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CHANGES OF PROSECUTORIAL LEGISLATION OF MONTENEGRO IN THE LIGHT OF EUROPEAN STANDARDS ON PROSECUTORIAL INDEPENDENCE AND ACCOUNTABILITY

Following a historic regime change in Montenegro in late 2020, changes to prosecutorial legislation have been initiated in Montenegro in the first half of 2021. The proclaimed aim of the legislative interventions was to tackle the issue of prosecution service being a captured institution, impervious to substantial prosecutorial accountability and reluctant to tackle corruption cases. The paper sets out to examine the extent to which the adopted changes to the Montenegrin Law on the State Prosecution Service are contributing to increased independence of the Prosecutorial Council and accountability of the Prosecutor General in Montenegro, assessing them against the relevant European standards and jurisprudence of the European Court of Human Rights, taking also into account the opinions of the Venice Commission. Using the dogmatic, comparative, and exegetic method, the authors will critically analyse the normative solutions and provide recommendations for their further improvement.

Keywords: state prosecutors, European standards, prosecutorial independence, accountability.

1. INTRODUCTORY REMARKS

The fundamental elements of the rule of law, understood to include the essential elements as proposed by Bingham (Bingham, 2010, p. 8) include existence of an agency or organisation, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts (VC, 2011, para. 57).

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The definition of the public prosecutor, and the core function of the prosecution service vary considerably across different countries (Ilić and Matic Boskovic, 2019: pp. 93-99). In recent years, however, it is notable that prosecutors do not act simply as intermediaries between the police and the courts when deciding on whether or not a case is to be prosecuted, but also have additional powers, including the negotiation of nature and severity of a criminal sanction. (Weigend, 2012). This is why prosecutors, along with judges, have come to be considered by some scholars as a part of a single value chain producing justice, where prosecutors collect information on a case and represent 'the public interest', while it is the task of the judges to question the reliability of the information provided by both suspect and prosecutor and reach a final decision based on that evidence (Voigt and Wulf, 2017). It is therefore argued that due to this interplay between prosecutors and judges, the establishment of a high level of *de facto* judicial independence is a necessary, but not a sufficient condition for ensuring that justice prevails in criminal cases - prosecutors also need to be independent. This shift from the discourse on prosecutorial autonomy to prosecutorial independence is notable in the recent years (Venice Commission 2010, CCPE, 2014, Principle 4, and IACHR, 2015, pp. 157-194), with a recent body of academic research investigating prosecutorial independence and institutional determinants for such independence (Voigt and Wulf, 2019).[57]

Both legal scholars and supranational institutions (Matic Boskovic, Ilic 2019: OECD 2020; Venice Commission, 2010, para. 26) analyse the differences between external independence of the prosecution service from other state powers, and also the individual prosecutors' ability to take decisions without undue influence within the prosecutorial system itself. This paper follows the view on the interrelation between the concept of external independence of prosecution services and individual independence of prosecutors, and that both are needed for the establishment of adequate prosecutorial system that is conducive to the rule of law. Taking as the starting point the literature encouraging "the general tendency to enhance the independence and effective autonomy of the prosecution services", and acknowledging that the independence of the prosecution services constitutes an "indispensable corollary to the independence of the judiciary" (CCPE, 2014, Principle 4), the paper will assess to which extent the fundamental change in prosecutorial legislation, effected in 2021, are in line with this tendency. The issue of prosecutorial independence is of key importance in Montenegro. The reasons for that are manifold.

Montenegro is a country that has implemented the South-European model of the judicial councils, with separate councils for judges and for prosecutors acting as key management bodies responsible for appointing and dismissing judges and prosecutors, respectively. However, the success of these two bodies in ensuring judicial independence has been

[57] A separate body of academic literature analyses the independence from a combined legal-economic standpoint, like Hayo and Voigt (2007) differentiate between two types of factors – those that are not open to policy intervention (e.g. legal tradition of a country, a country's political system) and factors that are open to policy intervention (e.g. degree of press freedom granted, regulations pertaining to prosecutorial authority, etc.), while Garoupa (2012) examines the relationship between institutional setup of the prosecution service and prosecutors' performance, showing that while the common European institutional model minimizes political dependence, it is still susceptible to possible capture by professional self-interests while at the same time struggling with designing incentives to promote performance and accountability.

limited thus far, as evidenced by the Judicial Framework and Independence rating within the Nations in Transit Freedom House Report, including a decline in 2020 from 3.75 to 3.50 out of 7.00. The 2020 EU Commission's Report assessed Montenegro as moderately prepared, with limited progress, whereas the composition of judicial and prosecutorial councils and appointment procedures are classified to be only broadly in line with European standards (European Commission, 2020, 20-21). In addition, the prosecution-led investigation which was introduced for all criminal offences in Montenegro in 2011 puts a strong emphasis on the need for both external and internal prosecutorial independence (World Bank, 2017. p. 30). Without prosecutorial independence, the effective investigation by prosecutors cannot be accomplished as one of its requirements pertaining to independent investigation is not fulfilled (Mowbray, 2002, p. 441).[58]

At the same time, Montenegro is a country that is struggling to effectively tackle corruption. The 2020 report states (European Commission, 2020, p. 26) that Montenegro made limited progress in the fight against corruption, with limited track record on repression and prevention of corruption. The Corruption Perception Index for 2020 places Montenegro, a frontrunner for EU accession, at the 67th place out of 180 countries, with a score of 45/100, outscoring only two EU member states: Bulgaria and Romania. What is more, in Montenegro, corruption is seen to be used by governing elite, not only to enrich itself but also, if not primarily, to prolong its stay in power. (Sotiropoulos, 2017, p 11).Dzankic and Keil (Dzankic and Keil, 2018) have pointed out that political elites in Montenegro feared an independent and well-functioning judiciary, as it threatened their position. Consequently, Montenegro has been categorized by some authors (e.g. Komar, 2020; Vachoudova 2019) as harshly as a captured state, with EU conditionality contributing to such capture.

It is unsurprising therefore that following a historic change of regime in Montenegro at the end of 2020, fight against corruption and related reinforcement of judicial and prosecutorial independence became a focal point of the new Government.[59] The effort can be supported by the findings of the recent academic literature, which shows significant correlations between prosecutorial independence and government accountability, i.e. with a higher probability that government officials suspected of a crime are prosecuted and punished (Gutmann and Voigt, 2019).

However, it should be kept in mind that in addition to legal reasons, there were immediate political reasons for the radical legislative interventions. It seems that such interventions have been motivated not only by the commitment to securing independence of the entire prosecutorial service, but also by conflicts between the ruling elite and the heads of the

[58] For more on the requirements of effective investigation see CCPE Opinion 12 (2017) on the Role of Prosecutors in the Relation to the Rights of Victims and Witnesses in Criminal Proceedings", para. 46. According to the said opinion and the caselaw of the ECtHR, the effective investigation has to be impartial, independent, thorough and sufficient, prompt and subjected to public scrutiny, and it is not *a priori* a question of result but of the means used.

