KONTROLNA LISTA VLADAVINE PRAVA ZA CRNU GORU

Program za vladavinu prava u Jugoistočnoj Evropi Fondacije Konrad Adenauer & Centar za demokratiju i ljudska prava

KONRAD ADENAUER STIFTUNG
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CEDEM
CENTAR ZA DEMOKRATIJU I LJUDSKA PRAVA

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Jugoistočnoj Evropi Fondacije Konrad Adenauer &
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Popis skraćenica

SE – Savjet Evrope

KSES - Konsultativni savjet evropskih sudija

EKLjP – Evropska konvencija o ljudskim pravima

ESLjP – Evropski sud za ljudska prava

EU – Evropska unija

ASZ – Agencija za sprovođenje zakona

NATO – Organizacija sjeverno-atlantskog ugovora

OEBS – Organizacija za evropsku bezbijednost i saradnju

COR – Ciljevi održivog razvoja

KSDT – Kancelarija specijalnog državnog tužioca

UEU – Ugovor o Evropskoj uniji

UN – Ujedinjene nacije

SADRŽAJ

PREDGOVOR

Vladavina prava je politički ideal o tome koliko dobro bi vlasti trebalo da rade. U svojoj suštini, ta ideja nosi načelo ograničavanja proizvoljne moći. Samo onda kada je moć ograničena, odgovornost, ljudska prava, demokratija i zajedničko dobro imaju svoje mejsto u radu vlade. To ograničenje se ostvaruje putem zakona, koji usmjeravaju i ograničavaju kompletno djelovanje države. Da bi bili još konkretniji, proizvoljnost pojedinaca na vlasti ograničava se na osnovu zakona.

Savremene demokratije ne bi funkcionisale da nema okvira koji postavlja osnovna pravila na kojima se može temeljiti neko društvo. Kako zapaža World Justice Project (Projekat svjetskog pravosuđa), „kada je vladavina prava slaba, lijekovi ne stižu do zdravstvenih ustanova, zločinačko nasilje se dešava bez kontrole, zakoni se sprovode nejednako širom društava, a strane investicije su na čekanju."[1]

Vladavina prava nije puka ideja koja je samoispunjavajuća. Ona se izgrađuje na dva ključna stuba: Prvi stub je opšte prihvatanje u društvu da se zakon primjenjuje jednako na sve njegove članove bez obzira na količinu moći koju ima neki pojedinac. Drugi stub, možda još važniji budući da utiče direktno na društvo, su jake i sposobne institucije koje podržavaju zakon. To je takođe razlog zbog kojega će se

1 World Justice Project. Indeks vladavine prava Projekta svjetskog pravosuđa za 2014. Dostupno na: http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

ova analiza fokusirati na institucije i njihove kapacitete i spremnost da djeluju u skladu sa zakonom i da ga sprovode.

Imajući na umu sve što je prethodno rečeno, nismo zainteresovani za analizu koja će samo koristiti normativni pristup budući da je većina zakona u regionu Jugoistočne Evrope formalno usklađena sa najvišim standardima vladavine prava. S obzirom na to, to je također i razlog zašto ne koristimo indikatore koji sadrže vrijednosti kao što su jednakost zakona, nediskriminacija itd. Budući da su te vrijednosti uglavnom (normativno) ugrađene u pravne sisteme država regiona Jugoistočne Evrope. Suštinski je značajnije da li se zakoni koji sadrže te vrijednosti poštuju u praksi. Dakle, nas interesuje „Aktivna vladavina prava".

Hartmut Rank, magistar prava
Direktor

dr Mahir Muharemović
Direktor Naučni savjetnik i koordinator Projekta

Program vladavine prava u Jugoistočnoj Evropi Fondacije Konrad Adenauer

„Svi smo mi sluge zakona kako bismo mogli biti slobodni."

Ciceron (106 p.n.e - 43 p.n.e.)

UVOD

Vladavina prava je važan cilj za građane i vlade širom planete. Prema sistemu Ujedinjenih nacija, vladavina prava je načelo upravljanja u kojem su sva lica, institucije i pravna lica, javna i privatna, uključujući i samu državu, odgovorni prema zakonima koji se javno proglašavaju, koji se jednako sprovode, kojima se nezavisno dosuđuje i koji su u skladu sa međunarodnim standardima ljudskih prava.[2] Iz tog razloga, društvo zasnovano na vladavini prava se smatra rezultatom Agende UN 2030 i Ciljeva održivog razvoja (COR).

Prema Savjetu Evrope, vladavina prava predstavlja jedno od „tri načela koja čine osnovu istinske demokratije" zajedno sa ličnom i političkom slobodom.[3] Evropska komisija takođe podsjeća da je „načelo vladavine prava je postepeno postalo dominantni organizacioni model savremenih ustavnih sistema" kako je navedeno u Preambulama Ugovora o Evropskoj uniji i Povelje o osnovnim pravima EU.[4]

Ovo načelo zahtijeva jasnoću po pitanju osnovnih društvenih i pravnih vrijednosti, ali i mjere za obezbjeđenje privrženost nadmoći zakona, jednakosti pred zakonom, odgovor-

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

3 *Statut Savjeta Evrope, ETS No.001, London*, 05/05/1949, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001

4 Saopštenje Komisije upućeno Evropskom parlamentu o *Savjetu: Novi okvir EU za osnaživanje vladavine prava* / COM/2014/0158 final/, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158&from=EN

nosti, razdvajanju grana vlasti, učešća u procesu odlučivanja i izbjegavanje proizvoljnosti. U kriznim vremenima, kao što je aktuelna kriza uzrokovana širenjem COVID-19, vrijednosti vladavine prava postaju smislenije, budući da građani zahtijevaju transparentne, pravične i odgovorne odgovore na vanrednu situaciju od javnih institucija.

Od svoga osnivanja, Centar za demokratiju i ljudska prava (CEDEM) usredsređen je na uspostavljanje vladavine prava u zemlji, čvrsto zagovarajući pravne reforme i izgradnju kapaciteta javnog sektora i civilnog društva kako bi se prihvatile i podržale vrijednosti vladavine prava. Fondacija Konrad Adenauer je već dugo vremena jedan od ključnih partnera CEDEM-a u sprovođenju ovih zadataka i približavanju zemlje idealu društva zasnovanog na vladavini prava.

Ovaj izvještaj o ocjeni stanja je pripremio CEDEM, kao dio ukupne inicijative koju sprovodi Program za vladavinu prava u Jugoistočnoj Evropi (KAS RoLP SEE) u odnosu na Kontrolnu listu o vladavini prava Venecijanske komisije. On daje sveobuhvatnu funkcionalnu ocjenu više indikatora vezanih za Crnu Goru koji obezbjeđuju bolje razumijevanje stanja vladavine prava u zemlji i njen uticaj na svakodnevni život njenih građana.

METODOLOGIJA

Metodologija ove ocjene se zasniva na **Kontrolnoj listi o vladavini prava venecijanske komisije,**[5] **koju je prilagodio KAS RoLP SEE** u cilju obezbjeđenja sistematske ocjene osnovnih stubova vladavine prava u onim zemljama koje obuhvata rečeni Program KAS-a za vladavinu prava. Budući da je vladavinu prava veoma teško definisati,[6] najdjelotvorniji način pristupanja istoj je da se ispita set rezultata koje ona donosi društvima, uključujući pravične zakone, dostupnu pravdu i otvorenu i odgovornu vladu.

Kontrolna lista se sastoji od **12 indikatora,**[7] **grupisanih od strane KAS RoLP SEE u 3 kategorije**, koji olakšavaju dosljedno shvatanje pojma vladavine prava u Crnoj Gori: poštovanje zakona (I); nezavisnost pravosuđa (II) i odsustvo korupcije (III). Oni su uglavnom usmjereni na ocjenjivanje pravnih garancija i ukazivanje na to kako su načela vladavine prava ugrađena u zakonodavstvu zemlje. Kako je pra-

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

6 Prema *tankoj definiciji vladavine prava*, zakoni samo moraju poštovati formalna pravila kako bi bili validni, bez obzira na njihov sadržaj; represivni režim bi prema toj definiciji mogao zadovoljiti vladavinu prava. Suštinska ili *debela definicija* prosuđuje kako sadržaj tako i formu zakona, zahtijevajući prepoznavanje suštinskih prava, Lord Tom Bingham: *The Rule of Law*, Allen Lane, 2010, op.cit. str. 66–67.

7 Indikator br. 3: *Da li ljudi pribjegavaju nasilju kako bi ispravili lične nepravde?* (Poštovanje zakona) nije uključeno u kontrolnu listu, zbog nedostatka dostupnih podataka za mjerenje njegovog ispunjenja.

vilno sprovođenje zakona od suštinskog značaja za Crnu Goru, kontrolna lista takođe uključuje **nekoliko dopunskih mjerila za ocjenjivanje praktične primjene načela vladavine prava**, do mjere do koje je to moguće.

Cilj takve metodologije je bio dvostruk: a) da se ocijeni trenutno stanje stvari u vezi sa vladavinom prava u Crnoj Gori, u cilju identifikovanja i analize glavnih nedostataka i ograničenja vezanih za odabrane indikatore; b) da se da doprinos oblikovanju opcija javne politike za otklanjanje tih nedostataka kroz tekuće reformske procese. Do izvjesne mjere, CEDEM je takođe nastojao da vrednuje način na koji je pravni sistem odgovorio na krizu uzrokovanu COVID-19, koja je otvorila mnoge kontroverze sa tačke gledišta vladavine prava.

Kod pronalaženja izvora za indikatore, Ustav je uzet kao najviši izvor prava, nakon čega su posmatrani zakoni i podzakonska akta, te izvještaji međunarodnih organizacija (CEPEJ, GRECO i Evropska komisija). Odgovarajući podaci su takođe prikupljeni preko Godišnjih izvještaja Vrhovnog državnog tužilaštva,[8] izvještaja NVO-a i zahtjeva za slobodni pristup informacijama; iz anketa o percepciji korupcije od strane javnosti sprovedenih od strane Centra za građansko obrazovanje i Centra za Monitoring i istraživanje u martu 2020. godine[9]; od indikatora vezanih za praksu, Vladinih i sudskih odluka; iz izvještaja nevladinih organizacija o monitoringu i dostupnih sudskih dosijea.

Ova ocjena ja namijenjena za široki auditorijum koji uključuje tvorce javne politike, civilno društvo, akademsku zajednicu, građani i pravni stručnjaci, kako bi pomogla u identifikovanju ključnih jakih strana i slabosti aktuelnog sistema vladavine prava u Crnoj Gori, kao i usmjeravanje opcija javne politike i vođenje daljih istraživačkih napora ka osnaživanju vladavine prava u zemlji.

8 https://tuzilastvo.me/static/drtz/doc/IZVJESTAJ__O_RADU_TUZILACKOG_SAVJETA_I_DRZAVNOG_TUZILASTVA_ZA_2019_GODINU.pdf

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

SAŽETAK

U Crnoj Gori postoji konsenzus o osnovnim elementima vladavine prava, uključujući zakonitost i pravnu sigurnost; jednakost pred zakonom; nezavisnost i nepristrasnost pravosuđa i poštovanje ljudskih prava. Načelo vladavine prava je proglašeno jednim od ključnih ciljeva zakonodavne reforme i jednim od suštinskih zahtjeva u procesu pristupanja zemlje Evropskoj uniji.[10] Međutim, uprkos sveobuhvatnim političkim i zakonodavnim reformama u sprezi sa izgradnjom institucionalnih kapaciteta, ostaje jaz između ***de jure*** i ***de facto*** vladavine prava, što znači da se u praksi mnoge odredbe vladavine prava ne garantuju, poštuju ili propisno prate na djelotvoran način. Takva situacija je smetnja imperativnim pitanjima u društvu, kao što je poštovanje zakona, jednaki pristup pravdi ili prevencija i suzbijanje korupcije.

Sve u svemu, ne ispunjavaju se standardi vezani za dovoljne ustavne i pravne garancije za nezavisnost pojedinačnih sudija. Pravni okvir koji garantuje nezavisnost pravosuđa postoji, međutim sudovi i tužilaštvo se još uvijek smatraju podložnim političkom uticaju. Javna uprava ne djeluje u potpunosti proaktivno i na odgovoran način koji bi rezultirao zadovoljstvom građana sa ishodima javnih politika.

Ostaju izazovi u pogledu konsolidacije dosadašnjih dostignuća u borbi protiv korupcije na visokom nivou. Iako su

10 Poštovanje vladavine prava je preduslov za članstvo u EU u skladu sa članom 49 Ugovora o EU.

krivična djela povezana sa korupcijom eksplicitno ili implicitno (kao što je bogatstvo koje se ne može objasniti) kažnjiva zatvorskim i/ili novčanim kaznama, zakon bi se trebao pozabaviti razgraničenjem ovih krivičnih djela na jasan način i sve to ispratiti koherentnom kaznenom politikom. Kako bi se postigli opipljivi rezultati, potrebno je strateško promišljanje o postojećem sistemu za borbu protiv korupcije. Državni organi treba da se više fokusiraju na pred-istražnu fazu koja je od suštinskog značaja za prikupljanje dokaza i donošenje osuđujućih presuda. Specijalizacija na ovom polju je takođe potrebna i blisko je povezana sa daljom izgradnjom kapaciteta unutar policije i državnog tužilaštva.

Pandemija COVID-19 stvorila je dodatne izazove u oblasti vladavine prava i doprinijela određenim objektivnim kašnjenjima u reformskoj agendi, kako se navodi u nedavnom nezvaničnom dokumentu o Poglavljima 23 i 24, objavljenom u junu 2020. godine.[11] Tokom krize uzrokovane COVID-19, zabilježeno je više kršenja načela vladavine prava, uključujući ono vezano za pravo na privatnost, slobodu kretanja i antidiskriminaciju, što je sve zaprijetilo istiskivanjem koncepta vladavine prava u zemlji. Naime, sama vladavina prava nije predstavljala značajno ograničenje fleksibilnosti djelovanja države suočene sa COVID-19. Međutim, činilo se da su javne institucije bile sklonije zapovjedničkim a manje procesno marljivijim djelovanjima. Takođe, Vlada je pokušala da uspostavi konkretna pravila za upravljanje COVID – 19 krizom, od kojih su pojedina suspendovala uobičajene građanske slobode i navodno dozvolila široki stepen diskrecije na strani pojedinih vladinih zvaničnika. Istovremeno, odgovor Skupštine uglavnom nije bio dostupan, dok su sudske instance djelovale sa zakašnjenjem.

11 Evropska komisija: *Non-paper on the state of play regarding Chapters 23 and 24 for Montenegro, Brussels*, 11 June 2020, stranica 2, dostupno na: https://europeanwesternbalkans.com/2020/06/15/ec-non-papers-note-pressures-on-judiciary-and-media-in-serbia-and-montenegro/

ISTORIJAT VLADAVINE PRAVA U CRNOJ GORI

Crna Gora je evropska i mediteranska zemlja, smještena na Balkanskom poluostrvu. Ukupne površine od 13,812 kvadratnih kilometara, graniči se sa Bosnom i Hercegovinom na sjeverozapadu, Srbijom na sjeveroistoku, Kosovom na istoku, Albanijom na jugoistoku, Jadranskim morem na jugozapadu i Hrvatskom na zapadu. Sa populacijom od 620,079 (prema popisu iz 2011. godine), Crna Gora je multi-etnička država čiji nacionalni sastav čini nekoliko etničkih grupa - Crnogorci, Srbi, Albanci, Bošnjaci, Hrvati, Muslimani i Romi.

