

Publisher

Human Rights Action
74 Slobode St, 81000 Podgorica, Montenegro
Phone/Fax: + 382 20 232 122, 232 358
e-mail: hra@t-com.me
www.hraction.org

For the Publisher

Dragan Prelević

Editors

Tea Gorjanc Prelević
Emilija Durutović

Translators

Joško Katalan
Tamara Jurlina

Layout and print

YUGRAFIC, Podgorica

Print run

500

The Assessment was made thanks to the initiative and financial support of the

Foundation Open Society Institute
- Representative Office in Montenegro



The publication was supported by the
British Embassy in Podgorica



Opinions presented in this publication represent exclusively views of HRA and do not necessarily correspond to the views of the donors.

**Assessment of the Reform of
Appointment of Judges in Montenegro
(2007 - 2008)**

Working group of the NGO “Human Rights Action”

Emilija Durutović, LL.M.

Tea Gorjanc Prelević, LL.M.

Darka Kisjelica

Radomir Prelević, Ph.D.

Ana Vuković

Podgorica
2009

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Foreword

On 20th July 2007, the *Human Rights Action* (HRA) published the „Reform Proposal for the Appointment of Judges in Montenegro“ (“Part one” in this publication) with the intention to assist the reform of judiciary with regards to the improvement of the guarantees of independence and responsibility of judges. We suggested for the election of judges to be displaced from the grasp of the politicians to the reformed, depoliticized Judicial Council, which would „blindfolded“ select the best candidates for judicial positions on the basis of precisely prescribed criteria. The bases of our Reform proposal were the criteria for the election, the assessment of the quality of work and determining the responsibility of judges. The application of these criteria would make it possible for the election and career of a judge not to be under the influence of political or some other interests which have nothing to do with the worthiness and professionalism of candidates for judicial function.

The publication in front of you contains the assesment of the reform of the appointment of judges implemented in Montenegro from the enactment of the Constitution in October 2007 until the end of 2008, together with the recommendations for the improvement of the reform (“Part two”).

The Constitution from October 2007 provides for the Judicial Council to elect and dismiss judges, to decide upon their disciplinary responsibility and so on. New regulations, which have been adopted, broadened considerably the criteria for the election and promotion of judges, prescribed the proceedings in which the Council deliberates as well as legal remedies against the decisions of the Council, mostly in accordance with the recommendations of the HRA. The Council started working in April 2008 and by the end of the year elected 31 judges and 44 lay judges, decided on the suspension of six judges, on disciplinary punishment concerning three judges and on the dismissal of two judges.

However, the prescribed criteria have remained incomplete, since the parameters for their evaluation have not been prescribed, and in this way there continue to be grounds for the arbitrary and unequal actions of the Council on the occasion of the election of judges. This was particularly evident in the insufficiently reasoned decisions of the Council on the elec-

tion of judges. For instance, from the decision on the election of Podgorica Higher Court judges dated 1st October 2008, it cannot be seen what determined the Council to elect the candidate whose overall mark had been lower than those of the other candidates, or one out of several candidates with the same average mark. The lack of precisely set criteria for the assessment of the results of the work of judges insufficiently specified disciplinary offences and the reasons for dismissal can lead to the situation where judges in the same or similar situation bear drastically different consequences. Therefore, we have recommended that these issues be paid urgent attention and appropriate consideration.

Another problem is the lack of appropriate guarantees of independence of the Judicial Council. Immediately upon the enactment of the new Constitution in November 2007, the HRA submitted the initiative for the amendments to be made in the same, amongst other things, the issues of the procedure of the election of the Chief Justice, the composition and the manner of the election of the members of the Judicial Council and of the Constitutional Court. The political election of the Chief Justice and the fact that the same person *ex officio* chairs the Judicial Council and its Commission for the election of judges creates an impression of the autocratic concept of managing the judiciary by the executive branch, also harming the public trust in the independence of judiciary.

The prescribed composition and the manner of the election of the Judicial Council members does not create the impression that the Council acts as a depoliticised, independent and impartial body, with the capacity to protect judges from the influence of the ruling political interest group. The majority of members of the existing Council could be inclined towards the ruling political coalition, since the guarantees are missing which would secure the election of non-party figures.

The European Commission, in its latest report on the progress of Montenegro expresses serious concern for the independence of Montenegrin judiciary, amongst other things because „the assessment of the extent to which the criteria have been met for the election of judges remains in the exclusive competence of the Judicial Council“. The exact objective of the recommendations arising from our analysis is the improvement of the independency of the Judicial Council, as well as of the objectivity and transparency of its work.

We are aware that the will of the political majority is necessary in order to achieve the change in the composition and the manner of the election of the Council's members, as well as that it is hardly likely that this will be achieved soon. However, we sincerely hope that in the meantime the Council itself will improve the guarantees of objectivity and transparency of its work, to the extent it is competent for.

The Assessment of the Reform of the Appointment of Judges' in Montenegro 2007-2008 was made by the working group of the HRA composed of the following members: Emilija Durutović, LL.M., a retired judge of the Court of Serbia and Montenegro and of the Supreme Court of Montenegro, Darka Kisjelica, a lawyer, Radomir Prelević, Ph. D. Law, Attorney at Law, Ana Vuković, a judge and Tea Gorjanc Prelević, LL.M., the editor of the Project and HRA program director.

The Assessment was made upon the initiative and with the financial support of the Foundation Open Society Institute - Representative Office in Montenegro, and its publication was supported by the British Embassy in Montenegro.

In Podgorica, in January 2009

Emilija Durutović and Tea Gorjanc Prelević,
Editors

I PART

**REFORM PROPOSAL FOR
THE APPOINTMENT OF
JUDGES IN MONTENEGRO**

(JULY 2007)

I Introduction

The project, the results of which are before you, originated from our belief that professional, independent and efficient judiciary is essential for the protection of human rights, as well as for the implementation of the rule of law in general.

Realising that Montenegrin judiciary at present does not enjoy the necessary trust and authority,¹ we have undertaken a research of the present method of selection, performance assessment and determination of liability of judges. The problems we have identified have been presented in the analysis and the corresponding solutions were proposed predominantly in accordance with the recommendations of international bodies and comparative practice we found appropriate for implementation in Montenegro.

We hope that the results of our research would be of use to those responsible for the reform of the judiciary, also to the point of enhancing its urgent implementation.²

1 In the public opinion research, CEDEM, 2006, only 26-29% citizens consider judges „very“ or „mostly“ neutral and incorruptible; Research of CEMI, December 2006. „More than half of citizens think that Judiciary is not independent“; In a TV show „Otvoreno“ on Montenegrin channel RTCG on 30 April, 2007, more than 80% spectators declared that they don't have trust in judges. Lack of trust in judiciary is to a some extent a consequence of erroneous interpretation of competencies, and hence is the malperformance of the state prosecutor being attributed to judges (for example, the *Freedom House* report was reported to have stated that the reason for the lack of trust in judges lies in the fact that cases of corruption and organised criminal are not being processed, *Vijesti*, 16 June 2007.) We believe that a thorough analysis and appropriate reform of organisation of the office of the state prosecutor is also necessary, which we relinquish to some other project.

² Noting that the Strategy for the Reform of the Judiciary for 2007-2012 adopted by the Government of the Republic of Montenegro on 21 June 2007 contains only principal guidelines on the issues considered within the project (see the Strategy, „Strengthening of the independence and impartiality of the judiciary“, page 8, available in local language at <http://www.gom.cg.yu/files/1184254169.doc>), and that the action plan for their development will be provided in the next four months (according to *Pobjeda*, „Politika“, 22.06.2007.)

Strengthening of guarantees for independence, competence and efficiency of judges in Montenegro presupposes an urgent consensus on the constitutional arrangement of the judicial power. Before deciding on concrete constitutional provisions, it is important to bear in mind all goals that need to be achieved by the reform of the judiciary, in order to secure an appropriate and durable constitutional frame for the reform.

The conclusion of our research is that the Montenegrin legal system lacks regulation that would limit arbitrariness on the course of judicial appointments, assessment of performance and determination of liability of judges for unprofessional performance. Our proposal is therefore based on introduction of objective criteria and legal remedies for review of their accurate implementation.

Taking into consideration the experience of Montenegro concerning the election of judges in the Parliament, which provided for judicial appointments in relation to political and less professional competence, we propose that a reformed, competent and independent Judicial Council should decide upon election and career of judges in a transparent and appropriately controlled procedure based on objective criteria. In addition to the protection of the independence of courts and judges, as provided by the Draft constitution, the Judicial Council should safeguard expertise, efficiency and accountability of the judiciary as well, and we have hence suggested that its competencies in this regard be specified and extended.

Our research has also shown that the initiation of the procedures determining disciplinary liability of judges proved difficult as the Judicial Council in its last four year mandate did not undertake a single disciplinary procedure.³ We have therefore proposed further regulation of disciplinary branches as well as strengthening the liability of presidents of courts for the courts' performance before the Judicial Council. On the other side, we proposed introduction of a possibility of dismissal of members of the Council due to their unprofessional performance.

³ Although according to our knowledge three procedures for dismissal have been undertaken and two have been initiated, we believe that the situation should have been reverse in that disciplinary procedures should have been used in due time as an incentive for responsible performance of judges, and that was avoided in the past period.

What follows is a brief review of activities undertaken within the project and our concluding summary of reform proposals. The original version in the local language contains a full scope of analysis and proposals (including detailed criteria for the appointment, evaluation of performance, disciplinary responsibility and dismissal of judges and presidents of courts) with reference to all sources of information, laws, comparative studies and instruments, and especially regulations of the states from the region that once shared the same legal system and similar experiences.

We thank the Open Society Institute Foundation – Representative Office in Montenegro, for their confidence and financial support of the project. We also thank You for Your interest for the results of our work.

In Podgorica, 20 July 2007

Authors – members of the working group:

Emilija Durutovic, LL.M., *retired judge of the Court of the State Union Serbia and Montenegro and of the Supreme Court of Montenegro, chairperson,*

Radomir Prelevic, Ph.D., *Attorney at Law, member of the Association of Lawyers,*

Darka Kisjelica, *Attorney at Law, former judge of the Basic Court in Hercegovina and lecturer on right for fair trial in the Judicial Training Centre of the Republic of Montenegro,*

Ana Vukovic, *judge of the Basic Court in Podgorica,*

Aleksa Ivanovic, *lawyer, adviser in the reform projects of the Montenegrin judiciary since 1998,*

Tea Gorjanc Prelevic, LL.M., *lawyer, first executive director of the Judicial Training Centre of the Republic of Montenegro (2000-2004), project coordinator.*

Project Activities

At the round table “New Constitution – character, principles and solutions in the area of democracy and human rights” organised on 2 November, 2006 by the Centre for Development of Non-Governmental Organisations and

the Open Society Institute Foundation – Representative Office Montenegro, the HRA representative stated suggestions for the improvement of the expert draft of the Constitution, also regarding the reposition of election of judges from the jurisdiction of the Parliament to the jurisdiction of an expert body, such as Judicial Council. These suggestions were published in the accompanying publication and delivered also to the Constitutional Board of the Montenegrin Parliament.⁴

It later appeared that parliamentary political parties almost unanimously declared their negative attitude toward the solution that judicial election should be repositioned from the Parliament and entrusted to expert body, for fear that the body, such as Judicial Council, would not objectively elect professional and independent judges without any control.

Taking into consideration such political attitude, on 1 February, 2007 the working group started to conceive a proposal of constitutional and statutory provisions that would provide a solution harmonised with international standards and recommendations, that would also provide for an appropriate control of Judicial Council operations. Aiming to influence the Parliament members authorised for preparation of the Draft Constitution of Montenegro, the working group delivered to the Constitutional Board members the proposal of constitutional provisions on judiciary on 9 February, 2007, along with the information on the project idea to develop a proposal of the corresponding legal solutions providing for detailed procedure and criteria for the judicial election⁵.

⁴ *Novi ustav – karakter, principi i rješenja u oblasti demokratije i ljudskih prava*, http://213.149.103.11/download/novi_ustav_inicijativa06.pdf

⁵ See Enclosure 4.1 (original version) Letter to the members of Constitutional Board and Working Draft of the constitutional regulations on judiciary, 9 February 2007. We proposed that the Judicial Council, composed of judges and independent experts should decide on the election, disciplinary responsibility and dismissal of judges instead of the Parliament, and suggested the following mechanisms of control of its operation:

- election of certain number of Council by the members of Parliament from the list of at least two candidates for each position, proposed by the Faculty of Law, Bar Association and NGO's;
- provision of objective and precise criteria for the Council operations,
- transparent operation of the Council, and
- introduction of legal remedies against its decisions.

In the first phase of the project, working group has taken into account the European Partnership with Montenegro (Decision of the European Council on the principles, priorities and conditions contained by the European Partnership, of 17 January 2007), assembled relevant international standards and recommendations, several studies of international practice, comparative constitutional solutions mostly of the ex-Yugoslav republics and used them during the proposal preparation of constitutional provisions⁶.

Although a thorough analysis of previous Judicial Council decision-making has been planned, the working group was not allowed access to documentation of this body. Following the request for access being denied by the director of the Administrative Office within the Supreme Court (the body in charge of administrative support for the Judicial Council) and by the final decision of the president of Supreme Court (and *ex officio* president of the Judicial Council) as well, with an explanation that the new Judicial Council had not yet been constituted and that there had been no one to permit access to documentation, HRA initiated an administrative dispute that had not been decided to date.

In the second phase of the project, working group analysed national and comparative statutory solutions, discussed law enforcement in practice

⁶ „Independent and impartial court – international standards“, Judicial Training Centre of the RoM, ed. Tea Gorjanc Prelevic, LL.M., Podgorica 2001 (the edition contains translations into local language of the UN *Basic Principles of the Independence of the Judiciary*, Council of Europe *Recommendation of the Committee of Ministers No. R (94)12 concerning on independence, efficiency and role of judges*, *European Charter for the Statute for Judges*); *European Council Decision on principles, priorities and conditions contained in the European partnership with Montenegro* of 17 January 2007 (translation published by the Centre for Civic Education, Podgorica, April 2007); *Judicial Reform in Countries of South East Europe*, General Directorate for Foreign Policy of the European Union, a study prepared upon request from the Committee for Political Affairs of the European Parliament, on 13 September, 2006; CEPEJ – European commission for efficiency of jurisdiction „European judicial systems – issue 2006“; *Appointments of the judges: certain European experiences* of John Bell (Cambridge), 2003; *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, IFES, April 2004.; Final report of the Conference „High Council of Judiciary – comparative analysis of models in Europe and region“, in the organisation of Serbian High Council of Judiciary and OSCE, Belgrade, August 2006; „Constitutional position of Judiciary“, Association of Judges of Serbia, Belgrade, 2005; „Constitutional prerequisites for a democratic Serbia“, Belgrade Centre for Human Rights, Belgrade, 1997; Constitution of the Republic of Croatia, Constitution of the Republic of Slovenia, Constitution of the Republic of Serbia, Amendments on the Constitution of the Republic of Macedonia of 9 December, 2005, etc.

and followed the preparation of the Draft Constitution. The working group coordinator participated in the Round table on Draft Constitution of the Republic of Montenegro in organisation of the Constitutional Assembly of Montenegro and the Venice Commission of the Council of Europe on 26 April, 2007. Detailed comments on provisions of the Draft Constitution also containing comments on the provisions relating to judiciary were delivered to the Constitutional Board on 3 May, 2007, as well as to the Venice Commission of the Council of Europe.⁷

In May and June 2007, the review of documents containing proposals of candidates for judicial appointments to the Parliament by the Judicial Council was accomplished in the Parliament, since it became obvious that this documentation will not be received from the Administrative Office with the Supreme Court.

We have prepared the final version of the report and proposals before you also on the basis of inputs of the round table organised in Podgorica on 12 July, 2007, with participating former members of the Judicial Council, current nominees for membership, presidents of courts, NGO representatives as well as representatives of several political parties. The publication will be distributed to members of Parliament, Government of the Republic of Montenegro, Faculty of Law, Bar Association, colleagues from NGO's and international organisations involved in the reform of the Montenegrin judiciary.

⁷http://www.hracion.org/Documents/NGO_REMARKS_ON_THE_DRAFT_CONSTITUTION.pdf

Conclusions – Reform Proposal

1. Proposal of Reform of the Appointment of Judges in Principle

- 1.1. Constitution should provide for reposition of the authority to appoint judges from the competence of the Parliament to an independent and expert Judicial Council. Controlling mechanism of the Council's operation should be vested in the Constitution, by regulating composition of its membership (especially in terms of independent experts), manner of election of its members (Parliament selects members outside the rank of judiciary from the offered list of candidates) and legal remedies against its decisions. Precise criteria for the Council's operation together with guarantees of transparency of its performance should be regulated by law.
- 1.2. New, constitutional position of the Judicial Council and enhancement of its duties and responsibilities especially in the procedure of election, determination of disciplinary responsibility and dismissal of judges, requires elaboration of the organisation and operation of the Council by a special law on Judicial Council, according to example of many states where such body exists. Law should define duties and responsibilities of the Council, manner of election and position of its members, procedure of decision-making and legal remedies against the Council decisions, as well as the relations of the Council towards other state bodies and the general public.
- 1.3. Rights and responsibilities of judges need to be prescribed in detail, either by amending the existing Courts Act or by adopting a special law on Judges. The objective criteria for election and advancement of judges and presidents of courts need to be prescribed and further elaborated by law (for the proposal of such criteria, see 1.2.1). The Judicial Council may elaborate the legal criteria in greater detail within its own normative competencies.
- 1.4. Objective evaluation of judges should be provided by regulating the procedure and objective criteria for evaluation of quality and

efficiency of judges' performance (for the proposed criteria, see 8.2), in addition to the improvement of the 1998 Regulation on the so-called "orientation norm", which may be done by the Council within its normative competencies.

- 1.5. Procedure of appointment and dismissal of judges, as well as disciplinary proceedings against judges should be carefully regulated by the law to provide appropriate guarantees of due-process, along with corresponding legal remedies against the decisions of the Judicial Council.

2. Composition of the Judicial Council and Procedure of Election of Its Members

- 2.1. Judges should constitute the majority of members of the Judicial Council. Judges members of the Council should be appointed by the extended assembly of the Supreme Court on the basis of votes of all judges for the candidates determined on the level of the courts.
- 2.2. Presidents of courts should not be members of the Judicial Council, as they are already endowed with special competencies and immediately respond to the Judicial Council regarding the state of courts. If insisted on the president of the Supreme Court as an *ex-officio* member of the Judicial Council, then the possibility of membership of presidents of other courts should especially be excluded.
- 2.3. The *ex-officio* member of the Judicial Council should not be its president.
- 2.4. Competencies of the Council as well as its character of an independent body determine that its members outside the rank of judiciary should be renowned and independent legal experts, who are neither members of the legislature and executive, nor carry functions in the political parties.
- 2.5. Minister of justice should continue not being a member of the Council, but be allowed to participate in the Council's sessions, upon invitation or at his/her initiative for the purpose of information, explanation and consultation with the Council.

- 2.6. In the case of insisting on the Council's *ex officio* members from the rank of executive and/or legislative authorities, the membership of the Council should be expanded enough to provide for the presence of NGO candidates to the end of promoting transparency of the Council and public trust in the judiciary.
- 2.7. Members of the Council outside the rank of judges should be elected by the qualified majority of the Parliament from a list of at least two candidates for each position, nominated by the Faculty of Law of the University of Montenegro, Bar Association and non-governmental organisations with at least two years of experience in the field of the protection of the rule of law and democracy, promotion of human rights and suppression of corruption. The Law should precisely regulate the procedure of selection of the Council members, including the possibility of a public hearing of candidates by the members of Parliament within a competent Parliamentary Board.

3. Mandate, Immunity and Dismissal of the Judicial Council Members

- 3.1. Mandate of the Council members should last for four years, permit re-election, but not consecutive election of the same member. The exception should be provided in the case of the first election of Council members according to the new Constitution, where the members elected in the meantime should also be allowed to be nominated for the next mandate.
- 3.2. Mandate of the member elected after the cessation of the previous Council member mandate, should not cease by means of mandate expiration of other Council members, as all members of the Council have individual mandates and not a collective one.
- 3.3. Possibility for promotion of judges during their mandate as Council members should be excluded.
- 3.4. Law should determine additional reasons for dismissal of Council members such as the permanent working incapacity, fulfilment of conditions for retirement, conviction for a criminal act making the member unsuitable for such function, as well as disorderly, partial and flawed performance.

- 3.5. At least three Council members or proponent for the Council members that are not from the rank of judges, start the dismissal procedure of the Council member. Decision on dismissal is brought by the body that has chosen the member, in the case of Parliament, by means of the same qualified majority.
- 3.6. Regarding the immunity of Council members that are not judges, they should enjoy protection from criminal and civil liability due to opinion expressed during performance of duties in the Council.
- 3.7. Having in mind the extended competencies of the Council, its members should be engaged in the Council with half working time or even full working time, and correspondingly compensated for such responsible work.

4. Competencies of the Judicial Council

- 4.1. Besides ensuring *independence* of the judiciary, as predicted by the Draft Constitution, the Judicial Council should also ensure *competency, efficiency and accountability* of the judiciary. Council would execute this function mostly within its competence to appoint and promote judges, decide on disciplinary responsibility and dismissal of judges, but also through supervision of education of judges, assessment of quality and efficiency of performance of judges and especially, of presidents of courts.
- 4.2. The Judicial Council Act should prescribe in detail all competencies of the Council at one place, such as:
 - deciding on status related issues of judges and presidents of courts: election, promotion, liability, as well as complaints of judges regarding violation of their rights and jeopardising the independency;
 - determining the number of judges and lay-judges, on the basis of new orientation criteria and upon the proposal of presidents of courts;
 - approving the act on internal organisation and systematisation brought by the president of the court;

- considering annual reports and assessing performance of courts and judges;
- reviewing petitions and complaints of citizens regarding the work of courts (consideration of the reports of the presidents of courts regarding their review of petitions);
- taking care of the initial and continuing professional education of judges;
- determining the court budget proposal in the procedure that involves consultation with the Government, i.e. the competent ministry; in case of disagreement, the president of the Judicial Council explains court budget to the Parliament;
- normative competencies: adopting new *orientation criteria for determination of the number of judges*, in cooperation with the Ministry of Justice, in order to improve the existing so-called judicial norm from the 1998 “Regulation on orientation standards for determination of the necessary number of judges and court staff”; adopting the *criteria and procedure for evaluation of the quality and efficiency of performance of judges* (including the form of questionnaires for opinions on decorum, capability and competence of candidates for judicial posts); adopting the *Code of Judicial Ethics, Regulation on Interior Operation* of the Council, initiation of amendments of laws or by-laws of significance for execution of the judicial function and giving opinion on draft bills and other regulations related to judiciary (for more details, see 4.2).

4.3. The Council could also be authorised to supervise necessary improvement of existing working conditions of judges, such as: regular supply of judges with texts of laws, including ratified international agreements, expert literature and choice of case-law of domestic and international courts; internet access; provision of technical equipment for recording and transcription of court hearings; delivery of annual reports on operations of the courts to all judges in the Republic, etc. (4.2.1).

4.4. *Personal data-base* of judges is very important for the operation of the Council in the procedures of election, advancement and dismissal of judges, and should be kept by the Administrative Office, while its contents and use should be regulated by law.

- 4.5. Organisational and functional independence of the Administrative Office (located within the Supreme Court) as the service in the function of the Judicial Council, should be elaborated by law in the sense of determination of tasks performed for the Council; the Council should appoint the director of Administrative Office on the basis of an open competition; Office should prepare for the Council the annual report on operations and expenses (4.2.2).
- 4.6. With regard to the Centre for education of members of judiciary (4.2.3):
- Taking into account that the Council should ensure the quality of professional education of judges, the Judicial Council Act should also regulate relations between the Centre and the Council;
 - The Act on Professional Education of Members of Judiciary should determine aims of initial education as was done by the 2007 Annual educational program;
 - Initial education of judges should be provided by the law as *obligatory*, with possible exceptions (for attorneys at law, prosecutors);
 - Organisational scheme with the Supreme Court should be reduced only to the point that the budget of the Centre goes along with judicial budget;
 - The Council should appoint the executive director of the Centre, on the basis of an open competition.

5. Disciplinary Violations and Reasons for Dismissal of Judges

- 5.1. In order to provide for the execution of disciplinary proceedings against judges in spite of “culture of ungrudging“, which in Montenegro often leads to the fact that deserving individuals do not advance, while irresponsible ones do not answer for their inappropriate and unlawful actions, an increase of accountability is proposed for the presidents of courts before the Judicial Council regarding the state of the courts, as well as for efficient operation of judges.

5.2. The Courts Act should be supplemented in a way to:

- strictly regulate rights and duties of judges;
- precisely determine what should be understood as *incompetent* and *irresponsible* execution of judicial function, which is the constitutional basis for dismissal of a judge (5.2.6.1.);
- supplement examples of breaches of judicial discipline and specify instances of a *disorderly* performance of the judicial function (5.2.1.), and *offence to the reputation of the judicial function* (5.2.2.);
- regulate severe disciplinary breach, and provide that it may also cause dismissal of the judge (5.2.3.);
- regulate special provisions concerning disciplinary responsibility and dismissal of the president of court (5.2.4.);
- regulate accountability of the president of court for not initiating disciplinary proceedings;
- regulate jurisdiction of the Judicial Council to initiate disciplinary proceedings against the president of court who did not fulfil his duties without justification;
- regulate facultative removal of the judge from office, as well as removal in the case of a severe disciplinary breach (5.2.5).

5.3. In accordance with the comparative practice, in addition to the two existing disciplinary sanctions provide for three additional sanctions: *deprivation of the case from the judge*, *reposition to another judicial duty within the court* and *suspension from duties*.

5.4. It should be regulated that, before imposing the sanctions for disciplinary breaches, the Council should take into consideration: severity of violation and occurred consequences, level of responsibility, circumstances of the disciplinary breach, earlier operations and behaviour of the judge, and other circumstances influencing the sentencing, including implementation of the principle of proportionality.

6. Procedure and Decision-Making of the Judicial Council and Legal Remedies Against Its Decisions

- 6.1. Contrary to previous limited jurisdiction, Judicial Council should receive full jurisdiction in the procedure of election and dismissal of judges, determination of other conditions for cessation of judicial function, as well as deciding on disciplinary breaches.
- 6.2. Procedures and manner of decision-making of the Judicial Council should be determined by the Judicial Council Act (6.2.).
- 6.3. Provide for the right of each of the members of the Council to initiate disciplinary proceedings with the Disciplinary Committee against the presidents of courts for irresponsible performance.
- 6.4. In disciplinary proceedings, as well as in the proceedings for dismissal from the judicial function, to the end of enhancing guarantees of due-process, the Council should apply accordingly the provisions of the Code of Criminal Procedure regarding hearing of the judge, deriving evidences, arguments before disciplinary council and voting, including taking minutes. Decisions of the Council should be executed in a written form, appropriately reasoned and with instruction on the right to a remedy.
- 6.5. In the procedure of judicial appointment, a well reasoned written decision on appointment should be delivered to all applicants with instruction on the right to a remedy.
- 6.6. Procedure of decision-making of the Judicial Council should be determined by the Act in principle, and in further detail by the Council's Regulation on Interior Operation.
- 6.7. As the judges will make at least half of the Judicial Council, the number of the Council's decisions by means of the simple majority should be limited, in order to achieve recognisable influence on decision-making of other Judicial Council members as well. Qualified majority of votes should be required for decisions on appointment of judges and presidents of courts and their dismissal.

- 6.8. Legal remedies (objection, complaint to the Administrative Court and to the Constitutional Court) should enable legal protection of participants in the procedure before Judicial Council, and also provide an important aspect of review of the Judicial Council's operation.
- 6.9. Objection to the Judicial Council should be prescribed by law against a decision on dismissal of the untimely or incomplete application for a judicial post in the procedure of appointment, and in disciplinary proceedings: against first instance decision of a Disciplinary Council Committee and against a decision on suspension from judicial function or the function of the president of court.
- 6.10. *Complaint to the Administrative court* should be prescribed by the Constitution or law against: second instance decision of the Judicial Council on disciplinary responsibility and against the Council's decision on judicial appointment (6.2.3).
- 6.12. *Complaint to the Constitutional court* should be prescribed by the Constitution against the decision on dismissal from judicial function (6.2.3).
- 6.13. A procedure of the Council's annulment of its decision on judicial appointment should be predicted for the case when the Council establishes that the decision has been made on the basis of incorrect information.

7. Transparency of Operation of the Judicial Council

Risk of the irresponsibility of the Judicial Council is being decreased by introduction of the mechanism for supervision of its operations. In addition to the above mentioned, it would also be necessary to provide for:

- 7.1. The publication of annual report and periodical reports on the operation of the Council;
- 7.2. Internet page of the Council, which would be regularly updated and have the following published data:

- applications of the candidates for judicial posts and promotion (election for higher function in the judicial hierarchy), in order to enable the public to point out to eventual incorrect presentation of data in the application;
 - Council's decisions on judicial appointments;
 - final decisions on disciplinary responsibility and dismissal of judges,
 - Council's Regulation on Interior Operation and other by-laws delivered by the Council,
 - Initiatives of the Council, annual evaluations of efficiency of the judicial system and other notifications.
- 7.4. Obligation of the Council to provide appropriate reasoning for its decisions (this obligation is being encouraged with introduction of the right to legal remedies against the Council's decisions);
- 7.5. Presidents of courts, Minister of Justice and Centre for education are obliged to provide regular reports to the Council;
- 6.6. Possibility of the Council to consult experts, consider the opinion of judges, Minister of justice, NGO's, and allow for participation in its open sessions of individuals who are not members of the Council;
- 7.7. Competent criticism from the part of the Parliamentarians and NGO's of the Judicial Council's performance may not, of course, be regulated, but we consider it crucial for ensuring the success of the Council's reform and strengthening of its role in the improvement of the state of judiciary.

