



JUDICIAL INDEPENDENCE IN MONTENEGRO

Myth or Reality

POLICY STUDY



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INTRODUCTION

Judicial independence is a cornerstone of democratic societies and a critical component of the rule of law. An independent judiciary serves as a check on the powers of the executive and legislative branches, preventing the abuse of authority and preserving the separation of powers. It ensures that judges can impartially and fairly adjudicate disputes, interpret laws, and protect the rights of all individuals, regardless of their background, influence, or affiliations. This policy paper explores the concept of judicial independence in Montenegro, its significance in the process of EU integration, and the challenges it faces today.

Montenegro launched accession negotiations with the European Union in June 2012. Negotiating Chapter 23 on judiciary and fundamental rights was opened in December 2013. Based on the interim benchmarks set under Chapter 23, Montenegro has committed to strengthening the independence of the judicial system. In the previous ten years, significant activities were carried out to improve the legal framework establishing guarantees of independence, accountability and professionalism in the judicial system. Amendments to the Constitution adopted in 2013 and the subsequent adoption of new legislation aligned with best European standards paved the way for judicial reforms and the creation of a judicial system resistant to external influences.

However, for several years, the EU has been continuously pointing out numerous problems in achieving the independence of the judiciary in Montenegro. The observations of the EU as well as non-governmental organizations that monitor judicial reforms indicate that the new legislative framework is still not fully implemented in practice. The judiciary remains vulnerable to external influence and political interference. Certain recent legislative initiatives were adopted deviating from the recommendations of the Venice Commission. The EU has urged the country to implement necessary reforms. However, due to the political instability in the last two years, these reforms have stalled.

The purpose of this policy paper is to provide a comprehensive analysis of the independence of the judiciary in Montenegro, assessing its status and the challenges. It contains information on the legal and institutional framework for the independence of judiciary, including an overview of the constitution, laws, and regulations, as well as the structure and composition of the judicial system. The Policy paper analyses institutional performance in implementation of the new system of appointment, professional appraisal and dismissal of judges. In addition, challenges in meeting interim benchmarks on judicial independence in Chapter 23 are presented. The paper provides recommendations on the direction in which reforms in the area of judicial independence should be implemented to unblock the EU accession process and bring the country closer to EU membership.

The implementation of judicial reform is crucial for the continuation of the EU integration process of Montenegro. Recent criminal investigations launched against current and former key judicial stakeholders, underperformance of the Judicial Council and low level of trust of citizens in the judicial system raise numerous systemic questions regarding the independence of the judiciary. By providing an in-depth assessment of the Montenegrin judiciary, CeMI aims to contribute to a better understanding of the current state of judicial independence and the efforts required to improve implementation of the reforms.

1. THE MONTENEGRIN JUDICIARY: LEGAL AND INSTITUTIONAL BACKGROUND OF JUDICIAL INDEPENDENCE

Montenegro initiated judicial reforms in 2000. Since then, the country has adopted several strategic documents aimed at establishing an independent judicial system that serves its citizens. The first concrete step in that direction was the adoption of the 2007 Constitution, which established the Judicial Council as a key constitutional body for protecting judicial independence. Prior to this, the Judicial Council functioned as an administrative body with a mere consultative role in the process of appointing judges, which was one of the primary competencies of the Montenegrin Parliament. The 2007 Constitution envisaged the responsibility of judicial appointments from Parliament to the Judicial Council, transforming it into the central institution responsible for overseeing the appointment of judges in Montenegro. However, the Constitution still contained provisions that did not guarantee the full independence of the judiciary, such as the provisions regulating the composition of the Judicial Council and the provision to which the Parliament is exclusively competent for the election of the President of the Supreme Court.

Shortly after the opening of negotiations with the EU, Montenegro had to enter into harmonization of the overall legal framework guaranteeing judicial independence with international standards. The first step in that direction was a comprehensive revision of the Constitutional provisions on judiciary. During the consultative process with the Venice Commission, it was proposed to Montenegro to revise procedure for the appointment of the President of the Supreme Court and to change the composition of the Judicial Council in order to create 'an adequate balance.' In addition, the Venice Commission proposed changes to the legislation (the Law on Judicial Council and Judges) in relation to the competencies of the Judicial Council; the transparency and effectiveness of disciplinary proceedings against judges; the composition of the disciplinary panel inside the Judicial Council; the existence of better remedies for victims of judicial misbehavior and the improvement of the processes of appointment of judges.¹

Addressing these recommendations was a key political task before Montenegro in order to open accession negotiations with the EU in Chapter 23. In July 2013, Montenegrin Parliament adopted amendments to the Constitution – related to judiciary, which have been assessed by the EU as 'broadly in line with the Venice Commission recommendations.'² EU further noted that the amendments strengthened the independence of the judiciary by reducing political influence on the appointment of prosecutors and high-level judicial officials through more transparent and merit-based procedures, and qualified majority thresholds where parliament is involved. The main Constitutional reforms included the following:

- Appointment and dismissal of the President of the Supreme Court – according to the adopted Constitutional amendments, the President of the Supreme Court of Montenegro is appointed by the Judicial Council by a two-third majority, thus avoiding 'the political

¹ See more: Opinion 626/2011 Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)010-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)010-e)

² In addition to the new provisions that strictly concern judicial independence, the provisions on the appointment of judges of the Constitutional Court and the appointment of the Supreme State Prosecutor have been revised. These provisions will not be assessed in this paper, because their more detailed reasoning deserves separate analysis and legal observations.

intervention of the Parliament.' By this decision, all judicial appointments have been transferred from Parliament to the competence of the Judicial Council.

- New composition and competences of the Judicial Council – according to the adopted Constitutional amendments, the Judicial Council's composition has been changed. The Council has a president and nine members. The members of the Judiciary Council are the President of the Supreme Court (ex officio), four judges elected by the Conference of Judges, four eminent lawyers that are elected by the Parliament (2/3 majority in the first round of vote and 3/5 majority in the second round of vote) and Minister of Justice (ex officio). According to the new constitutional solution, the Judicial Council's President is elected from among its members who do not perform judiciary functions.