[59] The Government has set Rule of Law and Equal Chances as its No. 1 Key priority in its 2021 Work Programme. This key priority includes, *inter alia*, strengthening independence and impartiality of the judiciary and fight against corruption (Government of Montenegro, 2021).

Special Prosecutor's Office and the Prosecutor General.[60] The underlying reasons for reform can also be interpreted as an attempt to effect a certain degree of discontinuity with the previous regime. Following two iterations of draft amendments aiming to address the said capture of the prosecutorial organization and foster prosecutorial independence and the related opinions of the Venice Commission, amendments to the Law on Prosecution Service were adopted in May 2021.[61]

Although this paper is primarily concerned with legal developments, political circumstances may also be taken into account when they throw a particular light on the causes or quality of undertaken legislative interventions.

The authors will try to address the question whether the change contributed to increased independence of the prosecutorial service or it was an attempt of a quick fix for quick wins that permeate a problematic approach of the legislative and executive powers towards prosecutorial independence. In assessing the prosecutorial independence and accountability the Montenegrin legislative framework, the authors will recourse to relevant European standards including among others the documents of the Venice Commission, of the CCPE and relevant case law of the European Court of Human Rights (ECtHR). On that road, the authors will offer a critical analysis of the new Montenegrin Law on State Prosecution Service (LSPS) using dogmatic, comparative and exegetic method/s and benchmark its solutions against the relevant European standards, focusing on the solutions governing the composition and method of appointment of the Prosecutorial Council, the termination of office of the previous composition of the Prosecutorial Council and the accountability of Prosecutor General.

In this paper, when presenting the relevant European standards, the authors will partly rely on the systematisation used in the Report on the independence and impartiality of the prosecution services in the Council of Europe Member States (2019) edition. While the given systematization is focused on the following three categories: organisational independence of the prosecution service from executive and legislative powers and other actors, functional independence, which entails appointment and security of tenure of prosecutors and Prosecutor General, and impartiality of prosecutors, concentrating on the aspect dealing with disciplinary measures, this paper will primarily deal with organizational independence of the prosecution service. That approach is selected as the recent legislative interventions are mostly set to tackle the issue of organizational independence. In addition, the question of the accountability of Prosecutor General will also be examined given that the new law contains certain improvements in this field. This is of additional relevance

[60] A more detailed account of the political background to the reform can be found in two opinions of the Venice Commission which are focused on reviewing draft amendments (VC, 2021a and VC, 2021b).

[61] The process of adoption of the amendments was criticised as not being sufficiently inclusive and lacking a substantial public debate, even though the Government, following criticism from the Venice Commission for the rushed draft, did organize an open debate on the issue. (HRA, 2021, Government of Montenegro, 2021). The Law on Amendments to the Law on State Prosecutors Service was adopted by the Parliament in April 2021, but were not promulgated by the President, Milo Djukanovic, who returned the Law to the Parliament, invoking the criticisms voiced by the Venice Commission. The Parliament adopted the same Law again, which, under Montenegrin Constitution (Article 94, paragraph 2), means that the President must promulgate it (National Assembly of Montenegro, 2021).

given that the Prosecutor General acts as a President of the Prosecutorial Council which is mandated with the key role in fostering the organizational independence of prosecutors.

2. COMPOSITION OF THE PROSECUTORIAL COUNCIL IN MONTENEGRO AND METHOD OF APPOINTMENT OF ITS MEMBERS

Assessment of the overall accomplishments of the most recent legal amendments of the LSPS requires a clear identification of points of departure as well as of constitutional obstacles which undermine further developments pertaining to the composition of the Prosecutorial Council and method of appointment of its members. Therefore, a short overview of the relevant legislative history and constitutional provisions will be provided. Subsequent to that, the most recent legislative interventions governing the composition of the Prosecutorial Council and method of appointment of its members will be examined and critically assessed.

2.1. Legal Solutions relevant for the Composition of the Prosecutorial Council and the Method for Appointing its Members before Legislative Amendments of 2021

It should be noted that Montenegro had recognised the institution of a judicial council as early as 1991 (Law on Regular Courts) with important competences in the field of human resource management in the courts (Knežević, 2003, p. 193). Following a strong push for the clear positioning of judicial power as an independent branch of power, Montenegro has introduced a judicial council, with a considerably changed composition and wider competences in 2002 (Law on Courts, 2002). This council was based on the South-European model, a choice that was common for the Western Balkan countries at the time. Following the referendum on Montenegro's independence in 2006, a new Montenegrin Constitution was adopted in 2007 and subsequently amended in 2013 within the larger framework of the EU accession process and the demands for securing more independence for the judiciary (judges and prosecutors alike). The 2013 constitutional amendments introduced a separate Prosecutorial Council followed by the relevant changes to the legal framework in 2015. Sturanovic criticised those reforms as not being sufficiently in line with the relevant *acquis* requirements (Sturanović, 2017). Also, the method of appointment of members of the Prosecutorial Council did not provide sufficient guarantees against undue influence. Despite those critical voices, the composition of the Prosecutorial Council even before the recent legislative interventions was assessed as mostly compatible with the key European requirement stating that prosecutors shall constitute the majority of members of Prosecutorial Council. However, it seems that adequate composition of the Prosecutorial Council cannot be seen as an isolated criterion from the method of appointment of members of the Prosecutorial Council, since the CCPE requires that such a majority should be elected "by their peers" (CCPE, 2018, para. 24).

More concretely, the solutions relating to the composition of the Prosecutorial Council in the 2015 LSPS resembled the solution envisaged for the Judicial Council but, somewhat strangely, the Prosecutorial Council had one member more (Article 18). It was comprised of

11 members, five of whom were prosecutors elected by their peers, four were distinguished lawyers elected by the Parliament, one member was delegated by the Minister of Justice, while the Prosecutor General was *ex officio* member of the Prosecutorial Council. While such a solution was broadly in line with the relevant European standards calling for at least a half of members of the prosecutorial council to be prosecutors (Matic Boskovic, 2017, p. 177), the requirement that such members should be elected by their peers was not fulfilled, given that the mandate of the Prosecutor General stems from this office, to which the PG is elected by the Parliament, by a 2/3 majority. Moreover, the method of appointment of distinguished lawyers to become members of the Prosecutorial Council was problematic for two key reasons. First, the process of their appointment did not provide sufficient guarantees against undue influence, as there were no restrictions in place with regard to political engagement of the distinguished lawyers who are members of the Prosecutorial Council. They were allowed to be deputies, or members and officials of political parties, even in the moment of the election (Network for Affirmation of Non-Governmental Sector, 2017, p. 13.). Second, the distinguished lawyers were appointed by the Parliament by a simple majority, thus ignoring arguments coming from the opposition parties. Given that the mandate of the Prosecutorial Council includes the appointment and dismissal of prosecutors, it is easy to see that the described solution provided ample room for political influence on the appointment of members of the Prosecutorial Council and consequently to the appointment of state prosecutors (HRA, 2019). The appointment procedure being one of cornerstones for ensuring prosecutorial independence, it was manifest the previous Montenegrin regulatory framework did not provide sufficient guarantees for such independence.