8. Reform Proposal of the Evaluation of Judges, and Evaluation of Efficiency and Quality of the Court System

- 8.1. It is necessary to adopt new orientation criteria for determination of the judicial norm, based, as proposed, on temporal standards. Such a norm, together with the criteria for evaluation of judges (1.2.1.2, 1.2.1.3, 1.2.1.4.) would represent an appropriate basis for evaluation

- of judicial performance. The existing norm should be increased, taking into account the norms prescribed in the neighbouring states, as well as the new court procedures that make relative the principle of determination of material truth and provide for the concentration of procedural actions.
- 8.2. Based on the comparative analysis executed for the purpose of reform in Bosnia and Herzegovina, and having in mind the pilot reform project currently implemented in B&H, we propose the reform of a judicial norm in Montenegro, according to determination of complexity of certain group of cases, in other words, according to the amount of time necessary for their solving (8.2.1.).
 - 8.3. Total evaluation of a judge should be performed only for the purpose of promotion, while the presidents of courts should determine every year in the annual operative report whether the judge fulfils all regular duties concerning results and efficiency, which represents one of the basis for initiation of a disciplinary responsibility (8.2.3.1.).
 - 8.4. Judicial Council should regulate the corresponding evaluation procedure, including the participation of the judge being evaluated and right of judge to object against evaluation.
 - 8.5. Evaluation from the annual report of the president of court on whether the judge fulfils his responsibilities should be a constituent part of personal evidence of judges with the Administration Office. Against such evaluation, the judge should also have the right to object to the president of court and the Judicial Council.
 - 8.6. Judicial Council should provide an annual assessment of efficiency evaluation of the entire judicial system based on the operative reports on the performance of courts and judges, which are delivered to the Council for consideration.
 - 8.7. What may be done without amending laws:
 - Improve reporting on efficiency and quality of performance of judges: in the existing annual reports, additional data should be provided for each judge;

- Provide public access to statistical reports for courts, for example to the 2006 Annual report on court operations;
- Provide and install as soon as possible a software for case management within the courts, as planned already in 1998, that would enable automatic provision of objective data on the case management, value of disputes, duration of the first and second instance proceedings and revision proceedings, manner of decision-making (by a judgment, a decision or settlement), which is of exceptional importance for the evaluation of performance of judges and the court in general; such system would also provide a proof of random distribution of cases.

Podgorica, July 2007

II PART

**ASSESSMENT OF THE REFORM
OF APPOINTMENT OF
JUDGES IN MONTENEGRO**

(2007 - 2008)

1. Criteria and procedure for appointment of judges and presidents of courts

1.1 Criteria for the appointment of judges and presidents of courts

Conditions for the appointment of judges, Law on Courts (Official Gazette of the Republic of Montenegro, no. 5/2002, 49/2004 and Gazette of Montenegro 22/2008):

General conditions, art. 31

The person that may be elected a judge is the one who: 1) is a citizen of Montenegro; 2) is of good overall health and fit for work; 3) is a Law School graduate; 4) passed qualifying examination for judges.

Special conditions, art. 32

A person who beside general conditions has also got the experience of working on legal matters may be elected a judge, i.e. a judge of:

- Basic Court - 5 years;
- Commercial Court - 6 years;
- Higher Court - 8 years;
- Court of Appeals and Administrative Court - 10 years;
- Supreme Court - 15 years.

A person distinguished by his/her professional impartiality, high moral virtues and proven professional abilities may also be elected a judge.

On the occasion of electing judges for a higher judicial function, apart from the criteria from the para. 2 of this Art., it is efficiency, accountability and quality of the performance of judicial function will be specially assessed in case a candidate has performed judicial function.

Criteria, Law on Judicial Council (Official Gazette of Montenegro, no. 13/2008), Art. 32:

(1) *Criteria for the appointment of judges are:*

1. *Professional knowledge, working experience and achieved results;*
2. *Published scientific works and other professional activities;*
3. *Professional training;*
4. *Ability to perform the duty he/she applies for impartially, conscientiously, diligently, decisively and accountably;*
5. *Communication skills;*
6. *Relationship with colleagues, behaviour outside the office, professionalism, impartiality and reputation.*

(2) *Beside the criteria from the para. 1 of this Art., the organizational skills of the candidates are taken into consideration for the appointment of court president.*

(3) *Closer criteria for the appointment of judges are determined by the Judicial Council Rules of Procedure.*

Closer criteria for the appointment of a judge being appointed for the first time, Judicial Council Rules of Procedure, Art. 33:

The closer criteria for the appointment of a judge being elected for the first time are:

***Professional knowledge:**

- Results achieved during the course of studies, expressed through the length of studies and the average mark,
- Results of written test;
- Ability to use information and communication technology;
- Knowledge of foreign languages;
- Mark obtained at the initial education graduation exam organized by the centre for the education of the members of the judiciary;
- Career promotions.

***Working experience:**

- length of working experience and place where the same was achieved (court, prosecution, practice of law, administration, economy).

***Working results:**

- Career promotion;
- Opinion acquired from the body where candidate worked.

***Published scientific works and other activities:**

- papers submitted at seminars in the country and abroad;
- participation in commissions for drafting laws and bylaws;
- lectures in the Centre for education of the members of the judiciary and in the organization of Human Resource Agency;
- mediation.

***Professional training:**

- master course and doctoral studies;
- undergone trainings in the organization of the Centre for education of the members of the judiciary and in the organization of international organizations;
- participation at seminars and other forms of education.

Closer criteria for the appointment of judges to higher courts (for advancing judges), Judicial Council Rules of Procedure, Art. 35:

***Working experience:**

- length of experience as a judge.

***Working results:**

- number of completed cases (total number during a year and percentage-wise) within the last three years prior to answering the announcement;
- manner of resolving cases (number of cases resolved on the basis of dispute hearing, i.e. main hearing, settlement, mediation and in some other way);
- quality of work expressed through the number of confirmed, altered and abolished judgements in the last three years;
- taking cases by the date of their arrival to court;
- respecting legal deadlines for actions in proceedings;
- respecting legal deadlines in drafting judicial decisions;
- respecting working hours;

- number of judicial revision requests assessed by court president as justified in accordance with the Art. 18 of the Law on protection of right to trial within reasonable time;
- number of cases taken away on the basis of the Art. 19 of the Law on protection of right to trial within reasonable time;
- expressed disciplinary measures.

**Published scientific works and other professional activities:*

- participation in commission for drafting laws and bylaws;
- mediation;
- lectures in the organization of the Centre for education of the members of the judiciary;
- work at faculties within clinics;
- papers submitted at seminars in the country and abroad.

**Professional training:*

- completed training in the organization of the Centre for education of the members of the judiciary and in the organization of international organizations;
- participation at seminars and other forms of education.

Conditions for the appointment of court presidents, Law on Courts, Art. 33:

Court president is a judge.

A person elected court president is concurrently elected a judge of the given court.

Court president remains a judge in the court after: the end of term he/she was elected for, the dismissal from the function of court president and the submittal of the request for the cessation of the function of court president.

Closer criteria for the appointment of court president, Judicial Council Rules of Procedure, Art. 35:

On the occasion of the appointment of court president, beside the criteria from the Art. 32 or 34 of this Rules of Procedure (depending on whether a candidate held a position of a judge or not), the candidate's view on the problems in the functioning of the court will be valued, his/her way of resolving these problems and his/her ideas for the improvement of the work of the court, under the criterion of the organizational ability of the candidate in the appraisal form.

On the occasion of the re-appointment of court president, beside closer criteria from the Art. 34 of this Rules of Procedure, the results will be appraised achieved in the previous term of office, expressed through the overall efficiency of the given court and the application of the Law on the Protection of Right to Trial within Reasonable Time, as well as the literal application of the Law on Courts and of the Law on Judicial Council, under the criterion of working results from the appraisal form.

Conditions for the appointment of lay-judge, Law on Courts, Art. 70:

The person that may be elected a lay-judge is the one who:

1. is fit for work and who is 30 years of age;
2. is a citizen of Montenegro;

As a rule, a lay-judge who participates in juvenile proceedings, beside the conditions envisaged by this law, shall have professional experience in the work with juveniles, and those elected to the commercial court, shall have professional experience in commercial transactions and operations.

The person that may not be elected a lay-judge is the one who:

- 1. is a subject of a condemning judgement for an act of crime and sentenced to the unconditional imprisonment term or some other punishment for an act making him incapable for the performance of the position of a lay-judge;*
 - 2. is a member of a political party;*
 - 3. is a judge, lawyer, prosecutor or deputy prosecutor, MP, Councillor, an elected or appointed person in public bodies or local self-government bodies and an employee of the Ministry of Interior.*
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1.1.1 General assessment

In relation to the former judges' appointment procedure, which left the space for thorough subjectivism, progress has been made, for the list of criteria has been widened and further developed into closer criteria (sub-criteria). However, the objective assessment of candidates is hindered by the fact that the parameters for evaluation of criteria have not been provided. Although the criteria are being assessed by a numerical mark, the sub-criteria are not assessed at all, nor were parameters developed for their evaluation. In such a way, a system for equal evaluation of candidates has not been provided.

In order to provide for objective and equal evaluation of candidates, it is necessary that the Judicial Council prescribes parameters and manner of evaluation of criteria and sub-criteria - by a numerical mark according to scoring system or by means of an appropriate descriptive mark.

1.1.1.1 Legal technique

1.1.1.1.1 Contrary from the Law on Courts (LC, arts. 31 and 32) and the Law on Judicial Council (LJC, art. 32), which establish general criteria for the appointment of judges, the Rules of Procedure of the Judicial Council (RPJC, arts. 33 and 35) determine closer criteria (sub-criteria) for the appointment of judges and the prescribed procedure, which in the sense of the legal technique is

not a proper solution, since Rules of procedure by their nature regulate solely the organization and the manner of work.

Instead of the Rules of Procedure, the sub-criteria for the appointment of judges should either be envisaged by the Law or by a special general act of the Judicial Council, whilst the rules of procedure should only provide for the procedure of operation of the Council on the occasion of their evaluation. There are also other provisions which should have been prescribed by the law, and not by the Rules of Procedure, which is pointed out at in the text below (see 6.2.1).

1.1.2 Worthiness

- 1.1.2.1 The HRA proposed for the “worthiness for the performance of the judicial function”, which would be assessed in accordance with the requirements of Judges’ Code of Ethics, to be determined as a general criterion for the appointment of judges (Reform proposal, point 1.2.1).
- 1.1.2.1.1 The amendment of the Art. 32, para. 2 of the Law on Courts, prescribes a special condition which reads that a person who is distinguished by his/her “professional impartiality, high moral values and proven professional skills” may be elected a judge. Worthiness is indirectly envisaged in the items 4 and 6 of the Art. 32 of the Law on Judicial Council, where the following criteria for the appointment of judges have been prescribed: “ability to perform the function he/she applies for in an impartial, conscientious, diligent, decisive and accountable way”, which primarily describes the relation towards work, as well as the “relation with colleagues, behaviour outside the office, professionalism, impartiality and reputation”, which describe worthiness for performance of the judicial function more closely.
- 1.1.2.1.2 In relation to these criteria, it has remained unclear what is the basis for their assessment from 1 to 5, as it is envisaged in the candidate assessment form filled in by each Appointment Commission member (RPJC, art. 36).¹ Also, having in mind the fact

¹ For more details on those forms, see 1.2.2.8.1-15.

that the proposal has not been accepted for judges candidates' applications to be published on the Internet site of the Judicial Council (JC), in order for the public to be able to express possible objections as regards candidates' worthiness for the performance of judicial function, raises the question how does Judicial Council get hold of information on the basis of which to assess those criteria, especially "relation with colleagues, behaviour outside the office, professionalism, impartiality and reputation". The only obvious thing from the regulations is that the information may be obtained by acquiring the opinion on "professional and working qualities" of each candidate (LJC, art. 31), whilst what is missing is the quest for information on other aspects crucial for the assessment of worthiness.

- 1.1.2.1.3 The opinion on all aspects of the worthiness of the candidate for the performance of the judicial function from the previous employer should be obtained on the basis of a questionnaire, the content of which would be prescribed by the JC, in order to trace concrete data significant for candidates' worthiness assessment (HRA Reform proposal 1.2.2.(4)).² The applications of the candidates should be posted at the web site of the Judicial Council in order to enable the public to point to the eventual unworthiness of the registered candidates, who should be informed of such information and provided with a right to reply³ (see items 1.2.2.3 and 1.2.2.5.2).

The criteria "relation with colleagues, behaviour outside the office, professionalism, impartiality and reputation", instead of the 1-5 mark, should be evaluated by a descriptive evaluation, within "satisfactory-non-satisfactory" range, and descriptive evaluation should primarily point to eventual hindrances with regard to worthiness for the appointment to judicial function.

- 1.1.2.1.4 Contrary to lay-judges, for whom the law envisages that they may not be elected to that function in case they had previously been sentenced for an act of crime which makes them unworthy for the performance of judicial function, or to the unconditional

2 An important aspect of worthiness is the absence of prejudices in the form of negative, discriminatory views in relation to gender, ethnic background, sexual orientation etc., which could also be one of the questions envisaged by the questionnaire.

3 See art. 42 of the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

imprisonment term, no such criteria have been prescribed for judges. However, the Council takes them into account, obviously solely on the basis of the provision of the Rules of Procedure which prescribes the the content of the application to a public announcement (Art. 27), where candidate is expected to submit the certificate that no criminal charges are brought against him/her, but not the certificate on conviction record. Instead, candidate is required to submit the statement of possible disciplinary measures pronounced, whether he/she had misdemeanour sanctions pronounced against him/her and whether he/she was sentenced for an act of crime. The question is raised of the justification of such provision of the Rules of Procedure, due to the fact that the law does not explicitly provide for the condition of non-conviction.

Previous non-conviction to an unconditional prison sentence or for an act of crime which would make a judge unworthy of his/her function should be prescribed among special conditions for becoming a judge.

1.1.3 Communication skill

1.1.3.1 The Law on Judicial Council (Art. 32, para. 1, point 5) provides for the “communication skill” as one of the general criteria for judges’ initial appointment, as well as for their promotion. According to the assessment form, the communication skill is assessed by a 1-5 mark. In such a way, this particular ability has been given an unsuitable importance, for it is questionable to what extent a judge requires a particularly expressed communication skill, and how to evaluate it, especially regarding judges applying for promotion⁵. Evaluation of the ability to communicate may prove very subjective and it is not convincing that the evaluation of this ability may precisely be determined on the basis of one interview for which no guidelines have been prescribed. Ability to communicate may prove of more importance for presidents of courts who are in position to represent the court in public.

5 Criteria “Relation with Colleagues” and “Out-of-Court Behaviour” (Art.36, point 6 LJC) may also provide basis for evaluation of an appropriate communication skill.

Ability to communicate should be excluded as particular criteria, especially for the promotion of judges, except with regard to presidents of courts, where it should be evaluated by a descriptive mark.

1.1.4 Closer criteria for appointment of judges being appointed for the first time

1.1.4.1 Professional knowledge, working experience and working results

1.1.4.1.1 Primarily assessed criteria are, logically, “professional knowledge”, “working experience” and “previous working results” (Art. 33, para. 1, point 1 of the JCL and Art. 33 of JCRP). “Professional knowledge” criterion is assessed on the basis of results achieved during the course of studies, results of the written exam, ability to use information and communication technologies, knowledge of foreign languages, initial education final exam mark and career promotion. The fact that all these sub-criteria within the framework of „professional knowledge” are assessed by a unique mark of 1-5, at which the evaluation of each individual criterion is not envisaged, enables unequal application. It is also clear that in this way a considerable space is left for subjectivism. For instance, how to evaluate candidates with low average mark during the course of studies, but with good knowledge of foreign languages and excellent PC skills? How to assess candidates who graduated from the faculty on time but with a lower mark from those whose studies lasted twice as long. In what way the knowledge of foreign languages and the ability to use information and communication technologies is appraised? Whether the knowledge of Word & Excel programmes and Internet surfing is taken into consideration?

Balanced assessment of candidates should be provided by a scoring sub-system for each of the stated sub-criteria. For example, “the results achieved during the course of studies” are expressed through 2 sub-criteria: length of studies and the average mark. It should be prescribed that the length of studies be scored in the following way: four years 5; 5 years 4; 6-7 years 3; 8 years - 2, more than 8 years - 1. Similar system is to be applied with the average mark obtained during the course of studies. Overall mark for the “achievement during the course of studies” is obtained by adding the marks and dividing the overall mark by 2. The sub-criterion “use of information and communication technology” should be stated precisely, and the knowledge should be scored of computer programmes, as well as the use of Internet.⁶ For the sub-criterion “knowledge of foreign languages” it should be prescribed on the basis of what it is to be assessed and how it is to be evaluated. With regard to “promotion at work” see point 1.1.4.1.3. For the evaluation of the written test, see 1.2.2.7.

1.1.4.1.2 The criterion “working experience” has been elaborated by the Rules of Procedure to the number of years and to the place where the experience has been gained. However, it has not been envisaged how the number of years and the “place where the experience has been gained” are to be assessed. Among the places where the experience has been gained (court, prosecution office, law office, administration, commercial sphere) there are no “universities, public notaries, Ombudsman’s office” although one should have in mind all these legal professions and encourage the candidates with this kind of experience to join judicial profession. With regards to the number of years, it should be borne in mind that the number of years of experience gained at the activities of legal profession has already been envisaged within the framework of special, minimum conditions for the appointment to judicial function (LC, Art.32), as well as that greater number

⁶ When prescribing the number of points it should be taken into consideration that basic computer programmes and the use of Internet can be mastered within a relatively short period of time by attending a course in the Centre for the education of the members of the judiciary, thus this criterion should not be given too big an importance.

of year is not necessarily an advantage in relation to the degree of professionalism.

“Working experience” should not be assessed as a special criterion, especially not numerically, as it has been envisaged. Instead, it is sufficient to stick to the assessment of the same in the form of a check of the compliance with minimum special condition for the election with regards to the required years of experience at the activities of legal profession (Law on Courts, Article 32), whilst the place of internship should be noted and evaluated in the light of the fulfilment of other criteria. It should be prescribed that in the case of equal fulfilment of other criteria, the advantage shall be given to judicial advisors.

- 1.1.4.1.3 The criterion “achieved results” consists of the sub-criteria “career promotion” and “employer’s opinion”. With regards to promotion, it is noted that “career promotion” has been envisaged as a sub-criterion for the assessment of “professional knowledge”, as it has been stated above. If we differentiate between the professional advancement and professional development, where the former assesses formal promotion to the position of a superior, and the latter the improvement of skills for the performance of legal activities, this should be specified in a precise way. Besides, the manner should be envisaged in which the JC obtains appropriate information for the assessment of the latter. In case the information on the improved skills for the performance of legal activities is expected from the employer in the form of an “opinion”, which has been independently envisaged as a second sub-criterion, then such an opinion should be secured on the basis of a specifically thought-out questionnaire. In that sense, the same objection stays as for the acquisition of the opinion of candidate’s worthiness (see item 1.1.2.1.3 and 1.2.2.5.2).

Regarding the criterion „achieved results”, it should be specified what the sub-criterion „job promotion” means, how one can reach the information on that; „employer’s opinion” should be made objective by prescribing a special questionnaire which would provide concrete answers related to the type of activity a candidate used to be engaged in and what the reasons were for his/her promotion. The achieved results should be assessed by means of a reasoned descriptive mark, instead of using numerals, as it is envisaged.”

1.1.4.2 *Published scientific papers and other activities*

- 1.1.4.2.1 The problem still persists of the non-existence of the scoring system for the assessment of the number of published papers, participation in commissions for the drafting of laws and bylaws, lectures and mediation (Article 33 of the JCRP). This criterion will be satisfied in practice only exceptionally, in case a scientific worker should decide to apply for the position of a judge.
- 1.1.4.2.2 It is especially necessary to consider the evaluation of criteria for the reception of scientific workers and other legal experts in judicial profession, in particular in case when these apply for the position in one of the higher courts, according to the length of their experience and on the basis of more closely prescribed “criteria for the appointment of a judge being appointed for the first time.” Within the framework of the assessment of professional knowledge of, for instance, a professor or a docent, it should be prescribed for such professional knowledge to bring maximum number of points, as well as that scientific workers, lawyers or prosecutors be not expected to attend initial training for judges. In this case, it is necessary to prescribe special assessment of the criteria in order to avoid disagreements and secure equal procedures in equal cases, in particular because in this way the access to judicial profession of educated people like scientific workers, experienced lawyers and prosecutors, would be made easier and appealing.⁷

⁷ A good example is the Article 74 of the Law on Courts of the Republic of Croatia, NN 150/2005, where for each level of judicial function special conditions are prescribed according to which lawyers, public notaries and scientific workers can be appointed judges. Thus, for instance, “a person who worked, following the judicial exam, as a court advisor or in other bodies of the judiciary for at least two years, or as a solicitor, public notary, public notary assistant or university professor or assistant in the field of legal sciences for at least two years, can be appointed a misdemeanour judge and a municipal court judge...” (Article 74, paragraph 1).

The criteria “published scientific papers and other activities” and “professional development” should be assessed as sub-criteria within the framework of the criterion “professional knowledge”, where they logically belong, and an appropriate scoring system should be prescribed for their balanced assessment. The evaluation of the criteria for the promotion to higher judicial functions should be specifically considered in relation to the candidates coming from universities, from legal practice and similar.

1.1.4.3 Professional development

- 1.1.4.3.1 As a criterion, professional development covers, amongst other things, the acquisition of master and doctor degrees, completed trainings and participation at seminars and other forms of education. It has not been prescribed which mark is used for assessing master and which one for assessing doctor degree, nor has it been prescribed how the attendance of certain forms of education is assessed.

Within the scope of the criterion “professional development” the scoring of master and doctor degrees should be prescribed, as well as the attendance of other relevant forms of education. When the number of points is prescribed, one should have in mind that the access to judicial profession should be facilitated for scientific workers, in such a way that it should be prescribed that they are not required the attendance of the initial training for judges.

1.1.5 Closer criteria for appointment of a judge being elected to a higher court (for advancing judges)

1.1.5.1 General remark

- 1.1.5.1.1 The criteria for the advancement of judges (Article 35 of the JCRP) have been prescribed in principle and they almost entirely coincide with the proposals of the HRA (items 1.2.1.3 and 1.2.1.4

of the Reform Proposal). However, the parameters are missing for the assessment of the sub-criteria, “achieved results” in particular, which make crucial part of promotion criteria. Although the Action Plan for the implementation of the Judiciary Reform Strategy envisaged that “clear and objective criteria would be established for the quantitative and qualitative assessment of the work of the holders of judicial positions in accordance with the international standards” within 1st - 3rd quarter of 2008, no such criteria were adopted by the end of the year.

Within the shortest possible time, it is necessary to adopt precise criteria for the assessment of the results achieved by judges, in relation to which the JC should prescribe a special scoring system in order to secure balanced assessment of candidates who should be promoted on the basis of the assessment of the achieved results.

1.1.5.2 Working experience

1.1.5.2.1 Working experience expressed through the length of time spent as a judge, shows that “Closer criteria for the appointment of a judge being to a higher court” are applied solely for judges who apply for a position of a higher court judge, whilst for other candidates who apply for the same position, the criteria are applied for the appointment of judges being appointed to that position for the first time (Article 33 of the JCRP). Although in practice it is a relatively rare case that legal experts outside courts apply to higher judicial positions, one should keep in mind that for this special sort of candidates the evaluation of the criteria should be secured in such a way that their assessment be balanced and that they be ensured a fair competition in relation to advancing judges (see item 1.1.4.2.2).

1.1.5.2.2 Contrary to the length of experience, *type of experience* is missing. It should have been especially relevant for the appointment of a judge to a vacant judicial position within certain court division. Regardless of the mandatory general formation of judges, a candidate who spent several years adjudicating and developing

him/her in one area of law, he/she should use that kind of acquired experience and enhance it on a higher judicial position. Otherwise, the professional advancement of judges will not give a contribution to the general improvement of the quality of adjudication.

It should be prescribed for the working experience to be assessed descriptively in the sense of the type of *acquired experience*, which is relevant for the judicial position the application is submitted for. The length of judicial working experience in general *should not be assessed as a special criterion*, instead it is sufficient to assess the same in the form of meeting a special requirement for the election of judges from the Article 32 of the Law on Courts, since the length of working experience need not always be an advantage (the same goes for the first election to a judicial position, see item 1.1.4.1.2). Conversely, parameters should be prescribed on the basis of which it would be secured for the length of working experience to obtain always the same mark.

1.1.5.3 Achieved results

- 1.1.5.3.1 The achieved results have been thoroughly elaborated in ten sub-criteria, but even here the evaluation of each individual one is missing.
- 1.1.5.3.2 The HRA proposed a clear classification and grouping of elements on the basis of which the results of work are assessed, as follows: 1) depending on the fulfilment of referential quotas (through the overall figure or in percentages); 2) quality of work (confirmed, altered and abolished judgements) and 3) efficiency in work which is appraised on the basis of a larger number of sub-criteria (item 1.2.1.3. of Reform Proposal). In this way, on the basis of the results from the annual report on the work of a judge, or the report on regular assessment (which is our proposal), objective assessment of the candidates would be secured. With these assumptions and the Methodology for drafting the annual reports on the work of judges, which still needs to be adopted as a special act, the JC should acquire all those

necessary data as a mandatory supplement to the documentation on the basis of which the assessment would be done. The procedure of regular assessment of judges should be prescribed by the Law on Courts (see item 8.3).

- 1.1.5.3.3 Contrary to the proposal of the HRA (item 1.2.1.4. of the Reform Proposal) the sub-criteria concerning the *relation towards work* (hearing cases according to the date of reception, respect of legal deadlines, respect and use of working hours, number and justification of complaints to work, pronounced disciplinary measures) are included in the overall assessment of the achieved results, despite the specificity of this category of sub-criteria, which should be assessed as a special criterion.
- 1.1.5.3.4 Without the appropriate methodology, it is not even possible to make objective assessment of the criteria related to cases being heard following the order of reception, or to respect legal deadlines for the drafting of the decisions and other prescribed deadlines for certain actions to be undertaken in the proceedings. It is also unclear how did the JC in the appointment procedure get hold of the data for the assessment of these categories, i.e. where it assessed them at all.

Objective assessment of the “achieved judicial results” of judicial candidates for higher courts requires for scoring parameters to be urgently prescribed, i.e. for the assessment of the work of judges with regards to all sub-criteria: manner of resolving cases, quality of work expressed through the number of confirmed, altered and quashed decisions and so on. It is also necessary for the Law on Courts to specify the procedure of regular assessment of judges in line with the Methodology for Drafting Annual Reports on Work of Individual Judges. The sub-criteria concerning the relation towards work should be specially scored and assessed independently from the achieved results. Parameters should be prescribed for the assessment of cases being heard in the order of their coming to court and for the compliance with legal deadlines, as well as for the manner in which this kind of data on the work of judges will be acquired.

1.1.5.4 *Published scientific works and other professional activities*

In relation to the criterion “published professional papers and other professional activities” (participation in law drafting commissions, mediations, lectures, published works), the system of scoring for the assessment of these activities should also be prescribed, since it has already been prescribed for these to be assessed by the total numerical mark ranging from 1 to 5. For the assessment of this criterion with regards to candidates being elected to a judicial position for the first time, see item 1.1.4.2.

1.1.5.5 *Professional development*

Acquiring master and doctor degrees has been prescribed as a sub-criterion solely for the election of candidates being elected judges for the first time (Article 33 of JCRP), and not on the occasion of the election of candidates for a higher court (Article 35 of JCRP), which is an obvious omission that needs to be corrected.

- 1.1.5.5.1 The criteria concerning professional knowledge and ability, contained in the item 1.2.1.2 of the Reform Proposal (good knowledge of procedural and substantive legal regulations, European Court of Human Rights case law, Montenegrin courts case law and others) have been taken over in an abridged form in the provisions which determine the content of the written test, which is optional and not expressly envisaged among the criteria for the appointment of a higher court judge. It is possible to come to this specific type of data on the basis of the questionnaire, on the basis of which the opinion would be acquired of the higher court which candidate is appointed to, which in turn would not be a deviation from the framework of the legal text.

The opinion of higher court judges on a given candidate should be obtained on the basis of the questionnaire, which would also cover the categories from the item 1.2.1.2 of the Reform Proposal (fair knowledge of procedural and substantive legal regulations, European Court of Human Rights case law, Montenegrin courts case law and so on).

1.1.6 Closer criteria for appointment of court president

1.1.6.1 The proposal of the HRA with regards to the prescription of special criteria for the appointment of court presidents from the item 1.2.1.5 of the Reform Proposal has been mostly adopted in the Article 36 of the JCRP, except in the part which suggests the acquisition of the written opinion of the judges of the court for the president of which given candidate is appointed. We consider that this needs to be prescribed for all the cases of the appointment of court presidents, due to the fact that this criterion will in any case be taken into consideration solely in cases of promotion - appointment for a judge, and president of a higher court, although in practice it is usually vice versa - judges of the same court, or judges from the first higher instance court apply for the position of the court president. Also, it is appropriate for the dignity of judicial profession that judges have got the opportunity to give their opinion on the candidates for the president of the court they adjudicate in, especially if one has in mind that it has been prescribed for them to give the opinion on the candidates for lay judges.

The right should be prescribed for judges of the court the president of which is elected to give their opinion to the Judicial Council on presidential candidates.

