



JUDICIAL COUNCIL OF MONTENEGRO ANALYSIS OF OPERATION (2008-2012)

**Veselin Radulović
Tea Gorjanc-Prelević**

in cooperation with Ana Šoć

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CONCLUSIONS

Regarding the long-delayed amendments to the Constitution of Montenegro aimed at eliminating political influence from the judiciary, legal solutions contained in May 2012 amendments represent certain progress, but still do not exclude political influence. There are no guarantees that half of the members of the Judicial Council, along with judges, shall not be politically engaged, enabling thereby political influence in future. Unfortunately, the only available option left is to introduce amendments to the Law on the Judicial Council, which have not yet been proposed, to try to ensure the recognition of the Council as a professional, independent and impartial body.

In addition to the fact that the Judicial Council has recently shown positive changes in terms of transparency and has responded positively to requests to provide information, a significant portion of the Council's work still remains non-transparent. Sessions of the Judicial Council have been closed to the public, despite the principle of transparency of the Council's work stipulated by law. Decisions on the appointment of judges are poorly reasoned, and do not include the Council's method of weighing of criteria or explanation why the Council appointed a certain candidate. It is particularly worrying that in the case of seven decisions on the first appointment and promotion of judges, no reasoning has been provided for the appointment of candidates whose total point score of assessment was smaller than of those who were not appointed. At the same time, pursuant to the most recent amendments to the Law on the Judicial Council, the candidates are denied access to their opponents' documentation, all of which does not contribute to building public confidence in the objectivity of work of the Council.

The criteria and sub-criteria for appointment and promotion of judges have been improved compared to previous years, but remain incomplete, since standards for their weighing have not yet been set. Incomprehensible and incomplete regulations that the Council failed to improve do not provide the minimum conditions for objective and equal assessment of candidates for judges appointed for the first time, as well as for judges who have been promoted.

There is still no document specifying the method of assessment of quality of judges' performance, or the system for regular assessment of their performance that would ensure certainty in terms of deciding on progress and accountability of judges. The system of assessment of quality of judges' performance is vague, there are no precise criteria for assessment of required elements of performance of judges (except for 5% of the grade), and therefore assessment depends on subjective judgment of the Judicial Council members, which does not ensure equal assessment. Furthermore, the system for calculating the percentage of judges' success in relation to the number of confirmed and reversed decisions is

illogical, as it implies that in each case an appeal against the decision of the judge is filed, which does not have to be the case (if only one appeal is filed in relation to all decisions adopted by a judge, and the decision on that appeal is reversed, that judge will have a 100% reversal rate). It is unfair not to credit successful performance of a judge visible through decisions to which the parties have not filed an appeal or through procedures which, for example, ended in settlement.

By the end of its first term in 2012, the Judicial Council did not adopt internal documents defining the qualitative and quantitative assessment of performance of judges in accordance with international standards, although the deadline for the completion of this task in the Action Plan of the Council was October 2010. The Council thus helped maintain the current situation that allows for arbitrary and non-objective assessment of judges.

As regards accountability of judges, it has been observed that imprecise legal framework provides for unequal treatment of judges and selective application of regulations, creating space for autocratic power over judges. Presidents of courts and the President of the Supreme Court are allowed to arbitrarily assess the justification of reasons for violating the law and subjectively decide which judge shall be held accountable, while the Judicial Council and its members have no authority to initiate disciplinary proceedings against any judge or court president. The President of the Supreme Court can never be subject to disciplinary proceedings. Practice shows that such system allows certain judges to avoid accountability for actions other judges have been sanctioned for.

The possibility of unequal treatment of judges is further ensured by non-transparent work of the Judicial Council. Choosing not to publish decisions on establishment of disciplinary responsibility, the Council prevents judges and general public from gaining insight into the judges' behaviour subject to sanctions, and from comparing it with the behaviour they have direct access to in specific procedures.

The practice shows that certain judges submitted requests for termination of office after a question of their responsibility had been raised, doing so according to suggestions or under the pressure from the highest ranks in the judiciary. Termination of office suspended any procedure of determining accountability of judges, leaving many cases of negligent and incompetent performance unresolved, possibly containing elements of criminal responsibility of some judges.

Violation of the Code of Judicial Ethics has not been determined in any of the cases. However, two decisions in which the Commission for the Code of Ethics found that the Code has not been violated are incomprehensible, do not provide an explanation as to what were the relevant facts to make such decisions and how these facts were obtained.

The quality of the Judicial Council decisions indicates that its members do not consider it necessary to specially elaborate their decisions to public. Such attitude is detrimental to acquiring public confidence in the objectivity of the Judicial Council and independence of the judiciary, which should be provided by the very Judicial Council.

Amendments to regulations have not yet influenced the Judicial Council to change its practice and adopt decisions accompanied by valid reasoning, enabling one to make clear conclusions as to why a certain decision was adopted. Therefore, it is necessary to amend the Constitution and other regulations as soon as possible in a manner that will establish guarantees for objective and predictable work of the Judicial Council. The Judicial Council itself should ensure urgent adoption of measures (indicators) for weighing of criteria and sub-criteria for appointing judges and assessing their work, and invest additional effort to make its work more transparent.

1. Introduction

The Judicial Council is the body responsible for ensuring independence and accountability of the judiciary. Under the 2007 Constitution, the Judicial Council for the first time became directly responsible for the appointment and promotion, disciplinary sanctions and dismissal of judges.¹

However, the 2007 Constitution did not provide for the composition of the Judicial Council independent of the political coalition in power and able to ensure the independence of the judiciary in Montenegro. The political method of electing the President of the Supreme Court and President of the Judicial Council was immediately criticized by the Venice Commission and assessed only as an interim solution.² Along with four representatives of judges, the Council members include the Minister of Justice, two members of the Parliament and two lawyers elected by the President of the Republic, in the context of the political situation in Montenegro, which does not ensure the perception of the Council as an expert body devoid of political influence.³

In November 2010, the European Commission stressed Montenegro's priority to "strengthen rule of law, in particular through de-politicised and merit-based appointments of members of the judicial and prosecutorial councils and of state prosecutors as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors"⁴ in order to achieve progress towards membership in the European Union.

In the Analytical Report accompanying the Opinion of the European Commission, which provides reasoning for the above priority in respect of the judiciary, it is noted that the election of the majority of members of the Judicial Council leaves room for political influence and calls into question the principle of separation of powers in relation to the judiciary.⁵ The Report stressed the need for the establishment of the career advancement system for judges based solely on merit, in order to strengthen the independence, professionalism and transparency

¹ Art. 125 and 126 of the Constitution of Montenegro.

² Opinion of the Venice Commission on the Constitution of Montenegro, November 2007, item 90, translation published in the book "International Human Rights Standards and Constitutional Guarantees in Montenegro", Human Rights Action, Podgorica, 2008.

³ One dominant political party, the Democratic Party of Socialists (DPS), has been in power in Montenegro for over 20 years. In 1990 it emerged from the League of Communists of Montenegro, the party in power since 1945 in the previous monopolistic one-party system. Cohabitation has never existed in Montenegro, the president and prime minister have always been DPS members. The current president of the state, who appointed two lawyers for members of the Judicial Council, is DPS vice president, while the Minister of Justice, member of the Judicial Council, comes from the same party. Wife of the President of the Republic was also a member of the Judicial Council, elected by the Conference of Judges.

⁴ Commission Opinion on Montenegro's application for membership of the European Union, SEC(2010) 1334, Brussels, 9 October 2010.

⁵ The European Commission, the Analytical Report accompanying the Opinion of the Commission on Montenegro's membership in the European Union, Brussels, 9 November 2010, p. 18.

in the judiciary. This conclusion is based on the assessment that "the criteria for selection of new entrants to the judicial system leave room for discretion by the Judicial Council and thus undermine transparency in the selection process."⁶ The Report also noted that there is no legal definition of the manner of weighing individual criteria, resulting in the lack of a unified selection procedure.⁷

In 2011 Progress Report on Montenegro, the European Commission assessed that the new criteria for selecting entrants to the judicial system reduce the room for discretion by the Judicial Council and thereby improve transparency in the selection process. However, it was noted that some of the criteria lack clarity, while the weighing of individual criteria is not fully satisfactory. It was concluded that the merit-based elements of the career system need to be further strengthened.⁸ The Commission expressed its expectations for the constitutional amendments to significantly reduce the legal possibilities for disproportionate political influence over appointment of judges, thus reinforcing independence of the judiciary.

* * *

Through this report, which is the result of the analysis of the Judicial Council work during its first term (2008-2012), Human Rights Action (HRA) seeks to further contribute to judicial reform in Montenegro, emphasizing the necessary conditions for depoliticised and objective work of the Judicial Council.

In December 2008, HRA published the conclusions of the "Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008",⁹ criticizing the constitutional arrangement regarding the Judicial Council and highlighting the need to establish an objective and transparent system for appointment and regular assessment of judges, which would make their progress, as well as accountability for incompetent and irresponsible performance of the judicial function, certain and objective.¹⁰ As such system, representing the foundation of judicial independence, does not yet exist, HRA continues to advocate for its establishment believing that this report and recommendations will finally contribute to achieving that aim.

Despite the reform implemented thus far, the appointment of judges in Montenegro still does not inspire trust, especially bearing in mind the Judicial Council decisions from the previous period which do not clarify reasons for appointing certain candidates as judges and not appointing others. The Council

⁶ Ibid.

⁷ Ibid.

⁸ The European Commission, Montenegro 2011 Progress Report, Brussels, 12 October 2011, p. 10, SEC(2011) 1204.

⁹ Available at: [http://www.hraction.org/wp-content/uploads/hra_reform_proposal_eng.pdf](http://www.hrraction.org/wp-content/uploads/hra_reform_proposal_eng.pdf).

¹⁰ The above Analysis of almost four years ago offers 109 recommendations for amendments to the legal framework of appointment, promotion of accountability of judges. Of these, 32 recommendations were adopted (29%), 25 were partially adopted (23%), and 52 recommendations were not adopted (48%).

could have reduced consequences of the lack of legal framework by adopting by-laws defining standards for weighing of criteria - which would objectify assessment of judges, or at least by providing substantial explanation for its decisions.

What the Judicial Council certainly could not have improved is its composition, which raises doubts that the political influence on the appointment of judges, even before the end of the first term of the Council, prevailed over the objective assessment of a candidate's ability to perform judicial function in Montenegro.

2. Constitutional framework and Constitution amending procedure

2.1. Judicial Council under the 2007 Constitution

2.1.1. Composition of the Judicial Council

According to Article 127 of the Constitution of Montenegro of October 2007, the Judicial Council has a president, who is a President of the Supreme Court, and the remaining nine members are:

- 1) four judges appointed and dismissed by the Conference of Judges;*
- 2) two MPs appointed and dismissed by the Parliament from among the members of the parliamentary majority and the opposition;*
- 3) two distinguished legal experts appointed and dismissed by the President of Montenegro; and*
- 4) Minister of Justice.*

Such composition of the Judicial Council enables dominant political influence. Of a total of nine members, five of them - the majority - are elected by the will of the parliamentary majority, i.e. the executive power. The President of the Supreme Court and the Judicial Council and MP from among the members of the parliamentary majority are elected by the parliamentary majority, two distinguished legal experts are elected by the President of Montenegro, who belongs to the parliamentary majority (Vice President of the ruling party DPS), while the Minister of Justice belongs to the executive branch and also to the parliamentary majority.

So, more than half of the members of the Judicial Council have become its members owing to the will of the parliamentary majority, which significantly compromised the Council during the previous period, since the Council should leave an impression of a professional, impartial and independent body. The impression of political interference has been further intensified by the fact that the Council member from among the judges used to be the wife of the State President.

Political impact of the Council is especially evident in the membership of the Minister of Justice, who directly represents the executive power. This fact is somewhat relieved by the decision that the Minister, as a member of the Council, has limited powers, because he does not participate in the procedures of determining disciplinary responsibility of judges.¹¹ However, this principle is not applied consistently because the Minister can take part in the procedures of dismissal and appointment of judges.

Similar to the solution regarding the limitations of the Minister of Justice, there is no basis for MPs who are members of the Judicial Council, and political officials, to vote in procedures on appointment of judges, on disciplinary responsibility of judges and their dismissal.

¹¹ Art. 128, para 3 of the Constitution of Montenegro.

2.1.2. Election of the President of the Supreme Court

Election of the President of the Supreme Court, i.e. the President of the Judicial Council, is no longer under the competence of the Judicial Council, in accordance with Art. 124 of the Constitution under which the Supreme Court President shall be elected by the Parliament on joint proposal of the President of Montenegro, President of the Parliament and Prime Minister. The Venice Commission considers this solution problematic because the judiciary is excluded from the procedure of selecting the President of the Supreme Court and of the Judicial Council.¹² The Commission indicated that the existing solution "gives the impression that the entire judiciary is under the control of the majority in the Parliament and that the President of Montenegro, President of the Parliament and Prime Minister take part in political control of judges" and recommended that the President of the Supreme Court be elected by the Judicial Council by a two thirds majority.¹³

The 2011 amendments to the Law on the Judicial Council stipulate that the President of the Supreme Court is elected on the basis of public vacancy announcement and opinion of the extended session of the Supreme Court, based on which the Judicial Council proposes three candidates to the presidents of the Government, Parliament and State, who decide which candidate to nominate before the Parliament.¹⁴

2.1.3. Election of the President of the Judicial Council

The solution pursuant to which the President of the Supreme Court is *ex officio* the President of the Judicial Council as well creates a strong impression that the judiciary is autocratically managed by a person elected in the Parliament by the sole will of the ruling majority. Moreover, under the provisions of Art. 125, para 3 of the Constitution, a president of whichever court cannot be a member of the Judicial Council, so it is illogical for the President of the Supreme Court to be not only a member of the Council, but also its president. The Judicial Council should supervise the work of courts and the courts are managed by their presidents who are most responsible for the situation in a court whose work they manage. Therefore, logical legal solution should stipulate that the court presidents are not the members of the Judicial Council, which supervises their work, and it should also apply to the Supreme Court President, who is, according to the logic of things and position he/she holds, most responsible for work and situation in courts. Also, the authority that the Supreme Court President logically has among other judges influences other judges, who are the Judicial Council members and whose superior is the President of the Supreme Court, to accept his position uncritically.

The Venice Commission considers that "it would have been preferable, instead of entrusting *ex officio* the President of the Supreme Court with the chairmanship of the Judicial Council, to provide that the President be elected by the Judicial Council among the lay members, in order to ensure the necessary links between

¹² Opinion of the Venice Commission on the Constitution of Montenegro, no. 392/2006, CDL-AD (2007)047 of 20 December 2006. Available at: <http://www.hraction.org/wp-content/uploads/knjiga-eng.pdf>, p. 170–202.

¹³ Ibid, § 88, p. 209.

¹⁴ Art. 28a of the Law on the Judicial Council, *Sl. list CG*, 39/2011, 4 August 2011.

the judiciary and the society, and to avoid the risk of "autocratic management" of the judiciary".¹⁵

2.1.4. Appointment of the Council members from the ranks of judges

Composition of the Judicial Council includes four judges who are appointed and dismissed by the Conference of Judges.¹⁶

Amendments to the Law on the Judicial Council¹⁷ from 2011 provide that the members of the Judicial Council from among the judges are three judges elected from the Supreme Court of Montenegro, Appellate Court of Montenegro, Administrative Court of Montenegro, high courts and commercial courts, while one member is elected from among the basic courts judges.

This solution represents an improvement over the prior solution, according to which only the judges from the higher instance courts could have become the Judicial Council members, meaning that the Judicial Council did not include judges of the courts that make up the majority of the judges. However, even now the law does not ensure that all levels of courts are equally represented, since, except for basic courts, it does not stipulate from which courts other three members shall be elected.¹⁸

Even after the latest amendments, the Law on the Judicial Council does not contain any provisions on the prevention of conflict of interest with respect to all members of the Council, which makes the political influence more plausible. This is particularly important given that the wife of the State President is a judge and used to be a member of the Judicial Council and the Disciplinary Commission President, and that it is not rare that judges are close relatives of officials of the executive and legislative branches.

2.1.5. Appointment of the Council members outside the ranks of judges

Three members of the Judicial Council who are not judges are political officials - two MPs and the Minister of Justice, and as for the two legal experts elected by the President (also the ruling party official), the law does not envisage a restriction ensuring that they are not politically engaged and were not members of political parties. The Constitution of Montenegro does not provide minimum guarantees that half of the members of the Judicial Council are not politically engaged.

The authority of the President - official of the ruling party, to appoint two legal experts in the Judicial Council at his sole discretion is also opposite to the position of the Venice Commission, which proposed that one reputable legal expert be

¹⁵ Opinion of the Venice Commission on the Constitution of Montenegro, as above, § 96.

¹⁶ Art. 127 of the Constitution of Montenegro.

¹⁷ *Sl. list CG*, 39/2011.

¹⁸ See the European Charter on the Statute for Judges, § 1.3 and „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, HRA, Podgorica, 2009, item 2.1.2.2.1, p.151 (http://www.hraction.org/wp-content/uploads/hra-analiza_reforme_izbora_sudija_u_crnoj_gori-cg.pdf).

elected by the President, and another by the civil society (NGOs, universities and the Bar Association).¹⁹

2.1.6. Competences of the Council concerning the courts budget

The Constitution²⁰ and the Law on Judicial Council²¹ stipulate only that the Judicial Council shall propose to the Government the amount of funds for the work of courts, i.e. courts annual budget. On the other hand, the Venice Commission considers that the Judicial Council should also be responsible for the allocation of funds for the judiciary and for managing those funds.²²

2.1.7. Appointment of judges of the Constitutional Court and the Judicial Council

The procedure for electing the President and judges of the Constitutional Court is under the exclusive influence of politics. The judges and the President of the Constitutional Court are elected by a majority vote of all MPs on the proposal of the President of Montenegro.²³ This solution is contrary to the Venice Commission opinion pursuant to which the candidates for the Constitutional Court judges should be selected by the Judicial Council, Parliament and President, the Constitutional Court judges should be elected by qualified majority and the President of the Constitutional Court should be elected by the judges of that Court.²⁴

2.2. Constitution amending procedure in the composition, election and competences of the Judicial Council

According to the European Commission Opinion on Montenegro's application for EU membership of October 2010, one of the priorities for Montenegro is to strengthen the rule of law, in particular through de-politicised and merit-based appointments of members of the Judicial Council and through reinforcement of the independence, autonomy, efficiency and accountability of judges. In the Analytical Report accompanying the Commission's Opinion it has been stressed that "the legal framework leaves room for the disproportionate political influence on the selection of judges, because most members of the Judicial Council are elected by the Parliament or the Government...".²⁵ Thus, after the Venice Commission especially criticized the method of electing the President of the Supreme Court and of the Judicial Council in its opinion on the Constitution of Montenegro, the European Commission too pointed to the need to review constitutional solutions regarding the Judicial Council.

¹⁹ Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL(2011)044, Section 3.1.3. item 19.

²⁰ Art. 128, para 1, item 6.

²¹ Art. 73, para 3.

²² Report on Independence of the Judiciary: Part I, Independence of Judges, CDL-AD (2010) 004, p. 52-55.

²³ Art. 91, 95 and 153 of the Constitution of Montenegro.

²⁴ Opinion of the Venice Commission on the Constitution of Montenegro, item 183-186.

²⁵ Working document of the European Commission, Analytical Report accompanying the Commission Opinion on Montenegro's membership in the European Union, Brussels, 9 November 2010, p. 17.

On 24 February 2011 the Government of Montenegro adopted the Analysis of the need to amend the Constitution in order to strengthen the independence of the judiciary, based on which the constitutional amendments have been proposed.

On 28 September 2011 the Parliament of Montenegro defined Draft Amendments to the Constitution of Montenegro. At the same session, the Parliament adopted conclusions pursuant to which a public debate on these Draft Amendments was to end on 31 October 2011. According to these conclusions, the Committee for Constitutional Affairs and Legislation was to define and submit to the Parliament the Proposed Amendments to the Constitution and Proposed Constitutional Law for Implementation of Amendments to the Constitution of Montenegro no later than 20 November 2011, but this happened only six months later, in late May 2012.

In the meantime, there were no visible activities in the process of amending the Constitution, except for the proposal of amendments to the Constitution defined on 19 March in the absence of opposition. Rationale for the finally defined proposed amendments of May 2012²⁶ does not contain reasons for proposing specific solutions or assessment of compliance with the opinion and views of the Venice Commission, but it only briefly states what is proposed by specific amendments. The lack of proper rationale is inappropriate for the proposal of amendments to the highest legal act in a state of law.

2.2.1. Composition of the Judicial Council under May 2012 Proposed Amendments to the Constitution

Proposed amendment IX to Article 127 of the Constitution of Montenegro, which prescribes the composition of the Judicial Council, represents an improvement over the current solution, since it does not envisage MPs as members of the Council but respected legal experts, in accordance with the recommendation of the Venice Commission, which insists that all Council members be legal experts.²⁷

However, there is still room for political influence, because the Minister is still envisaged as a member of the Council. Proposal made by HRA and a group of opposition MPs to ensure that members of the Judicial Council outside the ranks of judges are not politically engaged and are selected from the list of candidates proposed by civil associations (NGOs), universities and the Bar Association on the basis of the criteria and procedure prescribed by law - has not been adopted.²⁸ These shortcomings could be overcome by appropriate amendments to the Law on the Judicial Council.²⁹

²⁶ These proposed amendments were adopted by the Committee on Constitutional Affairs and Legislation of the Parliament of Montenegro, whose members include the members of the opposition party SNP, although they did not vote for the proposed changes because they disagreed with the solution that the Judicial Council appoints the President of the Supreme Court. They submitted their proposal of amendments to the President of the Parliament. ("Still no agreement on key decisions", *Pobjeda*, 25 May 2012).

²⁷ Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL(2011)044, Section 3.1.3, item 17.

²⁸ On 12 July 2011, 28 members of opposition parties submitted a proposal to amend the Constitution of Montenegro, see the proposal of amendments to Art. 127 of the Constitution. For HRA proposal see 2.4. below.

²⁹ For all draft amendments to the Law on the Judicial Council see 2.5. below.

President of the Supreme Court remains a member of the Judicial Council *ex officio*, which still leaves a risk that the authority of a person most responsible for the situation and work results in the courts will influence the body that supervises the work of the courts. This particularly in relation to the Judicial Council members from the ranks of judges, whose superior is the President of the Supreme Court.

2.2.2. Election of the President of the Supreme Court under May 2012 Proposed Amendments to the Constitution

Proposed Amendments envisage that the President of the Supreme Court of Montenegro is elected and dismissed by the Judicial Council by a two thirds majority, which represents progress towards the judiciary free from political influence and is in line with the recommendation of the Venice Commission.³⁰ The opposition has proposed that the President of the Supreme Court be elected by the Parliament by a two thirds majority³¹, which would provide that, in addition to the ruling coalition, the opposition too has influence on the election, but would also represent a political impact and involve the risk of blocking the election.

2.2.3. Election of the President of the Judicial Council under May 2012 Proposed Amendments to the Constitution

Progress has been made in relation to the method of electing the President of the Council, proposing that he/she be elected by the Judicial Council from among its members who are not holders of judicial office, by two-thirds majority vote of the Council members. This solution is a positive step in ensuring the necessary connection between the judiciary and society and in avoiding the risk of autocratic control of the judiciary, in accordance with the opinion of the Venice Commission.³²

The amendments also propose that the Minister of Justice cannot be elected the President of the Judicial Council, which is a logical and reasonable solution.

Since according to the proposed amendments, the Judicial Council members from among the judges and the Minister of Justice can not be elected as the President of the Judicial Council, the Judicial Council President could only be one of the legal experts appointed by the President or elected by the Parliament. The Venice Commission has proposed that one prominent legal expert be selected by the President, and other by the civil society (NGOs, universities and the Bar Association)³³, while the proposed amendments suggest that the President appoints two legal experts of his choice, which does not guarantee political impartiality of these persons. Since there are no restrictions for legal experts appointed by the President or elected by the Parliament to be politically engaged, or even members of political parties, it appears highly probable that the President

³⁰ Ibid, para 88, p. 209.

³¹ A proposal to amend the Constitution of Montenegro filed by 28 MPs, 12 July 2011, Art. 91, para 3, no. 00-11/11-2.

³² Ibid, para 96.

³³ Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL (2011) 044 Section 3.1.3. item 19.

of the Judicial Council, who has a casting vote, will be a person under political influence, politically engaged, or even a member of a political party.

Therefore, the proposed amendments do not represent sufficient progress in the sense that the Judicial Council is chaired by a person who is not politically influenced, or that the Council members are prominent experts and do not hold political office. This deficiency must be overcome by urgent legislative amendments.

2.2.4. Appointment of the Council members from the ranks of judges under May 2012 Proposed Amendments to the Constitution

Draft Amendments to the composition of the Judicial Council from September 2011 stipulated that the four judges in the Judicial Council elected by the Conference of Judges cannot be from among the court presidents. Such solution in relation to the presidents of courts was in line with the Proposal for amending the Constitution of Montenegro of a group of opposition MPs of 7 December 2011 and HRA.³⁴ However, this formulation was omitted in the Proposed Amendments of May 2012, probably because the Constitution already prescribes that the president of the court can not be a member of the Judicial Council.³⁵ Nevertheless, considering that the Judicial Council supervises the work of the courts, and therefore the work of their presidents, analogous to this solution neither the President of the Supreme Court should be a member of a body responsible for the supervision of the Supreme Court and its president.

2.2.5. Appointment of the Council members outside the ranks of judges under May 2012 Proposed Amendments to the Constitution

Of members who are not judges, pursuant to the proposed amendments the Parliament should elect two prominent legal experts at the proposal of the parliamentary majority and opposition, while two distinguished legal experts are to be appointed and dismissed by the President of Montenegro.

Improvement over the current solution in the Constitution has been achieved since it is now proposed that prominent legal experts, not MPs, be elected members of the Council, which is in line with the recommendation of the Venice Commission and proposals of both HRA and a group of opposition MPs. However, as noted above, no restrictions have been provided to ensure that those persons are not politically engaged, nor the possibility to select them from a list of candidates proposed by civil associations (NGOs) and universities, based on the criteria and procedure prescribed by law, so the proposed solution only partially contributes to avoiding politicization of the Judicial Council.

In addition, the Law on the Judicial Council stipulates that the President shall make a list of at least four candidates, based on previous consultations with the Bar Association, Association of Judges, Law Schools and the Academy of

³⁴ A group of 28 opposition deputies proposed that the Parliament decides by a two-third majority on the proposals of the members of the Judicial Council Conference of Judges (A proposal to amend the Constitution of Montenegro, filed by 28 MPs, 12 July 2011, no. 00-11/11-2).

³⁵ Art. 125, para 3.

Sciences, and submit that list for the opinion of the Supreme Court extended session.³⁶

However, these consultations and opinion are absolutely non-binding on the President and as such do not provide any guarantee for selection of a candidate who is not politically engaged, regardless of potential suggestions and proposals in consultations and opinions. One such example of disregard for opinions occurred at the election of the President of the Supreme Court and of the Judicial Council in 2007, when proponents failed to acknowledge the position of the Supreme Court General Session that the Supreme Court President should be someone from the ranks of judges.³⁷ This shortcoming could be overcome by introducing appropriate amendments to the Law on the Judicial Council, which would ensure that the President selects candidates proposed to him by NGOs, universities and the Bar Association.

2.2.6. Competences of the Council concerning the courts budget

Procedure for amending the Constitution contained no proposals as to the competence of the Judicial Council regarding the funding of the judiciary, thus neglecting the opinion of the Venice Commission that the Judicial Council should be responsible for the allocation of funds for the judiciary and for managing those funds.³⁸

2.2.7. Appointment of judges of the Constitutional Court and the Judicial Council

Pursuant to the proposed amendments to the Constitution, the Parliament no longer elects the President of the Constitutional Court, but the judges of the Court from among its members. However, the procedure for election of judges of the Constitutional Court remains under the exclusive influence of politics. All judges of the Constitutional Court will still be elected by the Parliament by majority vote of all MPs at the proposal of the President of Montenegro. This solution does not respect the opinion of the Venice Commission that the candidates for Constitutional Court judges should be nominated by the Judicial Council, Parliament and President, and that the Constitutional Court judges should be elected by qualified majority.³⁹

2.2.8. General assessment of the proposal of constitutional changes

Proposed amendments to the Constitution represent an improved solution, especially with regard to the election of the President of the Supreme Court and

³⁶ Art. 13a, Law on the Judicial Council.

³⁷ "On 14 November 2007 the presidents of the state, Parliament and Government - Filip Vujanović, Ranko Krivokapić and Željko Šturanović, met with judges of the Supreme Court of Montenegro regarding the agreement on the proposal for electing a new president of this Court. The Acting President of the Supreme Court Radoje Orović and all the judges unanimously recommended that the president be elected from the judiciary, particularly from among the judges of the Supreme Court." The courts of the Republic of Montenegro, <http://www.sudovi.cg.yu/home.php?PID=137&LANG=mn>. However, Vesna Medenica was nominated and elected as the President of the Supreme Court, previously holding the office of the Supreme State Prosecutor.

³⁸ Report on Independence of the Judiciary: Part I, Independence of Judges, CDL-AD (2010) 004, p.52-55.

³⁹ Opinion of the Venice Commission on the Constitution of Montenegro, item 183-186.

election of the President of the Judicial Council. However, as regards the composition of the Judicial Council, the proposed amendments do not guarantee that half of its members shall not be politically engaged, because no such restriction has been envisaged for the four members who are not judges (and they are elected by politicians), while the Minister of Justice and Human Rights is a political official. In addition, the amendments do not envisage that the President of the Judicial Council is not politically connected person, since it is stipulated that the President will be one of the four members. Therefore, the assessment of the success of the constitutional reform will depend on amendments to the Law on the Judicial Council, which must put a stop to political influence by envisaging (1) prohibition of political engagement of legal experts who are the Council members outside the ranks of judges, (2) their selection from the list of candidates proposed by civil associations and universities, (3) prevention of conflict of Interest in relation to all Council members.

2.3. Current situation in practice

Term of the members of the first Judicial Council, established in April 2008 under the 2007 Constitution of Montenegro, expired on 19 April 2012. According to the web page of the Judicial Council, four new members of the Judicial Council from among the judges were elected at its session held on 16 March 2012. Also, as reported by the media,⁴⁰ the President of Montenegro appointed two members of the Judicial Council in accordance with his constitutional authority.

