misdemeanour court to be twice less than the salary of the Deputy Secretary General of the Parliament. We have to take care of that.”

- **Public perception of judiciary’s independence**

As it comes to whether the judiciary is perceived as independent, it should be stated that trust into judiciary has been relatively low for years: according to Eurobarometer, only 49% of population expressed tendency of trust in police, only 38% said they tend to trust the Government, and also less than half of surveyed population (48%) said they trust to the justice system.⁷⁷ Public opinion research done by CEDEM in December 2019 indicated even lower public trust scores: 41.9% of for the Court system and 33, 2% for State Prosecution.⁷⁸

⁷⁷ Standard Eurobarometer: *Trust in Institutions, May 2016* <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Chart/index>

⁷⁸ <https://www.cedem.me/en/activities/1196-second-annual-poll-political-public-opinion-of-montenegro-december-2019>

Reform of the judicial system is as effective as citizens feel its benefits and show satisfaction with the results achieved. However, despite some progress in judicial reform, the opinion polls conducted in March and August 2020, respectively, show that trust in judiciary is steadily declining. To illustrate, in March 2020, trust into judicial system was 34%, in December 2019 41.9%,⁷⁹ while in December 2017 it was 48%.⁸⁰ The latest research of CEDEM, published last month, marked 37% of public trust in the court system and 36, 9% in state prosecution.⁸¹ Such a declining trend, compared to 2019, may be attributed to several public affairs which have shed light to the independent and impartial conduct of judiciary.

79 http://cedem.me/images/Politicko_javno_mnjenje_decembar_2019pdf.pdf

80 <http://cemi.org.me/2020/03/pad-povjerenja-gradana-u-pravosude/>

81 <http://www.cedem.me/publikacije/istrazivanja/politicko-javno-mnjenje/send/29-politicko-javno-mnjenje/1975-politicko-javno-mnjenje-avgust-2020>

ABSENCE OF CORRUPTION III

INDICATOR
PARTIALLY
ACHIEVED



The fight against the phenomenon of corruption in Montenegro involves preventive measures and criminal law measures. Preventive measures or specific rules of conduct against abusive exercise of public duties are applicable to public officials. Corruption-related offenses are clearly addressed in criminal law and anti-corruption law. Despite the delineation of these criminal offences, the judicial system is still not fully efficient in rendering proportional sanctions in the area of corruption. Most high-level corruption case has never reached the trial phase, ending in controversial plea bargain agreements. Those that have been trial resulted in mild sanctions or reversals of court decisions in appeal.

The European Commission country reports voiced concerns regarding the institutional and operational capacity of Montenegro to fight corruption and organized crime, and lack of the track record of effective investigation, prosecution and convictions for corruption - related crimes. Anti-corruption preventive measures are not compliant with GRECO recommendations. The Anti-Corruption Agency (so-called ASK) is often perceived as non-transparent and largely ineffective in implementing regulations on conflict of interest.

- **Public perception of corruption**

Public opinion polls in Montenegro show high percentage of public's mistrust to institutions and wide perception of the corruption at all levels. Even through public perception studies could mislead from the actual state of play, to some extent, they reflect a realistic picture of the state of play.

Namely, public perception survey conducted by two NGO, at February - March 2020⁸² (previous one was realised in 2017), presented slight changes in public understanding of corruption, but still recognise corruption as dominant issue of Montenegrin society. Citizens of Montenegro

82 <http://media.cgo-cce.org/2020/03/CGO-CEMI-Percepcija-korupcije-u-Crnoj-Gori-2020.pdf>

generally recognize various types of corruption; the largest number of them recognizes bribery of professors and police officers, and the least recognizable type of corruption refers to the use of acquaintances in order to obtain a certain document.

The main reasons for such perception of citizens are related to the poverty level, economic status of public servants and readiness of authorities to tackle corruption. Citizens do not find themselves confident enough to report corruption, as they perceive that they could have problems and that the reporting will not end with prosecution. Some illustrations of such perception stance are indicated below.

Three quarters of citizens believe that corruption is part of everyday life, and almost every second citizen believes that this could be changed by joining to the European Union, as well as by increasing the salaries of civil servants. Seven out of ten citizens believe that both subjects are equally responsible for bribery, and a third justifies corruption in some cases.