1.2 Judges' appointment procedure

Supreme Court, Constitution of Montenegro, Art. 124, paras. 3 and 4:

The Chief Justice is appointed and dismissed by the Parliament upon the joint proposal of the President of Montenegro, Mr. Speaker and the Prime Minister.

In case the proposal for the appointment of the Chief Justice is not submitted within 30 days, the Chief Justice is appointed upon the proposal of the competent working body of the Parliament.

General session of the Supreme Court, Law on Courts, Art. 27:

The Supreme Court at the General Session:

...

4. gives the opinion on the candidates for the Chief Justice and the judges of the Supreme Court;

...

Appointment of judges, Constitution of Montenegro, Art. 125, paras. 1 and 2:

A judge and the President of the Court is appointed and dismissed by the Judicial Council.
The President is appointed for the term of office of five years.

Appointment of judges, Law on Judicial Council, Chapter IV

Public announcement of vacancies, Art. 28 of the Law on Judicial Council

1. Judge and court president is elected on the basis of public announcement.
2. On vacancies for a position of a judge and court president the Judicial Council informs: for judge - court president, and for court president - the president of the first higher instance court.
3. The Judicial Council announces vacancies for a position of a judge and court president in the „Official Gazette of Montenegro” and one of printed media.
4. The provisions of this law related to the procedure of the appointment of judges are applied to the procedure of the appointment of court president, except for the Chief Justice.

Procedure upon applications, Art. 29 of the Law on Judicial Council

1. Candidates' applications are submitted to the Judicial Council within 15 days as of the day of the announcement.
2. The Judicial Council will reject all untimely and incomplete applications.
3. Against the decision on rejecting untimely or incomplete application the applicant is entitled to an objection to the Judicial Council, within three days as of the day of the receipt of the decision of the Judicial Council.
4. The decision of the Judicial Council upon the objection is final and no administrative dispute can be conducted against the same.

Standard application form, Art. 30 Law on Judicial Council

The application from the Art. 29 para. 1 of this law is submitted on the form determined by the Judicial Council.

Opinion on professional and working qualities, Art. 31 of the Law on Judicial Council

The Judicial Council acquires the opinion on professional and working qualities for the performance of judicial function for each candidate from:

1. bodies, companies or other legal entities where candidate works or used to work;
2. judges' conference of the court candidate is elected to;
3. judges' conference of the first higher instance court.

Interview with candidates, Art. 33 of the Law on Judicial Council

1. The Judicial Council Commission, composed of at least three members of the Judicial Council, conducts interviews with applying candidates who meet the appointment requirements.

2. *There is no need to conduct an interview with applying candidate if:*
 1. *during the last twelve months he/she has achieved negative mark at the interview conducted for the position in the court of the same or higher instance;*
 2. *he/she achieved negative marks at several interviews conducted for the position in the court of the same or higher instance, irrespective of the fact when the last interview was conducted.*
3. *On the basis of the interview and the acquired documentation, the Commission from the para. 1 of this Art. assesses each candidate, taking into consideration the criteria from the Art. 32 of this law.*
4. *The Commission decides on candidate's mark by the majority of votes.*
5. *Immediately after the interview has been conducted, the Commission from the para. 1 of this Art. fills in the standard form for the evaluation of candidates, which contains candidate's mark and its explanation.*
6. *The assessment manner and the content of candidates' assessment form are regulated by the Judicial Council Rules of Procedure.*

Written test, Art. 34 of the Law on Judicial Council

1. *The Judicial Council can organize written testing of candidates prior to the interview.*
2. *In case of the situation from the para. 1 of this Art., the Commission from the Art. 33 of this law compiles a ranking list of the applying candidates on the basis of the results achieved at the written exam, which list can be altered on the basis of the result achieved at the interview.*
3. *Closer conditions and manner of conducting testing and the way results are determined are regulated by the Judicial Council Rules of Procedure.*

Appointment proposal, Art. 35 of the Law on Judicial Council

1. *On the basis of the interview and the acquired documentation the Commission from the Art. 33 para. 1 of this law compiles a list of candidates who have achieved satisfactory results.*
2. *The list of candidates contains the marks of all the candidates who have been interviewed, i.e. who have been tested, as well as a brief overview of the assessment results.*
3. *Candidates' appointment list is submitted to the Judicial Council.*
4. *The Judicial Council makes the decision on appointment on its non-public session.*
5. *The appointment decision must contain written explanation.*

Lay-judges' appointment procedure, Art. 36 of the Law on Judicial Council

1. *Court president announces lay-judges' vacant positions in the court in one of printed media.*
2. *Court president conducts interviews with the applying candidates who meet the requirements and, on the basis of the interviews, compiles a list of candidates, which is submitted to the Judicial Council with the opinion of the judges' conference on each candidate.*

3. *The Judicial Council elects lay-judges on the basis of the list and the opinion from the para. 2 of this Article.*

Publishing appointment decision, Art. 37 of the Law on Judicial Council

1. *The Judicial Council communicates is appointment decision to the elected candidate, the court where judge or lay-judge is elected to and the Ministry of Justice.*
2. *The decision on the appointment of a judge or lay-judge is published in the Official Gazette of Montenegro”.*

Candidates’ rights, Art. 38 of the Law on Judicial Council

Candidate is also entitled to inspect the documentation related to other applying candidates, to see the results of written test, candidates’ marks and the opinions on the candidates and to submit written statement to the Judicial Council within three days as of the completed inspection.

Appointment Commission, Judicial Council Rules of Procedure, Art. 10

The Appointment Commission is established by the decision of the Judicial Council.

The Commission has got a Chair and two members. The Commission Chair is the JC President.

Judges make the majority in the Appointment Commission.

The Appointment Commission is appointed for a period of one year.

A Commission member may be re-elected to the Appointment Commission upon the expiry of one year as of the end of the previous term of office.

The Appointment Commission:

- *Checks the timeliness of applications and the completeness of the submitted documentation;*
- *Conducts interviews with candidates;*
- *Prepares test, conducts testing of candidates and assesses the test results when the Judicial Council decides to proceed with the written testing of candidates;*
- *Compiles applying candidates ranking.*

JUDGES’ APPOINTMENT PROCEDURE

Form and content of public announcement, Art. 26 of the Judicial Council Rules of Procedure

Public announcement contains the following:

- *Number and name of vacant positions;*
- *Basic legal requirements for the application to vacant positions in accordance with the Arts. 31 and 32 of the Law on Courts;*

- Procedure of applying to vacant positions;
- Place where applications can be taken over;
- Manner and place of submitting applications;
- Deadline for application submittal.

Applying to public announcement, Art. 27 of the Judicial Council Rules of Procedure

Public announcement application represents a standard form, the form and content of which have been established by the Judicial Council decision (form number 1).

The application form contains the warning that imparting of untrue or false information bears a consequence of the exclusion of a candidate from consideration or the initiation of disciplinary procedure.

Together with the filled out and signed application form a candidate submits the following documents:

- Certified copy of all university diplomas;
- Certified copy of the certificate on passed qualifying examination for judges;
- Certified copy of certificates on completed educations;
- Certified copy of certificate of Montenegrin citizenship;
- Certificate that no criminal proceedings have been brought against him/her;
- Candidate's statement on whether a disciplinary measure has been pronounced against him/her, whether he/she has been a subject of misdemeanour proceedings and whether he/she has been convicted for any act of crime and if so, when, where and for which act of crime;
- Statement that he/she is not a member of any political organization;
- Health certificate and
- Evidence on working experience.

Place and accessibility of applications, Art. 28 of the Judicial Council Rules of Procedure

Application forms will be accessible to candidates in all court buildings, offices of the Judicial Council, on the website of the Judicial Council, as well as on other places specified by the Judicial Council.

Incomplete and untimely applications, Art. 30 of the Judicial Council Rules of Procedure

The Appointment Commission submits the incomplete and untimely applications to the Judicial Council.

Interview with candidates, Art. 31 of the Judicial Council Rules of Procedure (JCRP)

The Appointment Commission conducts interviews with applying candidates who meet legal requirements, except with the candidates from the Art. 33 para. 2 of the law.

The Judicial Council promptly informs the candidate on the date, time and place of the interview.

During the interview, questions will be asked in order to find out whether a candidate meets the appointment criteria in accordance with the criteria established by the law and these Rules of Procedure.

As regards the interview with the candidate for court president his view of problem in the functioning of courts, the way of resolving these problems and the ideas for the improvement of the work of courts.

Each candidate can submit a written programme of his/her work.

Written test, Art. 33, JCRP

Written test is compiled by the Commission in such a way that on the basis of the achieved results it is possible to assess: the knowledge of procedural and substantive regulations, knowledge of the jurisprudence of Montenegrin courts, knowledge and application of international agreements and the case law of the European Court of Human Rights, level of analytical ability in resolving complex legal and factual issues.

Candidates will be informed about the date, time and place of testing at least five days before the testing day.

For each appointment procedure, the Test is prepared beforehand.

The Appointment Commission assesses the test results by marks ranging from 1 to five.

The mark is established by the majority votes of the Appointment Commission members.

Candidate assessment form, Art. 36, JCRP

Each Appointment Commission member fills in candidate assessment form immediately upon the completed interview (form number 2).

The marks for each criterion range from one to five.

Mark description:

- 1 and 2 - unsatisfactory,*
- 3 - good,*
- 4 - very good,*
- 5 - excellent.*

At the end of the form each Commission member enters his/her final mark with the relative explanation. The Judicial Council determines the form and content of candidate assessment form (form no. 2). On the basis of majority votes, the Appointment Commission determines the overall mark to be entered in candidate assessment form, the form and content of which are determined by the Judicial Council (form no. 3). In case the Commission members cannot come to an agreement on the overall mark, the same is determined by means of calculating the average mark, in such a way that final marks of each Commission member are added up and divided by three.

The average mark is:

- from 1 to 2 - unsatisfactory,*
- over 2 to 3 - good;*
- over 3 to 4 very good;*
- over 4 to 5 - excellent.*

Candidates' assessment form filled in by each Appointment Commission member
(Form no. 2 - Article 36 of the JCRP)

Name and surname of the candidate

Judicial position candidate applies to

Name and surname of Commission member

CRITERION

MARK (1-5)

RATIONALE

Professional knowledge

Working experience

Achieved results

Published scientific works

And other professional activities

Ability to perform function he/she applies for impartially, conscientiously,
diligently, decisively and accountably

Communication skills

Relationship with one's colleagues, behaviour outside office, professionalism,
impartiality and reputation

Candidate's organizational skills

(this is filled in for The candidate who applied for the position of court president)

FINAL MARK

(write numerical mark and its meaning - Article 36 of the JCRP)

Rationale

Date, Commission member signature

Form for candidate's overall mark given by Appointment Commission (Form no. 3 -
Article 36, paragraph 6 of the JCRP)

On the basis of the final marks of all members, the Appointment Commission, at its meeting
held on _____, assessed the candidate _____,
who applied for the position of _____ with the mark of
_____.

(write numerical mark and its meaning - Article 36 of the JCRP)

RATIONALE

Appointment Commission members

1. _____
2. _____

Appointment Commission Chair

Appointment decision, Article 37 of the JCRP

The Judicial Council decides on the appointment at the closed session.

The decision on the appointment is passed in the form established by the Judicial Council.

The decision on the appointment must be accompanied by a rationale.

The Judicial Council Decision on the appointment of a judge is final.

Servicing and publishing the decision on appointment, Art. 38, JCRP

The Judicial Council services the decision on appointment to all applying candidates, to the competent court and to the Minister of Justice.

The Decision on the appointment of judges is published in the Official Gazette of Montenegro and on the website of the Judicial Council.

The original documents, submitted with the application to the announcement, are returned to the unsuccessful candidates, as of the moment of the decision becoming effective.

Appointment of lay-judges, Art. 39 of JCRP

The Judicial Council elects lay-judges from the list of candidates proposed by the court president on the basis of the announced competition and the interviews conducted by the court president.

The List contains the following elements:

- *Candidates' names;*
- *Personal data for each candidate, including age, occupation and working experience;*
- *Opinion of the judges' conference about every candidate;*

The decision on electing a lay-judge is compiled in the form established by the Judicial Council and it contains the name of a lay-judge, the court he/she is elected to, day of beginning and of the end of the term of office. The Decision on electing a lay-judge is submitted to the elected lay-judge, to the president of the court he/she has been elected to and to the Ministry of Justice.

Lay-judge begins his/her duty on the day of taking the oath.

1.2.1 Appointment of Chief Justice

- 1.2.1.1 Contrary to the former proceedings for the appointment of the Chief Justice by the Parliament upon the proposal of the Judicial Council, which would obtain the opinion of the General Session of the Supreme Court Judges, the Constitution from October 2007 provides for the Chief Justice to be elected by the simple majority, upon a joint proposal of the President of the State, the Prime Minister and the Speaker. This manner of appointing the

Chief Justice violates the principle of the independence of judiciary, because of the fact that the appointment and dismissal of the president of the highest judicial instance, who represents judicial branch, is decided solely by the ruling political coalition, since, as a rule, all three presidents in Montenegro belong to the ruling coalition, which has got Parliamentary majority. Concurrently, neither judges nor opposition political parties have influence secured whatsoever on the appointment and dismissal of the Chief Justice.⁸ Such a solution does not exist anywhere in the region⁹, and the experts of the High Judicial and Prosecution Council of Bosnia and Herzegovina termed this *fatal* deviation from the basic rule on the appointment of judges by the Judicial Council.¹⁰

- 1.2.1.2 The Law on Courts still provides for the General Session of the Supreme Court to give the opinion on candidates for the Chief Justice, although in the Constitution there is no such provision.¹¹ In November 2007, the authorized proponents of the Chief Justice of Montenegro, the President of the State, the Speaker and the Prime Minister met the Supreme Court judges, but they did

8 See the *Opinion of the Venice Commission on Montenegrin Constitution*, items 88-90, 96, the translation was published in the book „International Human Rights Standards and Constitutional Guarantees in Montenegro“, edited by Tea Gorjanc-Prelević, Human Rights Action, Podgorica, 2008. The Commission emphasized that it had understood that “political appointment” of the Chief Justice was a consequence of the desire for the accountability of judiciary to be secured, thus it considers this a transitional solution and advises the authorities to enable for the appointment of the Chief Justice to be done by the greatest possible Parliamentary majority (item 90). However, former Supreme State Prosecutor was appointed the Chief Justice solely by the ruling coalition MPs whilst the opposition MPs voted against or boycotted the voting.

9 In *Serbia* it is the Parliament that appoints the President of the Supreme Cassation Court, but upon the proposal of the High Judicial Council and with the opinion of the General Session of the Supreme Cassation Court. In *Slovenia*, the Chief Justice is appointed by the Parliament upon the proposal of the Judicial Council. In *Macedonia*, the Chief Justice – as well as all other judges and court presidents – is appointed by the Judicial Council. In *Spain*, the Chief Justice is appointed by the King upon the proposal of the General Council of judicial authority. In *Croatia*, the Chief Justice is appointed by the Parliament, upon the proposal of the President of the Republic, with prior opinion of the General Session of the Supreme Court. (However, in Croatia no court president, including the Chief Justice, may be Judicial Council members). In *Hungary*, the Chief Justice is elected with 2/3 majority in the Parliament upon the proposal of the President of the state.

10 Judicial reform in Montenegro – experience of Bosnia and Herzegovina, Branko Perić, President of High Judicial and Prosecution Council of Bosnia and Herzegovina (HJPC), Sven Marius Urke and Lynn Sheehan, HJPC members and Therese Nelson, judiciary reform consultant, September 2007, page 39.

11 There is the issue of constitutionality of the provision of the Art. 127 item 4 of the Law on Courts, according to which General Session of the Supreme Court gives the opinion on the candidate for the Chief Justice. What is more, if one has in mind the 30 days deadline within which competent proponents submit their proposal to the Parliament, and in case this deadline elapses unsuccessfully, the competence is automatically transferred onto a Parliamentary body.

not accept their proposal for the Chief Justice to be appointed from among the judges of the Supreme Court, or at least from among the ranks of judges.¹²

- 1.2.1.3 Contrary to the usual status of the Chief Justice as the first among equal (*primus inter pares*),¹³ the manner of appointment and the concentration of the powers vested in the Chief Justice in Montenegro, who is also the JC President (see items 2.1.2.1), promote autocratic-political judicial management, which also the Venice Commission warned, emphasizing that in that way there was a risk of harming the public trust in the independence of the entire judicial branch.¹⁴

The Judicial Council should also appoint the Chief Justice in accordance with its power to appoint judges, by two thirds majority, as was the proposal of the Venice Commission.¹⁵ It should be secured for the Council during the procedure to also acquire the opinion of the General Session of the Supreme Court judges.

1.2.2 Procedure of appointing regular court judges

1.2.2.1 Judicial vacancy announcements

- 1.2.2.1.1 There are no provisions on announcing judicial vacancies on the website of the Judicial Council, but solely in the Official Gazette of Montenegro and in »one of the printed media«. Vacant lay-judges' posts are announced by court president solely in one printed medium. The printed medium which was exclusively used in 2008 for judicial vacancy announcements was "Pobjeda", the only daily newspaper which is still owned by the state and

12 "The President of the State, the Speaker and the Prime Minister, Filip Vujanović, Ranko Krivokapić and Željko Šturanović respectively, met on 14th November 2007 with the judges of the Supreme Court of Montenegro with the view of coming to an agreement on the proposal for the appointment of the new President of this court. The acting Chief Justice, Mr. Radoje Orović and all the judges unanimously proposed for the president to be elected from the judiciary branch, above all from among the judges of the Supreme Court of the Republic of Montenegro, <http://www.sudovi.cg.yu/home.php?PID=137&LANG=mn>. Mrs. Vesna Medenica, previously holding the office of the Supreme State Prosecutor, was proposed and appointed to the position of the Chief Justice.

13 See for instance the Opinion of the Venice Commission on the Constitution of Serbia, item 63, 19.3.2007.

14 Opinion of the Venice Commission on the Constitution of Montenegro, items 88 and 96.

15 Opinion of the Venice Commission on the Constitution of Montenegro, item 90

the circulation of which is the smallest of all the dailies in Montenegro. Having in mind that judicial vacancy announcement is not published on the Internet, younger generations in particular, among whom there are most judicial candidates, have got significantly less opportunity of being informed.

Judicial vacancy announcements on the JC website should also be prescribed, due to the fact that Internet is accessible to a large number of people and that this form of announcing has practically zero cost for the Council. All Montenegrin judges at their work places should be provided with PCs and printers, as well as with the Internet connection.

1.2.2.2 Application content

1.2.2.2.1 In the Rules of Procedure (Art. 28) there is a provision that a candidate must give a statement on whether a disciplinary measure has been pronounced against him/her, whether he/she has been a subject of misdemeanour proceedings and whether he/she has been convicted for any act of crime and if so, when, where and for which act of crime. This requirement is not in line with the Law on Courts which does not explicitly envisage the condition of earlier non-punishment or non-conviction for appointment of a judge. In that sense, see item 1.1.2.1.4.

The provision of the Rules of Procedure on the application content should be amended (Article 27) so as to exclude the requirement for the statement to be given on former conviction records, until these restrictions for the appointment of judges are expressly prescribed.

1.2.2.3 Publishing candidates' application on Judicial Council website

1.2.2.3.1 The proposal of the HRA has not been accepted for the candidates' applications, and their CVs to be published on the Judicial

Council website, in order to enable the public to point out to the Council false data mentioned in the application, i.e. the unworthiness of candidates to hold judicial positions (Reform Proposal item 7.2.2.a.).¹⁶ This is particularly important because no other appropriate way has been envisaged for the Council to find out the information relevant for the worthiness of candidates (see item 1.1.2.1.2). Also, for the same reasons it should be prescribed for the lay-judges candidates' list to be published, proposed by court presidents. It should be made possible for candidates to become familiar with negative remarks regarding their candidature as well as to respond to the same.

It should be provided for the candidates' applications to be published on the JC website, as well as the list of the proposed candidates for lay judges, so that the public could point out to their possible unworthiness. It should be made possible for candidates to become familiar with possible objections related to their candidature, as well as to respond to the same.

1.2.2.4 Rejecting untimely and incomplete applications

1.2.2.4.1 It has been envisaged for the three-member Commission of the Judicial Council for the appointment of judges, to submit to the JC untimely and incomplete applications, which are then rejected by the JC. Having in mind the fact that the JC decides in the same composition upon the objection against the decision on rejecting the application, with the purpose of improving the efficiency of work of the JC, it should be envisaged for the Commission to be competent to reject the untimely and incomplete applications and for JC to decide upon the objections.

The competence should be prescribed of the Commission for the appointment of judges to reject untimely and incomplete applications, since the JC is competent to decide upon the objection against the decision on application rejection.

¹⁶ Beside the practice of the HJPC of BiH, see also the Judicial Council of the republic of Slovenia, for instance, „Kandidature za prosto mesto predsednika Okrožnega sodišča v Ljubljani“, <http://www.sodni-svet.si/default.asp?k=ssnews&sssnewsid=81>.

1.2.2.5 *Acquiring opinions on professional and working qualities of candidates*

1.2.2.5.1 Acquiring the opinions on professional and working qualities in the procedure of appointing judges has been given an over-emphasized importance in the Law on Judicial Council (Article 31 of the LJC). What is more, for all the candidates, apart from the opinion of bodies, companies and other legal entities where a candidate works or used to work, the opinion is required both of the court the candidate is appointed to, and of the Conference of Judges' of a directly higher instance court, at which it is unclear on the basis of what data the conferences of these courts give the requested opinions on the candidates who have no previous experience in the field of judiciary or legal profession. Even in the procedure for the appointment of lay-judges it has been prescribed that the Conference of Judges of the court lay judge applies for will give the opinion on each candidate, although no previous trial period in the court has been envisaged for lay judges.

Mandatory meetings of judges aimed at giving opinions on candidates for judges should be abolished (Article 31 of the LJC) in case these did not work as judges or judicial advisors, or in case they worked neither in judiciary nor in legal practice. Giving of the opinions on the candidates for lay judges should also be excluded in case these had no experience of working in courts.

1.2.2.5.2 Due to the fact that the appointment in between the applying candidates is carried out on the basis of the assessment contained in the appropriate forms, the acquisition of opinions is solely an ancillary criterion which should have been defined as such. The Rules of Procedure prescribe that the opinion is acquired from the bodies candidates worked in for the purpose of assessing the results of his/her work (Article 33), which is narrower than the Article 31 of the Law on JC, according to which the opinion is acquired on professional qualities as well. The provision is missing for the Council to acquire data for the assessment of worthiness on the basis of opinions (see item 1.1.2.1.2). All the abovementioned

tioned points out to the non-elaborated concept of opinions been given in the procedure of assessing judicial candidates.

The opinions on various aspects of work and behaviour of the candidates should be obtained on the basis of the appropriate questionnaire, the content of which should be determined by the Judicial Council, in order to avoid the acquisition of stereotypical phrases instead of a meaningful mark. The courts should have at their disposal the data on the results achieved by expert assistants, which the opinion on their work should be based on.

1.2.2.6 *Interview with candidates*

- 1.2.2.6.1 In essence, the interview with candidates should examine the general profile of a given candidate: “During the interview it will be seen whether a candidate meets the criteria for the appointment, in accordance with the criteria established by the Law and these Rules of Procedure” (Art. 32, para. 3 of the JCRP). There is a risk of the interview with candidates being reduced to formality and to serve primarily for the elimination of candidates who seem unconvincing already at the first glance, and for the appointment among other candidates to continue being subject to subjectivism. Since the interview occupies a central place in the appointment procedure and since it is necessary to examine the same in the aforementioned sense, it is very much important how well organized and well thought out it will be, thus in this sense the JC should prescribe appropriate guidelines.
- 1.2.2.6.2 Interview is envisaged as mandatory irrespective of the fact whether a candidate is appointed a judge for the first time or as a judge of a higher court. Such solution is not the most suitable one, since for the needs of promotion (appointment to a higher instance court) the JC should have at its disposal numerous data for the assessment of candidates from centralized personal judicial records, in which case the interview should be optional. The interview and testing are of special significance on the occasion of the first appointment, having in mind the permanency of tenure of judicial function immediately after the first appointment.

The JC should prescribe the guidelines for conducting interviews with candidates. It should be prescribed for the interview not to be necessary in the procedure of the advancing of judges.

1.2.2.7 Written testing

1.2.2.7.1 Written testing has been prescribed as optional prior to the interview with a candidate (Art. 34 of the LJC). However, when the candidates are being appointed judges for the first time, written testing prior to the interview should be made mandatory.

1.2.2.7.2 In the Rules of Procedure of the Judicial Council (Art. 34) the objectives of testing are elaborated, referring to possible content of the test and it has been prescribed for the test results to be assessed with the mark ranging from 1-5, which can be altered upon the completed interview. The scoring system for assessing test has not been prescribed, although from the decisions of the JC on the appointment of judges, for instance of the Basic Court in Podgorica dated 8th August 2008, it is obvious that the JC expressed the test results by way of points, instead of putting a mark. The scoring system, as well as testing under a code,¹⁷ would secure objectivity to the greatest possible extent and it would exclude for the mark to be established by the *majority vote* (sic!) of the members of the Appointment Commission (Art. 34, para. 5).

The written test should precede the interview in case of the candidates being elected judges for the first time. It should be prescribed for the test to be assessed under a code, using the scoring system, and the provision of the Rules of Procedure by which the test mark is determined through voting should be abolished.

1.2.2.8 Candidates' assessment form

1.2.2.8.1 The Rules of Procedure (Art. 37) prescribes two candidates' assessment forms. Form number 2, which mostly follows the criteria

¹⁷ Such a solution is contained in the Art. 39 para. 2 of the Law on High Judicial and Prosecution Council of Bosnia and Herzegovina. ("Official Gazette of BiH" no. 25/04).

from the Article 32 of the LJC,¹⁸ is filled out by each JC three-member Judges' Appointment Commission member with his/her final mark for a candidate and a rationale, whilst in the Form number 3, on the basis of the majority of votes of the Commission members establishes the overall mark ranging from 1-5, with appropriate descriptive meaning from "unsatisfying" to "excellent". The Forms are the same for the candidates being appointed judges for the first time, and for those who are promoted and do not cover the sub-criteria which have been envisaged differently by the Rules of Procedure in relation to these two categories of candidates. The Form does not provide for the sub-criteria to be assessed, nor does it contain any parameters for the assessment of criteria.

- 1.2.2.8.2 In the Form there is no section which would state on the basis of what information source a specific mark has been awarded - is it an interview, or the employers' opinion, i.e. a body candidate used to work for, or the opinion of the conference of judges of the court candidate is appointed to, or the conference of a directly higher instance court, or a test, the annual report on the work of judges, certificate of a foreign language teaching institution etc.

Special forms should be prescribed for the candidates being elected judges for the first time and for judges who are candidates for higher instance positions. Both forms should retain the basic division of criteria from the Article 32 of the LJC, which need to be expanded by sub-criteria and the appropriate sections for the assessment of the same, as well as by the section for recording the sources of information on the basis of which assessment is done. The form for the assessment of candidates being elected for the first time for a higher court judge, and who do not come from the area of judiciary, should be specially adjusted.

- 1.2.2.8.3 The modification of the forms must be accompanied by a special act of the JC, where in the form of a "Form filling instruction" parameters would be prescribed for the evaluation of criteria and scoring system. The Instruction should specify which criterion is assessed numerically and which one descriptively.¹⁹

¹⁸ It is possible that the criterion "professional development" has been left out by a technical error.

¹⁹ See, for instance, the Instruction for filling in the form for the assessment of the work of judges of HJPC BiH.

- 1.2.2.8.3.1 The criterion “professional knowledge” (Form no. 2, the first one) should be enlarged with sections where sub-criteria prescribed in the Article 32 of the JCRP will be assessed, as well as with the sub-criteria “published scientific papers”, prescribed in the Form no.2 the fourth one, and “professional development, which has been left out from the Form (see items 1.1.4.1.1 for judges being appointed for the first time, and items 1.1.5.4 and 1.1.5.5 for advancing judges).
- 1.2.2.8.3.2 The criterion “working experience” (Form no. 2, the second one) should be limited to the description of the type of activities, tasks and responsibilities candidate used to work on - in the form of an opinion, on the basis of the questionnaire and acquire it for the candidates being appointed judges for the first time and for those who did not work in the judiciary (see item 1.1.4.1.2). For the advancing judges, the area of law should be taken into consideration in which a candidate used to adjudicate and assess the same in accordance with the profile of a judicial vacancy (see item 1.1.5.2.2).
- 1.2.2.8.3.3 The criterion “achieved results” (Form no. 2, the third one) is assessed differently with the candidates who are appointed judges for the first time, in relation to the advancing judges, since completely different sub-criteria have been envisaged for that. These will also be assessed differently - in the first case, descriptively, and in the second numerically, using the scoring system (see items 1.1.4.1.3 and 1.1.5.3.4). In both cases, it is necessary to prescribe sub-criteria assessing parameters, especially for the need of assessing the work of judges who apply for promotion and with whom the procedure of regular assessment should also be prescribed.
- 1.2.2.8.3.4 The criterion “published scientific works and other professional activities” (Form no. 2, the fourth one) and “professional development” (which is lacking in the Form no. 2) and the sub-criteria which make their content, should be scored and assessed as the integral part of the basic criterion “professional knowledge”.
- 1.2.2.8.3.5 The last three criteria assessed in the Form no.2 (following the order, fifth, sixth and seventh, excluding the eighth - criterion for court presidents) are: “ability for impartial, conscientious, diligent, decisive and responsible performance of the function”.

“communication skills” and “relation with one’s colleagues, behaviour outside one’s office, professionalism, impartiality and reputation.” The content of these criteria is partly also related to the assessment of worthiness (see item 1.1.2.1.1) The Rules of Procedure does not mention these criteria and there has been no elaboration as to what is the basis for the assessment of the same using a numerical mark from 1-5.