The proposed changes to the Constitution were adopted with the aim of contributing to depoliticizing the judiciary. For the first time, the Parliament was left without the competence to elect the President of the Supreme Court. Reaching a qualified majority was a necessary formal precondition to elect four lay members of the Judicial Council, thus ensuring the participation of the opposition in their selection process. This was a compromise solution that was supposed to encourage periodic political consultations on key judicial appointments. In accordance with the newly adopted rules, in 2014 the Parliament appointed new members of the Judicial Council. However, their appointment did not secure full depoliticization of the Judicial Council as two former political officials and members of the Parliament from Democratic Party of Socialist (DPS) and Socialist People's Party (SNP) were elected to the first composition of the Judicial Council after the revision of the Constitution.

It should be highlighted that reaching the required two-thirds majority for the election of members of the Judicial Council has become a problem since 2018. Since then, due to the parliament's inability to reach an agreement, three lay members of the Judicial Council continue with their mandate even though it has formally expired. A temporary anti-deadlock mechanism introduced in 2018 by the amendments to the Law on Judicial Council and Judges continues to be applied, enabling prolongation of the mandate to three lay members with questionable Constitutional grounds. In addition, the Council of Europe's anti-corruption monitoring body GRECO has raised concerns about judicial independence and proposed 'taking additional measures to strengthen the independence of the Judicial Council, real and perceived, against undue political influence.' It was recommended to "abolish the 'ex officio' membership of the Minister of Justice in the Judicial Council. For several years now, the European Union has also insisted on the implementation of this GRECO's recommendation within the framework of the negotiation chapter 23. However, it seems that there is no clearly expressed political will to implement it.

The constitutional amendments were a prelude to a detailed revision of the organizational judicial legislation – primarily the **Law on Judicial Council and Judges**³, which regulates the status of judges, their rights and obligations, as well as establishing a new framework for disciplinary and ethical responsibility of judges. The Law sets out the competencies of the Judicial Council and introduced new procedures on appointment and promotion of judges, rules on horizontal transfer of judges, and a new system of professional appraisal of judges aligned with European standards. In addition, new system of ethical and disciplinary liability and new system of initial and in-service judicial training were introduced. The Law was enacted in 2015 and has been amended several times since then. The most controversial

³ "Official Gazette of Montenegro", no. 11/2015, 28/2015 and 42/2018)

changes to the Law on the Judicial Council were adopted in 2018. These changes provided that 'the president and members of the Judicial Council from the ranks of eminent lawyers, whose mandate is terminated due to the expiration of the time for which they were elected, continue to perform their duties until the election of new members of the Judicial Council from of the rank of eminent lawyers.' According to these amendments it is possible to extend the mandate to existing Council's members from the ranks of eminent lawyers indefinitely, although the Constitution limits their term of office to four years. Three lay members of the Judicial Council are currently in their ninth year in office.

The Law on Courts regulates establishment, organization and jurisdiction of courts, organization of work of courts and judicial administration, as well as other issues of importance for the orderly and timely functioning of the court system in Montenegro. The Law on Courts enshrines the principle of judicial independence so that, in performing their duties, judges are bound to abide only by the Constitution, laws and international treaties. Montenegro's court system is consisted of basic courts, high courts, the Appellate court and the Supreme Court. There are fifteen basic courts in Montenegro, and they are responsible for resolving disputes and hearing cases at the first instance. Basic courts have jurisdiction over civil and criminal cases. There are two high courts in Montenegro, located in Podgorica and Bijelo Polje. High courts are second-instance courts, and they decide on appeals against decisions made by the basic courts. High courts have jurisdiction over both civil and criminal cases. The Appellate Court is located in Podgorica, and it has jurisdiction to decide on appeals against first-instance decisions of higher courts, as well as appeals against decisions of the Commercial Court. The Supreme Court of Montenegro is the highest court. It is responsible for ensuring the uniform application of the law and resolving disputes between the different courts in Montenegro. It has jurisdiction over all types of cases, including civil, criminal, and administrative. In addition to the regular courts, Montenegro also has specialized courts, such as the Administrative Court, which decides on cases related to administrative law, and the Commercial Court, which decides on commercial disputes. By amendments to the Law on Courts, which entered into force in 2015, three misdemeanor courts located in Podgorica, Bijelo Polje and Budva have been established.

In addition to the Law on Judicial Council and Judges and the Law on Courts and **the new Law on Centre for Training in Judiciary and State Prosecution Service** has been adopted in 2015, providing new institutional set up and organization of initial and in-service education of judges. The training of judges and prosecutors in Montenegro is overseen by the Centre for Training in Judiciary and State Prosecution Service (JTC), which is an independent institution. The JTC is responsible for designing and implementing training programs for judges and prosecutors at all levels, including initial and in-service training. The initial training for judges is organized by the JTC in cooperation with the Judicial Council. The basic training lasts for 18 months and includes both theoretical and practical components. During this period, candidate judges are introduced to the legal system of Montenegro, as well as various legal procedures and practices. In addition to the initial training, judges are required to undergo continuous training throughout their careers. The JTC organizes various seminars, workshops, and other training activities to help judges keep up to date with the latest developments in the law and improve their skills. According to the Law, the budget of the JTC is set in the amount of 2% of the overall judicial budget. In the latest Annual Report on Montenegro, the EU highlighted that JTC's administrative, managerial, strategic planning, communication and financial management capacities are still to be improved, adding that the allocated budget of the JTC in 2022 (437 754 EUR) is still below the legally established threshold.

The European Union has an overall positive assessment of the legal framework of Montenegro, which guarantees the independence of the judiciary. This conclusion was stated in almost all annual reports after the opening of accession negotiations in chapter 23. Following the adoption of constitutional amendments, all the laws in the area of judicial system have been aligned with European standards. The latest EU Report on Montenegro highlights concerns 'over the institutional performance and consolidation of independent Judicial Council'. In addition, the Report underlines that although the legal framework guaranteeing judicial independence is in place, the justice system continues to be perceived as vulnerable to political interference. With the lack of political commitment to judicial reforms of the Ministry of Justice, which is also recognized by the EU, it is no surprise that judicial reforms are stagnating and that the degree of trust of citizens in the work of judicial bodies is not at an enviable level. In the following paragraphs of this paper, the focus will be on the practical implementation of standards of judicial independence, pointing out the critical points on which the fulfillment of criteria for EU membership will depend in the coming period.