Along with the President of the Supreme Court of Montenegro and the Minister of Justice, who are members of the Judicial Council *ex officio*, there are two members whose terms expired on 19 April 2012. Up until June 2012, the Parliament did not elect new members of the Judicial Council from among MPs. The method of proposing candidates shows the neglect for professional references that members should have for proper performance of duties of the Council member. Contrary to the proposed amendments to the Constitution of 28 May 2012, providing that the Parliament elects and dismisses *two prominent legal experts* in the Judicial Council, the Administrative Committee of the Parliament recommended an economics expert from the ruling coalition for a member of the Judicial Council.⁴¹

Constitutive and the first regular session of the new composition of the Judicial Council was held on 15 June 2012.⁴² Among the new members of the Council is a judge of the Basic Court, which is a novelty, since the old composition of the

⁴⁰ Among others: "The Judicial Council elections", *Pobjeda*, 29 March 2012.

⁴¹ "Economist in the Council, Konjević and Gošović proposed as members of the Judicial Council, DPS dissatisfied", *Vijesti*, 29 May 2012.

⁴² Together with the Supreme Court President Vesna Medenica, new members of the Judicial Council from among the judges were: Gavriilo Čabarkapa and Natalija Filipović, judges of the Supreme Court of Montenegro, Miroslav Bašović, judge of the High Court in Podgorica and Miodrag Pešić, judge of the Basic Court in Podgorica. The Judicial Council members from among eminent legal experts are Veselin Racković and Radovan Krivokapić, and Raško Konjević and Neven Gošović from among the members of the Parliament of Montenegro. Minister of Justice and Human Rights Duško Marković is also the member of the Council. Gavriilo Čabarkapa was appointed Deputy President of the Judicial Council (<http://sudovi.me/sscg/saopstenja-za-javnost/konstituisan-novi-sudski-savjet-858>).

Council members from among the judges included mostly Supreme Court judges and one judge of the Appellate Court.

It is certain that a temporary composition of the Judicial Council has been elected, whose mandate will expire after the adoption of a constitutional reform that will provide for different composition of the Council and a new method for appointing its members.

2.4. Human Rights Actions (HRA) proposal

2.4.1. Composition of the Judicial Council

HRA proposal⁴³ implies that the Supreme Court President, Minister of Justice and MPs should not be the Judicial Council members, because such solution unnecessarily politicizes the Council; instead, the Council members should include on an equal basis judges and representatives of civil society, i.e. universities, the Bar Association and NGOs. Civil society representatives would be elected by the Parliament (one member by the parliamentary majority, one by opposition), President or the Bar Association, and nominated by universities and civil associations according to the procedure and criteria set forth by law. It has been proposed that the President of the Judicial Council be elected by the Council from among its members who are not judges by two-thirds majority vote of the Judicial Council members, and that the President of the Council shall not be a member of the Bar Association.

As in the case of MPs, the Minister too should not be a member of the Council, since it unnecessarily politicizes the Council. HRA believes that the Minister of Justice directly represents executive authority and compromises the Council as an impartial and independent body. On the other hand, as a member of the Council the Minister has extremely limited authority: he does not participate in the procedures of determining disciplinary responsibility of judges, and, in line with the same principle, he should not even participate in the procedure of dismissal and appointment of judges, which would help consistently implement the principle of non-interference of executive authorities in appointment or dismissal of judicial authorities.

If insisting on the membership of the Minister, it is necessary to provide that the Minister does not vote in procedures of dismissal and appointment of judges, in accordance with the same principle pursuant to which the minister does not vote in disciplinary proceedings. In the case of membership of the Minister, the State President should then elect only one prominent legal expert upon law schools proposal, because, as a rule, both the President and Minister of Justice of Montenegro come from the party that exercises executive authority.

2.4.2. Election of the President of the Supreme Court

President of the Supreme Court of Montenegro should be elected and dismissed by the reformed Judicial Council by two-thirds majority, in the interest of freeing the judiciary of political influence.

⁴³ HRA proposal was submitted to the Committee for Constitutional Affairs and Legislation of the Parliament of Montenegro on 31 October 2011 within the public debate on the draft amendments, and it is available at: http://www.hracion.org/wp-content/uploads/HRA_Predlog-28102011.pdf.

2.4.3. Election of the President of the Judicial Council

The solution to elect the Judicial Council President from among the members who are not judges reduces the risk of autocratic rule over the judiciary and takes into account the recommendation of the Venice Commission to thereby provide the necessary link between the judiciary and society.

2.4.4. Appointment of the Council members from the ranks of judges

Since the court presidents can not be members of the Council for justified reasons, the President of the Supreme Court should not automatically be entitled to this right, since the Council should also supervise his/her work. The amendments to the Judicial Council Law should ensure that half of the judges who are members of the Judicial Council are elected by the judges of basic and commercial courts, who make up a majority in relation to the judges of other courts. Thus, the Judicial Council would provide the widest possible representation of the judiciary, in accordance with international recommendations.⁴⁴

2.4.5. Appointment of the Council members outside the ranks of judges

For the Council's independence, it is crucial to establish who will be its members outside the ranks of judges. It is necessary to ensure that those be independent experts who are not politically engaged. HRA proposed a way to achieve the election of such members, based on a system of nomination, which should be specified by the Law on the Judicial Council, which should provide expertise and reputation of candidates and ensure they are not politically engaged.

The system of electing the members of government bodies under the system of nomination by the NGOs is not new in Montenegrin legal system, it is used for selection of NGO representatives in the RTCG (Radio Television of Montenegro) Council, Council for Cooperation between the Government and NGOs, Council for Protection against Discrimination, Council for Civil Control of the Police.⁴⁵

The President would nominate two distinguished legal experts from a list of candidates proposed by law schools, and one member of the Council would be elected by the Parliament of the Bar Association among its members.

The Venice Commission also proposed that the majority and the opposition each elect one "renowned member of the legal profession", who are not necessarily MPs. The MPs should elect these two Council members, one by the majority and one by the opposition for efficiency, or by overall 2/3 majority. In their Proposal of constitutional amendments, the opposition MPs have also insisted that MPs be members of the Judicial Council.⁴⁶

⁴⁴ European Charter on the Statute for Judges, § 1.3.

⁴⁵ The Law on Public Broadcasting Services of Montenegro ("Sl. list" 79/2008, Art. 28,29,30,37), Decision on the establishment of the Council for Cooperation between the Government of Montenegro and NGOs (*Sl. list*, 28 of 14 May 2010, Art. 7-12).

⁴⁶ A proposal to amend the Constitution of Montenegro of 12 July 2011, no. 00-11/11-2.

HRA proposal complies with the recommendation of the Venice Commission that there is parity between the Council members from among the judges and those who come from other segments of society.⁴⁷ This principle also helps avoid politicization and autocracy.

2.4.6. Competences of the Council concerning the courts budget

HRA reiterates its previous proposal⁴⁸ that the Law on the Judicial Council must envisage competences of the Council regarding the judicial budget drafting, monitoring of its execution and decision making on allocation of budget resources among the courts during the fiscal year, and that the President of the Judicial Council, in case of disagreement with the Government, should be provided an opportunity to present the judicial budget proposal to the Parliament.

2.4.7. Competences of the Judicial Council regarding the appointment of judges of the Constitutional Court

HRA proposes the adoption of a solution functioning well in Croatia and Germany, that the Constitutional Court judges be elected by 2/3 majority in the Parliament, and that the candidates be nominated by different proponents. The Judicial Council would propose to the Parliament three judges of the Constitutional Court, while the state President and competent Parliamentary Committee would nominate three judges of the Constitutional Court each. The Judicial Council would, as a rule, nominate judges with appropriate experience, the President prominent legal experts who are not judges, and the Parliament could nominate other candidates on the basis of an open competition. In this case it would be advisable to prescribe a qualified majority on the board which, on the basis of the competition, proposes to the Parliament candidates for election. The prescription of a qualified majority for the election of judges of the Constitutional Court is a necessary step in preventing political interference in the Constitutional Court, which is composed, by both current and proposed legal solution, in accordance with the will of the ruling political majority.

2.4.8. Other competencies of the Judicial Council

The Constitution should generally emphasize only the basic functions of the Judicial Council it is recognized for, such as the decision-making regarding the election and responsibilities of judges or termination of their office, while all others should be prescribed by the law.⁴⁹

2.5. Recommendations for amendments to the Law on the Judicial Council in accordance with constitutional changes

Since the Constitution reform will most likely not provide for full guarantees against political interference in the judiciary, it is necessary to amend the Law on

⁴⁷ Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL(2011)044 Section 3.1.2. item 14.

⁴⁸ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, Human Rights Action 2009, p. 98, 99.

⁴⁹ For more detail see „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, p. 90.

the Judicial Council together with the adoption of amendments to the Constitution, in order to provide such legal guarantees.

In this regard we suggest the following:

1. Prescribe the method of selecting members of the Judicial Council outside the ranks of judges which would ensure they are not politically engaged persons. To this end, legal experts elected by MPs should be selected from the list of candidates proposed by civil associations (NGOs), based on the criteria and procedure prescribed by law (modelled on the procedures for selection of NGO representatives in the RTCG Council, Council for Cooperation between the Government and NGOs, Council for Protection against Discrimination, Council for Civil Control of the Police).⁵⁰ The other two lawyers, elected by the President of Montenegro, should be selected from the list of candidates proposed by civil associations dealing with the rule of law, the Bar Association and law schools.

2. Prescribe conditions for the election of the Judicial Council members outside of ranks of judges, so as to ensure that they are:

a) persons truly independent from political power, who are not in any way politically engaged (e.g. were not members of any political party or actively engaged in a party, directly elected in elections and did not hold government office at least 10 years prior to the election);

b) persons who do not have any conflict of interest that could affect their work and decision making in the Judicial Council (this provision should be defined following the example of the provision on preventing conflict of interest from Art. 26 of the Law on Public Broadcasting Services in Montenegro (*Sl. list CG*, 79/08 of 23 December 2008));⁵¹

c) persons with appropriate legal knowledge and experience (bearing in mind that one of them will be the President of the Council).

⁵⁰ The Law on Public Broadcasting Services of Montenegro (*Sl. list*, 79/2008, Art. 28, 29, 30, 37), Decision on the establishment of the Council for Cooperation between the Government of Montenegro and NGOs (*Sl. list*, 28 of 14 May 2010, Art. 7-12).

⁵¹ Conflict of interest (Article 26)

Members of the Council shall not be:

- 1) MPs and members of the Parliamentary committees;
- 2) person elected, appointed or nominated by the Parliament, the President of Montenegro and the Government;
- 3) RTCG employees;
- 4) political party officials (presidents of parties, members of the presidency, their deputies, members of the executive and main boards, and other party officials);
- 5) persons who, as shareholders, members of management, members of the supervisory authorities, employees and the like, have an interest in legal entities involved in the production of radio and television programs, so that the membership of such person in the Council could lead to conflicts of interest;
- 6) persons who have been convicted of criminal offenses against official duty, the offense of corruption, fraud, theft or other criminal offense which renders him/her unfit for public office, regardless of the sentence imposed, or persons who have been convicted of another crime and sentenced to imprisonment for a term exceeding six months, during the period of the consequences of conviction;
- 7) persons who are spouses of persons mentioned in this article or their immediate family members.

3. Transparency of the Judicial Council operations

3.1. Principle of the public

Law on the Judicial Council (Art. 5) stipulates that the Council's work is public and that the public can be excluded only under this Law. The Law provides for mandatory exclusion of the public in two cases: session at which the Council decides on the selection of candidates for judges (Art. 35, para 3) and session at which the Council decides on dismissal of judges (Art. 66, para 3). In disciplinary proceedings before the Disciplinary Commission, the debate is as a rule public and the public may be excluded only at the request of a judge against whom the disciplinary proceedings have been initiated.⁵² *Such legal solution should also be prescribed in case when deciding on dismissal of a judge.*

The Judicial Council Rules of Procedure, in force until 18 November 2011, provided that the Council may decide to exclude the public from other sessions as well (Art. 4, para 2)⁵³, thereby seriously violating the principle of the public stipulated by law. Although the new Rules of Procedure contain no such provision, they envisage that "the minutes of the session are generally not available to the public", and neither are audiovisual recordings of the sessions (Art. 25, para 6 and 7), which points to the commitment of the Council to close their session to the public, as the Council have had in practice.

3.2. Sessions of the Judicial Council

Rules of Procedure of the Judicial Council envisage that every December the Council adopts its annual plan of regular sessions for the coming year (Art. 19, para 2), that sessions are held in "open atmosphere" (Art. 18 para. 1) and that sessions agenda proposal is published on the Council's website (Art. 21, para 4).⁵⁴

As part of this project, HRA intended to have one of its representatives attend sessions of the Judicial Council, in order to gain immediate insight into its work and assess the degree of transparency. In this sense, on 14 November 2011 the project assistant requested information from the Secretariat of the Judicial Council on the session date; the Secretariat responded that the date will be posted on the website and that the sessions are held once a month.

However, the very next day, on 15 November 2011, the Judicial Council held a session, and only a day later, on 16 November 2011, information on holding the session was published on its website. Already on 17 November 2011 HRA submitted a letter to the Presidents of the Judicial Council, expressing interest in attending the sessions, explaining that HRA representative could not attend the previous session due to the untimely publishing of information on the session, and kindly asking for the notice of the next session date, in case information is not published on the website.

⁵² Rules of Procedure of the Judicial Council, *Sl. list CG*, 57/2011 of 18 November 2011, Art. 58, para 6.

⁵³ *Sl. list CG*, 35/2008, 38/2008 and 6/2009, Art. 21, para 6.

⁵⁴ Rules of Procedure in effect until the adoption of new Rules on 18 November 2011 also stipulated that the proposed agenda shall be published on the website of the Judicial Council before the session (Art. 17, para 4).

On 19 November 2011 a new notice was published on the website of the Council - that the session took place the previous day, on 18 November 2011.

It is interesting that HRA representative was in the premises of the Judicial Council to submit certain requests the very day of the session, but when asking about the session date, she received an answer that the session has not yet been scheduled.

Since the Council continued its practice of concealing session dates, each month HRA requested in writing a notice of the session dates and sought for its representative to attend them. By June 2012, HRA submitted a total of five requests for attending the sessions of the Judicial Council; the Judicial Council responded to none.

This practice is obviously not conducive to public confidence in the work of the Judicial Council.

3.3. Publication of decisions of the Judicial Council

The Judicial Council Law provides that the Council shall publish its decisions on the appointment of judges only in the Official Gazette of Montenegro (*Sl. list CG*).⁵⁵ It is not stipulated that any decision of the Judicial Council shall be published on its website.⁵⁶

In order to improve the transparency of Judicial Council operations, HRA reiterates the recommendation to prescribe by the Judicial Council Law the duty of the Council to publish on its website the decisions on judges' appointment, disciplinary responsibility, dismissal, termination of judicial office, as well as on temporary suspension, with a rationale, immediately upon their adoption.

However, despite the absence of legal obligation, the Judicial Council publishes its decisions on the website, although not always on time and not every decision, or not every decision with a rationale.

Although the very Council insists that all of its decisions on termination of judicial office, disciplinary responsibility, appointment, dismissal, and temporary suspension of judges are published on its website,⁵⁷ Council's website has not always been regularly updated. For a long time it did not contain previously adopted decisions, some decisions have been published without a rationale, while some decisions have not been published at all. The Council has published many of its decisions on the website after their submission had been requested, and the Council, as a rule, rejected these requests on the grounds that the decisions have already been published.⁵⁸

However, after the last appointment of judges at the Judicial Council session held on 11 April 2012, the Judicial Council published its decisions on the appointment

⁵⁵ Law on the Judicial Council, *Sl. list CG*, 13/2008 and 39/2011, Art. 37, para 2.

⁵⁶ www.sudskisavjet.gov.me/http://sudovi.me/sscg

⁵⁷ For example, the decision of the Judicial Council [Su.R.br.](#) 213/12 of 28 March 2012.

⁵⁸ More detail about the Judicial Council decisions and their disclosure under Section 3.3. and 3.4.

of judges on the website, which encourages expectation that the work of the Judicial Council shall be transparent and that this body will keep its work public even without pressure and requests of the interested public. *Nonetheless, such practice should be provided by prescribing adequate legal obligation.*

Unlike the previous Rules of Procedure of the Judicial Council (Art. 61), the new Rules do not contain a provision under which the imposed disciplinary measures are, as a rule, published on the notice board and website of the Council, unless the Council would decide otherwise. Currently, neither the Law nor the Rules prescribe that this type of decision is to be published, even though, as mentioned above, the disciplinary procedure is generally open to the public, i.e. for the public that manages to obtain information on disciplinary procedure, because session dates are not announced in advance. The Council does not publish its decisions on determining disciplinary responsibility on the website. *HRA notes that its recommendation to publish decisions on establishing disciplinary responsibility of judges, following the practice of the Supreme Judicial and Prosecutorial Council of Bosnia-Herzegovina, in order to follow the practice of the Council in this area - has not been accepted.*⁵⁹

On its website the Council posted separately the decisions on the termination of judicial office and complete decision with the rationale. While it is commendable that the Council has decided to publish this kind of decisions without specific obligation, such way of publishing is confusing, because not all decisions with the rationale have been published. Decisions published without the rationale mainly concern the removal from judicial office of judges who were the subject of media interest and coverage, and whose work has often been accompanied by controversy.⁶⁰

3.4. Decisions rationale

In terms of transparency of the Judicial Council work, the earlier HRA recommendation to provide appropriate detailed and precise rationales for decisions concerning the appointment of judges, especially in cases where the appointed candidate has had lower average grade than a candidate which has not

⁵⁹ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, Podgorica 2009, item 7.3.2.2. and 7.3.2.3.

⁶⁰ Among the 2008 decision published on the website there was no rationale for the decision on the termination of office of a judge of the High Court in Podgorica Radovan Mandić and judge of the Basic Court in Plav Radenko Radević. Among the 2009 published decision there was no rationale for the decision on the termination of office of a judge of the High Court in Podgorica Lazar Aković, and among the 2010 decision published on the website there was no rationale for the decision on the termination of office of a judge of the Basic Court in Pljevlja Radoje Kandić and judge of the Basic Court in Berane Isad Jašarović. Also, published decisions from 2008 do not include a rationale for the decision on the dismissal of a judge of the Basic Court in Kolašin Ljiljana Simonović, while the decision was published together with 2009 decisions on the termination of office. Furthermore, the website does not include decisions with rationales on the termination of office of judges of the Specialized department of the High Court in Podgorica, who tried in the criminal proceedings for the most serious offenses, and who ceased to hold office over the period of the past four years (Radovan Mandić, Lazar Aković and Slavka Vukčević).

been appointed – has not been accepted.⁶¹ For more detail on this issue see "Practice of the Judicial Council in the appointment of judges" below.⁶²

3.5. Publication of other information on the Council's web page

3.5.1 General remarks

Website of the Judicial Council contributes significantly to the transparency of its work. However, it is not prescribed what should be posted on the website of the Council, as well as what the Council had already published. It is prescribed that the Council shall post test questions, annual reports of the Council,⁶³ vacancy announcements for the appointment of judges and court presidents, application forms and draft agendas for the Council sessions.⁶⁴

3.5.2 Sessions agenda

Despite the prescribed requirement to publish session draft agenda on the website prior to holding a session, the Council does not publish information about the session date, or publishes information about the session after it has been held. This prevents the public from attending sessions and following the work of the Council, as already noted.

3.5.3 Judicial vacancy announcements, forms and applications of candidates

HRA has previously proposed that judicial vacancy announcements and application forms be published on the website of the Council, as well as the applications of candidates, or at least the names of candidates, to enable the public to call attention to the false representation of data in an application or other sort of unworthiness of a candidate for judicial function.⁶⁵

Rules of Procedure of the Judicial Council (Art. 29, para 3) now provide that vacancies for judges and court presidents are posted on the courts website www.sudovi.me. According to data from this website on 1 June 2012, of a total of six judicial vacancies announced in 2011, four vacancy announcements were published,⁶⁶ while in 2012 two were announced and both were published. The website also publishes application forms.

However, data on persons who have applied for the position had not been published until this year. The decisions now list the names of all candidates, and earlier only the initials of the candidates who had applied were published. Such

⁶¹ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, item 7.3.2.3, p. 131.

⁶² More detail on rationales of the decisions on the appointment of judges in the Report under Section 5.

⁶³ Law on the Judicial Council (*Sl. list CG*, 3/2008 and 39/2011) Art. 34, para 3 and Art. 26, para 4.

⁶⁴ Art. 29, para. 3, Art. 32 and 21, para 4 of the Rules of the Judicial Council of 18 November 2011.

⁶⁵ Such practice of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina has been pointed out in the publication „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, Podgorica 2009, item 7.3.1.1, p. 129.

⁶⁶ There was no vacancy announcement for the appointment of a judge of the High Court in Bijelo Polje, a judge of the Basic Court in Kotor and a judge of the Basic Court in Cetinje, published in the *Sl. list CG*, 11/2011, or for the appointment of the President of the Appellate Court of Montenegro, a judge of the Administrative Court, two judges of the High Court in Podgorica and two judges of the High Court in Bijelo Polje, published in the *Sl. list CG*, 64/2011.

practice did not contribute to the transparency of the process of appointment of judges.⁶⁷

HRA repeats the recommendation to prescribe the disclosure of information about applicants for judicial office before deciding on their appointment.

3.5.4 Reports on the Judicial Council operations

Annual reports on the work of the Judicial Council are published on its website. However, content-wise, these reports represent reports about the work of the courts. As the authority that oversees the work of the courts, the Judicial Council should critically review and evaluate reports on the work of all courts, instead of listing statistics on the courts activities and overview of their work. Also, much of the report on the Judicial Council work contains information about the activities of the President of the Supreme Court, noting her visits to other countries and visits of representatives of other countries to the Supreme Court of Montenegro, which does not encourage the impression that this is a document describing the work of the Judicial Council.

3.5.5 Regulations relevant to the work of the Judicial Council

The website of the Council contains regulations relevant to its work, however, the Law on the Judicial Council has not been published in an updated version, and the Guide for Access to Information is published only in English.⁶⁸ In addition to the Rules of the Secretariat of the Judicial Council, which has been published, the website should also include all other internal documents of the Council that the Council is entitled to adopt under the Rules for the purpose of "efficient and effective work" (Art. 28, para 1).

3.6 Minutes from the Judicial Council sessions

Rules of Procedure of the Judicial Council state that the minutes of the Council sessions are generally not available to the public, and that the Council may decide whether to publish the minutes or a portion thereof. Previously applicable Rules of the Judicial Council contained the identical solution. Such a solution declares an act of the Judicial Council secret and empowers the Council to decide whether to ever publish that act, or at least its portion. In addition, no provision of the Rules of the Judicial Council, or of any other regulation, specifies the criteria based on which the Council could make the minutes of its session public. Such broad authority that the Council has given itself under the Rules is not in accordance with the principle of the public prescribed by the Judicial Council Law.⁶⁹

⁶⁷ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, item 7.3.1.3, p. 130, available at: http://www.hraction.org/wp-content/uploads/hra-analiza_reforme_izbora_sudija_u_crnoj_gori-eng.pdf.

⁶⁸ Latest review of the site <http://sudovi.me/sscg/sudski-savjet/propisi/> on 30 June 2012, Law on Judicial Council was published in a version from 2008, although it was amended in 2011.

⁶⁹ On 24 January 2012 the project coordinator filed an initiative before the Constitutional Court of Montenegro for assessment of the constitutionality and legality of the Rules of the Judicial Council which indicates that this act of the Judicial Council is contrary to the Constitution, the Law on the Judicial Council and the Law on Free Access to Information.

By failing to timely publish session dates on its website and prescribing secrecy of the minutes from the Judicial Council sessions, the Council has made a significant part of its operations non-transparent. In a situation where this institution has yet to prove itself as an authority that operates without political or other influence, transparency is a must, while the current level of secrecy is inappropriate. It is necessary to change the Council's practice and Rules of Procedure to increase its transparency.

3.7 Handling of requests for access to information

3.7.1 Failure to comply with the Administrative Court judgment

On 13 January 2011 HRA submitted a request for access to information asking the Judicial Council to provide information in the form of answers to the following questions:

- whether the responsible person of the Basic Court in Podgorica has been identified regarding the absolute time-bar in the case of prosecution of businessman Dragan Brković for the criminal offense of insult under Art. 195, para 2 in relation to item 1, and in relation to Art. 49 of the Criminal Code, under a private action of 8 July 2005, initiated on 26 April 2009; which judge of the Basic Court was in charge of that case and who at the time was the president of that court;
- whether the responsibility of any person from the Basic Court in Podgorica has been initiated and established, concerning the reasons for dismissal of a former judge of that Court, Žarko Savković;
- what are the results of control over the Basic Court operations in the past year: whether the control included non-compliance with deadlines for scheduling trials, undue delays, unprepared discussions/debates, who keeps statistical records on punitive policy of courts, who assesses the appropriateness of punitive policy and what are the assessments in 2009 and 2010.

Deciding on the above request, the Judicial Council adopted a decision Su.R.br. 20/2011 of 26 January 2011, refusing the request, so HRA filed a complaint with the Administrative Court of Montenegro for the annulment of the decision concerned.

In its ruling U br. 428/11 of 21 October 2011 the Administrative Court adopted the complaint, annulled the decision of the Judicial Council and ordered the adoption of a new, legitimate decision.

The Judicial Council failed to act on the said judgment of the Administrative Court and on 8 December 2011 HRA submitted a request to the President of the Judicial Council to comply with the Administrative Court ruling and adopt a new, legally-based decision. However, even after filing the repeated request, the Judicial Council has failed to act on the judgment of the Administrative Court until the day of publication of this report in June 2012, eight months after the adoption of the ruling.

By failing to comply with the judgment of the Administrative Court of Montenegro, the Judicial Council appears not only as a non-transparent body that hides facts relevant to its operations from the public, but also as a state authority which does not comply with court judgments defying so the rule of law.

3.7.2 Subsequent publication of decisions

Due to the observed selective disclosure of information on the website of the Judicial Council, in accordance with the Law on Free Access to Information, HRA addressed the Judicial Council with several requests for submission of documents relevant to the monitoring of Council's operations and objective assessment of its work. There was a practice of the Council to refuse requests for access to its decisions explaining that all decisions are published on the website, although at the time of submission or rejection of requests that was not the case.⁷⁰ However, after filing the complaint with the Administrative Court of Montenegro against the decision of the Judicial Council rejecting requests for submission of its decisions, the Judicial Council did publish the decisions that were missing on its website, although not all.⁷¹

On 11 April 2012 three requests were submitted to the Judicial Council, asking for:

- a) decisions adopted by the Council since 2009, related to the appointment of judges, termination of judicial office, dismissal, disciplinary responsibility and suspension, bearing in mind that the website of the Judicial Council did not contain all of these decisions;
- b) decisions on establishing disciplinary responsibility from 2009, 2010, 2011 and 2012, because no such decision has been posted on the website; and
- c) information on the number of decisions adopted by years starting from 2008, related to the appointment of judges, termination of judicial office, dismissal, disciplinary responsibility and suspension.

Requests for decisions on the appointment of judges, termination of judicial office, dismissal and suspension of judges (a) were refused by the Judicial Council on the grounds that those decisions have already been published. A portion of such decisions was published on the website subsequently. Also, as regards decisions on suspension, they were published without rationales and only those from 2008 and 2009.

The Council has submitted all decisions of the Disciplinary Commission (b), as well as information on the number of decisions regarding the appointment of

⁷⁰ On 13 March 2012 HRA submitted a request to the Judicial Council for decisions on the appointment of judges, termination of judicial office, dismissal and suspension for the period since 2009 and onwards. On 14 March 2012 the Secretariat of the Judicial Council submitted a notice that all decisions can be found on the website of the Judicial Council, ending with decisions on the appointment of 21 February 2012. However, contrary to allegations in the notice, the Council's website did not contain decisions, which, according to media reports, were adopted in the previous period. For example, based on articles in the media, it is known that at its session held on 21 October 2011 the Judicial Council established termination of judicial office of judges of the High Court in Podgorica Slavka Vukčević and Čedomir Janjević, and a judge of the High Court in Bijelo Polje Milorad Smolović. At its session held on 18 November 2011, the Council decided on termination of office of the President and Judge of the Appellate Court of Montenegro Dragutin Čolaković. None of these decisions were published on the website of the Judicial Council at the moment when HRA requested their submission and when the Judicial Council submitted a notice that all decisions have been published.

⁷¹ Decisions on suspension from 2010 are missing.

judges, dismissal, termination of judicial office, disciplinary responsibility and suspension (c).

3.7.3 Individual examples

(1) On 26 March 2012 HRA submitted a request to the Judicial Council for decisions on termination of office of judges Željko Vuković, Radovan Mandić, Lazar Aković and Slavka Vukčević, whose work was followed by controversy, and decisions on suspension of Željko Vuković, Radovan Mandić and Lazar Aković. The Judicial Council rejected this request stating that decisions on termination of judicial office are posted on its website, and that the requested decisions on suspension have not yet been adopted, meaning that the Council does not have them.⁷²

However, decisions on termination of judicial office have not been published on the website (except for certain decisions without rationale), and only one decision without rationale was published - the decision for which the Judicial Council claimed it did not exist, based on which the judge of the High Court in Podgorica Lazar Aković has been suspended from office.⁷³

(2) On 26 March 2012 HRA submitted a request for decisions on initiation of dismissal proceedings and decisions on termination of judicial office at the personal request of a judge whose dismissal has been sought. The Council refused this request, specifying that decisions on termination of judicial office rendered at the personal request of a judge whose dismissal is being sought are published on its website, and that decisions initiating dismissal proceedings have not been adopted whatsoever, so the Judicial Council does not hold them.⁷⁴

As noted above, decisions on termination of judicial office have been published on Council's website selectively and partially (without rationale). In addition, decisions on dismissal note that the Judicial Council initiated dismissal proceedings upon the proposal for dismissal, which indicates that the Council does hold the decisions that had initiated these proceedings.

However, after these requests and responses from HRA the Judicial Council started to publish the requested decisions.

