

JUDICIAL REFORM INDEX

FOR

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Introduction

The Judicial Reform Index (JRI) is a tool developed by the American Bar Association's Central and East European Law Initiative (ABA/CEELI). Its purpose is to assess a cross-section of factors important to judicial reform in emerging democracies. In an era when legal and judicial reform efforts are receiving more attention than in the past, the JRI is an appropriate and important assessment mechanism. The JRI will enable ABA/CEELI, its funders, and the emerging democracies themselves, to better target judicial reform programs and monitor progress towards establishing accountable, effective, independent judiciaries.

ABA/CEELI embarked on this project with the understanding that there is not uniform agreement on all the particulars that are involved in judicial reform. In particular, ABA/CEELI acknowledges that there are differences in legal cultures that may make certain issues more or less relevant in a particular context. However, after a decade of working in the field on this issue, ABA/CEELI has concluded that each of the thirty factors examined herein may have a significant impact on the judicial reform process. Thus, an examination of these factors creates a basis upon which to structure technical assistance programming and assess important elements of the reform process.

The technical nature of the JRI distinguishes this type of assessment tool from other independent assessments of a similar nature, such as the U.S. State Department's *Human Rights Report* and Freedom House's *Nations in Transit*. This assessment will *not* provide narrative commentary on the overall status of the judiciary in a country. Rather, the assessment will identify specific conditions, legal provisions, and mechanisms that are present in a country's judicial system and assess how well these correlate to specific reform criteria at the time of the assessment. In addition, this analytic process will not be a scientific statistical survey. The JRI is first and foremost a legal inquiry that draws upon a diverse pool of information that describes a country's legal system.

Assessing Reform Efforts

Assessing a country's progress towards judicial reform is fraught with challenges. No single criteria may serve as a talisman, and many commonly considered factors are difficult to quantify. For example, the key concept of an independent judiciary inherently tends towards the qualitative and cannot be measured simply by counting the number of judges or courtrooms in a country. It is difficult to find and interpret "evidence of impartiality, insularity, and the scope of a judiciary's authority as an institution." Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 611 (1996). Larkins cites the following faults in prior efforts to measure judicial independence:

- (1) the reliance on formal indicators of judicial independence which do not match reality,
- (2) the dearth of appropriate information on the courts which is common to comparative judicial studies,
- (3) the difficulties inherent in interpreting the significance of judicial outcomes, or
- (4) the arbitrary nature of assigning a numerical score to some attributes of judicial independence.

Id. at 615.

Larkins goes on to specifically criticize a 1975 study by David S. Clark, which sought to numerically measure the autonomy of Latin American Supreme Courts. In developing his "judicial effectiveness score," Clark included such indicators as tenure guarantees, method of removal, method of appointment, and salary guarantees. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L. Q. 405 – 442 (1975).



The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees, the Supreme Court had already been purged at least five times since the 1940s. By including these factors, Clark overstated . . . the independence of some countries' courts, placing such dependent courts as Brazil's ahead of Costa Rica's, the country that is almost universally seen as having the most independent judicial branch in Latin America.

Larkins, *supra*, at 615. Reliance on subjective rather than objective criteria may be equally susceptible to criticism. *E.g.*, Larkins, *supra*, at 618 (critiquing methodology which consisted of polling 84 social scientists regarding Latin American courts as little more than hearsay). Moreover, one cannot necessarily obtain reliable information by interviewing judges: “[j]udges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy.” Larkins, *supra*, at 616.

ABA/CEELI's Methodology

ABA/CEELI sought to address these issues and criticisms by including both subjective and objective criteria and by basing the criteria examined on some fundamental international norms, such as those set out in the *United Nations Basic Principles on the Independence of the Judiciary*; *Council of Europe Recommendation R(94)12 “On the Independence, Efficiency, and Role of Judges”*; and *Council of Europe, the European Charter on the Statute for Judges*. Reference was also made to a Concept Paper on Judicial Independence prepared by ABA/CEELI and criteria used by the International Association of Judges in evaluating membership applications.

Drawing on these norms, ABA/CEELI compiled a series of 30 statements setting forth factors that facilitate the development of an accountable, effective, independent judiciary. To assist assessors in their evaluation of these factors, ABA/CEELI developed corresponding commentary citing the basis for the statement and discussing its importance. A particular effort was made to avoid giving higher regard to American, as opposed to European concepts, of judicial structure and function. Thus, certain factors are included that an American or European judge may find somewhat unfamiliar, and it should be understood that the intention was to capture the best that leading judicial cultures have to offer. Furthermore, ABA/CEELI reviewed each factor in light of its decade of experience and concluded that each factor may be influential in the judicial reform process. Consequently, even if some factors are not universally-accepted as basic elements, ABA/CEELI determined their evaluation to be programmatically useful and justified. The categories incorporated address the quality, education, and diversity of judges; jurisdiction and judicial powers; financial and structural safeguards; accountability and transparency; and issues affecting the efficiency of the judiciary.

The question of whether to employ a “scoring” mechanism was one of the most difficult and controversial aspects of this project, and ABA/CEELI debated internally whether it should include one at all. During the 1999-2001 time period, ABA/CEELI tested various scoring mechanisms. Following a spirited discussion with members of the ABA/CEELI's Executive and Advisory Boards, as well as outside experts, ABA/CEELI decided to forego any attempt to provide an overall scoring of a country's reform progress to make absolutely clear that the JRI is not intended to be a complete assessment of a judicial system.

Despite this general conclusion, ABA/CEELI did conclude that qualitative evaluations could be made as to specific factors. Accordingly, each factor, or statement, is allocated one of three values: *positive*, *neutral*, or *negative*. These values only reflect the relationship of that statement to that country's judicial system. Where the statement strongly corresponds to the reality in a given country, the country is to be given a score of “positive” for that statement. However, if the statement is not at all representative of the conditions in that country, it is given a “negative.” If the conditions within the country correspond in some ways but not in others, it will be given a



“neutral.” Cf. Cohen, *The Chinese Communist Party and ‘Judicial Independence’: 1949-59*, 82 HARV. L. REV. 972 (1969), (suggesting that the degree of judicial independence exists on a continuum from “a completely unfettered judiciary to one that is completely subservient”). Again, as noted above, ABA/CEELI has decided not to provide a cumulative or overall score because, consistent with Larkin’s criticisms, ABA/CEELI determined that such an attempt at overall scoring would be counterproductive.

Instead, the results of the 30 separate evaluations are collected in a standardized format in each JRI country assessment. Following each factor, there is the assessed correlation and a description of the basis for this conclusion. In addition, a more in-depth analysis is included, detailing the various issues involved. Cataloguing the data in this way facilitates its incorporation into a database, and it permits end users to easily compare and contrast performance of different countries in specific areas and—as JRIs are updated—within a given country over time.

Social scientists could argue that some of the criteria would best be ascertained through public opinion polls or through more extensive interviews of lawyers and court personnel. Sensitive to the potentially prohibitive cost and time constraints involved, ABA/CEELI decided to structure these issues so that they could be effectively answered by limited questioning of a cross-section of judges, lawyers, journalists, and outside observers with detailed knowledge of the judicial system. Overall, the JRI is intended to be rapidly implemented by one or more legal specialists who are generally familiar with the country and region and who gather the objective information and conduct the interviews necessary to reach an assessment of each of the factors.

One of the purposes of the assessment is to help ABA/CEELI — and its funders and collegial organizations — determine the efficacy of their judicial reform programs and help target future assistance. Many of the issues raised (such as judicial salaries and improper outside influences), of course, cannot necessarily be directly and effectively addressed by outside providers of technical assistance. ABA/CEELI also recognizes that those areas of judicial reform that can be addressed by outsiders, such as judicial training, may not be the most important. Having the most exquisitely educated cadre of judges in the world is no guarantee of an accountable, effective, or independent judiciary; and yet, every judiciary does need to be well-trained. Moreover, the nexus between outside assistance and the country’s judiciary may be tenuous at best: building a truly competent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, it is important to examine focal areas with criteria that tend toward the quantifiable, so that progressive elements may better focus reform efforts. ABA/CEELI offers this product as a constructive step in this direction and welcomes constructive feedback.