When it comes to the identifying the obstacles set by Constitutional text, the Prosecutorial Council is envisaged as a key prosecutorial self-governance body (Constitution of Montenegro, Article 136). The reference in the Montenegrin Constitution is set within the boundaries of prosecutorial autonomy, not prosecutorial independence, stressing the ties of the prosecutorial service with the executive, which are then reinforced in the provisions of the Law on Prosecutorial Service.

Unlike the case is with the Judicial Council, the composition of which is regulated by the Montenegro Constitution (Article 127), the Constitution leaves the composition, method of appointment, term of office of the Prosecutorial Council to be regulated by statute. This solution was not, and still is not in line with the requirement that the key matters relating to the status of prosecutors should be regulated on the highest level, particularly given that Matic Boskovic emphasises (Matic Boskovic, 2017, p. 177) that countries that have adopted the South-European model regulate the judicial councils in their constitutions.

Such a solution is perhaps indicative of the above-mentioned approach taken by the Montenegrin legislator when it comes to prosecutors – to guarantee their autonomy, not their independence.

On the other hand, the competences of the Prosecutorial Council are partly regulated by the Constitution and partly by the LSPS. The said competencies were not subject to the most recent legislative amendments, since they were already in line with the European standards. Those competence related provisions are important for achieving prosecutorial

independence as it may have real effects in practice only if the Prosecutorial Council is mandated with the adequate spectrum of competencies. According to the applicable legal framework, the Prosecutorial Council has a wide range of powers to carry out both "traditional" and "new" functions in line with the European standards. According to the European standards, "traditional" functions include competences for appointment of prosecutors and heads of its offices and other human resource management functions. The "new" functions are related to management and budget matters. The international standards encourages attributing both "traditional" and "new" functions to both Judicial and Prosecutorial Councils. Montenegro's legal framework includes all aspects of the "traditional" functions of the Prosecutorial Council in that sense, although its powers are somewhat weaker with respect to appointment and dismissal of the Prosecutor General. In a similar vein, the Prosecutorial Council in Montenegro also encompasses new functions in line with international standards.

2.2. Legal Interventions relevant for the Composition of the Prosecutorial Council and the Method of Appointment of its Members

The latest amendments of the LSPS attempt to decrease the influence of the political elites on the election of members of the Prosecutorial Council in several ways.

Firstly, they reduce the number of prosecutors in the Prosecutorial Council elected by their peers from five to four, which means that prosecutors would not constitute a majority in the Prosecutorial Council, even though the Prosecutor General remains an *ex officio* president of the Prosecutorial Council (Article 18, paragraphs 2 and 3 of the consolidated LSPS). The solution whereby the number of members elected from among prosecutors is thus reduced, was assessed as the Venice Commission as being in principle in line with relevant European standards.

Nevertheless, the solution of introducing the majority of lay members over prosecutors should not be easily praised, as it constitutes a departure from the standard set by the CCPE in its Opinion No. 13, 2018. (CCPE, 2018, para. 24) which clearly advocates in favour of composition of the Prosecutorial Council with the majority of prosecutors elected by their peers in order to achieve the independence of the said self-governance body. While the CCPE particularly recognizes the importance of such a composition for situations where the prosecutors are to be recognised as judicial authorities within the meaning of Article 5 of the European Convention on Human Rights (ECHR) (CCPE, 2018 para. 24), the ECtHR additionally emphasizes the importance of the respective composition of the judicial councils when they are in charge of discipline of prosecutors, such as the current case in Montenegro. (Oleksandr Volkov v. Ukraine, 2013, para. 109 and 199). The amendments implemented in Montenegro, supported by the Venice Commission, seem to have favoured a straightforward solution to the concrete problem in the concrete country than a position that would firmly support prosecutorial self-governance.

The Venice Commission further expressed the reasonable concern that the method of appointment of members of the Prosecutorial Council from among legal experts with a simple parliamentary majority would run the risk of politicisation (VC, 2021a, para. 39). It

seems that the Venice Commission has focused mainly on the procedure for appointment of members of the Prosecutorial Council with a view to reducing the dominance of the political majority, while somewhat neglecting the fact that the requirement of prosecutorial majority is based on the need for members of a body to have relevant and up to date knowledge about the functioning of the prosecutorial service in order to effect the relevant self-governance competences is a satisfactory manner . The request for having prosecutors as a majority in the Prosecutorial Council is equally motivated by the demands for independence and for professional competence – an aspect that seems to be overlooked in examinations of the power plays between different stakeholders.

Second, it is also indicative that in the adopted amendments the solution favouring hierarchy in the prosecutorial self-governance is maintained, even though some countries in the region sharing a common legal past, such as Slovenia and Croatia, have forgone it.[62] This comment should be particularly viewed in the light of the relatively broad competences that the Prosecutor General has with regards to other prosecutors, including the right to file an initiative for instituting disciplinary proceedings coupled with current exclusion of the of state prosecutors of the Supreme State Prosecutor's Office from the regular assessment (Articles 86 paragraph 1 and MANS, 2017, p. 13).-

What was also missed was an opportunity to add more validity to the selection of the candidates for the Prosecutorial Council from the ranks of state prosecutors. While from the standpoint of European standards, the candidacy process is not problematic, the solution whereby candidates are put forward by the collegiate sessions of the respective prosecution offices does not foster true self-governance. Adopting a solution present in comparative practice – where the candidates' nomination can also be supported or sponsored by a certain number of their peers, e.g., in Serbia would have added one more layer of legitimacy.[63] Such a solution would have been an important feature of a normative overhaul of the system aiming to reduce opportunities for capture and internal policy to dominate the process. Furthermore, since the law does not prescribe that a head of the state prosecutor's office cannot be a candidate for a member of the Prosecutorial Council, which is a solution present in regional comparative practice,[64] there is still room for replicating the power structures within the prosecutorial organisation in the composition of the Prosecutorial Council.

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[62] See more on this at: Slovenian Law on State Prosecution, Article 97 and the Law Article 5, and Croatian Law on State Prosecutorial Council, Article 5.

[63] For example, in Serbia, candidates for the State Prosecutorial Council from the ranks of public prosecutors or deputy public prosecutors can be nominated either by the college of all prosecutors of a given public prosecutor's office or by at least public prosecutors or deputy public prosecutors of the same rank (Article 23, paragraph 2 of the Serbian Law on State Prosecutorial Council). Similarly, in Slovenia, the candidacy of prosecutors for the Prosecutorial Council is carried out through application of the rules for the candidacy of judges for the judicial council, meaning that each judge or prosecutor nominated by at least three peers is entered into a candidates list (Article 99 of the Law on Prosecution Service of Slovenia and Article 20 of the Law on Judicial Council of Slovenia).