Prema Ustavu iz 2007. godine, koji je usvojen nakon obnavljanja nezavisnosti zemlje 2006. godine, Crna Gora je građanska, demokratska, ekološka zemlja zasnovana na vladavini prava i socijalnoj pravdi. Crna Gora je članica UN, NATO, i Svjetske trgovinske organizacije, Organizacije za bezbijednost i saradnju u Evropi i Savjeta Evrope. Pristupni pregovori sa EU otpočeli su 2012. godine. Od tada, odnosi između Crne Gore i EU se konstanto poboljšavaju – tokom osmogodišnjeg procesa pregovaranja, otvorena su 33 poglavlja, od kojih su 3 privremeno zatvorena. Međutim, tempo pregovaranja je oslabio: u posljednjih dvije godine, Crna Gora je uspjela da otvori samo četiri poglavlja, a nijedno nije uspjela da zatvori. To je dovelo do pitanja da li je EU prećutno aktivirala klauzulu balansa koja joj omogućava da uspori proces pristupanja ukoliko se reforme vezane za vladavinu prava ne sprovode na zadovoljavajući način.

U svom nedavnom izvještaju za Crnu Goru, EU je podsjetila da se zahtijeva aktivno i konstruktivno učešće svih strana kako bi se unaprijedila parlamentarna odgovornost, nadzor izvršne grane vlasti, demokratski nadzor i veći kvalitet zakonodavstva.[12] Napredak ka ispunjavanju privremenih mjerila u poglavljima 23 i 24 se stog smatra od suštinskog značaja za ukupni napredak pregovora. Glavna pitanja su još uvijek vezana za efekte političkog uticaja na procese odlučivanja i za upitnu institucionalnu efikasnost u mnogim oblastima vladavine prava. Međutim, javnost je još uvijek zbunjena po pitanju značenja vladavine prava.

Pored toga, Crna Gora ima problema sa fragmentiranom političkom scenom koja je polarizovana i kojoj nedostaje istinski politički dijalog. Situacija se pogoršala u 2019. godini zbog neučešća opozicije u radu Skupštine (zbog „afere koverta" o partijskom finansiranju). Nedjelotvoran odgovor Vlade izazvao je mirne proteste koji su prestali u junu 2019. godine. Od kraja decembra 2019. godine, novousvojeni Zakon o slobodi vjeroispovijesti inicirao je seriju novih velikih protestnih marševa širom zemlje, kao i blokade puteva. Demonstracije su se nastavile u 2020. godini u formi mirnih protestnih šetnji. Posljedica toga, primjećen je pad u demokratskom tragu. U 2020. godini, Crna Gora je kategorisana kao tranzicioni i hibridni režim, nakon što je dobila demokratski procenat 48 od 100 *(0 odgovara najmanjem nivou demokratije, a 100 najvećem)*.[13] Parlamentarni izbori su održani 30. avgusta u atmosferi dubokih političkih i socijalnih podjela koje će oblikovati postizborni politički život u Crnoj Gori, uključujući smjenu vlasti u korist opozicije koja je osvojila većinu poslaničkih mjesta u Skupštini.

12 Radni dokument osoblja Evropske komisije, Izvještaj za Crnu Goru za 2019 /*Montenegro 2019 Report*/, Komunikacija o politici proširenja EU /*Communication on EU Enlargement Policy*/, {COM(2019) 260 final}, str. 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

POŠTOVANJE ZAKONA I

DJELIMIČNA ISPUNJENOST INDIKATORA

Najvažniji zahtjev vladavine prava je da ljudi na pozicijama vlasti treba da vrše svoju vlast unutar ograničavajućeg okvira dobro ustanovljenih javnih normi, umjesto na proizvoljan, ad hoc ili čisto diskrecioni način. Vladavina prava se utjelovljuje stabilnim ustavom koji se sastoji od formalnih pravila putem kojih se ograničavaju upravljačka ovlašćenja na osnovu zakonu i koja su „često veoma nesavršena formulacija načela koja ljudi mogu bolje poštovati u svom djelovanju nego iskazati riječima" (Hayek 1973: 118).[14] U takvom kontekstu, poštovanje zakona se odnosi na poštovanje određenog zakona ili pravila ili djelovanje u skladu sa ustavnim i institucionalnim sporazumima.

Prema članu 11 Ustava Crne Gore[15], vlast ima trojni karakter: zakonodavni, izvršni i sudski – od kojih nijedan ne bi trebalo da osporava druga dva. Ova podjela vlasti počiva na načelu kontrole i balansa, koji u mnogo širem smislu takođe uključuje nevladine kontrole upravljačkih ovlašćenja, putem slobodne i nezavisne štampe ili organizacija civilnog društva. Razdvajanje sudske grane vlasti od izvršne i zakonodavne je posebno važno (Montesquieu 1748: Bk. 11, Ch. 6).[16] Unutar određenih ustavnih ograničenja, pravosudna grana vlasti ima ovlašćenje da vrši nezavisnu kontrolu akata zakonodavne i izvršne grane vlasti.

- **Primat prava**

Primat prava zahtijeva kako od građana, tako i od institucija da podliježu važećim zakonima zemlje. Pored toga, domaći pravni sistem obezbjeđuje primat i usklađivanje sa potvrđenim međunarodnim ugovorima i međunarodnim običajnim pravom. Prema članu 9 Ustava Crne Gore, međunarodno pravni akti imaju primat nad ustavom i mogu se neposredno primjenjivati kada određena pitanja uređu-

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

15 "Službeni list Crne Gore", br. 1/2007, 38/2013 - Amandmani I - XVI

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

ju drukčije od unutrašnjeg zakonodavstva. Ovo je posebno važno kada se zna da je Crna Gora potpisnica gotovo svih međunarodnih i/ili regionalnih ugovora i paktova o ljudskim pravima.[17]

Crna Gora je zemlja sa veoma produktivnim zakonodavstvom, koja ima za cilj uvođenje pravne tekovine EU i međunarodnih standarda u nacionalni pravni sistem.[18] Postoje jasna zakonska pravila za postupak donošenja zakona, kao i ovašćenja izvršne grane vlasti; međutim, u praksi, primat zakonodavne grane vlasti nije u potpunosti obezbijeđen. Iako Ustav proklamuje suverenitet Skupštine, Vlada se smatra *glavnim zakonodavcem,* budući da skupštinski odbori uglavnom obdezbjeđuju jednoglasnu podršku nacrtima propisa predloženih od strane izvršne vlasti. Uprkos povećanog broja osoblja, kapacitet Skupštine da temeljito ispituje predložene propise po pitanju usklađenosti sa pravnom tekovinom EU ostaje slab.

Pored toga, predloženi propisi se ponekad neadekvatno obrazlažu ili se o njima ne vodi adekvatna rasprava. Premda je Uredba o javnim raspravama[19] usvojena u julu 2018. godine, proširujući opseg javnih rasprava kako na nacrte zakona tako i na nacionalne strategije, jedan broj javnih politika koje pogađaju prava građana usvojen je bez prethodnih javnih rasprava zbog širokog tumačenja zakonskih izuzetaka od obaveze održavanja javnih rasprava, kao što su nacrti izmjena i dopuna zakona o eksproprijaciji, o držav-

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

18 U 2019. godini, Skupština je usvojila 97 propisa – 42 zakona i 35 izmjena i dopuna zakona (u poređenju sa 83 propisa usvojena 2018. godine), kao i 62 odluke, 31 zaključak, i 2 druga akta, što ukupno čini 192 pravna akta, Skupština Crne Gore: Godišnji izvještaj za 2019, Podgorica, 2020, stranice 13 i 14, http://www.skupstina.me/images/dokumenti/izvjestaji-o-radu/Izvje%C5%Altaj_o_radu_Skup%C5%Altine_Crne_Gore_za_2019._godinu.pdf

19 Uredba o imenovanju predstavnika nevladinih organizacija u radna tijela državnih institucija i o vođenju javnih saslušanja u pripemi zakona i strategija („Službeni list Crne Gore," br. 41/18)

nim simbolima i danu državnosti, te o javnom redu i miru. U 2018. godini, 27 zakonskih akata od 198 (13,6 % od ukupnog broja) usvojeno je putem vanrednih procedura.[20]

Iako je kontrola izvršne grane vlasti posljednjih godina pojačana, preko instituta skupštinskih konsultativnih/kontrolnih saslušanja, rezultati još uvijek nisu dovoljno djelotvorni. U 2018. godini, održana su samo 4 kontrolna saslušanja, a broj konsultativnih saslušanja je značajno opao (30 u 2018. godini, u poređenju sa 43 u 2017. godini). Prikupljanje administrativnih podataka i njihovo sistematsko korišćenje u svrhu izrade javnih politika i zakona zahtijeva poboljšanja.[21]

- **Usklađenost sa zakonom**

Prema članu 145 Ustava, zakon mora biti u skladu sa Ustavom i potvrđenim međunarodnim ugovorima, a ostali propisi moraju biti u skladu sa ustavom i zakonima. Član 148 propisuje da pojedinačni pravni akt mora biti u skladu sa zakonom, kao i svi akti Vlade. Ustavnost i zakonitost štiti Ustavni sud Crne Gore.

Prema članu 149 Ustava, Ustavni sud odlučuje, *inter alia:* 1) o usklađenosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima; 2) o usklađenosti drugih propisa i opštih akata sa uistavom i zakonom; 3) o ustavnoj žalbi zbog povrede ljudskih prava i sloboda zajamčenih Ustavom, nakon iscrpljivanja svih djelotvornih pravnih lijekova; 4) da li je predsjednik Crne Gore prekršio Ustav; 5) o sukobu nadležnosti između sudova i drugih državnih organa, između državnih organa i organa jedinica lokalne samouprave i između organa jedinica lokalne samouprave; 6) o usklađenosti sa Ustavom mjera i radnji državnih organa preduzetih za vrijeme ratnog i vanrednog stanja.

Ukoliko je tokom postupka za ocjenjivanje ustavnosti i zakonitosti propis prestao biti na snazi, a posljedice njego-

20 Radni dokument osoblja Evropske komisije, *Montenegro 2019 Report*, Saopštenje o politici proširenja EU, {COM(2019) 260 final}, stranice 7 i 8.

21 *Ibid*, str. 12.

ve primjene nisu otklonjene, Ustavni sud utvrđuje da li je taj propis bio u skladu sa Ustavom i obavještava Skupštinu o upčenim pojavama neustavnosti i nezakonitosti. Svako može preuzeti inicijativu za pokretanje postupka provjere ustavnosti i zakonitosti. Postupke pred Ustavnim sudom za ocjenu ustavnosti i zakonitosti može pokrenuti neki sud, drugi državni organ, organ lokalne samouprave i pet poslanika (član 150 Ustava). Ustavni sud može sam pokrenuti postupak kontrole ustavnosti i zakonitosti. Odluka Ustavnog suda je obavezujuća i izvršna. Izvršenje odluke Ustavnog suda, kada je to neophodno, obezbjeđuje Vlada.

Najnoviji primjer neusklađenosti Vladinih akata i odluka sa ustavnim i zakonskim odredbama je objavljivanje liste crnogorskih državljana kojima je izrečena mjera samoizolacije na osnovu odluke Nacionalnog koordinacionog tijela za zarazne bolesti Vlade Crne Gore.[22]

U predmetu U-II br. 22/20, Ustavni sud je većinom glasova donio Odluku o pokretanju postupka kontrole ustavnosti i zakonitosti Odluke Nacionalnog koordinacionog tijela za zarazne bolesti o objelodanjivanju imena lica u samoizolaciji, br. 8-501 / 20-129, od 21. marta 2020. godine i Odluke o odbacivanju prijedloga za obustavu izvršenja spornih radnji preduzetih na osnovu toga akta.[23]

Većina sudija Ustavnog suda se složila da je objavljivanje ličnih podataka o licima u samoizolaciji stvorilo preduslov za njihovu stigmatizaciju, te je ocijenjeno da bi takav postupak mogao odvratiti one kojima je potrebna medicinska

22 Vladin NKT je vjerovao da će objelodanjivanje ličnog imena i prebivališta lica u samoizolaciji značajno doprinijeti poboljšanju poštovanju mjera samoizolacije, a sve u cilju zaštite javnog zdravlja. Stoga je zatražio mišljenje Agencije za zaštitu ličnih podataka i slobodni pristup informacijama, koja je dala zeleno svjetlo za to. Vlada je objavila listu na svojoj web stranici i redovno je ažurirala sa novim podacima, a potom je uklonila, https://senat.me/spisak-samoizolacija-vlada-crne-gore/

23 IV sjednica Ustavnog suda Crne Gore, održana 29. maja 2020. godine, http://www.ustavnisud.me/ustavnisud/objava/blog/7/objava/68-saopstenje-sa-iv-sjednice-ustavnog-suda-crne-gore

pomoć od traženja iste. Sam Ustav razgraničava moguću derogaciju prava u vanrednim okolnostima, ali uz puno poštovanje neotuđivosti osnovnih sloboda. Činjenica da građani čija su imena bila objavljena nisu dali svoj pristanak za to bila je takođe problematična sa tačke gledišta Ustavnog suda. Međutim, Sud je neopravdano dugo čekao sa donošenjem konačne odluke i nije odgovorio pravovremeno u smislu izdavanja privremene mjere obustave dalje cirkulacije ličnih podataka građana.[24]

- **Odgovornost državnih službenika pred zakonom i sprječavanje nekažnjivosti**

Što se tiče odgovornosti javnih funkcionera za poštovanje zakona i drugih propisa, glavne zabrinutosti su vezane za nedostatak odgovornosti državnih službenika za navodno i/ili dokazano mučenje i druga kršenja ljudskih prava, što negira vladavinu prava. Ove zabrinutosti ističu domaće NVO,[25] kao i Evropski komitet za sprječavanje mučenja i neljudskog ili ponižavajućeg postupanja ili kažnjavanja (CPT).

Jedan od najistaknutijih predmeta navodne nekažnjivosti državnih službenika tiče se prebijanje gospodina Milorada Mija Martinovića i drugih građana tokom građanskih protesta nakon izbora 2015. godine zbog čega su samo trojica policijskih službenika bili pravosnažno osuđeni – bivši načelnik Specijalne antiterorističke jedinice (koji je bio sus-

24 Objavljivanje rečene liste dovelo je do dalje zloupotrebe ličnih podataka, budući da je kasnije kreirana aplikacija koja je mjerila udaljenost lica u samoizolaciji: https://fosmedia.me/infos/drustvo/provjerite-udaljenost-od-osoba-koje-su-u-samoizolaciji .