2. FUNCTIONAL CHALLENGES OF THE JUDICIAL INDEPENDENCE IN MONTENEGRO

This section provides an assessment of the institutional performance on judicial independence in the country. This refers to an analysis of factors such as the institutional performance of the Judicial Council, appointment of judges in line with the newly adopted system, management of judicial resources available to the judiciary and overall public confidence in the justice system.

2.1. STRUCTURAL DILEMMAS: THE COMPLEXITIES OF ENSURING THE JUDICIAL COUNCIL'S INDEPENDENCE

The Judicial Council is an administrative body responsible for the effective management, coordination, and administration of a judicial system. While the specific functions and responsibilities are established by the Constitution and the Law on Judicial Council and Judges, the primary role of a Judicial Council (hereinafter: the Council) is to provide oversight, guidance, and support for the implementation of standards of judicial independence. The Judicial Council of Montenegro is established as an independent and autonomous institution which ensures the independence, autonomy, accountability and professionalism of the judicial system. According to the legal competences, the Council is in charge to appoint and dismiss judges and court presidents; to present to the Parliament Annual report on the overall situation in the judiciary; to proposed to the Government budget necessary for the regular functioning of the judiciary; to ensure the use, functionality and uniformity of the judicial information system; to consider complaints on the work of judges and court presidents; to conduct procedure of professional appraisal of judges; to provide opinions on draft regulations in the field of judiciary etc.

The Council is consists of 10 members. The President of the Supreme Court and the Minister of Justice are ex officio members of the Council, while eight other members of the Council are four judges elected by the Conference of Judges and four eminent lawyers elected by the Parliament of Montenegro. In the recent period, the work of the Council was burdened by frequent functioning with an incomplete composition. Only since August of 2022, following the appointment of new members of the Council from the ranks of judges, has the Council been functioning in full composition. Nevertheless, the presence of some members of the Judicial Council can be problematized from the aspect of constitutional principles. This refers primarily to three lay members whose mandate expired in 2018, the acting President of the Supreme Court and the Minister of Justice. Given that we provided a brief analysis of the constitutional background of the mandate of three lay members in the previous chapter, in this chapter we will briefly focus on the mandate of the Acting President of the Supreme Court and the Minister of Justice, as members of the Judicial Council.

President of the Supreme Court is a member of the Judicial Council 'ex constitutionae'. However, having in mind that former President of the Supreme Court resigned in December 2020, since then, this position is vacant. The Judicial Council has already failed to elect a new president of the Supreme Court so far, nominating acting President from the rank of

judges of the Supreme Court in two occasions. This situation opened a legal dilemma, can the acting President of the Supreme Court be appointed as a full member of the Judicial Council? Considering that the Council operates regularly and facing the challenge of a lack of members to work, it nevertheless decided to recognize the status of a member of the Acting President of the Supreme Court. This decision seems to have contributed to the necessary functionality of the Council. However, as the Venice Commission stated in its recent opinion, situations in which the temporary state turns into a permanent state should be avoided. It seems quite appropriate that the Judicial Council in this part should limit the mandate of the Acting President of the Supreme Court to a certain period of time.

Issue related to the membership of the Ministry of Justice in the Judicial Council has been problematized by GRECO. In its fourth evaluation Report on Montenegro, GRECO highlighted that it has reservations as to the *'ex officio'* participation of the Minister of Justice as a member of the Judicial Council 'more given past claims of politicisation of the judiciary in Montenegro'. GRECO underlined that according to the Opinion No.10 (2007) of the Consultative Council of European Judges, members of the Judicial Council should not be active politicians, in particular members of the government.⁴ In recent years, Montenegro has failed to address this GRECO recommendation. The EU also indicates in its reports that the presence of the Minister of Justice in the Judicial Council is not in line with the standards of independence of the judiciary. In the last report from October 2022 the EU highlights that the Judicial Council's independence from undue political influence, due to the *ex officio* participation of the Minister of Justice, as identified by the GRECO, is yet to be strengthened. It has to be noted that in the first four months of 2022, 12 Council's sessions were held without the presence of the Minister of Justice, because former Prime Minister Krivokapic refused to participate in the work of the Judicial Council in the capacity of the Minister of Justice. He justified his decision by referring to the recommendations of GRECO, on the need to reduce the influence of the executive power on the work of the Judicial Council. This is a good example of how politicians can demonstrate by their example that they are ready to take a political position on the issue of protecting the independence of the judiciary.

2.2. MOVING FORWARDS OR STAGNATING: REFORMS TO THE JUDICIAL APPOINTMENT PROCESS

The Judicial Council of Montenegro is the primary body responsible for the appointment of judges in the country. It sets guidelines, rules, and regulations on the appointment of judges. The process of selecting and appointing judges in Montenegro has undergone significant changes in recent years, with the aim of enhancing transparency, impartiality, and public trust in the judicial system. In previous period, the appointment process of judges faced several challenges, including allegations of political influence, nepotism, and lack of transparency.

Following legislative changes in 2015, the Council introduced significant procedural reform by introducing uniform nationwide application system for judicial recruitments. Previously, the recruitment process was implemented for specific vacant judicial positions in the specific courts. In many instances, it was known in advance which candidate would be selected as a judge for a specific court. Since 2015, the appointment process for judges begins with a national public call for applications. Candidates must meet specific eligibility requirements, such as having a law degree, passing the state and the bar exam, and possessing relevant work experience in the legal field. The Judicial Council evaluates the candidates based on

⁴ Opinion No.10 (2007) of the Consultative Council for European Judges on the Council for the Judiciary at the service of society. Available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf

their qualifications, experience, and professional achievements. In addition to these criteria, the Judicial Council conducts interviews with the candidates to assess their suitability for the position. During the interviews, the Council examines the candidates' professional background, knowledge, communication skills, ethical standards, and problem-solving abilities. Once the interviews are completed, the Judicial Council prepares a ranked list of candidates based on their overall performance. Successful candidates are then deployed to initial training in the JTC that lasts 18 months. Following completion of initial training, appointed judges are assigned to courts throughout Montenegro.