[64] For instance, in Slovenia, the Law on Prosecution Service explicitly prescribes in Article 97 that members of the Prosecutorial Council from the ranks of prosecutors are elected among those who do not hold managerial positions.

The next important intervention in the composition of the Prosecutorial Council lies in the changes related to its lay members. Namely, instead of the previous wording of the law, which envisaged five members of the Prosecutorial Council to be elected among prominent jurists, the new Law (Article 18 of the LSPS) refers only to four jurists, a solution which is on par with the number of prosecutors elected by their peers. In an attempt to answer to the concerns of the Venice Commission, expressed with regards to the version of the draft amendments of March 2021 - namely the fact that lay members are appointed by simple rather than qualified majority, which renders their election highly susceptible to politicisation – Montenegro has resorted to a solution whereby an additional lay member is elected from among reputable lawyers who are nominated by NGOs. This reputable lawyer is set to be as an expert in the field of rule of law, work of the public prosecution service or fight against organised crime and corruption. The amended Law further envisages that, following a public call, the candidates can only be nominated by NGOs who have been registered for at least 3 years, and which, according to their articles of incorporation, have the mentioned expertise listed as one of their key objectives, and have participated in projects in the said fields over the past three years. The candidate on whom the Parliament votes is the candidate supported by the largest number of NGOs. This solution closely resembles one that already exists in the Montenegrin legal system with regards to the appointment of members of the Anti-Corruption Agency Council from among of NGO representatives (Article 85 of the Law on Corruption Prevention). It was welcomed by the Venice Commission as a positive step forward (VC, 2021b, para. 35). The solution does indeed seem to foster pluralism in the composition of the Prosecutorial Council and through additional requirements related to specific expertise of the candidate nominated by NGOs to an extent mitigates the concern raised above with regards to insufficient grasp of the lay members of the particularities in the functioning of the state prosecution service.

Finally, the amendments introduce an important tool for depoliticising the Prosecutorial Council – incompatibility criteria for both lay members of the Prosecutorial Council and the members elected from among prosecutors. These criteria attempt at creating, as the Venice Commission notes (VC, 2021b, para. 29) "safety distance" between lay members and party politics, by prescribing that lay members cannot have spousal or family relations with MPs, Government ministers, the President of Montenegro or a person appointed by the Parliament, the Government or the President. Further, lay members of the Prosecutorial Council cannot be persons who were, within the last five years political party functionaries nor former elected or appointed central or local government officials, nor persons who were state prosecutors within the last eight years (Article 26 of the LSPS). When it comes to a similar safety distance between state prosecutors elected by their peers, on the one hand, and MPs, Government ministers or the country president, the law prescribes that spousal or family relations between them are incompatible with being a Prosecutorial Council's member (Article 18 of the LSPS).

The introduction of the said incompatibility criteria might seem like an overregulation, even though it is clearly introduced with a view to reducing the possible political influence on the Prosecutorial Council and, by extension, to the entire state prosecutorial service. Moreover, it is a solution not found in regional comparative practice burdened with similar

challenges *vis a vis* prosecutorial independence and undue influence. It should be noted, however, that prescribing of incompatibility criteria for members of the Prosecutorial Council from the ranks of prosecutors was a solution advocated for by a credible local NGO (HRA, 2017, 116). This indicates that the need for regulating such incompatibility stems clearly from the local circumstances and practices and does not constitute an excessive intervention on the part of the legislator. A closer look at the norm shows that it corresponds to the incompatibility requirements found in similar paragraphs regulating grounds for recusal prescribed in the Criminal Procedure Code (Article 38 of the Criminal Procedure Code) or with the notion of the related person in the Law on Corruption Prevention (Article 6). Therefore, it contributes to coherence of the overall national legal framework of Montenegro and as such should be welcomed.

3. TERMINATION OF MANDATE OF THE MEMBERS OF THE PROSECUTORIAL COUNCIL

One of the controversial issues envisaged in the amendments of the LSPS was the premature termination of the mandate for all the members of the Prosecutorial Council. The termination was envisaged in both versions of the draft amendments sponsored by the Parliament and the Government and analysed by the Venice Commission. The adopted solution is somewhat of an improvement from the versions analysed by the Venice Commission, but can still be considered divisive.

The draft amendments submitted to the Venice Commission in March 2021 envisaged the termination of office of the members of the Prosecutorial Council followed by election of the new members within 45 days from the day the amendments enter into force (Article 184a, paragraph 1 of the March amendments, VC, 2021a). This version of the draft amendments also envisaged a transitional mandate of the sitting Prosecutorial Council until the new members are elected. The revised draft amendments maintained a similar solution. The adopted amendments change the sequence for the termination of the mandate of the then sitting Prosecutorial Council in as much as they prescribe in detail the timeline for the election of new members of the Prosecutorial Council, the adopted amendments set out a similar time limit for election of new members, after which the mandate of the sitting Prosecutorial Council is terminated (Article 184b of the LSPS).

The Venice Commission objected to this solution, even though it did recognise that the political goal of the reform would not be achieved if the current members were allowed to serve until the end of their original mandate (VC, 2021a, para.48). Nonetheless, the Venice Commission clearly gave primacy to continuity, invoking its previous opinion on the draft amendments to Georgian legislation on the composition of the High Judicial Council (VC, 2013, para. 71-72) and reiterating that replacement of all members of the Prosecutorial Council could set a precedent whereby any incoming government or Parliament would make similar changes, which would not be conducive to the rule of law.

On the other hand, the Venice Commission was, in its March opinion, supportive of a solution whereby only some of the Prosecutorial Council members would be removed or the balance changed by adding one or two new members (VC, 2021a, para. 48) from among

lay members, suggesting they should be elected by a qualified majority. It should be noted that the version of the draft amendments the Venice Commission considered in March 2021 did not include the incompatibility clauses. It seems that it was due to them that the Venice Commission presented a different approach in its May opinion. In that opinion, the Venice Commission questions whether the extent of the proposed amendments can be considered as a sufficiently deep reform to justify the renewal of the entire composition of the Prosecutorial Council and the derogation of the principle of stability of tenure of its members, and was not convinced that was the case (VC, 2021b, paras. 47 and 48). It did, however, consider that the ineligibility criteria were an adequate and proportionate mechanism and that its application, to current members of the Prosecutorial Council on a case-to-case basis was justified (VC, 2021b, para. 49), provided that relevant procedural requirements are envisaged and observed.