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Montenegro Background

Legal Context

At the time of the JRI assessment mission in March 2002, Montenegro and Serbia were the last remaining republics of the Federal Republic of Yugoslavia (FRY). Each republic had its own parliament, president, prime minister, ministries, constitution, as well as a court system—including a supreme court and a constitutional court. In addition to republic governments, the separate federal system included a federal president, parliament, Federal Court, and Federal Constitutional Court. Under the FRY Constitution, each republic was subject to both federal and its own republic legislation and authorities.

Calls for the independence of Montenegro from the FRY over the past decade, however, have led to tensions, and recent changes, in the relationship between the two republics. In response to moves by the regime of Slobodan Milosevic to increase federal control over the Republic, Montenegro's 1998 general elections saw the victory of a pro-independence coalition. The new government refrained from calling an immediate referendum on independence, but declined to participate in federal institutions. Montenegro now is represented in some federal bodies by members of the opposition. In May 2000, as a further step away from Serbia and the federal state, Montenegro's Assembly declared that it would not recognize "any legal and political act adopted without the presence of legitimate and legal representatives of Montenegro in legislative, executive and judiciary powers of the federal state." As a sign of its near *de facto* independence from the FRY, Montenegro rejected the FRY Dinar, and adopted instead the Deutsche Mark, and subsequently the Euro, as its official currency. While tensions eased somewhat following Vojislav Kostunica's victory over Milosevic as federal President, and the FRY's subsequent delivery of Milosevic to the International Criminal Tribunal for the Former Yugoslavia to face pending indictments, a large segment of society in Montenegro remains in favor of calling a quick referendum on independence. At the time of the JRI assessment mission, the federal role vis-à-vis Montenegro was limited to some foreign affairs and defense matters, including a federal military presence in both republics.

An agreement of top political leaders in Serbia and Montenegro brokered by the European Union in mid-March 2002 envisages the formation of a new geopolitical entity named "Serbia and Montenegro." The agreement calls for the parliaments of the FRY, Serbia, and Montenegro to delegate members to a constitutional commission, which will draft a Constitutional Charter for the new state, to be approved by the Serbian, Montenegrin, and FRY assemblies. The new charter would "reaffirm the elements of Serbian and Montenegrin statehood" and include a state union (much like the present federal state) with a parliament, president, council of Ministers, and court. Furthermore, after a three-year waiting period, the member states would be entitled to institute proceedings for withdrawal from the union. It is not clear under exactly what circumstances a withdrawal would be recognized. In mid-April 2002, the parliaments of each republic agreed to the new arrangement, but objections by strong pro-independence parties in Montenegro led to the resignation of the Montenegrin Prime Minister. At the time of publication of this JRI, efforts were still underway to stabilize the Montenegrin government and to maintain a ruling coalition supportive of the new agreement.

This JRI analysis is restricted to the institutions of the Montenegrin judiciary and does not encompass the FRY Federal Court, Federal Constitutional Court, or Military Courts.¹

¹ The FRY Federal Court and Constitutional Court are addressed in ABA/CEELI's 2002 Judicial Reform Index for Serbia.



History of the Judiciary

Montenegro shares the legal tradition of the former Socialist Federal Republic of Yugoslavia (SFRY), including its strong influences from the Austro-Hungarian Empire. During the socialist era, strong executive branch and party influences on the judiciary were common, although perhaps less overt than in some other socialist systems in the region.

Today, Montenegro operates under a democratic Constitution that provides for the separation of the legislative, executive and judicial powers. Its courts apply both Montenegrin laws (including the Criminal Code of the Republic of Montenegro) and federal legislation (including federal criminal procedure and civil procedure codes). It is reported, however, that Montenegro officially refuses to apply the new FRY Criminal Procedure Code (effective April 1, 2002), along with other federal laws it considers to have been passed without legitimate Montenegrin representation. In addition, while recourse to the FRY Federal Court and FRY Constitutional Court are provided in the law in some instances, political considerations have severely restricted such avenues of relief. Moreover, both federal courts were packed with Milosevic loyalists and have yet to fully regain credibility as independent and impartial bodies.

Structure of the Courts

Montenegro has a Constitutional Court, a three-tiered regular court system, and an adjudicative system for minor offenses. In addition, the new Courts Act provides for an Appellate Court and an Administrative Court to be established as part of the regular court system by July 1, 2004.

The primary role of the **Montenegro Constitutional Court** is to rule on the compatibility of laws, regulations, and other general enactments with the Montenegro Constitution. It also has jurisdiction to address individual complaints for violation of human rights and freedoms, if such complaints are not within the jurisdiction of the Federal Constitutional Court and if there is no other legal remedy prescribed. The Court addresses certain conflicts between and among the judiciary, central administration, and local government, and it can determine whether the President of the Republic has violated the Constitution. The Court also has authority to address other matters relating to elections, political parties, citizens' associations, and elections.

The **Supreme Court** is the highest court within Montenegro's regular court system. It currently hears direct appeals from decisions of the higher courts and commercial courts, sits as a court of first instance in administrative matters, and provides extraordinary legal remedies in other cases. With the passage of the new Courts Act and the development of a new Appellate Court and Administrative Court, the Supreme Court will be able to focus more on its role of hearing final appeals with respect to the rulings of other courts of the Republic.

The **Appellate Court of the Republic of Montenegro**—to be established by June 1, 2004—will hear direct appeals for cases originating in the Higher Courts and Commercial Courts.

The **Administrative Court of the Republic of Montenegro**—also to be established by June 1, 2004—will provide the initial judicial review of final administrative decisions.

Higher Courts² in Bijelo Polje and Podgorica try serious criminal cases with possible sanctions of over ten years imprisonment. They also serve as appellate courts for matters tried in the basic courts.

Commercial Courts in Bijelo Polje and Podgorica register commercial companies and operate as courts of first instance for civil commercial matters and commercial offenses.

² Higher Courts were previously referred to as Superior Courts.



Fifteen **Basic Courts**³ throughout the Republic try criminal cases punishable by a fine or up to ten years of imprisonment. They also have original jurisdiction over most civil disputes between and among individuals.

Territorial Bodies for Minor Offenses in seventeen municipalities adjudicate petty offenses, including traffic offenses, punishable by a fine or imprisonment of up to sixty days. Decisions of the minor offenses tribunals are taken to the **Chamber for Minor Offenses**, which has its seat in Podgorica.

Conditions of Service

Qualifications

Judges of the Constitutional Court are selected from among “distinguished legal experts with at least fifteen years professional experience.” The President of the Constitutional Court is elected from among the judges of the Court.

The new Courts Act provides that to be eligible to serve as a judge one must: (1) be a citizen of the Federal Republic of Yugoslavia; (2) be generally in a healthy state and possess capacity; (3) have a university degree in law; and (4) have passed the bar examination. In addition, candidates must have the following work experience in the field of law: five years for the basic courts; six years for the commercial courts; eight years for the higher courts; ten years for the Appellate Court and Administrative Court; and fifteen years for the Supreme Court. These provisions will go into effect after the formation of the new Judicial Council—to be completed under the law by July 2002. Until then, the selection of judges will take place under the prior law on courts.

Judges of the minor offenses courts must have a law degree, have passed the examination for judges, and otherwise meet the criteria for work in administrative bodies. To serve on the Chamber for Minor Offenses, one must meet the above criteria and have at least five-years work experience in legal affairs.

Lay judges (juror judges) serve alongside professional judges on three- and five-judge panels in the basic courts, higher courts, and commercial courts, and they have equal votes to those of their professional judge colleagues. (A professional judge always serves as president of the panel, and handles many procedural matters in a case, including dictating the transcript.) A lay judge must be at least thirty years old, have legal capacity, and be a citizen of the FRY. Lay judges who are to deal with cases concerning minors or serve on the commercial court must have specific experience in those fields. Other lay judges need no special training or experience.

Appointment and Tenure

The five judges of the Constitutional Court are appointed by the Assembly, upon the recommendation of the President of the Republic. They serve nine-year terms without the right to be re-appointed. The President of the Constitutional Court, elected from amongst the members of the Constitutional Court, serves a three-year term.