After five years of implementing the new system of judicial appointments, the Judicial Council's practices have shown improvement, although certain challenges persist. According to research conducted by NGO Human Rights Action, that monitors the Council's work, a positive shift has been observed in the execution of the interview process, ensuring complete transparency in the selection procedure. Additionally, progress has been noted in the area of selection decisions. However, challenges remain concerning the promptness of appointing judges following their initial training, which lasts several months.⁵ Cases of undue influence on the process of selecting judges were not observed.

2.3. DEBATE SURROUNDING THE APPOINTMENT OF COURT PRESIDENTS

The Constitution of Montenegro (Article 124/5) stipulates that a person may be elected as the president of the Supreme Court no more than two times. Furthermore, according to the Law on the Judicial Council and Judges (Article 42(1)), no one may be elected as president of the same court more than twice. These legal provisions came into the public spotlight in 2019 when the Judicial Council decided to elect the former president of the Supreme Court and several other court presidents, who had already served the maximum of two mandates at the head of their respective courts, for an additional mandate.⁶ Some of the elected court presidents were elected for their eighth or fifth term in office.⁷

The EU directed sharp criticism at the Judicial Council regarding these controversial decisions. In the 2019 'Non-paper' on the state of play regarding chapters 23 and 24 for Montenegro, the EU has highlighted that senior appointments in the judiciary in the course of 2019, such as the re-appointment of the President of the Supreme Court for a third mandate despite the Constitutional limitation of two terms and re-appointments of court presidents raise concerns with regard to Judicial Council's interpretation of the Constitution and the applicable legislation.⁸ In the 2020 Report, the EU noted that a total of seven court presidents had been elected using the Council's concerning interpretation of the Constitution. Relevant NGOs also expressed reservations about this decision by the Judicial Council, asserting that the Council had grossly violated the Constitution. "We may only conclude that the Constitution had been abolished and to warn the public that instead of the rule of law what we have is rule of political power, overriding general interest for personal gain" the open letter of the NGOs underlined.⁹

Venice Commission standards suggest that limiting the terms of court presidents can promote

⁵ See more: Analysis of the system of appointment, promotion and judicial accountability in 2022, Human Rights Action, available at: <https://www.hracion.org/wp-content/uploads/2022/10/Analiza-postupaka-izbora-sudija-u-CG-2022-5.pdf>

⁶ Besides President of the Supreme Court, Presidents of the Basic Courts in Podgorica, Bar, Rozaje and Kotor were elected.

⁷ See more: <https://www.hracion.org/2020/11/24/sudski-savjet-opet-izabrao-vuckovica-na-8-mandat-uprkos-zakonskom-ogranicjenju/>

⁸ EC 'Non-paper on the state of play regarding chapters 23 and 24 for Montenegro', November 2019

⁹ See more: "Third selection of Vesna Medenica grossly violates the Constitution" available at: <https://institut-alternativa.org/en/third-selection-of-vesna-medenica-as-president-of-the-supreme-court-grossly-violates-constitution/>

accountability among elected officials by helping to prevent inappropriate concentrations of power. Due to pressure from the EU and internal political actors, including the Minister of Justice, the former President of the Supreme Court, Ms. Medenica, resigned in December 2020 after 13 years in the position. In her letter of resignation, she emphasized that she provided a “personal seal for the resolution of the issue concerning the election of the President of the Supreme Court.” In 2022, Ms. Medenica was arrested on charges of suspected abuse of office and involvement in a criminal organization. For two years now, the Judicial Council has been unable to elect a President of the Supreme Court, which jeopardizes the functioning of the judicial system and the independence of the judiciary. Finally, although there have been no recorded examples of court presidents being elected for more than two terms in recent two years, it should be noted that three court presidents are still in office, having been elected contrary to the spirit of the Constitution. In the absence of willingness to dismiss them from their roles, the Judicial Council will likely wait for their retirement to ‘remove’ them from office.

2.4. PURIFYING THE JUDICIARY: JUDGE RETIREMENT AS A CLEANSING MECHANISM

In Montenegro, the retirement of judges is not specifically regulated by the Constitution or the Law on the Judicial Council. Article 121 of the Constitution stipulates that the duty of a judge shall cease, among other reasons, when they fulfil the requirements for old-age retirement. The interpretation of the legal conditions for old-age retirement of judges has been disputed since the 2020 Law on Pensions Insurance lowered the general age requirement for acquiring the right to a pension, deviating from provisions in the general labour law. The Judicial Council’s initial position was that “the general Law on Pensions does not apply to judges,” and they were not ready to define their legal position on this matter until the Council’s request for a review of the constitutionality of the Law on Pensions is resolved by the Constitutional Court. However, following changes in the Council’s composition during 2021, the Council decided to set a precedent and terminate the mandates of 27 judges in September 2021, according to their interpretation of Article 17 of the Law on Pension and Disability Insurance. It is worth noting that these events occurred after the change of government in Montenegro following the parliamentary elections in 2020.

Governments or judicial councils may manipulate the retirement age of judges in order to remove judges who are deemed to be a political or ideological threat, or to install judges who are seen as more favourable. This can result in a politicized judiciary, which can undermine the rule of law and lead to unfair or biased decisions. Judges may be pressured or coerced into retiring early, particularly if they are deemed politically inconvenient or critical of the government. This can undermine the independence of the judiciary and lead to a loss of public trust in the judicial system. The decisions of the Judicial Council regarding the retirement of judges are currently under review by the Administrative Court. In January 2023, the Administrative Court overturned the Judicial Council’s decision to terminate the service of Supreme Court Judge Vujanovic at the age of 64, describing it as “discriminatory.” The Council accepted the Administrative Court’s ruling and returned Judge Vujanovic to work. However, only a few days later, the Council terminated the service of another Supreme Court Judge, Simonovic, repeating the same legal positions from the Council’s earlier decisions and directly violating the Administrative Court’s decision in the ‘Vujanovic case.’ This type of legal uncertainty and arbitrariness in the work of the Judicial Council directly threatens the independence of the judiciary.