Judging by the perception of citizens, corruption is most prevalent in health care system and among political parties, but also in other institutions, such as Administration for Inspection Affairs, Customs, Police, Prosecution, Media, Tax Office and Judiciary.

According to citizens' opinion, the main reasons for accepting bribes are the absence of fines and low wages. Almost a third of citizens take the absence of fines as the main reason for giving bribes, and in addition, 35% of citizens (which is significantly more than in 2017) believe that the reason is the difficulty of providing services on a regular basis.

One third of citizens evaluate the work of Anti-corruption Agency negatively, only 15% positively, and more than a third of citizens did not give their assessment.

Over two-fifths of citizens negatively evaluate the work of the Special State Prosecutor's Office in the fight against

corruption; especially citizens from the north, while close to 1/4 of citizens gave a neutral assessment.

Citizens who would not report a case of corruption basically indicate that it is in the competence of the state bodies to detect corruption, and that they do not believe that reporting would lead to any effect. The lack of faith in the effect of reporting corruption cases is significantly less pronounced compared to 2017. In there is a possibility of anonymous reporting of corruption, almost half of the citizens stated that they would inform the authorities.

Over two-fifths of citizens think that high-level and lower-level corruption are equally problematic, while almost a third point out that the higher problem is high-level corruption, at the political and business levels. Citizens most often state that severe penalties and equal application of law for all would be the most successful measures in solving the problem of corruption in the place where they live.

- **Low and high-level corruption ratio**

Differentiation of corruption its important from point of analysis which level of corruption its prevalent in the practice of prosecution service and does confirm the perception of publics.

Montenegrin legislation acknowledges two types of corruption, *low-level* corruption and *high-level* corruption. This concept has been introduced from the practical reasons, not to overburden Special State Prosecution Office (SSPO) with minor corruption cases. With adopting Law on Special State Prosecution Office at Montenegrin (2015) criminal legislation jurisdiction (*Subject Matter*) for High Corruption cases have been placed under SSPO. All other corruption cases are under jurisdiction of other basic and high prosecution offices.

Definition of high-level corruption lays down on two criteria - possible perpetrator and the amount of proceeds of crime.

- a) if a *public official*⁸³ committed the following criminal offences:
- abuse of office,
 - fraud in the conduct of an official duty,
 - trading in influence,
 - inciting to engage in trading in influence,
 - passive bribery,
 - active bribery,
- b) if the proceeds of crime exceeding the amount of **EUR 40,000** have been obtained by committing the following criminal offences:
- abuse of position in business undertakings,
 - abuse of authority in economy.

All corruption cases do not refer to the above given criteria will be reported or will be transferred by Special state Prosecution Office to the lower prosecution offices.

According data provided by Supreme State Prosecution Office, from the reported cases in 2019, against 486 persons for the corruption cases, 459 persons was reported to the Special state prosecution Office. From this number, 51 reported persons Special State Prosecution Office transferred to the lower prosecution offices. It appears that low-level corruption has been present at practice of prosecution service just against 78 person (*27 persons directly reported to Basis or High Prosecution offices and 51 persons transferred by SSPO to lower prosecuti-*

83 According **Law on prevention of corruption**, public officials shall refer to the persons elected, appointed or assigned to a post in a state authority, state administration body, judicial authority, local self-government body, local government body, independent body, regulatory body, public institution, public company or other business or legal person exercising public authority, i.e. activities of a public interest or state-owned (hereinafter: authority), as well as the person whose election, appointment or assignment to a post is subject to consent by an authority, regardless of the duration of the office and remuneration. (Article 3)

on offices) or **16%** of all reported persons for corruption. And the high-level corruption made 408 reported persons or **84% of all reported**. Such statistics could be explained with the fact that SSPO is specialised for tackling corruption because most of reported cases comes to SSPO. Number of cases transferred by SSPO to lower prosecution offices is twice higher than number of persons directly reported to basic and high prosecution offices.