- 1.2.2.8.3.6 The criterion “ability to perform one’s function impartially, conscientiously, diligently, decisively and accountably” (Form no. 2, fifth) should be linked to the assessment of the results achieved at work and assessed descriptively, on the basis of the opinion given by the candidate’s employer, or by the judges of the court a judges applies for, if they managed to have an insight into the work of the candidate.
- 1.2.2.8.3.7 “Communication skill” (Form no. 2, sixth) is important solely for court presidents and in case it is assessed at all, it should be assessed descriptively and not numerically (see item 1.1.3).
- 1.2.2.8.3.8 “Relation with colleagues, behaviour outside the office, professionalism, impartiality and reputation” (Form no. 2, seventh) should be assessed descriptively on the basis of the opinion of the former employer, interview with the candidate and the data possibly submitted by the public (on the basis of the published applications), so as to assess whether given candidate meets or not these general conditions of worthiness for the appointment to a judicial function (see item 1.1.2.1.3).

Together with the amended forms the Instruction should be prescribed on filling up the same, which would contain parameters for the evaluation of criteria and sub-criteria and which would envisage those things assessed using numerical marks, using scoring system, and those assessed descriptively, and in which way.

1.2.2.9 Decision rationale and legal remedy

- 1.2.2.9.1 The decisions on the appointment of judges passed in 2008, published in the *Official Gazette* and on the website of the “Courts of the Republic of Montenegro”, do not contain appropriate content-

full rationales. This is particularly visible when there is no explanation as to why a candidate has been chosen with smaller number of points than other candidates had, or when amongst the candidates with the same number of points only one has been selected.²⁰ Under the existing circumstances of the missing scoring of sub-criteria, the rationale should have been of particular significance. The insufficient rationale of the final administrative act represents essential violation of the Rules of Procedure (Art. 203, paras. 3 and 4 and Art. 226 of the Law on Administrative Procedure), which can ultimately lead to the annulment of all appointed judges, as well as of the decisions passed by them as judges (Art. 71 of the LJC). Having in mind the fact that one administrative dispute has been initiated against the decision on the appointment of judges, it should be finished within the shortest possible time, in order for a wider circle of persons not to incur any damage due to the possible annulment of all the decisions passed by recently appointed judges (detailed related to the overcoming of problems, item 6.2.3).

- 1.2.2.9.2 It has been prescribed that the decision of the JC on the appointment of judges must have a rationale, but not that it should not contain a legal remedy, in accordance with the constitutional guarantee of the right to legal remedy. Also, since the decision of the JC on the appointment of judges is a final administrative act, the obligatory nature of legal remedies results from the Law on General Administrative Procedure (Article 204, paragraph 1).

The JC must improve the quality of rationales of its decisions, especially if judges are to be elected before regulations are amended, since the existing, insufficiently precise criteria and the lack of parameters for their balanced assessment brings into doubt the objective and balanced assessment of the candidates. The decision on election must contain a legal remedy.

1.2.2.10 Inspection of documentation

- 1.2.2.10.1 The Law on Judicial Council (Art. 38) prescribes the right of each candidate to inspect his/her documentation and the ones

²⁰ The Decision on the appointment of Podgorica Higher Court judges, Su. R. Br. 357/08, dated 1st October 2008

of other candidates who applied to the announcement for the appointment of judges (i.e. written test results, candidates' marks and opinions on candidates). One candidate during the appointment of a Podgorica Basic Court judge lodged a complaint to the Administrative Court where he claims that his inspection of his previously assessed test was denied, as well as of other candidates' tests. Such form of restriction, apart from being contrary to the objective of the stated provision, represents the violation of the right to effective legal remedy, since this hinders the preparation of complaint to the Administrative Court against the decision on the appointment of a judge.

The Law on Judicial Council (Article 38) or the Rules of Procedure should prescribe the manner and the place for the inspection of election documentations. The deadline should be prescribed within which the Secretariat is obliged to enable the inspection of election documentation upon the receipt of the request, right to making Xerox copies of the case file and the right to inspection through an agent. The Law should prescribe the right to objection to the JC in case this right is interfered with.

1.2.2.11 Annulment of appointment decision

1.2.2.11.1 The Law on Judicial Council has also provided for the possibility of the Judicial Council annulling the decision on the appointment of judges, in case it is proved that a judge at the time of the appointment did not meet the appointment requirements, i.e. that the Council would have not selected him/her should it have been familiar with all the data during the appointment procedure (Art. 49 of the LJC). The actions and decisions of the judge whose appointment is annulled, are also annulled (criticism related to this provision can be seen in the items 6.2.3.1 and 6.2.6.7).

2. Composition of Judicial Council and appointment of its members

2.1 Composition of Judicial Council

Composition of the Judicial Council, Article 127 of the Constitution of Montenegro

The Judicial Council has got ten members: the Chief Justice is the JC President ex officio, whilst the remaining nine members are:

- *four judges appointed and dismissed by the Judges' Conference;*
 - *two MPs appointed and dismissed by the Parliament from among the members of the Parliamentary majority and the opposition;*
 - *two reputable legal experts appointed and dismissed by the President of Montenegro;*
 - *Minister of Justice.*
-

2.1.1 General remarks

2.1.1.1 The composition of the Judicial Council does not exclude political influence on the appointment of judges, instead, it tries to make a balance and so far it has been unsuccessful, according to our opinion. Judges elect solely four out of ten Council members. Politically elected Chief Justice, who is the JC President ex officio, three politicians in the Council (Minister and two MPs) and two legal experts, at the choice of the President of the State, who may also be politically active, do not make the Council seem s depoliticized, independent and impartial body, with the capacity to protect judges from the political influence. Such a composition in particular does not ensure the independence of the Council from the executive branch, contrary to the international recommendations (see item 2.2.3 of the Reform proposal).²¹ If Montenegro were to ever

21 The Venice Commission established, although without any detailed explanation, that the composition of the Judicial Council and the system for the appointment of its members was such that it could secure independence and autonomy of courts and judges and that it represents a good balance between the judiciary and the political power, but that there was a problem with the fact that the Chief Justice is ex officio the JC President (items 93, 95 and 96 of the Opinion of the Venice Commission on the Constitution of

consider the re-appointment of all judges, following the model used in Bosnia and Herzegovina and Serbia, such a composition of the Council in particular would not give sufficient guarantees of independence and impartiality for such a procedure.²²

- 2.1.1.2 Civil society organizations (CSOs), as well as the University and the Bar Association, have been excluded from the procedure of the appointment of Council members, although comparative experiences recommend for civil society candidates to be members of the Council due to the strengthening of transparency and monitoring of its work, as well as because of the strengthening of public trust in the judiciary. The experience of Bosnia and Herzegovina even recommends the presence of international Council members who might be of assistance with regards to the issues of independence and efficiency of judiciary.²³
- 2.1.1.3 In the existing Council composition, most of its members could be inclined towards one political party, i.e. coalition. The JC President is appointed and dismissed by the ruling coalition, the Minister of Justice and one MP are the representatives of the same coalition, and the two legal experts are appointed by the President of the State, who is a high ranking official of the ruling party. As one out of four judges, the Judges' Conference appointed a judge who is the wife of the President of the State, since the Law on Judicial Council did not provide for the restrictions in relation to the possible conflict of interests. In this way there is no impression on the Council as an independent and autonomous body as it is laid down in the Constitution.

Montenegro). Contrary to the Venice Commission, the president and the international members of the High Judicial and Prosecution Council of Bosnia and Herzegovina assessed that the composition of the Council was „far from optimal solution with regards to the best European practices“ – Reform of judiciary in Montenegro – experience of Bosnia and Herzegovina, Branko Perić, President of the High Judicial and Prosecution Council of Bosnia and Herzegovina (HJPC), Sven Marius Urke and Lynn Sheehan, members of the HJPC and Therese Nelson, judiciary reform consultant, September 2007, page 37.

- 22 The stance of the Venice Commission is that the re-appointment procedure requires the „Council composed of independent persons who enjoy confidence, and not of party appointees“. Opinion of the Venice Commission on the Constitution of Montenegro, Strasbourg, 19th March 2007, opinion no. 405/2006, CDL-AD(2007)004.
- 23 Reform of judiciary in Montenegro – experience of Bosnia and Herzegovina, Branko Perić, President of the High Judicial and Prosecution Council of Bosnia and Herzegovina (HJPC), Sven Marius Urke and Lynn Sheehan, members of the HJPC and Therese Nelson, judiciary reform consultant, September 2007, item 1.2.7. Key lessons learnt in Bosnia and Herzegovina, page 35.

The composition of the ten-member Judicial Council, the chair of which is the politically elected Chief Justice ex officio, with the other members being the Minister of Justice, two MPs, two legal experts appointed at the discretion of the President of the State and only four judges, one of which is the wife of the President of the State, does not give an impression of the Council as an autonomous and impartial body, independent from the executive branch, as it should be according to the international recommendations. Any influence has been excluded of universities, Bar Association and other NGOs on the election of the Council members, which does not exactly contribute to the establishing of public trust in the impartial work of this body. The composition of the Council should, therefore, be reformed.

2.1.2 *Judicial Council members among judges' ranks*

2.1.2.1 *Chief Justice and President of the Judicial Council*

2.1.2.1.1 The Chief Justice, not only is a member of the Judicial Council, but also its President ex officio. The Venice Commission criticized such a solution and suggested that the JC President be elected by the JC members themselves from among the members who are not judges, in order to avoid the danger of „autocratic judicial management”²⁴ The HRA fought hard for the solution which exists in Croatia, which states that neither the Chief Justice, nor other court presidents may be Council members²⁵, since the JC ought to be competent for monitoring the operations of all the courts and their presidents, including the Supreme Court and its president. Contrary to that, the area for examining the responsibility of the Chief Justice / JC President has been reduced and disproportionate with regards to numerous powers vested in this function:

- the possibility has been excluded for the disciplinary proceedings to be initiated against the Chief Justice (see more details under 6.2.1.3);

24 See the Opinion of Venice Commission on Montenegrin Constitution, 2007, items no. 88-92 and 96.

25 Art. 123 of the Constitution of the Republic of Croatia.

- the Chief Justice enjoy the immunity, just like an MP does, contrary to other judges who enjoy functional immunity (Art. 86, para. 4 and Art. 122 of the Constitution);
- the Council members do not enjoy functional immunity and, contrary to the JC President, dismissal procedure against each Council member can be initiated by majority vote, which additionally puts them into an unequal position.

2.1.2.1.2 Numerous powers of the Chief Justice and the JC President stimulate additionally the concept of “autocratic management”, which the Venice Commission warned against:

- i.* the Chief Justice and the JC President by position is the Chair of the three-member Commission of the JC for the appointment of judges, which assesses candidates (Article 10 of the JCRP);
- ii.* upon the proposal of the JC President, the Council appoints and dismisses the Vice-President of the Council from among the ranks of judges (Art. 20, para. 2 of the LJC);
- iii.* upon the proposal of the JC President, the Council also appoints the Director of the Secretariat of the Judicial Council (Art. 76, para. 2 of the LJC), contrary to the Law on civil servants and public employees (Art. 33, para. 1, Official Gazette of the Republic of Montenegro, no. 27/04) which provides for mandatory public competition to be announced;
- iv.* the Chief Justice and the JC President schedules and manages the work of the Judges’ Conference, acquires and counts the initial proposals for the appointment of judges as Council members from both courts and judges, compiles the lists of candidates and submits them to the Judges’ Conference which appoints the Council members from among the ranks of judges (Art. 11 of the LJC);
- v.* the JC President, contrary to other Council members, is the sole person empowered to submit the proposal for determining the disciplinary responsibility of a judge or court president (Art. 54, para. 2 of the LJC);

2.1.2.1.3 According to the experience of BiH, the JC President would have to be permanently employed with the Council, especially at the

initial stage of its work, which is the additional reason for the incompatibility with the position of the Chief Justice.²⁶

- 2.1.2.1.4 The impression of the inappropriate domination of the Chief Justice / JC President laid down by the stated regulations, is contributed by the fact that the official e-mail address of the Judicial Council of Montenegro at the letterheads of the official documents reads the address with the name of the JC President.

The Chief Justice should not be the President of the Judicial Council *ex officio*, nor the Chair of Judges' Election Commission; he/she should not have the power to propose the JC Vice-President, nor the Director of the Secretariat of the Council, who by law must be elected on the basis of the public competition. The Chief Justice in particular, should not have all the stated powers, as it is the case now.

2.1.2.2 Judges as Council members

- 2.1.2.2.1 Out of four Council members appointed from among the ranks of judges, two members come from among the judges of the Supreme Court, Appeal Court, Administrative Court and two higher courts, whilst the other two members come from among the „judges of all courts”.²⁷ In this way, “the widest representation of the judiciary” in the Council has not been secured, as it is suggested by the international recommendations (item 2.2.2 Reform Proposal),²⁸ i.e. for one half of the judges as Council members to be elected among the judges of basic and commercial courts, who make a striking majority in relation to the first group (170:70). So, in practice it has already happened that in April 2008 three judges of the Supreme Court and one Higher Court judge were appointed Council members.

26 Judiciary Reform in Montenegro – experience of Bosnia and Herzegovina, Branko Perić, President of the High Judicial and Prosecution Council of Bosnia and Herzegovina (HJPC), Sven Marius Urke and Lynn Sheehan, HJPC members and Therese Nelson, judiciary reform consultant, September 2007, page 37.

27 Art. 11, paras. 1 and 2 of the Law on Judicial Council (*Official Gazette of Montenegro*, no. 13/2008).

28 On the occasion of the first appointment of the reformed Council in 2008, one judge of Podgorica Higher Court and three judges of the Supreme Court of Montenegro were elected as Council members.

It should be prescribed for two Council members from among the ranks of judges to be elected from among the ranks of judges of basic and commercial courts, who make approximately 70% of the overall number of judges.

2.1.1.2.2.2 Since the Law on JC, in relation to the conditions for the appointment of its members, has not included the provision on the prevention of the possible conflict of interests, the Judges' Conference appointed as the Council member a judge who is the wife of the President of the State, i.e. the Vice-President of the political party which has been in power for almost two decades and which until the year 2008 had had a decisive influence in the parliament on the appointment of judges. Having in mind that the Reform objective was the exclusion of the political influence from the procedure of the appointment of judges, the presence of the President's wife, who had also participated in her husband's pre-election campaign, causes the objective concern that this member will act in accordance with the personnel interests of the ruling political party in the judiciary. Because of that we consider as obvious the need to render is impossible for the Council members (except for the Minister of Justice), following the models of similar provisions in other laws, to be the officials of the executive and legislative branch, i.e. connected with the members of these branches by means of kinship or conjugal relations.²⁹

The Law on Judicial Council should be supplemented by the provision on the prevention of the conflict of interests, and it should be prohibited for MPs or Councilors, political party officials, the persons appointed and posted in the Government of Montenegro, as well as the persons in conjugal relations with them, or their next of kin, collateral relatives up to the second degree of kinship or in in-law kinship, to be elected the Council members (those who are not a Minister and MPs).

²⁹ For instance, on the basis of the Law on Protection of Personal data and the Law on Public Broadcasting Services "Radio Montenegro" and "Television Montenegro", the Director and members of the Council of the Agency for the protection of personal data, and the Council of the Radio and TV Montenegro may not be MPs and Councilors, Government members, appointed or persons posted by the Government of Montenegro, political party officials, as well as the persons in conjugal relations with them, or their next of kin, collateral relatives up to the second degree of kinship or in in-law kinship (Law on Protection of Personal Data, *Official Gazette of Montenegro* no. 79/2008; Law on Public Broadcasting Services, *Official Gazette of the Republic of Montenegro*, no. 51/2002, article 23 and *Official Gazette of Montenegro*, no. 79/08 of 23rd December 2008, article 26).

2.1.3 Council members from outside ranks of judges

Three Council members are politicians - two MPs and the Minister of Justice, whilst there is no prohibition for the two respectable legal experts, appointed by the President of Montenegro, to be the members of political parties.³⁰ Therefore, with regards to the composition of the Council, there are no guarantees for one half of the Council members not to be politically active and not to exert political influence, although the basic idea behind the reform was for politics to be excluded from the appointment of judges. It remains unclear why it has been secured for the MPs and the Government members not to be members of the Councils of the Agency for telecommunications, Broadcasting Agency and RTCG, for instance, whilst this has been allowed in the Judicial Council.³¹

2.1.3.1 MPs as Council members

2.1.3.1.1 Political influence is not a balanced one, since the opposition MP is the sole Council member, beside three judges, in the current composition, who does not have to be favoured by the ruling political coalition.³² Such composition of the Council unsuccessfully balances political influences, introducing the representatives of two Parliamentary poles, instead of the effort to establish a system by means of which the Council would be staffed by re-

30 The Constitution and the Law on Judicial Council do not prohibit membership of the Council members in political parties, obviously because the Minister and two MPs are the Council members. Contrary to similar laws in neighbouring countries, there is no prohibition of political activity within the Council, although such a prohibition should go without saying on the basis of Art. 4 which prescribes that "the Judicial Council protects courts and judges from political influence". It is, however, unrealistic and contradictory to expect from the politicians in the Council not to carry out the policy of their respective parties.

31 For instance, the Chair of the Agency for Telecommunications, as well as the members of the Agency, must not be MPs or Councillors, or members of political party bodies (Law on Electronic Communications, *Official Gazette of Montenegro*, no. 50/2008, Art. 11); also, the members of the Broadcasting Agency may not be MPs and Councillors, elected, appointed and posted persons in the Government of Montenegro, political party officials as well as the persons in conjugal relations with them, or their next of kin, collateral relatives up to the second degree of kinship or in in-law kinship (Law on Broadcasting, *Official gazette of the Republic of Montenegro*, no. 51/2002, Art. 14). The same restriction are also valid for the members of the Council of Montenegro Radio and Television (RTCG) (Law on Public Broadcasting Services „Radio Montenegro“ and „Television Montenegro“, *Official Gazette of the Republic of Montenegro*, no. 51/2002, Art. 23).

32 The fourth judge is the wife of the President of the State and the Vice-President of the ruling political party, who took part in her husband's presidential campaign in 2008.

spectable experts who are not politically active.³³

- 2.1.3.1.2 There is no legal requirement for the MPs to have legal formation, which would be useful for the efficient and effective work of the Council.³⁴

Instead of the Parliament being represented in the Council, we suggest for the Parliament to elect the Council members from outside the ranks of judges, from among non-politically active experts, upon the proposal of the Bar Association, the University and NGOs active in the areas of the rule of law and human rights.

2.1.3.2 Minister as Council member

- 2.1.3.2.1 The Minister as a member of the Council compromises the concept of the Council as an autonomous body, independent from the executive branch.³⁵ Formerly, the Minister of Justice used to be a member of the Council in Montenegro, but this solution was abandoned in 2002, exactly with the purpose of reducing the influence of the executive branch on the appointment of judges.³⁶ The exclusion of the Minister from voting in the proceedings of disciplinary responsibility of judges, but not from the procedures of the appointment and dismissal of judges, makes his membership in the Council additionally problematic.³⁷

33 The HRA firmly supports the view, contrary to the opinion of the Venice Commission, that the composition of the Judicial Council is balanced (Opinion on Constitution of Montenegro item 79). We believe that such democratic solution at that historical moment might have been the only acceptable one, but also that it will not ensure depoliticized Judicial Council, such as it was proposed by the Venice Commission in its paper on the *appointment of judges* (Appointment of Judges, item 31, Sub-Commission for Judiciary, Venice, 14th March 2007, the paper was submitted to the participants of the round table on Draft Constitution of the Republic of Montenegro in the Parliament of the Republic of Montenegro, 26th April 2007).

34 The Law on Judicial Council, Art. 3, para. 1 requires that the Council members „must be persons of high moral and professional qualities“.

35 Art. 126 of the Constitution of Montenegro: „The Council is independent and autonomous body ...“.

36 The Minister of Justice is not a member of the Judicial Council in Croatia, Slovenia and Bosnia and Herzegovina, which is not the case in Macedonia and Serbia.

37 The Venice Commission, in its report “Appointment of Judges” states that the membership of the Minister in the Judicial Council causes a „justified concern“, and it suggests that in case the Minister is indeed a member of the Council he/she then should not participate in the proceedings of determining the disciplinary responsibility and the dismissal of judges.

2.1.3.2.2 The membership of the Minister in the Judicial Council is not indispensable, since it means that the Minister of Justice, in line with his/her competences, would at any rate cooperate with the Council and participate in its sessions, when needed (item 2.2.3.1 of the reform Proposal).³⁸

2.1.3.3 *Respectable legal experts*

2.1.3.3.1 The solution according to which the President of the State - as a rule a representative of the ruling political party in Montenegro - at his/her discretion appoints respectable legal experts as the members of the Council, whose political activism is not prohibited, does not contribute to the establishing of public trust in the impartial and independent character of this body.

2.2 *Judicial Council members' appointment procedure*

2.2.1 *Appointment of the President of the Judicial Council*

2.2.1.1 Political appointment of the Chief Justice, who is the JC President ex officio, has been criticized in the item 122. The Venice Commission expressly recommended the solution according to which the JC President is elected by the Council members from among the members outside the ranks of judges “so as to provide the necessary links between the judiciary and the society, and to avoid the danger from the «autocratic management of the judiciary»”.³⁹ In Slovenia, for instance, the President and the Vice-President are elected by secret voting, at which the terms of office of the President and of the Vice-President rotate, alternating every 20 months.⁴⁰

The JC President should be elected among the Council members themselves, in order to make sure for this person to be “the first among equals”, who will then organize the work of the Council in the procedural sense and present its decisions to the public. If the Chief Justice is a Council member ex officio, it should be made impossible for him/her to be elected the Council President.

38 This is the situation in Croatia, Slovenia, Bosnia and Herzegovina, Portugal, Spain etc.

39 Opinion of the Venice Commission on the Constitution of Montenegro, item 96.

40 Article 6 of the Judicial Council Rules of Procedure from 2008.

2.2.2 Appointment of Judicial Council members being elected from among ranks of judges

2.2.2.1 Appointment of two members from among ranks of judges from Supreme Court, Appeal Court of Montenegro, Administrative Court of Montenegro and higher courts

To a certain degree, the Law on Judicial Council specifies the appointment of four members of the Council from among the ranks of judges. Out of these four members, two are elected from among the judges of the Supreme, Appeal and Administrative courts and two higher courts (Art. 11, para.s 1 and 2). At the special sessions of judges of these courts (and the joint session of higher courts' judges), each court, i.e. higher courts together, suggests one candidate. The list of four candidates is compiled by the Chief Justice and hands it over to the Judges' Conference. The Judges' Conference votes for each individual proposal, thus two candidates with the greatest number of votes are elected (Art. 12).

2.2.2.1.1 Neither the Law nor any other act specifies the procedure according to which the stated courts elect their candidates, or in what way the joint session of higher courts' judges comes to one joint candidate, thus the democratic nature and transparency of these appointments have been left to the very courts, which does not give sufficient guarantees that all the judges in the country will have equal opportunity to be elected members of the Council.

The Law on JC should be amended, and the procedure should be prescribed for judges to apply for the Council members, as well as the procedure for the election of candidates on the level of the courts of law.

2.2.2.2 Appointment of two members from ranks of judges of all courts

The Law on Judicial Council (Art. 10, para. 1, item 2) envisages that, out of four members of the Judicial Council from the ranks of judges, two members be elected from among the ranks of judges of "all courts". These members are elected by the Judges' Conference, and the proposal comes in such a way that the "Chief Justice acquires the initial proposals containing two judges from each judge and court president, in the manner which will secure the confidentiality secrecy of the initial proposal. The Chief Justice makes a list of eight candidates who have got the greatest number of initial proposals and submits the same to the Judges' Conference" (Art. 11, para.s 3, 4 and 5).

2.2.2.2.1 This system of appointment does not ensure the widest representation of judges in the Council, since it leaves the possibility for all four Council members to be appointed from among the judges of the Supreme, Appeal, Administrative and higher courts (see item 2.1.2.2.1). The appointment procedure has not been prescribed in such a way so as to secure the appointment of motivated candidates, who wish to be the Council members and who are then able to place their candidature. Also, the appointment procedure is not prescribed in such a way so as to secure transparency.

The process of counting votes for the initial proposals of candidates for Council members from among the ranks of judges of all courts should be improved in such a way that instead of one person this be done by the Commission, composed of judges from various instances, at a public session. Since the existing system makes it possible for non-motivated candidates to be elected on the basis of a few votes alone, the same should be improved by prescribing two election rounds. In the first round, each court (basic and commercial) would nominate two candidates; in the second, all basic and commercial court judges would vote for four out of the proposed candidates, among whom would then the Conference of all judges elect two Council members.

2.2.3 *Appointment of Council members from outside ranks of judges*

2.2.3.1 *Appointment of two MPs appointed and dismissed by the Parliament from among ranks of Parliamentary majority and opposition*

2.2.3.1.1 The experience of the appointment of MPs in the first composition of the reformed Council has shown that the opposition parties could not come to an agreement on their representative in the Council for a long time, so that legal deadline for this appointment was exceeded and the Council started working without the representative of the opposition.⁴¹

⁴¹ A representative of the opposition parties was elected on 31st July 2008, three and a half months after the Council had been constituted and started working (Decision on the appointment of one JC member, 31st July 2008, Official Gazette of Montenegro, no. 49/08).

The law or the Rules of Procedure of the Parliament should prescribe the procedure for the appointment of MPs from among the ranks of ruling coalition and the opposition.

2.2.3.2 Two legal experts appointed by President of the State

Instead of the President of the State, as a rule the President of the ruling political party in Montenegro, electing respectable legal experts by himself, it should be enabled: a) for the Parliament to elect all the Council members from outside the ranks of judges from the list of legal experts, upon the proposal of the University, Bar Association and other CSOs fighting for the promotion of the rule of law and for the protection of human rights; b) for the Bar Association and the NGOs with the experience in the areas of the rule of law and the protection of human rights to propose the list of candidates which the President of the State would select two Council members.

3. Term of office, immunity and dismissal of Council members

Competence of the Judicial Council, Art. 127, para. 5 of the Constitution

...

The term of office of the Judicial Council is four years.

Re-appointment of judges, Art. 13 of the LJC

The members of the Judicial Council from the ranks of judges may be re-elected into the Judicial Council upon the expiry of four years from the end of the previous term of office in the Judicial Council.

Functional immunity, Article 122 of the Constitution

A judge and a lay judge enjoy functional immunity.

A judge and a lay judge may not be held responsible for the expressed opinion and voting on the occasion of making judicial decision, except if this is an act of crime.

A judge, in the proceedings initiated on the grounds of an act of crime committed during the performance of judicial function, may not be detained without the JC approval.

End of term of office, Art. 14 of the LJC

The term of office of a Council member ends prior to the expiry of the time he/she was elected to if: 1) the term of office on the basis of which he/she was elected to the Council ends; 2) he/she is elected a judge of a higher court or court president, when he/she is a Council member from the ranks of judges; 3) he/she is elected to judicial office, when he/she is a Council member who is not from the ranks of judges; 4) he/she resigns; 5) he/she is sentenced to an unconditional prison term...(Art. 14 of the LJC).

Dismissal, Art. 15 of the LJC

A member of the Judicial Council is dismissed if:

- 1. He/she exercises his/her duty negligently and unprofessionally;*
- 2. He/she is convicted for an act which makes him/her unworthy of the membership into the Judicial Council.*

In the cases from the para. 1, the proposal for the dismissal of a Council member is submitted by the Judicial Council to the body which elected him/her.

The term of office of a Council member ends on the day when he/she is dismissed by the body which elected him/her.

3.1 *Term of office*

- 3.1.1 The solution for the term of office of the Council to be a group one has been retained, i.e. that the term of office of a new Council member elected because the term of office of his/her predecessor expired prior to the expiry of the time he/she was elected to, lasts until the expiry of the term of office of the other Council members. It has not been envisaged for this Council member to be re-elected, which would be a useful solution.
- 3.1.2 In the case of judges as the Council members, the re-appointment is permitted following the expiry of four years as of the end of the previous term of office, which was the proposal of the HRA. However, in relation to the right to re-appointment of other Council members, there is a legal gap.
- 3.1.3 The appointment to a higher judicial function, i.e. the function of a court president, has been envisaged as a reason for the end of the term of office of a Council member.

The re-election should be prescribed of the Council member appointed following the expiry of the term of office of his/her predecessor in the Council. With regards to the right to re-election, the rule which is valid for judges as Council members should also be prescribed for other members being elected - allow the re-election, but not the consecutive one

3.2 *Immunity*

- 3.2.1 The Constitution does not provide for the immunity of the members of the Judicial Council from the responsibility for the expressed opinion whilst exercising the duty in the Council, contrary to, for instance, the solution in Croatia and Bosnia and Herzegovina, where the members of the Judicial Council enjoy Parliamentary, i.e. functional immunity.
- 3.2.2 Judges, Council members, enjoy functional immunity with regards to the execution of judicial office, i.e. in passing a judicial decision, which is not related to their work in the Council. The JC President, the MPs and the Minister, Council members, are protected by the

Parliamentary immunity (Art. 86 of the Constitution), whilst the remaining two members, respectable legal experts, have no immunity.

- 3.2.3 The international experts consider that giving a higher degree of immunity, i.e. Parliamentary immunity, to the persons who hold the positions appointed by the Parliament, can be considered an obstacle to the fight against corruption since they try to protect themselves from being held accountable for acts of crime committed whilst exercising their duty.⁴²

Functional immunity should be secured to all the JC members. The Chief Justice should also enjoy functional and not the one enjoyed by the MPs.

