

BUDGETARY CONSTRAINTS ON JUDICIAL INDEPENDENCE IN WESTERN BALKAN COUNTRIES

<i>Summary</i>	82	<i>Data and methodology</i>	84
<i>Introduction</i>	82	<i>Results and discussion</i>	86
<i>Literature review</i>	83	<i>Conclusion</i>	90

Abstract

Independent and impartial judicial systems do not exist without financial independence. Financial stability and transparent and objective resource mobilization and allocation in the judiciary are expected to strengthen courts' performance, limit pressure from different sources on judges' ruling, discourage corruptive behavior or practices and improve judges' integrity. Ultimately, these processes result in wider legal, political and economic advantages, including ensuring rule of law, strengthening democratic capacities and improving formal institutions relevant to the economic environment.

The purpose of this paper is to analyze and compare the budgetary constraints to the judicial system in five Western Balkans countries, including Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia in the period from 2010 to 2016. The comparative analysis of the different variables used as proxies of budgetary constraints has shown that Montenegro has the best performance with regard to allocating resources towards the judiciary system. However, all of the analyzed countries lag significantly behind the European average, which indicates the existence of an urgent need for improvements in resource allocation and mobilization in the judiciary systems in the Western Balkans region.

Key words: court independence; court impartiality; financial independence; court budget; prosecution services budget; Western Balkans.

I. INTRODUCTION

The benefits of establishing an independent and impartial judicial system are paramount with regard to concerning rule of law, establishing democratic institutions, investing in public trust in the judiciary and creating market supportive institutions (George, 2005; Shapkova Kocevsk, 2019). Independent and impartial judiciary can be understood as a legal environment where the judiciary is not exposed to any kind of pressure, both internal and external, and where judges' ruling should be made only on a legal basis.

A key precondition for ensuring judicial independence is providing the system with a sufficient amount of financial resources to perform its tasks. However, this process is closely related to the decision making processes in the executive branch, having in mind their role in preparation and

* Katerina Shapkova Kocevsk, PhD, Assistant Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Law Faculty. Contact e-mail: k.shapkova@pf.ukim.edu.mk

execution of the central (or federal) budget. To put it in other words, the executive branch by managing the budget process can implicitly control the resource mobilization process of the judiciary system. On the other hand, objective and transparent budget creation and execution process strengthens the independence and the impartiality of courts, supports judges' integrity, improves court performance and limits the corruptive prone behavior. Judicial independence is inexistent without financial freedom and stability of the system.

The main objective of this paper is to analyze and compare the budgetary constraints to the judicial system in five Western Balkans countries. We analyzed the budgetary constraints in Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia in the period from 2010 to 2016. Then we developed a few measurements of budgetary constraints and compare them between the sample countries.

The rest of the paper is organized as follows. Section 2 reviews the empirical literature on the budgetary constraints on court impartiality and independence. The data description and methods are given in the next section, Section 3. The results and discussion are presented in Section 4. In the last section, the main conclusions from the research are underlined.

II. LITERATURE REVIEW

Council of Europe's Recommendation CM/rec (2010) 12 of the Committee of Ministers to Member States on independence, efficiency and responsibilities of judges acknowledges judiciary independence as a fundamental guaranty for respecting the basic human rights of each individual. The recommendation emphasizes the citizens' right to a fair trial based exclusively on legal grounds without any inappropriate internal or external influence. However, judicial and court independence is narrowly related to the budgetary constraints and resources that have been allocated to the judiciary system. Concerning the budgetary constraints, the Recommendation proclaims that "[e]ach state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention (for the Protection of Human Rights and Fundamental Freedoms) and to enable judges to work efficiently" (Paragraph 33).

The 2011 Vilnius Declaration on challenges and opportunities for the judiciary in the current economic climate (European Network of Councils for the Judiciary) proclaims that: "The independence of the Judiciary and of every single judge is to be preserved as a prerequisite for the delivery of a fair and impartial justice in protecting human rights and fundamental freedoms. No necessity for cost cutting can be allowed to undermine judicial independence" (Article 10).