Difference of reported number of persons for the low-level corruption and high-level corruption should be alarming for the police and prosecution office as the most cases are related for high-level corruption. On other hand, Anti-corruption Agency should improve their efforts as high-level corruption prevention is directly under their competence. Additional issue is low rate of low-level corruption which does not correspond to the public opinion when it comes to most corrupted professions (not public officials), but still almost a third of citizens point out that the bigger issue is corruption that takes place at a high level, in politics and in business sector.

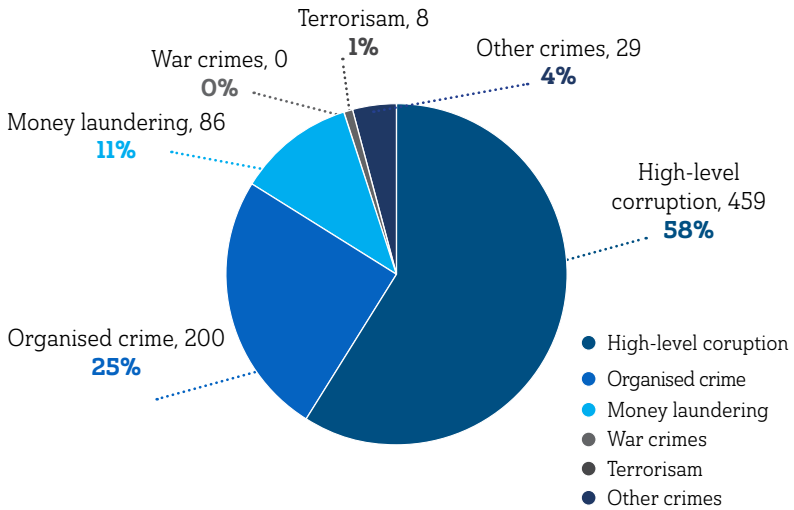
- **Participation of high-level corruption at SSPO case portfolio**

Domination of high-level corruption is present, even in relation to other cases under the jurisdiction of the SSPO. Namely, previously given number of 459 criminal charges was filed against adult perpetrators for high-level corruption, out of a total of 782 criminal charges filed in 2019, which make it a 58.7% of representation in total number reported adult perpetrators. Criminal charges filed to SSPO against adult perpetrators for other criminal offences under competence of SSPO (Organised crime, Money laundering, Terrorism, War crimes and other crimes) made just a 41,3% of all criminal charges in 2019.

With unresolved criminal charges from an earlier period (485) number of criminal charges for high-level corruption raise up to 944 in 2019 or 69.2% of total criminal charges

SSPO had in work in 2019. However, it is at the same level as was it in 2018 and in previous years.

Structure of criminal charges within SSPO for 2019



- **High-level corruption prosecution efficiency/quality of criminal charges**

Corruption is such a criminal phenomenon which presumes conspiracy of both involved subjects. For such criminal offence detention and prosecution is difficult and request specific investigation measures⁸⁴. Evidence need to be collected at the very time of committing the crime or investigation need to be based on circumstantial evidence. It could be expected that rate of solved corruption cases is lower than it comes to other criminal offences. If the standards for sufficient level of evidence is developed, prosecution should efficiently make decision should go forward with prosecution or drop charges.

When it comes to efficiency of SSPO, backlog of criminal charges from previous periods could refer to non-efficient work.

⁸⁴ Structure of corruption criminal offences in Montenegro is such that their nature does not require use of special investigation measures according to CPC.

Out of 944 corruption charges in progress, 419 charges were resolved in the 2019, ie 44.39% of charges for these criminal offenses. In relation to 351 persons (83.77% of resolved charges), decisions were made to reject criminal charges, a bill of indictment was filed against 1 person, orders to conduct an investigation were issued in 6 cases against 16 persons (3.82%), while charges against 51 persons (12.17%) transferred to other prosecutor's offices. There were unresolved charges against 525 persons or 55.61% of charges in progress.

In addition to the unresolved investigations from the previous period, against 76 persons, special prosecutors had a total of investigations against 92 persons in 2019. The investigation against 3 people was suspended, and after the investigation, 6 indictments were raised against 37 people. At the end of the reporting period, 52 investigations remained unresolved.

It seems that SPPO is efficient when it comes to criminal charges without sufficient grounds. When it comes to criminal charges that have grounds for investigation, they resulted in just one bill of indictment and 6 new launched investigations, in one year. This does not demonstrate the efficient fight against corruption.