3.3 Dismissal

- 3.3.1 Contrary to the former solution, when a Council member could be dismissed solely if he/she requested so or if his/her basic, judicial term of office ends, the Law on Judicial Council now prescribes detailed reasons for the cessation of the term of office and the dismissal of a Council member.
- 3.3.2 The Council adopts all its decisions by the majority of votes, as well as the decision on the proposal for the dismissal of its member.

The decision on the proposal for the dismissal of a Council member should require qualified majority vote.

42 Judiciary Reform in Montenegro – experience of Bosnia and Herzegovina, Branko Perić, President of High Judicial and Prosecution Council of Bosnia and Herzegovina (HJPC), Sven Marius Urke and Lynn Sheehan, HJPC members and Therese Nelson, Judiciary Reform Consultant, September 2007, page 18.

4. Competences of the Judicial Council

Judicial Council, Article 126 of the Constitution of Montenegro:

The JC is autonomous and independent body which secures the independence and autonomy of courts and judges.

Pursuant to the Art. 128, para. 1 of the Constitution, the JC shall:

1. *elect and dismiss from duty a judge, a president of a court and a lay judge;*
2. *establish the cessation of the judicial duty;*
3. *determine the number of judges and lay judges in any court;*
4. *deliberate on the activity report of courts, applications and complaints regarding the work of courts and take a standpoint with regard to them;*
5. *decide on the immunity of judges;*
6. *propose to the Government the amount of funds for the work of courts of law;*
7. *perform other duties as stipulated by law.*

Pursuant to the Law on Judicial Council (LJC):

- *ensures independence, autonomy, accountability and professionalism of courts and judges in terms with the Constitution and law (Art. 2);*
- *protects the court and judges from political interference (Art. 4);*
- *controls the work of judges and courts (Art. 23, item 1);*
- *decides on disciplinary responsibility of judges (Art. 23, item 2);*
- *provides opinions on draft laws and bylaws in the area of judiciary and initiates the enactment of relevant laws and regulations in the field (Art. 23, item 3);*
- *ensures the application, sustainability and uniformity of the Judicial Information System pertaining to the court system (Art 23, item 4);*
- *caters for the education of holders of judicial office in cooperation with the Prosecution Council (Art. 23, item 5);*
- *maintains records of the data on judges (Art. 23, item 6);*
- *considers complaints of judges and takes positions regarding the threat to their independence and autonomy (Art. 23, item 7);*
- *proposes referential criteria on the required number of judges and other civil servants and state employees of the court (Art. 23, item 8);*
- *establishes the methodology for the reporting on the work of courts and the annual schedule (Art. 23, item 9);*
- *prepares the draft Code of Ethics to be passed by the Conference of Courts (Art. 23, item 10);*
- *performs other tasks as envisaged by the law (Art. 23, item 11) - adopts the JCRP, Art. 25; assigns a judge to other court with the consent of the judge, Art. 42; without the consent - Art. 44; gives opinion of the activities that are incompatible with the performance of judicial function, Art. 45).*

Pursuant to the Judicial Council Rules of Procedure (JCRP):

- *the JC shall prepare the draft Action Plan to address strategic issues in the judiciary in the coming years and propose measures for its implementation (Art. 22, para. 1);*
 - *enact internal acts required for efficient and effective work of the JC (Art. 24)*
-

4.1 General remarks

- 4.1.1 As a result of a significant constitutional reform, the Judicial Council (JC) has become exclusively competent for the appointment and dismissal of judges, court presidents and lay judges. The overall prescribed competences of the JC are in line with the usual spectrum of competences in the international practice.
- 4.1.2 The authorities of the JC are not regulated in the most purposeful way, since it is the impression that the competences envisaged by the Constitution are of greater importance than those stipulated in the law, although objectively this is not the case.
- 4.1.3 Unlike the Constitution, whose Art. 126 limits the JC functions to securing the independence and autonomy of courts and judges, the LJC extends the function of the JC to include accountability and professionalism of courts and judges. It would have been more appropriate if the full range of the JC functions had been articulated in the Constitution itself, since it would provide for wider and more complete grounds for further elaboration of competences.

The Constitution should have regulated in a framework manner the competence of the JC in relation to the procedure of election and dismissal of judges and the termination of judicial function, as the key ones, with the reference for all other competences and the deliberation manner of the JC to be regulated by the law (item 4.2 of the Reform Proposal).⁴³

⁴³ The same view is held by the experts from BiH – *Judiciary Reform in Montenegro – experience of Bosnia and Herzegovina*, Branko Perić, Chair of the High Judicial and Prosecution Council of Bosnia and Herzegovina (HJPC), Sven Marius Urke and Lynn Sheehan, HJCP members and Therese Nelson, Judiciary Reform consultant, September 2007, page 43

4.1.4 The provision of the LJC, Banning Political Action (Art. 4) constitutes a poor elaboration of the LC (Art. 3, Independence and autonomy)⁴⁴ since it is limited only to protection of judges against political interference. It is envisaged that influences and pressures may come from other structures in the society (e.g. economic lobbies, criminal groups, etc.).

The Law on JC (Article 4), should be amended in such a way that the JC protects the court and the judge from all inappropriate pressures, and not only from the political influence.

4.1.5 The Constitution envisages that the JC shall deliberate applications and complaints on the work of courts and take standpoints on these (Art. 128, para. 1, item 4). The Law does not further elaborate this competence by authorising the JC to “deliberate also the complaints on the work of judges”, but limits itself to saying that the JC shall “control” the work of judges and courts. The JCRP envisages that anyone can file a complaint against a judge to the JC (Art. 41-44), which should have been further detailed in law.

4.1.6 It should be borne in mind that according to the current legislation, three institutions are competent to receive complaints against judges: Ministry of Justice (MoJ), JC and court presidents. In addition, the public was not informed that the Office for receiving complaints against judges and courts within the Supreme Court ceased to exist. Considering the expressly stated constitutional provision that the JC shall consider applications and complaints against courts, this conceptual inconsistency referring to the competences of the MoJ should be addressed in the new LC.

The Law should specify the right for the objections to the work of judges and courts to be submitted to the JC.

4.1.7 Certain provisions of the LC, particularly those referring to the judicial administration and competences of the MoJ (Art. 104-109) are characterised by conceptual inconsistencies, inappropriate division of competences, leading in some cases event to collision, all of which

⁴⁴ “Judicial function must not be exercised under any influence.” (Article 3, paragraph 2 of the LC) “Nobody shall exert influence on a judge in the exercise of judicial function.” (Article 3, paragraph 3).

are the matters that need to be addressed by the new LC. It primarily concerns the following provisions:

- on the competences of the MoJ in deciding upon applications and complaints (Art. 105 and 94 of the LC and Art. 125 para. 1 item 4 of the Constitution);
- on supervision over the actions taken pursuant to applications and complaints (LC Art. 106, item 2; JCRP Art. 41 and 44);
- on keeping “appropriate - prescribed records”, not providing the details of the type of records (LC Art. 106, item 8 and LJC Art. 23, item 6, which are in collision);
- on the competence of the MoJ in the procedure of the adoption of the Judicial Rules of Procedure in the section which is not related to judicial administration, but to the organization of the work of courts (judicial divisions and sessions of all courts, organization of trials, court management and so on, Article 83 and Article 97, paragraph 5 of the LC);
- on setting the referential criteria for the required number of judges without any indication that it is preceded by the JC proposal (LC Art. 109, item 4; LJC Art. 23 item 8);
- on adoption of other acts relevant for the work of courts regardless whether it pertains to the matters of court administration, although it is now within the scope of competences of the JC (LC Art. 109, item 5 and LJC Art. 23 items 9 and 10)⁴⁵.

The new Law on courts should eliminate conceptual inconsistencies, collision of provisions and inappropriate division of competences between the JC and the Ministry of Justice.

4.2 Relation between the Judicial Council and courts

4.2.1 According to the Law on JC, the Council “performs the control over the operation of courts and judges” (Article 23, item 1). The wording “to perform control over the work of courts and judges in terms with

⁴⁵ The Action Plan for the implementation of the Governmental Judicial Reform Strategy, page 5, line 1, envisages the following action: “review the existing normative framework on the supervision over the work of the judicial administration and conduct supervision over the work of the judicial administration in terms with European standards and experiences”

the Constitution and the Law” would be more appropriate,⁴⁶ considering that it implies indirect control (through reports on work, by deliberating applications and complaints, as may be inferred from Art. 128 item 4 of the Constitution), that is restricted, in accordance with the principle of independence and autonomy of judges (see Reform Proposal, item 4.1.c).

- 4.2.2 According to Art. 27, item 3 of the LJC, “the court is obliged to enable to the JC, at its request, direct examination of official files, documents and data, and to furnish the copies of requested files and documents.” This too wide a competence needs to be limited analogously to the authority of the court president, who may examine case files solely in precisely defined instances (Art. 94 of the LC). It should be borne in mind that the MoJ formerly had no such authority, as well as that the JC members are not solely judges, but, also, the Minister of Justice, the MPs etc. The existing legal solution endangers the independence and autonomy of judges and it has to be made specific in principle, so that the examination of files of the case being heard be done solely on the occasion of applications and complaints, when it does not suffice for a judge to give appropriate explanations.

The Law on JC should specify the relation between the Council and the court, so that the limit and the grounds for JC supervision be explicitly prescribed, instead of the general authority of the Council to supervise the work of the courts and judges (Article 23, item 1 and Article 27 of the LJC), which endangers the principle of judicial independence and makes it possible for the Council to act arbitrarily without a specific reason.

- 4.2.3 The relation between courts in the function of good quality and efficient performance of works, especially with regards to the place and role of the Supreme Court, has remained poorly elaborated.⁴⁷ The new Law on Courts should prescribe clear division of competences

46 See, for instance, Article 19, paragraph 2 of the Law on HJCP of BiH: “To the extent necessary for exercising the competences in line with this law ...”

47 Art. 120 of the LC envisages that lower courts are obliged to provide to superior courts the requested data and information needed to monitor and examine case law and organisational and expert control of the operation of courts, because of which the superior courts may perform direct insight into the work of lower courts and judges.

between the JC and the Supreme Court, with more precisely defined areas of divided responsibility.⁴⁸

The Law on Courts should make clear distinction between the competences of the JC and the Supreme Court.

4.3 An overview of individually set competences

4.3.1 The decision on the status issues of judges and the right of judges to complain to the Judicial Council

4.3.1.1 The JC is competent to decide on the activities which are incompatible with the performance of a judicial function, acting at the request of a judge (LJC Art. 45), or a court president (Art. 46). These provisions attempt to tone down otherwise criticised constitutional norm (Art. 123) envisaging that a judge, in addition to being a member of the Parliament or perform some other public function, may not professionally perform any other activities.

4.3.1.2 HRA advocated that the law should precisely lay down the rights and responsibilities of judges in order to ensure the guarantees of independence of the judiciary through the principle of legality. To that end, the law needs to precisely stipulate what shall not constitute forbidden public or professional activity, for instance taking as a model the Constitutional Law on the Constitutional Court of the Republic of Croatia (Article 10, paragraph 3): “other scientific or expert activity, membership in institutions and association of lawyers, charity, cultural, sport or other associations shall not be considered to be a public or a professional duty.” Notwithstanding such a provision, which should be taken over and incorporated as the paragraph 2 to the Article 45 of the LJC, in case of any remaining doubts, the competence of the JC to provide further interpretation in accordance with the law should be retained.⁴⁹

48 The experience of BiH expressly recommends that the Supreme Court should not be given the competence over the court system, since this court makes part of the system. *Judicial Reform in Montenegro – the Experience of Bosnia and Herzegovina*, Branko Peric, Sven Marius Urke and Lynn Sheehan, September 2007, p. 43.

49 For such an approach, see the Law on HJPC BiH, Articles 82-86.

The Law on Courts should specify what exactly will not be considered „public function”, i.e. „professional activity” incompatible with the performance of judicial function, whilst the JC should retain the competence to interpret further this legal provision, if required.

- 4.3.1.3 The competences of the JC now include also deciding upon complaints of judges related to infringement upon their independence and autonomy (LJC Art. 23, para 1, item 7), although the HRA proposed the possibility of filing complaints also on the grounds of violations of other rights enjoyed by judges (e.g. proper working conditions, etc.)⁵⁰.
- 4.3.1.4 The opportunity has been missed with the most recent amendments to the LC to expressly envisage the responsibility of the state for damages due to the unlawful and unconscientious work of a judge,⁵¹ with the possibility of refund from the judge if the damage was caused deliberately or due to the extreme negligence.⁵²
- 4.3.1.5 The opportunity has also been missed within the frame of status guarantees related to the permanence of judicial function to envisage the suspension of office in case of the appointment to some other public function (for instance, European Court of Human Rights Court judge, Director of the Centre for Training Holders of Judicial Position), contrary to the provisions existing in the countries in the region.

The Law on Courts should prescribe: the right of judges to lodge a complaint to the JC not only because of their independence and autonomy being endangered, but also of other rights.

50 This right has been indirectly prescribed in the Article 10 of the LC: “Montenegro shall secure means and conditions for the work of courts of law.”

51 See the Constitution of the Republic of Serbia, which expressly guarantees the right to damage compensation due to unlawful or improper work of public authorities (Article 35, paragraph 2).

52 The Law on the Protection of the Right to Trial within Reasonable Time (Art. 42) envisages that the state has the right to the refund if the violation of the right to trial within reasonable time was caused by the actions of the “public officials”. The Labour Law provides for the responsibility of an employee for damages at work or in relation with the same incurred by the employer, intentionally or due to the extreme negligence (Article 133, paragraph 1).

4.3.2 *Determining the number of judges and lay judges*

4.3.2.1 The JC determines the number of judges and lay judges at the proposal of the Minister of Justice at the initiative of the court president (Article 24, paragraph 1 of the LJC). This should be the autonomous competence of the JC, at the initiative of the court president.⁵³

4.3.3 *Adoption of Internal Organisation and Systematisation Act in courts*

4.3.3.1 The change of the Law on Courts (Article 84, paragraph 4 of the LC) which would imply that instead of the Government the JC should approve this act did not actually happen.⁵⁴

The Law on JC should prescribe for the Council to determine the number of judges and lay-judges upon the initiative of court presidents, and also to give the approval to the Labour Force Plan of the court president instead of the Government.

4.3.4 *Deliberation of annual reports and appraisal of court performance*

4.3.4.1 Through its annual report the JC includes also the data on the description and analysis of the situation in judiciary, on the number of received and closed cases within a year, problems and deficiencies, as well as the measures that need to be undertaken to rectify the deficiencies (LJC Art. 26). The Council determines the methodology for drafting the reports on the performance of courts (Article 23, item 9). See item 8.2 below for recommendations on how to enhance methodology of annual reporting.

53 High Judicial Council of Serbia determines the referential criteria for determining the number of judges in courts of general and specific jurisdictions (see www.vrhovni.sud.srbija.yu, work reports), High Judicial and Prosecution Council of BiH following the Law on HJPC of BiH Art. 17 bullet items 22 and 25 sets the criteria for the assessment of the work of judges and prosecutors and determines the required number of judges and prosecutors.

54 International experts from BiH suggested that the JC should adopt the Systematization Act with the labour force plan in courts, *Judiciary Reform in Montenegro – experiences of Bosnia and Herzegovina*, 2007, p. 44.

4.3.4.2 The General Conference of the Supreme Court is competent to deliberate the issues related to the work of courts, implementation of laws and other regulations and the exercise of judicial power, and when the Supreme Court deems it necessary it reports to the Parliament thereof (LC Art. 27, item point 2). This competence of the General Conference of the Supreme Court is justified and does not overlap with the competences of the JC, but we also believe it to be appropriate for the supreme judicial power to inform the general public directly, when it deems necessary, and in that sense, the Article 27, paragraph 2 of the LC should be amended. In both cases it is important to follow the principle of transparency of work of the given institutions.

The Law on Courts should envisage for the General Session of the Supreme Court to inform the Parliament, but also the public on the issues related to the work of the courts, on the application of laws and other regulations, at least once a year (Article 27, paragraph 2).

4.3.5 Competences concerning education of judges

4.3.5.1 Pursuant to the Law on Education of Holders of Judicial Positions, the work of the Centre for Education is under the supervision of the JC which the Centre submits the annual performance report to. Care of the education of the holders of judicial positions (Article 23, item 5 of the LJC) comprises more direct influence in drafting the annual and special education programmes. In the Action Plan for the implementation of the Judiciary Reform Strategy the focus of the activities of the Council is on securing the participation of as large a number of the holders of judicial positions as possible in the programmes of education, as well as on securing special budgetary funds for education. The Law on Courts should prescribe the objectives of the mandatory initial education, since this would facilitate the supervision of the implementation of the same.

The Law on Courts should prescribe the objectives of the initial education, as a standardized form of formation and the compulsory nature of the initial education, with possible exceptions. It

is also necessary to prescribe the manner of keeping records on the attendance of all forms of education and professional development, which is necessary in order for the Council to be able to assess the extent of the criteria being met for promotion. Also, it should be expressly prescribed for the Council to secure special budgetary funds for education.

4.3.6 *Securing uniform application and sustainability of Judicial Information System (JIS) in the section related to courts*

- 4.3.6.1 According to the Action Plan for the implementation of the Judiciary Reform Strategy, the leaders of the implementation of the Judicial Information System (JIS) are the Ministry of Justice, the Development Secretariat and the Supreme Court, although, pursuant to the Law on Judicial Council, the JC “secures the application, sustainability and uniformity of the Judicial Information System in the part related to courts” (Article 23, item 4).
- 4.3.6.2 Priority should be given to entering the decisions of the Supreme Court, the Appeal Court, the Administrative Court and of the higher courts in particular into the database, in order for them to be accessible not only to judges, but also to the general public.

The Council would have to monitor the compliance with the envisaged deadlines for the implementation of the Judicial Information System (JIS), which also includes education, and to request relative periodic reports. It is of a high priority to insert judicial decisions in JIS database, in order to make them accessible to judges and the public.

4.3.7 *Competences concerning the court budget*

- 4.3.7.1 A separate court budget to be proposed to the Parliament directly by the JC which would be in charge of the supervision over its spending, is one of the key guarantees for the independence of the judicial power. However, the Constitution envisages that the JC only proposes to the Government the amount of funds for the

work of courts, and this provision is inadequately elaborated in laws.

- 4.3.7.2 The Law on Courts contains the addition to the constitutional provision only in the sense that the means of work are contained in a separate line in the budget of Montenegro (Art. 110). Surprisingly, the LJC fails to elaborate this significant competence of the JC concerning the court budget, but focuses solely on the issue of financial resources needed for the operation of the JC which is provided as a separate item of the state budget (Art. 73), although the Action Plan envisaged that this Law would “regulate the manner of planning, proposing and managing the budgetary resources needed for the operation of judicial bodies”⁵⁵
- 4.3.7.3 The JC President is entitled to participate in the work of the session of the Parliament where the budget of the courts is discussed (Article 110, paragraph 4 of the LC). The proposal of the HRA was more specific - that the JC President explains the proposal of the budget of the courts, in case of the disagreement with the Government (item 4.2, page 38).
- 4.3.7.4 International experts concluded that, regarding its impact on the judiciary system, the budgetary process constitutes the single most important instrument for the executive and the judiciary, as well as that denying the provision of adequate financial resources may constitute improper influence on the judiciary. Montenegro was recommended that the LJC should expressly envisage the following competences of the JC:⁵⁶
- prepare the draft budget for each court;
 - prepare the overall budget for all courts;
 - negotiate the draft budget with the Government, as represented by the MoJ or the Ministry of Finance;
 - present the budget directly to the Parliament;
 - supervise budget execution (via the state treasury);
 - decide on the reallocation of budgetary resources among courts during a budget year.

55 Action Plan for the implementation of the Judicial Reform Strategy, I Strengthening independence and autonomy of the judiciary, measure 5. “Ensure greater autonomy in determining the item in the budget for the judiciary”, p. 6.

56 *Judiciary Reform in Montenegro – experience of Bosnia and Herzegovina*, 2007, item 1.3.8, p. 44.

The Law on JC should specifically provide for the competences of the Council with regards to the drafting of the budget of the judiciary, monitoring its execution and deciding on the re-allocation of budgetary funds among courts during a fiscal year. In case of disagreements with the Government, the Law should make it possible for the JC President to present the Draft Budget of the Judiciary in the Parliament.

4.3.8 Normative activity

4.3.8.1 Law on Judicial Council also envisages the normative competences of the JC, seen in giving opinions to draft laws and bylaws in the area of judiciary and initiating the enactment of relevant laws and regulations. The divided competences with the MoJ have been established in the relation to the Judicial Rules of Procedure and the referential criteria on the required number of judges and state servants and employees. In addition, the JC drafts the Code of Ethics to be adopted by the Conference of Judges. JC independently sets the methodology for reporting on performance of judges and the annual work schedule, which according to the current Judicial Rules of Procedure was one of the competences of the Chief Justice and was given in the form of an instruction. Methodologically speaking, it needs to be decided which data are subject to internal analysis (data on individual performance of judges), and which data are to be made public (as a rule, only the data on the operation of courts).⁵⁷ The adopted legislative provisions, except in relation to the Judicial Rules of Procedure, are in accordance with the HRA Reform Proposal (item 4.2, p. 39-40).

4.3.8.2 The regulation of competences of the JC in prescribing *the criteria and procedure for the regular appraisal of the performance of judges* is missing. These criteria are logically linked with the monthly or annual workload allocations. To that effect, the proposals of the HRA were contained in the item 4.2 of the Reform Proposal refer-

⁵⁷ The Action Plan envisages as one of the competences of the JC the adoption of the Guidance on Keeping Statistical Data in all judicial bodies, to give an overview, objective criteria and indicators to assess performance of judicial bodies. It remains unclear whether it implies one and the same or different acts. In any case, they need to be linked, having in mind that statistical monitoring is related to the data for which there is a harmonized legal interest (for instance, increase or decrease of crime in certain areas).

ring at the same time to the general acts of judicial councils in the region.

- 4.3.8.3 Since judge appraisal criteria are decisive in the appointment of judges to superior courts, it should be borne in mind that it is legally and technically proper for this matter to be regulated by a separate act, and not the Rules of Procedure whose content should only be limited to the organisational and operational arrangements. The same approach was adopted for the general acts in the region.

The Law on JC should extend the competence of the Council in relation to the adoption of general acts which establish the criteria for the assessment of work of judges and courts and so on.

4.3.9 Necessary improvements for performing the judicial function

- 4.3.9.1 In item 4.2.1 of the Reform Proposal, the HRA indicated the necessity to improve the conditions for performing the judicial function related to the competences of the JC. The Action Plan envisages that different bodies be entrusted with various promotions. The practice of treating these issues separately in budgeting and annual reporting should be established and formalised. This would avoid dealing with these vital issues sporadically.

The JC should plan budgetary funds for the operations of the courts having in mind the information on all the needs of the courts for the improvement of working conditions: technical equipment, provision of regulations and professional literature, Internet connection for each judge etc.

4.3.10 Appointment of the Judicial Council Secretariat Director and competences of the Secretariat

- 4.3.10.1 The Chapter VIII of the LJC leads to the conclusion that the proposals related to the organisational independence and functional competence of this body (item 4.2.2 of the Reform Proposal) have been adopted.

The appointment of the Director of the Secretariat by the Judicial Council, upon the proposal of the Council President, must be harmonized with the Law on Civil Servants and Public Employees, which provides for mandatory public competition (Article 33, paragraph 1, *Official Gazette of Montenegro*, no. 50/08).⁵⁸

- 4.3.10.2 The LJC prescribes the competences of the Secretariat solely in principle, at which the expressly prescribed keeping of the centralized personnel records of judges, and other records necessary for the deliberation of the Council is missing. The Law should prescribe mandatory data which records should be kept on and specify which of them are to be considered confidential (see Reform Proposal, item 4.2 and item 4.2.2, item c.).⁵⁹

The Law should explicitly prescribe and specify the competence of the Secretariat in relation to the keeping of centralized judges' personal records, contents of the same and of other records.

4.4 Extension of competences with regards to appointment of Chief Justice, Judicial Council's President and judges of Constitutional Court

- 4.4.1 Having in mind that the Venice Commission found as justified the political appointment of the Chief Justice as a transitional solution,⁶⁰ it is necessary extend the competence of the JC in an timely manner

58 See, for instance, the Article of the Law on HJPC BiH: "Director and Deputy Director (of the Council) are appointed by the Council, in accordance with the provisions of the Law on Public Service in the institutions of Bosnia and Herzegovina."

59 The LJC in the Article 23, item 6 prescribes solely for this body to keep the records on judges. Contrary to the Law, the Action Plan for the implementation of the Judiciary Reform Strategy refers to normative arrangement and establishing of the central database on appointment, assessment and advancement of the holders of judicial positions; the records on conducted disciplinary proceedings, dismissals and cessation of function; the records on Code violation; establishing and updating of the employees data, the records on citizens' complaint filed.

60 The Venice Commission opinion on the Constitution of Montenegro, item 90, translation published in the book "International human rights standards and constitutional guarantees in Montenegro," *Human Rights Action*, Podgorica, 2008.

with regards to the appointment of the Chief Justice (as it has been proposed in the item 1.2.1.3) and the appointment of the JC President (item 2.2.1.1). Apart from that, it is also necessary to reform the composition of the Council and the manner of appointment of its members so as to improve the guarantees of its independence.

4.4.2 The HRA proposed the amendments to the Constitution in relation to the procedure of the appointment of judges and the President of the Constitutional Court, since this procedure is also under the exclusive influence of politics. The judges and the President of the Constitutional Court are appointed by the Parliament with the majority vote of all the MPs, upon the proposal of the President of Montenegro.⁶¹ The following recommendations of the Venice Commission have not been respected:

- for the right to proposing candidates for Constitutional Court judges to be entrusted to the JC, the Parliament and the President of the State;
- for judges to be appointed in the Parliament by the qualified majority (which would also ensure the participation of the opposition in decision making);
- for the President of the Constitutional Court to be elected by the judges themselves.⁶²

The competence of the JC should be expanded with regards to the competence for the election and dismissal of the Chief Justice and of the JC President, as well as in relation to making proposals to the Parliament for the election of the Constitutional Court judges. In both procedures, it should be envisaged for the Council, prior to the election of the Chief Justice, or prior to the proposals of candidates for the Constitutional Court judges, to request the opinion of the session of judges of these courts.

61 Articles 153, 81, 91 and 95 of the Constitution of Montenegro.

62 Opinion of the Venice Commission on the Constitution of Montenegro, items 183-186.

5. *Disciplinary offences and reasons for dismissal of judges*

Permanence of judicial function, Constitution of Montenegro, Art. 121, para 2 and 3:

The duty of a judge shall cease at his/her own request, when he/she fulfils the requirements for age pension and if the judge has been sentenced to an unconditional imprisonment sentence.

The judge shall be released from duty: if he/she has been convicted of an act that makes him/her unworthy of the judicial duty, if he/she performs the judicial duty in an unprofessional or negligent manner or loses permanently the ability to perform the judicial duty.

Negligent exercise of a judicial function, Law on Courts, Official Gazette no. 22/2008, Art. 33a:

It shall be deemed a judge is negligent of his/her judicial function if without a justified reason he/she:

1. *fails to take cases in the order of registration;*
2. *fails to schedule sittings or hearings in cases allocated to him/her;*
3. *is tardy in attending sittings or hearings scheduled;*
4. *prevents supervision by the immediate superior court,*
5. *fails to attend meetings of judges or court departments;*
6. *is absent without leave;*
7. *and in other cases when the law envisages certain actions or omissions as negligent performance of a judicial function.*

Damaging the reputation of judicial function, LC, Official Gazette No. 22/2008, Art. 33b:

A judge is damaging the reputation of a judicial function in particular if he/she:

1. *appears at work and contacts the parties in a condition that makes him/her unfit to perform the judicial function (e.g. intoxicated, under the influence of narcotics);*
2. *causes disorder in a public place.*

Disciplinary responsibility, Law on Judicial Council (LJC), Art. 50

A judge is disciplinary responsible if negligent in the exercise of judicial function and if it is damaging to the reputation of the judicial function in cases envisaged by law.

Disciplinary measures, LJC, Art. 52

1. *The disciplinary measures are a warning and a salary reduction.*
2. *The salary may be decreased up to 20% for the duration of 6 months maximum.*

Suspension from duty, LJC, Art. 69.

A judge shall be suspended from duty if he/she is sentenced to detention, while the detention lasts or if the investigation against him/her has been initiated for an activity which makes him/her unfit for the performance of the judicial function.

A judge may be suspended from duty after the JC has made a decision to initiate proceedings for dismissal.

The suspension procedure is regulated by provisions of Art. 63-68 of the Judicial Council rules of Procedure (JCRP) and may be initiated pursuant to the motion of an authorised proponent which needs to be composed in writing, as well as by the JC ex officio. The suspension proceedings is envisaged as urgent, which implies that the JC is obliged to decide on the suspension request without delay, and not later than 8 days since the reception of the request for suspension as envisaged by provisions of Art. 65 para 2 of the JCRP.