25 U zajedničkoj izjavi, grupa NVO i građanskih aktivista – Akcija za ljudska prava (HRA), Mreža za afirmaciju nevladinog sektora (MANS), Građanska alijansa, Centar za ženska prava, LGBT Forum Progres i (bivši) predsjednik Savjeta za građansku kontrolu rada Policije Aleksandar Zeković ukazala je na ozbiljna kašnjenja u istragama koje se tiču mučenja, uključujući predmet Milorada Martinovića i predmet kršenja ljudskih prava Aleksandra Zekovića od strane jednog policijskog službenika koji nikada nije bio pod istragom niti kažnjen: https://www.paragraf.me/dnevne-vijesti/10122015/10122015-vijest3.html.

pendovan na 5 mjeseci i vraćen na dužnost u policiji) i 2 člana ove jedinice, obojica osuđeni na minimalnu kaznu od jedne godine i 5 mjeseci zatvora.[26] Drugi istaknuti predmeti uključuju prebijanje 30 zatvorenika u Upravi za izvršenje krivičnih sankcija (UIKS) od strane specijalne policijske interventne jedinice na dan 1. septembar 2005. godine, sa čim u vezi nije vođena nikakva djelotvorna istraga, niti za mučenje pokojnog Aleksandra Pejanovića u zgradi Uprave Policije u Podgorici, u oktobru 2008. godine.[27]

Izvještaj CPT-a o Crnoj Gori za 2013. godinu[28] identifikovao je policijske stanice i zatvore kao potencijalne crne tačke za mučenje i zlostavljanje lica lišenih slobode.[29] U svom izvještaju iz 2019. godine, CPT je podsjetio da su lica lšena slobode u Crnoj Gori još uvijek izložena riziku od zlostavljanja od strane policije i da više rukovodstvo policije mora da se pozabavi ovom pojavom kroz bolje trenažne aktivnosti i poboljšani nadzor. CPT je takođe naveo da tužioci treba da vode temeljitije istrage u predmetima navodnog zlostavljanja od strane policijskih službenika. U pogledu konkretnog predmeta navodnog pocijskog zlostavljanja tokom masovnih protesta u Podgorici

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

27 Navodno, članovi specijalne interventne jedinice policije su dva puta brutalno pretukli pokojnog Aleksandra Pejanovića dok je bio u policijskom pritvoru u policijskoj stanici u Podgorici, od 31. oktobra do 2. novembra 2008. godine. Sudski vještak je ustanovio 19 teških i lakih tjelesnih povreda po cijelom tijelu Pejanovića. Policijskom službeniku Goranu Stankoviću, koji je posvjedočio da je došlo do prebijanja odobren je azil u Luksemburgu iz bezbjednosnih razloga. Pejanović je ubijen u maju 2011. godine od strane policijskog službenika Zorana Bulatovića, koji je osuđen i služi zatvorsku kaznu od 13 godina: U 2016. godini, istraga o prebijanju Pejanovića 2008. godine otvorena je po treći put: https://www.hraction.org/2016/07/08/872016-hra-povodom-otvaranja-nove-istrage-o-prebijanju-aleksandra-pejanovica-2008-godine/

28 Izvještaj Vladi Crne Gore o posjeti Crnoj Gori relizovanoj od strane Evropskog komiteta za sprječavanje mučenja i neljudskog ili ponižavajućeg postupanja ili kažnjavanja (CPT) od 13. do 20. februara 2013. godine, Strasbourg, CPT/Inf (2014) 16, 22 May 2014: https://rm.coe.int/1680697756

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

u oktobru 2015. godine (*Milorad Martinović i drugi*), CPT je zaključio da je propuštanje od strane organa sprovođenja prethodnih preporuka (kao što je zahtjev da pripadnici policije nose jasno vidljive identifikacione brojeve), rezultiralo time da jedan broj pripadnika Specijalne antiterorističke jedinice nije gonjen usprkos nanošenja teških povreda jednom broju lica.[30]

- **Izvršenje sudskih odluka i Vladinih propisa**

Produktivno zakonodavstvo, kao što je crnogorsko, može samo po sebi predstavljati prepreku za sprovođenje. Usprkos činjenici da crnogorsko krivično zakonodavstvo obuhvata krivično djelo *Propuštanja izvršenja sudske odluke* (član 395)[31] koje se primjenjuje na javnog funkcionera ili odgovornog službenika koji odbije da izvrši pravosnažnu i izvršnu sudsku odluku[32] i kažnjivo je novčanom kaznom ili kaznom zatvora do dvije godine, prema nekim dostupnim podacima prikupljenim prije par godina, oko 15% od ukupnog broja sudskih odluka ostalo

30 Izvještaj Vladi Crne Gore o posjeti Crnoj Gori relizovanoj od strane Evropskog komiteta za sprječavanje mučenja i neljudskog ili ponižavajućeg postupanja ili kažnjavanja (CPT) od 9. do 16. oktobra 2017. godine, CPT/Inf (2019) 2, Strasbourg, 7. februar 2019. godine, https://rm.coe.int/1680925987

31 Krivični zakonik Crne Gore („Službeni list Republike Crne Gore", br. 70/2003, 13/2004 47/2006 i „Službeni list Crne Gore", br. 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 Nedavno, Vrhovni sud Crne Gore je podržao presudu Višeg suda u Podgorici kojom je bivša gradonačelnica Kolašina Željka Vuksanović oslobođena optužbe za izvršenje krivičnog djela neizvršenja sudske odluke. Vuksanovic je prethodno bila uslovno osuđena na tri mjeseca prvostepenom presudom Osnovnog suda u Kolašinu, za neizvršenje presude Upravnog suda Crne Gore od 23. januara 2018. godine, kojom je naloženo Sekretarijatu za prostorno planiranje, stanovanje i zaštitu životrne sredine Opštine Kolašin da vrati na posao Dragoljuba Bukilića i rasporedi ga na radno mjesto koje odgovara njegovoj stručnoj spremi i radnom iskustvu. Kako je obrazložio Viši sud u Podgorici, prema Zakonu o lokalnoj samoupravi, gradonačelnik ima prava i obaveze poslodavca i može biti odgovoran samo za izvršenje presuda koje su vezane za njegovu/njenu nadležnost: https://www.pobjeda.me/clanak/zeljka-vuksanovic-oslobodena-optuzbi-za-neizvrsavanje-sudske-odluke

je neizvršeno.[33] Daleko najveći broj neizvršenih sudskih odluka ticao se neplaćenih računa za utrošenu električnu energiju, vodu i telefonske usluge – nekih 157 hiljada sudskih presuda, kao i alimentacija i starateljstvo nad djetetom.[34]

Od tada, Crna Gora je uvela neke izmjene u politikama i postupcima izvršenja.[35] Sa ciljem unaprjeđenja izvršenja sudskih odluka, usvojen je Zakon o izmjenama i dopunama Zakona o vanparničnom postupku,[36] koji je stupio na snagu u maju 2015. godine, uvodeći obaveznu nadležnost notara kao sudskih povjerenika sa ciljem da se postupak učini efikasnijim. Izmjenama i dopunama Zakona o parničnom postupku iz 2015. godine uvedeni su novi instituti kao što je „vanredna revizija" i „odluka na osnovu uzorka", i izbjeglo se odugovlačenje postupka putem višestrukog ukidanja odluka od strane drugostepenih sudova uvođenjem obavezne presude u meritumu od strane suda druge instance.

Nakon reforme zakonodavstva o izvršnom postupku, uveden je i sistem javnih izvršitelja.[37] Osnovni razlog za napuštanje koncepta sudskog izvršenja prije svega je bila neefikasnost zbog velikog broja neriješenih predmeta. Javni izvršitelji vrše svoju funkciju profesionalno i nezavisno u skladu sa Zakonom o javnim izvršiteljima.[38] Zakonitost njihovog rada se preispituje u postupku pred nadležnim sudovima. Takođe, Ministarstvo pravde vrši nadzor nad radom javnih izvršitelja, dok Komora javnih izvršitelja, kao strukovno udruženje svih javnih izvršitelja, vodi brigu o za-

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

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

35 Država je u najvećem broju predmeta tužena strana što čini opterećenje za sudove. Pred domaćim sudovima u 2018. godini, zaštitinik državnih finansijskih interesa bio je uključen u 21 363 građanska, upravna i druga predmeta. Najveći broj parnica ticao se sprovođenja Zakona o radu.

36 „Službeni list Republike Crne Gore", br. 27/2006 i „Službeni list Crne Gore", br. 20/2015, 75/2018 i 67/2019

37 Direktorat za građansko zakonodavstvo i nadzor unutar Ministarstva pravde je zadužen za kontrolu rada javnig izvršitelja i notara.

38 „Službeni list Crne Gore", br. 61/2011, 22/2017

konitosti rada rješavajući pritužbe stranaka ili trećih lica, kao i putem unutrašnjh kontrola.

Ove promjene su rezultirale značajnim smanjenjem broja izvršnih predmeta pred sudovima, i povećanjem efikasnosti u rješavanju takvih predmeta u poređenju sa prethodnim periodom.[39] Godišnji izvještaj Komore javnih izvršitelja za 2019. godinu prikazuje slijedeće podatke:[40]

Ukupan broj izvršnih predmeta u radu	Ukupan broj riješenih predmeta	Ukupan broj neizvršenih predmeta	Iznos troškova javnih izvršitelja	Odnos*
62114	**22335**	**39779**	**3,751,846.04**	**32,77%**

Prosječno trajanje izvršnih postupaka koji su bazirani na izvršnim dokumentima je 18 dana.[41] Izvršenje upravnih odluka je takođe unaprijeđeno – u 2019. godini, javni upravni organi su riješili 2 ipo miliona (2,610,695.00) upravnih predmeta na centralnom i lokalnom nivou. Procenat riješenih upravnih predmeta unutar zakonskog roka na centralnom nivou je bio 97%, dok je na lokalnom nivou taj procenat bio čak 99%.[42]

Međutim, usprkos očiglednih poboljšanja u pogledu povećanja broja izvršnih predmeta, odnos između priliva i odliva predmeta još uvijek je relativno nizak. Takođe, sistem djelotvornog praćenja rada javnih izvršitelja tek treba biti uspostavljen, kroz adekvatno čuvanje i obradu statističkih podataka o izvršnom postupku i efikasnosti rada javnih

39 *Strategija za reformu pravosuđa u Crnoj Gori* 2019 – 2022, str. 13.

40 https://www.javni-izvrsitelji.me/images/2020/Izve%C5%Altaj%20za%202019.godinu.pdf

41 Ministarstvo pravde: Analiza djelotvornosti funkcionisanja sistema izvršenja (januar 2019 - decembar 2019), str. 3, dostupno na: http://www.mpa.gov.me/biblioteka

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

izvršitelja, u skladu sa smjernicama CEPEJ-a, što treba da obezbijedi mjerenje stopa povraćaja troškova i dužine izvršnih postupaka.[43] Pored toga, potrebne u izmjene pravnog okvira, budući da postojeće zakonodavstvo ne daje ovlašćenja javnom izvršitelju da ispituje autentičnost dokumenata koji se podnose za izvršenje, već bi izvršitelj trebao primijetiti da li je dokument krivotvoren ili ne.

Pored sudova i javnih izvršitelja, Ombudsman Crne Gore ima takođe značajnu ulogu u obezbjeđenju poštovanja zakona i podsticanje izvršenja sudskih odluka od strane vladinih službenika. U jednom ilustrativnom predmetu koji je ovdje prikazan, podnosioci pritužbe obratili su se kancelariji Ombudsmana 2017. godine zbog kršenja prava na naknadu za neisplaćene plate (77 mjesečnih plata za period od 1. januara 1997. do 1. juna 2003. godine) što je potvrđeno putem više izvršnih sudskih odluka Osnovnog suda u Podgorici, koje su ostale neizvršene od strane Vlade Crne Gore[44] u vrijeme podnošenja pritužbe. U svom mišljenju, Ombudsman je naglasio da je načelo hitnosti u izvršnim i stečajnim postupcima propisano nacionalnim zakonodavstvom. Ombudsman je takođe utvrdio da je prekršeno pravo podnosioca pritužbe na mirno uživanje imovine iz člana 1 Protokola I Evropske konvencije o ljudskim pravima zbog neizvršenja rečenih sudskih odluka.[45]

Prethodno, u predmetu Mijanović protiv Crne Gore, koji treba da se shodno primijeni na navedeni predmet, ESLjP je zauzeo isti pravni stav u vezi sa tumačenjem kršenja Konvencije, prema kojemu konačne sudske odluke u zemljama koje su uspostavile vladavinu prava ne mogu ostati neizvršene na štetu jedne strane, postati nevažeće ili biti neop-

43 Akcija za ljudska prava/Centar za praćenje i istraživanje: *Javni izvršitelji u Crnoj Gori*, Podgorica, 2017, str. 31, http://www.hraction.org/wp-content/uploads/CeMI_javniizvrsitelj_analiza.pdf

44 Podnosioci pritužbi su bili bivši zaposleni državnog preduzeća „Radoje Dakić" iz Podgorice.

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

ravdano odlagane. Upravo suprotno, država ima obavezu da razvije sistem za izvršenje presuda, koji je djelotvoran kako u zakonu tako i u praksi, te da osigura djelotvorno učešće cijelog svog aparata.[46]

Kada je riječ o postupku izvršenja presuda koje je donio Evropski sud, nema crnogorskih predmeta koji potpadaju pod „pojačanu" proceduru, koja se koristi onda kada Komitet zapazi neke posebne probleme u pravnom poretku neke zemlje. Sve donešene presude se sprovode unutar propisanih rokova. Kada je riječ o starijim presudama, sa izuzetkom predmeta *Siništaj i drugi protiv Crne Gore*, svi predmeti su uspješno okončani. To je posebno važno kada se zna da je Crna Gora rekorder među zemljama članicama SE prema indeksu podnešenih predstavki na 100 000 stanovnika, koji je u 2019. godini bio 6,86 (prosječni indeks država članica SE je 0,53[47]).

Prema zastupniku Crne Gore pred Evropskim sudom za ljudska prava, postoji potreba da se posebna pažnja posvećuje postupku izvršenja evropskih presuda, budući da ostaje nepoznat njegov ukupni značaj za nacionalni pravni sistem. Naime, stepen razumijevanja nadležnih državnih organa značaja ovog izvršnog postupka još uvijek je na zadovoljavajućem nivou, budući da institucije u praksi često crnogorskom zastupniku podnose nepotpune i nedosljedne informacije u vezi sa izvršenjem.[48]

- **Usklađivanje sudske prakse**

Transparentnost i usklađena sudska praksa imaju veliki uticaj na povjerenje javnosti u vladavinu prava. Najvažnija uloga u kreiranju jednoobrazne sudske prakse u Crnoj Gori data je Vrhovnom sudu unutar ustavne odredbe obezbjeđenja jednoobraznog sprovođenja zakona od

46 *Mijanović protiv Crne Gore,* predstavka br. 19580/06, presuda je donešena 17. septembra 2013.

47 Zastupnik Crne Gore pred Evropskim sudom za ljudska prava: *Godišnji izvještaj za 2019. godinu*, Podgorica, jun 2020. godine, stranice 17 i 43, dostupno na: http://www.gov.me/biblioteka/izvjestaji?pagerIndex=2

48 *Ibid*, str. 64 i 65.

strane sudova. Vrhovni sud realizuje tu funkciju kroz davanje pravnih mišljenja na kontroverzna pravna pitanja koja proističu u sudskoj praksi. U tu svrhu, ustanovljena su dva odjeljenja pri Vrhovnom sudu Crne Gore – Odjeljenje sudske prakse i pravne informatike i Odjeljenje za praćenje sudske prakse Evropskog suda za ljudska prava i prava Evropske unije. Odjeljenje sudske prakse prikuplja odluke relevantne za sudsku praksu, klasifikuje, analizira, ažurira i sprema ih u elektronsku bazu podataka. Ono također proučava sudske prakse i sastavlja prijedloge koji treba da budu predstavljeni sudijama kako bi se sudska praksa učinila jednoobraznijom.