Through this position, the Venice Commission sanctioned a *de facto* replacement of all members of the Prosecutorial Council, should they prove not to meet the relevant incompatibility criteria. Montenegrin legislator nevertheless did not clearly link the termination of the Prosecutorial Council mandate and the examination of the existence of incompatibility – while the incompatibility may *de facto* present *vis-a-vis* a considerable number of the members of the Prosecutorial Council at the time of the adoption of the amendments (as indicated in the VC, 2021a, para. 12), the amendments of the LSPS stipulating premature termination of office of the Prosecutorial Council did not refer to the incompatibility clauses directly in the legislative text. The link can, however, be seen in the reasoning of the amendments does indicate that the strict new rules aimed at depoliticising the composition of the Prosecutorial Council do not justify the continuation of the mandate of the current members (National Assembly of Montenegro, 2021, p. 14).

It is therefore worth examining in closer detail whether this solution is in line with relevant European standards. An obvious parallel that comes to mind is with the facts in the case *Baka v. Hungary*, when the mandate of the Hungarian President of the Supreme Court was prematurely terminated through constitutional and legislative reform in Hungary and the case of *Kövesi v. Romania*, concerning the premature termination of the mandate of the chief prosecutor of the National Anticorruption Directorate in Romania.

In both cases, the ECtHR found that the rights of the applicants were violated, given they were unable to effectively challenge the decisions on their premature mandates.

In the Baka case, the ECtHR found that Baka's right to access to court under Article 6 para. 1 of the ECHR was violated. Namely, the ECtHR held that "the premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. This lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful" (*Baka v. Hungary,* 2016, paragraph 121). ECtHR further stated that "in the light of the domestic legislative framework in force at the time of his election and during his mandate, the applicant could arguably claim to have had an entitlement under Hungarian law to protection against removal from his office as President of the Supreme Court during that period."

In the Kövesi case, ECtHR similarly found that although access to the function of the chief prosecutor, which was performed by the applicant, does in principle constitute a privilege and cannot be legally enforced, this was not the case regarding the termination of an employment relationship, which was at issue in the given case. ECtHR thus found that the applicant had a standing under the civil limb of Article 6, paragraph 1 of the ECHR (*Kövesi v. Romania*, 2020 para.124). Invoking the reasoning in the Baka case, ECtHR took the position that the applicant could arguably claim to have had an entitlement under Romanian law to protection against alleged unlawful removal from her position as chief prosecutor of the DNA (*Kövesi v. Romania*, 2020, para 121.), and found that the applicant could not exercise such a right. ECtHR thus concluded that there was a violation of Article 6 para.1 of the ECHR. Also similar to the Baka case, in the Kövesi case ECtHR found that the main reasons for the applicant's removal from her position as a chief prosecutor of the DNA were connected to her right to freedom of expression, which includes the freedom to communicate opinions and information and constituted an interference with the exercise of her right to freedom of expression, as guaranteed by Article 10 of the ECHR.

It could be claimed that in these two seminal decisions, as duly pointed out in the Joint concurring opinion of judges Pinto de Albuquerque and Dedov to the judgment in Baka case (para. 6), the ECtHR, invokes the soft law of the Council of Europe and other international organisations "as a legal basis not only to sustain the principle of the independence of the judiciary *in abstracto*, but also to assert *in concreto* the existence of the applicant's individual civil right to irremovability and of access to a court to protect that right". Moreover, as recently pointed out by Jelic and Kapetanakis (2021, p. 51), the ECtHR not only extended its previous jurisprudence set out in the Vilho Eskelinen judgment (*Vilho Eskelinen and others v. Finland*, 2007) to disputes concerning the career of judges and prosecutors, but also set an additional implicit criterion, whereby the national legislation excluding access to a court needs to be compatible with the rule of law.

The situation in the case of Montenegrin law is arguably different, and therefore it cannot be claimed to be in manifest violation of the established jurisprudence of the ECtHR. Below the authors provide a birds' eye view on this issue.

Namely, in both Baka and Kövesi cases, the applicants were removed from their offices as heads of the court, that is, of a prosecutorial office. In the Baka case, this also resulted in the termination of his mandate in the National Council of the Judiciary, to which he held *ex officio* by virtue of his position of the Supreme court president. It is precisely due to the fact that the function of the president of the Supreme court was intrinsically linked to the performance of judicial office, or, in the case of Kövesi to employment and her personal and professional situation in the given prosecutorial department, that the court clearly found that their mandate was a civil right protected under the civil limb of Article 6, paragraph 1.

The situation with the members of the Montenegro Prosecutorial Council is largely different. First of all, despite the pivotal role that the Prosecutorial Council has within the prosecutorial system, its function cannot be claimed to be intrinsically linked to the exercise of prosecutorial office, even with regards to the members from the ranks of prosecutors. Moreover, when it comes to lay members of the Prosecutorial Council, they are also not subject to the guarantees of prosecutorial independence attached to the

prosecutorial office. In this case, as Rakic-Vodinelic points out, a public office – and the office of a member of the Prosecutorial Council can clearly be defined as such – is not an acquired right (Rakic-Vodinelic, 2019, p. 11). It could further be argued that the right to completion of the mandate of the member of the Prosecutorial Council is not "civil" within the autonomous meaning of Article 6 paragraph 1, in the light of the criteria developed in the Vilho Eskelinen judgment. When it comes to the first criterion from the said case, as to whether the national law has expressly excluded access to a court for the post in question, a closer look into the pre-existing relevant provisions of the Montenegrin LSPS governing the premature termination of the mandate of the Prosecutorial Council member, it could be helpful to establish whether such a right was guaranteed before the adoption of the amendments. In general, the LSPS distinguishes between termination and dismissal.[65] In the first case, when the prescribed conditions for termination are met, the Prosecutorial Council only notes the termination of office of one of its members and informs the body that elected him/her thereof – these are the National Assembly for the lay member of the Prosecutorial Council and the Conference of Prosecutors for members from the ranks of state prosecutors. This means that the termination, in this case, takes place *ex lege* and that no legal remedy is envisaged in national law. In the second case, the Prosecutorial Council submits the proposal for the dismissal to the body that elected the member – the National Assembly and the Conference of State Prosecutors. There is no explicit legal remedy for such a decision. In fact, it would be difficult to argue that any of the existing remedies in the legal system of Montenegro could be resorted to. It seems evident that the state, in this case, Montenegro has excluded access to a court for the post in question even before passing the said controversial amendment of the LSPS. Such exclusion seems to stem from and be justified additionally from the following:

a) the position of a member of the Prosecutorial Council is undoubtedly not only a public office, but one that implies the exercise of public powers, or in order words, it seems manifest that the members of the Prosecutorial Council are "holders of posts involving responsibilities in the general interest or participation in the exercise of powers conferred by public law wielded a portion of the State's sovereign power in terms of the Pellegrin case (*Pellegrin v. France*, 1999, para 65.)