The Assembly appoints judges and lay judges, upon the recommendation of the Judicial Council and after the public announcement of vacancies. Judges so appointed have life tenure. (Changes in the composition of the Judicial Council will go into effect by July 2002, and the new Council will be charged with developing more detailed rules of procedure for the selection of

³ Basic Courts were previously referred to as Municipal Courts.



judges and lay judges.) Judges of the minor offenses tribunals are appointed by the Government⁴ for renewable five-year terms.

Training

There is no training program for aspiring judges and no requirement that sitting judges participate in continuing legal education courses. A number of judicial training activities are offered to sitting judges on an *ad hoc* basis, principally through the Montenegro Judicial Training Centre.

Assessment Team

The Montenegro JRI 2002 Analysis assessment team was led by Robert Pulver and benefited in substantial part from the efforts of Geralyn Busnardo, Aleksa Ivanovic, and Olja Stozinic. ABA/CEELI staff members Scott Carlson, Greg Gisvold, Julie Broome, and Sarah Churchill served as editors. The JRI conclusions and analyses are based on interviews that were conducted in Montenegro during February and March of 2002 and documents reviewed during that period and beyond. Records of relevant authorities and individuals interviewed are on file with ABA/CEELI.

⁴ The “Government” is defined in the Montenegro Constitution as the body composed of the Montenegrin Prime Minister, one or more deputy Prime Ministers, and Ministers.



Montenegro JRI 2002 Analysis

The Montenegro JRI 2002 Analysis reveals a judicial system that has recently taken the first steps toward reform. War and conflict within former Yugoslavia, as well as continuing tension over the issue of independence from the Federal Republic of Yugoslavia, have hampered and delayed Montenegro's efforts to throw off the legacy of communism and to adopt and implement relevant international standards. Thus, while initial steps are positive, Montenegro still suffers from some outdated socialist-era legislation and mentalities, tensions between the Republic and the federal state, and politicization of many issues relating to the judiciary and judicial reform. As such, it is no surprise that a significant number of JRI reform factors show negative or neutral correlations. While these correlations may provide a sense of the relative gravity of certain issues, ABA/CEELI stresses that the factor correlations noted herein possess their greatest utility when viewed in conjunction with the underlying analyses. In this regard, ABA/CEELI invites comments and information that would enable it to develop better or more detailed responses in future JRI assessments. ABA/CEELI views the JRI assessment process to be part of an ongoing effort to monitor, evaluate, and advance reform efforts.

Table of Factor Correlations

| I. Quality, Education, and Diversity | | |
|---|---|----------|
| Factor 1 | Judicial Qualification and Preparation | Negative |
| Factor 2 | Selection/Appointment Process | Neutral |
| Factor 3 | Continuing Legal Education | Negative |
| Factor 4 | Minority and Gender Representation | Negative |
| II. Judicial Powers | | |
| Factor 5 | Judicial Review of Legislation | Neutral |
| Factor 6 | Judicial Oversight of Administrative Practice | Neutral |
| Factor 7 | Judicial Jurisdiction over Civil Liberties | Neutral |
| Factor 8 | System of Appellate Review | Positive |
| Factor 9 | Contempt/Subpoena/Enforcement | Negative |
| III. Financial Resources | | |
| Factor 10 | Budgetary Input | Neutral |
| Factor 11 | Adequacy of Judicial Salaries | Negative |
| Factor 12 | Judicial Buildings | Neutral |
| Factor 13 | Judicial Security | Negative |
| IV. Structural Safeguards | | |
| Factor 14 | Guaranteed Tenure | Positive |
| Factor 15 | Objective Judicial Advancement Criteria | Neutral |
| Factor 16 | Judicial Immunity for Official Actions | Positive |
| Factor 17 | Removal and Discipline of Judges | Neutral |
| Factor 18 | Case Assignment | Negative |
| Factor 19 | Judicial Associations | Neutral |
| V. Accountability and Transparency | | |
| Factor 20 | Judicial Decisions and Improper Influence | Negative |
| Factor 21 | Code of Ethics | Negative |
| Factor 22 | Judicial Conduct Complaint Process | Neutral |
| Factor 23 | Public and Media Access to Proceedings | Positive |
| Factor 24 | Publication of Judicial Decisions | Negative |
| Factor 25 | Maintenance of Trial Records | Negative |
| VI. Efficiency | | |
| Factor 26 | Court Support Staff | Negative |
| Factor 27 | Judicial Positions | Positive |
| Factor 28 | Case Filing and Tracking Systems | Neutral |
| Factor 29 | Computers and Office Equipment | Negative |
| Factor 30 | Distribution and Indexing of Current Law | Negative |



I. Quality, Education, and Diversity

Factor 1: Judicial Qualification and Preparation

Judges have formal university-level legal training and have practiced before tribunals or, before taking the bench, are required (without cost to the judges) to take relevant courses concerning basic substantive and procedural areas of the law, the role of the judge in society, and cultural sensitivity.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| University-level legal education is required of all professional judges, but there is no requirement that they practice before tribunals before taking the bench. Lay judges are generally not required to have any particular training or background. | |

Analysis/Background:

All professional judges must have earned a law degree before taking the bench. COURTS ACT art. 31, O.G.R.M. 05/02 [hereinafter COURTS ACT], *abrogating* COURTS ACT O.G.R.M 20/95 (June 12, 1995) [hereinafter PRIOR COURTS ACT]; LAW ON MINOR OFFENSES art. 84, O.G.R.M. 25/94, 29/94, 48/99 [hereinafter LAW ON MINOR OFFENSES]. With the exception of judges of the territorial bodies for minor offenses, all judges must also have work experience in the legal field. There is no requirement that judges practice before tribunals or take any specific courses before joining the bench.

Many respondents feel that the Montenegro University Law Faculty does not sufficiently prepare students for a later role as a judge. They indicated that, while some reforms have been undertaken, the education provided lacks focus on practical skills such as legal writing and reasoning, drafting court documents, and questioning witnesses. In addition, many respondents feel that the general practice requirement did little to guarantee that a new judge had gained practical skills while working in the legal profession before taking the bench. Some respondent judges said they lacked the skills necessary to be a judge when they were first appointed. Many believed that there should be a requirement that a candidate have served as a trainee or legal advisor in the courts before being appointed to the bench, while others pointed out the need to improve the court trainee program to better prepare young lawyers for a potential judicial role.

With the exception of those lay judges who work on juvenile or commercial cases, lay judges are not required to have any particular training or background. COURTS ACT art. 70. Those who work on juvenile cases must have “professional experience in the work with minors.” *Id.* Lay judges who work in the commercial court must have “professional experience in the commercial market and in commercial activities.” *Id.*



Factor 2: Selection/Appointment Process

Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system should foster the selection of independent, impartial judges.

| Conclusion | Correlation: Neutral |
|---|-----------------------------|
| The prior system for the appointment of judges is seen by many as highly politicized. Because changes to the composition of the Judicial Council and to the process for selection of judges have yet to come into effect, it is too early to assess the objectivity of the new process. | |

Analysis/Background:

The Judicial Council recommends judges and lay judges for appointment to the Assembly. Many respondents felt that the selection process in the Judicial Council and before the Assembly thus far has focused excessively on the political affiliation of the candidates, and their social and political connections, rather than on their merits.

The new Courts Act changes the composition of the Judicial Council and paves the way for a more transparent and objective process of selection. The new Judicial Council, to be in place in July 2002 (six months from the effective date of the Courts Act), will be presided over by the President of the Supreme Court and will have ten other members: six from the judiciary; two law professors; and two other prominent legal experts. COURTS ACT art. 76. The current Judicial Council is presided over by the President of the Supreme Court, and it has as members the Minister of Justice, two judges, two members of the Assembly, and one other member of the legal profession. PRIOR COURTS ACT art. 44.

While the Ministry of Justice currently conducts the legal and administrative affairs of the Council, it is envisaged that the new Judicial Council will have greater independence from the executive branch. See PRIOR COURTS ACT art. 44; EXPLANATION TO THE COURTS ACT 62 (“accent on transparency” and “elimination of the decisive influence of the executive power” in the new judicial selection process). The new Courts Act has also increased the number of years of experience required for most judicial posts, and it has brought the process for the selection of lay judges under the authority of the Judicial Council. Moreover, the Rules of the Judicial Council, to be adopted after the formation of the new Council, could provide for increased transparency and a greater focus on objective criteria in the appointment process. Because the new Judicial Council has yet to be formed and begin its work, it is too early to assess the new process for the selection of judges.