Drugo odjeljenje igra ključnu ulogu u promociji sprovođenja Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda i sudske prakse Evropskog suda.[49] U prethodnom periodu, ovo odjeljenje je preduzelo mnogo aktivnosti koje su unaprijedila znanje o Konvenciji i povećale broj odluka nacionalnih sudova koje su primijenile načela i stavove koje je razvio Evropski sudu svojoj praksi. Pripremljeni su izvještaji o primjeni Evropske konvencije u praksi Vrhovnog suda Crne Gore, kao i o presudama Evropskog suda u vezi s Crnom Gorom. U tim dokumentima, Vrhovni sud Crne Gore se po prvi put bavio ponašanjem nacionalnih sudova u tom smislu, vršeći poređenja sa praksama Evropskog suda, i analizirajući presude ESLjP protiv Crne Gore u kojima je utvrđeno kršenje Konvencije.[50]

Također, mjesečni izvještaji se podnose svim sudijama Vrhovnog suda, kao i predsjednicima svih sudova, koji imaju obavezu da ih učine dostupnim ostalim sudijama. Izvještaji sadrže sažetke predmeta, kao i važna pitanja o kojima je

49 Od domaćih organa se zahtijeva da slijede i primjenjuju sudsku praksu Evropskog suda za ljudska prava u vezi drugih država, budući da ta sudska praksa daje jasnije značenje određenim normama Konvencije, kako bi ih učinila praktičnim i djelotvornim.

50 Vrhovni sud Crne Gore, *Godišnji izvještaj za 2019. godinu*, Podgorica, februar 2020. godine, https://sudovi.me/static//vrhs/doc/VRHOVNI_SUD_Izvjestaj_o_radu_2019.pdf

diskutovao Evropski sud.[51] Sve odluke koje Evropski sud donosi u odnosu na Crnu Goru postavljaju se na web stranicu Vrhovnog suda, kao i u regionalnu bazu podataka presuda Evropskog suda za ljudska prava za Zapadni Balkan.[52]

U cilju usklađivanja nacionalne sudske prakse sa praksom Evropskog suda, Vrhovni sud je postao članom Mreže vrhovnih sudova (Superior Courts Network)[53] u maju 2017. godine. Tu mrežu je uspostavio Evropski sud u oktobru 2015. godine sa ciljem razmjene informacija između najviših nacionalnih sudova i Evropskog suda.

Usprkos ovih napora, „crnogorski sudovi ne citiraju dovoljno često praksu Evropskog suda za ljudska prava", tako da postoji potreba da se nastavi sa edukacijom po pitanju Konvencije i prakse Evropskog suda za ljudska prava.[54] Izuzetak je Ustavni sud, koji je već uspostavio praksu citiranja Evropskog suda u gotovo svim svojim presudama, posebno u odnosu na kršenje prava na slobodu i bezbijednost ličnosti, pravo na pravično suđenje, slobodu izražavanja i mišljenja, itd.[55]

51 Ministarstvo pravde: *Strategija za Reformu pravosuđa 2019 – 2022*, septembar 2019, str. 57, dostupno na: http://www.mpa.gov.me/biblioteka/strategije

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

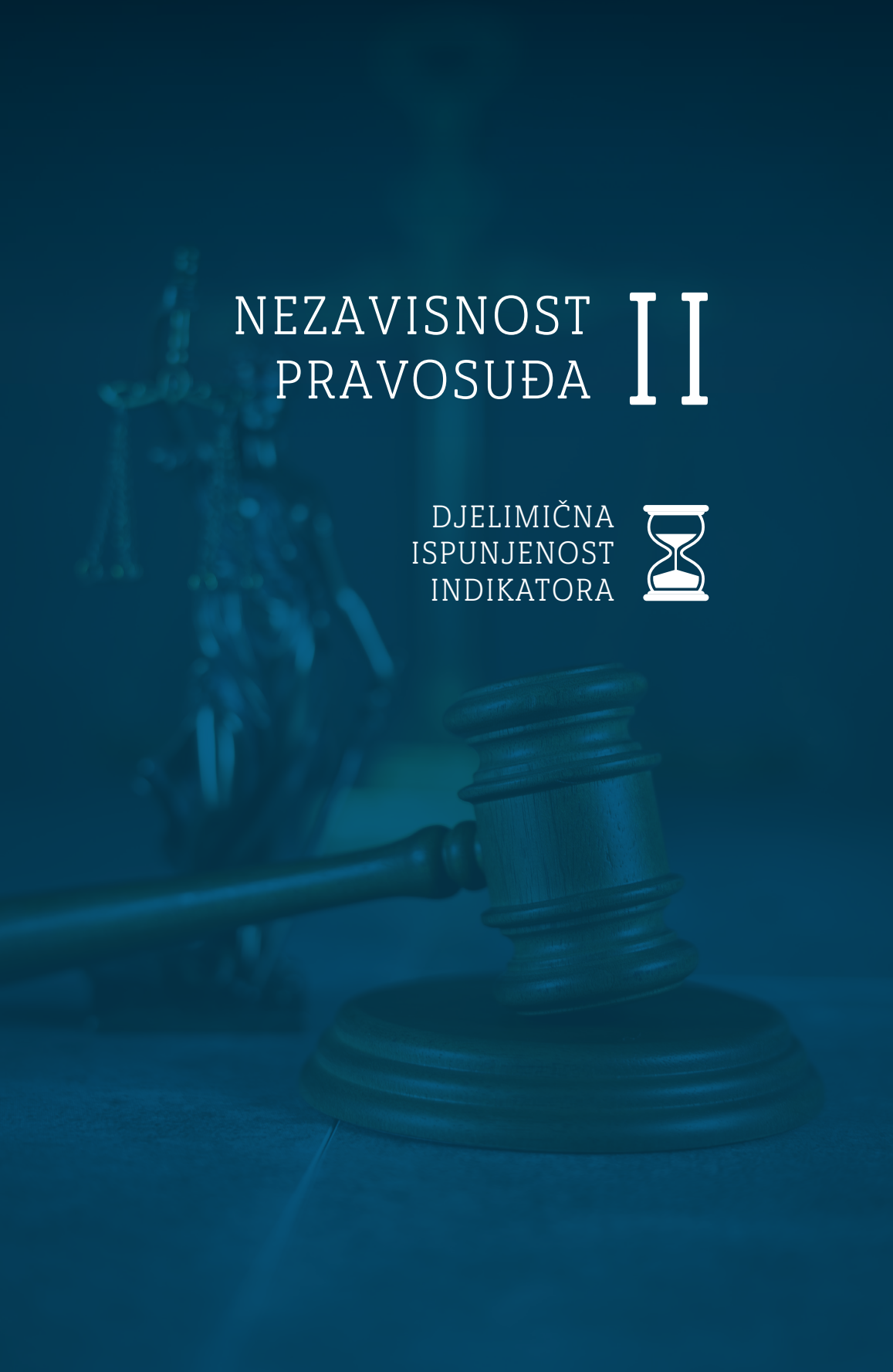
53 https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c=

54 *Strategija za Reformu pravosuđa 2019 – 2022*, op.cit. str. 58.

55 Molimo, pogledajte presudu U-III No. 26/20 od 17. januara 2020. godine, u kojoj se, *inter alia*, navode predmeti Bouyid protiv Belgije, predstavka br. 23380/09, ESLjP 2015 i *Saadi protiv Ujedinjenog Kraljevstva,* predstavka br. 13229/03, ESLjP 2008, dostupno na: http://www.ustavnisud.me/ustavnisud/objava/blog/2/objava/17-praksa-ustavnog-suda-crne-gore

NEZAVISNOST PRAVOSUĐA II

DJELIMIČNA ISPUNJENOST INDIKATORA



Nezavisnost pravosuđa je kičma vladavine prava i od suštinskoj je značaja za funkcionisanje demokratije. Nezavisnost pojedinačnih sudija štiti nezavisnost pravosuđa u cjelini. Još 2010. godine, Evropska komisija je privukla pažnju činjenici da je nezavisno, nepristrasno i profesionalno sudstvo temelj zaštite ljudskih prava, i preporučila Crnoj Gori da osnaži vladavinu prava kroz „depolitizovani sistem imenovanja članova sudskog i tužilačkog savjeta, kao i kroz osnaživanje nezavisnosti, autonomije, efikasnosti i odgovornosti sudija i tužilaca."[56]

Crna Gora ima višeslojni sistem pravosuđa, koji se sastoji od osnovnih sudova; viših sudova; Privrednog suda; Upravnog suda; Apelacionog suda i Vrhovnog suda, kao kasacionog suda. Prema Ustavu, pravosuđe je nezavisna grana vlasti. Zakon o sudovima propisuje to načelo tako da su, u obavljanju svojih dužnosti, sudije samo obavezne da se pridržavaju Ustava, zakona i međunarodnih ugovora. Sudski i Tužilački savjet su ključna tijela zadužena za upravljanje sistemom pravosuđa i karijere sudija i tužilaca. Njihov sastav i postupci imenovanja su generalno u skladu sa evropskim standardima, ali transparentnost njihovog rada bi trebala biti značajno unaprijeđena, posebno objavljivanjem potpuno obrazloženih odluka o napredovanjima, imenovanjima i disciplinskim postupcima, posebno ako se ima na umu da su postupci imenovanja i unaprjeđenja sudija ključni za zaštitu nezavisnosti pravosuđa.

- **Uloga i nadležnosti Sudskog i Tužilačkog savjeta**

U skladu sa Ustavom Crne Gore, Sudski savjet je autonomno i nezavisno tijelo, koje obezbjeđuje nezavisnost i autonomiju sudova i sudija. Sudski savjet je po prvi put ustanovljen 2008. godine kako bi se osigurala autonomija i nezavisnost pravosuđa. Usprkos zakonodavnih promjena izvršenih 2013. i 2015. godine, ostaju stalno prisutni proble-

56 Mišljenje Komisije kandidaturi Crne Gore za članstvo u Evropskoj uniji, predstavljeno u Briselu 9. novembra 2010. godine od strane komesara za proširenje Stefana Filea, file:///C:/Users/owner/Downloads/Misljenje_Komisije_o_zahtjevu_Crne_Gore_za_clanstvo_u_EU.pdf

mi sa navodnom politizacijom Sudskog savjeta. GRECO je takođe izrazio zabrinutost u tom smislu, kritikujući *ex officio* članstvo ministra pravde, kao i nedostatak transparentnih i objektivnh kriterijuma za izbor članova Savjeta koji ne dolaze iz redova sudija.[57] Takođe, zakonodavstvo ne sprječava da eminentni pravnici budu izabrani u Savjet između političara ili onih koji su prethodno obavljali političku funkciju.[58]

Sudski savjet ima predsjednika i devet članova. Članovi Sudskog savjeta su: predsjednik Vrhovnog suda, četvoro sudija koje imenuje i razrješava Konferencija sudija, vodeći računa o jednakoj zastupljenosti sudova i sudija, četvoro eminentih pravnika koje imenuje i razrješava Skupština, na prijedlog nadležnog skupštinskog odbora po javnom pozivu, i ministar pravde (koji ne može biti zabran za predsjednika Savjeta).

Zakon o Sudskom savjetu i sudijama je izmijenjen i dopunjen u junu 2018. godine predviđajući da: „Predsjednik i članovi Sudskog savjeta iz redova eminentnih pravnika, čiji mandat ističe zbog isteka vremena na koje su izabrani, nastavljaju da obavljaju funkciju do izbora i proglašenja novih članova Sudskog savjeta iz redova eminentnih pravnika."[59] To rješenje je podržala Venecijanska komisija, kao jedini način da se izbjegne blokada Sudskog savjeta u ovom trenutku, budući da nije bilo moguće obezbijediti potrebnu većinu.[60] U skladu sa prethodno rečenim izmjenama i dopu-

57 GRECO, *Drugi izvještaj o uklađenosti Četvrte runde evaluacije za Crnu Goru*, februar 2020. godine, str. 4 i 5, https://www.coe.int/en/web/greco/-/montenegro-publication-of-the-2nd-compliance-report-of-4th-evaluation-round

58 Pogledjte nacrte izmjena i dopuna Zakona o Sudskom savjetu i sudijama predložene od strane Akcije za ljudska prava, 20. januar 2015. godine, Podgorica: http://www.hraction.org/wp-content/uploads/Predlog-amandmana-na-Predlog-zakona-o-Sudskom-savjetu.pdf

59 član 139a, stav 1

60 Mišljenje o Nacrtu Zakona o izmjena i dopunama Zakona o Sudskom savjetu i sudijama, usvojeno od strane Venecijanske komisije na njenoj 115. plenarnoj sjednici (Venecija, 22-23. jun 2018. godine),https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)015-e

nama, konstitutivna sjednica Savjeta je održana 4. jula 2018. godine, na kojoj je za predsjednika izabran dr Mladen Vukčević iz redova istaknutih pravnika.

Međutim, članovi Sudskog savjeta koji nisu iz redova eminentnih pravnika nisu bili zamijenjeni nakon isteka mandata u julu 2018. godine, budući da potrebna dvotrećinska većina za to nije bila postignuta u Skupštini. Predsjednik Savjeta je podnio ostavku u decembra 2019. godine. Nakon toga, Sudski savjet je imenovao dr Vesnu Simović-Zvicer za predsjednicu, do objavljivanja novih članova Sudskog savjeta iz redova eminentnih pravnika. Kako izmjene i dopune zakona ne sadrže nikakav rok za to, moguće je produžiti mandat postojećim članovima iz redova eminentnih pravnika na neodređeni vremenski period.

Nedavno, Sudski savjet je ponovo izabrao pet predsjednika sudova, uključujući predsjednika Vrhovnog suda koji je na istom mjestu bio više od deset godina, što je protivno prethodnim preporukama GRECO-a. Takva situacija je ponovo pokrenula rasprave o nezavisnosti pravosuđa i potencijalnoj pretjeranoj koncentraciji moći, što je takođe zapaženo u najnovijem nezvaničnom dokumentu objavljenom u junu 2020. godine. Pored toga, predsjednik Vrhovnog suda ne bi trebao biti član sudskog savjeta, posebno ako se ima na umu da su predsjednici sudova odgovorni za rad sudova pred Sudskim savjetom.

U skladu sa ustavom Crne Gore, Tužilački savjet obezbjeđuje nezavisnost kancelarije državnog tužioca. Vrhovni državni tužilac predsjedava Tužilačkim savjetom, osim u disciplinskim postupcima. U smislu nadležnosti, Ustav propisuje da Tužilački savjet utvrđuje prijedlog za izbor vrhovnog državnog tužioca, imenuje i razrješava starješine državnih tužilaštava i državne tužioce, određuje prekid funkcije starješina državnih tužilaštava i državnih tužilaca, predlaže Vladi Program rada Državnog tužilaštva, i obavlja druge zadatke utvrđene zakonom.