In the meantime, consultations are ongoing on the revision of the Law on Judicial Council and Judges. The Judicial Council proposes the Amendments to the Law on Judicial Council and

Judges, stipulating that all judges, regardless of gender, meet the retirement conditions at the age of 66, with the exception of female judges who request themselves to exercise the right to retire earlier. However, the Ministry of Justice is not yet ready to accept this proposal. In its last opinion on the draft Law on Judicial Council and Judges, the Venice Commission highlighted that the work-related rights of the judges, such as the right to an adequate salary, or their retirement age, should be clearly regulated by the Law, due to the specificity of the rules applicable to the judiciary, the judges' special status in the society and to protect and uphold the basic principle of judicial independence. The Venice Commission urged Montenegro to introduce provisions work-related rights of the judges in the Law, recalling that judges cannot be equated to civil servants. "They(judges) have a special status and perform a unique and fundamental constitutional function. It is therefore fundamental to preserve the specificity of the rules applicable to the judiciary, in order to protect and uphold the basic principle of judicial independence," the Venice Commission concludes.

2.5. THE CORRUPTION OF JUDICIAL INTEGRITY: SECRET LOANS AND APARTMENTS FOR JUDGES

Judicial financial independence is a crucial component of an impartial and professional justice system. However, if it is not properly monitored and regulated, it can create a risk of potential government abuse. Financial independence allows the judiciary to make decisions without fear of repercussions or undue influence from other branches of government. For example, in Montenegro where the government is the sole provider of judicial funding, it may use this financial leverage to influence the work of courts or individual judges, thereby compromising the impartiality of the judiciary.

For years, the executive power in Montenegro, led by the former Democratic Party of Socialists (DPS), has exerted undue political influence on the judiciary through secret decisions to grant favourable loans and apartments to judges. In a non-transparent procedure, judges have been awarded apartments for 20% of their estimated value, as well as financial assistance for settlement housing needs.¹⁰ Although the Law on Housing and Maintenance of Residential Buildings explicitly ruled out the possibility of regulating the housing needs of judges and state prosecutors in 2014, former DPS-led governments continued to apply this practice for years. Solving the housing needs of judges is a key responsibility of the Judicial Council, which adopted a Rulebook in 2014 on the criteria and manner for resolving the housing needs of judges. However, the Council remained completely silent on the Government's practice of awarding apartments and loans on favourable conditions to judges through the decisions of its Commission. In 2021, the National Council for the Fight against High-Level Corruption presented cases of senior judicial officials who received apartments and loans on favourable terms contrary to the law, noting that documents were classified as "internal".¹¹ The 2021 EU Report on Montenegro assessed that the reports on state-sponsored apartments or loans under favourable conditions granted by previous governments to members of the judiciary, including senior officials and those handling politically sensitive cases, continue to raise concerns.

The judiciary should be financially self-sufficient and free from influence from other branches of government in matters related to its financial management. This means that the judiciary

¹⁰ See more: NVO MANS, "Stambena politika Vlade – primjeri kršenja zakona i procedura", V. Čalović Marković, 2021 available at: <https://www.mans.co.me/wp-content/uploads/2021/04/Vanja-Calovic-Markovic-prezentacija-stanovi.pdf>

¹¹ See more: <https://www.gov.me/en/article/calovic-markovic-abazovic-judges-prosecutors-and-mps-received-apartments-and-favourable-loans-under-a-veil-of-secrecy>

should have control over its own budget and financial management, without being subject to undue influence from the Government or the Parliament. In Montenegro, the government is deciding on the budget proposal for the judiciary, while the Parliament adopts it, with very little room for intervention by the judicial branch of power represented by the Judicial Council. In the budget proposal procedure, the Judicial Council is only the proposer, while the final decision on the budget depends exclusively on the Government and the Parliament. This constantly creates a risk of interference with the financial independence of the judiciary. Consequently, judicial dependence on government funds is creating an environment in which Montenegrin key judicial institutions and stakeholders are susceptible to political/government influence.

2.6. THE STRUGGLE FOR JUDICIAL ACCOUNTABILITY: WHY PROGRESS REMAINS ELUSIVE

Judicial accountability is an essential component of any democratic system. It ensures that judges are held responsible for their actions and decisions, and that citizens can trust in the fairness and impartiality of the judicial system. However, in Montenegro, the pursuit of judicial accountability has been challenging, with limited results overall. While there are formal mechanisms for holding judges accountable, such as ethical and disciplinary procedures and oversight by the Judicial Council, these mechanisms have been rarely used in practice. The EU is constantly highlighting ineffectiveness of judicial accountability mechanisms. The last EU country Report on Montenegro noted that the promotion and enforcement of codes of ethics and disciplinary accountability standards and procedures for judges and prosecutors remain limited. Further improvements and effective enforcement of the judicial inspection system are needed, including more thorough and unannounced inspections.

Reports of bribery and nepotism are constantly raising questions about the impartiality of the judiciary. During the past year, the judicial system was hit by several corruption scandals that resulted in the criminal prosecution of several current and former key judicial stakeholders (former President of the Supreme Court and President of the Commercial Court) and judges. The overall image of the judiciary in the public is damaged, and the degree of trust of citizens in the work of the courts has reached its lowest point. According to research conducted by the Centre for Monitoring and Research (CeMI) in 2022, over half of citizens (51.6%) do not trust the judiciary.¹²

The 2015 revised Law on judicial Council and Judges introduced a new disciplinary and ethical liability system for judges. However, according to some expert assessments, the problem of inadequate legal framework in the area of judicial accountability are still present. The descriptions of ethical and disciplinary misbehaviours do not contain substantive differences. More specifically, the difference between different types of judicial misconducts is 'not insignificant' because the disciplinary violations imply serious sanctions, unlike the violations of the Code of Ethics for judges, which are practically unpunishable.¹³