(3) In addition to the above mentioned refusals of HRA requests, the Judicial Council⁷⁵ refused to submit the report of the President of the High Court and the conclusion of the Judicial Council⁷⁶ he had acted upon, regarding actions of the President of the Basic Court in Podgorica in one case (for more details on this case see 8.1.2). Previously in this case the President of the High Court adopted the request for exemption of the President of the Basic Court in Podgorica because he had failed to comply with the principle of random assignment of cases, which by law constitutes negligent and incompetent performance of one's function. Therefore, the Judicial Council adopted a conclusion seeking a report on this occasion from the President of the High Court in Podgorica. Explaining its

⁷² Su.R.br.244/12 of 28 March 2012.

⁷³ Su.R.br.1105/09 of 3 October 2009.

⁷⁴ Su.R.br.213/12 of 28 March 2012.

⁷⁵ Decision Su.R.br. 177/12 of 28 March 2012.

⁷⁶ Su.R.br.772/11 of 19 September 2011.

decision to reject to submit its conclusion and the report of the President of the High Court to HRA, the Judicial Council noted that the conclusion represents "an integral part of the minutes", referring to the disputed provision of Art. 25 of the Rules of Procedure of the Judicial Council (whose constitutionality and legality need to be examined by the Constitutional Court at the initiative of January 2012), which prescribes the confidentiality of the minutes of the Judicial Council session.

Also, as in the example given above, the Council states that the Report of the President of the High Court in Podgorica in this case has been published on the website of the High Court in Podgorica, although the website did not contain that report even on the date of finalizing this report in June 2012. For this reason HRA filed a complaint with the Administrative Court of Montenegro, which issued a ruling on 27 June 2012 and annulled the decision of the Judicial Council.⁷⁷ Acting upon this decision of the Administrative Court, the Judicial Council allowed HRA access to the requested information and submitted these documents.⁷⁸

(4) The Judicial Council also refused to submit the decision establishing that there are no grounds to initiate disciplinary proceedings against the President of the Basic Court in Podgorica for violating the principle of random assignment of cases, accepting the opinion from the report of the President of the High Court in Podgorica, who had previously found in his decision on exemption of the President of the Basic Court in Podgorica a violation of the above principle set out by law. Regarding this HRA request, the Judicial Council did not even adopt a decision, but it only sent a notice without any explanation.⁷⁹ For more detail on this case see section 8.1.3.

3.8 Denying access to records of other candidates

Pending the entry into force of the Law on Amendments to the Law on the Judicial Council in July 2011 (*Sl. list CG*, 39/2011), Art. 38 of the then in force Law on the Judicial Council (*Sl. list CG*, 13/2008) stipulated the following:

"a candidate has the right to have insight into own record and records of other candidates who have applied for judicial vacancy announcement, into results of written tests, assessment of candidates and opinions on candidates, and to submit a written statement on that to the Judicial Council no later than three days after the insight".

This right is considerably limited by the Law on Amendments to the Law on the Judicial Council, as the candidates are now unable to access records of other candidates, but only the final assessment of other candidates.

This solution does not help strengthen trust in transparent and fair operation of the Council, candidates are unable to verify assessment procedure and are forced to file complaints before a court to be able to gain access to all documents. There are no valid reasons for such a solution, so it is certainly necessary to amend it.⁸⁰

⁷⁷ U.br.795/12.

⁷⁸ Su.R.br.177-1/12 of 9 July 2012.

⁷⁹ Su. R.br.136-1/2012 of 27 February 2012.

⁸⁰ When presenting the Analyses on 12 July 2012, Radule Kojović, judge of the Supreme Court of Montenegro and member and deputy president of the Judicial Council in the previous term, noted that these legal changes are not satisfactory and that, despite of them, all candidates shall have the opportunity to access the full documentation.

Law on the Judicial Council should prescribe that each candidate has the right to have insight into their own and records of other candidates who have applied for the judicial vacancy announcement (into the results of written tests, assessment of candidates and opinions on candidates). It is also necessary to specify by the law or Rules of Procedure the procedure of gaining insight into documents and the rights of candidates, by clearly prescribing the manner and place of gaining insight into election documents, deadline within which the Secretariat shall provide access to election documents upon request, the right to copy documents, the right to gain an insight through a legal counsel and the right to object to the Judicial Council in the event of denial of this right.

Recommendations:

1. As a rule, make the Judicial Council sessions open to the public.
2. Amend the Law on the Judicial Council to prescribe the exclusion of the public from sessions at which the Council decides on dismissal and disciplinary responsibility of judges only at the request of a judge whose responsibility is being established.
3. Specify by law all information to be published on the Council's website, and particularly ensure timely upload of:
 - a) decisions on the appointment, disciplinary responsibility, dismissal and suspension of judges, with a rationale;
 - b) applications of candidates for the judicial post;
 - c) all regulations relevant to the work of the Judicial Council;
 - d) notices of session dates, with the proposed agenda.
4. Amend and align the Rules of Procedure of the Judicial Council with the statutory principle of the public, by abolishing the Council's right to arbitrarily decide on when to keep the minutes of the session secret (Art. 25, para 6 of the Rules).
5. Immediately publish the Judicial Council decisions together with a rationale; it is unnecessary to publish dispositions of certain decisions separately.
6. Change the form and contents of the annual report on the work of the Judicial Council so that the report includes the Council's assessment of the work of courts, and not only statistics on the work of courts. Also, the annual report on the Judicial Council operations should not contain promotional information about the Supreme Court President's visits to other states, but information on the purpose and results of such activities and funds expended from the budget for these purposes.
7. Ensure that the Judicial Council respects court rulings binding on the Council.
8. Amend the Law on the Judicial Council to ensure access to one's personal records, as well as records of other candidates for election; specify the procedure of accessing the records and the right to appeal in case of denial of this right.

4. Criteria for appointment of judges and court presidents and their assessment

4.1. General remarks

Law on Courts (*Sl. list RCG*, 5/2002 and 49/2004 and *Sl. list CG*, 22/2008 and 39/2011) prescribes framework conditions, criteria for selection of judges, President of the Supreme Court and presidents of other courts:

1. Requirements for election of judges

General requirements

Article 31

A person may be elected as a judge if he/she:

- 1) is a national of Montenegro;*
- 2) is medically fit and possesses capacity to exercise rights;*
- 3) has a university degree in the field of law;*
- 4) has passed bar examination;*

Special requirements

Article 32

In addition to the general requirements, a person may be elected as a judge if he/she possesses work experience of the following duration in the field of law:

- for a judge of the basic court – five years,*
- for a judge of the commercial court – six years,*
- for a judge of the high court – eight years,*
- for a judge of the Appellate Court and the Administrative Court – ten years,*
- for a judge of the Supreme Court – fifteen years.*

Requirements for election and mandate of the President of the Supreme Court

Article 32a

A person may be elected as the President of the Supreme Court if he/she meets general and special requirements for a judge of the Supreme Court and possesses professional impartiality, high professional and moral qualities.

President of the Supreme Court shall be elected for a term of five years..

Requirements for election of a president of court

Article 33

A president of court is a judge.

The person elected as a president of court is at the same time elected as a judge of that court. The president of court shall continue to serve as judge of the court after: the expiry of his/her term of office, removal from the office of the president of court and submission of request for termination of office of the president of court.

Law on the Judicial Council (*Sl. list CG*, 13/2008 and 39/2011) prescribes the precise criteria and sub-criteria for the appointment of judges appointed for the first time, advancing judges and court presidents:

Criteria for the appointment of a judge to be appointed for the first time
Article 32

Criteria for appointment of a judge to be appointed for the first time shall be the following:

- 1) Professional knowledge assessed on the basis of the sub-criteria:*
 - average grade and the length of studies;*
 - professional trainings (initial training, seminars, workshops);*
 - title awarded (Master of Laws, Doctor of the Science of Law);*
 - computer literacy and foreign language skills*

- 2) Ability to perform judicial office assessed on the basis of the sub-criteria:*
 - written examination;*
 - work experience (types of assignments a candidate performed so far, the length of work experience, work performance, promotions etc.);*
 - communication skills and personal conduct.*

- 3) Worthiness for the performance of judicial office assessed on the basis of the sub-criteria:*
 - the fact that he/she has not been convicted for criminal offences which renders him/her unworthy of judicial office, nor sentenced in a misdemeanour procedure;*
 - reputation and irreproachable conduct;*
 - relationship with colleagues and clients;*

Criteria for the appointment of an advancing judge
Article 32a

Criteria for the appointment of an advancing judge shall be the following:

- 1) Knowledge assessed on the basis of the sub-criteria:*
 - professional trainings (regular constant trainings and other forms of training);*
 - title awarded (Master of Laws, Doctor of the Science of Law);*
 - published scientific papers and expertise and other professional activities;*
 - computer literacy and foreign languages skills.*

- 2) Capability of holding a judicial office assessed on the basis of the sub-criteria:*
 - work experience;*
 - work performance during the last three years assessed on the basis of: number and type of resolved cases and the manner of resolving the cases; the number of confirmed, altered, abolished judgements and the judgements resulting in trials conducted upon legal remedies; percentage of resolved cases in relation to approximate norms; resolving cases in the order of their receipt; acting in a timely manner and the time needed for drafting judgments;*
 - the number of cases which resulted in the statute of limitations; the number of justified review requests;*
 - communication skills and personal conduct.*

- 3) Worthiness for holding a judicial office assessed on the basis of the sub-criteria:*
 - the fact that he/she has not been charged in a disciplinary procedure with the violation of the dignity of a judicial office;*
 - relationship with colleagues and clients;*
 - reputation and irreproachable conduct.*

Criteria for appointment of a court president
Article 32b

A court president, in addition to the criteria under Article 32a of this law, shall be capable of managing and organising the work in a court, which comprises the following:

- *ability to organize work;*
- *knowledge of court administration;*
- *reputation that a candidate enjoys among the judges of the court in which he/she performs judicial office;*
- *dedication to preserve the independence of courts and judges.*

The new Rules of Procedure of the Judicial Council of 18 November 2011 prescribe a range of points that can be awarded to the assessment of each sub-criterion, for example 0-4, 0-20 (Art. 43-45).

The existing legal provisions and new Rules of Procedure represent an improvement over the previous situation, because the criteria and sub-criteria are now prescribed by the law, and their assessment by the Rules.⁸¹

The new Rules of Procedure provide that each sub-criterion is assessed separately. It also prescribes the forms for candidates appointed as a judge for the first time and for judges to be appointed to the court of higher instance.

However, the main recommendation of HRA to prescribe the parameters for assessing the criteria and sub-criteria in order to ensure uniform treatment and the most objective possible handling of the Council members in evaluating candidates - has not been accepted. (Specifically, this recommendation has been adopted only in relation to the evaluation of the sub-criterion "average grade and length of study"). This still allows for arbitrary and inconsistent actions of the Council in the appointment of judges, as will hereinafter be explained in more detail.⁸²

In addition to the range of points for evaluation of each sub-criterion, the new Rules of Procedure should also prescribe the parameters for awarding these points and thus provide a uniform and objective assessment of candidates.

In its Action Plan for the period 2009-2013, as one of its 12 strategic objectives the Judicial Council has identified the improvement of mechanisms for assessment of judges and expert associates. Normative framework for defining

⁸¹ Amendments to the Law on the Judicial Council of 4 August 2011 and the new Rules of Procedure of 18 November 2011 include HRA suggestion to legally prescribe all the criteria, „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, HRA, Podgorica 2009, item 1.1.1.1.1, p. 40.

⁸² In its publication „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, p. 40-43, in early 2009 HRA proposed the parameters standards for the assessment (descriptive or numerical) of each sub-criterion. The adoption of these standards would set a clear basis for objective appointment of judges and convincing assumption of independence of the judiciary.

Pending the adoption of the new Rules of the Judicial Council, on 12 October 2011 HRA submitted a letter to the Judicial Council pointing out that the Rules should prescribe *the parameters for the evaluation of the criteria and sub-criteria for the appointment of judges*, as well as other issues important to the transparency and fairness of the election of judges. Most of the proposals in this letter were not adopted (http://www.hracion.org/wp-content/uploads/Dopis-sudskom-Savjetu_20102011.pdf). The Judicial Council did not bother to respond to HRA letter, or to the previously published publication „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“.

the objective and clear criteria for assessment and promotion of judicial office holders has been provided as a priority in the implementation of this strategic goal, and one of the tasks set by the Judicial Council in this regard is the adoption of "internal documents which will clearly define objective criteria for qualitative and quantitative evaluation of the performance of judges in accordance with international standards". Although the Action Plan stated that the specific tasks are to be performed to achieve the priorities, and the deadline for the fulfilment of this task was October 2010, the Judicial Council has not yet adopted internal documents that would define the qualitative and quantitative evaluation of the performance of judges.

The Judicial Council does not implement specific tasks defined in its Action Plan and thus maintains the existing situation which allows for arbitrary and biased evaluation of judges.

4.2. Criteria scoring system under the provisions of the Judicial Council Rules of Procedure

The Rules of the Judicial Council envisage scoring as the sole form of assessment (evaluation) of the criteria and sub-criteria. In addition to the basic objection regarding the lack of the scoring parameters, HRA believes it is absurd to score the criterion "Worthiness to perform judicial function" and that it would be better to descriptively assess the sub-criteria "Work experience" and "Communication skills and personal conduct", as explained below in detail.

4.2.1. Appointment of judges appointed for the first time

4.2.1.1. General remarks

When choosing among the candidates for a judge appointed for the first time, three criteria are assessed: acquired knowledge, ability to perform judicial function and worthiness to perform judicial function, which are evaluated based on the fulfilment of the sub-criteria (see Art. 32 of the Law on the Judicial Council).

4.2.1.2. Criterion "Acquired knowledge"

Acquired knowledge is assessed on the basis of the sub-criteria:

- a) average grade and duration of studies,*
- b) professional development (completed initial training, seminars, workshops),*
- c) academic qualification (Master of Laws, Doctor of the Science of Law),*
- d) computer skills and knowledge of foreign languages.*

4.2.1.2.1 Sub-criterion "Average grade and duration of studies"

Of the four sub-criteria listed (and all other sub-criteria), the Rules of Procedure set standards for the evaluation of only one - "Average grade and duration of studies", by prescribing number of points for a range of average grades at the university, and the degree of reduction of points in case the candidate studied for

more than four years.⁸³ This ensures that each candidate at the same level regarding the average grade and duration of studies always earns the same number of points, rather than having the Council members assign grades in each case of the appointment of a judge. In other words, now it is certain that each candidate for a judge who had studied 4 years and had an average grade of 8 to 9 shall earn 3 points, and that someone with the same average grade, but who had studied twice as long will earn less points. This ensures certainty and objectivity, especially with regard to the uniform conduct of the Council in evaluating each candidate and on every occasion.

However, for evaluation of all other sub-criteria only the adequate range of points that can be awarded is prescribed, but not the parameters or benchmarks which determine how many points can be awarded in a particular circumstance, which inevitably leads to uneven and subjective evaluation.

Regarding the assessment of all other sub-criteria, only the range of points that can be awarded to candidates has been prescribed, without any indication of what determines that numerical score, i.e. what influences it to be lower or higher. This regulation still leaves plenty room for subjective and arbitrary decision-making in the appointment of judges or their advancement.

Out of 100 possible points a candidate for a judge can achieve, it is only possible to accurately determine how an average grade and duration of studies that brings a maximum of 5 points has been scored. As regards all other criteria and sub-criteria which make up 95 points, there is ample room for subjective evaluation and selection of candidates. The fact that even 95% of possible points awarded to candidates can be awarded arbitrarily suggests that the new Rules of Procedure achieved little progress in relation to the previous and still leave much room for biased selection of judges.

4.2.1.2.2 Sub-criterion "Professional development"

Sub-criterion (b) *professional development (completed initial training, seminars, workshops)* is assessed on a 0 to 5 point scale, but it is not defined whether the completed initial training in itself implies 5, 4 or 3 points? Does attending a seminar deserve 1, 2 or 3 points? Will seminars that may be of importance for the performance of judicial functions (e.g. seminars on human rights) be awarded more points or not? All this should be laid down, so as not to allow for subjective evaluation that does not provide for uniform conduct of the Council and does not guarantee its objectivity.

4.2.1.2.3 Sub-criterion "Academic qualification"

Sub-criterion (c) *"Academic qualification" (Master of Laws, Doctor of the Science of Law)* is assessed on a 0 to 5 point scale, but it is unclear how many points the Master of Laws or Doctor of the Science of Law will earn, whether the change in

⁸³ See Art. 43, para 2 and 3 of the Rules of the Judicial Council of 18 November 2011.

the system for awarding academic titles in accordance with the Bologna Declaration will be taken into account, etc.

Also, a small number of points obtainable for academic degree (maximum 5, as opposed to maximum 10 points for "Reputation and irreproachable conduct") shows that this sub-criterion is not adequately evaluated. Thus, academics are not encouraged to become candidates for judges, although it would be ideal that all judges have the highest education possible. It is certainly desirable to increase a range of points that can be awarded to e.g. a candidate who is a doctor of the science of law, to thereby compensate for the lack in case that such a candidate, for example, did not attend seminars or initial training for judges.

Besides the fact that there are no parameters for scoring of academic knowledge, information at which educational institution the academic qualification has been obtained is completely neglected, which leaves room for the same or even better scoring of a diploma acquired in a newly established institution without references and reputation as opposed to a diploma that a candidate acquired at the institution with long tradition and professors who have undisputed international authority.

4.2.1.2.4 Sub-criterion "Computer skills and knowledge of foreign languages"

Sub-criterion (d) "Computer skills and knowledge of foreign languages" is assessed jointly, on a 0 to 5 point scale, but it has not been prescribed how to divide the points, what if a candidate speaks and writes a foreign language outstandingly, but cannot use a computer? It should be borne in mind that computer skills can be learned much faster than a foreign language and in view of that appropriate parameters for the separate scoring of each of the two sub-criteria should be prescribed.⁸⁴ Level of knowledge of foreign languages is evaluated differently in diplomas, and the parameters for evaluating this knowledge should be prescribed based on this. For absolute objectivity, this knowledge should be verified by appropriate testing.

4.2.1.3. Criterion "Ability to perform judicial function"

Ability to perform judicial function is assessed based on the three sub-criteria:

- written examination;
- work experience (types of assignments a candidate performed so far, the length of work experience, work performance, promotions etc.);
- communication skills and personal conduct.

4.2.1.3.1 Sub-criterion "Written examination"

⁸⁴ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, item 1.1.4.1.1, p. 44.

Sub-criterion "Written examination" carries the most points (50) in relation to the points earned by other sub-criteria (typically up to 5). The test score represents 50% of total points.

The Rules of Procedure prescribe a range of points that can be awarded to a candidate for a specific grade s/he received on the test, in the following manner:

- 0 to 39 points, if the candidate received grade 1 and 2 on the test;
- 40 points if the candidate received grade 3 on the test;
- 45 points, if the candidate received grade 4 on the test;
- 50 points, if the candidate received grade 5 on the test.

The Rules prescribe the content of the test, i.e. areas covered by the written test questions, and that the test must specify how many points each question can earn.⁸⁵ However, there is no indication as to how many points a certain area should earn and how the Commission carries out the evaluation. The Rules of Procedure provide that the number of points for each question is determined by majority vote of the Commission members, and that the Commission evaluates the test by majority vote on the basis of the total number of points won, and that the test grades are as follows:

- 1 (one) if the candidate achieved less than 55% of the total possible points;
- 2 (two) if the candidate achieved 55-65% of the total possible points;
- 3 (three) if the candidate achieved 65-75% of the total possible points;
- 4 (four) if the candidate achieved 75-85% of the total possible points;
- 5 (five) if the candidate achieved 85-100% of the total possible points.⁸⁶

Such solution does not ensure objective and balanced evaluation of candidates. It is unclear on what basis the Testing Commission determines the number of points for different questions, it is possible that same areas are evaluated differently in different tests, it is not known on what basis higher or lower score is given for certain questions and the Testing Commission has an authority to arbitrarily decide on a number of points to be awarded for particular questions, which additionally creates space for arbitrary evaluation of candidates. This is especially important since the written examination makes up 50 points, which is half of the total number of points a candidate can obtain. Finally, it is unclear why the Commission evaluates the test by majority vote, since a percentage of points for achieving certain grade has been specifically prescribed?

Prescribed anonymity of testing does not provide objectivity in evaluating the candidates, because it does not preclude the possibility of favouring a particular candidate by a part or the whole Commission. Although the Rules provide that a candidate discloses his/her code number only immediately before the interview, and after the test is evaluated (Art. 38, para 4), the fact that the interview is not conducted on the same day as the test, but at least eight days later (Art. 42, para 1) does not ensure that in the meantime the candidate will not be able to inform the Commissioner member about their code.

⁸⁵ Art. 36.

⁸⁶ Art. 41.

It would be reasonable to introduce a lower limit of passing scores, because now it is possible that a candidate who achieved 65% of possible points gets 39 points, same as a candidate who achieved 1% of possible points. Also, this lower limit would ensure that the judiciary does not employ really incompetent candidates, who might otherwise meet other formal criteria.

4.2.1.3.2 Sub-criterion "Work experience"

Sub-criterion (b) "Work experience (type of work that the candidate has performed, length of work experience, merit, promotion, etc.)" is assessed on a 0 to 5 point scale, but also with no indication of how to evaluate all these elements.

Sub-criterion "Work experience" in general should not be evaluated as a separate sub-criterion, since the years of work experience in the legal profession are prescribed by law as a separate requirement for judges. Also, for example, a longer work experience does not necessarily indicate a preference in terms of expertise.⁸⁷ However, if the scoring of this sub-criterion is maintained, it is necessary to prescribe parameters for its evaluation in order to avoid inconsistent and unfair treatment.

For example, in evaluating "work experience" candidate M.K., with 14 years experience mostly in the court, received 5 points, while the other candidate, who had 6 years of service, out of court, received 4 points.⁸⁸ So in this case a candidate with 14 years experience, mainly in the court, received only 1 point more than a candidate who has 6 years of experience outside the court.

The place of service as such is no longer listed under the sub-criterion "work experience", but the "type of work performed by the candidate," which is a more precise solution. However, it would be advisable to stipulate how to evaluate different types of work and give advantage to candidates who have worked in courts, especially as legal advisors.⁸⁹

It is not prescribed what is implied by "promotion". Also, a form for obtaining employer's opinion on a candidate, which, on this subject, contains the section "work results", is not prescribed in sufficient detail to provide for this type of information.⁹⁰ HRA has previously recommended prescribing a specific type of questionnaire to obtain relevant information from the employer, as well as specifying what is implied by "promotion". A particular challenge is the choice of method for evaluating elements of the sub-criterion "work experience" prescribed

⁸⁷ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, item 1.1.4.1.2, p. 45-46.

⁸⁸ Information obtained in an interview with M.K., a candidate who has examined the form containing the grades.

⁸⁹ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, item 1.1.4.1.2, p. 45-46, recommending that in the event of equal meeting of other criteria, court advisors have the advantage.

⁹⁰ This form is an integral part of the Rules of the Judicial Council of 18 November 2011.

in such manner. One solution is to assess this sub-criterion descriptively without scoring, as previously recommended.⁹¹

4.2.1.3.3 Sub-criterion "Communication skills and personal conduct"

Sub-criterion "Communication skills and personal conduct" is assessed on a 0 to 5 point scale, and the new Rules stipulate that during an interview with a candidate for judge or court president, facts and circumstances for evaluating the sub-criterion "communication skills and personal performance" shall be particularly examined (Art. 42, para 2). It remains completely unclear how the assessment of this sub-criterion can be precisely determined numerically based on one conversation, content of which has not been prescribed by guidelines. Due to the fact that it is impossible to determine how to assess one's communication skills and personal conduct, as well as an opportunity to check the assessment of this sub-criterion of a candidate, there is still room for subjective and arbitrary evaluation of candidates under this sub-criterion as well. HRA has previously pointed out that "communication skills" should be excluded as a separate criterion, except in respect of candidates for court presidents, where this feature should be assessed descriptively rather than numerically.⁹²

4.2.1.4 Criterion "Worthiness to perform judicial function"

4.2.1.4.1 Sub-criterion "Clean criminal record and no conviction for an offence rendering a person unworthy to perform judicial function"

The fact that a candidate has not been convicted of criminal offenses or convicted of an offense rendering him unworthy to perform the judicial function is assessed on a 0 to 4 point scale.

It is unclear why this sub-criterion is not intended as one of the general conditions for appointment of judges, which would ensure elimination of candidates who were convicted of crimes or offenses that make them unworthy of the judicial function, similar to the general requirements for employment in state bodies specified in the Law on Civil Servants.⁹³ This solution makes it possible to score such an important issue, so the candidate who is on this basis unworthy of judicial office can receive 0 points, which in combination with other points may lead to his/her appointment as a judge. On the other hand, if a candidate was convicted or punished for offenses rendering him unworthy to perform the judicial function, there is still space for extreme arbitrariness in scoring and assessing the severity of the offense or punishment on the scale from 1 to 4.

The logical solution would imply that the clean criminal record and no conviction for violations making a person unworthy to perform judicial function be

⁹¹ Ibid, 1.1.4.1.3, p. 46.

⁹² „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, item 1.1.3.1, p. 43.

⁹³ Art. 32, para 1, line 5 reads: "The state agency may employ a person who has not been convicted of a crime that renders him unfit to work in a state agency and against whom no criminal proceedings have been initiated for a criminal offense prosecuted *ex officio*".

prescribed only as a general condition, noting the act for which the candidate has been convicted, but which does not render him unworthy of the judicial position.

4.2.1.4.2 Sub-criterion "Reputation and irreproachable conduct"

"Reputation and irreproachable conduct" is assessed on a 0 to 10 point scale, and provides twice as many points than most other sub-criteria, which obviously gives special importance to such candidate's traits.

However, it is unclear on what basis candidate's reputation and conduct are evaluated, and especially on what basis reputation and conduct receive different numerical value. It is entirely unclear what represents the basis for assessing one's reputation, i.e. how and why the Commission could have assessed differently reputation of a candidate. Further, even if it is clear on what basis this sub-criterion is assessed, it remains unclear in what way the Commission obtains information for assessing "reputation and irreproachable conduct" of candidates.

In this sense, HRA has previously proposed that all candidates' applications be published on the website of the Judicial Council, so that the public can point to the possible inadequacy of applicants, which would then be verified by the Council.⁹⁴ Also, HRA stands by its assessment that this sub-criterion should be evaluated descriptively ("satisfactory" - "not satisfactory"), not numerically, especially since there is no way of knowing on what basis the candidates could receive a different number of points.

4.2.1.4.3 Sub-criterion "Relationship with colleagues and clients"

"Relationship with colleagues and clients" is assessed on a 0 to 6 point scale, while it remains unclear how the Commission determines the quality of candidates' relationship with colleagues and clients, and based on what criteria this is evaluated numerically. This applies particularly to the evaluation of the relationship "with clients" when the candidates have not worked with clients. It is unclear whether this will earn him/her fewer points. Also, it remains unknown based on which information the Commission will determine the quality of relationships with colleagues and clients, whether it will receive information directly from clients and colleagues, from which clients and colleagues, etc.

In this regard, previous HRA proposal which has not been adopted suggests that the forms include a section for stating sources of information upon which the evaluation has been carried out, as it remains controversial how the Judicial Council obtains information for assessing the criteria and sub-criteria, especially the last two sub-criteria presented - "Reputation and irreproachable conduct" and "Relationships with colleagues and clients". Regulations only stipulate that information can be provided through obtaining the "opinion of an organ where a candidate had worked", but only regarding the professional and working qualities of candidates (Art. 31 of the Judicial Council Law), while there is no search for other information on other criteria and sub-criteria.

⁹⁴ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, item 1.2.2.3.1, p. 63.

4.2.2. Appointment of an advancing judge

Amendments to the Law on the Judicial Council, which came into force in August 2011, prescribe the criteria for the appointment of advancing judges, as well as the sub-criteria based on which they are evaluated (see above).

As in selecting a judge appointed for the first time, three basic criteria are evaluated: (1) acquired knowledge, (2) work experience and (3) worthiness to perform judicial function, but the sub-criteria in relation to which the fulfilment of these criteria is assessed are somewhat different compared to those evaluated in the first selection of candidates for a judge.

As in the case of the criteria for the selection of judges appointed for the first time, the new Rules of Procedure of 18 November 2011 provide an appropriate range of points for assessment of each sub-criterion, but also completely lack parameters or standards, on the basis of which a certain number of points for any of the sub-criteria can be assigned. This still enables inequality in evaluation and bias in deciding on promotion of judges.

HRA believes that specifying the parameters for objective evaluation of judges, as well as their regular assessment, is necessary for objective decision-making on career advancement or accountability for unprofessional work. This system of parameters and assessment has not yet been established.

4.2.2.1 Criterion "Acquired knowledge"

4.2.2.1.1 Sub-criterion "Professional development"

Sub-criterion *professional development (ongoing training and other forms of training)* is assessed on a 0 to 5 point scale, but contains no further indications of what exactly it comprises and how it is evaluated, especially in the light of the existence of a separate sub-criterion "academic qualification" where it is indicated that this qualification includes master and doctor of law. HRA assumes that the participation of judges in continuing training programs organized for judges is the subject of evaluation. It is not clear how this sub-criterion is assessed, especially in the light of the fact that the judges in Montenegro are not provided a specified number of days per year for professional development. Also, it is not known whether there are any training programs carried out continuously.

4.2.2.1.2 Sub-criterion "Academic qualification (Master of Laws, Doctor of the Science of Law)"

Sub-criterion *academic qualification (Master of Laws, Doctor of the Science of Law)* is also evaluated on a 0 to 5 point scale. It is unclear how academic degrees listed under this sub-criterion are assessed, as explained above under 4.2.1.2.3.

4.2.2.1.3 Sub-criterion "Published scientific papers and other activities"

Sub-criterion *published scientific papers and other activities in the profession* is also assessed on a 0 to 5 point scale, but still lacks the scoring system. The formulation "other activities in the profession" is general and it is hard to imagine what activities (in addition to published papers) could be evaluated under this criterion. If it implies the membership in working groups for drafting legislation or the like, it should be prescribed that the basis on which an applicant became a member of the working group shall be taken into consideration, and that volunteer work and personal initiative will be particularly appreciated.

4.2.2.1.4 Sub-criterion "Computer skills and knowledge of foreign languages"

As in selecting a judge appointed for the first time, there are no parameters for evaluating candidates under the sub-criterion *computer skills and foreign languages*. The same comment applies as above, regarding the first appointment.