b) the very procedure of appointment and dismissal of members of the Prosecutorial Council is intrinsically linked with the level of trust clearly within the bounds of "a special bond of trust and loyalty" of the Prosecutorial Council members and the state (*Pellegrin v. France,* 1999, para. 65);

c) none of the members of the Prosecutorial Council enters into an employment relationship within the Council. The LSPS only states (Article 33) that Prosecutorial

[65] When it comes to termination, Article 29 foresees that it takes place in the following cases: 1) termination of the office that was the basis for his/her election to the Prosecutorial Council: 2) resignation; 3) conviction and imposition of an unconditional prison sentence. When it comes to dismissal, the grounds for dismissal envisaged in Article 30 are: 1) unconscientious and unprofessional discharge of Prosecutorial Council member's duties, meaning conduct that is contrary to his/her powers defined in the law, and the failure to meet the duties defined in the law; 2) conviction of an offence that renders one unworthy of discharging duties of a Prosecutorial Council member, meaning a criminal offence prosecuted ex officio and punishable by imprisonment, and 3) with regards to state prosecutors, if a disciplinary sanction was imposed on the state prosecutor.

Council members who are employed are be entitled to absence from work in order to discharge their duties in the Prosecutorial Council, and further underlines that during such absence those members whose salaries are secured from the budget shall receive salaries and other emoluments based on the employment in the authority they are employed in. While the LSPS does envisage the right to emoluments to the Prosecutorial Council members, the wording of the law clearly indicates that the Labour Law does not apply to such emoluments.[66] This again underscores the conclusion that, unlike in the cases of *Baka* and *Kövesi*, the functions of the member of the Prosecutorial Council are not linked to the exercise of the relevant judicial office, and is hence out of the scope of protection awarded to judges and prosecutors in these two cases.

Thus, it seems that the premature termination of the mandate of a Prosecutorial Council member through statutory provisions does not constitute a significant departure from the existing norms of Montenegro legislation when it comes to the right to legal remedy, from a strictly legal point of view.

According to the criteria set in the Vilho Eskelinen case, the burden of proof that the exclusion of the rights under Article 6 for the civil servant is justified is on the Government. Further, Baka and Kovesi show that such norms of national law need to comply with the rule of law.

It could be argued that, if the provisions of the law were challenged before the ECtHR, Montenegro could show that the exclusion of the rights under Article 6 in the case of premature termination of mandate by way of statutory provisions is justified and is in line with the general legal regime, which continues to be applicable to the termination of office and dismissal of the members of the Prosecutorial Council. Further, it could be argued the exclusion in principle stems from the very procedure of appointment of the Prosecutorial Council members, which implies the existence of trust between the body that has elected the member and the member itself, which was evidently missing with regards to the members of the Prosecutorial Council from the ranks of lay members of the Prosecutorial Council and the new composition of the Parliament at the time the amendments were adopted.

The one criterion where Montenegro could arguably have difficulties justifying the amendments is the one set in the Baka and Kövesi case, namely that the exclusion is compatible with the rule of law. It is noteworthy to recall that in the Baka case, the Venice Commission had previously found the regulatory measures whereby Baka's office was prematurely terminated as contrary to the rule of law (VC, 2012, para.113), as they were directed towards one specific person. In the case of Montenegro legislation, the Venice Commission did not expressly assess any of the measures investigated in its May opinion as being contrary to the rule of law, although it raises concerns with regards to their adoption.

However, the overall social and political background need to be taken into account when examining this issue. The decisions in the Baka and Kövesi cases were intrinsically linked with the exercise of freedom of expression – more to the point, ECtHR found that

[66] Montenegrin Labour Law, Official Gazette No. 74/2019 and 8/2021 refers to salaries and compensation of salary in cases such as sick leave, holiday and the like (Articles 94-103).

there were evident causal links between their exercise of his freedom of expression and the termination of their mandate (paragraph 148), which in Baka's case had a "chilling effect" (*Baka*, 2016, para. 160).

Conversely, the underlying causes of the Montenegrin reforms are motivated by reasonably demonstrated deficiencies in the work of the entire prosecutorial service in tackling corruption and by the existing close ties between the members of the Prosecutorial Council and the former Montenegrin political elites, which was duly recognised by the Venice Commission. It could therefore be argued that the underlying reasons for reform in Montenegro were aimed at fostering, not undermining the rule of law. It therefore seems that it would be difficult to claim that the provisions of the amendments to the Montenegrin LSPS are contrary to the recent jurisprudence of the ECtHR. This, however, does not render them fully compliant with relevant European rule of law standards.

While the general determination of the legislator to institute substantive reforms in the Montenegrin prosecutorial service is understandable, a more nuanced approach to the sensitive issue of termination of mandate of the entire Prosecutorial Council would have been more appropriate and less likely to be, in hindsight and without a clear current context, open to being challenged from the standpoint of their compatibility with relevant European standards.

4. ACCOUNTABILITY OF THE PROSECUTOR GENERAL

The independence of the Prosecutorial Council requires that the Prosecutor General as a President of that Council is both independent and accountable. The CCPE sheds light on the interrelation between the independence of prosecutors and judicial independence. In that context, the CCPE states that the independence of public prosecutors constitutes a guarantee that the full benefits of judicial independence will be realised as well as of the fairness and effectiveness of the overall justice system. (CCJE and CCPE, 2009, paras. 3, 8 and 27). In addition, the relationship between the independence of prosecutors and their accountability is clearly established by the CCPE, which states that clear mechanisms related to instituting prosecution or disciplinary proceedings against prosecutors are needed as to ensure their independence (CCPE, 2018, para. 25). Moreover, the CCPE and OECD in their documents recommend that prosecutors should not benefit from a general immunity but from functional one which is limited to actions carried in good faith in pursuance of their duties. (CCPE, 2014, para. 10, OECD, 2020, p. 115). In those respects, neither CCPE opinions nor other international documents include specific rules governing the immunity of Prosecutors Generals, thus treating them equally to other prosecutors. Finally, CCPE underlines that not only the manner in which the Prosecutor General is appointed, but also the manner in which he or she is dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office. (CCPE, 2014, para. 55).[67]

[67] In doing so, CCPE refers back to Venice Commission, Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service (VC, 2011, paras. 34-35).

Unlike the European standards, the LSPS does not establish the said mechanisms for instituting disciplinary proceedings against the Prosecutor General. That legal solution is conditioned by the Montenegro Constitution, which stipulates that Prosecutor General benefits from a general immunity and therefore cannot be held liable for both disciplinary and criminal offences. The relevant provisions of the LSPS pertaining to accountability of Prosecutor General which depart from the aforementioned European standards on disciplinary liability and functional immunity were somehow fully overlooked by both Venice Commission opinions on the draft amendments to the Montenegrin LSPS of 2021. This could be arguably explained by the fact that those matters were not covered by the draft amendments. It is worth remembering that the issue of dismissal of the Prosecutor General were raised in the previous Venice Commission opinions related to the draft Constitutional amendments of 2013 (VC, 2013), and the draft LSPS of 2014 (VC, 2014). In them the Venice Commission commended the draft amendments for ensuring that the amended Article 135 of the Constitution and the law envisages clear grounds for dismissal of the Prosecutor General (see: Venice Commission, 2013,). However, this solution has not been promulgated in 2013, and the grounds for the dismissal of Prosecutor General remained unregulated in the Constitution and vaguely and narrowly regulated in the statute.