The ethical and disciplinary systems for judges in Montenegro have proven to be ineffective. In 2022, 37 disciplinary proceedings were conducted to determine the disciplinary responsibilities of judges. Of these, 35 proposals for disciplinary misconduct were rejected as unfounded,

¹² See more: <https://mina.news/arhiva/gradani-najmanje-vjeruju-partijama-najvise-zdravstvenom-sistemu/>

¹³ See more: <https://www.hraction.org/wp-content/uploads/2022/10/Analiza-postupaka-izbora-sudija-u-CG-2022-5.pdf>

while two procedures remain ongoing. Meanwhile, the number of judges who violate the Law on Prevention of Corruption has been increasing year after year. In 2022 alone, the Agency for Prevention of Corruption (APC) found 11 judges violating the Law on prevention of corruption by failing to provide complete and accurate information about their assets and income. In some cases, court presidents failed to propose disciplinary action for judges who violated the law based on the decisions of the Agency for the Prevention of Corruption. Consequently, none of these judges was found to be responsible in the disciplinary proceedings in front of the Judicial Council related to this issue.¹⁴

2.7. THE CONSEQUENCES OF POLITICIANS' STATEMENTS THAT UNDERMINE JUDICIAL INDEPENDENCE

In recent times, particularly since the change of government in 2020, there have been numerous instances of high-ranking political officials making statements that undermine the independence of the judiciary. In some cases, the criticism was directed at the overall judicial system and the state of the judiciary, while in other instances, specific judges and their court decisions were targeted. However, the Judicial Council, courts, Constitutional Court, the Agency for the Prevention of Corruption, and competent NGOs have established a commendable practice of publicly condemning political decisions that threaten the independence of the judiciary. Despite the absence of concrete legal mechanisms to protect the integrity of the judicial system and judges in decision-making, these institutions and civil society organisations have effectively reprimanded politicians whose statements have put undue pressure on the independence of the court and judges.

The most notable examples are:

- The current Prime Minister of Montenegro, Abazovic, made a statement in which he accused Judge Basovic of 'releasing criminals and arresting the state.' He also suggested that Judge Basovic bears direct professional and moral responsibility if any of the released criminals commits any criminal offense, particularly assassination, while on the run. Following this statement, the Judicial Council publicly condemned Abazovic's comments, emphasizing that they undermine the independence of the judiciary.¹⁵ In addition, the Human Rights Action (HRA) protested against the pressure exerted on the court by the statements of Abazovic. "By harshly criticising the judge's decision, and furthermore essentially accusing the judge of working for the mafia, Abazovic exerted inappropriate pressure on the court... This attack is made even more outrageous bearing in mind that Judge Basovic has for years represented a bright spot in the Montenegrin judiciary both in terms of the quality of his decisions and with regard to personal integrity. We appeal to Mr. Abazovic and all other representatives of the executive and legislative authorities to act in accordance with democratic standards and to respect the principle of separation of powers and independence of the court, as well as the human right to personal liberty and a fair trial. HRA strongly opposes the populist stance that all judges and prosecutors in Montenegro are corrupt, and that any decision which does not suit the authorities is used to support this argument." HRA concluded.¹⁶
- The former Minister of Justice, Leposavic, made a statement regarding the ongoing second-instance proceeding in the case of a "coup attempt" involving two former opposition

¹⁴ See more: <https://www.hracion.org/wp-content/uploads/2022/10/Analiza-postupaka-izbora-sudija-u-CG-2022-5.pdf>

¹⁵ See more: <https://pravosudje.me/sdsv/sadrzaj/NNkR>

¹⁶ See more: <https://www.hracion.org/2021/04/25/protest-against-pressure-of-the-deputy-prime-minister-on-court/?lang=en>

leaders who are now part of the ruling majority. Leposavic suggested that if the two political leaders are finally convicted, an “Amnesty Law” could be adopted. He also claimed that, in his opinion, the case is “ready for retrial”. The Agency for the Prevention of Corruption (APC) responded to these comments by issuing an opinion that highlighted the undue political influence on the independence of the judiciary by the former Minister of Justice. The APC emphasized that the Minister’s statements endangered the public interest and pointed to the existence of corruption. This opinion represents an essential institutional response to inappropriate political statements that undermine the independence of the judiciary: “Leposavic, instead of respecting and strengthening the independence and impartiality of the judiciary, abused the position of the minister,” the APC concluded.¹⁷

- The Vice President of the Democratic Party of Socialists (DPS) and Mayor of Podgorica, Vukovic, made a statement about a decision made by the Administrative Court regarding his election as Mayor. Namely, during the session of the local Assembly, Vukovic stated that he never criticizes any state institution. “This would be a precedent. That court never makes judgments in an interval of less than three to six months. At the Administrative Court, you have requests from the Capital Podgorica that are two years old and are not being acted upon. For the first time in the practice of that Court, after an oral hearing, they made a decision on the same” he said adding that the Court’s decision was “was a direct interference in the election process and a violation of the law” announcing criminal charges against the judges of the Administrative Court”. The Judicial Council responded that such political comments on the decision made by the court put undue pressure on the independence and impartiality of the court and judges. “We would like to remind everyone of the importance of the constitutional principle of the separation of powers, and the valid principles of the judiciary, which states that the court is autonomous and independent,” the Council concluded.¹⁸
- Statement by the current Minister of Justice Kovac in his capacity as a member of the Judicial Council regarding the Administrative Court’s decision which annulled the decision of the Judicial Council on retirement of one of the judges of the Supreme Court of Montenegro: “This decision represents a classic example of corporatism as an extremely malignant phenomenon that must not be present in the judicial system of a democratic society that pleads for respect for the rule of law. We have a striking example of judicial decision-making, which in itself indicates the need to review the responsibility of all judges, bearing in mind the content of such decisions. As a member of the Judicial Council, I believe that it is necessary to make an identical decision regarding the termination of the judicial function, despite this, in my opinion, scandalous decision of the Administrative Court.” The Judicial Council responded promptly to this statement by the Minister, emphasizing that ‘Minister’s statement is not the position of the Judicial Council’ and that by reacting publicly, the Council strives to protect the public’s trust in the judiciary from what is essentially a political attack that causes incalculable damage.¹⁹