4.2.2.2. Criterion "Ability to perform judicial function"

4.2.2.2.1 Sub-criterion "Work experience"

Work experience is awarded with $\frac{1}{4}$ of the total number of points (0-25), but there are no parameters for its evaluation.

Earlier HRA proposal which has been ignored suggests that the candidates from outside the judiciary should be evaluated on an equal grounds and granted fair treatment in relation to advancing judges. Current solution discourages academics, lawyers, prosecutors, notaries and all those who have particularly desirable experience and knowledge needed to apply for judicial office.

Assessment of the kind of work experience has also been neglected, and it should be of importance for the appointment of a judge in a particular judicial department. To ensure that judges make a full contribution to improving the quality of trials, it is necessary to ensure that a candidate who has tried and perfected in one area for years uses experience and knowledge gained in such manner to advance to the higher court. This especially because Montenegro has not encouraged the specialization of judges, but it was common, for example, for a judge who has tried during most, especially recent years of his/her career in a criminal matter to be appointed a judge of the Civil Department of the Supreme Court.

The lack of parameters ensuring that the same length and same kind of work experience is always equally assessed is a disadvantage that allows arbitrary decision-making and evaluation of the sub-criteria, which can ensure up to $\frac{1}{4}$ of the total number of points.

4.2.2.2.2 Sub-criterion "Achieved results of the last three years"

Sub-criterion *achieved results of the last three years* also carries $\frac{1}{4}$ of the total number of points (0-25). However, this sub-criterion too includes no parameters which would indicate how to carry out the assessment.

Instead of elaborating in the Rules of Procedure the bases explicitly laid down in the Law on the Judicial Council, these legal basis are mentioned neither in Art. 44, which states that the working results are assessed jointly on a 0 to 25 point scale, nor in form No. 4, which also provides for the section for total score only.

Law on the Judicial Council under Art. 32a, para 2, line b, explicitly states that the results of a judge's work in the past three years are assessed based on:

- 1) the number and type of cases solved and method of solving;
- 2) the number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy;
- 3) the percentage of solved cases in relation to approximate norms;
- 4) resolving cases in the order received;
- 5) timely acting and decisions-making;
- 6) the number of time barred cases;
- 7) the number of founded review requests.

It remains completely unclear based on which parameters these elements explicitly listed in the law as the bases for evaluating the work of judges shall be assessed. (For example, what "number" and what "type of solved cases" deserve a grade 5 or 4, 3, 2 or 1? What "percentage of solved cases in relation to approximate norms" deserves a grade 5, or 2?) Without standards (parameters) for evaluation of the elements of sub-criteria, they are merely a curtain behind which there is still too much room for arbitrary and inconsistent evaluation of judges and career prospects of those with essentially worse results.

It is necessary to prescribe the parameters for assessment of judges on all the elements mentioned in the Law on the Judicial Council (Art. 32a, para 2, line b) and provide a system of regular evaluation of judges. See Chapter 9 for details.

Specifically, in relation to *the number and type of cases solved and method of solving*, there is ample room for arbitrary assessment of resolved cases according to reports, arbitrary assessment of cases resolved based on the merits or otherwise, arbitrary assessment of cases resolved through mediation and settlement.

The practice shows that the courts render most decisions in December each year and this information has been publicly communicated by the President of the Supreme Court and the Judicial Council.⁹⁵ These decisions are included in the

⁹⁵ At the Round Table "Human Rights in Montenegro - the challenges of institutional protection" held on 10 December 2010 on the occasion of International Human Rights Day at the Faculty of Law of the University of Montenegro, the President of the Judicial Council and the Supreme Court of Montenegro Vesna Medenica spoke about the statistical data concerning the results of the courts

number of solved cases based on which the work of judges is assessed, but it has not been taken into account how many of those decisions are not based on merits, or how many decisions were later revoked by the second instance court. What particularly conceals the actual (lack of) quality of the work of judges is the fact that the cases where the decisions had been revoked were later assigned a new number at the first instance court, in accordance with the Court Rules. This provides a legal basis which enables concealing of the substandard work of a judge and at the same time, through the number of solved cases, i.e. the quantity (which increases due to the decisions that are revoked as a result of poor performance of judges), substandard work is assessed with a higher grade.

For example, in the case initiated in October 2008 before the Basic Court in Podgorica, a judge issued a decision⁹⁶ in December 2009 to discontinue the proceedings. This decision was quashed, on party's appeal, by the High Court decision⁹⁷ in May 2010 and the case was returned to the Basic Court, which scheduled a hearing for 21 October 2010, but with a new case number assigned to it⁹⁸, which indicates that this was a new case from 2010. Basic Court judge adopted a decision in this case in January 2011, by the High Court quashed it in November of that year and returned the case to the same judge of the Basic Court. The case was then assigned a new number (third from the beginning of the proceedings),⁹⁹ and the judge adopted a new decision in April 2012.

So, in this case the judge issued a total of three decisions, two on the merits and one procedural decision, which are treated as decisions in three cases, due to changing of the case number. Despite the fact that in this case two decisions abolishing the decisions of this judge were rendered, the lack of evaluation parameters allows this judge to be rated higher than someone who would have solve this case by rendering a merit-based decision. Therefore, the fact that it took three and half years for this case to end due to the poor performance of this judge and that the judge's substandard work caused an increased quantity of the decisions issued by him, may lead to absurdity and serve as a basis for better assessment of this judge.

It is particularly unclear how the work results are assessed in relation to the *number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy*. Evaluation of the quality of a judge's performance under this sub-criterion in the reports on the work of the courts is expressed as a percentage by recording the number of confirmed, modified and overruled decisions out of the total number of decisions on remedies, and then expressing it as a percentage. However, **this sub-criterion completely overlooks the total number of decisions issued and in particular the decisions that have become final and that neither party has appealed to**. For example, a judge who would have only one decision on the appeal, which was reversed, would have a percentage of 100% reversed

operations and noted that the results will soon be even better "since the courts adopt most decisions in December".

⁹⁶ P.br.2537/08 of 24 December 2009.

⁹⁷ Gž.br.1914/10-08 of 25 May 2010.

⁹⁸ P.br.2473/10.

⁹⁹ P.br.5043/11.

decisions, although in all other cases the parties were satisfied with his decision and did not file an appeal. Under this sub-criterion all these final judgments would not be evaluated, which is unreasonable and unfair.

Further, the sub-criterion "achieved results in the last three years" carries 25 points, allowing ample room for arbitrariness and subjectivity in the evaluation because there is no indication as to how many points a certain percentage of confirmed, modified or overruled decisions will earn.

Law on the Judicial Council states that the work results will also be valued on the basis of *resolving cases in the order received*. This basis of assessment has become meaningless due to the courts practice to assign new case numbers after the abolition of decisions by the second instance court. Thus, in the above example, the judge's apparently substandard work on this basis could have obtained more points because the cases' numbers indicate he had acted in three, not in one case, hence one could come to an absurd and unfounded conclusion that this judge handled the cases in the order of receiving, and even acted promptly.

If the basis of *time for making decisions* is to be added to all the above, it appears that on that basis too the judge who performs his tasks in such unsatisfactory manner could get more points, because his time for making three decisions would have been assessed with regard to three different case numbers, although his substandard work caused the adoption of three decisions (for now) in the case that could have be ended in one decision!

Given that the results of work of the past three years, with work experience, are awarded most points and that these two sub-criteria together carry 1/2 total points (50), complete absence of parameters for evaluating any of the mentioned bases and awarding a certain number of points for any of them, leaves room for biased and inconsistent evaluation of judges and their promotion.

4.2.2.2.3 Sub-criterion "Communication skills and personal conduct"

For assessing *communication skills and personal conduct* a point scale from 0 to 10 has been envisaged, while it is also quite unclear how the score for this sub-criterion can be precisely determined numerically based on one conversation, guidelines for which has not been prescribed. Given that this sub-criterion is the same for both the judges who are advancing and those appointed for the first time, the same comment previously stated applies.

4.2.2.3. Criterion "Worthiness to perform judicial function"

4.2.2.3.1 Sub-criterion "Violation of the Code of Judicial Ethics"

Violation of the Code of Judicial Ethics is a sub-criterion assessed on a point scale from 0 to 8. Bearing in mind the fact that the Judicial Council, since its

establishment until now¹⁰⁰, has not yet found a violation of the Code, and that since the establishment of the Commission for the Code of Ethics on 1 October 2011, the Commission provided its opinion only in two cases (both times that the judge did not violate the Code)¹⁰¹, the question is how this sub-criterion is evaluated and based on what a candidate can obtain more or less points under this sub-criterion.

As with the evaluation of the fact that a candidate "has not been convicted of criminal offenses or punished for offenses", scoring of this sub-criterion too proves absurd.

4.2.2.3.2 Sub-criterion "Relationship with colleagues and clients"

Sub-criterion *relationships with colleagues and clients* is awarded 0 to 4 points, unlike in the case of a judge appointed for the first time, where this sub-criterion is awarded up to 6 points. Unlike in the case of judges appointed for the first time, it is at least certain that there are parties in respect of which the relationship of a judge could be evaluated. However, it is completely unclear how this relationship will be assessed, based on which information, and how that information will be evaluated using points. This particularly applies to the evaluation of relationship with clients because it is not known whether information from the clients will be obtained, from which parties, will the number of complaints filed against judges be assessed, etc.

HRA reiterates the proposal that the forms contain a section for recording sources of information upon which the evaluation is carried out, since it remains debatable in which way the Judicial Council obtains information for evaluating the criteria and sub-criteria, especially "relationship with colleagues and clients" and "reputation and irreproachable conduct".

4.2.2.3.2 Sub-criterion "Reputation and irreproachable conduct"

This sub-criterion is awarded from 0 to 8 points, but, as with the first appointment of a judge, it is again unclear on what basis the reputation and conduct of candidates is assessed, on what basis it is awarded different numerical values. It is unclear what represents the basis for scoring the reputation of judges, and especially how and why the Commission could make different assessments. Behaviour indicating that a certain judge is loyal to vices to the extent that harms his honour and reputation of the judicial profession, should be a problem for holding a judicial office. If there is no such conduct, then it is absurd and unfounded to assess reputation.

4.2.3. Appointment of court presidents

Amendments to the Law on the Judicial Council, which came into force in August 2011, provide that, in addition to the criteria for the appointment of an advancing judge, the court president must have the ability to manage and organize work in the courts, which is assessed in relation to (Art. 32, b):

¹⁰⁰ Before the entry into force of the Law on the Judicial Council, establishing any violations of the code of ethics was the responsibility of the Association of Judges, which also adopted the Code.

¹⁰¹ Su.EK. br. 1/11 of 29 December 2011 and Su.EK. br. 2/11 of 29 December 2011.

- 1) ability to organize work;
- 2) knowledge of operations of the court administration;
- 3) reputation a candidate enjoys in the court where he/she performs a judicial function;
- 4) commitment to preserve the independence of the court and judges.

The new Rules of Procedure of the Judicial Council prescribe the range of points a candidate for the president of the court can receive under all sub-criteria for the appointment of an advancing judge and for the court president (Art. 45). However, again none of the criteria include parameters for their evaluation, which leaves room for partiality in appointing the presidents of the courts.

Earlier HRA proposal to prescribe the obligation for obtaining written opinion of the judges of the court whose president is being elected about the candidate for president has been disregarded.

Recommendations:

1. Rules of Procedure of the Judicial Council should be amended to lay down the precise standards (parameters) for assessing each criteria and sub-criteria, so as to ensure a uniform and objective assessment of candidates, as has been started in relation to the criterion "Average grade and duration of studies".
2. It is essential that the Judicial Council urgently adopts internal documents defining qualitative and quantitative assessment of judges, bearing in mind that according to the Action Plan of the Judicial Council this should have been carried out in 2010.
3. Instead of a numerical score of 1-5, evaluate the criterion of "Worthiness to perform the judicial function" descriptively, in the range "satisfactory - unsatisfactory", primarily to highlight the potential problems in terms of worthiness for the position of a judge.
4. Define "Communication skills" as a separate criterion, except in respect of candidates for presidents of courts, where this property is to be assessed descriptively, rather than numerically.
5. "Work experience" should not be assessed numerically, as currently prescribed - it is enough to verify that a candidate meets special minimum requirements for the position of a judge in terms of years of experience in the field of law, while the place of service should be noted and assessed in light of the fulfilment of other criteria. Stipulate that judicial advisors will have an advantage in case of equal fulfilment of other criteria.
6. Regarding the criterion "Achieved results", specify what is implied under the sub-criterion "Career advancement", how to obtain information with regard to that, and objectify "Opinion of the employer" by providing for a special questionnaire that would provide concrete answers about the type of work activities the candidate has carried out and in which area has he advanced.

Evaluate achieved results descriptively with a rationale, rather than numerically, as prescribed.

7. Prescribe appropriate scoring system for the criteria "Published scientific papers and other activities" and "Professional development" for the purpose of their uniform assessment. Particularly consider assessment of the criteria for appointment to higher functions in the judiciary in relation to candidates from universities, bar association, etc., to ensure their uniform assessment.

8. Under the sub-criterion "Academic qualification" prescribe a precise scoring system for degrees Master of Laws, Doctor of the Science of Law, as well as for completion of other relevant forms of education. When defining the scoring system, bear in mind that access requirements for judicial function for scholars should be eased by prescribing that they are not required to attend initial training for judges. In that sense, HRA strongly recommends that the academic qualification be valued significantly higher in order to stimulate judges to acquire specialized knowledge and professional development.

9. Provide that work experience be assessed descriptively, in terms of type of acquired experience relevant to the judicial position the application has been submitted for. As regards the length of the judicial experience, it is sufficient to meet the special condition for appointment of a judge from Art. 32 of the Law on Courts, because the length of experience does not always have to be an advantage (same at the first appointment as a judge). Otherwise, specify parameters to ensure that the same length of experience always earns the same score.

10. Objective assessment of "Achieved results" of judges candidates for judges of higher courts requires urgent prescription of parameters for the scoring, i.e. the assessment of judges' performance in terms of all the sub-criteria: the method of resolving cases, quality of work expressed by the number of confirmed, modified and overruled decisions, and others. The Law on Courts should specify the procedure for regular assessment of judges in accordance with the Methodology for drafting annual reports on the work of individual judges. Prescribe the parameters to assess the assignment of cases in the order they were received and compliance with statutory deadlines, as well as the method for obtaining this type of information regarding the work of judges.

11. Forms should include a section for keeping a record of sources of information based on which the assessment has been carried out, since it remains controversial how the Judicial Council obtains information upon which it assesses the criteria and sub-criteria, especially "the relationship with colleagues and clients and reputation and out of office conduct".

5. Practice of the Judicial Council in the appointment of judges

5.1. General remarks and conclusion

In the second half of 2011 there have been changes to the regulations relevant to the appointment of judges. In late July 2011, the Law on Amendments to the Law on the Judicial Council (*Sl. list CG*, 39/2011) was adopted, specifying the criteria and sub-criteria and changing certain other aspects of the process of appointment of judges. The new Rules of Procedure of the Judicial Council of 18 November 2011 stipulate a range of points assigned to each sub-criterion ("*Sl. list CG*", 57/2011).

HRA has divided the analyzed decisions into two main groups - decision reached prior to the change of regulations and decisions adopted on the basis of the amended regulations. Also, in accordance with the division of the criteria for the appointment of judges, decisions have been divided into those concerning the first appointment of candidates for a judge and those on promotion of judges.

In relation to all these decisions, the same pattern is discernible, especially in terms of rationales. Rationales are not sufficiently substantial and convincing, especially in those cases where no explanation whatsoever has been provided as to why the Judicial Council opted to appoint those candidates who have had fewer total points than opponents who were not selected. There were a total of seven such decisions, four prior to 2011 amendments to the regulations and three after the amendments until the end of June 2012. Only on the occasion of one of these decisions the administrative proceedings were initiated, as described below. This leaves the impression that the Council members did not consider it necessary to particularly explain their decisions in order to gain public confidence in their work.

5.2. Commission for the Appointment of Judges / Testing Commission

According to Article 10 of the previous Rules of the Judicial Council, in force until 18 November 2011¹⁰², the Commission for the Appointment of Judges had a president and two members. Commission President was the President of the Judicial Council and President of the Supreme Court, the majority of the members of the Commission consisted of judges and the Commission was appointed for a term of one year. The Commission had the responsibility to: a) verify timely submission of applications and completeness of submitted documentation; b) conduct interviews with candidates c) prepare the test, conduct testing of candidates and evaluate test results when the Judicial Council decides to conduct written examination, and d) make a ranking list of candidates. Members of the Commission were the only ones rating the candidates by filling forms for evaluation after the interview with the candidates.¹⁰³

¹⁰² *Sl. list CG*, 35/2008, 38/2008 and 6/2009.

¹⁰³ *Ibid*, Art. 36 of the Rules.

As of 28 January 2009 it was prescribed that a member of the Judicial Council who is not a member of the Commission for the Appointment may access the written tests of candidates and participate in the interview with the applicants.¹⁰⁴

Composition of the Appointment Commission contributed to the impression that the judiciary is administered autocratically, which has also been pointed out by the Venice Commission.¹⁰⁵ Control over the appointment of judges has been established by the Supreme Court President, elected solely by the political will of the ruling majority. The Supreme Court President, who is also the President of the Judicial Council *ex officio*, is *ex officio* the President of the Commission for the Appointment of Judges. It is logical to assume that a person with such strong political support and the concentration of power¹⁰⁶ has a crucial role in the Appointment Commission where he/she constitutes majority with one more judge.

The Council's documentation available to the public does not reveal whether the Council members who were not part of the Appointment Commission used their right of access to the written tests of candidates and participated in interviews with candidates. On 18 April 2012 HRA requested the Judicial Council to provide information whether any member of the Judicial Council has ever used this right and reviewed the tests of candidates and participated in interviews; on this occasion the Council submitted a notification stating *"that some members of the Judicial Council attended and participated in interviews with the applicants conducted by the Commission for the Appointment and had an insight into the completed and evaluated tests of candidates"*, without further details.¹⁰⁷ Moreover, even if the Judicial Council members have used this opportunity regularly in every case, it still was not of obvious importance, since not one decision of the Council on the appointment of judges notes such actions.

Instead of the Commission for the Appointment of Judges, the new Rules of Procedure of the Judicial Council (Art. 13) of 18 November 2011 envisage the Testing Commission which shall:

- verify timely submission of applications and completeness of submitted documentation;
- prepare the test, conduct testing of candidates and evaluate test results;
- determine the average number of points based on the assessment of each member of the Judicial Council;
- make a list of candidates for the appointment.

The Commission still has a president and two members, who also have their deputies appointed, and it is appointed for a period of one year (Art. 11 and 12). The new Rules omit the provision under which the President of the Judicial Council is the President of the Commission, while other provisions indicate that this possibility is not excluded.

¹⁰⁴ Decision on amendments to Art. 10 of the Judicial Council Rules of Procedure published in *Sl. list CG*, 6/2009.

¹⁰⁵ The Venice Commission on the Constitution of Montenegro, 2007, items 88-92 and 96.

¹⁰⁶ See „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, p. 75.

¹⁰⁷ Which does not contain a reference number and the date of adoption.

However, the description of the competences of the Commission indicates that now all members of the Judicial Council participate in interviews with candidates and evaluate candidates, which significantly enhances the impression of the fairness of the appointment process.

5.3. Practice of the Judicial Council prior to 2011 regulations changes

5.3.1. Appointment of judges appointed for the first time

Prior to amending the regulations in the second half of 2011, the Judicial Council:

- in 2008 issued 8 decisions on the appointment of judges appointed for the first time, based on which 18 judges of the basic courts came into office;
- in 2009 issued 8 decisions on the appointment of judges appointed for the first time, based on which 8 judges of the basic courts came into office;
- in 2010 issued 16 decisions on the appointment of judges appointed for the first time, based on which 19 judges of the basic courts came into office;
- in 2011 issued 7 decisions on the appointment of judges appointed for the first time, based on which 7 judges of the basic courts and 1 judge of the Administrative Court of Montenegro came into office.¹⁰⁸

The analysis of these decisions indicates that they were made using the same pattern and do not contain indications of how candidates have been evaluated, on what basis and criteria, but they usually accept the decision of the Commission for the Appointment, chaired by the President of the Supreme Court. In two cases of the appointment where the Commission evaluated a candidate not better than others, it is stated that this was a majority decision, without any further explanation. The fact that the content of each decision is practically the same, without more substantial reasoning, casts doubt on the method of the appointment of judges and indicates the possibility that judges are not chosen objectively.

Decision rationales note that the Appointment Committee compiled a list of candidates who have been tested, a brief overview of assessment results after conducted interviews and that this was submitted to the Judicial Council, which found that the Commission considered the results of the test, results after the interview, expert knowledge, experience, working results, published scientific papers and other activities, training of candidates, submitted opinions of the professional and working qualities, and then a grade the candidate received.

It is not clear how the Judicial Council established all aforementioned from the list of candidates with a brief overview of assessment results. Such rationales are not sufficiently convincing and allow doubt that the Judicial Council has not exercised access to the documents of candidates, that not all its members were interested

¹⁰⁸ Based on information from the Judicial Council website (<http://sudovi.me/sscg>)

to learn about the characteristics of candidates, and that they were in advance ready to leave the decision on the selection to the Appointment Commission, which, in turn, had an obligation to explain how it had evaluated the candidates.

Although the provision of then in force Article 33, para 4 of the Judicial Council Law provided that the Appointment Commission decides on candidates' grades by majority vote, each of the analyzed 39 decision state that each candidate had been unanimously assessed by the Commission.

At the end of almost every decision's rationale there is the same formulation that the candidate has been selected only because he "has higher overall score than other applicants". Thus, the identical rationales indicate that the Judicial Council only stated that the Appointment Commission evaluated the selected candidate with the highest grade. The decisions do not include a closer explanation of the methods for evaluation of candidates, which is particularly contentious given that neither then nor later the parameters for evaluating (scoring) the criteria were prescribed, allowing disproportionate space for inconsistent and subjective evaluation.

In addition to the majority of decisions on selection of candidates assessed by the Commission with the highest number of points, there are those on the selection of candidates who did not receive the highest score in relation to other candidates. In such cases it is stated that the candidate has been chosen by the Judicial Council by "majority vote", without stating the reasons that influenced the majority not to support the candidate best assessed by the Commission.¹⁰⁹

These shortcomings in the decisions of the Judicial Council are best illustrated in the following two examples. The first is the decision of May 2011, on appointment of a judge of the Administrative Court of Montenegro.¹¹⁰

Pursuant to the Law on Courts (Art. 32, line 4)¹¹¹ appointment of the Administrative Court judge requires work experience in the legal profession for at least 10 years. According to this provision, only the Supreme Court judge needs longer experience (15 years), a judge of the Appellate Court needs the same experience as a judge of the Administrative Court, while judges of the high, commercial and basic courts need significantly less experience (8 years, 6 years and 5 years). This provision implies that a judge of the high, commercial or basic court, who would be appointed a judge of the Administrative Court, would in fact be promoted.

On 9 May 2011 the Judicial Council issued a decision that an advisor of the Administrative Court be appointed a judge of that court, which means that this candidate has been appointed a judge for the first time. However, the said decision notes that three candidates have applied for this vacancy announcement, and that, in addition to the adviser in this court, the other two candidates were judges of the Commercial and of the Basic Court in Podgorica. It is assumed that the appointed candidate was evaluated by the criteria applied at the first election for a judge, while the other two candidates were evaluated according to the criteria applied in relation to advancing judges. However, as these criteria are not

¹⁰⁹ See decisions: Su.R.br.1212/2010 and Su.R.br.272/2011.

¹¹⁰ Su.R.br.406/2011.

¹¹¹ *Sl. list RCG*, 5/2002 and 49/2004 and *Sl. list CG*, 22/2008 and 39/2011.

congruent, and it is not stipulated how to assess them in the case of parallel application, the Judicial Council should have noted something with regard to that in the rationale of its decision.

The Judicial Council Rules of Procedure in force at the time of the adoption of this decision provided that the criterion Work experience, with regard to advancing judges, shall be determined on the basis of the length of judicial service (Art. 35). On the other hand, for candidates appointed as judges for the first time, the length of service and the place of service are evaluated (Art. 33).

By unanimous decision of the Appointment Commission the candidate who was an adviser in the Administrative Court was rated highest, but the decision on the appointment of the Judicial Council does not include an explanation as to how did the Commission reach this assessment, what were the grades of the candidates already working as judges and how many points were they awarded based on the length of judicial experience, and how is it possible that a candidate, who could not get points based on the length of judicial service, is rated better than the candidates who were judges.

It is possible for a candidate who was an adviser to ultimately be assessed better than the candidates who are judges, but such a case requires detailed explanation as to how such assessment had been reached. Otherwise, with this method of deciding not accompanied by any explanation, the appointment of this judge raises doubt, as well as the qualities of previously appointed judges who had been performing a judicial function for years, but have obtained fewer points than an advisor in the court.

Rationale for this decision, as well as for all others in the past, comes to the conclusion that the selected candidate "is awarded higher overall score compared to other candidates applying for the post of the Administrative Court judge".

The decision on the appointment of a judge of the Basic Court in Berane of 8 February 2010¹¹², after listing the grades the Appointment Commission awarded each candidate, states the following:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, the Judicial Council has decided to appoint A.Ć. as a judge of the Basic Court in Berane. This due to the reason that the above candidate, which also follows from the aforesaid, has been awarded higher overall grade compared to other candidates applying for the post of a judge of the Basic Court in Berane.

Therefore, in this case, as in most other cases,¹¹³ the Judicial Council has essentially confirmed the choice of the Commission, without any indication of how the evaluation of each candidate was conducted, what is their reference, and what did the Commission establish by examining their reference.

Contrary to this view, pursuant to the decision on the appointment of two judges of the Basic Court in Nikšić from 16 February 2011¹¹⁴, the selected candidate D.B.

¹¹² Su.R.br.169/2010.

¹¹³ Su.R.br.167/2010, Su.R.br.541/2010, Su.R.br.371/2010, Su.R.br.786/2010, Su.R.br.372/2010, Su.R.br.787/2010, Su.R.br.373/2010, Su.R.br.540/2010.

¹¹⁴ Su.R.br.1212/2010.

was awarded lower overall grade (4) by the Appointment Committee than candidate M.B. who was not selected (4.14), so after listing the grades the Committee awarded each candidate, the following was stated:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, the Judicial Council has decided by majority vote to appoint candidates N.T. and D.B. as judges of the Basic Court in Nikšić.

Similarly, on 31 March 2011 the Judicial Council appointed a judge of the Basic Court in Kotor¹¹⁵, although the selected candidate had lower overall score than another candidate who was not selected (3:57 compared to 4), which has been justified only by stating that the appointment was decided "by majority vote":

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, the Judicial Council has decided by majority vote to appoint candidate D.C. as a judge of the Basic Court in Kotor.

These decisions indicate that a candidate has been selected by majority vote in the Judicial Council, regardless of the total number of points or other reference based on which he deserves to be appointed. This decision contains no reason as to why the majority of the members of the Judicial Council voted for the candidate who has a lower score than another candidate.

Due to the lack of a rationale, it remains unclear whether the judges were appointed on the basis of their grades or majority vote in the Judicial Council, and on what basis the Judicial Council members have generally voted. This practice does not secure public confidence in the objective work of the Judicial Council.

5.3.2. Appointment of an advancing judge

Prior to 2011 amendments to the Judicial Council Law and the Rules of Procedure of the Judicial Council, the Judicial Council:

- in 2008 issued 5 decisions on promotion of judges, on the basis of which 11 judges of high courts came into office;
- in 2009 issued 7 decisions on promotion of judges, on the basis of which 8 judges of high courts, 2 judges of the Appellate Court of Montenegro and 1 judge of the Supreme Court of Montenegro came into office;
- in 2010 issued 8 decisions on promotion of judges, on the basis of which 8 judges of high courts, 2 judges of the Appellate Court of Montenegro and 3 judges of the Supreme Court of Montenegro came into office.

¹¹⁵ Su.R.br.272/2011.

As in the case of decisions on the first appointment as a judge, analysis of these decisions too shows that the decisions were made using the same pattern, that no decision has meaningful explanation which might suggest why a particular candidate has been promoted, especially when the selected candidate has had lower score than others. No decision on the appointment contains indications of how candidates were evaluated in relation to certain criteria and based on which parameters. It is not certain that the Council as a whole conducted a review of the records of all candidates. These shortcomings as regards proper rationales cast doubt on the promotion of judges during this period.

All decisions on the appointment of advancing judges from this period are identical in content. Rationales state that the Appointment Commission compiled a list of candidates¹¹⁶ and a brief overview of assessment results after the interviews, and that the list was submitted to the Judicial Council, which found that the Commission considered the results of the interview,¹¹⁷ the expertise, experience, work results, published scientific papers and other activities, training of candidates, submitted opinion on their professional and working qualities, and then state which grade a candidate received.

Rationales of these decisions have the same shortcomings as rationales of decisions on the first appointment as a judge. They indicate that the Judicial Council relied on the list of candidates with an overview of assessment results, without reviewing the documentation of candidates, and that the decision on the appointment was essentially left to the Appointment Commission. Although the decisions stated that the Appointment Commission considered the results of candidates from previous years, rationales of these decisions show that the Judicial Council as a whole has not been directly informed about these results.

Template rationales of decisions on the appointment of advancing judges have been partially amended by the Judicial Council in 2009 by adding that the Judicial Council made the decision "after examining the reference of applicants, as well as their achieved results in 2007, 2008 and 2009". However, even these decisions contain no explanation as to what the Judicial Council has found by examining the references and achieved results of candidates, or how they were assessed. Bearing in mind that the parameters for evaluation of the criteria and sub-criteria such as achieved results are not prescribed¹¹⁸, the lack of explanation gains in importance.

However, in decisions on the appointment of advancing judges adopted in 2010 the Judicial Council uses both new and old rationale patterns. Four decisions on the basis of which four judges advanced to a High Court still provide rationale indicating that the Judicial Council did not examine the reference and working results of the judges and that the decision was made solely on the basis of the list and assessment results of the Appointment Commission. In other four decisions from 2010 the Judicial Council noted that it had examined the reference

¹¹⁶ Only the words "that have been tested" have been left out of the rationales of decisions on the appointment of judges elected for the first time, and in all other aspects explanations are the same as in those decisions.