While the Venice Commission in its Opinion of March 2021 rightly criticized the proposed new grounds for disciplinary liability of prosecutors as an overly broad formula,[68] it failed to deal with the clear lack of disciplinary liability of Prosecutor General. The Venice Commission welcomed the subsequent efforts of the Montenegrin authorities to follow its March recommendations, whereby the previously proposed disciplinary offences were abandoned in the revised version of draft amendments to the LSPS (Article 108). Finally, the amended LSPS introduced only one additional ground for disciplinary liability of prosecutors amounting to "committing a serious disciplinary offence which caused significant damage to the reputation of the State Prosecutor's Office" (Article 108). The introduced disciplinary offence reflects the approach recommended by the Venice Commission, according to which a disciplinary liability should be imposed on the prosecutor only for gross misbehaviour and not simply for an incorrect application of the law. (VC, 2021b, para. 16, p. 5). This approach is also in line with CCPE opinion No. 13, para. 47, point 2. The new disciplinary offence is even more important for the status, accountability and independence of the Prosecutor General, as it also constitutes a new ground for his or her dismissal. Arguable, the prescribed general immunity of Prosecutor General from disciplinary proceedings tried to be initially overcome and mitigated by introducing new rules extending the ground for the dismissal of Prosecutor General in case when conditions for prescribed disciplinary offence are met.

However, the legislative intervention was not sufficiently comprehensive and coherent, as it did not sufficiently clarify the ground for dismissal of Prosecutor General. Consequently, the legislative amendments did not meet the aforementioned CCPE standard according to which adequate dismissal regime is needed at to ensure the correct functioning of

[68] The initially proposed new disciplinary offence was worded as "5) acts contrary to legally prescribed competences, as well as when he/she does not fulfil legally prescribed obligations".

the prosecutor's office (CCPE, 2014, para. 55). The Law envisages an unprofessional and negligent performance of function of Prosecutor General as a sole ground for his dismissal, without providing any further clarification of that ground (Article 110). The amendments did not bring any improvements in that regard. On the other hand, the unprofessional and negligent performance of function is also prescribed within the same law as grounds for the disciplinary offence for prosecutors and its meaning is clearly elaborated within the disciplinary provisions (Articles 108 and 109). It seems strange that the legislator missed the opportunity to clarify the meaning of the undefined ground for dismissal of Prosecutor General at least by referring to the adequately defined disciplinary offence of the unprofessional and negligent performance of function. That omission is arguably attributable to the legislative applied technique commonly applied in Montenegro, and therefore the meaning of the said ground for dismissal of Prosecutor General will be interpreted by relying on the meaning of the respective disciplinary offence.

As mentioned before, the amended LSPS is important for prosecutors as it extended the scope of the disciplinary offence of unprofessional and negligent performance of function by stipulating that the commission of a serious disciplinary offence which caused significant damage to the reputation of the State Prosecutor's Office will also fall under its umbrella. The said provision of the amended law should be also assessed as a positive step towards extending the grounds for dismissal of Prosecutor General. Such a positive step cannot be considered as sufficient means for fully addressing the problem of the lack of disciplinary accountability of Prosecutor General since that problem is rooted in the Constitution.

It is noteworthy that even before the CCPE adopted its opinions with regard to functional immunity and accountability of prosecutors, the ECtHR developed the standards in that respect in the case *Kolevi v. Bulgaria.* The judgment in the case *Kolevi v. Bulgaria* is particularly important since it specifically deals with the immunity of Prosecutor General. In *Kolevi v. Bulgaria*, the ECtHR found, among other, the violation of procedural limb of Article 2 since the investigation into the death of Mr. Kolevi was not independent, objective or effective (*Kolevi v. Bulgaria*, 2009, paras. 214 and 215). The ECtHR identified the *de facto* impunity of the General Prosecutor in Bulgaria given that until September 2003 it was legally impossible in Bulgaria to bring criminal charges against the Prosecutor General without his consent. (Vassileva, 2020). However, a brief comparison between the circumstances of Kolevi case and current legal solutions of Montenegro shows that *Kolevi* is not applicable to current Montenegrin scenario.

Namely, until September 2003 it was not legally possible to bring criminal charges against the Prosecutor General without his consent in Bulgaria. The same is not the case with Montenegro, where general immunity is to be lifted by the Parliament without the prior consent of the Prosecutor General. (*Kolevi v. Bulgaria*, 2009, paras. 204, Constitution of Montenegro and Article 82 of Constitution of Montenegro). Also, under the Bulgarian law of that time, the conviction was a prerequisite for the termination/dismissal of a term of office of the Prosecutor General (*Kolevi v. Bulgaria*, 2009, para. 204). On the contrary, the criminal conviction is not the prerequisite for the dismissal of the Prosecutor General in Montenegro as a ground for dismissal amounts to unprofessional and negligent performance of functions which includes commission of specified disciplinary offences.

Nevertheless, when some of those flagrant deficiencies were eventually remedied in 2003 (*Kolevi v. Bulgaria*, 2009, para. 205), the ECtHR found that even the mere power of the Prosecutor General and high-ranking prosecutors to set aside any decision taken by a subordinate prosecutor or investigator will hinder any prosecutor from bringing charges against the Prosecutor General. Finally, unlike Bulgarian framework where the Prosecutor General can only be removed from office by decision of the Supreme Judicial Council, Montenegrin legal framework mandates the Parliament to decide in that respect. (*Kolevi v. Bulgaria*, 2009, para. 207).

Apparently, it cannot be claimed that the Montenegrin legal framework is in violation of the judgment in the case Kolevi. However, Kolevi case still can serve as a useful reminder that the ECtHR applies rather strict test when assessing whether the independence of investigation into someone's death was met. Therefore, it remains questionable how would ECtHR qualify the existing scope of immunity of the Prosecutor General under the Montenegrin legal framework. In the absence of applicable case law of the ECtHR it would be of key importance for Montenegrin national authorities to more closely stick to the CCPE opinions in part recommending the functional immunity, as well as introduction of criminal and disciplinary liability for each and every prosecutor, including the Prosecutor General. The extension of the grounds for dismissal of Prosecutor General apparently constitutes a positive step, but further reforms are needed in order to introduce the accountability of the Prosecutor General within the limits of functional immunity. In order to be effective and comprehensive, those reforms should be directed towards amending both the Constitution and the LSPS. Otherwise, Montenegrin legal framework would risk going against the CCPE standards according to which an exercise of control over the decisions of the subordinate prosecutors should be subject to proper safeguards for the rights of individual prosecutors (CCPE, 2014, para, 42). Those proper safeguards cannot be provided in the absence of accountability mechanisms of the Prosecutor General.