17 See more: https://www.antikorupcija.me/media/documents/Mi%C5%A1ljenje_Agencije_br_03-01-89-4-20.pdf?fbclid=IwAR09UJjWpMcX1EvJtXLFxXTJ03-SB3tslseHKpQsFfrqoKE7qu-zpY27pes

18 See more: <https://pravosudje.me/sdsv/sadrzaj/rBdl>

19 See more: <https://sudovi.me/sdsv/sadrzaj/LnXq>

3. ASSESSING THE PROSPECTS FOR JUDICIAL INDEPENDENCE IN MONTENEGRO: PERSPECTIVES AND POLICY RECOMMENDATIONS

The EU accession process involves a rigorous assessment of Montenegro's progress in implementing judicial reforms. By making sustainable progress on judicial reforms, Montenegro must demonstrate its ability to meet the requirements for EU membership in Chapter 23. The revised enlargement methodology places a strong emphasis on the independence of the judiciary as a core element of the rule of law reforms and sets out a clear roadmap for Montenegro to make progress towards meeting the interim benchmarks (IBMs) for EU membership. According to the revised enlargement methodology, progress in Chapters 23 and 24 is considered a pillar of the accession negotiations. The EU has defined 45 interim benchmarks (IBMs) for Montenegro in Chapter 23, with following interim benchmarks related to the independence of the judiciary:

- IBM 1: *Montenegro implements constitutional amendments in line with the recommendations of the Venice Commission and European standards and best practices. Montenegro subsequently adopts implementing legislation.*
- IBM 2: *Montenegro establishes an initial track-record of appointments of high-level judges and high-level prosecutors based on transparent and merit-based procedures and substantial qualified majority thresholds where the parliament is involved.*
- IBM 3: *Montenegro establishes an initial track-record of recruiting judges and prosecutors on the basis of a single, nationwide, transparent and merit-based system and ensures that candidate judges and prosecutors undergo obligatory initial training in the Judicial Training Centre prior to their nomination.*
- IBM 4: *Montenegro establishes an initial track record of implementing a fair and transparent system of promoting judges and prosecutors based on periodic, professional performance assessment (including at senior level).*
- IBM 5: *Montenegro strengthens the administrative capacity of the Judicial and Prosecutorial Councils allowing them to perform in a professional, accountable, transparent, and impartial manner their key functions.*

The latest EU Report on Montenegro confirms a stagnation of key judicial reforms. It is now vital for the country's EU process to focus on meeting the IBMs on judicial independence. Success in the implementation of these IBMs will determine the future pace of Montenegro's EU accession negotiations. In the following section of this paper, we will try to outline the key judicial reform activities that Montenegro needs to implement to meet the IBMs for Chapter 23 and to enter the final phase of negotiations with the EU.

RECOMMENDATION 1. Ensuring merit-based key judicial appointments through the Parliamentary procedure (lay-members of the Judicial Council, the Supreme State Prosecutor, and a remaining judge of the Constitutional Court)

Ensuring a transparent and impartial parliamentary process for appointing key judicial

stakeholders, including lay-members of the Judicial Council, the Supreme State Prosecutor, and a remaining judge of the Constitutional Court, is of utmost importance concerning the fulfilment of the interim benchmark 2 - Montenegro establishes an initial track-record of appointments of high-level judges and high level prosecutors based on transparent and merit-based procedures and substantial qualified majority thresholds where the parliament is involved. At the parliamentary level, it is essential to establish a genuine, periodic political dialogue on key judicial appointments. The recent procedure for the appointment of three judges of the Constitutional Court is a commendable practice. Additionally, transparent and impartial nomination and selection procedures, based solely on merit and without consideration given to political affiliation or any other subjective factor of the applicants, need to be established.

RECOMMENDATION 2: Establishing clear qualification requirements for the lay-members of the Judicial Council

At a practical level, Montenegro needs to establish clear qualification requirements and ensure that those are applied consistently and objectively in the nomination and selection process. This is particularly important for the appointment of lay members of the Judicial Council, for which clear criteria should be defined in the Law on Judicial Council and Judges. It is essential to avoid the situation of electing lawyers, such as defence attorneys, to the membership of the Judicial Council, as was the case with the Prosecutorial Council. Electing lawyers to an institution that decides on the rights and duties of judges can compromise the independence of the judiciary. It should be noted that presence of lawyers, as members of the Judicial Council, who can participate in decisions on the appointment, promotion, or disciplinary responsibility of judges, can be abused and be subject to different forms of undue influence.

RECOMMENDATION 3: Improve institutional performance of the Judicial Council

A particular challenge in the coming period will be to ensure the full functionality of the Judicial Council and consistent implementation of the revised legal framework in the area of judicial independence. The EU has expressed concern about the recent institutional performance of the Judicial Council and highlighted that the Judicial Council's long-lasting functioning in an incomplete composition has been undermining its ability to take some important decisions (such as the appointment of the Supreme Court President). It is also noted with concern that Council's frequent delays in the exercise of some important powers has a negative impact on the overall functioning of the justice system.²⁰

Two years ago, the European Union expressed concern regarding the Judicial Council's professional capacity, including their level of commitment and time devoted to fulfilling their duties. Therefore, it is important in the upcoming period to explore ways of enhancing the professionalism of the Council's members. One potential model is for judges elected to the Judicial Council to suspend their judicial functions during their term and devote 100% of their work time to the Council. The current system, which features mostly amateur members with only one professional (the President of the Council), is not a viable long-term solution. In addition, for the regular work of the Judicial Council, new functional premises that will meet the needs of the efficient functioning of the Council should be provided without further delay. The Council does not have its own premises, and often uses the meeting rooms of other

²⁰ See more: EC Montenegro 2022 Report, October 2022. Available at: https://neighbourhood-enlargement.ec.europa.eu/montenegro-report-2022_en

institutions for holding session and meetings. It is necessary to provide adequate financial and spatial capacities for the smooth operation of the Judicial Council.