Factor 3: Continuing Legal Education

Judges must undergo, on a regular basis and without cost to them, professionally prepared continuing legal education courses, the subject matters of which are generally determined by the judges themselves and which inform them of changes and developments in the law.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| The Montenegro Judicial Training Centre provides free training to judges, but continuing legal education is not mandatory. | |

Analysis/Background:

The Montenegro Judicial Training Centre (JTC) was founded in November 2000 and began offering a range of seminars to judges, free of charge, shortly thereafter. The JTC is supported by the Montenegro Association of Judges, international donors, and technical assistance providers. Its managing board is composed primarily of judges. Courses offered are based on input from the judges themselves, as well as from the JTC staff and board. Although the seminars the JTC organized during its first year were somewhat *ad hoc*, a more comprehensive curriculum is now being developed. Continuing legal education is not mandatory for judges, and there has been low attendance by some courts. Specifically, more senior judges are less likely to attend seminars than their counterparts at lower levels of the court system.

Many respondents identified the need for continuing training of sitting judges as crucial for the reform of the judiciary. While older judges are skilled in court practice and in the prior legal framework, they lack exposure to international human rights and new practices. Moreover, when new judges are appointed, they were said to lack the practical skills needed to perform their functions. Finally, with rapid changes and reforms underway in Montenegro's legal system, all sitting judges would benefit from practically oriented training on new laws as they are passed.

Factor 4: Minority and Gender Representation

Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.

| Conclusion | Correlation: Negative |
|---|------------------------------|
| The pool of applicants and group of appointees does not adequately reflect Montenegro's ethnic/religious diversity, and women are underrepresented in leadership positions. | |

Analysis/Background:

While precise data is not available on Montenegro's ethnic composition, a majority of its residents identify themselves as being of Montenegrin ethnicity. Other ethnic groups in Montenegro include Bosniak (Muslim Slav), Albanian, Serbian, Roma, and Croat. While the Ministry of Justice provided detailed information regarding the gender make-up of the judiciary, neither the Ministry, nor representatives interviewed from any other body could provide figures on the racial/religious make up of the judiciary or of the pool of applicants.



Religion and ethnicity in Montenegro are said to be so closely intertwined as to be almost “inseparable.” See U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2001, FEDERAL REPUBLIC OF YUGOSLAVIA, 40 [hereinafter U.S. STATE DEPT., HR REP. FRY 2001]. Thus, most Montenegrins and Serbs are Orthodox (with a tense division between the Serbian and Montenegrin Orthodox Churches), while the vast majority of Albanians and Bosniaks identify themselves as Muslim. Because of the lack of data on the ethnic make-up of the judiciary, a precise analysis of this factor is not possible. Nevertheless, while it appears that Bosniaks are well represented in areas of Montenegro in which they form a majority or large minority, they are underrepresented at higher levels of the court system in Podgorica. Moreover, Albanians are said to be underrepresented even in some areas in which they form a majority of the local population (such as Ulcinj), and it does not appear that there is a single Albanian judge on the Higher Court, Supreme Court or Constitutional Court. Respondents indicated there are no Roma judges in Montenegro. While statistics on the pool of applicants are not available, it appears that few if any Roma have completed law school, met the criteria for appointment, and applied for judicial posts. While Montenegro is said to have a better record on inter-ethnic relations than some other parts of the former Yugoslavia, greater efforts need to be taken to facilitate and encourage underrepresented groups to participate at all levels of the judiciary and in all regions.

Many respondents believed that women form a majority of the judges in Montenegro. Nevertheless, data from the Ministry of Justice shows that of 242 judges in the regular court system (excluding minor offenses tribunals), 92 (or 38%) are female. See MINISTRY OF JUSTICE OF THE REPUBLIC OF MONTENEGRO, *Informal Report on Gender Relations in Montenegro* (March 5, 2002). Women make up 43% of the judges on the basic courts, 50% on the commercial courts, 42% on the higher courts, and 26% of the members of the Supreme Court. *Id.* There are no women among the five members of the Constitutional Court. Only one of twenty court presidents in the regular court system is female. While some felt that few women apply for posts as court presidents, the paucity of women court presidents and lack of any women on the Constitutional Court suggest an artificial barrier against women in top leadership positions in the courts and elsewhere in society. See U.S. STATE DEPT., HR REP. FRY 2001, 42 (“Women do not enjoy a status equal to that of men and few women hold upper level management positions in government or commerce.”)

Lay judges are primarily male retirees, but statistics regarding the ethnicity and gender of lay judges are not available.

II. Judicial Powers

Factor 5: Judicial Review of Legislation

A judicial organ has the power to determine the ultimate constitutionality of legislation and official acts, and such decisions are enforced.

| <i>Conclusion</i> | <i>Correlation: Neutral</i> |
|--|------------------------------------|
| The Constitutional Court has authority to determine the constitutionality and legality of Montenegro’s legislation and other general acts, and its decisions are binding. There is currently no effective mechanism to challenge federal enactments, or to challenge republic enactments on federal grounds. | |



Analysis/Background:

The Constitutional Court of the Republic of Montenegro has jurisdiction to assess the compatibility of Montenegro’s own laws, regulations, and other general enactments with the Montenegro Constitution. CONSTITUTION OF THE REPUBLIC OF MONTENEGRO art. 113 [hereinafter CONST. MONT.]. Once the Court rules that an enactment is inconsistent with the Republic’s Constitution, the enactment automatically ceases to be in force. *Id.* at art. 115. While respondents overwhelmingly indicated that decisions of the Constitutional Court were respected and enforced, one respondent reported that a local authority had resisted reforming its taxation rules although required to do so under a final decision of the Constitutional Court.

Under the current federal system in the FRY, the compatibility of republic or federal legislation with the Federal Constitution may be tested in the Federal Constitutional Court. CONSTITUTION OF THE FEDERAL REPUBLIC OF YUGOSLAVIA arts. 124 & 129 [hereinafter FEDERAL CONSTITUTION]. Nonetheless, many in Montenegro do not recognize the federal authority in this regard and do not feel that the Federal Constitutional Court, as currently constituted, is a fair and impartial body.

In May 2000, the Assembly of Montenegro pronounced that it would not recognize “any legal and political act adopted without the presence of legitimate and legal representatives of Montenegro in legislative, executive and judiciary powers of the federal state.” RESOLUTION ON PROTECTION OF RIGHTS AND INTERESTS OF THE REPUBLIC OF MONTENEGRO AND ITS CITIZENS, O.G.R.M. 37/00. While relations have eased somewhat following Kostunica’s victory over Milosevic as FRY President, the Federal Constitutional Court lacks credibility in both Montenegro and Serbia. See ABA/CEELI 2002 JUDICIAL REFORM INDEX FOR SERBIA, Factor 5 analysis. Thus, most respondents felt that it would be difficult or impossible for a citizen to launch a federal constitutional challenge with confidence that the results would subsequently be implemented in Montenegro. Respondents said that if one were to attempt to launch a federal constitutional challenge, some courts in Montenegro would refuse to transfer files to the federal authority or otherwise impede the process. Thus, it appears that there is currently no effective mechanism to challenge the constitutionality and legality of federal laws and to bring a federal constitutional challenge to Montenegro’s laws.

Under the March 2002 agreement to restructure the FRY into a new state union called “Serbia and Montenegro,” a constitutional commission with delegates from the assemblies of Montenegro, Serbia, and FRY are to come up with a Constitutional Charter for the new entity. See PROCEEDING POINTS FOR THE RESTRUCTURING OF RELATIONS BETWEEN SERBIA AND MONTENEGRO (March 14, 2002). The resulting state union (similar to the current federal state) would have a Court of Serbia and Montenegro with constitutional court and administrative court functions. The Court would review administrative acts of the state union and would “deal with the harmonization of court practice.” *Id.* The Court will have an equal number of judges from each of the two states and will not serve as an appellate court. It remains to be seen whether the agreement will in fact lead to a credible and acceptable replacement for the FRY Constitutional Court.