¹¹⁷ Here too the only part left out notes that the Commission took into account the results obtained in the written test, and in all other aspects explanations are the same as in decisions on the appointment.

¹¹⁸ For a more detailed explanation see sections 4.2.2.2.2. and 9.

and working results, but there is no indication of what the Council identified thereby and how it evaluated the reference and working results.

Such practice indicates that the Judicial Council makes decisions on different criteria and appoints certain candidates as judges after examining their references and results, while other judges are appointed without such examination, i.e. that in all cases the decisions offer template rationales, and that the Council only formally states the selection previously conducted by the Appointment Commission.

As the decisions on the first appointment of judges, the decisions on the promotion of judges too note that each candidate has been assessed unanimously by the members of the Appointment Commission.

At the end of the reasoning of the majority of decision there are identical statements that a candidate has been elected because "he obtained higher overall grade as compared to other applicants".

Thus, the decision on the appointment of three judges of the Supreme Court of Montenegro of 8 February 2010¹¹⁹, after listing the grades awarded to each candidate by the Appointment Commission, notes the following:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, after having examined the references of applicants and working results of 2007, 2008 and 2009, the Judicial Council decided to appoint candidates B.F., D.M. and R.K. as judges of the Supreme Court of Montenegro in Podgorica. This due to the reason that the above candidates, which also follows from the aforesaid, have been awarded higher overall grades compared to other candidates applying for the post of a judge of the Supreme Court of Montenegro in Podgorica.

So, the Judicial Council has essentially confirmed the choice of the Commission, without any indication of how the assessment of each candidate was carried out, what are their references and what the Judicial Council found by examining the reference. Ultimately, the question is why the Judicial Council examined the references of candidates if the decision implies that the candidates were selected because they had been assessed better than others by the Commission.

Other decisions of the Judicial Council too contain identical explanations.¹²⁰

Contrary to this view, the decision on the selection of two judges of the High Court in Podgorica of 16 November 2010¹²¹ appoints a candidate with lower overall score compared to four other candidates, so after listing the grades awarded to each candidate by the Appointment Commission, the decision notes the following:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, after having examined the references of applicants and working results of 2007,

¹¹⁹ Su.R.br.163/2010.

¹²⁰ Su.R.br.227/08, Su.R.br.356/08, Su.R.br.445/08, Su.R.br.369/2010, Su.R.br.164/2010.

Su.R.br.537/2010, Su.R.br.539/2010, Su.R.br.310/2010, Su.R.br.165/2010.

¹²¹ Su.R.br.1212/2010.

2008, 2009 and the first half of 2010, the Judicial Council decided by majority vote to appoint candidates K.Dj. and P.T. as judges of the High Court in Podgorica. This due to the reason that, in accordance with Article 128, para 2 of the Constitution of Montenegro (Sl. list CG, 1/07), the Judicial Council decides by majority vote of all members.

So, this decision implies that a candidate who received a majority vote of the Judicial Council shall be selected, regardless of his grade, his reference and achieved work results. This decision includes no reason that would explain why the majority of the Judicial Council members voted for the candidate who has a lower score than the other four candidates.

In the same way the Judicial Council appointed judges of the High Court in Podgorica in its decision of 1 October 2008¹²², where the candidates' scores were also neglected, so out of six judges, four judges with lower scores than other candidates were selected. The decision does not state why exactly those candidates have been appointed judges, but only that it has been done "unanimously".

Therefore, it remains completely incomprehensible whether judges progress based on their score or majority vote of the Judicial Council, i.e. on what basis the Judicial Council members vote.

5.3.3. Appointment of court presidents

Prior to the amendments of regulations in July and November 2011, according to information from the website, the Judicial Council:

- in 2009 issued 14 decisions on the appointment of the court president, based on which 11 presidents of basic courts, 2 presidents of high courts and 1 president of the Administrative Court of Montenegro came into office;
- in 2010 issued 6 decisions on the appointment of the court president, based on which 5 presidents of basic courts and 1 president of the Appellate Court of Montenegro came into office.

Analysis of these decisions shows that the decisions were made using the same pattern, that no decision has meaningful explanation which might suggest why a particular candidate was appointed, while other was not, no decision contains indications of how candidates were evaluated in relation to certain criteria and based on which parameters, nor do they mention or evaluate ideas or programs of the courts presidents to improve the work in courts. Therefore, incomprehensible content of these decisions justifies the suspicion that the presidents of courts are not elected fairly, based on merit.

¹²² Su.R.br.357/08.

Every decision on the election of the court president has identical content and template rationale stipulating that the Appointment Commission evaluated candidates after the interview and submitted a brief overview of assessment results to the Judicial Council, which found that the Commission considered the results of the interview¹²³, the expertise, working experience, working results, published scientific papers and other activities, training of candidates, submitted opinions of the professional and working qualities, performance of candidates and then noting the grade a candidate obtained.

These decisions too do not indicate how the Judicial Council managed to determine all of the above after brief overview of assessment results, which leaves the impression that the choice is actually left to the Appointment Commission. Although these decisions as well note that the Appointment Commission considered the results of candidates from previous years, the decisions rationales also show that the Judicial Council was not directly informed about these results.

Template rationales of decisions on the appointment of courts presidents, where the judges who have applied or have been appointed, already held a post of the court president they had applied for, were partially amended by the Judicial Council by adding that the Council found that the Appointment Commission also had an insight into *"candidate's achievements in the previous term, expressed through the overall timeliness of that court and the application of the Law on the protection of the right to trial within a reasonable time, as well as the consistent application of the Law on Courts and the Law on the Judicial Council"*. However, this decision does not indicate that the entire Judicial Council reviewed the results of the candidate who is the court president, or timeliness of the court whose president is elected, or the application of these laws.

Also, the decisions do not specify how the Appointment Commission obtained information on the results of the court operations, timeliness and consistent application of laws, or state the method of evaluating all of the above.

Two decisions on the appointment of the higher court presidents¹²⁴, one decision on the appointment of the President of the Appellate Court of Montenegro¹²⁵ and two decisions on the appointment of the basic courts presidents¹²⁶ note that the Appointment Commission had an insight into candidate's *"view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"* in accordance with Article 32, para 4 of the then applicable Rules of Procedure of the Judicial Council,¹²⁷ which provided that these topics too be considered during an interview with a candidate. However, the reasoning of these decisions does not contain any indication of how these candidates presented their *"view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"*, or how the Appointment Commission evaluated the abovesaid.

¹²³ Here too the only part left out notes that the Commission took into account the results obtained in the written test, and in all other aspects explanations are the same as in decisions on the appointment.

¹²⁴ Su. R. br. 612/09 of 9 June 2009 and Su. R. br. 454/09 of 16 April 2009.

¹²⁵ Su. R. br. 162/2010 of 8 February 2010.

¹²⁶ Su. R. br. 368/2010 of 18 March 2010 and Su. R. br. 1085/2010 of 11 October 2010.

¹²⁷ *Sl. list CG*, [35/2008](#), [38/2008](#) and [6/2009](#)

Besides being concerned about the fact that the Judicial Council appointed court presidents without directly reviewing and considering the candidates' opinion in respect of the court operations, it is unclear on what grounds other decisions on the appointment of court presidents do not mention whether the Appointment Commission examined such views of the candidates. This especially because Art. 32, para 4 of the then applicable Rules of the Judicial Council¹²⁸ expressly stipulated that during an interview with a candidate for president of the court, the Appointment Commission shall particularly examine his views regarding problems in the functioning of the court, manner of solving these problems and ideas for improving the work of the court.

This raises the suspicion that in all other interviews the Appointment Commission completely ignored its obligation to examine the above criterion, and that the applicants did not at all express their *"view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"*. In this way, the presidents of courts were selected on unequal terms.

This practice indicates either that the Judicial Council makes decisions on different criteria and appoints certain candidates for the court president after an insight into their *"view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"* and other candidates without applying this obligation, or that in each case the appointment of the court president is explained by a template rationale and that the Council only formally confirms the choice of the Commission.

As in all previously analyzed decisions, these too state that the Appointment Commission adopted their decisions unanimously.

In any case, decisions on the selection of court presidents do not indicate why a particular candidate was appointed, while some others were not. Rationales that come to a conclusion that a certain judge was elected a president because he received better grade than other candidates, without any indication of how all the applicants were assessed, or because that was done by evaluating the results of the assessment (where only one candidate applied), are not convincing. This especially considering that the decisions imply that the Judicial Council too had no access to anything that would suggest how the assessment in making the decision has been carried out.

5.4. Practice of the Judicial Council following 2011 regulations changes

According to data from the website of the Judicial Council, following the amendments to the Judicial Council Law on 22 July 2011 and adoption of the new Rules of Procedure on 18 November 2011, eight decisions on the appointment of judges were issued as follows:

- two decisions on the appointment of four judges of higher courts;
- one decision on the appointment of a judge of the Administrative Court of Montenegro;

¹²⁸ *Sl. list CG*, [35/2008](#), [38/2008](#) and [6/2009](#)

- four decisions on the appointment of six judges of basic courts, and
- one decision on the appointment of a judge of the Appellate Court.

Analysis of these decisions shows that the changes to regulations have not influenced the Judicial Council to change its practice and provide better rationales for its decision. Amendments to the regulations specified the criteria, introduced the scoring system, but also direct participation of all members of the Council in interviews with candidates and their evaluation. However, despite this, once again the adopted decisions contain no explanation about the appointment of candidates who did not have the highest score or were not evaluated better than the rest of candidates.

If the Rules do not explicitly prescribe the cases allowing derogation in favour of a candidate with fewer points, such decisions could be reversed by the Administrative Court as illegal. Besides this, there is a problem of the crucial lack of explanation of such a decision, which is another reason for its invalidity.

Following amendments to the Judicial Council Law regarding the criteria and sub-criteria for the appointment of judges and adoption of new Rules of the Judicial Council, which stipulates a range of points for the assessment of sub-criteria, the website of the Judicial Council has published a decision on the appointment of a judge first time appointed.¹²⁹

Rationale for this decision is different from previous explanations of decisions, because it is consistent with the legal solutions from the amendments and the new Rules. This decision was adopted on the basis of the vacancy announcements two candidates have applied for, one of which withdrew the application.

Unlike the decisions from the previous period, the rationale states that the evaluated test has been submitted to all members of the Judicial Council. This is certainly an improvement over the prior decisions, which do not indicate that the Judicial Council actually reviewed any part of the documentation that was the basis for the assessment and when the Judicial Council had access only to the list of candidates.

The rationale for this decision implies that the members of the Judicial Council, in accordance with the new solutions from the law and the Rules, interviewed the applicants, obtained documentation and opinion on working and professional qualities of a candidate and evaluated him/her using the prescribed criteria and sub-criteria in the prescribed form.

However, it remains unclear how the scoring of candidates was carried out and how each member of the Judicial Council scored the fulfilment of the criteria and sub-criteria based on which the Commission established the average number of points which was the basis for the evaluation of a candidate.

¹²⁹ Su. R. br. 61/12 of 21 February 2012.

Following the publication of this decision, the website of the Judicial Council also published: the decision on the appointment of two judges of the Basic Court in Bijelo Polje¹³⁰, decision on the appointment of two judges of the Basic Court in Podgorica¹³¹ and decision on the appointment of a judge of the Basic Court in Kotor.¹³²

In the decision on the appointment of two judges of the Basic Court in Bijelo Polje, two judges were chosen among eight candidates. This decision implies that the selected candidate was previously employed by the Police Administration and had fewer points than the candidate who is an adviser in the court and who was not elected, although ranked higher on the list of candidates. The decision states that it was adopted unanimously, but there is no explanation as to how the number of points was established and why the appointed candidate had fewer points in relation to a candidate who was not elected!

Candidate M.K., who applied for the judicial post in the Basic Court in Bijelo Polje as an adviser at the Basic Court in Berane, announced the initiation of an administrative dispute before the Administrative Court of Montenegro, for annulment of the decision on the appointment of a candidate rated worse than her. Her experience confirms the conclusion that judges are selected arbitrarily, without proper explanation and reasons justifying the choice.

After an insight into the candidates' awarded score, M.K. found that the "work experience" of 14 years of service in the court secured her 5 points, while other candidate who had 6 years of service out of court (and judiciary) received 4 points. This is a practical example of awarding points arbitrarily under a certain sub-criterion since there are no parameters for evaluation. Thus, in this case a candidate with 14 years of experience in the court received only 1 extra point as compared to a candidate with not even half the work experience outside the judiciary.

In relation to training, the above candidate had a certificate of completion of initial training¹³³ with the grade "stands out", and on this basis obtained 5 points. Although the initial training is provided precisely in order to prepare candidates for the exercise of judicial functions, in that respect she received only two points more than a candidate from the Police Administration who was appointed a judge, and who did not complete this training.

Further, according to M.K., the candidates completed a written test on 5 April, and on 10 April an interview with the candidates was conducted, making the required confidentiality in testing pointless. The anonymity of testing itself does not protect from favouring certain candidates, because the members of the Commission who wish to favour a candidate are certainly able to find out which test belongs to that candidate, i.e. which number has been assigned to it, prior to

¹³⁰ Su.R.br.124/12 of 11 April 2012.

¹³¹ Su.R.br.123/12 of 11 April 2012.

¹³² Su.R.br.125/12 of 11 April 2012.

¹³³ Art. 7, para 2 of the Law on Initial Training ("Sl. list CG", 27/2006) provides that the initial training is organized for associates in the judiciary (courts and prosecutors' offices), as well as for law graduates who meet the general requirements for employment in public administration and have passed the bar examination, with the aim to prepare them for the performance of judicial function.

interviewing him/her. *Therefore, written testing, test assessment and interviews with candidates should all be organized on the same day, immediately one after another.*

Finally, what is of particular concern is a way the interviews with candidates are conducted. In the experience of the candidate M.K., candidates are questioned exclusively by the President of the Supreme Court and the Judicial Council, while the issues raised with regard to family status and number of children should be banned as a possible source of discrimination in the selection (e.g. women who are expected to use the maternity leave, or have small children so it is assumed that they could be absent from work, etc.), as prescribed in the case of employment with any employer.¹³⁴ This situation further justifies the earlier HRA recommendation to prescribe guidelines for interviewing candidates, which should also prescribe, as it turns out, the issues that candidates are not allowed to be questioned about.

In a similar way as in the selection of judges appointed for the first time, the decision on the appointment of two judges of the High Court in Podgorica notes that 12 candidates had applied for a judicial vacancy announcement.¹³⁵ Unlike in the previous period, the decisions now state that the Judicial Council members evaluated the candidates and submitted the completed assessment forms to the Commission to compile a list of candidates for election. However, based on the list of candidates with the average number of points, of 11 evaluated candidates for the judge of the High Court, the Judicial Council chose a candidate who had the most points, but also the candidate whose number of points secured him fourth place.

The decision contains no explanation for the reasons for such choice and for not selecting the two candidates who had more points and as such held the second and third position on the list, but merely states that the Judicial Council selected the fourth candidate on the list by majority vote.

Also, in the decision adopted by the Judicial Council two days later¹³⁶ on the appointment of two judges to the High Court in Bijelo Polje, there was a choice between five candidates and the candidate who had the most points was selected, but, again, also the candidate who was only fourth in terms of the score.

This decision too provides no explanation or reason why other candidates who had more points than an appointed judge were not chosen, or on what basis the Judicial Council decided to select a candidate who had fewer points, but also repeats the statement that the Judicial Council chose the candidates by majority vote.

In contrast, the decision on the appointment of a judge of the Administrative Court of Montenegro¹³⁷ appointed a judge who had the highest number of points

¹³⁴ The Labour Law (*Sl. list CG*, 49/2008 and 26/2009) provides that an employer can not require data on family or marital status and family planning from the person with whom he intends to enter into a contract of employment, or the submission of documents and other evidence not directly relevant for the performance of duties the employment contract is based on (Art. 18, para 2). The fine for violation of this provision is from ten to three hundred times the minimum wage in Montenegro (Art. 172).

¹³⁵ Su. R. br. 69/12 of 23 February 2012.

¹³⁶ Su. R. br. 60/12 of 21 February 2012.

¹³⁷ Su. R. br. 59/12 of 21 February 2012.

out of eight candidates, but that decision as well lacks reasoning upon which such selection was made. This explanation too proves to be incomprehensible, especially since other decisions indicate that the number of points is not decisive for the selection of a candidate and that a candidate with fewer points may be selected.

Such method of the appointment of judges encourages doubt that judges are not selected fairly, do not advance fairly and that there are reasons unknown to the public based on which some judges are appointed or promoted, while others are not, or at least not at the same pace.

5.5. Fairness of the procedure and legal remedies

Law on the Judicial Council¹³⁸ provides that the Judicial Council shall announce a vacancy for the post of a judge or president in the Official Gazette of Montenegro ("Sl. list CG") and in one of the print media. Moreover, in practice such announcements are usually published on the website of the Judicial Council as well, which further helps inform a greater number of people, especially younger generation, on the vacancy announcement. However, HRA remains at an earlier recommendation to expressly prescribe this obligation by law.

Fairness and efficiency of the appointment process of judges would also be significantly improved by publishing all candidates' applications on the website of the Judicial Council. Since these applications are not published, the public can not point to possible inadequacy of the candidates.

Regarding the applying process of candidates, it is prescribed that the Judicial Council rejects untimely or incomplete applications, but also decides on the complaint against such decisions.¹³⁹ This solution makes pointless the filing of the complaint as a legal remedy against the decision to reject untimely or incomplete application, because the same body that made the decision decides on it. In this sense, HRA has previously suggested that the Appointment Commission be authorized to reject untimely or incomplete applications, while the Judicial Council would decide on the complaints to such decisions.

The Judicial Council has not laid down guidelines for interviewing candidates, and current practice shows that it is possible that only the President of the Supreme Court asks questions, even those that should be prohibited (see previous section 5.4.). Also, the law implies that the interview is also conducted with advancing judges, which is illogical and unnecessary.

According to the Rules of the Judicial Council¹⁴⁰, the number of points scored on the test is determined by a majority vote of the Commission. This solution does

¹³⁸ Art. 28, para 3.

¹³⁹ Art. 29 of the Law on the Judicial Council.

¹⁴⁰ Art. 41, para 1.

not contribute to the impression of procedural fairness, because it is absurd to vote on something that is numerically measurable.

Also, the prescribed forms are incomplete and do not contain a column for stating a source of information based on which the assessment is carried out; they are not adapted for the assessment of a candidate appointed a judge of the higher instance court for the first time, who does not come from the judiciary. The lack of instructions for filling out forms and parameters for the evaluation of criteria and sub-criteria leaves room for arbitrariness and inequality in the evaluation.

Although the decisions on the appointment include instruction on legal remedy, HRA believes that this not being explicitly prescribed by law is a serious shortcoming, since the law only provides that the decision must include a written rationale.¹⁴¹ On the other hand, decisions analysis indicates that their rationales are unclear and cast doubt on an objective and correct appointment.

Although the law prescribes the right of a candidate to access own documentation and written test¹⁴², as well as final evaluation grade of other candidates, there are still doubts as regards objective assessment because the candidates are denied the right to access documents and tests of others. Also, the regulations do not prescribe the method and place to get an insight into electoral documents, deadline for the Secretariat to provide an insight into electoral documents upon request, the right to copy documents, the right to access documents through an attorney, or the right to file a complaint to the Judicial Council in the event of denial of this right.

Law on the Judicial Council does not prescribe the consequences of the annulment of the decision on the appointment of a judge who did not meet the general requirements for selection. The acts and actions taken by that judge would also have to be annulled. In this sense, another shortcoming of the law is that it does not expressly prescribe urgent nature of an administrative action against a decision on the appointment of a judge.

Since the Constitution prescribes the reasons for dismissals of a judge, appeals against such decisions should be considered by the Constitutional, not the Administrative Court. In addition, the Administrative Court therefore also decides on the decisions on the appointment of judges of that court, which calls into question the objectivity and impartiality in such procedures.

Recommendations:

1. It is necessary to stop the practice of template and incomprehensible decision rationales. Instead, define rationales which provide clear answer as to why a certain candidate is appointed a judge, and the other candidate is not, or why a certain judge is promoted, while the other is not.

¹⁴¹ Art. 35, para 4 of the Law on the Judicial Council.

¹⁴² Art. 38 of the Law on the Judicial Council.

2. Publish applications of candidates for the judicial post on the Judicial Council website, so that the public can point to the possible inadequacy of applicants. Allow candidates to learn about possible objections to their candidacy, as well as to respond to them.
3. Obtain the opinion of the higher court judges on promotion based on a questionnaire that would include the categories of good knowledge of procedural and substantive legal regulations, practice of the European Court of Human Rights, practice of Montenegrin courts etc.
4. Prescribe the right of judges of the court whose president is being elected to submit their opinion on candidates for the president to the Judicial Council.
5. Amend Art. 38 of the Law on the Judicial Council in a manner that will grant all candidates for the judicial post the right to access records of other candidates (above recommendation no. 7) and prescribe: method and place to get an insight into electoral documents, deadline for the Secretariat to provide an insight into electoral documents upon request, the right to copy documents, the right to access documents through attorney, the right to file a complaint to the Judicial Council in the event of denial of this right and deadline in which the Judicial Council is to decide on the complaint.
6. Prescribe the competence of the Commission for Appointment of Judges to reject untimely or incomplete applications, given that the Council decides on the complaint against the decision to reject an application.
7. Obtain opinions on various aspects of work and behaviour of candidates based on a questionnaire, whose content should be determined by the Judicial Council, to avoid obtaining stereotyped phrases instead of substantive evaluation. Courts should hold data on achieved work results of expert associates, on which the opinion of their performance should be based.
8. The Judicial Council should prescribe guidelines for conducting interviews with candidates, including the questions a candidate must not be asked. Stipulate that the interview is not required in the promotion of judges.
9. In the "Annulment of the decision on the appointment" (Art. 49, para 2 of the Law on the Judicial Council), for the purpose of appropriateness, HRA once again proposes the introduction of an obligation to postpone the start date of performing judicial function in order to verify the information from paragraph 1 of the same article, considering the implications of Article 71 entailed by the annulment of the decision on appointment.
10. HRA reiterates its objection that the judicial protection against decisions of the Judicial Council must not be provided in administrative proceedings, but with the Constitutional Court.

6. Assignment of judges to higher instance courts to provide assistance

Art. 42, para 3 of the Law on the Judicial Council stipulates the following:

The Judicial Council may temporarily transfer a judge for a period of up to one year, with his/her consent, to a higher instance court in the event the workload of that court has been temporarily increased or in the event of a large accumulation of unsolved cases, which cannot be efficiently handled by the existing number of judges in that court. The judge that is being reassigned must fulfill all of the criteria specified for the position in the court to which he/she is being transferred.

Art. 43 of the Law on the Judicial Council:

(1) The Judicial Council shall adopt a decision on the temporary transfer of a judge to another court upon the request of the president of the court the judge is to be transferred to.

(2) Before taking a decision on the temporary transfer of a judge to another court, the Judicial Council shall first consult with the president of the court who filed the request, the judge who is being considered for the temporary reassignment and the president of the court in which the judge ordinarily performs his/her judicial duties.

Law prescribes a controversial possibility for a judge who is not formally appointed a judge of the higher instance court to hold that position based on an individual decision of the Judicial Council on the temporary transfer to that position. This solution is also controversial from the aspect of the legal basis for court action, which is the element of the human right to a fair trial.¹⁴³

HRA particularly points to shortcomings in making these decisions, which allow unequal treatment of judges. It should be noted that a decision on the temporary transfer of a judge to a court of higher instance inevitably favours that judge for further progress, in addition to enabling the transferred judge to receive higher wage.

Decisions taken by the Judicial Council on the temporary transfer were not published on its website, so HRA requested access to this type of decisions referred to in the Report on the work of the Judicial Council.¹⁴⁴

It was found that these decisions do not offer valid rationales and do not indicate that the Judicial Council has determined whether a judge meets the requirements for a judge of a court he is reassigned to. Also, the decisions do not indicate the method of deciding about which judge, of all judges who can qualify, shall be referred to a higher instance court.

All reviewed decisions only cite the provisions of Art. 42 and 43 of the Judicial Council Law, but none contains specific reasons for the decision, especially the

¹⁴³ Art. 6, para 1 of the European Convention on Human Rights reads: " In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...".

¹⁴⁴ Decisions were sought and obtained.

reasons why and how a certain judge was selected to be reassigned to a higher instance court.

Given the right to fairness of the proceedings in relation to the legal composition of the court, judges who were not appointed as higher court judges should generally not be referred to that court. This prohibition does not apply to judges of equal rank, so they should be used for the purpose of increasing timeliness. If it is necessary to increase the number of judges of the high court, then they should be selected in accordance with law.

Recommendation:

1. Abolish the authority of the Judicial Council to temporarily assign judges to work in the court of higher instance.

7. Disciplinary responsibility of judges and court presidents

7.1 Disciplinary violations

7.1.1 General remarks

Law on the Judicial Council¹⁴⁵ prescribes disciplinary responsibility if a judge neglectfully performs his judicial function or harms the reputation of the judicial function in cases prescribed by law, and if a court president neglectfully performs his function or harms the reputation of the office of a court president.

The Constitution of Montenegro¹⁴⁶ stipulates that a judge shall be dismissed in the following cases: conviction for an offense that makes him unsuitable to hold judicial office, incompetent or negligent performance of a judicial function, or permanent loss of capacity for performing judicial function. This constitutional solution seems illogical in relation to the reason when a judge "*permanently loses his capacity to perform judicial function*". This reason should be a basis for the termination of judicial office, not for dismissal, because the dismissal procedure involves determination of responsibility and culpability of a judge for certain actions or omissions, while the loss of ability can not be considered the responsibility of a judge.

Amendments to the Law on Courts¹⁴⁷ specify what constitutes undue performance of the judicial function and harm to the reputation of judicial function by judges and court presidents, negligent and unprofessional execution of office of judges and court presidents:

Undue performance of judicial duties
Article 33a

A judge shall be deemed to perform the judicial duty unduly if the duty is not performed in a usual manner and particularly if for a longer time or in a greater number of cases and without a reasonable justification such judge:

- 1) does not act upon the cases in the order they have been received;*
- 2) does not summon sittings or hearings for cases assigned to him/her to act upon them or if, in any other manner, delays the proceedings;*
- 3) fails to ask for his/her challenge in cases where there is a reason for such challenge;*
- 4) does not come or comes later to summoned hearings of arguments or hearings or panel of judges sessions;*
- 5) does not process his/her rulings timely;*
- 6) does not follow the schedule for deciding on pending cases or does not act upon a decision based on a review request;*
- 7) prevents the performance of supervision as prescribed by the law;*
- 8) does not attend mandatory training program."*

Harming the reputation of judicial office
Article 33b

A judge shall be deemed to harm the reputation of judicial office, in particular if:

¹⁴⁵ Art. 50.

¹⁴⁶ Art. 121.

¹⁴⁷ *Sl. list CG*, 39/2011.

- 1) during the performance of the judicial duty or at any public place brings himself/herself in the situation or behaves in the manner that is inappropriate to the performance of the judicial duty;
- 2) behaves inappropriately towards the participants in any court proceedings and the court staff;
- 3) does not abstain from inappropriate relations with the attorneys and parties upon whose cases he/she acts or discloses information he/she has found out during acting upon such cases;
- 4) uses his/her judicial position for gaining his/her private interests and the interests of his/her family or close persons;
- 5) receives gifts or does not present the data of his/her property or income as required by the regulations governing the conflict of interests.

Undue performance of the judicial function by the president of the court
Article 33v

A president of the court shall be deemed as in undue performance of duty if such president of the court, without reasonable grounds:

- 1) contrary to the law, changes the annual schedule of the court businesses;
- 2) does not act upon complaints and review requests;
- 3) does not institute disciplinary proceedings against a judge when he/she knows or must have known the grounds for such proceedings;
- 4) prevents the supervision to be carried out according to the law;
- 5) does not ensure education for judges, advisers and other staff in a court as it should be according to the regulations;
- 6) does not present or presents incomplete and inaccurate performance reports and other data required under the law.

Harming the reputation of the office of the president of a court
Article 33g

A president of a court shall be deemed to harm the reputation of the office of the president of a court if:

- 1) during the performance of the president or at any public place brings himself/herself in the situation or behaves in the manner that is inappropriate to the performance of the court president duty;
- 2) behaves inappropriately towards the clients and the court staff;
- 3) uses his/her position of the court president for gaining his/her private interests and the interests of his/her family or close persons;
- 4) receives gifts or does not present the data of his/her property and income as required by the regulations governing the conflict of interests.

Negligent and unprofessional performance of the duty of the president of a court
Article 33d

A president of a court shall be deemed as in negligent and unprofessional performance of the duty of the president of a court if:

- 1) during the supervision of the performance of the court management, wrongful acts and irregularities in the performance of the court management that are detrimental to the proper and regular performance of the court duties and functions are found;
- 2) he/she does not respect the principle of the random assignment of cases;
- 3) he/she withholds, contrary to the law, already assigned cases;
- 4) he/she violates the principle of impartiality of a judge;
- 5) he/she does not make a motion to dismiss a judge from duty in cases prescribed by the law when he/she knows or must have known the reasons for such dismissal.

Unprofessional and negligent performance of the judicial duty
Article 33e

An unprofessional and negligent performance of the judicial duty shall be particularly the one during which a judge, without reasonable grounds:

- 1) does not achieve, to a large extent, the expected results as regards the quality and quantity of performance for a previous two-year period compared to the average number of solved cases of the same type and complexity at the level of that court;*
- 2) exceeds substantially the legally prescribed deadline for making respective rulings in a larger number of cases;*
- 3) delays proceedings or does not act upon cases, inducing thereby the limitation of the criminal prosecution or the limitation of the criminal sanction execution;*
- 4) performs activities or undertakes actions that are incompatible with the performance of the judicial duty.*

7.1.2 Undue performance of judicial function

Decisions of the Disciplinary Commission and the Judicial Council indicate unequal treatment in the assessment of undue performance of judicial function and result in legal uncertainty among judges. The wording of Article 33a of the Law on Courts, which prescribes the undue performance of the judicial function "for a longer time or in a greater number of cases" is vague and unevenly and arbitrarily interpreted in practice. Also, a question arises concerning the application of warning as a sanction, since the practice shows that undue performance can possibly grow into negligence.