RECOMMENDATION 4: Revising legal framework on judicial independence

As stated in the 2022 EU Report, Montenegro should avoid reversing earlier achievements in the judicial reforms by addressing in substance all the outstanding recommendations of the Venice Commission and the Council of Europe Group of States against Corruption (GRECO), and by fully and unambiguously implementing the relevant constitutional and legal framework. This EU conclusion is general cohesion with defined IBMs on judicial independence. To meet the EU's IBM 1 for judicial independence (Montenegro implements constitutional amendments in line with the recommendations of the Venice Commission and European standards and best practices; Montenegro subsequently adopts implementing legislation) key stakeholders, primarily Ministry of Justice has to prioritise work on the revision of the legal framework and ensure that it is fully line with the Venice Commission and GRECO recommendations.

RECOMMENDATION 5. Adopting Constitutional amendment to abolish the “ex officio” membership of the Minister of Justice in the Judicial Council

Regarding GRECO's recommendation to strengthen the independence of the Judicial Council and protect it from undue political influence, Montenegro has to **adopt amendments to the Constitution of Montenegro and abolish the “ex officio” membership of the Minister of Justice in the Judicial Council**. By implementing the GRECO recommendation, Montenegro can make significant progress towards meeting the EU's interim benchmarks and accelerate its path towards EU accession. Concerning formal preconditions, next convocation of the Montenegrin Parliament will have to reach necessary 2/3 majority for the adoption of the necessary Constitutional amendment. This will be one of the key priorities and tasks of the new parliamentary convocation formed after the parliamentary elections scheduled for 11 June 2023.

RECOMMENDATION 6. Finalising the process of the revision of the Law on Judicial Council and Judges in line with Venice Commission recommendations

Concerning the revision of the legal framework on judicial independence, the revision of the Law on the Judicial Council and Judges is currently ongoing. The latest amendments to the Law on Judicial Council and Judges were drafted in 2022 with the aim of improving the transparency and independence of the judiciary. Recently, the Venice Commission issued two opinions on proposed amendments to the Law on Judicial Council in which it 'praised the constructive approach of the Ministry of Justice of Montenegro' confirmed overall 'positive assessment of the draft law.' However, according to the Venice Commission certain recommendations still need to be addressed by the Working Group of the Ministry of Justice. Namely, the Venice Commission proposed:

- To regulate the work-related rights of the judges, such as the right to an adequate salary or their retirement age, by the law;
- To reduce the applicability of exceptional anti-deadlock mechanisms, such as the election of the acting president of the Supreme Court 'to equally exceptional events' in order to avoid transforming the exception into the rule;
- To envisage appropriate and tailored evaluation for the judges of the Supreme Court; and
- To provide that the members of the Judicial Council alone are in charge for initiating disciplinary proceedings.

During the finalization of this paper, the work on the Law has not yet been completed by the Ministry of Justice.

RECOMMENDATION 7: Ensuring full implementation of the Law on Judicial Council and Judges

From the perspective of meeting the IBM 3, to which Montenegro establishes an initial track-record of recruiting judges and prosecutors on the basis of a single, nationwide, transparent and merit-based system and ensures that candidate judges undergo obligatory initial training in the Judicial Training Centre prior to their nomination, it is necessary to continue organising nationwide competitions for judges in close cooperation and coordination with the Judicial Training Centre (JTC). It is crucial for the Judicial Council and the Judicial Training Centre (JTC) to coordinate and agree on the timeline for the initial training of judge candidates. This will prevent the creation of multiple generations of trainees within a single calendar year, which could lead to logistical issues and affect the quality of the training program. Therefore, it is necessary to establish a clear plan and timeline for the initial training, taking into account the availability of resources, the number of candidates, and other relevant factors. By doing so, Montenegro can ensure the effectiveness and efficiency of the training process and enhance the quality of judiciary.

RECOMMENDATION 8: Prioritise the appointment of the President of the Supreme Court

The Judicial Council should prioritize appointing a President for the Supreme Court, a position that has remained unfilled for over two years and has consequently hindered the effectiveness and independence of the judiciary.

RECOMMENDATION 9: Aligning appointment of court presidents with Constitutional principles

Appointment of court presidents should align with the constitutional principle that prohibits any individual from serving as president of the same court more than two mandates. This would adhere to European standards and prevent the concentration of power within the judiciary, which poses a significant threat to judicial independence.

RECOMMENDATION 10: Improving the implementation of the system of professional performance assessment of judges

The Judicial Council has to establish a track-record of implementing a fair and transparent system of promoting judges based on periodic, professional performance assessment. In recent years, as concluded by the EU, implementation of the system of regular professional evaluation of judges is affected by Judicial Council's inactivity. In 2021, no judges was evaluated using the regular assessment scheme, while 101 judges were evaluated as part of the promotion procedure. In the process of the revision of the Law on Judicial Council and Judges, special attention should be given to revising assessment criteria for judges. As proposed by Human Rights Action HRA, it is necessary to amend the Article 90, paragraph 2 of the Law on the Judicial Council and Judges so that the quality of the work of judges is assessed also in relation to the decisions of the Constitutional Court of Montenegro and the European Court of Human Rights.

RECOMMENDATION 11: Ensuring a political environment that upholds the principle of separation of powers

Political comments and statements that undermine judicial independence can have a significant impact on the credibility of the judiciary. When politicians make public statements that criticize specific judges or court decisions, it can be perceived as an attempt to exert undue influence on the judiciary and undermine its independence. Such comments can also create a perception among the public that the judiciary is not impartial and is susceptible to political pressure, which can ultimately erode public trust in the judicial system. This can be particularly harmful in countries like Montenegro that are undergoing judicial reforms within the EU accession process. Therefore, it is of utmost importance that politicians, and especially the highest state officials, always respect the principle of separation of powers and acknowledge that the judiciary is an independent branch of power. They should understand that the judiciary has the authority to interpret and apply the law without any undue influence. Additionally, political actors should refrain from commenting on specific cases and avoid making inflammatory or derogatory comments about the work of the courts or individual judges.