Factor 6: Judicial Oversight of Administrative Practice

The judiciary has the power to review administrative acts and to compel the government to act where a legal duty to act exists.

| | |
|--|-----------------------------|
| Conclusion | Correlation: Neutral |
| The judiciary has the power to review administrative acts and compel government action, but the procedure is often protracted and sometimes ineffective. | |



Analysis/Background:

The judiciary has the power to review administrative acts and to either annul the act, or to enter its own verdict on the matter. See LAW ON ADMINISTRATIVE LITIGIOUS PROCEEDINGS art. 41, O.G.F.R.Y. 46/96 [hereinafter LAW ON ADMINISTRATIVE DISPUTES]. Parties must generally exhaust two rounds of administrative review before beginning a case in the court. A judicial challenge may be initiated within thirty days of receipt of the final administrative decision. See *id.* at art. 22. Challenges to the decisions of government agencies currently are filed in the Supreme Court, which has a separate administrative law division. See *id.* at art. 17(3); PRIOR COURTS ACT art. 13(f). The new Courts Act provides for the formation of an Administrative Court to provide judicial review of administrative decisions, after the exhaustion of administrative remedies. See COURTS ACT arts. 23-24. This should reduce the burden on the Supreme Court’s administrative panel and will potentially reduce any delay in hearing administrative matters. The new court is to begin its work no later than July 1, 2004. *Id.* at art. 132.

Judicial review of administrative decisions typically has been plagued by delays and protracted proceedings. Some respondents said that a matter could easily become moot before the court issued its decision in an administrative pending matter before it. For example, a citizen might want to challenge the issuance of a construction permit, but the structure might be completed or near completion before that matter is heard in the court. Moreover, some respondents complained that, despite having the authority to compel government action, the courts are much more likely to simply strike down a government decision and return the matter to the administrative system. Thus, despite a strong administrative law system in the former Yugoslavia in comparison with other communist regimes, it appears that courts are still reluctant to use their full powers to compel government action where necessary. It remains to be seen how the new Administrative Court will work in practice.

Factor 7: Judicial Jurisdiction over Civil Liberties

The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.

| | |
|--|-----------------------------|
| Conclusion | Correlation: Neutral |
| The judiciary has ultimate jurisdiction over cases involving civil rights and liberties, but citizens are not accustomed to enforcing such rights in the courts. | |

Analysis/Background:

Articles 14 through 76 of the Montenegro Constitution set forth the freedoms and rights of citizens. CONST. MONT. arts. 14-76. The Montenegro Constitution also provides that all citizens are entitled to an ultimate judicial remedy for the violation of their rights. *Id.* at art. 17. The FRY has not adopted, and Montenegro has not otherwise incorporated into its republic legislation, the European Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights.

Citizens’ rights under the Montenegro Constitution are to be reflected in legislation, which is then enforceable in the regular court system. As such, arguments in the regular court system regarding citizens’ rights are based on provisions of regular law, and judges and lawyers are not comfortable basing their arguments on the Constitution alone. When there is no other legal remedy available and the matter is not within the competency of the Federal Constitutional Court, citizens may address complaints for violations of their freedoms and rights to the Constitutional



Court of Montenegro. *Id.* at art. 113(4). The Constitutional Court receives only a handful of such complaints per year, and it might adjudicate only one or two. In addition, it appears that, outside the context of criminal procedure law, citizens and most lawyers are not accustomed to asserting civil rights and liberties claims or issues in the court system.

The Federal Constitution contains rights and freedoms similar to those found in the Constitution of Montenegro, and the Federal Constitutional Court has the authority to rule on “complaints about a ruling or action violating the rights and freedoms of man and the citizen enshrined in the present Constitution.” FEDERAL CONSTITUTION arts. 19-67 & 124(6). As discussed above under Factor 5, the Federal Constitutional Court lacks credibility, and its authority is not likely to be recognized by most Montenegrin institutions. As such, there is currently no effective body for the enforcement of rights exclusive to the Federal Constitution, and citizens would have to base claims on the Constitution of Montenegro.

Factor 8: System of Appellate Review

Judicial decisions may be reversed only through the judicial appellate process.

| Conclusion | Correlation: Positive |
|--|------------------------------|
| With the exception of legislative grants of amnesty and presidential pardons, judicial decisions may only be reversed through the appellate process. | |

Analysis/Background:

The principle that judicial decisions may only be reversed by higher judicial bodies is well understood and is respected in practice. Respondents were unaware of any instance in which another branch of government asserted the ability to “reverse” a final judicial decision, other than through a constitutionally based power to grant amnesty or a pardon. Under the Constitution, the Assembly has the power to grant amnesty and the President can issue pardons for criminal offenses under the law of the Republic. CONST. MONT. arts. 81(10) & 88(6).

A recent amnesty law granted every prisoner convicted and serving their sentence as of December 2000 with an automatic reduction of their sentence. LAW ON AMNESTY FOR PERSONS SENTENCED ACCORDING TO MONTENEGRO LAWS. O.G.R.M. 57/00. The law provided for a twenty-five percent sentence reduction for those convicted under Montenegrin law and a fifteen percent reduction for those convicted under the FRY Criminal Code. *Id.* at art. 1. Because the law applied to all prisoners, including sex offenders, members of civil society voiced strong discontent with the application of the law to this category of offenders. Respondents were unaware of any other recent controversial or abusive exercises of the amnesty or pardon powers.



Factor 9: Contempt/Subpoena/ Enforcement

Judges have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers are respected and supported by other branches of government.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| The law provides courts with subpoena, contempt and enforcement powers, but such powers are often underutilized. | |

Analysis/Background:

Courts have the authority in both criminal and civil cases to issue summonses, compel attendance of reluctant witnesses, and fine those who do not show up. CRIMINAL PROCEDURE ACT OF THE FEDERAL REPUBLIC OF YUGOSLAVIA arts. 101, 108, 302-307 O.G.F.R.Y. 070/01-1 [hereinafter CRIM. PROC. ACT];⁵ LAW ON CIVIL PROCEDURE OF THE FEDERAL REPUBLIC OF YUGOSLAVIA art. 248, O.G.S.F.R.Y 4/77; O.G.F.R.Y. 27/92, 12/98, 3/02 [hereinafter LAW CIV. PROC.]. Nonetheless, respondents almost universally pointed to significant problems in compelling witness attendance and to the repeated postponement of court proceedings when witnesses fail to appear. Respondents also pointed to specific problems in compelling the attendance of witnesses or parties located in Kosovo.

Postal employees, responsible for the delivery of most summonses and other court documents, are said to often fail to obtain the signature of the recipient of the document. In one instance, a criminal defendant missed the time to lodge an appeal of his conviction because he/she had never received the court's conviction order. It was later discovered that the defendant—who was in custody at the time—had in fact not been properly served and that a postal employee had signed the receipt of delivery instead of the defendant. When the problem was uncovered, the defendant was permitted additional time to lodge his/her appeal.

If a summons is properly delivered and the witness does not show up, respondents differed as to their assessment of the effectiveness of the police in compelling witness attendance. Police were generally said to be helpful in finding witnesses in criminal cases, but they were considered to be less helpful in civil cases. Moreover, police in some regions were said to be more responsive than in other parts of the country. One respondent said that the police would only compel witness attendance “if they wanted to.”

Finally, courts were said to rarely, if ever, assess and collect fines from witnesses for failure to appear. Effective January 26, 2002, the FRY increased fines from a maximum fine of 300 dinar (\$5) to 30,000 dinar (\$500) for the failure of a witness to appear. LAW CIV. PROC. art. 248. Nevertheless, because Montenegro's Assembly does not recognize “any legal and political act adopted without the presence of legitimate and legal representatives of Montenegro in legislative, executive and judiciary powers of the federal state” it is likely that courts would not apply the new fines. See RESOLUTION ON PROTECTION OF RIGHTS AND INTERESTS OF THE REPUBLIC OF MONTENEGRO AND ITS CITIZENS, O.G.R.M. 37/00.