Tužilački savjet ima predsjednika i deset članova. Predsjednik Tužilačkog savjeta je vrhovni državni tužilac. Članovi

Tužilačkog savjeta su: pet državnih tužilaca sa stalnim zaposlenjem i barem pet godina radnog iskustva u obavljanju tužilačke funkcije, od kojih četiri iz Vrhovnog državnog tužilaštva, Specijalnog državnog tužilaštva i viših državnih tužilaštava, a jedan iz osnovnih državnih tužilaštava, a koje bira i razrješava Konferencija državnih tužilaca; četiri ugledna pravnika koje bira i razrješava Skupština Crne Gore, na prijedlog nadležnog radnog tijela; jedan predstavnik Ministarstva pravde, kojeg imenuje ministar pravde iz reda zaposlenih u Ministarstvu pravde. Državni tužilac čiji rad je ocijenjen kao nezadovoljavajući ili kome je izrečena disciplinska sankcija ne može biti izabran za člana Tužilačkog savjeta. Sastav Tužilačkog savjeta objavljuje predsjednik Crne Gore.[61]

Takav sastav Tužilačkog savjeta ipak odaje utisak političke kontrole i uticaja. Iako je Venecijanska komisija[62] mišljenja da vrhovni državni tužilac može predsjedavati Tužilačkim savjetom, *ex officio*, izuzev u disciplinskim postupcima (Amandman XI Ustava Crne Gore), takvo rješenje je problematično u lokalnom kontekstu, budući da je vrhovni državni tužilac osoba koja je najviše odgovorna za rad tužilaštva. Konačno, Tužilački savjet treba da vrši nadzor rada Vrhovnog državnog tužilaštva, tako da je nelogično da vrhovni državni tužilac učestvuje u tom nadzoru. Pored toga, autoritet koji ima vrhovni državni tužilac među ostalim tužiocima može stvoriti opasnost da mišljenja Savjeta mogu biti nekritično prihvaćena od strane tužilaca, koji su članovi Savjeta, kako im ne bi zamjerio vrhovni državni tužilac.

Nadalje, nema nikakvih garancija da polovina članova Savjeta neće biti politički aktivno, zato što za četiri člana koja nisu tužioci nema takvog ograničenja (njih biraju političari), dok predstavnik Ministarstva pravde dolazi iz izvršne grane vlasti.

61 član 18 Zakona o državnom tužilaštvu, „Službeni list Crne Gore", br. 011/15, 042/15, 080/17, 010/18, 076/20

62 Mišljenje Venecijanske komisije o nacrtu ustavnih amandmana, koji se odnose na pravosudni sistem Crne Gore, br. 677/2012, 17. decembar 2012, CDL-AD (2012) 024, stav 50

Imajući na umu da je ključno za nezavisnost Savjeta ko će biti njegovi članovi izvan redova tužilaca, vjerujem da bi trebalo osigurati da članovi Tužilačkog savjeta koji nisu tužioci budu oni koji su istinski nezavisni od političke moći ili koji uopšte nisu politički aktivni. Prema GRECO-u, trebalo bi osnažiti operativne aranžmane za izbjegavanje pretjerane koncentracije moći unutar Savjeta, a tužioci bi trebali biti dalje podržavani u svojem nepristrasnom djelovanju.[63]

- **Imaenovanje sudija i tužilaca**

Sudski savjet osigurava nezavisnost, autonomiju, odgovornost i profesionalizam sudova i sudija.[64] Detaljne odredbe u vezi sa pozicijom i radom sudija sadržane su u Zakonu o Sudskom savjetu i sudijama. Kriterijumi za izbor sudije koji se bira po prvi put su: ocjena na pisanom testu, t.j. ocjena na pravosudnom ispitu u skladu sa zakonom koji uređuje polaganje pravosudnog ispita, te ocjena na intervjuu sa kandidatom (član 48). Pisani test uključuje izradu presude i nosi ukupno 80 poena (40 poena po odluci). U intervjuu je moguće ostvariti do 20 poena, a tom prilikom se ocjenjuje motivacija za rad na sudu, komunikacija, sposobnost za donošenje odluka i rješavanje konflikata i shvatanje uloge sudije u društvu. I Sudski i Tužilački savjet su usvojili Smjernice za vođenje intervjua sa kandidatima za izbor. Primjena ovih smjernice, međutim, je važna za jednoobrazni tretman kandidata. Pored Smjernica, Sudski savjet je usvojio Pravila za ocjenjivanje sudija i predsjednika sudova,[65] koja sadrže kriterijume, pod-kriterijume i indikatore za ocjenjivanje sudija, što smatramo velikim korakom naprijed, smanjujući mogućnost za proizvoljno ocjenjivanje.

Novina u Zakonu o Sudskom savjetu i sudijama je inicijalna obuka, koju moraju proći kandidati za sudije, a koja se

63 GRECO, *Drugi izvještaj o uklađenosti Četvrte runde evaluacije za Crnu Goru*, februar 2020. godine, str. 6.

64 Zakon o Sudskom savjetu i sudijama („Službeni list Crne Gore", br. 011/15, 028/15, 042/18, član 2)

65 „Službeni list Crne Gore", br. 075/15

sastoji od teoretskog i praktičnog dijela, a traje 18 mjeseci. Tokom inicijalne obuke, kandidat za sudiju zasniva radni odnos kod Osnovnog suda u Podgorici do donošenja odluke o izboru. Kandidat za sudiju ima pravo na platu u iznosu od 70% plate sudije u osnovnom sudu. Sudski savjet imenuje sudijom kandidata koji je dobio ocjenu „zadovoljava" na inicijalnoj obuci.

Da li će ove novine donijeti pozitivne promjene u praksi, ostaje da se vidi. Generalno, može se reći da se radi na uspostavljanju većih garancija za izbor najboljih kandidata za sudije, ali još uvijek postoji prostora za poboljašnje kada je riječ o transparentnosti i meritokratiji procesa imenovanja, kao što je već spomenuto.

Što se tiče nepristrasnosti u odlučivanju, sudije bi trebale biti nezavisne i nepristrasne i sposobne da djeluju bez bilo kakvih ograničenja, nedoličnog uticaja, pritiska, prijetnje ili miješanja, neposrednog ili posrednog, od strane bilo kog autoriteta, uključujući autoritete unutar pravosuđa. Ove garancije su date u Zakonu o Sudskom savjetu i sudijama, međutim, postoji prostor za poboljšanje kada je riječ o etičkoj i disciplinskoj odgovornosti, posebno u smislu proporcionalnosti i djelotvornosti mehanizama odgovornosti. Takođe, tek treba uspostaviti pravilni mehanizam za izvještavanje o, i bavljenje pitanjem nedoličnog uticaja sudija. Sudije, s druge strane, imaju pasivni stav prema takvim inicijativama.

Nezavisnost Državnog tužilaštva, kao autonomnog javnog tijela koje goni počinioce krivičnih djela, ugrađena je u Ustav, te zajamčena Zakonom o državnom tužilaštvu. Međutim, ima sporenja oko ustavne pozicije i autonomije tužilačke službe unutar ukupne državne strukture. Slična zabrinutost postoji u odnosu na sastav i rad Tužilačkog savjeta kao nezavisnog tijela kojem su povjerene ključne odgovornosti u vezi sa karijerom tužilaca, koje su pobrojene u Ustavu.

Naime, vrhovni državni tužilac koga bira Skupština, na osnovu prijedloga Tužilačkog savjeta, predsjedava ovim Sa-

vjetom, izuzev kada ovo tijelo odlučuje o disciplinskoj odgovornosti tužilaca. Nedavno je Savjet prihvatio kandidaturu aktuelnog vrhovnog državnog tužioca usprkos navoda o korupciji koje je iznio protiv njega jedan od prvo-osumnjičenih u mnogim tekućim istragama državnog tužilaštva. Sekretar Vrhovnog državnog tužilaštva, na koga se gleda kao na jednog od glavnih saradnika vrhovnog državnog tužioca, formalno je optužen na bazi tih navoda. Pa ipak, Savjet se gotovo ne oglašava po pitanju tih navoda. Takav stav građani smatraju kontroverznim i jedan dio pravne zajednice ponovo pokreće pitanje sporne nezavisnosti tužilaštva i samog Savjeta.

Prema važećim ustavnim odredbama, vrhovnog državnog tužioca bira i razrješava Skupština, na prijedlog Tužilačkog savjetal, dvotrećinskom većinom glasova poslanika, na javni poziv. Ako kandidat ne dobije potrebnu većinu, Skupština u drugom krugu odlučuje tropetinskom većinom glasova poslanika, između kandidata koji ispunjavaju zakonske zahtjeve.[66] Takođe se predviđa da zadatke Državnog tužilaštva izvršavaju starješine tužilaštava i državni tužioci, čija funkcija je stalna, izuzev kada je državni tužilac izabran po prvi put, u kom slučaju je njegov/njen mandat 4 godine, dok se vrhovni državni tužilac i starješine tužilaštava biraju na period od 5 godina.[67]

Iako je ovo rješenje u skladu sa preporukom Venecijanske komisije u vezi sa imenovanjem vrhovnog državnog tužioca, osnov za njegovo/njeno razrješenje nije predviđen Ustavom, iako je Venecijanska komisija zagovarala to u svom mišljenju od 24. juna 2013. godine. Takođe, sastav Tužilačkog savjeta i način imenovanja njegovih članova prebali su biti propisani Ustavom, a ne zakonom,[68] kako je preporučila Venecijanska komisija. Nadalje, Zakon o državnom tužilaštvu nije izmijenjen i dopunjen da bi propisao način

66 Amandmani III, IV i X na Ustav, „Službeni list Crne Gore", br. 38/ 2013-1

67 Amandman X na Ustav Crne Gore (2013)

68 Ustav, s druge strane, propisuje da starješine državnih tužilaštava i državni tužilac budu razriješeni ukoliko su pravosnažnom presudom osuđeni na bezuslovnu kaznu zatvora – prestanak službe i postupa razrješenja bliže su propisani zakonom.

zamjene njegovih članova ukoliko ih Skupština ne izabere, niti je predviđeno kako bi njihov mandat bio produžen.[69]

U avgustu 2019. godine, objavljen je javni poziv za izbor vrhovnog državnog tužioca, međutim, kako nijedna prijava nije bila primljena, Tužilački savjet je imenovao bivšeg vrhovnog tužioca za vršioca dužnosti, u skladu sa članom 48 Zakona o državnom tužilaštvu[70] koji propisuje da u slučaju podnošenja ostavke ili razrješenja vrhovnog državnog tužioca, ili isteka njegovog/njenog mandata, Tužilački savjet imenuje vršioca dužnosti vrhovnog državnog tužioca iz redova tužilaca iz Vrhovnog državnog tužilaštva. Međutim, Zakon o državnom tužilaštvu ne precizira što se događa u slučaju da se ne izabere vrhovni državni tužilac, t.j. kada bi trebalo lansirati novi konkurs.

Zakon o državnom tužilaštvu propisuje opšte uslove, koji su inače neophodni za rad u državnim tijelima, naime završen pravni fakultet, VIII nivo kvalifikacije obrazovanja i položen pravosudni ispit, te posebne uslove za izbor državnog tužioca i starješine državnog tužilaštva. Postoji izuzetak od ovih odredbi u smislu da starješine viših državnih tužilaštava ili Vrhovnog državnog tužilaštva, lica koja su radila kao sudije najmanje 12 godina, državni tužioci, advokati, notari ili profesori prava mogu biti imenovani na tu funkciju.

Kriterijumi za izbor državnog tužioca koji se bira po prvi put su: ocjena na pisanom testu, t.j. ocjena na pravosudnom ispitu u skladu sa zakonom koji uređuje pravosudni ispit i ocjena sa intervjua sa kandidatom (član 59 Zakona o državnom tužilaštvu). Pisani test uključuje pripremu optužnog akta ili nekog drugog spisa iz nadležnosti državnog tužilaštva i nosi ukupno 80 poena (40 poena po aktu). Pisani test se radi pod posebnom šifrom. Tokom intervjua, moguće je sakupiti do 20 poena, a tom prilikom se ocjenjuje motivisa-

69 Zakon o Sudskom savjetu i sudijama propisuje produžetak mandata njegovih članova, (član 16b).

70 https://www.paragraf.me/dnevne-vijesti/29082019/29082019-vijest1.html

nost za rad u državnom tužilaštvu, komunikacija, sposobnost donošenja odluka i rješavanja sukoba, kao i razumijevanje uloge državnog tužioca u društvu.

Kao i u slučaju izbora kandidata za sudije, od kandidata za javnog tužioca se traži da obavi inicijalnu obuku koja se sastoji iz teoretskog i praktičnog dijela i traje 18 mjeseci. Kandidat za državnog tužioca zasniva radni odnos kod Osnovnog državnog tužilaštva na određeno vrijeme dok se ne donese odluka o izboru. Kandidat za državnog tužioca ima pravo na platu u iznosu od 70% plate državnog tužioca u osnovnom državnom tužilaštvu.

Slično Sudskom savjetu, Tužilački savjet je usvojio Smjernice za vođenje intervjua sa kandidatima za tužioce, koje se takođe koriste za postupak unaprjeđenja tužilaca. Primjena smjernica je važna zbog jednoobraznosti postupanja prema kandidatima. Pored Smjernica, Tužilački savjet je usvojio i Pravila za ocjenjivanje državnih tužilaca i starješina državnih tužilaštava,[71] koja sadrže kriterijume, pod-kriterijume i indikatore za ocjenjivanje, što mi smatramo vellikim korakom naprijed.

- **Finansiranje pravosuđa**

Što se tiče finansiranja pravosuđa, uporedni podaci Sudskog i Tužilačkog savjeta ukazuju na lagani uzlazni trend u pogledu iznosa javnih sredstava namijenjenih pravosuđu. Međutim, finansijska nezavisnost pravosuđa je još uvijek ograničena i uslovljena postupkom odobravanja budžetskih sredstava dodijeljenih pravosuđu od strane Ministarstva finansija. To se smatra faktorom koji uveliko otežava eksternu finansijsku nezavisnost pravosuđa.

Sredstva za rad koja su na raspolaganju Sudskog savjeta se predviđaju u budžetu Crne Gore. Finansisjki resursi za rad Sudskog savjeta obezbjeđuju se unutar dijela budžeta Crne Gore za pravosuđe kao posebni program. Sudski savjet predlaže raščlanjeni godišnji budžet za rad Sudskog savjeta. Sudski savjet podnosi prijedlog godiš-

71 „Službeni list Crne Gore", br. 1/2016 i 66/2016

njeg budžeta Vladi Crne Gore.[72] Predsjednik Sudskog savjeta ima pravo učešća na skupštinskom zasijedanju na kojem se raspravlja o nacrtu budžeta Sudskog savjeta. Finansijski resursi za rad sudova obezbjeđuju se u odjeljku budžeta za pravosuđe, razdijeljena po posednim budžetskim programima za svaki sud posebno. Sudski savjet podnosi prijedlog budžeta Vladi Crne Gore.[73]

Finansijski resursi za rad Državnog tužilaštva i Tužilačkog savjeta obezbjeđuju se u posebnom odjeljku budžeta Crne Gore. Tužilački savjet predlaže diobu godišnjeg budžeta za rad svakog državnog tužilaštva i za Tužilački savjet. Tužilački savjet podnosi prijedlog godišnjeg budžeta Vladi Crne Gore. Predsjednik Tužilačkog savjeta ima pravo učešća na skupštinskom zasjedanju na kojem se raspravlja o prijedlogu budžeta za rad Državnog tužilaštva i Tužilačkog savjeta.[74]

Iz gornjih odredaba je jasno da finansijska nezavisnost pravosuđa ostaje ograničena i uslovljena postupkom za odobravanje budžetskih sredstava koja Ministarstvo finansija dodjeljue pravosuđu. Premda postoji blagi uzlazni trend u iznosu javnih sredstava namijenjenih pravosuđu, ovo se smatra faktorom koji uveliko otežava eksternu finansijsku nezavisnost pravosuđa.