However, amendments to the Law on Courts define undue and negligent performance of judicial duties and contempt of judicial function in a better manner than earlier. Amendments omit the earlier formulation that the judge performs judicial function in an undue manner "in other cases where the law provides that certain acts or omissions of a judge constitute undue performance of judicial function", which provided room for arbitrary and inconsistent sanctioning of judges, because the cases of undue performance of a judicial function were not accurately and fully defined. Neither this nor any other law specifically prescribed acts or omissions which constitute undue exercise of judicial function, i.e. disciplinary offense.

However, the wording that "*a judge shall be deemed to perform the judicial duty unduly if the duty is not performed in a usual manner and particularly if for a longer time or in a greater number of cases and without a reasonable justification*" still allows for arbitrary and inconsistent treatment and sanctioning of judges.

How long is "a longer term", how many cases does "a greater number of cases" imply, and what is "reasonable justification" – can not be concluded based on the regulations. Therefore, persons authorized to initiate disciplinary proceedings (court presidents) might arbitrarily assess the implication of "a longer term", "greater number of cases", or the lack of "reasonable justification". This allows for both arbitrariness and inequality in treatment, i.e. the possibility that in some cases a certain period of time is considered longer, a certain number of cases larger, or especially the reasons may be regarded as justified, while in some other cases, in the same or similar situation all this would not be treated equally.

Examples from practice, referred to below, indicate that the judges are treated unequally and that these general standards are applied selectively and unequally in relation to judges. All this reinforces the impression that the judges are governed autocratically and kept in suspense and under constant pressure that proceedings may be initiated against them based on an arbitrary assessment of court presidents, who are authorized to initiate such proceedings.

The phrase "without a reasonable justification" in some cases allows for arbitrary tolerance for the violation of deadlines set by the procedural law. Deadlines for the publication and making of judicial decisions are regulated by special laws, as well as the obligation of judges, in case of passing the deadline, to notify the court president, who shall undertake measures in this regard.

Amendments to the Law on Courts stipulate that a judge may violate statutory deadlines for a specified time period in several cases and that the court president arbitrarily decides whether this is carried out for a "longer term", in a "greater number of cases", or whether there is "reasonable justification" for violating these deadlines. Such regulation should immediately be amended, because it regulates in a different manner the issues already regulated under procedural laws relating to the rules of procedure, which should certainly not be the subject of the Law on Courts. A particular problem is the uniformity of practice - "longer", "greater" or "reasonable" may be perceived differently by different court presidents. Since the Disciplinary Commission does not publish its decisions, this further prevents the establishment of a uniform practice regarding the initiation of disciplinary proceedings and establishment of disciplinary responsibility.

7.1.3 Negligent and unprofessional performance of judicial function

The same wording "*if without reasonable justification*" should be omitted in the case of unprofessional and negligent performance of judicial function (Art. 33e). In any case, a judge is the one who should defend himself with the existence of possible valid reasons which in themselves may exclude the existence of responsibility and prove their existence; it is not acceptable for initiators of the proceedings to arbitrarily do so.

Therefore, the law defines both unprofessional and negligent performance of judicial function only provided that those actions are conducted "*without reasonable justification*". Here too there is space for unexplained arbitrariness in allowing a certain judge to go unpunished, for example, for exceeding statutory deadlines for making decisions in a greater number of cases, delaying proceedings and not acting upon cases, causing the limitation of the criminal prosecution or of the criminal sanction execution and for performing activities that are incompatible with the judicial function. It is entirely unclear what could be the "reasonable grounds" for such actions of a judge.

It follows that the law amendments allow the evasion of responsibility for individual judges and court presidents, which would depend on the arbitrary assessment of their superiors. Allowing this practice is extremely dangerous and

detrimental to the independence of judges, since there is always a question of reasons as to why some judges are allowed to avoid responsibility for actions that other judges are sanctioned for, but also the possibility of seeking or expecting favours in the form of a specific action in some cases, which is detrimental to the rule of law.

7.1.4. Undue performance of a court president function

In the same manner the law prescribes undue performance of the function of the court president, provided it is carried out *"without reasonable justification"*. It remains unclear what represents reasonable justification for the court president to amend the annual schedule of work in the court, not to act on complaints and review requests, not to initiate disciplinary responsibility of a judge with regard to whom he knows or should know that there are grounds for responsibility, to preclude the exercise of supervision and training for judges and court staff and not to submit or submit incomplete or inaccurate reports on operations and other information.

Such a broad formulation of the basis for exclusion of responsibility gives the authority to presidents of directly higher courts and the Supreme Court President to arbitrarily assess reasonable justification for violation of laws and failure to perform official duties by a court president. In addition to not prescribing "reasonable justification" anywhere, it is unfounded and even absurd to think that in general a court president may have good reason, for example, for not dealing with complaints and review requests, not initiating disciplinary responsibility of a judge for whom he knows that there are reasons to do so, or submitting incomplete or inaccurate reports about the work.

For example, the provisions of Articles 6 and 20 of the Law on the protection of the right to trial within a reasonable time¹⁴⁸ prescribe that the failure of the president of a court to act upon a review request within 60 days constitutes grounds for initiating the proceedings to establish his responsibility. These reasonable grounds for the responsibility of the court president have been made completely senseless by prescribing the authority of the president of the directly higher court and the President of the Supreme Court to assess the "reasonable justification" for failure of the court president and to arbitrarily decide not to initiate the disciplinary proceedings.

7.1.5 Contempt of judicial function

The Law on Courts does not provide that the violation of the Code of Judicial Ethics constitutes undue or negligent performance of the judicial function, i.e. the basis for determining disciplinary responsibility of judges. Also, the law does not prescribe that the violation of the Code constitutes contempt of the judicial function. Therefore, a violation of the Code is still not punishable, although the Code itself provides that its violation constitutes grounds for disciplinary action

¹⁴⁸ *Sl. list CG*, 11/2007.

and procedure for removal of judges under the Constitution and the law (Art. 14, para 6). HRA has previously stressed the need to lay down in the Law on Courts the Code violations that constitute undue or negligent performance of judicial office, or contempt of judicial function.¹⁴⁹

7.2 Disciplinary proceedings

7.2.1 Authority to initiate disciplinary proceedings against judges and court presidents

In addition to the Law on the Judicial Council, the new Rules of Procedure of the Judicial Council prescribe the contents of the proposal to initiate disciplinary proceedings (Art. 54) and specify the disciplinary proceedings (Art. 55 - 69).

Members of the Judicial Council are still not among the persons authorized to determine the disciplinary responsibility of judges and court presidents, which is certainly not conducive to promoting responsible and professional work of the courts. Also, since only the court president, the president of the directly higher court and the President of the Supreme Court are authorized to determine disciplinary responsibility, it appears that it is still not possible to initiate disciplinary proceedings against the President of the Supreme Court, as no person is authorized to do so.

HRA has previously indicated that it is inappropriate for the President of the Supreme Court to be fully protected from the disciplinary responsibility and to be only politically responsible, which is contrary to the principle of judicial independence. It is illogical and incomprehensible that the Judicial Council, as a body that supervises all courts and judges (including the President of the Supreme Court), has no authority to initiate disciplinary proceedings against any judge, including the Supreme Court President. It should be noted that back in 1991 the Law on Regular Courts prescribed the authority of the Judicial Council to initiate the disciplinary procedure against the Supreme Court President.¹⁵⁰

7.2.2. Disciplinary Commission

The procedure of determining disciplinary responsibility of judges is conducted by a Disciplinary Commission appointed by the Judicial Council for a period of two years.¹⁵¹ The amendments to the Judicial Council Law¹⁵² stipulate that the Disciplinary Commission has a president and two members, that the president is appointed from among the members of the Judicial Council who are not judges, and two members from among the judges who are not members of the Judicial Council and have at least 15 years of experience. However, neither the law nor

¹⁴⁹ See „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, p. 107.

¹⁵⁰ Art. 46, para 3: "President of the court shall submit a request to the Judicial Council to initiate disciplinary proceedings against a judge, which shall include the facts of a violation of standards of judicial conduct prescribed by law or the rules of the court. Request in relation to the president of the court shall be submitted by the president of the directly higher court, and in relation to the Supreme Court President, by the Judicial Council." (Law on Regular Courts, *Sl. list RCG*, 48/91 and 18/92).

¹⁵¹ Art. 51 of the Law on the Judicial Council.

¹⁵² *Sl. list CG*, 39/2011.

the Rules of the Judicial Council specify the procedure of appointment of the Disciplinary Commission members, which is important especially for the appointment of two members outside the Judicial Council.

7.3 Practice of the Judicial Council and Disciplinary Commission in assessing undue, negligent and unprofessional work of judges

The practice of the Disciplinary Commission basically started on 1 August 2008. Although its composition should guarantee a high degree of legitimacy, this is not always the case. The fact that its decisions were not published on the website represents quite a shortcoming, because court presidents who initiate the proceedings could be guided by those decisions, and unequal treatment in equal situations could be eliminated or reduced to a minimum.

According to the Annual Reports on the work of the courts from 2008 until 2011, 13 proposals to institute disciplinary proceedings against judges have been submitted to the Disciplinary Commission. Of these, four proposals were rejected as unfounded, five proposals were adopted and judges imposed four disciplinary measures - the salary reduction of 20% for three months or for one month and two warnings. In four proposals, after the Disciplinary Commission found that there are grounds for dismissal of a judge, the proceedings were interrupted and the case submitted to the Judicial Council.

Pursuant to Art. 63, para 2 of the Judicial Council Law, after having established that there are grounds for initiating the proceedings for dismissal, the Judicial Council submitted 10 received proposals to the Disciplinary Commission to examine the reasons for dismissal. After collecting data and evidence, the Disciplinary Commission in due course submitted a report to the Judicial Council, which, in deciding on the proposal, made decisions on the dismissal of four judges, two proposals have been rejected as unfounded, while in two proposals the dismissal proceedings were suspended, and during the proceedings four judges submitted a request for termination of office.

Since the Disciplinary Commission decisions are not published on the website of the Council, HRA addressed the Council with the request for access to information, and 11 decisions adopted until 31 January 2012 were submitted. Decisions are still not published on the website of the Judicial Council.

The analysis of these decisions and their comparison with the facts in other cases available to members of the team that worked on this project, also lead to the conclusion that judges are treated unequally and that not the same conditions for establishing disciplinary responsibility apply to all judges, that the criteria by which judges are held responsible are interpreted differently and that disciplinary proceedings are generally initiated only after inspection by the Supreme Court.

In its decision¹⁵³ of 1 September 2008 the Disciplinary Commission rejected as unfounded the proposal for establishing disciplinary responsibility of a judge of the Basic Court in Kolašin, who had been charged with undue performance of the

¹⁵³ Dp.br.1/08.

judicial function between July 2006 and end of 2007 due to exceeding statutory deadlines for making judgments in criminal matters in 16 cases and the violation of statutory deadlines for scheduling of the main trial in 3 cases, between September 2006 and May 2008, which led to the limitation of criminal prosecution in one case.

The decision states that the judge in his statement pointed out that the President of the High Court, by order of the Supreme Court President, pressured him and offered him a settlement in order to resign and that the limitation deadline for the prosecution in the mentioned time-barred case is 6 years and that the investigating judge previously spent five years in investigation.

Disciplinary Commission then took the position that exceeding the statutory deadline for writing a decision is not prescribed as a disciplinary offense¹⁵⁴. However, only a few months later, in its decision¹⁵⁵ on the dismissal of a judge the Judicial Council stated:

"failure to act upon cases in accordance with the rules of procedure constitutes undue performance of the judicial function and provides the reason for dismissal under Art. 121, para 3 of the Constitution of Montenegro."

Violation of the rules of procedure could have been interpreted as an act that is not a disciplinary offense and for which one cannot be held responsible, but also as an act that can be qualified as unprofessional performance, and for which a judge can be dismissed. Such different interpretations in practice further support our recommendation that disciplinary offenses should be specified better.

Moreover, the Disciplinary Commission in the said decision indicated that it had taken into account whether the shortcomings in the performance have elements for dismissal, but that it was concluded that these grounds do not exist because statutory deadlines had been exceeded in 16 cases, which, by the assessment of the Disciplinary Commission, does not represent "greater number of cases" for dismissal of the judge. In the decision on dismissal mentioned earlier, performance of a judge contrary to the rules of procedure qualified as unprofessional performance was also established in 16 cases.

In addition to the above, in this procedure the Disciplinary Commission has determined that the party requesting the establishment of the disciplinary responsibility is the very investigating judge in the case where the statute of limitation in the criminal prosecution occurred and that it was him who conducted a five-year investigation during which he questioned the suspects and one witness.

In this decision neither the Disciplinary Commission, nor the Judicial Council later, dealt with the allegations that the judge was pressured by top judicial authorities to resign. One year later, the Judicial Council issued a decision¹⁵⁶ pursuant to which this judge ceased to hold office due to an unconditional one-year prison

¹⁵⁴ This action is prescribed as a negligent exercise of judicial function in the amendments to the Law on Courts, which came into force in August 2011.

¹⁵⁵ Su.R.br.636/08 of 26 December 2008.

¹⁵⁶ Su.R.br.1571/09 of 11 November 2009.

sentence for criminal offenses of abuse of office and negligent performance of duty, performed in connection with the exercise of the judicial function.

Also, the Disciplinary Committee and the Judicial Council never addressed the issue of competence and timeliness of the work of the court president, who tried to attribute to another judge shortcomings in his own work and a five-year investigation during which he had only questioned the suspects and one witness, even though all of the facts were basically established in the previously conducted procedure.

In other decisions from 2008¹⁵⁷ the Disciplinary Commission found responsible the judges of the Basic Court in Bar for not scheduling the hearings in 104, and in 54 criminal cases in 2007. Both procedures were initiated after the control of the Supreme Court of Montenegro.

Less than five months later, the Disciplinary Commission adopted a decision¹⁵⁸ on the negligent performance of judicial office for the reason that a judge in one case failed to schedule a hearing during the period from 22 March to 12 December 2008. In the same decision the Disciplinary Commission adjourned the proceedings because the judge in one case did not schedule hearings in the period from 3 November 2006 until 28 November 2008, and because in another case she made the decision to stay the proceedings due to the party's death, and the case file contained no evidence of death of the party, which was assessed by the Commission as a reason for dismissal and the case was submitted to the Judicial Council.

In this decision the Disciplinary Commission established the "standards" it failed to apply in other proceedings, because the rationale states:

"Disciplinary Commission believes that judges litigants may schedule hearings in more than 5 cases a day, which certainly increases the number of cases in which she could have scheduled hearings within one month".

In addition to being unclear based on what grounds the Commission came to a conclusion on the number of hearings that may be scheduled daily, it is particularly unclear why the same standard has not been applied in relation to other judges. It is also unclear why in other cases the judges who do not schedule hearings for a period of nine months or more are not sanctioned. This further justifies HRA recommendation that the Judicial Council should be granted the authority to initiate proceedings for establishing disciplinary responsibility. Also, the Judicial Council receives information about such shortcomings through the complaints of citizens.

Nine months later, the Disciplinary Commission adopted a decision¹⁵⁹ to impose a disciplinary measure of reduction of a monthly salary by 20% in relation to a judge of the Basic Court in Podgorica as a result of undue performance of the judicial function because as of 27 October 2008 until 14 September 2009 she failed to schedule a hearing in the case where the suit was filed in December 1984, assigned to that judge on 27 October 2008. This decision implies that the

¹⁵⁷ Dp.br.2/08 of 10 September 2008, Dp.br.4/08 of 10 September 2008.

¹⁵⁸ Dp.br.1/09 of 02 February 2009.

¹⁵⁹ Dp.br.3/09 of 09 October 2009.

same judge was assigned an even older case, in which the suit was filed back in 1983. Also, in its decision the Disciplinary Commission found that the same case, in which the judge failed to schedule hearings for almost 11 months, was in the High Court for deciding on appeal for a total of 2 years and 10 months.

So, in the case which lasted for 25 years and was in the High Court the last time on appeal for 2 years and 10 months, only a judge this case was assigned to at the time when it was already 24 years old has been sanctioned, because she failed to schedule a hearing for almost 11 months after it was assigned to her.

Contrary to the views of the above decisions, in the case before the Basic Court in Podgorica¹⁶⁰, mentioned earlier in this report, the judge of that court scheduled a preliminary hearing more than a year after the suit had been filed. Also, in the case before the same court¹⁶¹ a judge scheduled a preliminary hearing after more than nine months and only after filing of the request to accelerate the procedure, which was adopted by the High Court, while in another case¹⁶² a trial was scheduled after more than 11 months and later in the same case the statute of limitation on criminal prosecution occurred.

None of the judges who acted in these cases have ever been held accountable for not scheduling hearings in the period which is longer than the period for which the judge of the Basic Court in Podgorica in the above case was sanctioned.

In relation to actions of a judge assessed by the Disciplinary Commission in its first decision in 2009¹⁶³ as a reason for dismissal, the decision of the Commission stated that the judge:

"exhibited negligence, especially since it is a procedure of an urgent nature, and there is no excuse whatsoever to keep case file in a desk drawer for two years."

During the same time period, in the case before the Basic Court in Podgorica¹⁶⁴ which was a labour dispute and therefore urgent, a judge of that court "kept the case in a drawer" and issued a judgment one year and seven and a half months after the conclusion of the hearing, although the statutory deadline is 30 days. This judge was never held accountable for negligent performance, or "keeping the case in a desk drawer", even though the President of the High Court¹⁶⁵ and the President of the Supreme Court of Montenegro¹⁶⁶ had been informed about all the above.

Therefore, this decisions of the Disciplinary Commission too demonstrate unequal treatment of judges, but also a suspicion that judges are pressured with their mistakes from the past.

In early September 2009 the Judicial Council issued a decision on dismissal¹⁶⁷ of a judge. Only 7 months earlier that judge was sanctioned with a 20% salary

¹⁶⁰ P.br.5043/2011.

¹⁶¹ P.br.164/2011.

¹⁶² K.br.1236/05.

¹⁶³ Dp.br.1/09 of 2 February 2009.

¹⁶⁴ P.br.19954/01.

¹⁶⁵ In the request to expedite the proceedings of 13 October 2008.

¹⁶⁶ In the complaint of 6 April 2009.

¹⁶⁷ Su.R.br.983/09 of 4 September 2009.

reduction for not scheduling a hearing in one case for almost 8 months. However, the decision on dismissal points to the new shortcomings of that judge assessed as unprofessional and negligent work. Thus, in addition to acting in two cases where the Disciplinary Commission found the grounds for dismissal, the decision on dismissal points to judge's incompetent performance in another 30 cases from 2008 in which decisions were modified or overruled and in 20 cases from the first 4 months of 2009, while the negligent work was established in another 17 cases.

Majority of cases (47) for which this judge had been dismissed date from the previous period, so it is unclear why the dismissal procedure was not initiated earlier. Also, disciplinary action and sanctioning of a judge for not scheduling a hearing in only one case prove probable that the judge has been pressured to seek termination of judicial office herself. In any case, it is inexplicable and unacceptable that the data on a negligent and unprofessional work were concealed or unnoticed for a long time.

In the decision¹⁶⁸ from the following year the Disciplinary Commission found no disciplinary offense in a case where a judge failed to rule on the motion for a temporary measure for three years, although the statutory deadline for deciding on such a motion is 5 days. The rationale states that failure of a judge to decide on a party's motion in due time constitutes negligent performance of a judicial function only on the condition that it is not an isolated case.

That same year the Disciplinary Commission adopted a decision¹⁶⁹ on a negligent performance of judicial function where a judge in one case failed to schedule a hearing, did not respect the principle of urgency and adopted a decision nearly four months after the submitted motion. This decision indisputably shows that the former President of the Basic Court and the Supreme Court President (and the President of the Judicial Council) were familiar with the reasons for initiating the disciplinary proceedings almost a year earlier, since May 2009. The judge's salary was reduced by 20% for a period of three months, but the disciplinary measure was not carried out, because pursuant to the decision¹⁷⁰ of the Judicial Council, this judge ceased to hold office at his own request on 27 May 2010.

Decisions of the Disciplinary Commission and the Judicial Council prove unequal treatment of judges and further strengthen doubts that the data about negligence and illegal activities in the work of judges is being covered up and used as a pressure on judges to seek the termination of judicial office themselves (see section 8.2 below). This especially regarding the fact that the President of the Supreme Court and the Judicial Council, who has the competence to propose initiation of a disciplinary procedure against judges, has not initiated proceedings for almost a year even though she was familiar with the reasons for which a judge was later sanctioned.

Recommendations:

1. Amend the Law on the Judicial Council to grant the Judicial Council members as well the authority to submit a proposal for establishing disciplinary

¹⁶⁸ Dp.br.1/10 of 25 October 2010.

¹⁶⁹ Dp.br.2/10 of 8 April 2010.

¹⁷⁰ Su.R.br.653/2010.

responsibility of judges and court presidents, especially the proposal for establishment of disciplinary responsibility of the President of the Supreme Court.

2. The Law on Courts should be amended so as to omit the possibility of determining the "reasonable grounds" in case of a judge's undue performance of judicial function, or incompetent and negligent performance of judicial function, as it allows for arbitrary and inconsistent interpretation and actions of courts presidents.

3. The Law on Courts should expressly prescribe that the violation of the Judicial Code of Ethics represents the basis for determining disciplinary responsibility of a judge, i.e. undue or negligent performance of judicial function, or the contempt of judicial function.¹⁷¹

4. Amend the Law on Courts so as to prescribe the existence of a violation of judicial discipline, in addition to mentioned cases, when a judge:

- fails to fulfill mentoring duties and obligations for professional development of trainee judges;
- in case of unexcused absence from work;
- fails to wear official attire in accordance with regulations;
- behaves rudely or impolitely towards the parties and other participants in the proceedings and fails to prevent such behaviour of others under his/her authority in the proceedings led by him/her;
- fails to refrain from any action which is improper or leads to such impression, as well as from any action which causes distrust, incites suspicion, weakens confidence or in any other way damages the reputation of the court and its impartiality;
- fails to resist threats, blackmails and other assaults on his/her persona and integrity;
- is not able to resist political influence, public opinion, bias (particularly in relation to prohibited grounds of discrimination), temptations, vices, passions, private and family interests and other internal and external influences;
- visits places of improper reputation. (repeated recommendations from 2008)¹⁷²

5. "Disciplinary Commission" (Art. 51 of the Law on the Judicial Council) does not prescribe the procedure and criteria based on which the Judicial Council elects members of the Disciplinary Commission who are not the Judicial Council members.

6. Publish decisions of the Disciplinary Commission to ensure uniformity of practices of court presidents as only they have an authority to initiate disciplinary proceedings, and to insure that the public and all judges are familiar with the practice of this Commission.

¹⁷¹ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, op.cit. item 5.1.2. p. 107.

¹⁷² „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, op.cit. items 5.1.3 – 5.4.2. p. 107-111;

8. Dismissal of judges

8.1. Practice of the Judicial Council

8.1.1. Assessment of negligent performance of judicial function in practice

As presented in the previous chapter, the decisions of the Disciplinary Commission illustrate how the Commission perceives undue, unprofessional and negligent performance of a judicial duty.

Also, unequal treatment of judges in assessing negligent and unprofessional performance is best reflected in the previous three decisions of the Judicial Council on dismissal of judges. On the basis of these decisions, it can be concluded that the work of judges is arbitrarily and unequally qualified as negligent and incompetent performance of a judicial function, and that negligent and unprofessional work are tolerated unreasonably long.

In the decision on dismissal of a judge of the Basic Court in Podgorica¹⁷³ it is said that his negligence in performing the judicial function is due to:

"failure to act in many cases, contrary to Art. 4 of the Law on Courts ("Sl. list RCG" br. 5/02, 49/04 and 22/08), which, due to the failure to act in some cases for several years, threatened the right of the parties to a fair and public trial before an independent and impartial court within a reasonable time, protected by Art. 6 of the European Convention on Human Rights and Fundamental Freedoms and Art. 16 para 1 and 2 of the Criminal Procedure Code, as well as the right of the parties to an effective legal remedy, protected by Art. 13 of the European Convention on Human Rights and Fundamental Freedoms".

It is further stated that the judge failed to take any investigative action in 10 cases which, based on the numbers assigned to them, date from: 1999 - one case, 2004 - 3 cases, 2005 - 4 cases, and 2006 - 2 cases.

It is also indicated that the judge failed to take any investigative action in 111 cases from 2007, failed to act in 39 more cases in the period since 1997 (which can also be concluded based on the case numbers), and that his failure to act in another 17 cases resulted in the statute of limitation of criminal prosecution.

It follows that, in order to establish negligent work and sanction negligent performance of a judicial function, it was necessary for a judge to fail to take any action in 121 cases, fail to act in 56 cases, 17 of which resulted in the statute of limitation of criminal prosecution, and all this over a time period of 11 years. It is concerning that the reaction to such a performance of a judge did not occur much earlier. In this sense, the logical conclusion is that there were serious shortcomings in supervising the work of this judge and the Basic Court in Podgorica, where he held the office.

In the decision on dismissal of a judge of the Basic Court in Pljevlja¹⁷⁴, issued less than three months after the previous one, it is also stated that the judge

¹⁷³ Su.R.br. 367/08 of 1 October 2008.

¹⁷⁴ Su.R.br. 636/08 of 26 December 2008.

performed his judicial function unprofessionally. The decision's rationale lists 11 cases in which actions were not undertaken and 8 cases in which the judge applied the law incorrectly, and all this starting 29 December 2004 when the judge began to perform his judicial function.

Although as in the previous case this decision indicates failure to act, or failure to take action in certain cases, it does not include qualification of negligent performance of a judicial function. Also, there is a significant difference in the number of cases based on which the work of these judges has been assessed as incompetent or negligent, as well as in the time period during which the judges acted in that manner. In the first case the judge failed to undertake any action in 121 cases during the period of 11 years, and in the second case - in 11 cases for a period of 4 years. Therefore, it is completely incomprehensible when and on what basis the actions against judges who do not act in their cases are taken.

More than two years later, the decision on dismissal of a judge of the Basic Court in Cetinje¹⁷⁵ states that this judge performed his judicial function negligently because *"the judge failed to make written copies of decisions in cases assigned to him in due time, namely: in 70 decisions up to 4 months, in 36 decisions up to 5 months, 33 decisions up to 6 months, 15 decisions up to 7 months, and in 7 decision up to 8 months"*.

This decision implies that such conduct was at first the reason for the President of the Court in Cetinje to submit a proposal for establishing disciplinary responsibility of this judge. As the Disciplinary Committee found that in this case there are grounds for dismissal of the judge, that procedure was terminated. President of the Court then accepted the assessment of the Disciplinary Commission that there are grounds for dismissal, and, according to law, the proposal to establish disciplinary responsibility was considered the proposal for dismissal.

This decision effectively shows that the reasons for disciplinary responsibility are not clearly prescribed and leave ample room for arbitrariness in the decision of the court president, as the person authorized to submit proposals for establishing disciplinary responsibility of judges. In this case, the president of the court held that there are reasons for disciplinary responsibility of a judge, while the Disciplinary Commission assessed that these are the grounds for dismissal.

This decision also demonstrates the arbitrariness in the evaluation of whether a judge had "reasonable justification" for actions he had been charged with. The Judicial Council has found that the judge's allegations had no impact on a different decision in this legal matter and with regard to that provided only one reason - *"the published judgement must be made in writing and sent off within the period prescribed by Art. 378 of the Criminal Procedure Code"*.

Therefore, this decision implies that the decision in each case must be made in writing and sent off within the statutory deadline, without exception. Otherwise, the Judicial Council would be obliged to indicate in the decision's rationale that the judge allegations represent "reasonable grounds" for violating the deadlines prescribed by law and provide clear reasons for such a position.

¹⁷⁵ Su.R.br. 104/11 of 8 February 2011.

Contrary to the position of this decision, in its decision¹⁷⁶ described above in section 7.2., the Disciplinary Commission took the standpoint that exceeding legal deadline for making a written decision is not prescribed by law as a disciplinary offense, and refused the proposal to establish disciplinary responsibility. Three years later, that action was prescribed by law as undue performance of a judicial function.¹⁷⁷

Therefore, this decision on dismissal too shows that the judges are not treated equally and that for some judges there may be room for "reasonable justification" for breach of statutory deadlines, while others are made aware that *"the issued judgment must be prepared in writing and sent off within the deadline prescribed by law"*, or otherwise they shall be dismissed at the time when their superiors arbitrarily and for reasons known to only them decide to initiate the proceedings. Moreover, in this case the judge was dismissed for the action that had not even been treated as a disciplinary offense couple of years earlier.

The stipulation that the violation of statutory deadlines is acceptable if there are "reasonable grounds" imposes an obligation on the Judicial Council to particularly take into consideration the reasons indicated by the judge whose dismissal has been requested. Rationales of all decisions on dismissal do not include the assessment of allegations and reasons that the judges have given, but only routinely note that the Judicial Council *"assessed the statement of the said judge as unfounded and lacking legal arguments that would call into question the allegations contained in the Proposal for dismissal and Report of the Disciplinary Commission"*.

The possibility of unequal treatment of judges is further enabled by non-transparent operation of the Judicial Council, which prevents judges themselves, as well as the general public, to have access to all decisions and be aware of the kind of judges' behaviour that is sanctioned. Besides, the regulations and practice that enable some judges to violate statutory deadlines without being sanctioned and be able to find a "reasonable justification" discourages the parties in court proceedings to report such cases.

In fact, even in cases where a judge has considerably exceeded the statutory deadline in a particular case, this does not provide a reason for questioning his responsibility unless the Judicial Council finds that the judge has exceeded deadlines in several cases, for a longer time period and without reasonable justification. Since the parties do not have access to judge's behaviour as regards other cases, their complaints can be arbitrarily rejected even if the judge clearly negligently performs his duties.

Contrary to these examples, which point to the arbitrariness in the evaluation of unprofessional and negligent performance of a judicial function depending on the number of cases and time period during which a judge has acted in such manner, as well as possible existence of "reasonable grounds", the practice of the Judicial Council indicates that some judges are sanctioned when their work is assessed as unprofessional and negligent only in one case.

¹⁷⁶ Dp.br.1/08.

¹⁷⁷ In the amendments to the Law on Courts, which came into force in August 2011.