⁵ It is reported that courts in Montenegro have not applied the new FRY Criminal Procedure Act (effective April 1, 2002), because they consider it to have been promulgated without legitimate Montenegrin representation. While this JRI makes reference to the new Criminal Procedure Act, provisions of the prior federal criminal procedure legislation (analyzed during the assessment mission) are substantially similar with respect to most issues discussed herein.



Respondents universally felt that the establishment of court police under the direct control of the judiciary, as foreseen in the new Courts Act, would greatly improve the system for issuing summons and court documents and compelling attendance of reluctant witnesses. See COURTS ACT art. 124. Police directly under the authority of the courts will be more responsive to judicial orders.

Judges also have contempt powers, but they rarely invoke them. In both civil and criminal cases, judges may remove from the court and fine any participant or person attending a proceeding who disrupts the proceeding or fails to obey an order from the court. LAW CIV. PROC. art. 318; CRIM. PROC. ACT art. 299. Although the FRY Assembly recently increased fines for contempt from 300 dinars (\$5) to 30,000 dinars (\$500), it is likely that many courts in Montenegro would refuse to apply the new federal provisions. See LAW CIV. PROC. art. 248. See also RESOLUTION ON PROTECTION OF RIGHTS AND INTERESTS OF THE REPUBLIC OF MONTENEGRO AND ITS CITIZENS, O.G.R.M. 37/00.

The enforcement of civil judgments is also problematic. When a losing party fails to comply with a civil judgment, the winning party must file a new action in the civil execution department of the relevant court. Depending on the substantive law in question, the enforcement action may give the losing party the opportunity virtually to relitigate the original decision in the case and to take other procedural steps to delay enforcement. In addition, the police are often uncooperative in the enforcement of civil judgments.

III. Financial Resources

Factor 10: Budgetary Input

The judiciary has a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches, and, once funds are allocated to the judiciary, the judiciary has control over its own budget and how such funds are expended.

| Conclusion | Correlation: Neutral |
|--|-----------------------------|
| The judiciary has input into the budget, but does not advocate its needs in the Assembly. Once allocated, funds are directly controlled by the judiciary, subject to system-wide revenue shortfalls. | |

Analysis/Background:

Under the regular budget process, each court is to prepare an annual request budget and submit it to the Supreme Court. (One basic court indicated that it did not present an annual budget request; presumably, budget assumptions for courts that do not submit a proposal are based on the prior years' budget or actual expenditures.) The Supreme Court compiles the budgets from each court and presents the overall court budget to the Government. The Government, in compiling the Republic's annual budget, has complete control over what is ultimately submitted to the Assembly and often reduces what the judiciary has requested. Once in the Assembly, judges do not advocate for the needs of the court system, and the Assembly is often seen to simply rubber stamp the Government's submission.

Once the budget is approved, the Supreme Court is allotted funds periodically, but as with the rest of the Republic's budget, the allocation of funds is subject to frequent budgetary shortfalls. As funds are needed in the individual courts, courts make requests to the Supreme Court, and the Court transfers funds to the individual courts' bank accounts. Courts then have control over



how funds are expended, but generally they must expend funds in accordance with budget line-items.

In practice, it appears that system-wide revenue shortfalls have led to a delay in the allocation of funds to the courts. As a result, many courts are slow to pay court-assigned counsel and experts. Moreover, many respondents felt that the funds requested by the Government and ultimately granted by the Assembly were insufficient to fulfill the needs of the judiciary. Several respondents suggested that the courts should have a “separate budget” from that of the Republic, meaning in particular that court costs and other funds received by the courts should be retained by the courts for their own use, rather than being paid into the Republic’s coffers.

In sum, it appears that the judiciary has significant input into the budgetary process, but it lacks direct input at the level of the Assembly. This appears to be in large part the legacy of a one-party system and ongoing shortcomings in parliamentary practice. Once allocated, the judiciary again appears to have significant control over the expenditure of funds, but it is plagued by revenue shortfalls that affect the rest of the system.

Factor 11: Adequacy of Judicial Salaries

Judicial salaries are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income.

| Conclusion | Correlation: Negative |
|---|------------------------------|
| Judicial salaries are on a par with those of other civil servants, but they are not sufficient to attract and retain the most qualified candidates or to enable judges to support their families in a reasonably secure manner. The system of providing housing to some judges is subject to abuse and provides a direct method for the assertion of undue influence over judges. | |

Analysis/Background:

Judicial salaries are extremely low, but generally they are on a par with salaries of other civil servants. Judges currently receive the following monthly salaries, which are not subject to taxation: The President of the Supreme Court—670 Deutsche Marks (DM); The President of the Constitutional Court and judges of the Supreme Court—637DM; judges of the Constitutional Court and presidents of higher courts—605DM; presidents of courts of minor offenses—572DM; presidents of commercial courts and judges of the higher courts—540DM; presidents of basic courts, judges of the Chamber of Minor Offenses, judges of the commercial courts, judges of the basic courts, and presidents of territorial minor offenses tribunals—508DM; and judges of the territorial minor offenses tribunals—470DM. These salaries include a twenty-percent increment for members of the judiciary. LAW ON SALARIES AND OTHER FEES OF MEMBERS OF PARLIAMENT AND REPUBLICAN FUNCTIONARIES art. 2, O.G.R.M. 28/93 [hereinafter LAW ON SALARIES]; RESOLUTION ON THE BONUS ON SALARIES OF HOLDERS OF JUDICIAL FUNCTIONS, O.G.R.M. 10/96.⁶ The new Courts Act foresees that judicial salaries will be governed by a special law. COURTS ACT art. 11.

In addition, judges and other functionaries receive an increment of from one-half to one percent for each year of service and receive retirement pay equal to their salary during their last month of service. LAW ON SALARIES arts. 4, 11. Judges and other functionaries are also entitled to

⁶ Salaries are calculated by multiplying the given coefficient for each position, by 90DM—the applicable multiplier for the year 2002.



reimbursement for transportation to and from work, meals during working hours, and expenses associated with work. *Id.* at art. 9.

While the President, Prime Minister and members of the Assembly are entitled to free state-provided transportation, judges are not. Moreover, unlike judges, members of the Assembly are entitled to an “allowance” equal to twenty percent of their salaries. Thus, after including their “allowance,” Members of Parliament receive the same monthly amount as the President of the Constitutional Court and judges of the Supreme Court—637DM—but they have the benefit of state-provided transportation.

In addition to salaries and the aforementioned benefits, as a holdover from the former socialist system, some judges and other civil servants are provided houses, apartments, or housing loans from the government for free or on very favorable terms. See DECISION OF THE GOVERNMENT OF MONTENEGRO ON THE WAY AND CRITERIA FOR RESOLVING THE HOUSING NEEDS OF REPUBLICAN OFFICIALS, O.G.R.M. 11/97. The Housing Issues Commission of the Government of the Republic of Montenegro is to provide housing, from resources available during the budget year, based on the significance of the official’s position (level of the official’s salary multiplier), the official’s current housing situation, and the number of family members in the official’s household. *Id.* at arts. 8-11.

Despite what appear to be objective criteria in the law, there is much room for abuse and corruption. For example, with the consent of the Government, the Commission can provide benefits to individual officials without announcement, or can allocate an apartment to a person in social need “as a gift.” *Id.* at art. 25. Those in favor with the members of the Commission are said to be more likely to receive benefits, and on more favorable terms. Some high officials receive benefits quickly and keep the benefits indefinitely even after they leave their positions. Others are said to receive an apartment and then rent it out for a profit. While judges in some courts appeared to have government-provided housing, judges in other courts complained that they were not treated equally and had waited twenty or more years for housing. Respondents were generally unfamiliar with the operation of the Commission, suggesting that it suffers from a lack of transparency. Many felt that judges in favor with the ruling party would be rewarded with housing, while judges ruling against the wishes of the Government would not. Even if this were not the case, it leaves judges with the impression that they are more likely to receive housing benefits if they rule in accordance with the wishes of those currently in power.

Almost all respondents said that judicial salaries are insufficient to attract and retain qualified judges and that many judges had left the bench to become private practitioners. Some judges appear to join the bench as a way of learning the law and, after they gain experience, leave for a more lucrative private career. On the other hand, one former judge said that it was also difficult to generate income as a private practitioner and that many young people still want to become judges (at least as initial training for the later practice of law).