Već 2001. godine, Konsultativni savjet evropskih sudija (KSES) zauzeo je stav da je finansiranje sudova blisko povezano sa pitanjem nezavisnosti sudija u smislu određivanja uslova po kojima sudovi vrše svoju funkciju.[75] KSES je saglasan da iako je finansiranje suda dio državnog budžeta, ono ne bi trebalo biti podložno političkim fluktuacijama. Premda je nivo resursa koje neka zemlja može priuštiti za svoje sudove politička odluka, mora se uraditi dubinska analiza

72 Zakon o Sudskom savjetu i sudijama, članovi 6, 131 i 132

73 Zakon o sudovima, „Službeni list Crne Gore", br. 011/15, 076/20

74 Zakon o državnom tužilaštvu, član 180

75 Konsultativni savjet evropskih sudija (KSES) CCJE (2001) OP N° 2, Strasbourg, 23. novembar 2001, https://www.coe.int/en/web/ccje/home

u odnosu na razdvajanje vlasti, kako bi se obezbijedilo da niti izvršna niti zakonodavna vlast ne mogu izvršiti bilo kakav pritisak na pravosuđe u procesu budžetiranja. Odluke o dodjeli sredstava sudovima moraju se dakle donositi uz strogo poštovanje nezavisnosti pravosuđa.

Kroz preporuke Savjeta Evrope i EUROL 2, Sudski savjet je počeo sa procesom unaprjeđenja finansijskog upravljanja, kao i kapaciteta Sekretarijata Savjeta u oblasti planiranja i izvršenja budžeta, kao i planiranja ljudskih resursa i izgradnje kapaciteta. Kontrola budžeta od strane sudova, kao priprema za uvođenje decentralizovanog finansijskog upravljanja u sudovima predviđena je Akcionim planom za sprovođenje Strategije za reformu pravosuđa 2019-2022; vremenski okvir za sprovođenje aktivnosti je četvrti kvartal 2020. godine.[76]

Sudije, starješine državnog tužilaštva i državni tužioci ostvaruju pravo na platu i ostala prava iz rada i na osnovu rada, u skladu sa zakonom. Naime, najveći udio u izvršavanju budžeta za pravosuđe ide na rashode za bruto plate, što iznosi čak 68,97% ukupnog budžeta. Međutim, postavlja se pitanje da li su plate sudija / tužilaca dovoljne i u skladu sa sudskim / tužilačkim pozivom?

U projektu koji su sproveli CEDEM i Centar za monitoring i istraživanje, između ostalog, vođeni su opsežni intervjui sa predsjednicima sudova, sudijama raznih sudova, tužiocima, advokatima, predstavnicima Sudskog savjeta, Ombudsmanom i drugima. Oni su davali odgovore na na razna pitanja, uključujući i slijedeće: *Da li je materijalni status (položaj) sudija (tužilaca) na zadovoljavajućem nivou, a ako nije, da li mislite da to može uticati na kvalitet rada, ali i na samu objektivnost?*

Većina ispitanika je odgovorilo da iznos plate nije na zadovoljavajućem nivou, ali uzimajući u obzir opšti životni standard, on može biti prihvatljiv. Oni su, nadalje, istakli da

76 Sudski savjet: *Godišnji izvještaj za 2019. godinu*, Podgorica, 2020. godine, str. 8, https://sudovi.me/static/sdsv/doc/FINAL_-Godisnji_izvjestaj_2019.-stampa.pdf

je, pored niskih zarada, mnogo veći problem činjenica da veliki dio njih nema riješeno stambeno pitanje, i ne samo u Podgorici. Najveći broj je saglasan da neadekvatne zarade ne bi trebalo da utiču na njihov kvalitet rada i objektivnost. Takođe je istaknuto da „pravosuđe nema priliku koju koriste organi izvršne vlasti, omogućavajući sebi podizanje nivoa plata do 30% ili 40% putem podzakonskih akata. Tome se mora posvetiti dužna pažnja i moraju se ustanoviti određeni standardi plata sudija. Treba da imamo ugrađeni odnos o tome što znači ugled sudije. Ne možemo dopustiti da plata sudije u sudu za prekršaje bude dva puta niža od plate zamjenika generalnog sekretara Skupštine. O tome moramo povesti računa."

- **Percepcija javnosti o nezavisnosti pravosuđa**

Kada se radi o tome da li se pravosuđe percipira kao nezavisno, treba reći da je godinama povjerenje javnosti u pravosuđe relativno nisko: prema Eurobarometru, samo 49% stanovništva je iskazalo tendenciju povjerenja u policiju, samo 38% je reklo da obično ima povjerenje u Vladu, a takođe manje od polovine anketiranih (48%) je reklo da ima povjerenje u sistem pravosuđa.[77] Istraživanje javnog mnijenja koje je sproveo CEDEM u decembru 2019. godine pokazalo je još niži rezultat vezan za povjerenje javnosti: 41,9% za sistem sudova i 33, 2% za državno tužilaštvo.[78]

Reforma pravosudnog sistema je djelotvorna onoliko koliko građani osjećaju njene benefite i pokazuju zadovoljstvo sa postignutim rezultatima. Međutim, usprkos određenog napretka u reformi pravosuđa, ankete koje su vođene u martu i avgustu 2020. godine, pokazuju da pvjerenje u pravosuđe konstantno opada. Da bismo to ilustrovali, u martu 2020. godine, povjerenje u sistem pravosuđa je bilo 34%, u

77 Standard Eurobarometar: Povjerenje u institucije, maj 2016. godine http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Chart/index

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

decembru 2019. godine 41,9%,[79] dok je u decembru 2017. godine ono bilo 48%.[80] Najnovije istraživanje CEDEM-a, koje je objavljeno prošlog mjeseca, pokazalo je 37% povjerenje javnosti u siszem sudova i 36,9% u državno tužilaštvo.[81] Takav opadajući trend, u poređenju sa 2019. godinom, može se pripisati više javnih afera koje su bacile svjetlo na nezavisnost i nepristrasno ponašanje pravosuđa.

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

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

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

ODSUSTVO KORUPCIJE III

DJELIMIČNA ISPUNJENOST INDIKATORA

Borba protiv pojave korupcije u Crnoj Gori uključuje preventivne mjere i mjere iz oblasti krivičnog prava. Preventivne mjere ili specifična pravila ponašanja protiv zloupotreba u vršenju javnih dužnosti primjenjive su na javne funkcionere. Koruptivna krivična djela su jasno obrađena u krivičnom pravu i u zakonu o borbi protiv korupcije. Uspkos razgraničenja tih krivičnih djela, pravosudni sistem još uvjek nije u potpunosti efikasan u izricanju proporcionalnih sankcija iz oblasti korupcije. Većina predmeta korupcije na visokom nivou nije nikada dobilo sudski epilog, završavajući kontroverznim sporazumima o priznanju krivice. Oni koji su rezultirali sudskim epilogom okončani su blagim kaznama ili preinačenjem sudskih odluka u žalbenom postupku.

Izvještaji Evropska komisije za zemlje iskazali su zabrinutost u vezi sa institucionalnim i operativnim kapacitetom Crne Gore za borbu protiv korupcije i organizovanog kriminala, te nedostatak rezultata djelotvornih istraga, gonjenja i osuđujućih presuda za krivična djela sa elementima korupcije. Preventivne anti-koruptivne mjere nisu u skladu sa preporukama GRECO-a. Agencija za borbu protiv korupcije (takozvana „ASK") se često percipira kao netransparentna i uveliko nedjelotvorna za sprovođenje propisa o sukobu interesa.

- **Javna percepcija korupcije**

Javno mnijenje u Crnoj Gori pokazuje visoki procent nepovjerenja javnosti u institucije i široku percepciju korupcije na svim nivoima. Iako bi studije o percepciji javnosti mogle donekle obmanjujuće u odnosu na aktuelno stanje stvari, one odražavaju realnu sliku stanja stvari.

Naime, ankete o percepciji javnosti vođene od strane dvije nevladine organizacije, u februaru - martu 2020. godine[82] (prethodna je realizovana 2017. godine), prikazale su male promjene u razumijevanju korupcije od strane javnosti, ali ipak prepoznaju korupciju kao dominantni problem u crnogorskom društvu. Građani Crne Gore generalno pre-

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

poznaju razne vrste korupcije; najveći broj njih prepoznaje podmićivanje profesora i policijskih službenika, a najmanje prepoznatljiva vrsta korupcije odnosi se na korišćenje poznanstava za dobijanje određenog dokumenta.

Glavni razlozi za takvu percepciju građana vezani su za nivo siromaštva, ekonomski status javnih službenika i spremnost organa da rješavaju problem korupcije. Građani ne smatraju da imaju dovoljno samopouzdanja da prijavljuju korupciju, budući da uviđaju da bi mogli imati problema i da prijavljivanje neće završiti gonjenjem. Neke ilustracije takve percepcije navedene su u tekstu koji slijedi.

Tri čevrtine građana vjeruje da je korupcija dio svakodnevnog života, i gotovo svaki drugi građanin vjeruje da bi se to moglo promijeniti priključenjem Evropskoj uniji, kao i povećanjem plata državnih službenika. Sedam od deset građana vjeruje da su obije stvari jednako odgovorne za podmićivanje, a jedna trećina opravdava korupciju u nekim slučajevima.

Sudeći prema percepciji građana, korupcija je najdominatnija u sistemu zdravstva i među političkim partijama, ali i u drugim institucijama, kao što je Uprava za inspekcijske poslove, Carina, Policija, tužilaštvo, mediji, poreska služba i pravosuđe.

Po mišljenju građana, glavni razlozi za primanje mita su: odsustvo novčanih kazni i niske zarade. Gotovo trećina građana smatra da je odsustvo novčanih kazni glavni razlog za davanje mita, a osim toga, 35% građana (što je znatno više nego 2017. godine) vjeruje da je razlog teškoća pružanja usluga na redovnoj osnovion a regular basis.

Jedna trećina građana negativno ocjenjuje rad Agencije za borbu protiv korupcije, samo 15% pozitivno, a više od trećine građana nije dalo svoj sud.

Preko dvije petine građana negativno ocjenjuje rad Specijalnog državnog tužilaštva u borbi protiv korupcije; posebno građani sa sjevera zemlje, dok je blizu 1/4 građana dalo neutralnu ocjenu.

Građani koji ne bi prijavili slučaj korupcije u suštini navode da je nadležnost državnih organa da otkrivaju korupciju, i da oni ne vjeruju da bi prijavljivanje dalo bilo kakvog rezultata. Nedostatak vjere u efekat prijavljivanja slučajeva korupcije je značajno manje izražen u poređenju sa 2017. godinom. Da postoji mogućnost anonimnog prijavljivanja korupcije, gotovo polovina građana je navela da bi obavijestili organe.

Preko dvije petine građana misli da su korupcija na visokom i niskom nivou jednako problematične, dok gotovo jedna trećina ističe da je korupcija na visokom nivou veći problem, na političkom i poslovnom nivou. Građani najčešće navode da bi visoke kazne i jednaka primjena zakona za sve bile najuspješnije mjere u rješavanju problema korupcije u mjestima gdje žive.

- **Odnos korupcije na niskom i visokom nivou**

Diferencijacija korupcije je važna sa tačke gledišta analize koji nivo korupcije je dominantan u praksi tužilačke službe i potvrđuje percepciju javnosti.

Crnogorsko zakonodavstvo priznaje dvije vrste korupcije, na *niskom* i *visokom nivou*. Ovaj koncept je uveden iz praktičnih razloga, kako se ne bi preopterećivalo Specijalno državno tužilaštvo (SDT) sa manjim predmetima korupcije. Usvajanjem Zakona o Specijalnom državnom tužilaštvu u crnogorskom (2015) krivičnom zakonodavstvu, nadležnost (*predmetna*) za predmete visoke korupcije dana je SDT-u. Svi ostali predmeti korupcije su pod nadležnošću osnovnih i viših tužilaštava.

Definicija korupcije na visokom nivou se oslanja na dva kriterijuma – mogući počinilac i iznos imovinske koristi stečene krivičnim djelom.

a) Ako je neki *javni funkcioner*[83] počinio slijedeća krivična djela:

- zloupotreba položaja,
- prevara u obavljanju službene dužnosti,
- trgovina uticajem,
- podsticanje na uključenje u trgovinu uticajem,
- pasivno podmićivanje,
- aktivno podmićivanje,

b) Ako je stečena imovinska korist prešla iznos od **40,000 EUR** počinjenjem slijedećih krivičnih djela:

- zloupotreba položaja u privrednom poslovanju,
- zloupotreba ovlašćenja u privredi.

Svi predmeti sa elemenima korupcije koji se ne odnose na gornje kriterijume biće preneseni nižim tužilaštvima od strane Specijalnog tužilaštva.

Prema podacima datim od strane Vrhovnog državnog tužilaštva, od prijavljenih slučajeva korupcije **2019. godine,** protiv 486 lica, 459 lica je prijavljeno Specijalnom državnom tužilaštvu. Od ovog broja, SDT je 51 prijavljeno lice uputio nižim tužilaštvima. Čini se da je korupcija na niskom nivou prisutna u praksi tužilaštva samo protiv 78 lica (*27 lica je bilo direktno prijavljeno osnovnim ili višim tužilaštvima, a 51 lice je SDT uputio nižim tužilaštvima*) ili 16% svih lica prijavljenih za korupciju. A korupcija na visokom nivou činila je 408 prijavljenih lica ili **84% svih prijavljenih**. Takva statistika bi se mogla objasniti činjenicom da je SDT specijalizovano za rje-

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)

šavanje predmeta korupcije, zato što najveći broj prijavljenih slučajeva dolazi do SDT-a. Broh predmeta prenesenih nižim tužilaštvima od strane SDT-a je dva puta veći od broja lica direktno prijavljenih osnovnim i višim tužilaštvima.

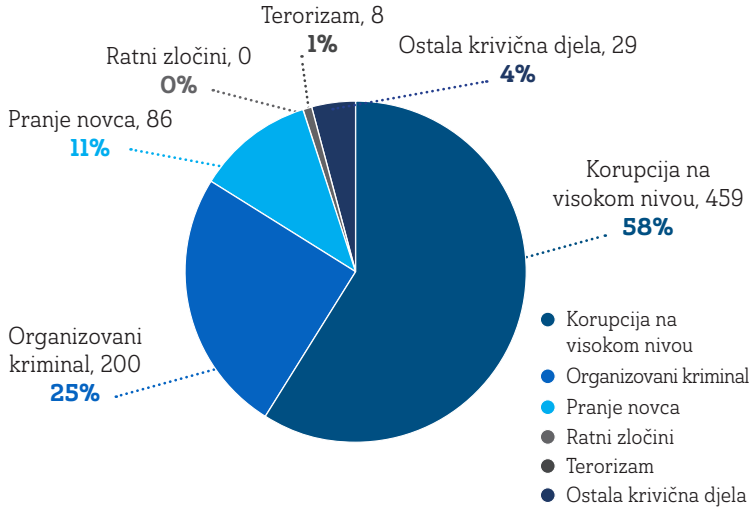
Razlika između prijavljenog broja lica za korupciju na niskom i visokom nivou bi trebala biti alarmantna za policiju i tužilaštvo budući da je ***najveći broj predmeta vezan za korupciju na visokom nivou****. S druge strane, Agencija za borbu protiv korupcije treba pojačati svoje napore budući da je sprječavanje korupcije na visokom nivou direktno pod njenom nadležnošću. Dodatni problem je niska stoma korupcije na niskom nivou što ne odgovara javnom mnijenju kada je riječ o najkorumpiranijim profesijama (ne javni funkcioneri), ali ipak gotovo jedna trećina građana ističe da je veći problem korupcija koja se dešava na visokom nivou, u politici i u poslovnom sektoru.*

- **Učešće korupcija na visokom nivou u portfoliju predmeta SDT-a**

Dominacija korupcije na visokom nivou je prisutna čak i u odnosu na ostale predmete u nadležnošću SDT-a. Naime, prethodno data brojka od 459 krivičnih prijava bilo je podneseno protiv odraslih počinilaca za korupciju na visokom nivou, od ukupnog broja od 782 krivične prijave podnesene 2019. godine, što čini 58,7% zastupljenosti u ukupnom broju prijavljenih odraslih počinilaca. Krivične prijave podnesene SDT-a protiv odraslih počinilaca za druga krivična djela u nadležnosti SDT-a (organizovani kriminal, pranje novca, terorizam, ratni zločini i ostala krivična djela) činila su samo 41,3% svih krivičnih prijava u 2019. godini.