"Funding of the Judiciary" project by the European Network of Councils for the Judiciary formulates 12 separate recommendations to strengthen court impartiality regarding budgetary constraints. Some of these recommendations include that "courts should not be financed on the basis of discretionary decisions of official bodies but on the basis of objective and transparent criteria; in order to ensure and strengthen the separation of powers, the Council for the Judiciary, or a body on which the Judiciary is represented, should be closely involved and fully informed at all stages in the budgetary process and should have an opportunity to express its views about the proposed budget to Parliament; each State should therefore allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rights and to enable judges and court staff to work efficiently; courts should not be funded on an annual basis but should have the certainty of longer-term financial budgets and should be protected from fluctuations caused by political instability; budgetary constraints may lead to the necessity for prioritization in the

allocation of resources. Any prioritization must be determined by the judicial authority itself; and to meet the present and future legitimate expectations of society, the judicial system must have the resources to innovate and modernize such as information and communication technology” (ENCJ Report- Funding of the Judiciary 2015-2016, pp. 3-5).

Challenges for judicial independence and impartiality in the member states of the Council of Europe Report (2016) states that “in order to meet the needs of the judicial systems, the country members must allocate appropriate funds for efficient work of the courts and the prosecutors’ offices and for remuneration of judges and prosecutors” (Paragraph 24). This report also found that although budgetary control over the courts is devoted to the government or the parliament of the country, there are still countries where the government has some influence over budget creation and allocation (Paragraph 255, p.84-85).

Having in mind the negative consequences of external and internal interference in judges decision making about court independence, new model of judiciary and court budgeting emerged in the 90s of the last century and has been developing ever since. This paradigm is titled “performance-based budgeting”. The novelty of this approach is that it shifts the traditional channels of resource mobilization processes in the judiciary from central government to courts, to funding following the results and outcomes of courts’ work. “Performance – based budgeting” models originate from the New Public Management movement, and is also known as “Court Management” or “New Court Management” process (Schauffler, 2007). From a European perspective, a recent study (Vapiana, 2018) tests the relationship between the “performance-based” budgeting system and the functioning of courts and the autonomy of judges in the case of Finland and The Netherlands.

III. DATA AND METHODOLOGY

For our analysis, we have collected data through the dynamic database of the European Commission for the Efficiency of Justice (hereinafter: CEPEJ). CEPEJ was established in 2002 by the Committee of Ministers of Council of Europe with a purpose to assess the efficiency of judicial systems and proposes practical tools and measures for working towards an increasingly efficient service for the public (CEPEJ STUDIES No. 26, 2018, p. 5). To strengthen the corpus of continuous data collection, CEPEJ adopted a new version of the Scheme (CEPEJ(2018)16rev5) in 2018.

The data published in this database are biannual and date back to 2010. Thus the database provides insight for the following years: 2010, 2012, 2014 and 2016. The overall database includes information about 49 countries.¹ In our analysis, we have focused only on countries that belong to the Western Balkan geographical region and that are not members of the European Union. Based on these criteria, our analysis covers the following countries: Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia. Unfortunately, although Kosovo fulfills the sample selection criteria (is a Western Balkan country and is not a member of EU), we have excluded it from our analysis, because CEPEJ does not publish information about Kosovo.

¹ Following states are included in CEPEJ dynamic database: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, North Macedonia, Turkey, Ukraine, and United Kingdom. The results for the United Kingdom are presented separately for England and Wales and Scotland because of their different operating and independent judicial system.