Most respondents felt that current salary levels are not sufficient to enable judges to support their families and live in a reasonably secure environment. They pointed out that judges, unlike many other civil servants, cannot hold other jobs or generate income through other means. See CONST. MONT. art. 106 (judges may not perform other public function or engage in any professional activity). One respondent said that low salaries put judges in the position of purchasing goods on credit and later facing pressure to treat their creditor more favorably in court proceedings. Those who have been given governmental housing support, on the other hand, may well be able to live and support their families in a reasonably secure fashion, relative to the current income levels in Montenegro. Some may even be relatively overcompensated (particularly as it appears that people retain their housing even after leaving their civil servant position).

In sum, current salaries alone (for judges and their court staff) are insufficient both to attract and retain qualified judges and for judges to support their families in a reasonably secure manner. Those who receive homes or apartments from the state, on the other hand, are for the most part



adequately compensated or even overcompensated in comparison to those who do not receive housing. The system of providing housing to judges and other civil servants presents a serious threat to the independence of the judiciary and paves the way for outright corruption of judges and other civil servants by the administration. Resources currently allocated for judicial housing should instead be shared with all judges, on an equitable and transparent basis, as part of their regular monthly salary.

Factor 12: Judicial Buildings

Judicial buildings are conveniently located and easy to find, and they provide a respectable environment for the dispensation of justice with adequate infrastructure.

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|---|-----------------------------|
| Conclusion | Correlation: Neutral |
| Judicial buildings are conveniently located and easy to find. While the courts are generally sufficient to fulfill their intended purpose, many are overcrowded and lack a sufficient number of courtrooms. | |

Analysis/Background:

Court buildings are for the most part conveniently located and easy to find. Moreover, most courts have one or more large courtrooms that are sufficient to handle most cases in which there is significant public interest. Nonetheless, the lack of a sufficient number of these large courtrooms requires judges frequently to hold proceedings in their small offices. This creates a less than ideal environment for the dispensation of justice, can reduce the authority of the court in the eyes of the parties and lawyers, and can facilitate *ex parte* communications and other improper conduct.

The Supreme Court is housed along with the Higher Court of Podgorica, the Podgorica Minor Offenses Court, and two prosecutors' offices. While the premises are in quite good condition, housing the Court with other institutions detracts from its authority as the highest judicial body in Montenegro's regular court system. Moreover, the Supreme Court lacks a sufficient number of courtrooms for its case load. The Higher Court of Podgorica, housed in the same facility, similarly lacks sufficient courtrooms. The space in the Basic Court of Bar was said to be sufficient for the work of the court, but the building was not designed as a court building and existing space is not optimally allocated. Establishment of the Appellate Court of Montenegro and the Administrative Court of Montenegro, while a positive step, may well place additional demands on the already overburdened court facilities in Podgorica.

Factor 13: Judicial Security

Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination.

| | |
|---|------------------------------|
| Conclusion | Correlation: Negative |
| Additional resources are needed to help protect judges from security threats inside and outside of court buildings. | |



Analysis/Background:

Some respondents indicated that judges on occasion receive threats. Threats are more likely in regions in which organized crime is taking root. Most respondents felt that judicial security issues are likely to increase in the future, as larger commercial cases are likely to be heard, and as the problem of organized crime increases.

Security in most courts visited was poor. Some—but not all—courthouses have metal detectors at the doors. No package scanners were observed. While some facilities have a police officer as a guard, other court buildings have no security personnel (except personnel that might be assigned to guard a particular defendant during a court proceeding). Moreover, most courts lack separate circulation systems for judges, criminal defendants, lawyers, and the public.

Respondents indicated that judges have no special security or protection, and they are treated like any other citizen if they encounter a problem. Thus, judges currently rely on the police if they encounter any particularized security threat. Under the new Courts Act, Judicial Police will be established, among other things, to provide for “the protection of persons and property.” COURTS ACT art. 124. The role and organization of the Judicial Police will be further elaborated in a separate law. *Id.* It remains to be seen whether the new Judicial Police will be formulated, and funded, in such a way as to give meaningful protection to judges both inside the court buildings and outside when necessary.

IV. Structural Safeguards

Factor 14: Guaranteed tenure

Senior level judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.

| Conclusion | Correlation: Positive |
|---|------------------------------|
| Judges of the regular court system have life tenure, while those of the Constitutional Court serve nine-year non-renewable terms. | |

Analysis/Background:

The Constitution provides judges of the regular court system with life tenure. CONST. MONT. art. 103. They may only be removed if they reach retirement age, are convicted of a crime and sentenced to prison, are convicted of an offense which makes them unsuitable to perform judicial functions, perform their function “unprofessionally and unconscientiously,” or if they have permanently lost the capacity to perform their function. *Id.* Court presidents are appointed for renewable four-year terms, and they return to the function of a regular judge after the conclusion of their presidency. COURTS ACT art. 33. The short duration and renewability of court presidencies opens the door somewhat for increased political influence over court presidents.

Judges of the minor offenses tribunals are appointed for five-year renewable terms. LAW ON MINOR OFFENSES art. 82.

Judges of the Constitutional Court serve nine-year terms and may not be re-appointed. CONST. MONT. art. 111. Constitutional Court judges may be removed on the same grounds as regular



court judges, except they may not be removed for performing their functions “unprofessionally and unconscientiously.” *Id.* at art. 112.

Factor 15: Objective Judicial Advancement Criteria

Judges are advanced through the judicial system on the basis of objective criteria such as ability, integrity, and experience.

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|--|-----------------------------|
| Conclusion | Correlation: Neutral |
| <p>The prior system for the selection and advancement of judges is seen by many as highly politicized. It is too early to assess the objectivity of the advancement process to be implemented by a reconstituted Judicial Council.</p> | |

Analysis/Background:

The new procedure for promoting a judge within the judiciary is the same as for the initial selection of judges. The Judicial Council announces openings, those who are interested apply, and based on the applications, interviews and relevant materials, the Judicial Council recommends judges for appointment by the Assembly. COURTS ACT arts. 34-39.

One of the factors to be considered is an assessment of the candidates’ professional and working qualities. For a judge applicant, this assessment is conducted by the college of the court on which they sit and by the college of the immediately higher court. *Id.* at art. 36.

As discussed under Factor 2 above, many respondents felt that the selection process in the Judicial Council and before the Assembly thus far has focused excessively on the political affiliation of the candidates, and their social connections, rather than on their merits. Several respondents felt, in particular, that the court presidents were selected more based on connections and political affiliation than on professional merit. The new Courts Act—designed in part to reduce this type of political influence—changes the composition of the Judicial Council and paves the way for a more transparent and equitable selection process. The new Judicial Council is to be in place by July 2002. It is too early to assess the objectivity of the new process.

Factor 16: Judicial Immunity for Official Actions

Judges have immunity for actions taken in their official capacity.

| | |
|--|------------------------------|
| Conclusion | Correlation: Positive |
| <p>Judges have immunity for actions taken in their official capacity, but they appear to be subject to criminal sanction for unlawful decisions done for personal gain or to harm another. Respondents did not report any problems regarding the scope of judicial immunity in practice.</p> | |



Analysis/Background:

Judges have immunity for actions taken in their official capacity, subject to some limitations. The Constitution provides judges with the same immunity as deputies of the Assembly, who may not be held accountable for an opinion expressed or a vote cast in the Assembly. CONST. MONT. art. 79. The criminal code, however, provides a criminal sanction against a judge or lay judge who “renders an unlawful decision or in any other way violates the law with a view to procure any gain or inflict damage on another person in the proceedings at the court of law.” CRIMINAL CODE OF THE REPUBLIC OF MONTENEGRO art. 223, O.G. 42/93; 14/94; 27/94. This provision is arguably contrary to the broad Constitutional grant of immunity for opinions expressed or votes cast.

Judges also enjoy the same immunity from criminal process as that enjoyed by deputies. The Constitution provides that no deputy of the Assembly may be subject to criminal proceedings or detained without prior approval of the Assembly (but may be detained if apprehended during the commission of a criminal offense for which the penalty prescribed exceeds five years’ imprisonment). CONST. MONT. art. 79. Respondents did not report any recent problems regarding the scope of judicial immunity in practice. If anything, judges enjoy far reaching immunity even for actions unrelated to their professional functions.