Efficiency is in direct line to effectiveness of fight against corruption, and both are based on quality of criminal charges and investigative standards implemented in work of LEA and prosecution service. Despite differentiation of low and high-level corruption, SPPO is obviously overloaded with high-level corruption criminal charges to prosecute it efficiently and effectively, which resulted with low number of launched investigation. It should be reconsidered upon new corruption risk assessment which cases should be defined as high-level corruption and as such be under jurisdiction of SSPO.

- **Raised indictments/quality of investigation**

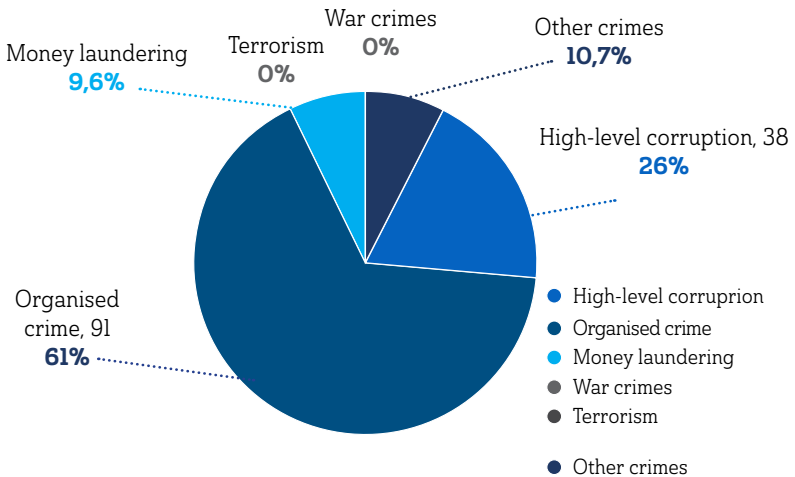
In 2019, SSPO raised indictments (including one bill of indictments) against a total of 38 people with high-level

corruption offenses, in 6 cases. In addition to unresolved indictments from previous years against 53 persons, in 2019, 91 persons were indicted before the court.

When it comes of other criminal offences under SPPO jurisdiction, significantly more indictments have been raised, inversely proportional to number of criminal charges, but proportional to number of conducted investigations. Namely, beside indictments against 38 persons for criminal offenses of high corruption, SSPO raised indictment against **91 persons for criminal offenses of organized crime, 9 persons for the criminal offense of money laundering and 10 persons for other criminal offenses.**

It could be found that prosecution of high-level corruption cases is not questionable when it comes to investigations which result in indictment at most cases. Question that follows is linked to the extent to which the investigations are effective, by looking at confirmed indictments and court decisions.

Structure of indictments raised within SSPO for 2019



- **Judicial outcome of corruption cases/quality of investigation and indictments**

At the high-level corruption cases, court rendered decisions for 9 persons, of which the found guilty 4 persons

(3 to imprisonment, of which 1 on the basis of a plea agreement and 1 on probation), while *acquittals were passed in relation to 5 persons (55.6% of all rendered judgments for high-level corruption)*. At the end of the 2019, charges against 82 individuals remained unresolved.

In regard to rest of criminal offences (*organised crime, money laundering, other crimes*) indictments, in 2019, the court made decisions against 71 persons. The verdicts were convicted against 70 persons, 98.6% of all rendered judgments (against 65 persons for imprisonment and against 6 persons for suspended sentence), no acquittals were passed, while for 1 person the verdict was dismissing.

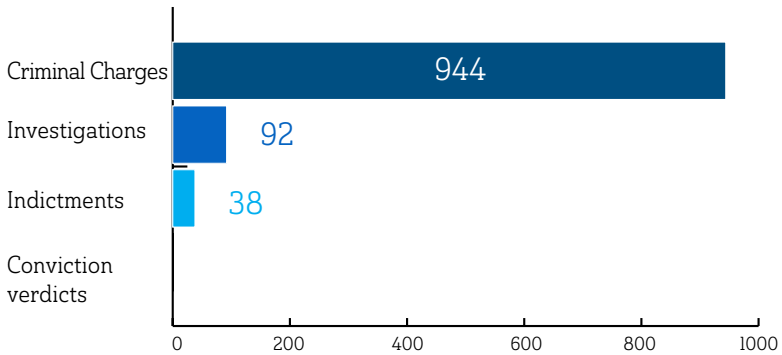
At the general level, according to the indictments of the Basic, Higher and Special State Prosecutor's Offices, 93.00% of the charges were resolved by a conviction, acquitting 3.60% and 1.51% of the charges by dismissal verdict.