Sa neriješenim krivičnim prijavama iz ranijeg perioda (485), broj krivičnih prijava za korupciju na visokom nivou porastao je do 944 u 2019. godini, ili 69,2% od ukupnog broja krivičnih prijava koje je SDT imao u radu u 2019. godine. Međutim, to je na istom nivou na kojem je bilo 2018. i prethodnih godina.

Struktura krivičnih prijava kod SDT-a u 2019. godini



- **Efikasnost gonjenja korupcije na visokom nivou/ kvalitet krivičnih prijava**

Korupcija je takva krivična pojava koja pretpostavlja konspirativnost oba uključena subjekta. Za takvo krivično djelo pritvaranje i gonjene je teško i zahtijeva posebne istražne mjere[84]. Dokaze treba prikupljati u vrijeme počinjenja krivičnog djela ili istraga treba biti bazirana na posrednim dokazima. Moglo bi se očekivati da stopa riješenih koruptivnih predmeta bude niža nego kod drugih krivičnih djela. Ako bi se razvili standardi za dovoljni nivo dokaza, tužilaštvo bi trebalo donijeti odluku na efikasan način i nastaviti sa gonjenjem ili odustati od optužbe.

Kada je riječ o efikasnosti SDT-a, zaostale krivične prijave iz prethodnog perioda mogle bi se pripisati neefikasnom radu.

Od 944 prijave za korupciju koje su u radu, 419 prijava je riješeno u 2019. godini, t.j. 44,39% prijava za ova krivična djela. U odnosu na **351 lice (83,77% riješenih prija-**

84 Struktura koruptivnih krivičnih djela u Crnoj Gori je takva da njihova priroda ne zahtijeva korišćenje specijalnih istražnih tehnika prema ZKP.

va), donešene su odluke da se krivične prijave odbace, optužni akt je podnešen protiv 1 lica, nalozi za vođenje istrage su izdati u 6 slučajeva protiv 16 lica (3,82%), dok su optužbe protiv 51 lica (12,17%) prenesene ostalim tužilaštvima. Nerazriješenih optužbi je bilo protiv 525 lica ili 55,61% prijava u radu.

Pored neriješenih istraga iz prethodnog perioda, protiv 76 lica, specijalni tužioci su ukupno sproveli istragu protiv 92 lica u 2019. godini. Istraga protiv 3 lica je prekinuta, a nakon istrage, 6 podignuto je 6 optužnica protiv 37 lica. Na kraju izvještajnog perioda, 52 istrage su ostale neriješene.

Čini se da je SDT efikasan kada je riječ o krivičnim prijavama bez dovoljno osnova. Kada je riječ o krivičnim prijavama koje imaju osnova za istragu, one su rezultirale samo jednim optužnim aktom i 6 novih pokrenutih istraga, u jednoj godini. To ne pokazuje efikasnu borbu protiv korupcije.

Efikasnost je u direktnoj vezi sa djelotvornošću borbe protiv korupcije, a oboje je bazirano na kvalitetu krivičnih prijava i istražnih standarda koji se sprovode u radu Agencije za sprovođenje zakona i tužilačke službe. Usprkos diferencijacije na korupciju niskog i visokog nivoa, SDT je očigledno preopterećen krivičnim prijavama korupcije visokog nivoa da bi ih gonio efikasno i djelotvorno, što je rezultiralo malim brojem pokrenutih istraga. Trebalo bi ponovo razmotriti, na osnovu nove ocjene rizika od korupcije, koje predmete bi trebalo definisati kao korupciju visokog nivoa i kao takve staviti u nadležnost SDT-a.

- **Podignute optužnice/kvalitet istraga**

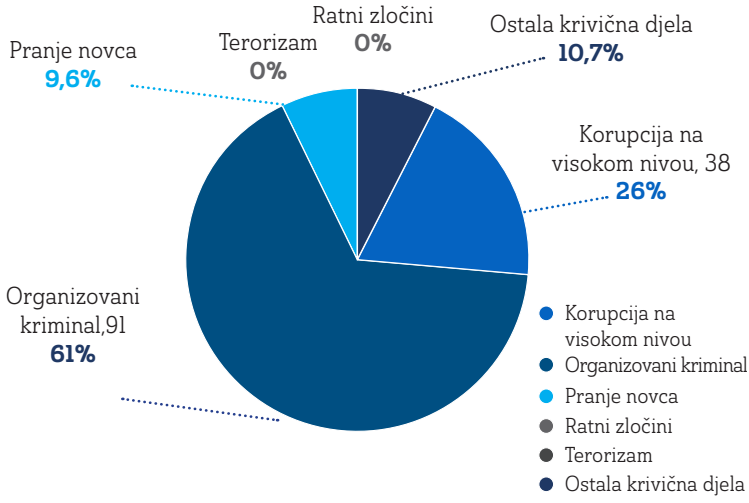
U 2019. godini, SDT je podigao optužnice (uključujući jedan optužni akt) protiv ukupno 38 lica sa krivičnim djelima visoke korupcije, u 6 predmeta. Pored neriješenih optužnica iz prethodnih godina protiv 53 lica, u 2019. godini 91 lice je bilo optuženo i izvedeno pred sud.

Kada je riječ o ostalim krivičnim djelima iz nadležnosti SDT-a, značajno više optužnica je podignuto, obrnuto proporcionalno

broju krivičnih prijava, ali proporcionalno broju vođenih istraga. Naime, pored optužnica protiv 38 lica za krivična djela visoke korupcije, SDT je podigao optužnicu protiv raised **91 lica za krivična djela organizovanog kriminala, 9 lica za krivično djelo pranja novca i 10 lica za ostala krivična djela.**

Moglo bi se smatrati da gonjenje predmeta korupcije na visokom nivou nije upitno kada je riječ o istragama koje rezultiraju optužnicom u većini slučajeva. Pitanje koje slijedi je povezano sa stepenom do kojega su istrage djelotvorne, posmatrajući potvrđene optužnice i sudske odluke.

Struktura podignitih optužnica u SDT-u za 2019.



- **Sudski ishod slučajeva korupcije/kvalitet istrage i optužnica**

U predmetima korupcije na visokom nivou, sud je donio odluke za 9 lica, od kojih je krivica utvrđena kod 4 lica (3 osuđena na kaznu zatvora, od kojih 1 na osnovu sporazuma o priznanju krivice i 1 uslovno), dok su **u odnosu na 5 lica izrečene oslobađajuće presude (55,6% svih izrečenih presuda za korupciju na visokom nivou)**. Na kraju 2019. godine, ostale su neriješene prijave protiv 82 lica.

Što se tiče optužnica za ostala krivična djela (*organizo-*

vani kriminal, pranje novca, ostala krivična djela), u 2019. godini sud je donio odluke protiv 71 lica. Osuđujuće presude su bile za 70 lica, 98,6% od svih izrečenih presuda (protiv 65 lica izrečene su kazne zatvora, a protiv 6 lica uslovne kazne zatvora), **nije bilo izrečenih oslobađajućih presuda,** dok je za 1 lice presuda bila odbacivanje optužbe.

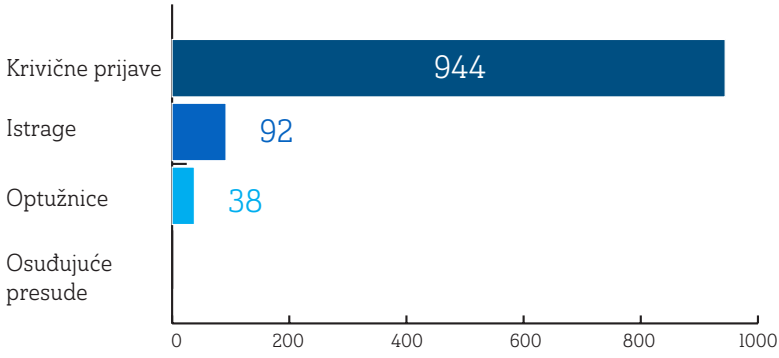
Na opštem nivou, prema optužnicama osnovnih, viših i Specijalnog državnog tužilaštva, 93,00% prijava je riješeno osuđujućom presudom, oslobađajućom 3,60%, a kod 1,51% presuda je bila odbacivanje optužbe.

Na oslobađajuće sudske odluke za korupciju na visokom nivou, specijalni tužioci su podnijeli žalbe u odnosu na 5 lica, dk je iz prethodnog perioda pred sudom bilo 3 neriješene žalbe. **Žalbe su odbačene u odnosu na 7 lica, a u odnosu na 1 lice, pritužbe su ostale neriješene**.

Uspješnost optužnica podignutih za krivično djelo korupcije na visokom nivou znatno je niža od prosjeka za optužnice za ostala krivična djela u nadležnosti SDT-a, kao i od opšteg prosjeka uspješnosti u Crnoj Gori. Takva statistika zahtijeva reagovanje odgovornih organa, posebno Apelacionog suda koji je potvrdio sve prvostepene odluke SDT-a.

Tabela prikazuje djelotvornost borbe protiv korupcije na visokom nivou u Crnoj Gori:

Predmeti korupcije na visokom nivou napreduju u 2019 godini u okviru SSPO



• Struktura koruptivnih krivičnih djela

Nacionalni krivično-pravni okvir Crne Gore uključuje više krivičnih djela u Krivičnom zakoniku, kao koruptivna krivična djela. Korupcija na visokom nivou je takođe definisana i u Zakonu o Specijalnom tužilaštvu. Ova krivična djela, kao opšti zaštitni cilj imaju službenu dužnost (javnu službu), opšte krivično djelo je zloupotreba službenog položaja (član 416). Konkretna koruptivna krivična djela uključuju pasivno podmićivanje (član 423) i aktivno podmićivanje (član 424).

Usprkos raznovrsnog krivično-pravnog okvira za borbu protiv korupcije, tužioci ne koriste sve mogućnosti, posebno u odnosu na koruptivne predmete *per se*, kao što je podmićivanje. Tužioci u najvećem broju slučajeva optužuju za krivično djelo zloupotrebe službenog položaja ili zloupotrebu položaja u privrednom poslovanju. U praksi SDT-a, preko 95% istraga u 2019. godini, vođeno je u odnosu na krivično djelo zloupotrebe službene dužnosti ili zloupotrebe položaja u privrednom poslovanju. Samo jedna istraga je vođena u odnosu na pasivno podmićivanje. Percepcija građana pokazuje da je podmićivanje najčešći oblik korupcije i oni smatraju da je prisutna na nižem nivou državne administracije.

Različita krivična djela zahtijevaju različite istražne mjere, uz specijalizaciju. Zakonik o krivičnom postupku, nakon nalaza Ustavnog suda (2018) da su neke od odredaba koje se tiču specijalnih istražnih mjera protivne Ustavu, ne predviđa sve mjere koje su specifične za koruptivna krivična djela. Takva situacija bi mogla spriječiti policiju i tužilaštvo u otkrivanju i pribavljanju dokaza za konkretna koruptivna krivična djela.

ZAKLJUČCI I PREPORUKE

Usprkos tome što se načela vladavine prava smatraju od suštinskog značaja za ostvarivanje demokratskih i političkih i pravnih kriterijuma za pristupanje EU, potrebna je veća transparentnost, odgovornost i spremnost institucija i društva u cjelini kako bi se obezbijedila njena djelotvorna primjena. Osnovna načela vladavine prava zaista jesu ugrađena u Ustav Crne Gore, međutim, ona nisu adekvatno operacionizovana kroz zakonodavstvo koje je na snazi, te se stoga ne sprovodi djelotvorno u praksi niti se propisno prati. Glavni faktori koji ometaju ostvarivanje vladavine prava odnose se na isuviše česte izmjene i dopune postojećeg pravnog okvira, nekažnjivost i pretjerani formalizam.

Naime, koncept vladavine prava u zemlji se još uvijek oblikuje unutar formalističkih ideja, sa manje strateške orijentacije i bez dovoljno sredstava za sprovođenje. Iako je postignut određeni napredak u reformi pravosuđa, reformske aktivnosti još uvijek nisu proizvele željene rezultate u smislu stvaranja nezavisnog, nepristrasnog, odgovornog i efikasnog sistema pravosuđa. Usprkos ustavnih amandmana iz 2013. godine i naknadne reforme sudskog zakonodavstva iz 2015. godine, do prave depolitizacije se još nije došlo. Pravosuđe se još uvijek percipira kao osjetljivo na politički uticaj. Još nije osigurano da Sudski i Tu-

žilački savjet budu u potpunosti nezavisna tijela; proces imenovanja i razrješenja sudija i tužilaca još uvijek nije baziran na zaslugama.

Predstavnici izvršne vlasti (Ministarstvo pravde) su još uvijek članovi Sudskog i Tužilačkog savjeta, što je, opet, GRECO žestoko kritikovao u svom nedavnom izvještaju o Crnoj Gori. Premda je izmjenama i dopunama zakona o Sudskom savjetu i sudijama iz 2018. godine uveden mehanizam protiv blokade, on ne propisuje nikakve rokove, tako da proces može trajati beskonačno, figurativno govoreći. Nema kriterijuma za izbor uglednih pravnika koji bi osigurali njihovu nezavisnost od političkog miješanja i spriječili sukob interesa. Na kraju, ali ne manje važno, povjerenje javnosti u pravosuđe i njihovo zadovoljstvo pravosudnim sistemom označeni su opadajućim trendom od 2017. godine. Ovo su sve znaci upozorenja koji traže veću političku posvećenost i više promjena baziranih na dokazima u normativnom okviru, popraćeno i promjenama u praksi. Ostaje važno da Crna Gora ne ide unazad u odnosu na reformu pravosuđa i da nastavi da bilježi rezultate, posebno u borbi protiv korupcije, obezbjeđujući nezavisnost svih institucija, kako je istakla Evropska komisija u junu ove godine.