We were interested in several aspects of budgetary constraints of the judiciary in the sample countries. Specifically, we have inquired relevant data about the budget of the courts, legal aid budget, prosecution services budget and budget of the whole judiciary system. All of these data were collected from the CEPEJ database. The variable *Judicial system budget* is consisted of three separate values: budget of the courts, legal aid budget, and prosecution services budget. *Budget of the courts*, is considered to be the total approved amount of public funds allocated to the functioning of all courts. It includes gross salaries of judicial and non-judicial staff working within courts, expenses for equipment, investments, installation, use and maintenance of computer systems, justice expenses borne by the state, funds for maintenance and operation of court buildings (costs for rental, electricity, security, cleaning, maintenance, etc.), investments in new court buildings, training directly covered by the courts for the training of judges and non-judicial staff and other expenses. The *Legal aid budget* is the budget that has been formally approved by the Parliament (or another competent public authority) as aid provided by the state to persons who do not have sufficient financial means to defend or represent themselves in court or to prevent litigation or to offer access to legal advice or information. Third component, public prosecution services budget is the budget that has been formally approved by the Parliament (or another competent public authority) to public prosecutor services. In addition to the judicial system budget, we have used one more variable from CEPEJ, representing the budgetary framework of the judiciary in the elected countries. The variable *Whole Justice System Budget* is the judicial system budget expanded with the approved budgets for prison system, probation services, High Judicial Council, Constitutional Court, judicial management body, Advocacy State, enforcement services, notariat, forensic services, judicial protection of juveniles, functioning of the Ministry of Justice, refugees and asylum seekers services, immigration service, and other elements of the wider judicial environment. All of the aforementioned variables are denominated in Euros.

To normalize and make the variables regarding budgetary constraints of the judicial system comparable between the countries, we have employed a few more variables published in CEPEJ dynamic database. Thus, we have used the following variables: total number of cases, judges, and prosecutors. The total number of cases is the sum of all number of resolved cases (criminal and not criminal) at first, second and highest instance courts in the countries. The total number of judges is the number of professional judges sitting in courts (if possible on 31 December of the reference year) in the selected countries. The total number of prosecutors is the number of public prosecutors, calculated on 31 December of the reference year.

Additionally, several economic and demographic variables have been used in our analysis. Thus the variable *Inhabitants* from the CEPEJ database reflects the number of inhabitants in a country in the reference year. The variable *Expenditures* presents the total annual amount of public expenditure covering all expenses made by the (federal) state or (federal) public bodies, including public deficits. If applicable, expenditures at the federal level are excluded. The next variable titled *GDP* is the nominal gross domestic product per capita. We also used the GDP in current prices (World Development Indicators, 2019) converted to Euros using OECD exchange rates (OECD, 2019). These are important variables because GDP is considered to be an indicator of economic activity which measures total consumption, investment, government spending and the value of net exports. Both GDP and Expenditures variables have been given in Euros. Data in the CEPEJ database have been provided by the participating States and entities (CEPEJ Studies No. 26, 2018, p.13).

In the following table (Table 1) are presented basic descriptive statistics (average values) of the demographic variables included in the research.

Table 1. Descriptive stats (average values) of economic and demographic data

Country	Inhabitants	Annual public expenditure (State level)	GDP per capita (in EUR)	Nominal GDP in Euros	Average of GDPpc	Average of Average gross annual salary
Albania	2,945,086	2,901,885,750	3,420	9,821,601,009	3,349	4,292
Bosnia and Herzegovina	3,752,938	5,754,438,076	3,752	13,913,400,154	3,721	7,818
Macedonia	2,065,613	1,416,405,430	3,955	8,224,821,507	3,980	6,108
Montenegro	620,029	1,659,187,300	5,515	3,429,712,765	5,532	8,721
Serbia	7,161,295	14,619,815,036	4,394	34,370,768,750	4,804	5,993

Source: CEPEJ database (2019) and World development indicators database (2019).