5.1 Negligence in the exercise of judicial duty

- 5.1.1 The Law on Amendments to the Law on Courts (from April 2008) missed the opportunity to expressly define the obligations of judges the violation of which would constitute non-conscientious and negligent exercise of the judicial function or the acts that harm the reputation of judicial function. Pursuant to the principle of legality, in order to impose appropriate sanctions, it is necessary to establish whether any and which among the obligations stipulated by law the judge failed to perform.⁶³ Although the amended LC states that a judge is negligent in the exercise of the judicial function “also in other cases when envisaged by law that certain acts or omissions of a judge constitute negligent performance of a judicial function” (Art. 33 a, bullet point 7), *neither this nor any other law* specifically envisages other instances in which a judge is considered to be negligent in performance of his/her function, or makes a disciplinary offence. This enables arbitrary and imbalanced punishing of judges (see also item 6.2.4.4).
- 5.1.2 Although the Judicial Code of Ethics envisages that the Code violation constitutes the grounds for instigating disciplinary proceedings and dismissal proceedings, in accordance with the Constitution and the law (Art. 14, para 6), the Code does not have legal strength and may not be brought in connection with the quoted provision of Art. 33 a, item 7 of the LC, but the law needs to explicitly stipulate that the Code violation constitutes negligent or unconscientiously exercise of

63 For example, *the Law on Judicial Service* of the Republic of Slovenia prescribes the actions, which represent the violation of judicial duties, or negligent exercise of judicial function in 27 items altogether (Article 81, paragraph 2).

the judicial function, that is the grounds for determining the disciplinary responsibility of a judge.⁶⁴

The new Law on Courts should define all obligations of judges the violation of which means unconscientiously and negligent performance of judicial function and contempt of judicial function. The Law should expressly prescribe the violation of the Code which represents negligent or unconscientiously performance of judicial function, i.e. the contempt of judicial function.

5.1.3 Art. 33a of the LC should be amended so as to envisage the existence of a violation of judicial discipline if a judge is negligent in the exercise of the judicial function, in addition to the above instances, also when he/she:

5.1.3.1 *exceeds the statutory deadlines for delivering judgements and other rulings without justified reason;*

Although the procedural and other legislation envisages that pronounced judgement needs to be written and dispatched within one month upon its pronouncement, or exceptionally within 2 months⁶⁵, as well as that a judge is obliged to inform the court president in case s/he exceeds such statutory deadlines, and the court president to undertake measures for the judgement to be written as soon as possible, but acting in contradiction to this provision does not lead to any sanction either for the judge or the court president.

5.1.3.2 *causes severe infringement of the relations within the court which are substantial for the exercise of the judicial function;*

5.1.3.3 *fails to fulfil mentoring duties and obligations for professional development of trainee judges;*

It is possible that the work of judicial councils will be obstructed due to the unjustified rejection of a judge to participate in the work of the councils, thus it is necessary to sanction such behaviour.

64 The Conference of Judges, at its session held on 26.07.2008, adopted the Judicial Code of Ethics which sets forth the ethical principles and rules of conduct that judges need to adhere to in order to preserve, promote and enhance the dignity and the reputation of judges and judiciary. The Code of Ethics sets independence, impartiality, knowledge, professionalism, and equality, responsibility and integrity and decent conduct as fundamental principles. Art. 14 envisages that judges are obliged to observe the Judicial Code of Ethics and that everyone shall have the right to indicate the conduct of any judge contrary to the Code. The JC shall establish the code violations and keep records thereof in the personal file of the judge. Code violation constitutes grounds for instigating disciplinary proceedings or the dismissal proceedings as stipulated by the Constitution and the Law.

65 Art. 368 of the Code of Criminal Procedure and Art. 340, para. 2 of the Code of Civil Procedure

5.1.3.4 *fails to fulfil the obligations of own professional development and training;*

The Law on Education within the Judicial Bodies regulates the method and forms of education for judges and state prosecutors, holders of the judicial office, as well as the persons preparing for the exercise of the judicial function. However, neither this nor any other law sanctions the violation of judge's obligation for professional development and training.⁶⁶ The education programme for the holders of the judicial office includes the familiarisation with most relevant areas of international law, international standards and recommendations, including the EU law and the international human rights standards, which already make part of or will become sources of law, and need to be known the same as national legislation. Without professional development it is not possible to apply international standards and the necessity to sanction failure to fulfil this obligation is only understandable.⁶⁷

5.1.3.5 *unexcused absence from work - the quoted provision of Art. 33a states only "absence from work" without the stipulation "unexcused";*

5.1.3.6 *fails to attain the expected work performance for more than 10 consecutive months without a justified reason;*

The 10 month timeframe constitutes the objectively needed interval in order for a judge to overcome possible difficulties caused by justified reasons, such as sickness, etc. and attain the work performance continuity.

"The expected results" must be prescribed within the shortest possible time in the form of the criteria for the assessment of the work of judges, which would constitute a new, objectively set quota for judges.

5.1.3.7 *fails to wear official attire in accordance with regulations*

The obligation for judges to wear the official attire - a toga - in trial is envisaged by Art. 125 of the LC, but there are no sanctions envisaged for violations. In practice, this provision is violated when

⁶⁶ The Code of Judicial Ethics prescribes the right and obligation for a judge to continuous professional development and training (Article 5) which comprises the participation in offered professional programmes, as well as that the violation of the Code constitutes the basis for the initiation of the disciplinary proceedings or the proceedings for the dismissal of judges, in accordance with the Constitution and the Law (Article 14).

⁶⁷ In this sense, see also the Article 81, item 25 of the Law on judicial service of the Republic of Slovenia.

the trial is held in offices, as places totally unsuited for court trials, instead in courtrooms, which are in scarce supply.

5.2 Damaging the reputation of judicial office

5.2.1 The LC (Art. 33b) also envisages that a judge harms the reputation of judicial office “*in particular if...*”, implying that there are other ways in which it is possible to harm the reputation of the judicial office which are not expressly stipulated. Such a shortcoming in the legal regulation enables arbitrariness in assessing the reasons for dismissals by the court president or the JC, which needs to be rectified by urgent enactment of the new LC to provide more details in this respect and referred to the Code of Judicial Ethics in relation to the interpretation of certain behaviours.

5.2.2 Art. 33b of the LC should be amended so as to envisage the violation of judicial discipline exists if a judge harms the reputation of judicial office, in addition to the cases above and in cases when a judge:

5.2.2.1 *behaves improperly, impolitely and indecently in public;*

Art. 9 of the Code, Dignity of Judicial Office, envisages that a judge is obliged, in the exercise of the judicial function and outside the court, to develop standards of conduct which contribute to the reputation and dignity of the court and judicial office. This is yet another provision which refers to the necessity of sanctioning, in addition to public disturbance, also the above forms of conduct of judges in the public. A judge needs in all forms of his/her public conduct to refrain from any behaviour which might damage the reputation of the judicial function and must not allow public manifestation of any form of rude or uncivil conduct.

5.2.2.2 *behaves rudely or impolitely towards the parties and other participants in the proceedings and if failing to prevent such behaviour from others under his/her control in the proceedings led by him/her;*

Procedural laws (Art. 306 of the Code of Criminal Procedure and Art. 178, para 2 of the Code of Civil Procedure) envisage the obligation of the court to protect own reputation, the reputation of parties and other participants to the proceedings against any insult, threat or other form of assault. A judge is obliged to sanction such behaviour by a warning, request to leave and a fine. This is another provision whose violation on the part of judges is not sanctioned by any law.

- 5.2.2.3 *receives gifts and other gains related to the judicial function;*
- 5.2.2.4 *uses hate speech, both when performing his/her function and in public;*
- 5.2.2.5 *discloses information obtained in the performance of the judicial function to any purposes other than for the actual exercise of the judicial function;*
- 5.2.2.6 *uses or transfers to others the prestige of the judicial office to pursue own interests or interests of the members of his/her family or any other person, or by his/her conduct leaves the impression that anyone may influence a judge in the execution of the judicial function;*
- 5.2.2.7 *fails to refrain from any action which is improper or leads to such perception, as well as any action which causes distrust, incites suspicion, weakens confidence or in any other way damages the reputation in the court and his/her impartiality;*
- 5.2.2.8 *fails to resist threats, blackmails and other attacks on his/her personality and integrity;*
- 5.2.2.9 *is not able to resist political influence, public opinion, bias (in particular in relation to prohibited grounds of discrimination), temptations, vices, passions, private and family interests and other internal and external influences;*⁶⁸
- 5.2.2.10 *frequents places of improper reputation.*

The new Law on Courts should specify the list of conducts which constitute the violation of reputation of judicial function, and refer to the Code of Judicial Ethics in relation to their interpretation, in order to render impossible arbitrary and imbalanced punishment of judges.

5.3 Serious disciplinary offences

- 5.3.1 The new legislative provisions did not accept the previous HRA proposals regarding the stipulation of serious disciplinary offences to constitute also the reason for dismissal and suspension of a judge from his/her duty (item 5.2.3 of the Reform Proposal).

⁶⁸ Most of these forms of behaviour are contained in the part of the Code entitled "Honour and incorruptibility" Article 8; "Dignity of judicial profession", Article 9; "Relation with public and media", Article 12.

5.4 Disciplinary responsibility and dismissal of court president

- 5.4.1 The Law on the amendments of the Law on Courts 2008 missed the opportunity to amend the provision on the Responsibility of Court President pursuant to the item 5.2.4 of the reform Proposal. It has still not been envisaged the responsibility for the failure to initiate a disciplinary proceedings, for the failure to perform or untimely performing of the activities of judicial administration, etc.
- 5.4.2 Regardless of the provisions relating to the cessation of judicial office, the establishment of disciplinary responsibility and dismissal of judges applying accordingly to court presidents as well, with the exception of the Chief Justice (Art. 72 LJC), separate provisions of the disciplinary responsibility and dismissal of court presidents need to be stipulated as well, bearing in mind the specifics of his/her duties and responsibilities.

The Law on Courts, Article 95 “Responsibility of Court President” should be amended in such a way that the reasons will be supplemented and specify for the initiation of the proceedings of disciplinary responsibility, and the proceedings for the dismissal of court presidents. In that sense, former proposals from the item 5.2.4 of the Reform Proposal should be supplemented with the following wording: “does not decide within legal deadline on control requests”, which constitutes a sanction for the breach by the court president of the obligation envisaged by the Law on Protection of the right to a Trial within Reasonable Time (Articles 6 and 20).

5.5 Suspension from duty

5.5.1 Urgency of proceedings

- 5.5.1.1 The interpretation Art. 65, para 2 of the Rules of Procedure may lead to the conclusion that the 8 day interval for the decision of the JC on the request for suspension of a judge refers only to the suspension cases instigated as per motions of authorized proponents, but not to the cases when the JC decides *ex officio*, i.e. when

a dismissal proceedings has been instigated. Such an interpretation was confirmed in practice since the JC with its decision Su. R. br. 216-1/08 of 06.08.2008, on the same day suspended a judge against whom the dismissal proposal was submitted on 01.07.2008. Such regulative provisions and practice prejudice the provision of Art. 65. Para. 1 of the JCRP stipulating that the suspension proceedings are an urgent one. Without setting the deadlines for the attainment of urgency in suspension proceedings it is not possible to make a distinction between the suspension proceedings and any other proceedings with no stipulation of urgency.

The Law should prescribe that the proceedings of temporary suspension of a judge is a summary one, and the obligation should be prescribed for the Council to decide on temporary suspension of a judge within 8 days, both in the cases of mandatory and optional suspension. The delay in passing such a decision enables the creation of legal uncertainty.

5.5.2 *Reasons for suspension in law and in practice*

5.5.2.1 In dismissal proceedings against three judges of Basic Courts in Podgorica and Bar, against all three of them the JC on 06.08.2008 passed the decision of their suspension, invoking the provision of Art. 69, para 2 of the LJC, that a judge may be suspended after the JC has accepted the motion to instigate dismissal proceedings. The indication “may” does not mean that the suspension decision is adopted in each instance when the JC accepts a motion for instigating dismissal procedure, nor does it mean that the JC is not obliged to justify such a decision with specific reasons. The application of Art. 69, para 2 by the LC from the very start indicates the ambiguity and imprecision of the quoted legislative provision. The JC did not state the reasons for suspension in any of the three stated suspension decisions. The rationale of the decision Su.R. br.216-1/08 of 06.08.2008 on a suspension of a judge states: “Having accepted the motion for instigating the dismissal proceedings of the judge, the JC finds that the reasons as stipulated by Art. 69 para 2 of the LJC for suspension of a judge are fulfilled.” There is no mention of the reasons the JC deliberated in passing the decision of suspension. It stems from the above decision that with the exception

of the condition of having in the specific case accepted the motion for dismissal, there is no other reason justifying the suspension measure. Such a case is the confirmation of the necessity for the given provision to be amended and made more precise which reasons the JC is to assess when passing the suspension decision in cases when the Law envisages that the JC may, but does not have to pass such a decision. Art. 64 of the Rules of Procedure stipulates that the provisions on the disciplinary proceedings apply accordingly on the suspension procedure. Pursuant to Art. 57 of the JCRP the decision of the Disciplinary Commission must be justified. With a view of the above and the fact that the suspension decision is a final administrative act, which is nullified if not followed by a rationale, it is evident that the reasons for its adoption need to be clearly stated.⁶⁹

- 5.5.2.2 In more recent practice, in dismissal proceedings against a judge, JC passed a suspension decision against a judge on maternity leave at the time, which is in contravention to the constitutional provision of special protection of women, mother and child (Constitution, Art. 73).

Article 69, paragraph 2 of the Law on Judicial Council should be supplemented with specification of reasons the Council should evaluate when deciding on a temporary suspension of a judge. The Law should prescribe for the decisions of the Council on temporary suspension to have compulsory rationales, as well as that a lady judge at maternity leave may not be discharged, nor can against her be initiated any disciplinary proceedings, or dismissal proceedings.

5.6 Reasons for dismissal of a judge

5.6.1 General remarks

- 5.6.1.1 Constitutionally envisaged dismissal reasons are insufficient and enable arbitrary application. This is especially visible in relation to “unprofessional and unconscientious” performance of judicial function, which has not been defined in the Law.

⁶⁹ See, for instance, the Article 31, paragraph a of the Law on State Judicial Council of the Republic of Croatia.

5.6.1.2 It is quite absurd that the conviction of a judge for an act that makes him/her unfit for the exercise of the judicial function is stipulated as a reason for dismissal, while the same has not been prescribed as an impediment for the appointment of a judge, since the LC in its Art 31 does not envisage existence of prior conviction for such a criminal offence as one of the general conditions for appointment of judges.

5.6.2 Unprofessional and negligent exercise of the judicial function

5.6.2.1 It also necessitates specifying cases in which there is unprofessional and unconscientious performance of judicial function, at which obvious lack of professionalism and negligence at work must be emphasized. The Law on Courts must elaborate the notions of the lack of professionalism and negligence and link the same to the criteria for the assessment of results achieved by judges, which also need to be adopted. For instance, it should be specified in which cases the failure to act within legal deadlines leading to the statutory limitations will be considered the basis for disciplinary sanctions, and in which ones for the dismissal of judges.

5.6.2.2 The HRA proposed that the unprofessional and negligent exercise of the judicial function must take account of the manifest unsatisfactory level of competence or negligence of a judge which affects the quality of his/her work, as well as the manner in which it should be made more specific (Reform Proposal, item. 5.2.6.1), something to be borne in mind in enactment of the LC.

The Law on Courts should specify Constitutional concepts of „unprofessional and negligent performance of judicial function” (see Reform Proposal, item 5.2.6.1). The concept „unprofessional” should be linked to the criteria for the assessment of the work of judges, which are yet to be adopted. It should also prescribe for former conviction record for an act of crime making a judge unworthy of judicial position to constitute a hindrance for the appointment to a judicial position.

5.6.3 *Permanent loss of business capacity*

- 5.6.3.1 The proposal has been adopted of the HRA that upon the dismissal proposal, on the grounds of permanent loss of capacity for the exercise of the judicial function, the JC shall procure the opinion of the competent authority (LJC, Art. 65, para 2). This is a useful and needed novelty, since it is only pursuant to the enforceable decision of the court or the competent authority on withdrawal of business capacity of a judge that a justified decision may be made. However, we still believe that permanent loss of business capacity should be listed among the reasons leading to the cessation of function, and not to the dismissal from function.

Permanent loss of ability for the performance of judicial function should have been classified by the Constitution among the reasons for the cessation of judicial function, and not for dismissal.

6. Procedure and decision-making of the Judicial Council and remedies against its decisions

The JC shall conduct the appointment and dismissal procedure for judges and court presidents, with the exception of the Chief Justice, the procedure for the establishment of disciplinary responsibility and suspension. The procedures are envisaged by the LJC and the JCRP.

The JC decides with the majority of votes of all JC members (LJC Art. 19, para 3; JCRP Art. 22, para 4), while the sessions may be held if majority of JC members are present (LJC Art. 19, para 2).

In the procedures of disciplinary responsibility of judges, the Minister of Justice does not cast votes (Article 128, paragraph 3 of the Constitution). When deliberating on the responsibility of judges it is not possible for the proponent, the members of the Disciplinary Commission and the JC members for whom there are circumstances, which cause suspicion in their impartiality to participate, in the Disciplinary Commission and in the JC.

The JC President decides on the exception from the paragraph 1 and the JC decides on his/her exception (Article 59 of LJC).

There is the right of objection: against the decision of rejection of an untimely or incomplete application for the appointment to judicial post and against the decision on establishing the disciplinary responsibility (LJC, Art. 29, para 3 and Art.57).

JC decisions on the appointment, suspension and dismissal of judges are final and no administrative proceedings may be instigated against them (LJC, Art. 39, 60 and 70).

The procedure for establishing the disciplinary responsibility of judges is conducted by the Disciplinary Commission established by the JC for the period of one year. The Commission has got the Chair and two members with their substitutes. The Commission Chair and his/her deputy are appointed from among the JC members, and the members and their substitutes from among the ranks of judges who are not the JC members (Article 51 of the LJC). The Disciplinary Commission collects data and evidence for the examination of justification of proposals for the dismissal of a judge and submits the report to the JC (Article 64 of the LJC).

- 1. JC shall annul the decision on the appointment of a judge if it is proven that the judge at the time of appointment did not meet the appointment criteria, that is, if the JC receives the data which, if known at the time of appointment, would constitute the reason for the JC not to pass the decision of appointment.*
- 2. JC may postpone the date for the beginning of exercise of the judicial function in order to check the data referred to in para. 1 of this Art..*
- 3. If the JC annuls the appointment decision, it will appoint to duty the next candidate from the list or will repeat the appointment procedure (LJC, Art. 49).*

The actions undertaken and the decisions made by the judge whose appointment was annulled shall be null and void (LJC, Art. 71, para 2).

6.1 Current situation

6.1.1 With the provisions of the new Constitution, the JC was given full authority in the procedures for appointment and dismissal of judges (with the exception of the appointment of the Chief Justice), establishment of disciplinary responsibility, suspension and cessation of judicial function. The JC was constituted in April 2008, pursuant to the Constitution of October 2007 and the LJC of February 2008. By the end of 2008, JC elected 31 judges and 44 lay judges, passed decisions to suspend six judges, imposed disciplinary sanctions upon three and dismissed two judges.⁷⁰

6.2 Procedures in which Judicial Council decides

6.2.1 Legal technique

6.2.1.1 The procedures of the JC in the appointment, establishing disciplinary responsibility, suspension and dismissal of judges, as well as means of redress against the JC decisions are not fully stipulated by the LJC, but are to a great extent envisaged by the JCRP, which is not appropriate to the nature of this type of provisions and the sub-law level of the JCRP, and thus the Law should be amended accordingly.⁷¹

Basic rules of JC procedures, as well as the right to legal remedies against the decisions of the Council, should be prescribed by the Law, and not by the Rules of Procedure.

6.2.2 Disciplinary proceedings against a court president

6.2.2.1 The HRA proposals that each JC member should have the right to submit the motion for determining the disciplinary responsibility of court presidents for negligent work, aimed to improve the re-

70 Source: website "Courts of the Republic of Montenegro" (www.sudovi.cg.yu) and daily "Vijesti" of 27.12.2008, p.9

71 In particular the procedure for the appointment of judges (JCRP Art. 26-41); submission of complaints against a judge and acting upon complaints (JCRP Art. 42-45), disciplinary proceedings (JCRP Art. 46-59) and the suspension procedure (JCRP Art.63-68).

sponsible and professional work of the judiciary, were not accepted. Among the JC members, only the Chief Justice and JC chair have the right to submit the motion to determine the disciplinary responsibility of a judge, or court president (LJC Art. 54).

It should be prescribed for each JC member, and not only for the JC President, to be entitled to initiate a procedure to examine disciplinary responsibility of court presidents.

- 6.2.2.2 Since laws do not contain special provisions on disciplinary responsibility of court presidents, it is concluded that the same rules as for judges apply to court presidents, i.e. that “the motion for determining disciplinary responsibility may be submitted by court presidents, the president of the immediately superior court and Chief Justice”(LJC, Art. 54, para 2). Thus, it may be derived that the motion to instigate disciplinary proceedings against a court president may be submitted by the president of the immediately superior court and the Chief Justice. In the existing arrangement of the court system in Montenegro, it means that the president of Higher Court and Chief Justice may instigate disciplinary proceedings against a basic court president, while disciplinary proceedings against a higher court president, Commercial Court president, Administrative Court president and the Appellate Court president may be instigated only by Chief Justice. Considering that the Supreme Court of Montenegro is the highest court in the court system hierarchy, thus it is inferred that it is not possible to instigate disciplinary proceedings against the Chief Justice, since there is no eligible proponent.
- 6.2.2.3 It is inappropriate for the JC chair and Chief Justice to remain immune of any disciplinary responsibility. Thus, with a view of his/her appointment and dismissal, it is only ensured for the Chief Justice to be exclusively politically responsible to the contravention of the principle of independence of the judiciary.
- 6.2.2.4 HRA proposed to stipulate the authority for the General Session of the Supreme Court to launch the procedure to assess disciplinary responsibility of the Chief Justice, as well as for the JC members to be given the right to initiate disciplinary proceedings against any court president, since this is in line with the supervisory role of this body.

The procedure should be prescribed for establishing disciplinary responsibility of the Chief Justice and of the JC President. The General Session of the Supreme Court should also be authorized to initiate such a procedure. In this way, the solution according to which the Chief Justice and the JC President is accountable solely to the ruling politicians (President of the State, the Speaker and the Prime Minister, i.e. Parliamentary majority) would be partly mitigated.

6.2.3 *Annulment of the decision on the appointment of a judge and nullity of actions and decisions of judges whose appointment was annulled*

- 6.2.3.1 The HRA proposal that the JC should have the right to annul the decision on the appointment of a judge should it receive information, following the decision, that the data taken into consideration during appointment were false. This proposal was incorporated in LJC, Art. 49, while Art. 71, para. 2 of the same law envisages that all actions and decisions of the judge whose appointment has been annulled shall be null and void.

For the reasons of legal certainty, the Law on Judicial Council (Article 71, paragraph 2) should be amended so that actions and decisions be annulled solely of the judge whose election has been made void because he/she had not met general requirements for the election (citizenship; general medical conditions and business ability; Law School degree; passed judicial examination - Article 31 and 32 of the LC). This even more so when one has in mind that this provision is applied to the acts and actions of the judge whose election is made void by the Administrative Court, and not only by the Judicial Council. The Law should specifically emphasize that the administrative dispute against the election decision is a summary one.

6.2.4 *Proposals to enhance fairness of procedure of appointment, establishing disciplinary responsibility and dismissal of judges*

6.2.4.1 The greatest part of the HRA proposal related to fairness of the procedure have been incorporated in regulations adopted in the meantime by deleting the relevant provisions from the LC,⁷² in order to provide for more complete regulation of the matter in LJC and JCRP.

6.2.4.2 The following HRA proposals have been accepted:

- to ensure in disciplinary proceedings the appropriate application of the provisions of the Code of Criminal Procedure (JCRP Art. 46);
- to submit to the judge the motion for instigating disciplinary proceedings (LJC Art. 54. para 4. And JCRP Art. 50);
- to make a report of the deliberation and voting before the Disciplinary Commission(JCRP Art. 55 and 56);
- in the appointment the written decision with the rationale is submitted to all the candidates with a note on legal remedy (JCRP Art. 38, para 3, and Art. 39 - we believe this should be written in law, not the RP).

6.2.4.3 Although the proposal for the decisions on disciplinary responsibility to be submitted in writing with the rationale and the legal remedy advice has been accepted (JCRP Art. 56 and 57), it is not expressly stipulated that also the dismissal decisions need to be followed by rationale and contain the legal remedy note. In one case of a dismissal of a judge by the end of 2008, the Dismissal Decision did not contain the advice on legal remedy⁷³.

In practice, the need has been noticed for the Law on JC (Article 70) to prescribe as mandatory for the decisions on dismissing judges to contain legal remedies.

⁷² Law o Amendments to the Law on Courts (Official Gazette of MNE, no. 22/2008)

⁷³ Su. R. br. 367/08, of 01.10 2008.

- 6.2.4.4 The HRA proposal was not accepted that the disciplinary proceedings may be instigated only for the violation which when committed was stipulated as a violation, because the old provision was retained stating that a judge is disciplinary responsible when negligent of duty or harming the reputation of the judiciary office, where these forms of conduct are not exhaustively defined (negligence) or not expressly defined (harming the reputation), which leaves room for arbitrariness and unequal treatment in equal circumstances.
- 6.2.4.5 Neither the LJC nor the JCRP stipulate in what manner, following what procedure and criteria does the JC appoint the members of the Disciplinary Commission who are not the members of the JC (LJC Art. 51, para 3; JCRP Art. 11).

With the purpose of securing fairness of disciplinary proceedings, the Law should prescribe the composition and procedure of election of the Disciplinary Commission members.⁷⁴

- 6.2.4.6 The proposal for the disciplinary measures to be stricken from the records after the expiry of two or three years of their coming into force has not been accepted, although such practice exists in the region.⁷⁵

It should be prescribed for the disciplinary measures to be deleted from the records after the lapse of two to three years from the moment when the decision on the pronouncing the same had become effective, depending on the seriousness of the offence.

6.2.5 *Decision-making*

- 6.2.5.1 JC decides by majority vote of its ten members. There is no quorum stipulated for decision-making, but it is envisaged that ses-

74 HJPC BiH experts proposed the establishment of a separate office of the disciplinary prosecutor following the successful BiH model. Obviously, both the prosecutor and the staff would be elected by the JC following the procedure envisaged by law. Judiciary Reform in Montenegro – the experience of Bosnia and Herzegovina, Branko Peric, HJCP BiH president, Sven Marius Urke and Lynn Sheehan, HJCP members, and Therese Nelson, judicial reform consultant, September 2007, p. 41.

75 Warning punishment is deleted from the records ex officio two years as of the day of the decision on pronouncing the same going into effect, and the fine after the period of three years (Article 22 paragraph 4 of the Law on State Judicial Council of the Republic of Croatia).

sions may only be held if most of the members are present. There is no envisaged qualified majority in any instance, contrary to the HRA recommendations (Reform Proposal item 6.2.2).

- 6.2.5.2 The JC should make decisions by qualified majority of votes upon the proposal for the dismissal of its member, as well as on the appointment and dismissal of judges, i.e. court presidents.⁷⁶
- 6.2.5.3 With regards to the exception of the Council members, the Constitution envisages for the Minister of Justice not to cast vote when decision is made on disciplinary responsibility, which would mean that he/she may cast his/her vote when dismissal of a judge is being decided. The LJC mitigates such illogical solution by stipulating the provision whereby a Council member, including its President, may be excepted from voting in the proceedings for establishing responsibility of a judge whenever in relation to these “there are circumstances which cause suspicion regarding the impartiality.” We have no information as to whether the Minister of Justice cast his/her vote in the sole proceedings of the dismissal of a judge in 2008. The Rules of Procedure of the Judicial Council of Slovenia and the High Judicial and Prosecution Council of Bosnia and Herzegovina, for instance, elaborate the cases in which it is necessary to except a Council member from voting (kinship, conjugal relation, extra marital relation) both in the proceedings for establishing the responsibility of judges and in the procedures of the appointment of judges, or deciding on other issues.⁷⁷

The Constitution should have prescribed for the Minister of Justice not to cast vote in all the proceedings for establishing the responsibility of judges, and not only in disciplinary proceedings, thus the provision on the exception of the Law on JC (Article 59) should be applied in such a way that this shortcoming be compensated for. The provision should be expanded with the reasons for exception, like kinship, marriage and extra-marital relation,

76 The Judicial Council of the Republic of Slovenia, for instance, by means of a two-thirds majority adopts the Rules of Procedure, decides on the appointment, advancement and dismissal of judges, on the inclusion in certain payment class, adopts the criteria on minimum expected workload of judges and on the quality of work of judges for the assessment of the performance of judicial function, on the appointment of the JC President and his/her deputy (Article 9 of the JCRP, 11th September 2008).

77 Article 10 of the JCRP, of 11th September 2008; Article 6, item 4 of the HJPCRP BiH, cleaned up text from 2007: <http://www.hjpc.ba/intro/pdf/PoslovnikVSTVBiH.pdf>

and it should be expressly prescribed for the exception not to be applied in the procedure of the election of judges. It should be prescribed for the Council member not to be able to participate even in the hearing of the issues in relation to which he/she has been exempted from voting.⁷⁸

6.2.6 *Legal remedies*

- 6.2.6.1 The LJC establishes the system of legal remedies which enable legal protection of the participants in the procedure of appointment, disciplinary responsibility, suspension and dismissal before the JC.
- 6.2.6.2 As stated above, it is not envisaged that the decision on the dismissal of a judge must contain any advice on legal remedy, which is noticeable in practice.
- 6.2.6.3 The HRA proposal for the possibility of filing a *complaint* before the JC against the decision of the Disciplinary Commission (LJC Art. 57) and the JC decision to dismiss untimely and incomplete applications (LJC Art. 29, para 3) has been accepted.
- 6.2.6.4 The HRA proposals for the remedy against the final decision of the JC on establishing disciplinary responsibility and the appointment of a judge in the form of a complaint brought before the Administrative Court of Montenegro has been accepted (LJC Art. 60 and 39). The administrative dispute may also be instigated against the JC decision on suspension (JCRP Art. 66), but all provisions relevant for legal remedies should have been stipulated in law, and not the Rules of Procedure.
- 6.2.6.5 The proposals concerning the guarantees of the fairness of proceedings and legal remedies in cases of dismissal and appointment of judges have been accepted in principle (LJC Art. 70).⁷⁹ The law envisages that legal redress against the dismissal decision shall be exercised before the Administrative Court, while the HRA proposed for the redress to be exercised before the Constitutional Court since the grounds for the dismissal of judges are fully stipu-

⁷⁸ See Article 6, item 5 of the HJPCRP BiH.