5. CONCLUDING REMARKS

Prosecutorial independence is one of the fundamental elements of the rule of law, and an indispensable corollary of judicial independence. The general tendency towards enhancing independence of prosecution services and its importance for the judicial independence, has been recognised and fostered by various Council of Europe consultative bodies, such as the CCPE and the Venice Commission through their opinions and reports. The ECtHR also played an important role in developing the standards of prosecutorial independance, setting the groundwork for the adoption of the said soft-law instruments.

Academic literature became increasingly focused on investigating prosecutorial independence and institutional determinants for such independence (Voigt and Wulf, 2019, Gutmann and Voigt, 2019). The findings of some authors also show significant correlations between prosecutorial independence and government accountability (Gutmann and Voigt, 2019).

It is unsurprising therefore that the prosecutorial independence became a focal point of the new Montenegrin Government following a historic change of political regime at the end of 2020 – a regime which was assessed by scholars as a captured state. This was done

through amendments of the LSPS aiming to further foster prosecutorial independence and give additional momentum to fight against corruption. While Montenegrin regulatory framework regarding the organisation of the prosecutorial service did not *prima faciae* depart significantly from the relevant European standards, it was still susceptible to influences from political elites and presented a limited track record in prosecuting corruption, particularly high-level corruption.

The attempt of the new Montenegrin political elites to tackle this problem through amendments to the LSPS can arguably also be interpreted as an effort aiming at effecting a certain degree of discontinuity with the previous regime and the power structures it had instituted. Following two iterations, the Amendments to the LSPS were adopted in May 2021.

While the underlying political goals of the reform can seem understandable, it remains questionable to what extent was the purported goal of the implemented reform achieved and whether the change does indeed contribute to increased independence of the prosecutorial service. The amendments were focused with reforming the composition, requirements and method for election of members of the Prosecutorial Council, a key prosecutorial self-governance body, while at the same time strengthening the norms dealing with accountability of prosecutors. They also prescribe premature termination of the mandate of the Prosecutor Council elected under the previous regime.

The solutions, formulated in iterations, as mentioned above, were closely scrutinised by the Venice Commission, which raised sound recommendations and concerns and in doing so, significantly improved the content of the final text of the amendments. This too an extent corroborates the positive potential of external conditionality in fostering the rule of law. However, the overall outcome is still burdened with a number of limitations embedded in the constitutional text, most markedly with regards to the regulation of accountability of the Prosecutor General, a key figure in the prosecutorial system.

When it comes to the composition of the Prosecutorial Council and the method of appointments of its members, it seems that Montenegrin reform has achieved mixed results. Firstly, the balance between the members of the Prosecutorial Council was shifted from majority of them being prosecutors elected by their peers, to majority of them being lay members. This solution was supported by the Venice Commission, even though it departs from the standards set by the CCPE. By taking this stance, the Venice Commission clearly favoured a straightforward solution to the concrete problem in the concrete country than a position that would firmly support prosecutorial self-governance and thus missed a chance to improve the existing legal framework.

Further, the legislator failed to give up, in the amendments, the existing strict hierarchy in the prosecutorial self-governance which can be particularly problematic when coupled with the relatively broad competences that the Prosecutor General has with regards to other prosecutors, including the right to file an initiative for instituting disciplinary proceedings (Article 110 of the LSPS).

On the other hand, the second important intervention in the composition of the Prosecutorial Council relating to lay members can be assessed as a positive step forward. The solution at hand is one whereby, to an extent inspired by the opinion of the Venice Commission and relying on existing national practice, whereby one lay member is elected

from among reputable lawyers who are nominated by NGOs. The solution was rightly welcomed by the Venice Commission as a positive step forward as it fosters pluralism in the composition of the Prosecutorial Council and through additional requirements related to specific expertise of the candidate nominated by NGOs to some extent mitigates the concern that could be raised with regards to insufficient grasp of the lay members of the particularities in the functioning of the state prosecution service.

Furthermore, the amendments brought the improvements to the prosecutorial independence by introducing an important tool for depoliticising the Prosecutor Council – incompatibility criteria for both lay members of the Prosecutor Council and the members elected from among prosecutors. Although that solution is not found in regional comparative practice burdened with similar challenges *vis a vis* prosecutorial independence and undue influence, the need for regulating such incompatibility stems clearly from the local circumstances and practices.

One of the most controversial solutions of the amendments is surely the one envisaging premature termination of the mandate for all the members of the Prosecutorial Council, which was recognised by the Venice Commission as instrumental in substantially effecting the reform. Based on the conducted brief examination of the ECtHR judgments in the cases of Baka, Kövesi, and its previous jurisprudence, it would be difficult to claim that provisions of the amendments to the Montenegrin LSPS are manifestly contrary to the recent jurisprudence of the ECtHR. While the adopted solution is perhaps the clearest indication of the underlying desire for discontinuity, it remains divisive. It is evident that a more nuanced approach to the sensitive issue of termination of mandate of the entire Prosecutorial Council would have been more appropriate and less likely to be open to being challenged from the standpoint of their compatibility to relevant European standards. Moreover, they are a practice that should not be further encouraged.

When it comes to accountability, the key intervention of the reform is extending the scope of the disciplinary accountability to include unprofessional and negligent performance of function by stipulating that the commission of a serious disciplinary offence which caused significant damage to the reputation of the State Prosecutor's Office will also fall under its umbrella. The said provision of the amended law also constitutes a positive step towards extending the grounds for dismissal of Prosecutor General. Such a positive step cannot be considered as a sufficient avenue for fully addressing the problem of the lack of disciplinary accountability of Prosecutor General since the issue problem is rooted in the Constitution. Without eliminating the general immunity of Prosecutor General, who also acts as a President of the Prosecutor Council, proper safeguards against undue influence within the hierarchical prosecutorial systems cannot be effectively established.

In sum, the adopted amendments to the LSPS show some improvements aimed at fostering prosecutorial independence and accountability. However, a closer inspection does confirm the suspicion that the exercise was indeed a quick fix for quick wins. The reform fails to address some issues of key importance, which remain embedded in the constitution (the general immunity for the Prosecutor General) and seems more set to effect discontinuity than to provide a substantive overhaul of all the aspects of the prosecutorial system which have shown to be deficient in practice. While frequent changes

to the fundamental rules governing organisational independence, functional independence and impartiality of prosecutors cannot be advocated for, it seems evident that on its path towards ensuring the existence of independent prosecution service as per relevant European standards, Montenegro has a number of hurdles to overcome and improved regulatory solutions to adopt.

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