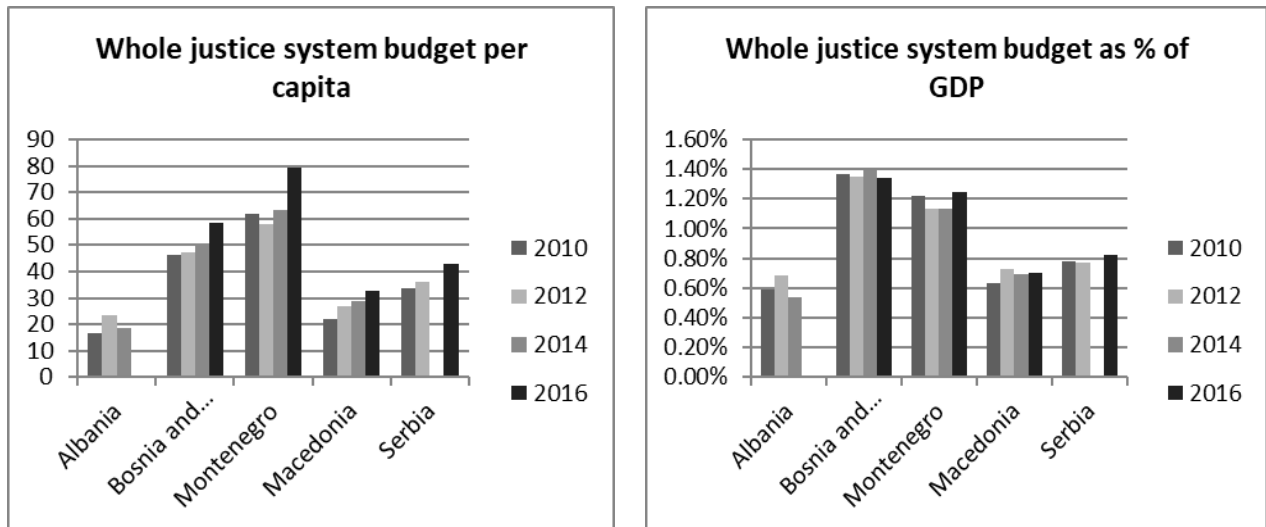
IV. RESULTS AND DISCUSSION

Several aspects of economic and budgetary constraints were taken into consideration in the analysis. First, we were interested in comparing the whole judiciary system budget in the appointed region. Having in mind the countries' specifics such as size, population and different structure of the judicial system, we developed two independent indicators to make this comparison: whole justice system budget per capita and whole justice system budget as a percentage of GDP.

We calculated the first variable, the whole justice system budget per capita, by dividing the whole justice system budget with the number of inhabitants in the countries in the respected years. The results are plotted in Figure 1. It can be noticed, that all of the WB countries except Albania, present a tendency to increase the whole justice system budget per capita in the analyzed period. This trend can be evaluated as a positive one since it can be interpreted as partial relativization of the budgetary constraints of the whole judicial system. From the WB countries, Montenegro constantly has devoted most funds for the whole judiciary system per inhabitant.

The WB countries distributed from 0.5% to 1.4% of GDP for the budget of the whole justice system. Bosnia and Herzegovina and Montenegro dispensed more than 1% of GDP, while Albania, Macedonia and Serbia budget of the whole justice system is less than 1%.

Figure 1. Whole justice system budget (2010-2016)