⁷⁹ „According application of the disciplinary proceedings”. The provisions of this law pertaining to statute of limitation, exemption, redress and defence in disciplinary proceedings shall be applied accordingly to the dismissal proceedings.“

lated by the Constitution. Also, the Administrative Court can come into situation to act in the case of the conflict of interests.

Against the decision on the dismissal of a judge the right should be ensured to appeal to the Constitutional, and not to the Administrative Court, since the Constitution prescribes the reasons for dismissal and because the Administrative Court can be found in the conflict of interests.

- 6.2.6.6 The procedure for the appointment of judges envisages that the candidate is entitled to examine own and the documents of other candidates who have applied for the competition for the appointment of a judge (testing results, assessment of candidates and opinion of candidates) and submit the written opinion thereof to the JC within three days from having performed examination (LJC Art. 38). In practice, however, problems arise concerning the exercise of this right leading to the need to stipulate the examination procedure and the right of complaint to the JC in case of the examination being prevented from whatever reason.

The Law on JC (Article 38) should prescribe the right to objection to the Council in case of the right to inspection of electoral documentation is hindered for whatever reason; also, the deadline for the Council deliberation upon the objection should be prescribed.

- 6.2.6.7 Considering the effect of the annulment of the decision on the appointment of candidates (LJC, Art. 49, para 3 and Art. 71) the written statement or complaint should be linked with a specific deadline within which the taking oath process and assuming of office of the elected judges would be stayed. In other words, Art. 49, para 2 needs to be amended so as to oblige the JC to postpone the commencement of the exercise of the judicial function until the expiry of the deadline for the reassessment of the appointment decision. Otherwise, judges will be discouraged to reassess and challenge the legality of proceedings, and then initiate the administrative proceedings.

The JC must delay the date of the beginning of a judicial function in case it should obtain data which might lead to the annulment of the decision on the election of a judge, thus the Article 49, paragraph 2 of the LJC should be amended accordingly.

7. Transparency of operation of the Judicial Council

The work of the Judicial Council is, in principle, public (Art. 5 LJC and Art. 4 of the JCRP). The law envisages that the JC session deciding on the appointment (LJC Art. 35, para 4) and dismissal of judges (LJC Art. 66, para 3) is closed for the public. The JCRP envisages that the JC may decide to have other sessions closed for the public as well (Art. 4, para 2). Voting is public, but at the time of voting only the JC president and members may be present in the room in which JC is in session (JCRP, art. 22, para 3). As a rule, the minutes from the sessions are not available to the public, and the JC may decide for the minutes or parts thereof to be made available to the public (JCRP, Art. 21, para 6). Sound recordings of the JC sessions are not available to the public (JCRP, Art. 21, para 7). The draft agenda is publicized on the JC website before the session (JCRP, Art. 17, para 4).

A judge and a court president are appointed pursuant to a public announcement. The JC announces the vacant post of a judge or a court president in the Official Gazette and one of the print media (LJC, Art. 28, para 1 and 3). The application forms shall be available to candidates in the premises of courts, JC offices, at the JC website, as well as at other places as stipulated by the JC (JCRP Art. 29).

Candidates have the right to examine own documents and the documents submitted by other candidates applying for the judicial post, the results of written tests, assessment of each candidate and the opinion about each candidate... (LJC, Art. 38).

The appointment decision shall be final and must be justified (LJC, Art. 39 and JCRP Art. 37, para 3 and 4). The appointment decision is furnished by the JC to all candidates who applied, the competent court and the Ministry of Justice. The decision on the appointment of a judge is published in the Official Gazette of Montenegro and the JC website (JCRP Art. 39, paragraph 2).

The Decision of the Disciplinary Commission is submitted to the motion proponent, the judge whose responsibility is being assessed and the JC (LJC Art. 56). The disciplinary measures pronounced are published on the notice board and the JC web page, unless the JC decides otherwise (JCRP Art. 61).

In order to come up with the list of candidates for the appointment of JC members from among the judges of all courts (LJC, Art. 10, para 1, bullet point 2), the Chief Justice obtains from each judge and court president the initial proposal in the manner ensuring the secrecy of the initial proposal, and then compiles a list of eight candidates which have received the greatest number of nominations and submits it to the Conference of Judges (LJC Art.11, para 3 and 4).

7.1 General remarks

7.1.1 Assessing the judiciary system in Montenegro, the European Commission's Montenegro 2008 Progress Report states: "However, serious con-

cerns regarding the independence of the judiciary persist... Objective criteria such as professional capacity and integrity have been developed for appointment of judges and prosecutors, but assessment of the extent to which these criteria have been fulfilled remains within the sole discretion of the Judicial Council and the future Prosecutorial Council...” This justified concern could be significantly reduced should the JC make its work much more transparent than is the case at present.

- 7.1.2 In November 2008, the authors of this analysis required from the JC, pursuant to the Law on Free Access to Information, to render possible the examination of the representative samples of the appointment documents, of the establishing of disciplinary responsibility and dismissal of judges, a which from the copies of the documents candidates’ names would be erased, pursuant to the Law. In January 2009, we got the notification that our proposal would only be considered when the JC adopted the Guide on Access to Information in the Possession of the Council,⁸⁰ which had not occurred until 20 March 2009, when this text went into publishing.

7.2 Public sessions

- 7.2.1 The principle of the publicity of work of the JC, stipulated by the LJC, has been considerably diminished by the general authority, which it awarded itself by the JCRP, to be able to make each session closed for the public.
- 7.2.2 Contrary to the solution according to which the sessions at which the JC deliberates on the appointment and dismissal of judges are closed to public, the Croatian State JC deliberates on the appointment at public sessions, whilst the sessions at which the responsibility of judges is established may be opened to public upon the request of the judge whose responsibility is established.⁸¹
- 7.2.3 The exclusion of the public during voting appears to be superfluous when the session is open for the public, since it is envisaged anyway that as a rule the public is excluded when the JC decides on the appointment and dismissal of judges. The JCRP envisages public voting, and if the JC members may know how each of them cast vote, there is no justification for such information to be denied to the pub-

80 JC, Su. R. br. 653/08, of 30th December 2008.

81 SJCRP – manner of operation, Article 7, paragraph 3; Article 9 and Article 11.

lic in particular when it comes to public sessions. As a general rule, the publicity of work contributes to responsible and conscientious exercise of a function, as well as the increased public trust in the work of the reformed JC expected to act objectively and to improve the responsibility and independence of judges.

The authority of the Council, prescribed in the Rules of the Procedure (Article 4, paragraph 2), that the Council may close to public every its session, should be abolished. The procedures for establishing disciplinary responsibility and dismissal of judges should be made open to public upon the request of the judge whose responsibility is established, thus the Law on JC should be amended accordingly.

7.3 Judicial Council website and publication of documents

The JC does not have its own website, but the information relevant for the JC work are posted at the domain administered by the Supreme Court “Courts of the Republic of Montenegro” (www.sudovi.cg.yu), under the heading “News, Public Announcements”. The HRA proposed the establishment of a separate website for the JC, similar to the one of the HJPC BiH containing the following sections:

7.3.1 Applications of candidates for the judicial posts

- 7.3.1.1 It is not envisaged to post on the JC web page the applications of candidates for judicial posts, which was proposed by the HRA to enable the public to draw the attention to the JC on any possible false presentation of the data provided in the application which the JC, in accordance with its authorities, is able to check.⁸²
- 7.3.1.2 The LJC states that the announcement of vacant judicial posts will be published in the “Official Gazette of Montenegro and one of the print media”, while it is not envisaged to post the announcement on the website, which would contribute to better information of the interested prospective candidates. The public announcement

82 At its website the HJPC of BiH posts the names of all candidates applying as per announced vacant posts, and the names of candidates which were called for an interview for a specific post, see <http://www.hjpc.ba/home.aspx>.

for judicial office was published this summer in the daily “Pobjeda”, although the daily with the largest circulation in Montenegro is “Vijesti”, while “Pobjeda” has much lower circulation and is less read among the younger population.⁸³

- 7.3.1.3 The JCRP envisages that the application form should be posted on the JC website, which has not been done so far.

Special web-page of the JC should be launched where competitions for the election of judges would be regularly placed, where competition application forms could be found, as well as where the applications of earlier candidates could be found.

7.3.2 *Decisions on the appointment of judges and final decisions on disciplinary responsibility and dismissal of judges*

- 73.2.1 Decisions on the appointment of judges and lay judges are published in the Official Gazette of Montenegro and the JC website, and the decisions on establishing disciplinary responsibility are posted on the website, but without the rationale, although all decisions need to contain the rationale and it is not envisaged that it is possible to leave the rationale out upon publication.⁸⁴ Such a procedure is not in line with generally proclaimed publicity of the JC work, it does not contribute to increasing the public trust in the reformed JC, nor the aim of enhancing the responsible work of judges.⁸⁵
- 7.3.2.2 The JCRP envisages that the pronounced disciplinary measures are published at the JC notice board and the website, if the JC does not decide otherwise (Art. 61). The possibility left to the JC to deny the disclosure of information on pronounced disciplinary measures may lead to unjustified discrimination and thus the justification for this provision is not clear. The information on disciplinary offences pronounced against two judges (01.10.2008) was posted

83 The Working Group heard from several interested persons that for the above reasons they were not timely informed of the publication of the announcement for vacant judicial posts.

84 JCRP Art. 35, para 5, Art. 38, para 2, Art. 56.

85 HJPC BiH publicizes full decisions on: a) appointment, b) disciplinary responsibility, or c) dismissal of judges – see examples

a) <http://www.hjpc.ba/secr/app-dept/app-fin/>;

b) [http://www.hjpc.ba/pr/preleases/1/?cid=3982,2,1](http://www.hjpc.ba/pr/preleases/1/?cid=3982,2,1;);

c) <http://www.hjpc.ba/hjpcdec/discipl/1/?cid=3582,2,1>).

on the website, without the rationale which could give grounds to conclude what type of disciplinary offence constituted the grounds for punishment.

- 7.3.2.3 It is not stipulated to publish decisions on the dismissal of judges, which is an evident error, considering the obligation to publicize the decision on the appointment of a judge in the Official Gazette. The information of the JC decision to dismiss a judge was posted on the website (01.10.2008.), again without the rationale.

It should be prescribed for the decision on election, on disciplinary responsibility and on the dismissal of judges to be published on the JC website.

7.3.3 Reports on the work of the Judicial Council

- 7.3.3.1 The JC adopts and publishes regular annual JC Report not later than by 25th March of the current year. The report is posted on the JC website, it is published in the Official Gazette and presented at a press conference, it is submitted to the Parliament, the Government and the President not later than 31st March of the current year for the previous year.⁸⁶

- 7.3.3.2 JC also adopts the Action Plan (in cooperation with “relevant NGOs”), and every three months the JC Secretariat compiles a report with an explanatory memorandum on the Action Plan implementation and submits it to the JC. Such reports should also be posted on the JC website.

The Report on the work of the Council and the Action Plan should be published on the web-page of the Council.

7.3.4 Rules of Procedure and other bylaws passed by the Judicial Council

- 7.3.4.1 It is envisaged that the JCRP and other JC enactments are published only in the Official Gazette,⁸⁷ and all should, together with

⁸⁶ JCRP Art. 23, para 6

⁸⁷ LJC Art. 25, para 2.

the LJC, be posted on the website to be more readily accessible to the public.

- 7.3.4.2 The Judicial Code of Ethics and the Draft Regulation on Referential Criteria to Determine the Required Number of Judges, Civil Servants and State Employees in Courts was posted on the “Courts of the Republic of Montenegro” website.

7.3.5 Initiatives, annual assessments of the court system efficiency and other communications

- 7.3.5.1 The report under the heading “2007 - Overview of the Work of Courts in Montenegro” was posted on the Courts of the Republic of Montenegro” website, in the “Work Reports” column.

7.4 Reasoning of the decision to elect a judge

- 7.4.1 HRA was particularly insistent on the JC decisions on the appointment, disciplinary responsibility and dismissal of judges to be provided with a proper and meaningful reasoning, which is a requirement if wishing to have the opportunity for an effective legal remedy against the decision.
- 7.4.2 The reasoning provided in the JC decision to elect a Higher Court judge in Podgorica as of 01.10.2008 does not give such a justification which would clearly justify the appointment of certain candidates. The rationale does not indicate why the candidates with higher average mark than others were not elected for Higher Court judges, nor what led the JC to choose the specific candidate among several who had the same average mark.⁸⁸ There is an equally scarce rationale for the appointment of Basic Court judges as of 08.08.2008. The decisions on appointment of judges, as noted above, are published without a rationale, in the Official Gazette.

The adoption of decisions with appropriate details and precise reasoning and their publishing is of key importance for establishing the trust in the objective work of the Council.

88 Su. R. br. 357/08, of 1st October 2008

7.5 *Inspection of documents*

- 7.5.1 LJC envisages the right of each candidate to examine own documents and the documents of other candidates applying for the judicial post, the results of written tests, assessment of candidates and opinions about the candidates, but the procedure for the exercise of this right is not stipulated. Given that one candidate filed a complaint with the Administrative Court claiming he was prevented access to test results - the reviewed test - the procedure for the exercise of the right to examine documents needs to be detailed in line with the proposal from item 1.2.2.10.

It is necessary to specify the procedure of examining the appointment documents (see item 1.2.2.10.1).

7.6 *Reports to Judicial Council by court presidents and the Ministry of Justice*

- 7.6.1 Law on Judicial Council, Art. 27 “Relation between JC and Courts” stipulates the obligation on the part of courts to submit to the JC all the data and information from their jurisdiction, including the “direct insight into official files, documents, data, as well as to submit the copies of requested files and documents”. Failure to act upon the JC decision or request shall constitute negligent exercise of function (LJC, Art. 21, para 5). These provisions need to be made more detailed to ensure the independence and autonomy of judges, as proposed by item 4.2.2. There is no similar provision in relation to the Ministry of Justice. The separation of competences between the Ministry of Justice and the JC should be made more precise by the LC, as stated in item 4.1.7.

7.7 *Involvement of external associates and advisers in the work of the Judicial Council*

- 7.7.1 The proposal has been adopted for the external associates to be involved in the work of the JC, so that the LJC makes it possible for the Council to establish separate commissions and expert teams comprising of experts outside the JC (LJC, Art. 21 and JCRP Art. 12).

8. Referential quota and assessment of results of work of judges and courts

Regulation on the referential criteria for determination of the necessary number of judges and courts' employees has been adopted on 8 December 2008 by the Ministry of Justice (Official Gazette of Montenegro, no. 76/08).

According to the Law on Judicial Council (Art. 23):

The Judicial Council, apart from the competences established by the Constitution:

1. Exercises the supervision over the work of courts and judges;

...

8. Suggests referential criteria on the necessary number of judges and other civil servants and public employees in courts,

9. Establishes the methodology for drafting the report on the work of courts and the annual work schedule.

Survey of the work of courts (Annual report) for 2007 has been based on data selected in accordance with the provisions of the Rules of Court from 2004 on statistical data and databases on the work of courts and judges.

8.1 Regulation on referential criteria for determination of the needed number of judges and courts' employees

8.1.1 Ministry of Justice adopted a new Regulation on referential criteria for determination of the necessary number of judges and courts' employees in December 2008, acting upon the proposal of the Judicial Council.⁸⁹ The newly enacted Regulation has significantly increased the referential criteria (30% - 50%), which will be difficult to achieve in the current working conditions of judges.⁹⁰ Nevertheless, the existing system of determination of the necessary number of judges and employees in courts should be seriously reconsidered.

⁸⁹ New Law on Courts should prescribe that the Judicial Council alone adopts this Regulation or other act for determination of the necessary number of judges and court's employees and manner of evaluation of work results of courts and judges (see 4.3.2.1).

⁹⁰ Except if the court advisors would partially take in the work load, as no particular referential criteria was set for them.

- 8.1.2 HRA proposed in 2007 (Proposal of Reform, items 8.1 - 8.3) that orientation criteria (judicial norm), which evaluate the work performance on the basis of number of decided items and not on the amount of invested work, should be supplemented by standards for determination of complexity of cases and the amount of work required for processing them. Those criteria, based on the amount of working time needed for processing of particular type of cases, i.e. temporal criteria, would serve for the assessment of the performance of judges and for determination of the necessary number of judges and court employees. The Regulation on time criteria would have as a starting basis the available (effective) annual fund of working hours within which the number of cases to be concluded would be determined depending on the type and complexity. In this way the deficiencies of the current referential criteria would be eliminated, which enable abuse in the form of work on easier cases, neglecting and delaying the work on more difficult.
- 8.1.3 The method of assessment of performance of judges and courts and determination of the necessary number of judges are essentially connected due to the interdependence between the criteria for the assessment of the work of judges (fulfilment of the quota), total number of cases in the docket and the necessary number of judges in the court or in a state (Reform Proposal, 8.2.2). The necessary number of judges represents the relation between the number of cases and the judicial quota within one or more years:

$$\text{Necessary number of judges} = \frac{\text{Total number of cases}}{\text{Judicial quota}}$$

It is necessary that the Judicial Council in due time in cooperation with the Ministry of Justice determines a new system of temporal criteria (so called “ponder” system), which would as its basis have an available (effective) yearly fund of working hours within which one should determine the periods needed for the resolution of a particular type of cases in accordance with their complexity. In this way, one would arrive to the required number of cases that an average judge should be able to conclude and to the necessary number of judges. Such temporal criteria would be a part of the Regulation on the criteria for assessment of the work of judges (Reform Proposal, 8.2.3. and 8.2.3.1).

- 8.1.4 The Draft Regulation, beside the referential quota, increases the number of advisors (expert assistants), typists and other court employees, judges and the employed in courts.⁹¹ Until now, the number of advisors and typists has proved to be inadequate, which was obviously taken into consideration on the occasion of the adoption of the new RP, in line with the international recommendations which indicate that judges should be freed as much as it is possible from administrative work for which additional staff should be engaged.⁹²
- 8.1.5 Due to the fact that the RP was only adopted in December 2008, and that the appropriate number of advisors has not yet been employed in courts, the effect of these improvements is yet to be felt. Until now, many judges wrote letters to authorities and third parties themselves, or dictated them, typed judgements and rarely had the assistance of legally qualified associates with regards to the drafting of decision. The Judiciary Reform Strategy Action Plan⁹³ envisages that by the Third quarter of 2008 the JC, the Supreme Court and the courts of law will adopt the plan for freeing judges from the administrative work in judicial cases (more efficient use of expert associates and judicial interns) which has not yet been adopted. Securing conditions for stenographic and audio-visual minute keeping has been envisaged by the Action Plan as late as for the First quarter of 2010.⁹⁴
- 8.1.6 Inadequate level of technical equipment in courts hinders the achievement of the set quotas. A judge, typist and assigned intern or an advisor use solely one computer, thus it is impossible for more activities to be performed at the same time. Several judicial advisors use one computer and they have at their disposal one typist, therefore they have to wait one another in order to finish their work. Sometimes only one printer comes to several computers, and for field work old mechanical typewriters are used instead of a laptop computer, etc.

91 Currently, it is envisaged for the Basic Court (Article 10) to have 1 advisor per 2 judges, whilst formerly there used to be 1 advisor per 4 judges; in the Higher Court current ratio is 1:1, in relation to the former ratio of 1 advisor per 3 judges.

92 The recommendation of the Committee of Ministers of the Council of Europe R (94) 12 to member states on the independence, efficiency and role of judges. See also the recommendations of the round table methods of efficient resolving of backlog and on long-term measures for the improvement of efficiency of the judiciary, "Methods of efficient resolving of backlog", Judiciary Training Center of the republic of Montenegro, Podgorica, 2003, prepared by T. Gorjanc-Prelević and A. Spasić, p. 93.

93 II Strengthening of the efficiency of judiciary (p. 14)

94 II Strengthening of the efficiency of judiciary (p. 1). In Kotor Basic Court, the audio-visual minute keeping is performed in the experimental stage.

- 8.1.7 In most courts the system of electronic minute keeping has not yet been established. It is necessary for fast and easy access to the data on the performance of individual judges and case flow. It would facilitate the linking of similar type of cases for the purpose of possible combining of the same and in order to render impossible for contradictory decisions to be made. This system should also secure automated random case allocation to judges, so that every party can find out, for instance, at the moment of the complaint being lodged, which judge the case has been allocated to.
- 8.1.8 Montenegro has got the largest number of judges in relation to the number of inhabitants compared to the majority of the countries in the region and in Europe, which is the reason why it does not apply the best European practices in the respect.⁹⁵ Causes should also be sought in the system of education. In the short-term, having in mind considerable backlog in certain courts, it is good that the realization of the programme for resolving these cases is ongoing and that the increase of the number of judicial advisors and other high quality, well trained, administrative staff has been envisaged.

High quality and efficient work of courts and judges in the long run cannot be realistically achieved with the increase of the referential quotas or with the increase of the number of judges, but through insisting on continuous training and urgent securing of the appropriate conditions for the work of judges, like: increase of the number of expert assistants, introduction of the necessary technical equipment, establishing the Judicial Information System (JIS), introduction of electronic keeping of registers in all courts and so on.

8.2. Methodology for drafting Survey of work of courts (Annual report)

- 8.2.1 The Report on the work of courts (Survey of the work of courts) for the year 2007 has been made on the basis of the methodology prescribed by the Judicial Rules of Procedure from 2004 on keeping statistics and re-

⁹⁵ Judiciary Reform in Montenegro – Experience of BiH, September 2007, p. 22; see also the Research of the Judiciary Training Centre of the Republic of Montenegro on the number of judges in relation to the number of inhabitants in the European states (June 2003), I the “Method of efficient resolving the problem of backlog”, the Judiciary Training Centre of the Republic of Montenegro, Podgorica, 2003, prepared by T. Gorjanc-Prelević and A. Spasić, p. 97.

ords on the work of courts and judges. The report for 2008 will be based on the same methodology, since the new one has not yet been adopted.

- 8.2.2 In the part related to statistical report, the report on the work of courts for the year 2007 has not been methodologically harmonized. The indicators of the annual inflow are used (which are used in all statistical reports in the neighbouring countries) as well as those of monthly inflow. The efficiency is calculated in relation to the overall number of cases being heard and of those unresolved ones. The indicator of the monthly inflow is also used for presenting inefficiency in relation to the monthly case inflow.
- 8.3.3 The efficiency review in relation to the monthly inflow is picturesque (for instance, in case this year's monthly inflow is taken into consideration, Herceg-Novi Basic Court should have to work two years and four and a half months without receiving a single new case in order to get rid of the backlog), but it is not a good basis for the review of the work of courts.⁹⁶

In accordance with its authorities, the JC should urgently adopt the Methodology for drafting the reports on the work of courts and present in it the objective which is aimed at with the adoption of certain methodological approach with the establishing of statistical data which will be collected and processed.

- 8.2.4 The 2007 report does not contain sufficient critical review with regards to the efficiency of courts.
- 8.2.5 The courts in Montenegro have got a backlog of 60.5% (inefficiency) which is obtained when the number of unresolved cases is divided by the total number of cases being heard, all of it concerning the year 2007. The mathematical relation includes the number of unresolved cases and the total number of cases being heard (both resolved and unresolved), and the greater the percentage the greater the inefficiency, i.e. the work of the courts is worse.

⁹⁶ The category of annual inflow is used in the region (Slovenia, Croatia, Bosnia and Herzegovina); particularly important is the Report the work of the HJPC of Bosnia and Herzegovina on the Internet site www.hjpc.ba. This report uses the following indicators: 1. relation of the number of unresolved cases from the year the report is given for in relation to the number of unresolved cases from the previous report period (change of condition of unresolved cases), 2. relation of the number of resolved cases and received cases (flow coefficient) 3. time needed for resolving unresolved cases expressed in years (number of year needed for the elimination of cases).

- 8.2.6 The inefficiency of the higher courts is 44.73%. Commercial courts are excellent, with the inefficiency of 4.39%. The inefficiency of the Administrative court is 45.75% (this court inherited its cases from the former Administrative Division of the Supreme Court). As for the Court of Appeals there is no proportional report on the inefficiency except in the last part, joint for all courts where it amounts to 29.21%. The inefficiency of the Supreme Court is 5.64%.
- 8.2.7 With such inefficiency level, the fulfilment of the individual judicial quota, presented collectively is paradoxically high: in basic courts - 155%, in Higher - 206%, in Commercial - 128%, in the Administrative - 112%, in the Court of Appeals - 209% and in the Supreme Court - 143%, which points out to the fact that former quotas were set too low. However, the quotas have been increased considerably and they will not be achievable in case the working conditions of judges are not improved. For this paradox, there is no explanation in the Review of the Work of Courts.
- 8.2.8 In the Review of the Work of Courts there is no report on:
- several time rejected cases (traditionally, these cases receive new numbers upon each rejection, which hinders the monitoring the length of procedure);
 - data on the year of the initiation of disputes;
 - data on the total length of procedure including the execution of the decision in a given case (where applicable), which is exceptionally important for the assessment of compliance with the right to trial within reasonable time which comprises the execution of decisions;
 - data on limitations in criminal cases.
- 8.2.9 The Review of the Work of Courts must be supplemented by the reports of judges of all courts with regards to the data important for the assessment of “the results achieved by judges”, which are evaluated on the occasion of the advancement of judges:
- order of cases being heard;
 - compliance with procedural deadlines of scheduling and drafting of decisions;
 - quantity, number of resolved cases, by type and manner;
 - quality - higher instance decisions in relation to a given case.⁹⁷

⁹⁷ So, the First Municipal Court in Belgrade, on the website www.prvisud.com publishes reports for all judges individually, every three months, i.e. for each report period. Reports on the work of individual

The Methodology of drafting the report on the work of courts should contain the indicators on real duration of proceedings (year of the initiation of a proceedings and time of completion, time of decision execution, data on backlog in criminal matter and so on), for the purpose of more objective presentation of the condition which is of importance with regards to the compliance with the right to trial within reasonable time. The reports on the work of judges of all courts must also contain the data on the order of cases being heard, compliance with procedural deadlines, quantity of resolved cases per type, manner and quality - decisions of higher instance in relation to a given case etc., in line with the content of the criterion „achieved results” (Article 35 of the JCRP), which is assessed on the occasion of the promotion of judges.

8.2.10 Big majority of judges in Montenegro (except for the Basic Court in Podgorica and the Supreme Court where Judicial Information System - PRIS has been introduced) work on PCs which still do not have Internet access, nor are they connected in networks, or with court registries, and they also have no organized access to case law. Not a single judge during his working hours can access the web site of the Supreme Court of Montenegro, instead he/she must do it from his/her home, after leaving the office. Although it requires no adoption of legal or other regulations, electronic minute keeping in Montenegrin courts has not yet been secured for a big majority. Beside the courts which have had PRIS introduced, within some courts⁹⁸ reference case flow records programmes, but they are far from fulfilling the desired objective, which is easy and fast access to information on:

- case flow;
- actions undertaken in a case within and beyond legal deadlines;
- length of proceeding;
- hearings and trials held and scheduled;
- case resolving manners;
- compliance with decision drafting deadlines;

judges are made within each court and then submitted quarterly to the Judicial Council. Montenegrin Judicial Rules of Procedure prescribe for these reports to be made half-yearly.

98 Like civil registry in Herceg-Novi Basic Court

- multiple quashing of decisions;
- data on the year of the initiation of a dispute;
- data on the length of proceedings including also the execution.

8.2.11 Electronically kept register provides data on random case allocation. The programme for keeping these registers should be arranged in such a way that court presidents and the JC can at any given time get the elements for the overall report on the work of judges and courts within a certain period of time.⁹⁹ These data would have to be used on the occasion of establishing criteria compliance when a judge is elected to a higher court. The group of prescribed criteria can be found in the section „Closer criteria for appointment of judges to higher court“ (Article 35 of the JCRP) like:

- taking of cases by date of their arrival to court;
- compliance with legal deadlines for actions in the proceedings;
- compliance with legal deadlines in drafting judicial decisions.

8.2.12 According to the current methodology and regulations, these criteria cannot be monitored and expressed in reports for other court except from those where PRIS has been installed (Judicial Information System). In order for the Council to have possible insight into these criteria for each individual judge who has applied for a place in a higher instance from the courts where there is still no PRIS, it would have to send its member or members to make an inspection of candidate's cases, to note down the compliance with these criteria, to compile a verbal on the same and to prepare the same for the session of the JC where decision is passed on the appointment of candidates. In order to avoid excessive workload being put onto the Council members through extraordinary control and in order for these criteria not being only a decorative element of our regulations, reporting on the work of judges and courts should be expanded through the monitoring and presentation of these elements.

8.2.13 The Judiciary Reform Strategy Action Plan provides for the PRIS to be introduced in all courts, also for the *case management software* to be installed with the purpose of getting rid of backlog, as well as for conditions to be created for the PRIS to become accessible also to citizens in relation to certain data and electronic application

⁹⁹ The Report on the Work of Judicial Advisors should also be visible in these registers

submission.¹⁰⁰ The set deadline for this was the last quarter of 2008, which has obviously not been met.

The introduction of information-communication technology in courts, including electronic keeping of registers, is indispensable for resolving the issue of efficiency and responsibility of judicial system (monitoring of work, activity records, collection of statistical data), transparency of judicial work (user access to information) and access to information in the area of law for judges (laws, judicial decisions and so on).