At the acquittal court decisions of high-level corruption, special prosecutors filed appeals in relation to all 5 persons, while from the previous period there were 3 unresolved appeals before the court. **Appeals were rejected in relation to 7 persons, and in relation to 1 person the complaint remained unresolved.**

Success of the indictments raised for the high-level corruption criminal offence is significantly lower than the average for the other criminal offence's indictments under jurisdiction of SPPO, as well than the general success average in Montenegro. Such statistics require reaction of responsible authorities, especially of the Appellate court that confirmed all first instance decisions by SSPO.

Chart above present effectiveness of fight against high-level corruption in Montenegro:

High-level corruption cases progress in 2019 eithin SSPO



- **Structure of the corruption criminal offences**

The national criminal legal framework of Montenegro includes several criminal offences in the Criminal Code, as corruption criminal offences. High-level corruption is also defined by the Law on Special Prosecution Office. These offences, as a general protective object have official duty (public service), the general offence is Misuse of Office (article 416). Specific corruption offences include Passive Bribery (article 423) and Active Bribery (article 424).

Despite versatile criminal legal framework for tackling corruption, prosecutors do not use all possibilities, especially in regard to *per se* corruption cases, such as Bribery. Prosecutors at most cases incriminate for the criminal offence Misuse of Office or Abuse of Position in Business Undertakings. In practice of SSPO over 95% investigations, in 2019, have been conducted for the criminal offence Misuse of Office or Abuse of Position in Business Undertakings. Only one investigation was conducted for Passive Bribery. Citizens perception show that Bribery is most common form of corruption and they see it present at the low level of state administration.

Different criminal offences require different investigative measures, with specialisation. Criminal Procedure Code, after Constitutional court findings (2018) that some of the

special investigation measure provisions are in contrary to Constitution, do not provide all measures specific for the corruption criminal offences. Such situation could prevent police and prosecution service to detect and to obtain evidence for specific corruption cases.

CONCLUSIONS AND RECOMMENDATIONS

Despite the rule of law principles are considered essential for achieving democratic and political and legal criteria for EU accession, greater transparency, accountability and responsiveness of institutions and society as a whole is needed to ensure its effective implementation in practice. Main rule of law principles are indeed enshrined in the Constitution of Montenegro, however, they are not adequately operationalized through the legislation in force and therefore not effectively implemented in practice nor dutifully monitored. Main factors that are hindering rule of law achievements are related to too-frequent amendments to the existing legal framework, impunity and excessive formalism.

Namely, concept of the Rule of Law in the country is still taking shape inside formalistic ideas, with less strategic orientation and without sufficient means for the implementation. Although some progress has been made on judicial reform, reform activities have not yet produced the desired effects in terms of creating an independent, impartial, accountable and efficient judicial system. Despite constitutional amendments in 2013 and subsequent reform of judicial legislation in 2015, real depoliticisation has not taken place yet. The judiciary is still perceived as sensitive to political interference. It has not yet been ensured that the Judicial and Prosecutorial Councils are truly independent

bodies; the process of appointment and dismissal of judges and prosecutors is still not merit-based.

Representatives of executive branch (Ministry of Justice) are still members of Judicial and Prosecutorial Councils, what was again heavily criticized by GRECO in its recent report on Montenegro. Although the anti-deadlock mechanism was introduced by 2018 amendments to the Law on the Judicial Council and Judges, it does not prescribe any deadlines, so the process may last indefinitely, figuratively speaking. There are no such criteria for the selection of reputable lawyers that would ensure their independence from political interference and prevent conflicts of interest. Last, but not least, public trust into judiciary and their satisfaction with the judicial system are marked by the declining trend as of 2017. These are all warning signs that call for stronger political commitment and more evidence-based changes in the normative framework, accompanied by the changes in practice as well. 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 independence of all institutions, as underlined by the European Commission in June this year.