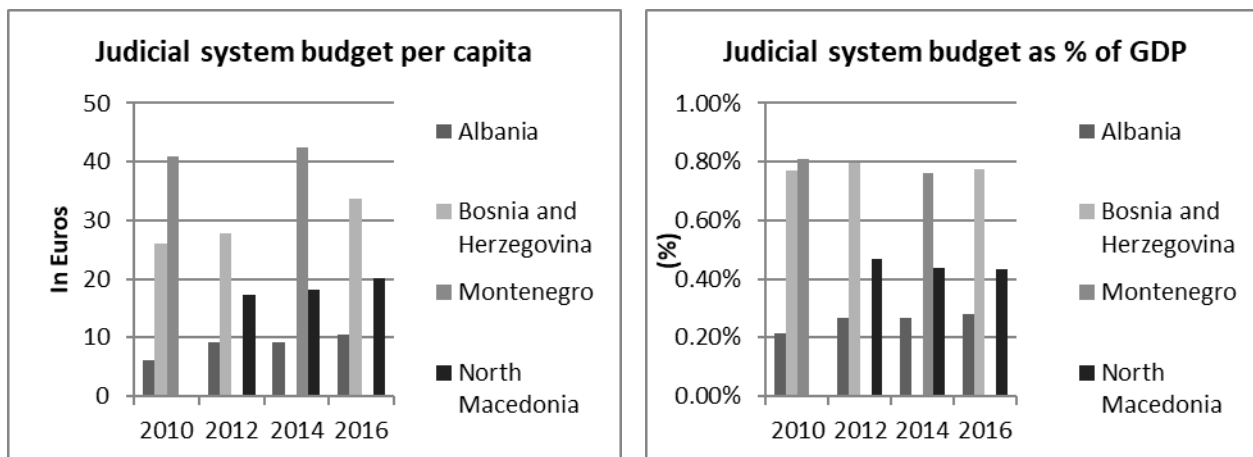
Source: Author's calculation based on CEPEJ database (2019) and World development indicators database (2019).

Next, we compared the judicial system budget of the countries. Judicial system budget is the whole justice system budget minus the approved budgets for prison system, probation services, High Judicial Council, Constitutional Court, judicial management body, Advocacy State, enforcement services, notariat, forensic services, judicial protection of juveniles, functioning of the Ministry of Justice, refugees and asylum seekers services, immigration service, and other elements of the wider judicial environment. The judicial system budget is given in two versions, as per capita or as a share of GDP.

Judicial system budget per capita, similarly to whole system budget per capita, is highest in Montenegro and in Bosnia and Herzegovina. In all of the analyzed periods, these two countries allocated more than 25 euros for the judicial system per capita. Macedonia allocated between 12 and 20 Euros, while Albania distributed less than 10 Euros per inhabitant for the judicial system. For comparison, the European average of the public budget allocated to the judicial systems in 2016 is 64 euros, and its median value is 53 euros (European judicial systems Efficiency and quality of justice, 2018, p.26)

Again, the judicial system budget as a percentage of GDP is highest in Bosnia and Herzegovina and Montenegro (round 0.8% of GDP). In Macedonia, the average judicial system budget is approximately 0.44% of GDP, and in Albania is only 0.26% of GDP. Figure 2 presents judicial system budget diagrams, per capita and as a percentage of GDP forms.

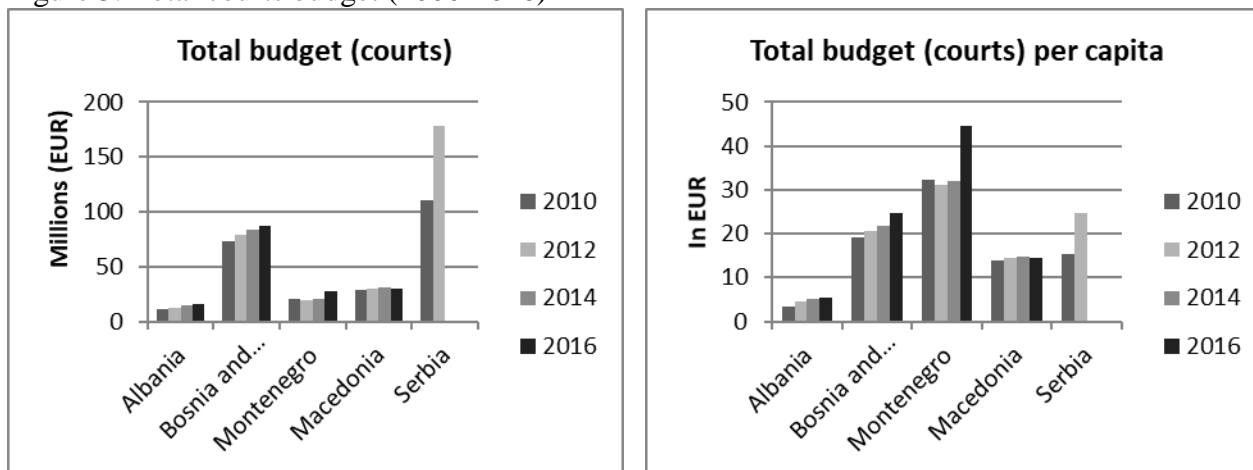
Figure 2. Judicial system budget (2010-2016)