8.3 Regular assessment of work of judges

8.3.1 The HRA formerly proposed for regular assessment of judges to be introduced, on the basis of the extended criteria for the assessment of the results achieved by judges (Reform Proposal item 8.2.3 and 8.2.3.1). The assessment should be carried out by court presidents once a year, after they have collected the data on annual performance of judges in all categories envisaged by the criterion “results achieved by judges” (Article 35 of the JCRP) of which meeting the quota is only one part. It is necessary for the JC to prescribe the parameters for the assessment of all the sub-criteria within the framework of the “achieved results” in order for harmonized assessment to be secured. The law should also envisage the right of a judge to objection to the Council against court president’s assessment.

The Law on Courts should prescribe regular mandatory annual assessment of the results of the work of judges. The JC should prescribe the parameters for the assessment of all the sub-criteria within the framework of the “achieved results”, in order for transparency to be secured.

100 Judiciary Reform Action Plan – Judicial Information System.

RECOMMENDATIONS

1. Criteria and procedure for election of judges and court presidents

(1.1) Criteria for election of judges and court presidents

- (1.1.1) In order to secure objective and balanced assessments of candidates, a special general act of the Council is necessary, which would prescribe the assessment manner and the parameters for the evaluation of criteria and sub-criteria - using numerical marks according to the system of scoring or by means of descriptive marks.
- (1.1.1.1) Instead by the Rules of Procedure, the sub-criteria should have been prescribed by the law or by a special general act of the Council, whilst the Rules of Procedure should solely prescribe the procedure of the work of the Council on the occasion of assessing the same. There are also other provisions of the Rules of Procedure which should have been prescribed in the law (item 6.2.1).
- (1.1.2) The criterion „relations with colleagues, behaviour outside the office, professionalism, impartiality and reputation”, instead of the numerical marks from 1 to 5, should be assessed by means of descriptive marks ranging from „satisfactory to non satisfactory”, which would primarily point out to possible hindrances with regards to the worthiness for the performance of judicial function.
- (1.1.2.1.4) Previous non-conviction to an unconditional prison sentence or for an act of crime which would make a judge unworthy of his/her function should be prescribed among special conditions for becoming a judge.
- (1.1.3.1) „Communication ability” should be excluded from special criteria, except in relation to the candidates for court presidents, with whom this aptitude should be assessed descriptively instead by using numerical marks.

- (1.1.4.1.1) Within the framework of the criterion “professional knowledge”, the system of scoring should be prescribed for each sub-criterion. For the evaluation of “the results achieved during the course of studies”, a scoring system should be provided for both the length of studying and the average marks (see the text for more detail). “Use of information and communication technology” should be made more specific and the knowledge of specific computer programmes and the use of Internet should be scored. For the sub-criterion “knowledge of foreign languages”, it should be prescribed on the basis of what it is determined and how it is assessed. With regards to “job promotion” see item 1.1.4.1.3. For the written test evaluation, see 1.2.2.7.
- (1.1.4.1.2) “Working experience” should not be assessed as a special criterion, especially not numerically, as it has been envisaged. Instead, it is sufficient to stick to the assessment of the same in the form of a check of the compliance with minimum special condition for the election with regards to the required years of experience at the activities of legal profession (Law on Courts, Article 32), whilst the place of internship should be noted and evaluated in the light of the fulfilment of other criteria. It should be prescribed that in the case of equal fulfilment of other criteria, the advantage shall be given to judicial advisors.
- (1.1.4.1.3) Regarding the criterion „achieved results”, it should be specified what the sub-criterion „job promotion” means, how one can reach the information on that; „employer’s opinion” should be made objective by prescribing a special questionnaire which would provide concrete answers related to the type of activity a candidate used to be engaged in and what the reasons were for his/her promotion. The achieved results should be assessed by means of a reasoned descriptive mark, instead of using numerals, as it is envisaged”.
- (1.1.4.2.2) The criteria “published scientific papers and other activities” and “professional training” should be assessed as sub-criteria within the framework of the criterion “professional knowledge”, where they logically belong, and an appropriate scoring system should be prescribed for their balanced assessment. The evaluation of the criteria for the promotion to higher judicial functions should be specifically considered in relation to the

candidates coming from universities, from legal practice and similar.

- (1.1.4.3.1) Within the scope of the criterion “professional training” the scoring of master and doctor degrees should be prescribed, as well as the attendance of other relevant forms of education. When the number of points is prescribed, one should have in mind that the access to judicial profession should be facilitated for scientific workers, in such a way that it should be prescribed that they are not required the attendance of the initial training for judges.
- (1.1.5.1.1) Within the shortest possible time, it is necessary to adopt precise criteria for the assessment of the results achieved by judges, in relation to which the JC should prescribe a special scoring system in order to secure balanced assessment of candidates who should be promoted on the basis of the assessment of the achieved results.
- (1.1.5.2.2) It should be prescribed for the working experience to be assessed descriptively in the sense of the type of acquired experience, which is relevant for the judicial position the application is submitted for. The length of judicial working experience in general should not be assessed as a special criterion, instead it is sufficient to assess the same in the form of meeting a special requirement for the election of judges from the Article 32 of the Law on Courts, since the length of working experience need not always be an advantage (the same goes for the first election to a judicial position, see item 1.1.4.1.2). Conversely, parameters should be prescribed on the basis of which it would be secured for the length of working experience to obtain always the same mark.
- (1.1.5.3.4) Objective assessment of the “achieved judicial results” of judicial candidates for higher courts requires for scoring parameters to be urgently prescribed, i.e. for the assessment of the work of judges with regards to all sub-criteria: manner of resolving cases, quality of work expressed through the number of confirmed, altered and quashed decisions and so on. It is also necessary for the Law on Courts to specify the procedure of regular assessment of judges in line with the Methodology for Drafting Annual Reports on Work of Individual Judges. The

sub-criteria concerning the relation towards work should be specially scored and assessed independently from the achieved results. Parameters should be prescribed for the assessment of cases being heard in the order of their coming to court and for the compliance with legal deadlines, as well as for the manner in which this kind of data on the work of judges will be acquired.

- (1.1.5.4) In relation to the criterion “published professional papers and other professional activities” (participation in law drafting commissions, mediations, lectures, published works), the system of scoring for the assessment of these activities should also be prescribed, since it has already been prescribed for these to be assessed by the total numerical mark ranging from 1 to 5. For the assessment of this criterion with regards to candidates being elected to a judicial position for the first time, see item 1.1.4.2.
- (1.1.5.5) Acquiring master and doctor degrees has been prescribed as a sub-criterion solely for the election of candidates being elected judges for the first time (Article 33 of JCRP), and not on the occasion of the election of candidates for a higher court (Article 35 of JCRP), which is an obvious omission that needs to be corrected.
 - (1.1.5.5.1) The opinion of higher court judges on a given candidate should be obtained on the basis of the questionnaire, which would also cover the categories from the item 1.2.1.2 of the Reform Proposal (fair knowledge of procedural and substantive legal regulations, European Court of Human Rights case law, Montenegrin courts case law and so on).
- (1.1.6.1) The right should be prescribed for judges of the court the president of which is elected to give their opinion to the Judicial Council on presidential candidates.

(1.2) Judges’ appointment procedure

- (1.2.1.3) In line with its competence to elect judges, the JC should also elect the Chief Justice, just as it is the proposal of the Venice Commission, by two-thirds majority. It should also be secured

for the JC to obtain the opinion of the General Session of Supreme Court judges during this procedure.

- (1.2.2.1.1) Judicial vacancy announcements on the JC website should also be prescribed. All Montenegrin judges at their work places should be provided with PCs and printers, as well as with the Internet connection.
- (1.2.2.2.1) The provision of the Rules of Procedure on the application content should be amended (Article 27) so as to exclude the requirement for the statement to be given on former conviction records, until these restrictions for the appointment of judges are expressly prescribed in the law.
- (1.2.2.3.1) It should be provided for the candidates' applications to be published on the JC website, as well as the list of the proposed candidates for lay judges, so that the public could point out to their possible unworthiness. It should be made possible for candidates to become familiar with possible objections related to their candidature, as well as to respond to the same.
- (1.2.2.4.1) The competence should be prescribed of the Commission for the election of judges to reject untimely and incomplete applications, since the Council is competent to decide upon the objection against the decision on application rejection.
- (1.2.2.5.1) Mandatory meetings of judges aimed at giving opinions on candidates for judges should be abolished (Article 31 of the LJC) in case these did not work as judges or judicial advisors, or in case they worked neither in judiciary nor in legal practice. Giving of the opinions on the candidates for lay judges should also be excluded in case these had no experience of working in courts.
- (1.2.2.5.2) The opinions on various aspects of work and behaviour of the candidates should be obtained on the basis of the appropriate questionnaire, the content of which should be determined by the Judicial Council, in order to avoid the acquisition of stereotypic phrases instead of a meaningful mark. The courts should have at their disposal the data on the results achieved by expert assistants, which the opinion on their work should be based on.

- (1.2.2.6.2) The JC should prescribe the guidelines for conducting interviews with candidates. It should be prescribed for the interview not to be necessary in the procedure of the promotion of judges.
- (1.2.2.7.2) The written test should precede the interview in case of the candidates being elected judges for the first time. It should be prescribed for the test to be assessed under a code, using the scoring system, and the provision of the Rules of Procedure by which the test mark is determined through voting should be abolished.
- (1.2.2.8.2) Special forms should be prescribed for the candidates being elected judges for the first time and for judges who are candidates for higher instance positions. Both forms should retain the basic division of criteria from the Article 32 of the LJC, which need to be expanded by sub-criteria and the appropriate sections for the assessment of the same, as well as by the section for recording the sources of information on the basis of which assessment is done. The form for the assessment of candidates being elected for the first time for a higher court judge, and who do not come from the area of judiciary, should be specially adjusted.
- (1.2.2.8.3) Together with the amended forms the Instruction should be prescribed on filling up the same, which would contain parameters for the evaluation of criteria and sub-criteria and which would envisage those things assessed using numerical marks, using scoring system, and those assessed descriptively, and in which way. (For detailed instructions, see item 1.2.2.8).
- (1.2.2.9) The JC must improve the quality of rationales of its decisions, especially if judges are to be elected before regulations are amended, since the existing, insufficiently precise criteria and the lack of parameters for their balanced assessment brings into doubt the objective and balanced assessment of the candidates. The decision on election must contain a legal remedy.
- (1.2.2.10) The Law on Judicial Council (Article 38) or the Rules of Procedure should prescribe the manner and the place for the inspection of election documentations. The deadline should be prescribed within which the Secretariat is obliged to enable the

inspection of election documentation upon the receipt of the request, right to making Xerox copies of the case file and the right to inspection through an agent. The Law should prescribe the right to objection to the JC in case this right is interfered with.

2. Composition of Judicial Council and manner of election of its members

- (2.1.1.3) The composition of the ten-member Judicial Council, the chair of which is the tically elected Chief Justice *ex officio*, with the other members being the Minister of Justice, two MPs, two legal experts appointed at the discretion of the President of the State and only four judges, one of which is the wife of the President of the State, does not give an impression of the Council as an autonomous and impartial body, independent from the executive branch, as it should be according to the international recommendations. Any influence has been excluded of universities, Bar Association and other NGOs on the election of the Council members, which does not exactly contribute to the establishing of public trust in the impartial work of this body. The composition of the Council should, therefore, be reformed.
- (2.1.2.1) The Chief Justice should not be the *ex officio* President of the Judicial Council, nor the Chair of Judges' Election Commission; he/she should not have the power to propose the JC Vice-President, nor the Director of the Secretariat of the Council, who by law must be elected on the basis of the public competition. The Chief Justice in particular, should not have all the stated powers, as it is the case now.
- (2.1.2.2.1) It should be prescribed for two Council members from among the ranks of judges to be elected from among the ranks of judges of basic and commercial courts, who make approximately 70% of the overall number of judges.
- (2.1.2.2.2) Conflict of interest prevention provision of the Law on Judicial Council should be amended, and it should be prohibited for MPs, Councillors, political party officials, the persons appointed and posted in the Government of Montenegro, as well as the persons in conjugal relations with them, or their next

of kin, collateral relatives up to the second degree of kinship or in in-law kinship, following the pattern used by other bodies where this is prescribed (Personal Data Protection Agency, RTCG Council) to be elected the Council members (those who are not Minister and MPs).

- (2.1.3.1.2) Instead of the Parliament being represented in the Council, we suggest for the Parliament to elect the Council members from outside the ranks of judges, from among non-politically active experts, upon the proposal of the Bar Association, the University and NGOs active in the areas of the rule of law and human rights.
- (2.2.1.1) The JC President should be elected among the Council members themselves, in order to make sure for this person to be “the first among equals”, who will then organize the work of the Council in the procedural sense and present its decisions to the public. If the Chief Justice is a Council member ex officio, it should be made impossible for him/her to be elected the Council President.
- (2.2.2.1.1) The Law on JC should be amended, and the procedure should be prescribed for judges to apply for the Council members, as well as the procedure for the election of candidates on the court’s level.
- (2.2.2.2.1) The process of counting votes for the initial proposals of candidates for Council members from among the ranks of judges of all courts should be improved in such a way that instead of one person this be done by the Commission, composed of judges from various instances, at a public session. Since the existing system makes it possible for non-motivated candidates to be elected on the basis of a few votes alone, the same should be improved by prescribing two election rounds. In the first round, each court (basic and commercial) would nominate two candidates; in the second, all basic and commercial court judges would vote for four out of the proposed candidates, among whom would then the Conference of all judges elect two Council members.
- (2.2.3.1.1) The Law or the Parliamentary Rules of Procedure should prescribe the procedure for the election of the Council members from among the ranks of the ruling and the opposition parties.

- (2.2.3.2) Instead of the President of the State, as a rule the President of the ruling political party in Montenegro, electing respectable legal experts by himself, it should be enabled: a) for the Parliament to elect all the Council members from outside the ranks of judges from the list of legal experts, upon the proposal of the University, Bar Association and other CSOs fighting for the promotion of the rule of law and for the protection of human rights; b) for the Bar Association and the NGOs with the experience in the areas of the rule of law and the protection of human rights to propose the list of candidates which the President of the State would select two Council members.

3. Term of office, immunity and dismissal of Judicial Council members

- (3.1) The re-election should be prescribed of the Council member appointed following the expiry of the term of office of his/her predecessor in the Council. With regards to the right to re-election, the rule which is valid for judges as Council members should also be prescribed for other members being elected - allow the re-election, but not the consecutive one.
- (3.2) Functional immunity should be secured to all the JC members. The Chief Justice should also enjoy functional and not the one enjoyed by the MPs.
- (3.3) The decision on the proposal for the dismissal of a Council member should require qualified majority vote.

4. Competences of the Judicial Council

- (4.1.3) The Constitution should have regulated in a framework manner the competence of the JC in relation to the procedure of election and dismissal of judges and the termination of judicial function, as the key ones, with the reference for all other competences and the deliberation manner of the JC to be regulated by the law.
- (4.1.4) The Law on JC (Article 4), should be amended in such a way that the JC protects the court and the judge from all inappropriate pressures, and not only from the political influence.

- (4.1.6) The Law should specify the right for the objections to the work of judges and courts to be submitted to the JC.
- (4.1.7) The Law on courts should eliminate conceptual inconsistencies, collision of provisions and inappropriate division of competences between the JC and the Ministry of Justice.
- (4.2.2) The Law on JC should specify the relation between the Council and the court, so that the limit and the grounds for JC supervision be explicitly prescribed, instead of the general authority of the Council to supervise the work of the courts and judges (Article 23, item 1 and Article 27 of the LJC), which endangers the principle of judicial independence and makes it possible for the Council to act arbitrarily without a specific reason.
- (4.2.3) The Law on Courts should make clear distinction between the competences of the JC and the Supreme Court.
- (4.3.1.2) The Law on Courts should specify what exactly will not be considered „public function”, i.e. „professional activity” incompatible with the performance of judicial function, whilst the JC should retain the competence to interpret further this legal provision, if required.
- (4.3.1.5) The Law on Courts should prescribe: the right of judges to lodge a complaint to the JC not only because of their independence and autonomy being endangered, but also of other rights; the responsibility of the State for damage caused due to the illegal and negligent work of judges; suspension of judicial function in case of the election to another public function.
- (4.3.3.1) The Law on JC should prescribe for the Council to determine the number of judges and lay-judges upon the initiative of court presidents, and also to give the approval to the Staff Plan of the court president instead of the Government.
- (4.3.4.2) The Law on Courts should envisage for the General Session of the Supreme Court to inform the Parliament, but also the public on the issues related to the work of the courts, on the application of laws and other regulations, at least once a year (Article 27, paragraph 2).
- (4.3.5.1) The Law on Courts should prescribe the objectives of the initial education, as a standardized form of formation and the com-

pulsory nature of the initial education, with possible exceptions. It is also necessary to prescribe the manner of keeping records on the attendance of all forms of education and professional training, which is necessary in order for the Council to be able to assess the extent of the criteria being met for promotion. Also, it should be expressly prescribed for the Council to secure special budgetary funds for education.

- (4.3.6.2) The Council would have to monitor the compliance with the envisaged deadlines for the implementation of the Judicial Information System (JIS), which also includes education, and to request relative periodic reports. It is of a high priority to insert judicial decisions in JIS database, in order to make the same accessible to judges and the public.
- (4.3.7.4) The Law on JC should specifically provide for the competences of the Council with regards to the drafting of the budget of the judiciary, monitoring its execution and deciding on the re-allocation of budgetary funds among courts during a fiscal year. In case of disagreements with the Government, the Law should make it possible for the JC President to present the Draft Budget of the Judiciary in the Parliament.
- (4.3.8.3) The Law on JC should extend the competence of the Council in relation to the adoption of general acts which establish the criteria and procedure for the assessment of work of judges and courts and so on.
- (4.3.9.1) The JC should plan budgetary funds for the operations of the courts having in mind the information on all the needs of the courts for the improvement of working conditions: technical equipment, provision of regulations and professional literature, Internet connection for each judge etc.
- (4.3.10.1) The election of the Director of the Secretariat by the Judicial Council, upon the proposal of the Council President, should be harmonized with the Law on Civil Servants and Public Employees, which provides for mandatory public competition.
- (4.3.10.2) The Law should explicitly prescribe and specify the competence of the Secretariat in relation to the keeping of centralized judges' personal records and other records, as well as the contents of such records.

- (4.4.2) The competence of the JC should be expanded with regards to the competence for the election and dismissal of the Chief Justice and of the JC President, as well as in relation to making proposals to the Parliament for the election of the Constitutional Court judges. In both procedures, it should be envisaged for the Council, prior to the election of the Chief Justice, or prior to the proposals of candidates for the Constitutional Court judges, to request the opinion of the session of judges of these courts.

5. Disciplinary offences and reasons for dismissal of judges

- (5.1.2) The Law on Courts should define all obligations of judges the violation of which means unconscientious and negligent performance of judicial function and contempt of judicial function. The Law should expressly prescribe the violation of the Code which represents negligent or unconscientious performance of judicial function, i.e. the contempt of judicial function. The Law should specify behaviours which constitute contempt of judicial function and with regards to their interpretation refer to the Judicial Code of Ethics, in order for the arbitrary and misbalanced punishment of judges to be made impossible.
- (5.1.3) The Law on Courts (Article 33a) should be amended in such a way that the breach of judicial discipline exists also when a judge:
- (5.1.3.1) *unjustifiably exceeds legal deadlines for drafting of judgments and other decisions;*
 - (5.1.3.2) *causes serious damage to the relations in the court which have got significant influence on the performance of judicial function;*
 - (5.1.3.3) *does not fulfil the obligations and duties of a mentor for professional training of his/her colleagues-trainees;*
 - (5.1.3.4) *does not fulfil the obligations of professional training and education;*
 - (5.1.3.5) *he/she is unjustifiably absent from work - in the provision of the Article 33a of the Law o Courts it solely reads „absent from work”, without the wording „unjustifiably”;*

- (5.1.3.6) *does not achieve the expected results in his/her work for more than 10 consecutive months without a justified reason;*
- (5.1.3.7) *does not wear a toga in accordance with the regulations.*
- (5.2.2) The new Law on Courts should specify the list of conducts which constitute the violation of reputation of judicial function, and refer to the Code of Judicial Ethics in relation to their interpretation, in order to render impossible arbitrary and imbalanced punishment of judges. The Article 33b of the Law on Courts should be amended so that the breach of judicial discipline exists also if a judge harms the reputation of judicial function when:
- (5.2.2.1) *he/she behaves indecently, impolitely and unworthily in public places;*
- (5.2.2.2) *he/she behaves impolitely and treats indecently his/her parties and other participants in the proceedings and if he/she does not prevent the same behaviour with the others under his/her control in the proceedings led by him/her;*
- (5.2.2.3) *he/she receives gifts and other benefits related to judicial position;*
- (5.2.2.4) *he/she uses hate speech in public and while carrying out his/her duty;*
- (5.2.2.5) *he/she discloses the information acquired during the performance of judicial function in any other purpose except in the one related to the performance of judicial function;*
- (5.2.2.6) *he/she uses or renounces the prestige of judicial function for the purpose of satisfying his/her own interests or the interests of his/her family members or indeed anybody else's, or when his/her behaviour leaves the impression that anyone can exert influence on a judge during his/her performing his/her function;*
- (5.2.2.7) *he/she does not refrain from each action which is improper or leaves such impression, as well as from the action which causes and inspires suspicion, weakens the confidence or in any other way harms the trust in the court and its objectiveness;*
- (5.2.2.8) *does not resist threats, blackmails and other attacks on his/her personality and integrity;*
- (5.2.2.9) *he/she is not capable of resisting political influences, public opinion, prejudices (especially with regards to the prohibited grounds*

for discrimination), temptations, vices, passions, private and family interests and other internal and external influences;

- (5.2.2.10) *he/she frequents places the reputation of which is improper.*
- (5.4.2) The Law on Courts (Article 95) should be amended in such a way that the reasons will be supplemented and specified for the initiation of the proceedings of disciplinary responsibility and the dismissal of court presidents. In that sense, former proposals from the item 5.2.4 of the Reform Proposal should be supplemented with the following wording: “does not decide within legal deadline on control requests”, which constitutes a sanction for the breach by the court president of the obligation envisaged by the Law on Protection of the Right to a Trial within Reasonable Time (Articles 6 and 20).
- (5.5.1) The Law should prescribe that the proceedings of temporary suspension of a judge is a summary one, and the obligation should be prescribed for the Council to decide on temporary suspension of a judge within 8 days, both in the cases of mandatory and optional suspension. The delay in passing such a decision enables the creation of legal uncertainty.
- (5.5.2) Article 69, paragraph 2 of the Law on Judicial Council should be supplemented with specification of reasons the Council should evaluate when deciding on a temporary suspension of a judge. The Law should prescribe for the decisions of the Council on temporary suspension to have compulsory rationales, as well as that a lady judge at maternity leave may not be discharged, nor can against her be initiated any disciplinary proceedings, or dismissal proceedings.
- (5.6.2) The Law on Courts should specify Constitutional concepts of „unprofessional and negligent performance of judicial function”. The concept „unprofessional” should be linked to the criteria for the assessment of the work of judges, which are still to be adopted. It should also prescribe for former conviction record for an act of crime making a judge unworthy of judicial position constitutes a hindrance for the election to judicial position.
- (5.6.3) Permanent loss of ability for the performance of judicial function should have been classified by the Constitution among the reasons for the end of judicial function, and not for dismissal.

6. Procedure and decision-making of the Judicial Council and remedies against its decisions

- (6.2.1.1) Basic rules of JC procedures, as well as the right to legal remedies against the decisions of the Council, should be prescribed by the Law, and not by the Rules of Procedure.
- (6.2.2.1) It should be prescribed for each JC member, and not only for the JC President, to be entitled to initiate a procedure to examine disciplinary responsibility of court presidents.
- (6.2.2.4) The procedure should be prescribed for establishing disciplinary responsibility of the Chief Justice and of the JC President. The General Session of the Supreme Court should also be authorized to initiate such a procedure. In this way, the solution according to which the Chief Justice and the JC President is accountable solely to the ruling politicians (President of the State, the Speaker and the Prime Minister, i.e. Parliamentary majority) would be partly mitigated.
- (6.2.3.1) For the reasons of legal certainty, the Law on JC (Article 71, paragraph 2) should be amended so that actions and decisions be annulled solely of the judge whose election has been made void because he/she had not met general requirements for the election (citizenship; general medical conditions and business ability; Law School degree; passed judicial examination). This even more so when one has in mind that the stated provision is applied to the acts and actions of the judge whose election is made void by the Administrative Court, and not only by the Judicial Council. The Law should specifically emphasize that the administrative dispute against the election decision is a summary one.
- (6.2.4.3) In practice, the need has been noticed for the Law on JC (Article 70) to prescribe as mandatory for the decisions on dismissing judges to contain legal remedies.
- (6.2.4.5) With the purpose of securing fairness of the disciplinary procedures, the composition and procedure of election of the Disciplinary Commission members should be prescribed by law.
- (6.2.4.6) It should be prescribed for the disciplinary measures to be deleted from the records after the lapse of two to three years from

the moment when the decision on the pronouncing the same had become effective, depending on the seriousness of the offence.

- (6.2.5.3) The Constitution should have prescribed for the Minister of Justice not to cast vote in all the proceedings for establishing the responsibility of judges, and not only in disciplinary proceedings, thus the provision on the exception of the Law on JC (Article 59) should be applied in such a way that this shortcoming be compensated for. The provision should be expanded with the reasons for exception, like kinship, marriage and extra-marital relation, and it should be expressly prescribed for the exception not to be applied in the procedure of the election of judges. It should be prescribed for the Council member not to be able to participate even in the hearing of the issues in relation to which he/she has been exempted from voting.
- (6.2.6.5) Against the decision on the dismissal of a judge the right should be ensured to appeal to the Constitutional, and not to the Administrative Court, since the Constitution prescribes the reasons for dismissal and because the Administrative Court can be found in the conflict of interests.
- (6.2.6.6) The Law or the Rules of Procedure should prescribe the right to objection to the Council in case of the right to inspection of electoral documentation is hindered for whatever reason; also, the deadline for the Council deliberation upon the objection should be prescribed.
- (6.2.6.7) The JC must delay the date of the beginning of a judicial function in case it should obtain data which might lead to the annulment of the decision on the election of a judge, thus the Law on Courts should be amended accordingly (Article 49, paragraph 2).

7. *Transparency of work of Judicial Council*

- (7.2.3) The authority of the Council, prescribed in the Rules of the Procedure (Article 4, paragraph 2), that the Council may close to public every its session, should be abolished. The procedures for establishing disciplinary responsibility and dismissal of

judges should be made open to public upon the request of the judge whose responsibility is established, thus the Law on JC should be amended accordingly.

- (7.3.1.3) Special web-page of the JC should be launched where competitions for the election of judges would be regularly placed, where competition application forms could be found, as well as where the applications of earlier candidates could be found.
- (7.3.2.3) It should be prescribed for the decision on election, on disciplinary responsibility and on the dismissal of judges to be published on the JC web-page with rationales, with the purpose of the transparency of work of the Council.
- (7.3.3.2) The Report on the work of the Council and the Action Plan should be published on the web-page of the Council.
- (7.4.2) The adoption of decisions with appropriate details and precise reasoning and their publishing is of key importance for establishing the trust in the objective work of the Council.
- (7.5.1) It is necessary to specify the procedure of examining the appointment documents (see item 1.2.2.10.1).

8. Referential quota and assessment of results of work of judges and courts

- (8.1.3) It is necessary for the Council, within a foreseeable time, in cooperation with the Ministry of Justice, to establish a new system of time quotas (so called, weighted system), which would have as its starting basis the available (effective) annual fund of hours within which it should be expressed how much time is needed for resolving certain types of cases according to their seriousness and complexity. In such a way we come to the number of cases that an average judge should resolve, as well as to the number of judges needed. Such quotas would make integral part of the Regulation on Criteria for the Assessment of the Work of Judges (see Reform Proposal items 8.2.3 and 8.2.3.1).
- (8.1.10) High quality and efficient work of courts and judges in the long run cannot be realistically achieved with the increase of the referential quotas or with the increase of the number of judges,

but through insisting on continuous training and urgent securing of the appropriate conditions for the work of judges, like: increase of the number of expert assistants, introduction of the necessary technical equipment, establishing the Judicial Information System (JIS), introduction of electronic keeping of registers in all courts and so on.

- (8.2.3) In accordance with its authorities, the JC should urgently adopt the Methodology for drafting the reports on the work of courts and present in it the objective which is aimed at with the adoption of certain methodological approach for the collection of statistical data.
- (8.2.9) The Methodology of drafting the report on the work of courts should contain the indicators on real duration of proceedings (year of the initiation of a proceedings and time of completion, time of decision execution, data on backlog in criminal matter and so on), for the purpose of more objective presentation of the condition which is of importance with regards to the compliance with the right to trial within reasonable time. The reports on the work of judges of all courts must also contain the data on the order of cases being heard, compliance with procedural deadlines, quantity of resolved cases per type, manner and quality - decisions of higher instance in relation to a given case etc., in line with the content of the criterion „achieved results” (Article 35 of the JCRP), which is assessed on the occasion of the promotion of judges.
- (8.2.13) The introduction of information technology in courts, including electronic keeping of registers, is indispensable for resolving the issue of efficiency and responsibility of judicial system (monitoring of work, activity records, collection of statistical data), transparency of judicial work (user access to information) and access to information in the area of law for judges (laws, judicial decisions and so on).
- (8.3.1) The Law on Courts should prescribe regular mandatory annual assessment of the results of the work of judges. The JC should prescribe the parameters for the assessment of all the sub-criteria within the framework of the “achieved results”, in order for transparency to be secured.