Acting on the initiative of 9 September 2009 of the President of the High Court in Podgorica, on 3 October 2009 the Judicial Council adopted a decision on suspension of Lazar Aković, a judge of that Court. In this decision the Judicial Council has confirmed the allegations of the proposal for dismissal that in one case the judge performed his judicial function negligently due to "lengthy procedure", "exceeding the legal deadline for communication of the judgment" and "making errors in the judgment submitted to the parties".

None of the acts passed by the Judicial Council against judge Aković were published on the Council's website. The Council refused to submit the decision in this case falsely stating that "all decisions are published on the website", but has published the decision on termination of office of this judge later.

Therefore, in analyzing this case HRA also used the information published in the media, which, in addition to the evident lack of transparency, support the conclusion that it is completely unclear on what basis judges are sanctioned and their work evaluated.

In the case in which it has been concluded that judge Aković conducted "lengthy procedure", the first hearing was held on 26 March 2006, and the judgment was rendered on 7 August 2009. This case is one of the most complex cases conducted before the Montenegrin courts, it contained the records of over 1000 pages, and the first instance verdict comprises over 300 pages.

There was no official note of the reasons why the Judicial Council in the case of judge Aković concluded that he had led "lengthy procedure", or whether, and if so, how the Council evaluated the fact of the complexity of the case and the volume of the case file. The two and a half years after the termination of judge Aković's office, this case is still pending before the first instance court - the High Court in Podgorica. The first instance verdict has since been abolished twice by the second instance court and the case was assigned to a third judge in the court of first instance. So far, the Judicial Council has found that only judge Aković, who ceased to hold office two and a half years ago, acted negligently in this case.

It is also unclear whether the Judicial Council assessed the facts of the case complexity and the scope of case documentation in relation to exceeding the legal deadline for adopting a decision. In the practice of courts it is not uncommon for judges to violate deadlines for making judgments without being sanctioned in some much simpler and less extensive cases.¹⁷⁸

Nearly two years after the dismissal of judge Aković, in the same case a judge of the High Court in Podgorica, Slavka Vukčević, made a mistake in writing the judgment and corrected it in a decision, the same way judge Aković previously did. On this occasion the Minister of Justice and President of the Supreme Court of Montenegro demanded of the President of the High Court to examine the work of judge Vukčević in that case. The same President of the High Court who two years earlier filed the initiative for the dismissal of judge Aković due to negligent performance of the judicial function in the same case, subsequently refused to

¹⁷⁸ For example, in a labour dispute that is legally urgent, a judge of the Basic Court in Podgorica reached a verdict P.br. 19954/01 after 7 months and 15 days after the conclusion of the hearing. The Judicial Council was notified on this case, but has failed to take any action to determine the liability of the judge.

act on this request and in a letter to the Judicial Council¹⁷⁹ stated that the second instance court, the Appellate Court of Montenegro, will make its decision on shortcomings regarding the judgment and decision issued by judge Vukčević.

Thus, it appears that this case too is the evidence of unequal treatment of judges, this time by the same Court President, who, in case of one judge, submits a proposal for dismissal due to, among other things, mistakes in making the judgment, while in case of another judge refuses to comment on errors in making the judgment in the same case, explaining that the second instance court will decide on that.

This proves probable the public statement of the former judge Lazar Aković that the President of the High Court, before submission of the proposal for dismissal, said to him that he is "pressured to do so", or otherwise the dismissal procedure will be initiated against him as well, advising Aković to "meet with the President of the Supreme Court" (who is also the President of the Judicial Council), or "resign".¹⁸⁰

Finally, it remains completely unclear why the President of the High Court initiated the procedure for dismissal of a judge in the case where the first instance judgment was made, without an explanation whether the duration of the procedure, assessed as lengthy, had been caused by (non) actions of the judge and whether the errors in the judgment should have been left to the second instance court for review. This especially since the same Court President in the same case later took the view that the second instance court should decide on errors in the judgment.

What is common to both the judgments, in which the judges corrected their mistakes by decisions, is that they were both later abolished by the second instance court - the Appellate Court of Montenegro. However, lack of transparency and denial of the right of the public to learn about the reasons for initiating dismissal procedure of a judge during the proceedings in the most complex case, encourages further doubts about the independence of judges and autocratic administration of the judiciary.

After the dismissal of judge Aković, a judge whose daughter was appointed a judge of the Basic Court in Nikšić just months earlier by the Judicial Council decision¹⁸¹, was appointed a judge-rapporteur in the second instance procedure. Also, the judge appointed as a judge-rapporteur in the second instance procedure was elected the President of the Appellate Court of Montenegro by the decision of the Judicial Council during the process of deciding on the first instance judgment.¹⁸² These decisions of the Judicial Council do not indicate for what reasons the President of the Appellate Court has been appointed, or previously his daughter as a judge of the Basic Court in Nikšić. This especially because the decision on appointment of a judge of the Basic Court indicates that on a written test one candidate had more points than the judge who was elected, but received a lower grade. Nonetheless, the decision offers no explanation or reasons for such evaluation.

¹⁷⁹ V-Su.br. 215/11 of 21 September 2011.

¹⁸⁰ *Pobjeda*, 24 October 2009.

¹⁸¹ Su. R. br. 792/09 of 17 July 2009.

¹⁸² Su. R. br.162/2010 of 8 February 2010.

Such actions and decisions of the Judicial Council, which are not accompanied by clear explanation, point to serious doubts about the independence of judges and possible influence on the decision of the second instance court. If errors in the judgments that the judges corrected by decisions were such as to affect the legality of the judgment, then only the second instance court could have decided on that matter, while the viewpoints of the Judicial Council, President of the Supreme or any other court, and especially the Minister Justice, as the representative of executive power, put pressure on the court which should decide on the legality of the judgment. On the other hand, if the error was of technical nature, then all of these subjects again had no basis to conclude that the judge acted negligently and unprofessionally. Further, if a judge that has a key role in the second instance procedure, in which the judgment is repealed, afterwards gets promoted by the Judicial Council and if the very Judicial Council previously appoints his daughter a judge and fails to provide proper rationale for these decisions, then the suspicion about the objectivity of the Council and independence of judges is further strengthened.

8.1.2. Random assignment of cases - the case of the President of the Basic Court in Podgorica

Arbitrariness in the actions of the Judicial Council in determining the responsibility of judges is confirmed in practice by the example of treating a case of the President of the Basic Court in Podgorica. On 12 September 2011 the President of the High Court in Podgorica issued a decision¹⁸³ to adopt the request for exemption of the President of the Basic Court in Podgorica in case K.br.386/11.

In the explanation of this decision, the President of the High Court noted that the President of the Basic Court:

"took the case without considering the provisions of Art. 89, 90 and 91 of the Law on Courts, and Art. 55 of the Court Rules of Procedure (Sl. list RCG, 5/02 and 49/04), i.e. that the principle of random assignment of cases has not been met" and that "he obviously failed to comply with the above rules ..., ... which could be a factor that casts doubt on his impartiality".

Art. 50, para 2 of the Law on the Judicial Council (Sl. list CG, 13/2008, 39/2011):

The president of the court shall be liable to disciplinary action in case he/she performs his/her duty improperly or harms the reputation of the office of the court president.

According to the Law on Amendments to the Law on Courts (Sl. list CG, 39/11), in Article 33d, para 1, item 2:

President of the court shall be deemed to exercise his/her office in a negligent and incompetent manner if he/she:

2) fails to comply with the principle of random assignment of cases.

The Constitution of Montenegro (Sl. list CG, 1/2007) in Art. 121, para 3 stipulates:

A judge shall be dismissed if: convicted of an offense that renders him/her unfit to perform the judicial function, in case of incompetent or negligent performance of judicial function, or in case of permanent loss of ability to perform judicial function.

¹⁸³ VII Su.br.72/11.

Art. 71a of the Law on Amendments to the Law on the Judicial Council envisages that:

The president of the court shall be dismissed in the case of negligent and unprofessional performance of the office of the court president.

Art. 61 of the Law on the Judicial Council stipulates who can submit a proposal for the dismissal of a judge:

(1) A judge may be dismissed in cases stipulated by the Constitution.

(2) A proposal for the dismissal of a judge may be submitted by a president of the court where the judge performs a judicial function, president of the directly higher court, president of the Supreme Court, Minister of Justice and another member of the Judicial Council.

Rejection of the proposal

Art. 63 of the Law on the Judicial Council:

(1) The Judicial Council shall refuse or reject the proposal for dismissal if it finds that there are no grounds for the procedure, that the proposal was submitted by an unauthorized person or in an untimely manner.

(2) If the Judicial Council finds that there are grounds for the dismissal procedure, the proposal shall be submitted to the Disciplinary Commission of Art. 51 of this Law, which examines the reasons for dismissal.

Determining the just cause for filing the proposal

Art. 64 of the Law on the Judicial Council:

(1) The Disciplinary Commission shall gather the information and evidence necessary to determine whether or not just cause for the filing of the initiative exists.

(2) The judge against whom the initiative was brought is entitled to attend the sessions of the Disciplinary Commission and observe its work.

(3) Upon reviewing the collected information and evidence, the Disciplinary Commission shall submit a report to the Judicial Council within the deadline set by the Judicial Council.

(4) A copy of the report prepared by the Disciplinary Commission shall be delivered to the judge against whom the initiative was brought.

Bearing in mind the cited statutory provisions, there is no doubt that the President of the Basic Court in Podgorica in this case failed to comply with the principle of random assignment of cases and that such conduct constitutes negligent and incompetent performance of the function of the president of the court, which is the legal basis for dismissal of the court president.

However, in its conclusion¹⁸⁴ of 19 September 2011 the Judicial Council asked the President of the High Court in Podgorica for the report on actions of the President of the Basic Court in Podgorica in this case. Contrary to the above provisions and contrary to his statements from the decision adopting the request for exemption of the President of the Basic Court in Podgorica, the President of the High Court gave his opinion in the report to the Judicial Council that there is no basis to initiate disciplinary action.

This opinion was adopted by the Judicial Council at its session held on 28 December 2011.

¹⁸⁴ Su.R.br. 772/11.

In the notice of the Judicial Council, submitted to HRA upon the request for submission of a decision in this case, the following is noted:

"At its XV session the Judicial Council accepted the opinion of the President of the High Court in Podgorica that there are no grounds for disciplinary action against Zoran Radović, President of the Basic Court in Podgorica, with the conclusion that all presidents should be regularly assigned cases according to the percentage of the norm determined for them".¹⁸⁵

Thus, it appears that the Judicial Council did not at all address the issue of responsibility of the President of the Basic Court and that it has accepted the opinion of the President of the High Court without any explanation. The statement that *"all court presidents should be regularly assigned cases according to the percentage of the norm determined for them"* is not an explanation for tolerating in this case the behaviour prescribed by law as incompetent and negligent performance of the function of the court president.

In addition, it is incomprehensible why the Judicial Council has not shown interest to get a statement from the President of the High Court regarding his opinion that there are no grounds for disciplinary action being contrary to what he had found in the procedure for the exemption of the Basic Court President. Moreover, it is incomprehensible and worrying that the Judicial Council, as a body to supervise the work of the courts, has not shown interest to examine the actions of the President of the Basic Court in Podgorica (as well as of the presidents of other courts), who noted the following in his statement¹⁸⁶ regarding the request for exemption:

"given the great interest of the public and the media attention this case has attracted in its investigation phase, I took the case in order to contribute with my experience to the work and credibility of the court, which has been the practice of the presidents of Montenegrin courts in such cases".

In addition to being unacceptable that a court president considers that he "contributes to the credibility of the court" when acting in a manner the law defines as unprofessional and negligent performance of a function, his statement that this has been "the practice of the presidents of Montenegrin courts" is especially concerning.

In the opinion of the President of the High Court in Podgorica¹⁸⁷, submitted to HRA by the Judicial Council only in the procedure of execution of the judgment of the Administrative Court, it is stated that there are no grounds for initiating disciplinary proceedings against the President of the Basic Court in Podgorica. In the explanation the President of the High Court makes incomprehensible reference to the provision of Art. 31, para 1 of the Law on Courts which prescribes general requirements for the selection of judges, provision of Art. 9 of the Rules of approximate norms for determining the number of judges and other court employees, which stipulates the percentage of reduction of norms for presidents of courts and the Court Rules provisions which deal with the method of random allocation of cases. In the opinion of the President of the High Court it is

¹⁸⁵ The same reasoning the Judicial Council announced in the media, for example: "When for the norm, the law can be avoided", *Vijesti*, 18 February 2012.

¹⁸⁶ Decision VII Su.br.72/11 of 12 September 2011.

¹⁸⁷ V-Su.br.214/11 of 17 November 2011.

also stated that the court presidents must act in the most extreme cases. Although this obligation is not prescribed by any act, the President of the High Court did not provide any basis on which for determining that the case in question is one of the "most complex cases".

None of the provisions of the legislation that the President of the High Court referred to in the explanation that there are no grounds for determining accountability, gives the right and justification to the court president to violate the legal principle of random allocation of cases. Moreover, the same President of the High Court had previously issued a decision on the exemption of the President of the Basic Court¹⁸⁸ in which he stated that the President of the Basic Court violated the very Law on Courts and the Court Rules – regulations that he now uses as a basis for avoiding responsibility.

Previously cited provisions of the Law on Courts and Law on the Judicial Council stipulate that the president of the court shall be dismissed in the case of non-compliance with the principle of random assignment of cases. Above attitudes of the President of the High Court show that in practice the regulations are often ignored and evaded and the existence of liability in some cases assessed arbitrarily.

As this case concerns the events the Mayor of the Capital actively participated in, where his son, also a public official, was charged with a criminal offense, such conduct of the court president and his statement that this was the "practice" in Montenegro, as well as assertions of the President of the High Court that this is the "most difficult case", indicate serious doubts about the independence of the courts, and that the judicial branch is under the direct influence of politics and that the law is knowingly violated when in the interest of a public official. This even more so given that the Judicial Council, which supervises the work in courts, shares the view that there is no basis for disciplinary procedure and offers no explanation for such a position, and in addition has no interest to examine what are the other cases when the "practice" of not respecting the principle of random assignment of cases was applied.

Therefore, in addition to showing that the responsibility of judges does not depend on whether they have violated the laws but of one's arbitrary assessment, this case also calls into question the independence of the judiciary.

8.1.3. Random assignment of cases - the case of the President of the High Court in Podgorica

In a similar manner as the President of the High Court in Podgorica, the President of the Supreme Court of Montenegro gave her opinion on an initiative to submit the proposal for the dismissal of the President of the High Court and similarly interpreted the "right" of the president to disregard the principle of random allocation of cases. In a letter¹⁸⁹ to the Judicial Council of 26 December 2011, the President of the Montenegrin Supreme Court first notes:

¹⁸⁸ VII Su.br.72/11 of 12 September 2011.

¹⁸⁹ Su.IV.br.331/11.

"The then Acting President of the Court Ivica Stanković took the case and the documentation available for insight does not indicate with certainty whether the case was allocated using the method of random assignment."

The President of the Supreme Court of Montenegro has thus established that in the High Court in Podgorica it is not possible to determine whether a case was assigned to a judge by the principle of random allocation, i.e. that there is no system that would conclusively show that cases have been assigned legally. It is concerning that the President of the Supreme Court at the same time failed to announce what steps will be undertaken to determine whether in this case the principle of random assignment of cases has been met, and how to ensure that it will be possible to verify this in every case.

In the same letter the President of the Supreme Court of Montenegro further stated that on 16 April 2009 the President of the High Court in Podgorica was elected a judge of the Supreme Court of Montenegro, that the case was assigned to a judge who herself sought the exemption and that the case was then taken over by the newly elected President of the High Court, since it was a complex case previously assigned to the President of the High Court, and, by the logic of taking over the cases, he ordered the Court Registry to assign to him the specified case.

No provision of any regulation authorizes the president of a court to violate the principle of random assignment of cases and take over a case because it is complex and because it has previously been assigned to a former president, also suspected of having violated the same principle, or to order the Registry to assign any case to him. Furthermore, it remains completely incomprehensible who and on what basis assessed that the case was "complex".

Rather than carrying out the examination that will undoubtedly determine whether the previous and current presidents of the High Court violated the principle of random assignment of cases in the same case, the President of the Supreme Court further finds that:

"the president of the Court is also a judge, which means that he also must try",

and that:

"Court Rules of Procedure do not elaborate a method of random allocation of cases. The method of random allocation of cases will be developed and recognized after the full implementation of the PRIS¹⁹⁰ and cases will be electronically allocated to the presidents of courts as well starting from 1 January 2012."

By taking such position, the President of the Supreme Court of Montenegro has explicitly stated that all the presidents of courts could have violated the legal principle of random allocation of cases without being sanctioned and taken over cases at own discretion up to 1 January 2012, although the principle of random allocation of cases was clearly envisaged by the 2002 Law on Courts, and elaborated in detail in the 2004 Court Rules of Procedure.¹⁹¹

¹⁹⁰ Judicial Information System.

¹⁹¹ See Court Rules of Procedure, *Sl. list RCG*, 36/2004, Art. 55-64, <http://sudovi.me/podaci/vrhs/dokumenta/591.pdf>

In any case, contrary to allegations of the President of the Supreme Court of Montenegro, in late 2010 in the "Information on the implementation of judicial reform", the Ministry of Justice stated:

"Judicial Information System (PRIS) has been implemented at all locations of users of justice information system (Ministry of Justice, courts ...), with a centralized and unified database and centrally installed application solutions available to users 24 hours a day, seven days a week."

It follows that the President of the Supreme Court of Montenegro finds unjustified excuses for breaking the law by judges, since the report of the Ministry of Justice indicates that the PRIS was implemented back in 2010 at all locations of the judiciary's information system users, in the courts as well.

Although responsible for the supervision of the courts, the Judicial Council also failed to take any action to check why it is not possible to determine whether the High Court in Podgorica respects the principle of random assignment of cases, how it is possible that the court president gives order to the Court Registry Office to assign a specific case to him, or actions to determine liability for violations of this legal principle.

8.1.4. Deciding on suspension from judicial office

Law on the Judicial Council prescribes conditions for the suspension of a judge:

Suspension

Article 69

(1) A judge shall be suspended from duty, should any of the following occur:

1) If he/she is being held in pre-trial confinement. .

2) If an investigation is initiated against him/her for the commission of an act that renders him/her unworthy of holding a judicial office.

(2) A judge shall be suspended from duty if the Judicial Council accepts the proposal to initiate the procedure for his/her dismissal.

(3) The decision on the suspension of a judge shall be issued by the Judicial Council.

New Rules of the Judicial Council prescribe:

Suspension from duty

The principle of emergency

Article 70

The procedure for the suspension of a judge from exercising his/her duties is urgent.

Initiation of the procedure for the suspension from duty

Article 71

The procedure for the suspension can be initiated:

- at the request of the president of the court where a judge performs his duties, the president of the directly higher court and the Supreme Court President (hereinafter the authorized proposer),

- by the Judicial Council *ex officio*.

Request of the authorized proposer for the suspension shall be submitted to the Judicial Council in writing.

The provisions of the Rules relating to the contents of the proposal to initiate disciplinary proceedings shall be applied to the content of the request for the suspension.

Deciding on Request

Article 72

The Judicial Council shall decide on a temporary suspension from duty for the reasons specified in Art. 69, para 1 item 1 of the Law on the Judicial Council on the basis of the decision on detention.

In the process of suspension for the reasons referred to in Art. 69, para 1, item 2 of the Law on the Judicial Council, the judge must be allowed to explain the reasons for the suspension.

The judge may submit his statement within 48 hours of receipt of the decision on the investigation by the Judicial Council.

Judicial Protection

Article 73

The decision of the Judicial Council on the suspension from office of a judge is final.

Administrative procedure may be initiated against the decision referred to in paragraph 1 of this Article.

The claim for initiating administrative procedure shall not stay the enforcement of the decision on suspension from office of a judge.

The new Rules of Procedure of the Judicial Council do not include the earlier HRA recommendation to provide for the deadlines for the prescribed principle of urgency of the suspension procedure.

With a pronounced lack of transparency in the work of the Judicial Council, a declarative prescribing of the urgency of the suspension procedure lacks practical significance and allows different treatment of judges. Thus, in a decision by the Judicial Council¹⁹² a judge was suspended from duty on 16 July 2009 for being under investigation on suspicion of having committed a serious form of criminal offense of abuse of office due to actions taken by this judge in the proceedings in which another person gained € 811,000. Two years later, the Judicial Council issued a decision¹⁹³ pursuant to which this judge ceased to hold office because he had reached the statutory retirement age. Among the decisions that lifted the suspension from office there is no decision on this judge, **so it follows that the Judicial Council did nothing to establish the responsibility of that judge for the full two years, but waited for the judge to acquire the retirement age, which is why he ceased to hold office.**

Therefore, the principle of urgency in the suspension procedure remains only declarative, because it is not concretized by prescribing precise deadlines. The Judicial Council should, without undue delay, carry out every procedure for determining the responsibility of judges, regardless of whether the criminal

¹⁹² Su.R.br.796/09 of 16 July 2009.

¹⁹³ Su.R.br.582/2011 of 1 July 2011.

procedure against a judge has been initiated for the same cause. Possible absence of criminal liability does not affect the establishment of the existence of disciplinary responsibility or the reasons to dismiss of a judge.

Since the Law on Judicial Council indicates¹⁹⁴ that a judge shall *always* be suspended from duty in case of detention ordered against him or investigation for an offense that renders him unfit to perform a judicial function, and that a judge *may* be removed from office after the Judicial Council accepts the proposal for removal procedure, this certainly implies the obligation of the Judicial Council to explain the specific reasons for the decision on suspension in cases when such decision may be, but does not have to be issued.

On its website the Judicial Council published 9 decisions on suspension of judges from office in 2008 and 9 decisions on suspension of judges from office in 2009, but without rationales. Decisions submitted by the Judicial Council upon a request indicate that from 2008 until the end of 2010 a total of 20 decisions on suspension of judges from office were issued. These decisions' rationales do not state the reasons why the judges were suspended from office in cases when the law provides that suspension is not mandatory. Each such decision contains only the following identical statement:

"After accepting the proposal to initiate a dismissal procedure, the Judicial Council found that the grounds referred to in Art. 69, para 2 of the Law on the Judicial Council for the removal of judges have been met."

This practice suggests that the judges are suspended from office arbitrarily, without proper justification and without clearly stipulated reasons that should be taken into account when adopting such decision.

According to data from the website of the Judicial Council and decisions submitted by the Judicial Council, it appears that as of 2008, of a total of 20 decisions on suspension of judges from office, 10 decisions were adopted due to initiation of the investigation for a crime which renders the judge unfit to perform a judicial function.

Contrary to these official figures, the President of the Judicial Council and the Supreme Court of Montenegro has publicly said to the diplomatic representatives of countries that have embassies in Montenegro that 20 judges *"had been suspended from the judicial function for committing a criminal offense"*.¹⁹⁵

These data indicate that 20 judges committed a crime and are therefore removed from office, which would point to the serious results in combating corruption in the judiciary.

However, these allegations are not true because half of the decisions on suspension of judges from office (10 of them) were issued due to the investigation for a crime that renders a judge unfit to perform the judicial function, while none of these procedures resulted in convictions. Therefore,

¹⁹⁴ Art. 69.

¹⁹⁵ "Medenica: There are not enough courtrooms", *Vijesti*, 8 May 2012.

considerably smaller number of judges have been convicted for an offense that renders them unfit to perform the judicial function than it appears.

By noting that these judges were removed from office *"for committing a criminal offense"*, the President of the Judicial Council and the Supreme Court of Montenegro violated the presumption of innocence for judges against whom criminal proceedings are still pending. Moreover, bearing in mind the formal and de facto position of the President of the Judicial Council and the Supreme Court of Montenegro, her public attitudes can be interpreted as pressure on the courts that adjudicate in these proceedings.

8.2. Termination of judicial office upon judge's personal request

A judge shall cease to hold office at his/her own request after meeting the conditions for obtaining the old age pension and if sentenced to unconditional imprisonment.¹⁹⁶

According to the annual reports data, the most common reason for termination of judicial office is a personal request of the judge. Thus, in 2008 four decisions on the termination of judicial office were adopted, including two at the personal request of a judge; in 2009 nine decisions on the termination of judicial office were issued, eight of them at own request; in 2010 there were twelve decisions on the termination of judicial office, ten of them at the personal request of judges; in 2011 eleven decisions on the termination of judicial office were adopted, six of which at judges' personal request.

Thus, in most cases, the judges ceased to hold office at their own request. Since the judges are not obliged to state their personal reasons, it is not possible to draw conclusions about the reasons why such significant number of judges leaves judicial office.

However, in some cases a decision of a judge to personally request the termination of office came shortly after the initiation or announcement of initiation of the procedure for determining his/her responsibility. In addition, the suspicion that judges seek termination of office at their own initiative also arises from the previous explicit announcement of such decisions by the President of the Judicial Council and the Supreme Court of Montenegro. As reported by the media,¹⁹⁷ on 24 June 2008 at the extended session of the Supreme Court held in Cetinje, the President of the Judicial Council and of the Supreme Court of Montenegro said:

"All those who are not aware of their obligations, the weight of judicial office and its responsibilities must make a radical decision to leave the judicial function, before the "court" of public, as well as before oneself. Incompetence and ignorance, malicious intent and avoidance of justice will find no understanding of the Judicial Council in future."

¹⁹⁶ The Constitution of Montenegro, Art. 121, para 2.

¹⁹⁷ Among others: "Supplementary education for judges", *Pobjeda*, 25 June 2008.

At the same session, the President of the Judicial Council reminded that "all the presidents of basic courts were obliged to submit proposals for the dismissal of judges where there were grounds for such decision until 1 July".

These allegations indicate that up until 1 July there were grounds for dismissal of certain judges, but that the presidents of courts failed to submit a proposal for dismissal. The presidents of basic courts have had and still have a legal obligation to file a proposal for dismissal of judges, always when there are reasons to do so, and not only by 1 July 2008, but at all times. Such statements from the top of the judiciary can be interpreted as a message to judges against whom it would be possible to initiate the dismissal procedure to leave judicial office themselves. Additionally, this certainly applies to those against whom such proceedings have been initiated.

Every decision on the termination of judicial office "at the personal request" following this announcement from the top of the judiciary is burdened by the suspicion that it was issued under pressure on the judge and that it is possible that in such cases there were reasons for establishing the responsibility of judges, but were hidden this way.

In any case, the allegations of the President of the Judicial Council indisputably confirm that there are those judges whom she considers "incompetent and who avoid justice out of malicious intent", which calls into question the reasons and motives that the Judicial Council has so far had "understanding" for with regard to such judges, and particularly why no process for determining liability has been initiated the against such judges, instead of encouraging them to leave office at their own request.

These public attitudes render pointless the work of the Judicial Council as the organ responsible for supervision of the courts, and point to the responsibility of the Judicial Council in concealing the cases of illegal work and keeping of data on illegal work in order to rule the judges autocratically and be able to pressure them.

Due to the above practice which allowed avoiding the responsibility, HRA finds it *necessary to prescribe that a judge can not cease to hold office at his/her own request following a request for initiation of the dismissal procedure, until the completion of that procedure.* This particularly because the dismissal, as a sanction, should also have a preventive effect, whether a judge is dismissed due to incompetence or deliberate evasion of justice. Each such case would have to be fully elucidated.

After the announcement of the position of the President of the Judicial Council, first decision on the termination of judicial office at the personal request of a judge was issued by the Judicial Council on 4 July 2008¹⁹⁸. Dismissal procedure was not initiated against this judge, but the President of the Judicial Council has previously requested access to the case file this judge has acted in, which is why the trial in that case was delayed.¹⁹⁹

¹⁹⁸ Su.R.br.92/08.

¹⁹⁹ "The case at Medenica's office", *Pobjeda*, 17 June 2008.

On 6 August 2008 the Judicial Council issued a decision²⁰⁰ on suspension from office of a judge of the Basic Court in Bar, which does not indicate the reasons for the suspension. The decision states that the Judicial Council accepted the proposal of the President of the Basic Court in Bar to initiate proceedings for the dismissal of that judge, but there is no indication about the reasons for the dismissal in the case. A month later the judge in question acted upon the "advice" of the President of the Judicial Council directed to judges and requested the termination of judicial office, and less than two months after the suspension from office, the Judicial Council decided²⁰¹ on the termination of judicial function of that judge for personal reasons. The reasons for suspension from duty of this judge have remained unknown and unresolved, but also whether in this particular case there were any reasons for dismissal whatsoever.

On 3 October 2009 the Judicial Council issued a decision²⁰² on suspension from office of a judge of the High Court in Podgorica Lazar Aković. This decision too contains no explanation as regards the reasons based on which the Judicial Council could have concluded to remove a judge from office in this case. In the decision the Judicial Council states that it has considered the dismissal proposal and the statement submitted by the judge, but it fails to mention how the documents were assessed and the reasons for adopting such decision.

According to public statements of this judge²⁰³, the President of the High Court told him, before submitting the proposal for dismissal, that he must seek his removal as he is "under pressure" and advised him to meet and talk with the President of the Supreme Court of Montenegro, or to submit resignation.

The session at which this judge was suspended from duty was scheduled for a day of weekend (Saturday, 3 October 2009), when the proposal for dismissal of judge Aković was accepted and when he was suspended from office. On the same day and only a few hours after this session, the police protection that judge Aković was entitled to based on assessment of the safety risk, for trying in the most complex cases of organized crime, was withdrawn. The abolition of the police protection of this judge was performed without carrying out a new assessment of the safety risk, or determining termination of the risk to his safety.²⁰⁴

Such actions additionally indicate the pressure on judges not only by the top judiciary, but also in cooperation with the executive authorities, i.e. the police. Moreover, it follows that this case involved undertaking of coordinated measures against the judge by the Judicial Council and the police. Otherwise, there is a question as regards the reasons for suspending a judge and immediately afterwards withdrawing the police protection on the same day, on the weekend. At that moment judge Aković still held the judicial office and was protected based on assessment of the safety risk, not on the basis of the function. Therefore, it is impossible that such a risk to judge's safety stops upon his suspension and

²⁰⁰ Su.R.br.215/08.

²⁰¹ Su.R.br. 349/08 of 1 October 2008.

²⁰² The decision was not posted on the website, and the Judicial Council replied to HRA request that it cannot deliver the decision, on the grounds that "it has not been adopted". Acting on the new request, the Judicial Council did submit the decision on temporary suspension from office of this judge.

²⁰³ "Leaves without regrets", *Pobjeda*, 24 October 2009.