Source: Author's calculation based on CEPEJ database (2019) and World development indicators database (2019).

The total court budget, in absolute terms, is highest in Serbia. However, if we transform it per inhabitant, we notice that again Montenegro is appointing most funds to the court system per capita. It is noteworthy that Montenegro has the highest growth in this variable in 2016 compared both to Montenegro's courts system budget in the previous years and to the other WB countries, as well. For comparison, the European average of the approved public budget allocated to courts per inhabitant in 2016 is 39 euros, and its median value is 34 euros (European judicial systems Efficiency and quality of justice, 2018, p.42)

Figure 3. Total courts budget (2000-2016)



Source: Author's calculation based on CEPEJ database (2019) and World development indicators database (2019).

On the resource allocation or expenditure side, gross salaries constitute the widest category of the courts' budget. In 2016, the total amount for gross salaries varies between 70% (in Albania) to 83.4% in Bosnia and Herzegovina. The cost analysis also has shown that the courts almost do not allocate funds for computerization (expenses for equipment, investments, installation, use, and maintenance of computer systems) or training (judges and non-judicial staff).

Table 2. Expenditures structure of courts' budget (2016)

Country	Gross salaries	Computerization	Justice expenses	Court buildings	New court buildings	Training	Other budget elements
Albania	70.3%	1.7%	2.0%	0.3%	5.1%	0.1%	20.5%

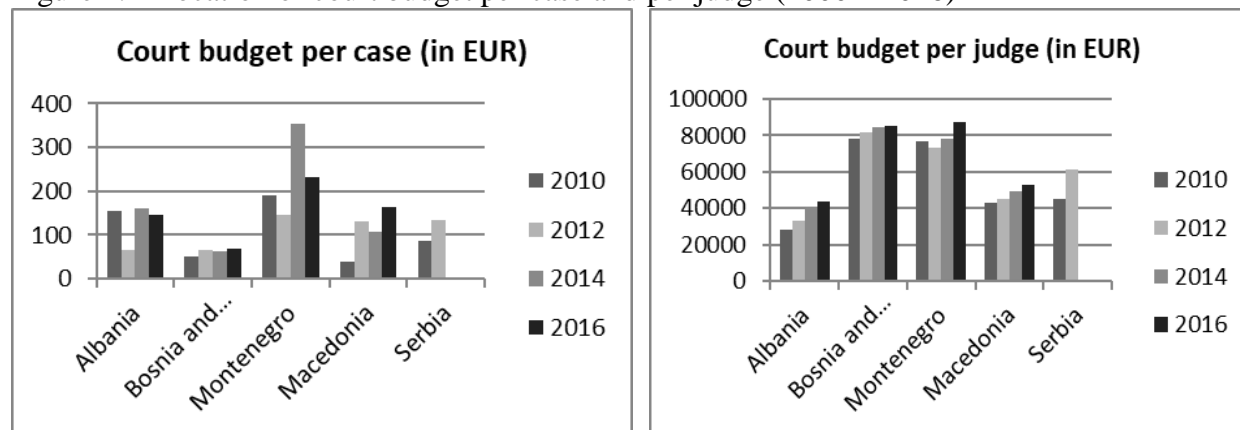
Bosnia and Herzegovina	83.4%
Montenegro	75.3%	1.4%	3.3%	0.2%	6.8%	0.1%	12.8%
Macedonia	82.4%	1.0%	1.6%	7.2%	0.0%	0.0%	7.8%

Source: Author's calculation based on CEPEJ database (2019) and World development indicators database (2019).