Što se tiče upravljanja, postoji potreba za osnaženje transparentnosti, učešća zainteresovanih strana, te kapaciteta Vlade za sprovođenje reformi. Novi pravni okvir i metodologija vezana za strateško planiranje trebali bi dovesti do boljeg kvaliteta strateškog planiranja, boljeg praćenja i izvršavanja. Tokom procesa izvršavanja presuda i odluka Evropskog suda, zapaženo je da je najveći broj odluka nacionalnih sudova bazirano isključivo na nacionalnoj regulativi, i na pojedine međunarodne dokumente i Konvencijska prava. U tom smislu, neophodno je podsticati domaće državne organe, posebno domaće sudove, da prilikom donošenja odluka, pored nacionalne regulative primjenjuju Konvencijsko pravo, budući da je ono izvor prava u skladu sa članom 9 Ustava.

Pravni lijekovi protiv nesprovođenja legislative su se takođe pokazali neefikasnim u toliko što nema jasnih sankcija, već sporadičnih pokušaja da se nadoknade propusti u implementaciji.

Percepcija javnosti i statistika o prijavljenoj korupciji istovremeno potvđuju činjenicu da korupcija u Crnoj Gori ostaje dominantna u mnogim oblastima političkog, ekonomskog i društvenog života i da nastavlja biti ozbiljan problem U Crnoj Gori.

Prema diferencijaciji dvije vrste korupcije od strane crnogorskog zakonodavstva i u pogledu statistike prijavljenih slučajeva, korupcija na visokom nivou je uglavnom zastupljena u praksi, što je suprotno od percepcije korupcije koju ima javnost. Većina krivični prijava se podnosi Specijalnom državnom tužilaštvu tako da prijave korupcije čine značajn dio posla SDT-a (69,2% svih krivičnih prijava za 2019. godinu). Međutim, ogroman broj krivičnih prijava nije proizveo dovoljan broj istraga ili optužnica. Na kraju 2019. godine, imali smo tek 4 osuđujuće presude. Takav rezultat je u skladu sa povjerenjem građana u sposobnost institucija da se bore protiv korupcije.

Na osnovu prethodno spomenutih nalaza istraživanja, mogu se istaći slijedeće preporuke za dalje osnaživanje vladavine prava u Crnoj Gori:

- Obezbijediti pravilno sprovođenje tripartitne podjele vlasti – fokusirajući se na parlamentarnu demokratiju, u kojoj najviše zakonodavno tijelo treba preuzeti date nadležnosti na djelotvoran način.
- Obezbijediti puno poštovanje sistema *provjera i ravnoteža* kako bi se spriječilo da pojedinačne sudije budu podložne eksternom uticaju, ali i da bi se spriječio nezakoniti politički uticaj na funkcionisanje pravosuđa.
- Putem amandmana na Ustav, isključiti ministra pravde i predsjednika Vrhovnog suda iz članstva u Sud-

skom savjetu. Takođe, vrhovni državni tužilac ne bi trebao biti članom Tužilačkog savjeta.

- Izmijeniti i dopuniti zakone o Sudskom savjetu i sudijama i o Državnom tužilaštvu kako bi se obezbijedile veće garancije nezavisnosti i nepristrasnosti članova sudskog i Tužilačkog savjeta, kao ključna nezavisna samoupravljajuća pravosudna tijela, propisivanjem transparentnih i objektivnih kriterijuma za njihov izbor, kao i osiguravajući da se članovi tih tijela koji ne dolaze iz pravosuđa ne biraju između onih koji imaju političku pozadinu ili prethodnu profesionalnu političku karijeru.

- Izmijeniti i dopuniti Zakon o Državnom tužilaštvu slijedeći primjer Zakona o Sudskom savjetu i sudijama, za propisivanje produženja mandata eminentnim pravnicima u slučaju da Skupština ne izabere sva četiri nova člana. Način izbora onih čiji mandat se produžava i rokovi za to takođe treba da budu propisani.

- Borba protiv korupcije u Crnoj Gori zahtijeva strateško promišljanje. Ocjena rizika treba biti osnov za zakonodavne izmjene u pogledu diferencijacije nadležnosti na način da Specijalno tužilaštvo treba da se fokusira samo na teške koruptivne predmete, dok ostala tužilaštva treba da prošire svoju nadležnost u borbi protiv korupcije na nižim nivoima.

- Zbog prirode korupcije, državni organi treba da pojačaju svoj fokus na pred-istražne radnje, kao na ključnu fazu za prikupljanje dovoljnog broja dokaza da bi se dokazalo postojanje korupcije.

- Specijalizacija u borbi protiv korupcije je preduslov za pozitivne rezultate i zahtijeva dalju izgradnju kapaciteta unutar policije i državnog tužilaštva.

INDIKATORI VLADAVINE PRAVA

I Poštovanje zakona

1. Da li je djelovanje izvršne grane vlasti u skladu sa Ustavom i drugiom zakonima?
2. Da li se Vladini propisi sprovode na djelotvoran način?
3. Da li je sudska kontrola usklađenosti akata i odluka izvršne grane vlasti sa zakonom djelotvorna?
4. Da li ima primjera sankcija protiv Vladinih predstavnika za nepoštovanje zakona?
5. Da li izvršna i zakonodavna vlast sprovode odluke međunarodnih i domaćih sudova?
6. Da li je sprovođenje zakona od strane sudova konzistentno (u sektoru građanskog i krivičnog pravosuđa)?

II Nezavisnost pravosuđa

1. Da li ima garancija da će najkompetentniji i moralni pojedinci biti imenovani za sudije?
2. Kako se, generalno, pravosuđe finansira?
3. Da li su plate sudija pravične i dovoljne?
4. Da li se pravosuđe percipira kao nezavisno?

III Odsustvo korupcije

1. Kakva je percepcija javnosti u odnosu na korupciju u vladinim tijelima?
2. Da li ima sudskih predmeta koji potvrđuju ili osporavaju percipirani nivo korupcije?

RULE OF LAW CHECKLIST FOR MONTENEGRO

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

KONRAD ADENAUER STIFTUNG
RULE OF LAW · SOUTH EAST EUROPE

CEDEM RUL
CENTAR ZA DEMOKRATIJU I LJUDSKA PRAVA

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RULE OF LAW CHECKLIST FOR MONTENEGRO

Podgorica, September 2020

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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

CONTENTS

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".

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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 outspread, 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 indictors,[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_TUZILACKOG_SAVJETA_I_DRZAVNOG_TUZILASTVA_ZA_2019_GODINU.pdf

9 http://media.cgo-cce.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 resultin 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 obeyance of a particular law or rule or acting in accordance with constitutional and institutional agreements.

According to Article 11 of the Constitution of Montenegro[15], 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 covenants.[17]

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/multilateralniodnosi/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-radu/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 obeyance 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 Martinovic and in the case of violations of human rights of Aleksandar Zekovic 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 2013[28] 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-mjeseci-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-istrage-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 Montenegrin, 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 decision[32] and is punishable by a fine or a prison term up to two years, according to some available data collected couple of years ago, around 15% of total ju-

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

dicial 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

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 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-neizvrsavanje-sudske-odluke

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

34 https://www.vijesti.me/vijesti/drustvo/322350/sudske-presude-i-njihovo-izvrsavanje-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.

40https://www.javni-izvrsitelji.me/images/2020/Izve%C5%A1taj%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

42http://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 1997until 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 Montenegro[44] 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 I 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.

45https://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: 0,53[47]).

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_Izvjestaj_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

52http://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=

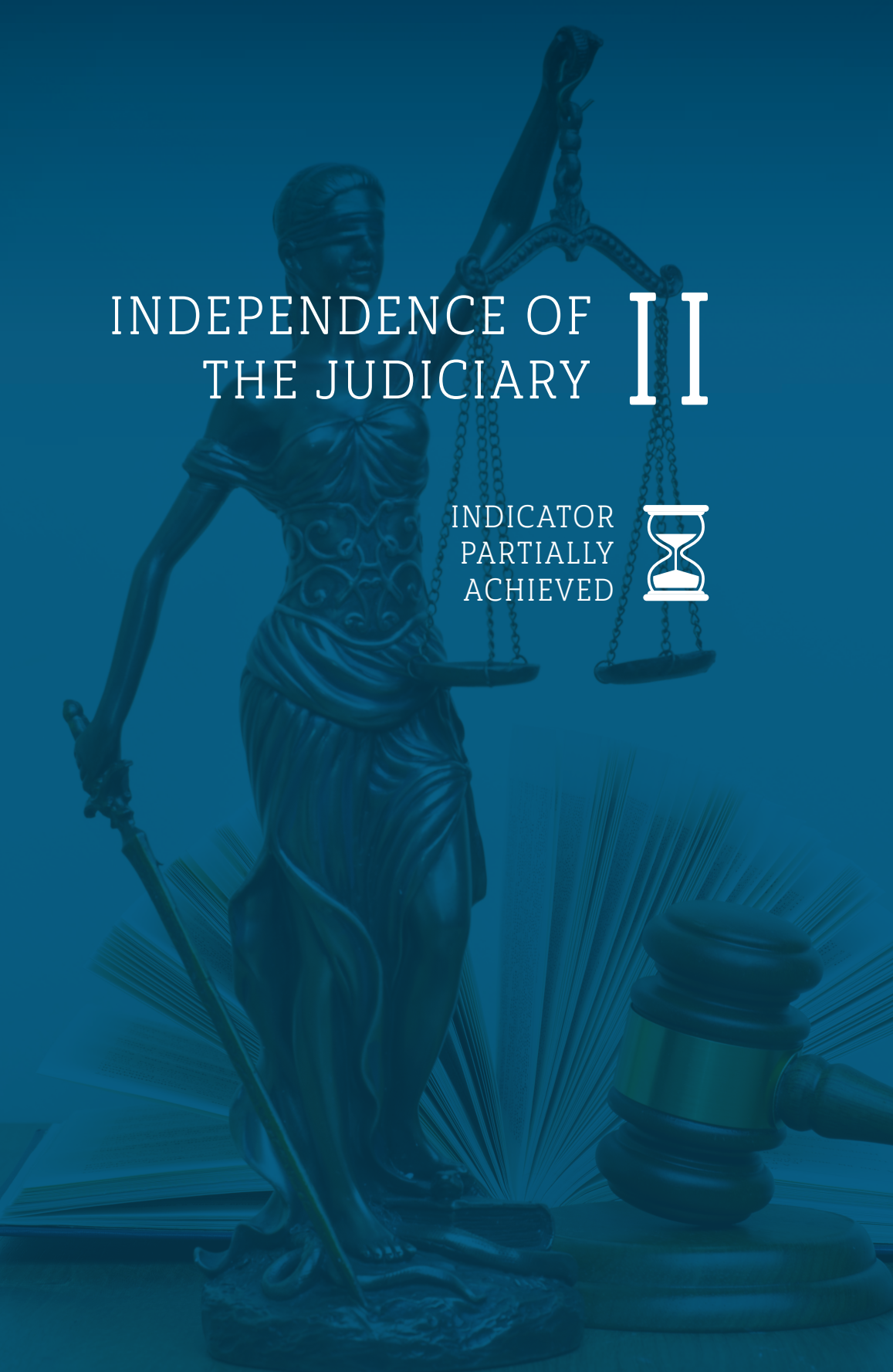
54 *Strategy for the Reform of the Judiciary 2019 – 2022*, op.cit. page 58.

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.ustavnisud.me/ustavnisud/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_zahtjevu_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

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 Commission[62] 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 Prosecution[70] 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 decisi-

70https://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 EUROL 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/

81http://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 2020[82] (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.

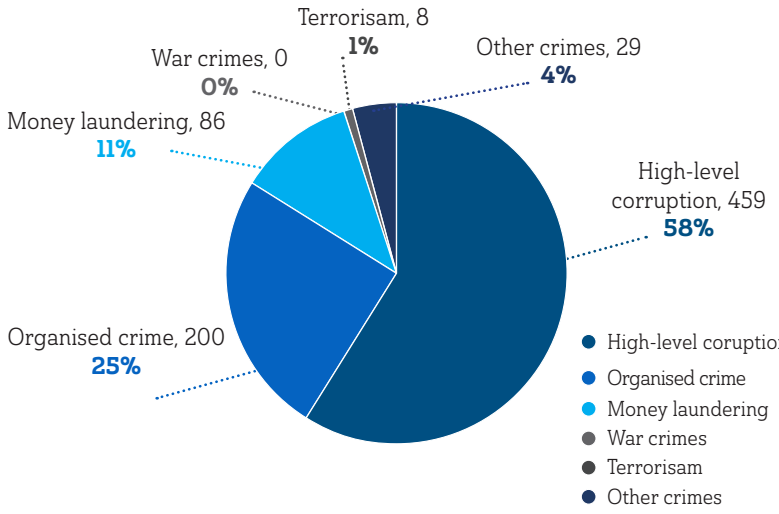
- **Participation of high-level corruption at SSPO case portfolio**

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 measures[84]. 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 lunched 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**

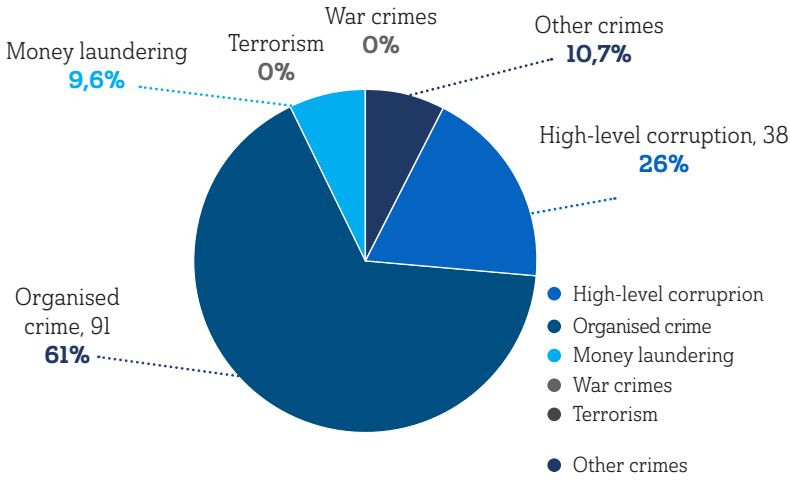
In 2019, SSPO raised indictments (including one bill of indictments) against a total of 38 people with high-level

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.

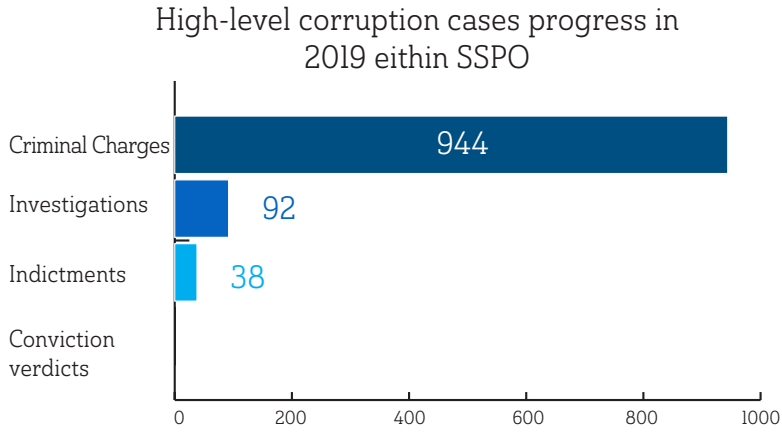
In regard to rest of criminal offences (*organised crime, money laundering, other crimes*) indictments, in 2019, the court made decisions against 71 persons. The verdicts were convicted against 70 persons, 98.6% of all rendered judgments (against 65 persons for imprisonment and against 6 persons for 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:



- **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 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 Coun-

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?