²⁰⁴ "The judge in the open", *Monitor*, 30 October 2009.

withdrawal of security proves to be a measure of pressure taken against this judge.

On 24 October 2009 judge Aković required the Judicial Council to terminate his office and on 11 November 2009 the Council issued a decision²⁰⁵ based on which judge Aković ceased to hold office at his own request. In this case too there are doubts about the existence of the grounds for dismissal, but also about the possible extortion of the request for termination of office.

On 27 May 2010 the Judicial Council ruled on the termination of judicial office at the personal request of a judge of the Basic Court in Danilovgrad.²⁰⁶ Previously, the President of the Basic Court in Danilovgrad submitted to the Judicial Council a proposal to start disciplinary proceedings against this judge.²⁰⁷ This information and the text of the proposal to initiate disciplinary proceedings were obtained directly from the party who filed a complaint against that judge. At the request of HRA, the Judicial Council submitted the decisions of the Disciplinary Commission of the Judicial Council, including the decision²⁰⁸ establishing the responsibility of this judge and imposing a disciplinary measure of a 20% salary reduction for the period of three months for negligent performance of judicial function in one case, while in relation to actions of the same judge in another case the disciplinary proceedings were stayed due to the existence of the reasons for dismissal and the documents were submitted to the Judicial Council for further action.

In relation to the case where the Disciplinary Commission held that the judge had performed his judicial function in a negligent and incompetent manner which constituted the grounds for his dismissal, the Disciplinary Commission noted that *"the statement 'subsequently hire an expert in civil engineering' has been entered into the minutes from the hearing"* before the party signed it. The Commission has also found that this statement is *"skewed to the right side, so that it touches the text of the previous paragraph and the party's signature, creating an impression that it was added after the signing of the party, as it seems to be 'pushed' in between the signature and the previous paragraph of the decision"*.

Also, the Disciplinary Commission found that in the case file:

"there is no decision of the court that the expert civil engineer referred to",

and that the case file:

"includes an order to the Accounting Department given by judge V. on 2 February 2009 to pay € 130.00 to expert B.B. from the temporary deposit on which the party B.M. had paid € 180.00... .. from the funds paid by the party B.M. on the basis of the court's visit to the site and remuneration and costs of an expert of other profession suggested by the party".

These actions raise suspicion that the judge in this case committed the act of counterfeiting official documents and abuse of office. However, both the Disciplinary Committee and the Judicial Council failed to further address the issue of possible counterfeiting of the hearing minutes and illegal hiring of an expert

²⁰⁵ Su.R.br.1569/09.

²⁰⁶ Su.R.br. 653/2010.

²⁰⁷ Su.br.33/2010 of 10 February 2010.

²⁰⁸ Dp.br.2/10 of 8 April 2012.

and payment of his remuneration from the funds paid on a different basis and for other purposes.

At the meeting held on 27 May 2010, the Judicial Council issued a decision²⁰⁹ on the termination of office of this judge at his own request. In this case too there is suspicion that the "personal reasons" include those concerning the establishment of the responsibility (perhaps criminal), but also the ambiguity as regards the reasons due to which the Judicial Council failed to deal with issues that raise suspicion about the commission of criminal offenses in exercising the judicial function.

On 21 October 2011 the Judicial Council adopted a decision²¹⁰ on the termination of office of a judge of the High Court in Podgorica Slavka Vukčević, again at the judge's own request. As noted above, this judge has previously found herself in a similar position as judge Aković, except that the dismissal procedure against her has not been initiated, although on this occasion the Minister of Justice stated that the Judicial Council had found errors in her work and announced undertaking of measures.²¹¹

8.3. Violation of the Code of Judicial Ethics

Prior to the entry into force of the Law on Amendments to the Law on the Judicial Council²¹² and establishment of the Commission for the Code of Judicial Ethics on 1 October 2011, the body responsible for monitoring the implementation of the Code of Judicial Ethics with the Judicial Council,²¹³ the Judicial Council was the body responsible for determining whether there has been any breach of the Code.

Since the adoption of the Code of Judicial Ethics on 26 July 2008, until the appointment of the Commission for the Code of Judicial Ethics on 1 October 2011, the Judicial Council has never determined whether a judge has violated the Code. Therefore, over a period of three years the Judicial Council found no cases of potential violation of the Code of Judicial Ethics.

Since the appointment of the Commission for the Code of Judicial Ethics, this Commission gave its opinion on the breach of the Code in two cases. In both cases the Commission held that the judges did not violate the Code, but the Commission's rationales are vague and lack the explanation on what basis the Commission concluded that the Code has not been violated.

In one case, the Commission acted on a complaint²¹⁴ of employees in the High Court in Podgorica, who argued that the judge of that court Valentina Pavličić addressed a series of insults to the President of the Trade Union Biserka Ivanović

²⁰⁹ Su.R.br. 653/2010.

²¹⁰ Su.R.br.903/2011.

²¹¹ Among others: "Failures are obvious", *Dan*, 22 September 2011; "Shortcomings in writing of the judgment", *TV Vijesti, News at 6.30 PM*, 21 September 2011.

²¹² *Sl. list CG*, 39/2011 of 4 August 2011.

²¹³ Art. 8, para 4 of the Law on the Judicial Council

²¹⁴ Su. EK br 2/2011 of 28 October 2011.

and other court staff and threw Ivanović out of her office. According to the allegations of the staff²¹⁵, the judge thus violated Article 13 of the Code of Judicial Ethics, which prescribes the relationship with colleagues and court staff.²¹⁶

On 29 December 2011 the Commission for the Code of Judicial Ethics gave its opinion²¹⁷ that a judge did not violate the provision of Article 13 of the Code, which regulates the relationship with fellow judges and court staff. In the rationale the Commission states that the judge acted in accordance with the provision of Article 318 of the Criminal Procedure Code, which specifies the conduction of the main hearing by the presiding judge, as well as his/her duty to ensure thorough hearing in the case, establishment of the truth and elimination of everything that delays the proceedings and does not contribute to solving of the case.

Further, the Commission found that the judge in this case acted in accordance with this provision of the Criminal Procedure Code, did not behave improperly in communication with the President of the staff strike committee and did not hurt the reputation of the judicial function.

Such rationale of the Commission is incomprehensible, because it does not indicate whether the Commission determined in which manner the judge communicated with the court staff and how the Commission assessed the manner of communication. Also, it is not mentioned whether the Commission questioned the complainants, the judge and other witnesses of events to determine the merits of the allegations in the complaint, i.e. on what basis did the Commission establish the facts upon which it based its decision.

Instead, the Commission gave its opinion on the manner the judge conducted the proceedings and ran the main hearing, although the disputed event occurred in the office of the judge, outside the courtroom. Bearing all this in mind, it follows that the Commission conducted the procedure formally and failed to determine the merits of the complaint whatsoever.

The competence of the Commission is not to determine whether a judge respects the provisions of procedural law in any case, so this case implies that the Commission members are not aware of their responsibilities and make decisions only formally, without verifying the allegations of the complaint and determining the facts.

The second opinion²¹⁸ that the Commission delivered on the same day, 29 December 2011, contains no explanation that would even suggest what were the allegations in the complaint against a judge, whether the Commission determined

²¹⁵ "Get out of my office", *Dan*, 6 October 2011.

²¹⁶ Art. 13 of the Code reads:

"A judge is required to maintain and develop good relationships and cooperation with colleagues.

A judge is required to assist judicial associates and interns in their professional training and development.

A judge is required to develop a level of conduct in accordance with this Code with judicial associates and interns.

A judge is required to properly treat all employees in the court."

²¹⁷ Su.EK. br. 2/11.

²¹⁸ Su.EK: br. 1/11.

in which manner the judge communicated with a party that filed the complaint because of the manner of communication and how the Commission assessed this way of communication.

Instead, as in the already mentioned case, the Commission cited the provisions of the Law on Courts and the Civil Procedure Code, concerning the right to view and copy the court records, then determined that the complainant sought review of records from the court president, not from the judge, based on which the Commission "concludes" that on 5 September 2011 the judge did not violate the Code in communication with the client.

The competence of the Commission is not to determine whether a party in a case sought review of the files from the judge or the court president and whether a judge complied with the provisions of procedural law, so this case implies that the Commission members are not aware of their responsibilities and make decisions only formally, without verifying the allegations of the complaint and determining the facts.

In any case, based on documentation on the work of the Commission one can not conclude that the Commission verified the allegations in the complaints in both cases and on that basis the Commission determined whether the judges acted contrary to the reputation of the judicial function. Also, the decisions are completely useless from the standpoint of practice which should point to the interpretation of the Code in future, which is a shame and makes the work of the Commission seem particularly useless.

Recommendations:

1. Rationale for decisions on dismissal must be more comprehensive, include the position of a judge whose dismissal is being considered, as well as a reasoned assessment of that position.
2. Amend the Rules of Procedure of the Judicial Council to specify the legal principle of emergency in cases of temporary suspension from judicial office by laying down deadlines for action.
3. Amend Art. 69, para 2 of the Law on the Judicial Council by specifying the reasons the Council shall consider when deciding on temporary suspension of a judge. The Law should prescribe that the Council's decision on suspension has to be substantiated, and that the judge on maternity leave can not be suspended, nor can disciplinary proceedings or dismissal procedure be initiated against her.²¹⁹
4. Rationale for decisions on temporary suspension must include clear reasons as to why a judge has been suspended.
5. Amend the Law on the Judicial Council to stipulate that a judge can not cease to hold office at his/her own request following initiation of dismissal procedure, before the completion of the procedure.

²¹⁹ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, op.cit. item 5.5.2. p. 112;

6. In "Appropriate application of disciplinary proceedings", Art. 70 of the Law on the Judicial Council, delete words "judicial protection" and add paragraph 2 that reads: "The decision on dismissal of a judge includes an instruction on the right to protection in administrative proceedings." This in case the proposal for the protection against decisions of the Judicial Council before the Constitutional Court is not accepted.

7. Rationale for opinions of the Code of Ethics Commission should be considerably improved, so as to represent a useful contribution to the interpretation of the Code.

9. Assessment of the quality of performance of judges

Analysis of the Judicial Council decisions indicates that the system for assessing the quality of the work of judges is unclear, does not ensure equal evaluation and assessment of results that deserve promotion or question the responsibility of judges, and that the public, especially judges, can not be certain about the method of evaluation of their work and acts or omissions that constitute the grounds for a promotion or sanctioning. This kind of uncertainty enables autocratic governance of the judiciary and threatens the independence of judges.

Reports on the work of courts published on the web page www.sudovi.me provide information about the quality of work in all the courts individually. This quality is expressed as a percentage and evaluated exclusively based on the number of confirmed, modified and overruled decisions by the second instance court. Most courts do not publish their reports on the work, and those that do publish the reports in different forms. Thus, of all first instance courts, only five published the reports²²⁰ for a particular year. The High Court in Podgorica has published only a brief overview at the court level, the Appellate Court of Montenegro published the report on the quality of work only at the level of the court (and not individually per judges) and the Administrative Court of Montenegro published the reports from 2007 until 2011 which state only the number of solved cases per judge, but not the quality of work. Therefore, most courts in Montenegro do not publish reports on their activities on their websites.

All published reports on the work of courts²²¹ dealing with the quality of work per judges individually, indicate that the quality of the judges' work is assessed exclusively based on the decisions of the second instance court on legal remedies. Thus, the quality of the work of judges is expressed solely through percentage relative to the number of confirmed, modified and overruled decisions.

This method of evaluation of the quality of the work of judges can not offer a true and complete picture of whether a judge performs his duties well or not. Neither report addresses the evaluation of decisions that have become legally binding because neither party used legal remedy against them. This allows for illogical and absurd situation that a judge has only one decision at the second instance court for the assessment and that this decision is overruled. According to the above methodology, that judge would have a 100% percentage of overruled decisions, regardless of the possible number of cases resolved in another way. Also, neither report containing information about an individual work of judges provides an overall assessment of the work of any judge, but only notes information on regulatory compliance and percentages by type of a decision on legal remedy.²²²

²²⁰ Basic Court in Rožaje for 2010, Basic Court in Cetinje for 2008, 2009 and 2010, Basic Court in Bijelo Polje for 2009 and 2010, Basic Court in Podgorica for 2011, Basic Court in Danilovgrad for 2009 and 2010.

²²¹ Among others: Report on the work of the Basic Court in Podgorica for 2011, Report on the work of the Basic Court in Danilovgrad for 2011, 2010 and 2009.

²²² Ibid.

Furthermore, it is incomprehensible which method is used for the evaluation of decisions that are later modified or overruled by one of the extraordinary legal remedies, by the ruling of the Constitutional Court on a constitutional complaint or the decision of the European Court of Human Rights. These decisions should be of particular importance to assess the quality of a judge's performance, especially when the European Court of Human Rights finds a violation of a basic human right.

It follows that for the quality performance of a judge it is more important how that judge will be evaluated by the directly higher court, than by the Supreme Court of Montenegro, the Constitutional Court of Montenegro or even the European Court of Human Rights, because the quality of the work of judges is assessed strictly on the basis of decisions of the immediately higher court.

Some courts in their reports on the work²²³, in the tables showing the individual work of judges include information on the timeliness of decision making, i.e. the number of cases in which the judge exceeded the statutory deadline for making judgments and the period for which the deadline was exceeded. However, there is no indication of how to assess these data, and practice of the Judicial Council in the decisions previously mentioned shows that such untimely actions of judges are sometimes tolerated and sometimes not.

In relation to the quality of the performance of judges in criminal proceedings, no report contains information on the number of cases in which there was a bar to criminal prosecution. This information, which should be of great importance in assessing the performance of judges in this paper, has been completely ignored in the reports, and it appears that it is not determined at all. Moreover, in these cases the court makes a judgment dismissing the charges because of the statute of limitation of criminal prosecution and that decision increases the quantity of the work of judges, so the judge's possible inefficiency contributing to the limitation of criminal prosecution may even partially affect a better assessment of that judge's performance through a review of the number of decisions made, which is absurd.

Also, neither report contains data on cases in which the decision was repeatedly suspended on appeal, on cases that have thus repeatedly changed the number assigned to them, or data on the total length of proceedings, including the enforcement of a final decision.

HRA reiterates its previous recommendation that the Judicial Council should adopt the Methodology for producing a report on the work of courts with all indicators of the quality and quantity of work, in accordance with the contents of the sub-criterion "Work results" (Law on the Judicial Council, Art. 32a, item 2, b).²²⁴

In an attempt to obtain clear indications of how the quality of the performance of judges is assessed, on 27 April 2012 HRA requested the Judicial Council to submit the document based on which the judges are assessed, the criteria based on

²²³ Basic Courts in Cetinje and Podgorica.

²²⁴ For more detail see: „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, p. 140.

which the general assessment of the performance is provided, and information on how to assess a judgment that no one appeals to and which thus becomes final.

In the notification²²⁵ of 4 May 2012 the Judicial Council noted that the evaluation of judges and the criteria based on which the general assessment of the performance of judges is provided are specified by the Law on Courts and the Regulations on the approximate norms for determining the required number of judges and other court staff.

Contrary to the claims of the Judicial Council, the Law on Courts²²⁶ in Article 1 provides that this law governs *the establishment, organization and jurisdiction of courts; conditions for the appointment of judges and lay judges; organization of the work of courts; judicial administration; financing of the courts and other issues of importance for the proper and timely functioning of the courts*. No provision of this Law prescribes a method of evaluation of judges and the criteria by which the general assessment of judges is provided.

Also, the Regulations on the approximate norms for determining the required number of judges and other court staff in Article 1 provide that this act establishes approximate norms for determining the number of judges and other court employees, necessary for timely and quality performance of judicial functions. This document defines the norms for determining the required number of judges individually in the courts based on the number of cases that need to be solved annually. Not one provision in this regulation prescribes a method of evaluation of judges and the criteria by which the general assessment of judges is provided, or how to assess the work of a judge who annually resolves fewer cases than prescribed by these criteria.

The Judicial Council has also failed to provide an answer to the question of the principle of evaluating the rulings that have become legally binding because no party appealed to them, and noted that such rulings are *"not assessed, except in proceedings brought by extraordinary legal remedies"*.

Such statements of the Judicial Council, particularly the reference to regulations that do not concern the assessment of the quality of the judges' work, indicate that this body does not know how and on what basis the quality of the work of judges is evaluated, i.e. that there is no comprehensible system for assessment of judges that would allow judges to advance or be sanctioned in an objective manner.

Recommendations:

1. HRA reiterates its 2007 and 2009 recommendation to introduce regular assessment of judges by prescribing in separate Rules of Procedure the standards for assessing the criterion "Ability to perform judicial function" and sub-criterion "Achieved results of the last three years", which are assessed, according to Art. 32a, item 2, line b) of the Law on Courts, on the basis of:

²²⁵ Su.R. br. 319-1/12.

²²⁶ *Sl. list RCG*, 5/2002 and 49/2004 and *Sl. list CG*, 22/2008 and 39/2011.

- 1) the number and type of cases solved, and method of solving;
- 2) the number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy;
- 3) the percentage of solved cases in relation to approximate norms;
- 4) resolving cases in the order received;
- 5) timely acting and decisions-making;
- 6) the number of time barred cases;
- 7) the number of founded review requests.

2. The Methodology for drafting annual reports on the work of judges and courts should provide for the collection of data based on which the above elements of the sub-criterion "Achieved results" would be assessed.

RECOMMENDATIONS

2. Constitutional framework and Constitution amending procedure

Since the Constitution reform will certainly not provide for full guarantees against political interference in the judiciary, it is necessary to amend the Law on the Judicial Council together with the adoption of amendments to the Constitution, in order to provide such legal guarantees.

1. Prescribe the method of selecting members of the Judicial Council out of ranks of judges to ensure they are not politically engaged. To this end, lawyers elected by the Parliament should be selected from the list of candidates proposed by civil associations (NGOs), based on the criteria and procedure prescribed by law (modelled on the procedures for selection of NGO representatives in the Radio Television of Montenegro - RTCG Council, Council for Cooperation between the Government and NGOs, Council for Protection against Discrimination, Council for Civil Control of the Police). The other two lawyers, elected by the President of Montenegro, should be selected from the list of candidates proposed by civil associations dealing with the rule of law, the Bar Association and law schools.

2. Prescribe conditions for election of the Judicial Council members outside of ranks of judges, so as to ensure that they are:

a) persons truly independent from political power, who are not in any way politically engaged (e.g. were not members of any political party or actively engaged in a party, directly elected in elections and did not hold government office at least 10 years prior to the election);

b) persons who do not have any conflict of interest that could affect their work and decision making in the Judicial Council (this provision should be defined following the example of the provision on preventing conflict of interest from Art. 26 of the Law on Public Broadcasting Services in Montenegro ("Sl. list Crne Gore", 79/08 of 23 December 2008));

c) persons with appropriate legal knowledge and experience (bearing in mind that one of them will be the president of the Council).

3. Transparency of the Judicial Council operations

1. As a rule, make the Judicial Council sessions open to the public.

2. Amend the Law on the Judicial Council to prescribe the exclusion of the public from sessions at which the Council decides on dismissal and disciplinary responsibility of judges only at the request of a judge whose responsibility is being established.

3. Specify by law all information to be published on the Council's website, and particularly ensure timely upload of:

a) decisions on the appointment, disciplinary responsibility, dismissal and suspension of judges, with a rationale;

- b) applications of candidates for the judicial post;
- c) all regulations relevant to the work of the Judicial Council;
- d) notices of session dates, with the proposed agenda.

4. Amend and align the Rules of Procedure of the Judicial Council with the statutory principle of the public, by abolishing the Council's right to arbitrarily decide on when to keep the minutes of the session secret (Art. 25, para 6 of the Rules).

5. Immediately publish the Judicial Council decisions together with a rationale; it is unnecessary to publish dispositions of certain decisions separately.

6. Change the form and contents of the annual report on the work of the Judicial Council so that the report includes the Council's assessment of the work of courts, and not only statistics on the work of courts. Also, the annual report on the Judicial Council operations should not contain promotional information about the Supreme Court President's visits to other states, but information on the purpose and results of such activities and funds expended from the budget for these purposes.

7. Ensure that the Judicial Council respects court rulings binding on the Council.

8. Amend the Law on the Judicial Council to ensure access to one's personal records, as well as records of other candidates for election; specify the procedure of accessing the records and the right to appeal in case of denial of this right.

4. Criteria for appointment of judges and court president and their assessment

1. Rules of Procedure of the Judicial Council should be amended to lay down the precise standards (parameters) for assessing each criteria and sub-criteria, so as to ensure a uniform and objective assessment of candidates, as has been started in relation to the criterion "Average grade and duration of studies".

2. It is essential that the Judicial Council urgently adopts internal documents defining qualitative and quantitative assessment of judges, bearing in mind that according to the Action Plan of the Judicial Council this should have been carried out in 2010.

3. Instead of a numerical score of 1-5, evaluate the criterion of "Worthiness to perform the judicial function" descriptively, in the range "satisfactory - unsatisfactory", primarily to highlight the potential problems in terms of worthiness for the position of a judge.

4. Define "Communication skills" as a separate criterion, except in respect of candidates for presidents of courts, where this property is to be assessed descriptively, rather than numerically.

5. "Work experience" should not be assessed numerically, as currently prescribed - it is enough to verify that a candidate meets special minimum requirements for the position of a judge in terms of years of experience in the field of law, while

the place of service should be noted and assessed in light of the fulfilment of other criteria. Stipulate that judicial advisors will have an advantage in case of equal fulfilment of other criteria.

6. Regarding the criterion "Achieved results", specify what is implied under the sub-criterion "Career advancement", how to obtain information with regard to that, and objectify "Opinion of the employer" by providing for a special questionnaire that would provide concrete answers about the type of work activities the candidate has carried out and in which area has he advanced. Evaluate achieved results descriptively with a rationale, rather than numerically, as prescribed.

7. Prescribe appropriate scoring system for the criteria "Published scientific papers and other activities" and "Professional development" for the purpose of their uniform assessment. Particularly consider assessment of the criteria for appointment to higher functions in the judiciary in relation to candidates from universities, bar association, etc., to ensure their uniform assessment.

8. Under the sub-criterion "Academic qualification" prescribe a precise scoring system for degrees Master of Laws, Doctor of the Science of Law, as well as for completion of other relevant forms of education. When defining the scoring system, bear in mind that access requirements for judicial function for scholars should be eased by prescribing that they are not required to attend initial training for judges. In that sense, HRA strongly recommends that the academic qualification be valued significantly higher in order to stimulate judges to acquire specialized knowledge and professional development.

9. Provide that work experience be assessed descriptively, in terms of type of acquired experience relevant to the judicial position the application has been submitted for. As regards the length of the judicial experience, it is sufficient to meet the special condition for appointment of a judge from Art. 32 of the Law on Courts, because the length of experience does not always have to be an advantage (the same at the first appointment as a judge). Otherwise, specify parameters to ensure that the same length of experience always earns the same score.

10. Objective assessment of "Achieved results" of judges candidates for judges of higher courts requires urgent prescription of parameters for the scoring, i.e. the assessment of judges' performance in terms of all the sub-criteria: the method of resolving cases, quality of work expressed by the number of confirmed, modified and overruled decisions, and others. The Law on Courts should specify the procedure for regular assessment of judges in accordance with the Methodology for drafting annual reports on the work of individual judges. Prescribe the parameters to assess the assignment of cases in the order they were received and compliance with statutory deadlines, as well as the method for obtaining this type of information regarding the work of judges.

11. Forms should include a section for keeping a record of sources of information based on which the assessment has been carried out, since it remains controversial how the Judicial Council obtains information upon which it assesses the criteria and sub-criteria, especially "the relationship with colleagues and clients and reputation and out of office conduct".

5. Practice of the Judicial Council in the appointment of judges

1. It is necessary to stop the practice of template and incomprehensible decision rationales. Instead, define rationales which provide clear answer as to why a certain candidate is appointed a judge, and the other candidate is not, or why a certain judge is promoted, while the other is not.
2. Publish applications of candidates for the judicial post on the Judicial Council website, so that the public can point to the possible inadequacy of applicants. Allow candidates to learn about possible objections to their candidacy, as well as to respond to them.
3. Obtain the opinion of the higher court judges on promotion based on a questionnaire that would include the categories of good knowledge of procedural and substantive legal regulations, practice of the European Court of Human Rights, practice of Montenegrin courts etc.
4. Prescribe the right of judges of the court whose president is being elected to submit their opinion on candidates for the president to the Judicial Council.
5. Amend Art. 38 of the Law on the Judicial Council in a manner that will grant all candidates for the judicial post the right to access records of other candidates (above recommendation no. 7) and prescribe: method and place to get an insight into electoral documents, deadline for the Secretariat to provide an insight into electoral documents upon request, the right to copy documents, the right to access documents through attorney, the right to file a complaint to the Judicial Council in the event of denial of this right and deadline in which the Judicial Council is to decide on the complaint.
6. Prescribe the competence of the Commission for Appointment of Judges to reject untimely or incomplete applications, given that the Council decides on the complaint against the decision to reject an application.
7. Obtain opinions on various aspects of work and behaviour of candidates based on a questionnaire, whose content should be determined by the Judicial Council, to avoid obtaining stereotyped phrases instead of substantive evaluation. Courts should hold data on achieved work results of expert associates, on which the opinion of their performance should be based.
8. The Judicial Council should prescribe guidelines for conducting interviews with candidates. Stipulate that the interview is not required in the promotion of judges.
9. In the "Annulment of the decision on the appointment" (Art. 49, para 2 of the Law on the Judicial Council), for the purpose of appropriateness, HRA once again proposes the introduction of an obligation to postpone the start date of performing judicial function in order to verify the information from paragraph 1 of the same article, considering the implications of Article 71 entailed by the annulment of the decision on appointment.

10. HRA reiterates its objection that the judicial protection against decisions of the Judicial Council must not be provided in administrative proceedings, but with the Constitutional Court.

6. Assignment of judges to the court of higher instance to provide assistance

1. Abolish the authority of the Judicial Council to temporarily assign judges to work in the court of higher instance.

7. Disciplinary responsibility of judges and court presidents

1. Amend the Law on the Judicial Council to grant the Judicial Council members as well the authority to submit a proposal for establishing disciplinary responsibility of judges and court presidents, especially the proposal for establishment of disciplinary responsibility of the President of the Supreme Court.

2. The Law on Courts should be amended so as to omit the possibility of determining the "reasonable grounds" in case of a judge's negligent performance of judicial function, or incompetent and negligent performance of judicial function, as it allows for arbitrary and inconsistent interpretation and actions of courts presidents.

3. The Law on Courts should expressly prescribe that the violation of the Judicial Code of Ethics represents the basis for determining disciplinary responsibility of a judge, i.e. undue or negligent performance of judicial function, or the contempt of judicial function.²²⁷

4. Amend the Law on Courts so as to prescribe the existence of a violation of judicial discipline, in addition to mentioned cases, when a judge:

- fails to fulfill mentoring duties and obligations for professional development of trainee judges;
- in case of unexcused absence from work;
- fails to wear official attire in accordance with regulations;
- behaves rudely or impolitely towards the parties and other participants in the proceedings and fails to prevent such behaviour of others under his/her authority in the proceedings led by him/her;
- fails to refrain from any action which is improper or leads to such impression, as well as from any action which causes distrust, incites suspicion, weakens confidence or in any other way damages the reputation of the court and its impartiality;
- fails to resist threats, blackmails and other assaults on his/her persona and integrity;
- is not able to resist political influence, public opinion, bias (particularly in relation to prohibited grounds of discrimination), temptations, vices, passions, private and family interests and other internal and external influences;

²²⁷ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, op.cit. item 5.1.2. p. 107.

- visits places of improper reputation. (repeated recommendations from 2008)²²⁸

5. "Disciplinary Commission" (Art. 51 of the Law on the Judicial Council) does not prescribe the procedure and criteria based on which the Judicial Council elects members of the Disciplinary Commission who are not the Judicial Council members.

6. Publish decisions of the Disciplinary Commission to ensure uniformity of practices of court presidents as only they have an authority to initiate disciplinary proceedings, and to insure that the public and all judges are familiar with the practice of this Commission.

8. Dismissal of judges

1. Rationale for decisions on dismissal must be more comprehensive, include the position of a judge whose dismissal is being considered, as well as a reasoned assessment of that position.

2. Amend the Rules of Procedure of the Judicial Council to specify the legal principle of emergency in cases of temporary suspension from judicial office by laying down deadlines for action.

3. Amend Art. 69, para 2 of the Law on the Judicial Council by specifying the reasons the Council shall consider when deciding on temporary suspension of a judge. The Law should prescribe that the Council's decision on suspension must be substantiated, and that the judge on maternity leave can not be suspended, nor can disciplinary proceedings or dismissal procedure be initiated against her.²²⁹

4. Rationale for decisions on temporary suspension must include clear reasons as to why a judge has been suspended.

5. Amend the Law on the Judicial Council to stipulate that a judge can not cease to hold office at his/her own request following initiation of dismissal procedure, before the completion of the procedure.

6. In "Appropriate application of disciplinary proceedings", Art. 70 of the Law on the Judicial Council, delete words "judicial protection" and add paragraph 2 that reads: "The decision on dismissal of a judge includes an instruction on the right to protection in administrative proceedings." This in case the proposal for the protection against decisions of the Judicial Council before the Constitutional Court is not accepted.

7. Rationale for opinions of the Code of Ethics Commission should be considerably improved, so as to represent a useful contribution to the interpretation of the Code.

²²⁸ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, op.cit. items 5.1.3 – 5.4.2. p. 107-111;

²²⁹ „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“, op.cit. item 5.5.2. p. 112;

9. Assessment of the quality of performance of judges

1. HRA reiterates its 2007 and 2009 recommendation to introduce regular assessment of judges by prescribing in separate Rules of Procedure the standards for assessing the criterion "Ability to perform judicial function" and sub-criterion "Achieved results of the last three years", which are assessed, according to Art. 32a, item 2, line b) of the Law on Courts, on the basis of:

- 1) the number and types of cases solved, and method of solving;
- 2) the number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy;
- 3) the percentage of solved cases in relation to approximate norms;
- 4) resolving cases in the order received;
- 5) timely acting and decisions-making;
- 6) the number of time barred cases;
- 7) the number of founded review requests.

2. The Methodology for drafting annual reports on the work of judges and courts should provide for the collection of data based on which the above elements of the sub-criterion "Achieved results" would be assessed.