Moreover, we have calculated how much of the court budget is, on average, available per case in the selected countries. We titled this variable as a court budget per case. Court budget per case, on average, is highest in Montenegro and lowest in Bosnia and Herzegovina.

Another aspect of resource allocation is the share of the court budget available to a judge. Thus, we calculated the court budget per judge as a division between the total court budget in the country and the total number of professional judges sitting in courts. The idea behind this indicator is that the higher value of court budget per judge can be interpreted as lower budgetary and fiscal constraints of the judges in making decisions, hence better court independence and impartiality. Again, Montenegro and Bosnia and Herzegovina have the highest court budget per judge (approximately 80.000 Euros per judge), while the judges in Albania have access to the lowest funds compared to the rest of the WB countries, on average (see Figure 4).

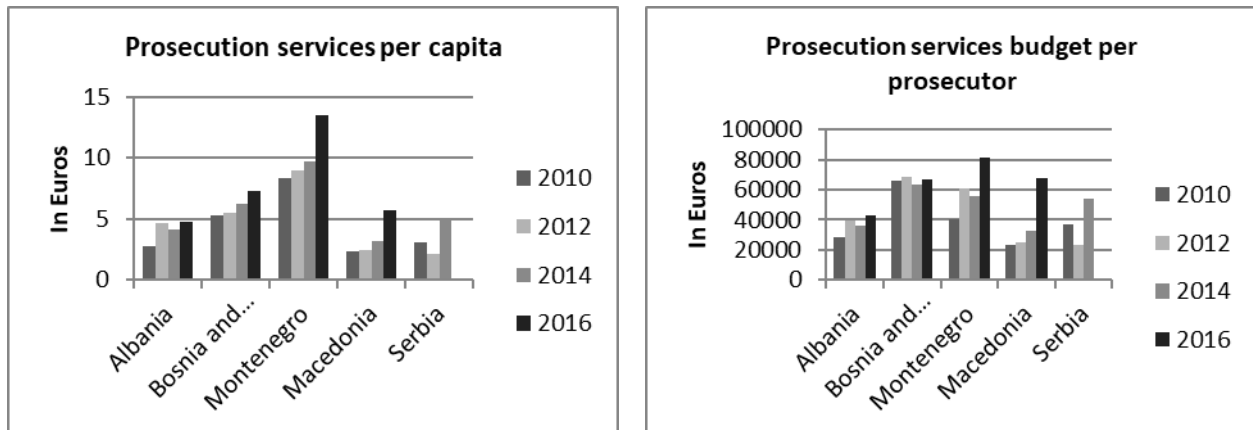
Figure 4. Allocation of court budget per case and per judge (2000 – 2016)



Source: Author's calculation based on CEPEJ database (2019) and World development indicators database (2019).

Last, but not least important, is the financial independence and possibility for overcoming budgetary constraints of the prosecution offices in the WB countries. In order to examine the current situation with regard to this important part of the judicial system, we have developed two separate variables: prosecution services budget per capita and prosecution services budget per prosecutor. In the first case, we divided the total budget of the public prosecution services by the number of inhabitants in a country, and in the second case, we have divided it by the number of public prosecutors. The results from these transformations are given in Figure 5.

Figure 5. Prosecution services budget (2000-2016)



Source: Author's calculation based on CEPEJ database (2019) and World development indicators database (2019).