As regards governance, there is a need to strengthen transparency, stakeholders' participation, and the government's capacity to implement reforms. A new legal framework and methodology on strategic planning should lead to better quality strategic planning, better monitoring and execution. During the process of execution of judgments and decisions of the European Court, it has been noticed that most of the national court decision are based exclusively on national regulations, and to particular international documents and convention rights. In this regard, it is necessary to encourage domestic state authorities, especially domestic courts, to apply in addition to national regulations when drafting their decisions, sine the Convention law is a legal source pursuant to Article 9 of the Constitution.

Remedies against non-implementation of legislation have also proved to be inefficient in that there are no clear sanctions but rather scattered attempts to make up for the implementation gaps.

Public perception and statistics on reported corruption simultaneously confirm fact that corruption in Montenegro remains prevalent in many areas of political, economic and social life and continues to be a serious problem in Montenegro.

According to the differentiation of two types of corruption by Montenegrin legislation and in regard of reported cases statistics, high-level corruption is mostly represented in practice, which is opposite of public perception of corruption. Most of criminal charges have been submitted to Special State Prosecution Office making corruption charges significant part of SPPO work (69.2% of all criminal charges in work for 2019). However, huge number of criminal charges has not produced sufficient number of investigations or indictments. At the end of 2019 we had just 4 convicting judgments. Such result is in conformity to trust of citizens in institution capabilities to fight corruption.

Based on the above-mentioned research findings, following recommendations may be outlined to further strengthen the rule of law in Montenegro:

- Ensure proper implementation of the tripartite division of powers – focusing on parliamentary democracy, in which the highest legislative body should assume its given competences effectively.
- Ensure full respect for the *checks and balances* system to prevent individual judges from being prone to external influence, but also to prevent illicit political influence on the functioning of judiciary.
- Through amendments to the Constitution, exclude the Minister of Justice and President of the Supreme Court from the membership in the Judicial Council.

- cil. Also, Supreme State Prosecutor should not be a member of the Prosecutorial Council.
- Amend the Laws on the Judicial Council and Judges and on the State Prosecution to ensure higher guarantees of the independence and impartiality of the members of the Judicial and Prosecutorial Council as crucial independent self-governing judicial bodies, by prescribing transparent and objective criteria for their selection as well as by ensuring that non-judicial members of these bodies are not appointed among those with political background or previous professional political carrier.
 - Amend the Law on the State Prosecution by following the example of the Law on Judicial Council and judges, to prescribe the extension of the mandate of eminent lawyers in case that the Parliament does not elect all four new members. The manner of election of those whose term is being extended and the deadlines for that should be prescribed as well.
 - Fight against corruption in Montenegro need to be strategically reconsidered. Risk assessment needs to be a basis for legislation changes in regard to differentiation of jurisdiction in a manner that Special Prosecution Office should be focused only on serious corruption cases, while other prosecution offices should extend their jurisdiction in a fight against corruption at lower levels.
 - Because of nature of corruption, state authorities need do increase their focus to the pre-investigation as the crucial phase to collect sufficient evidence and justify the existence of corruption.
 - Specialisation in fight against corruption is a precondition for positive results and requires further capacity building within police and state prosecution service.

RULE OF LAW INDICATORS

I Compliance with the Law

1. Does the action of the executive branch conform with the Constitution and other laws?
2. Are Government regulations effectively enforced?
3. Is the judicial review of the conformity of the acts and decisions of the executive branch of government with the law effective?
4. Are there examples of sanctions of government agents for non-obedience of the law?
5. Are international and domestic court decisions implemented by the executive and legislative branch?
6. Is the implementation of laws consistent by the courts (in the civil and criminal justice sector)?

II Independence of Judiciary

1. Are there guarantees that the most competent and moral individuals are appointed as judges?
2. How is the judiciary, in general, financed?
3. Are there fair and sufficient salaries for judges?
4. Is the judiciary perceived as independent?

III Absence of Corruption

1. What is the public's perception of the corruption in governmental bodies?
2. Are there court cases that confirm or refute the perceived corruption level?