From the above-presented graphs, we can conclude that again Montenegro has the softest budgetary constraint of the prosecution services, given per capita and per prosecutor. Moreover, Montenegro relatively allocates more funds to the prosecution services per capita (or, per inhabitant) compared to the European average. The latest data show that the European average of the approved public budget allocated to public prosecution services per inhabitant in 2016 is 12 euros, and its median value is 9.9 euros (European judicial systems Efficiency and quality of justice, 2018, p.58).

V. CONCLUSIONS

The literature review has shown that the existence of an independent and impartial judicial system, including both courts and prosecution services, is a vital precondition for EU approximation and accession processes, ensuring rule of law and strengthening democratic capacities of the countries. Moreover, a fundamental prerequisite for judiciary independence and impartiality is the ensuring transparent and objective budget development and execution process. Judicial independence is possible solely with financial independence.

Our analysis aimed to examine the different budgetary constraints to the judicial system in the Western Balkans countries. Five countries were in the focus of the analysis: Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia. The comparative analysis showed that over the years the sample countries are increasing the funds allocated to the whole justice system, judiciary system, including courts and prosecution services. However, it is evident that not all of the countries express the same dedication in achieving better financial independence of the justice and judiciary systems. Most definitely, Montenegro is a positive example of a leader in this region by allocating relatively (compared to the number of inhabitants and as a percentage of GDP) a higher amount of funds. However, unfortunately, the region lags behind the European average in this area. The determination for gaining budgetary and fiscal independence of the judicial system should be prioritized, having in mind the numerous benefits it allocates to the citizens, economy, and country as whole.

References:

- Council of Europe (2010). *Judges: independence, efficiency and responsibilities. Recommendation CM/rec (2010) 12 and explanatory memorandum*. Retrieved from: <https://rm.coe.int/16807096c1> [Accessed at 22 August 2019]
- Council of Europe (2016). *Challenges for judicial independence and impartiality in the member states of the Council of Europe*. Retrieved from: <https://rm.coe.int/168066d624> [Accessed at 22 August 2019]
- European Commission for the Efficiency of Justice (CEPEJ) dynamic database. Data retrieved in August 2019.
- European Commission for the Efficiency of Justice (CEPEJ). *Explanatory note to the scheme for evaluating judicial systems 2018 - 2020 Cycle*. Retrieved from: <https://www.coe.int/en/web/cepej/dynamic-database-of-european-judicial-systems> [Accessed at 12 August 2019]
- European judicial systems Efficiency and quality of justice (2018). *CEPEJ Studies No. 26*. Retrieved from: <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c> [Accessed 1 December 2019]
- European Network of Councils for the Judiciary (2011). *Vilnius declaration on challenges and opportunities for the judiciary in the current economic climate*. Retrieved from: https://www.encj.eu/images/stories/pdf/opinions/encj_vilnius_declaration_final_10_june_2011.pdf [Accessed at 22 August 2019]
- European Network of Councils for the Judiciary (2016). *Funding of the Judiciary, ENCJ report 2015-2016*. Retrieved from: https://www.encj.eu/images/stories/pdf/workinggroups/encj_2015_2016_report_funding_judiciary_adopted_ga.pdf [Accessed at 22 August 2019]
- George, Ronald M. (2005). Challenges facing and independent judiciary. *New York University Law Review* 80(5): 1345 – 1365.
- Schauffler, Richard Y. (2007). Judicial accountability in the US state courts. Measuring court performance. *Utrecht Law Review* 3: 112–28.
- Shapkova Kocevskaja, Katerina (2019). Judiciary independence, impartiality, the court budget: Understanding outcomes from economic constraints to court performance. In *Collection of papers from the Fifth International Scientific Conference Ohrid School of Law 2019 Abuse of the Law and “Abnormal” Law versus Rule of Law*, pp.191-206. Skopje: Iuridica Prima.
- Viapiana, Federica (2018). Pressure on Judges: How the Budgeting System Can Impact on Judge’s Autonomy. *Laws* 7, 38:1-17. doi:10.3390/laws7040038