Factor 17: Removal and Discipline of Judges

Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.

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|---|-----------------------------|
| Conclusion | Correlation: Neutral |
| Because the new procedures for discipline and removal of judges have yet to be implemented, it is too early to evaluate their fairness and effectiveness. | |

Analysis/Background:

The Constitution provides that judges may only be removed if they reach retirement age, are convicted of a crime and sentenced to prison, are convicted of an offense which makes them unsuitable to perform judicial functions, perform their function “unprofessionally and unconscientiously,” or have permanently lost the capacity to perform their function. CONST. MONT. art. 103. Similar provisions apply to judges of the Constitutional Court, but they cannot be removed for unprofessional and unconscientious conduct, and removal proceedings take place in the Assembly without the involvement of the Judicial Council. See *Id.* at art. 112.

The Judicial Council is empowered to make recommendations to the Assembly for removal of a judge or lay judge in the regular court system, or for the cessation of his/her function. Under the new Courts Act, only the president of the court on which the judge sits, a minimum of three members of the Judicial Council, the Disciplinary Committee of the Judicial Council, the president of a directly higher court, the President of the Supreme Court, or the Minister of Justice may submit an initiative for the removal of a judge. COURTS ACT art. 54. Any initiative submitted by another body will be rejected. See *Id.* at art. 56. The accused judge has the right to be present during removal proceedings and to have counsel, but his/her right to present and question witnesses is not clearly elaborated. *Id.* at arts. 59 & 61. Additional procedural protections for accused judges could and should be elaborated in Rules of the Judicial Council to be adopted after the Council is reconstituted. An abbreviated proceeding is possible for determination of the “cessation” of a judge’s term, as opposed to removal for misconduct. See *Id.* at 53.



In addition, the new Courts Act provides that the Assembly may nullify the prior appointment of a judge, “if it is proven that at the time of election the judge did not satisfy the conditions for the election.” *Id.* at art. 66.

The new Courts Act introduces a new, and separate, system for the discipline of judges. Judges may be disciplined for performing their judicial function “negligently” or for violating “the dignity of the judicial function.” COURTS ACT art. 43. A judge is deemed to have performed his or her function negligently if, without appropriate justification, the judge: (1) “does not take cases in the order they are registered;” (2) “does not schedule the time for a public hearing or a public sitting for the cases assigned to him/her;” (3) “is tardy in attending scheduled public hearings or public sittings;” or (4) “for other negligent conduct defined in the Courts Act.” *Id.* at art. 45. A judge is deemed to “violate the dignity of the judicial function” if he/she: (1) “appears in the court or comes into contact with parties in a condition that makes him/her unfit for performing the judicial function (under influence of alcohol or intoxicating drugs);” or (2) “causes disorder in a public place.” *Id.* at 44. If, in disciplinary proceedings, the Council finds grounds for removal of a judge, it can also initiate removal proceedings. *Id.* at art. 50.

Only the president of the court on which the judge sits, the president of the directly higher court, or the President of the Supreme Court may submit a proposal for judicial discipline. Such a proposal must be submitted within fifteen days “of the cognizance of the reasons” for disciplinary action and no later than sixty days from “the origin of those reasons.” *Id.* at art. 46. Proposals that are late or are submitted by an unauthorized person must be rejected. *Id.* at art. 45. These restrictions could render the discipline process ineffective.

Apart from the processes for discipline and removal of judges, there has been a long-standing practice for citizens to lodge complaints about judicial conduct with the president of a court or with the President of the Supreme Court. Respondents differed as to the efficacy of such process (see Factor 22). Moreover, given the short timeframe for the initiation of disciplinary proceedings, it is unlikely that citizens’ complaints to a court president would be resolved before the time has expired for the initiation of a disciplinary proceeding in the Judicial Council.

In practice, there have been few procedures initiated under the Prior Courts Act for the removal of judges, and there was no prior system for judicial discipline. The fairness, effectiveness, and transparency of the new process for judicial discipline remains to be seen.

Factor 18: Case Assignment

Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise, and they may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| <p>Although the new Courts Act provides for the random assignment of cases, court presidents will retain wide discretion in assigning cases until these provisions come into effect.</p> | |



Analysis/Background:

Court presidents enjoy wide latitude in assigning cases, and respondents said that this authority was abused in some courts. Respondents indicated that a court president might abuse his/her assignment authority by assigning a particular case to a judge that owed him/her a favor, to a judge with a particular pre-disposition on a matter, or to a judge that would not act on the case and simply “put it in a drawer.” One respondent admitted to requesting that the court president assign cases to particular judges that are known to be quicker than others, as a way to expedite cases.

Court presidents appear to have substantial power over the other judges on the court, and some respondents said that court presidents are appointed more on political grounds than on professional merit. The new Courts Act attempts to redefine the post of court president as the “first among equals,” a departure from socialist-era thinking. See EXPLANATION TO THE COURTS ACT 66.

The new Courts Act also provides that cases must be assigned randomly. COURTS ACT arts. 89-93. The Courts Act defines random case assignment, not just as a procedural requirement, but as a right of each party. *Id.* at art. 8. Nevertheless, the random allocation of cases will not begin until thirty days from the adoption of the new Rules of the Court, which might not be in force for another year. *Id.* at art. 133. Steps should be taken to assure that random case assignment requirement is *immediately* implemented, even if an interim measure is required.

Factor 19: Judicial Associations

An association exists, the sole aim of which is to protect and promote the interests of the judiciary, and this organization is active.

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| Conclusion | Correlation: Neutral |
| The Association of Judges of Montenegro has some activities, but it needs to do more to promote the interests of the judiciary. | |

Analysis/Background:

The Association of Judges of Montenegro—a voluntary association—was founded in 1993, and until 1999, it had few activities. With the support of ABA/CEELI, the Association has been more active, but it has additional steps to take before it can be considered an active and effective voice of its members.

The Association holds annual meetings of its regional delegates, convenes executive board meetings as needed, supports the work of the Judicial Training Centre, publishes a bulletin of its activities, and has pursued some advocacy on the issue of judges’ salaries. Some Association members, although not necessarily acting behalf of the Association, were integrally involved with the drafting of the new Courts Act. The Association is also working to revise its governing statute, and it is considering work on a new judicial code of ethics.

On the other hand, the Association has never convened a meeting of all its members, has no office, and has no paid support staff. While it has formed some subject-matter committees, to date they have been largely inactive. Many respondents, particularly those outside Podgorica, said they were unaware of the Association’s activities. One judge who has been on the bench for




more than a year said he/she did not even know that the Association existed. Others felt that the Association will not be considered a true voice of the judges until it begins holding annual meetings of all member judges (rather than just delegates). The Association could also benefit by targeting outreach activities to newly appointed judges and by more assertively advocating with the legislative and executive branches for the interests of the judiciary.

V. Accountability and Transparency

Factor 20: Judicial Decisions and Improper Influence

Judicial decisions are based solely on the facts and law without any undue influence from senior judges (e.g., court presidents), private interests, or other branches of government.

| Conclusion | Correlation: Negative |
|---|------------------------------|
|  Social pressures, political influences, and private interests at times influence judicial decision-making. Court presidents have great sway over the decisions of lower judges within their courts. | |

Analysis/Background:

Responses varied widely as to the types and degree of inappropriate influence on the judiciary. A handful of respondents said that no inappropriate influence comes to play in judicial decision-making. Others identified a range of factors—including senior judges, social pressures, political and governmental powers, and private influences—as interfering with the fair dispensation of justice.

It appears that court presidents hold great authority over other judges on their courts. Court presidents play a role in the evaluation of other judges, are seen as higher in the hierarchy, and are therefore in a position to unduly influence decisions in some cases. Several respondents felt that the appointment process is particularly politicized when it comes to the appointment of court presidents and that presidents on some courts use their position to influence the timing or outcome of particular cases. Their power to assign cases, relatively unfettered under the Prior Courts Act and Court Rules, provides one mechanism for influencing cases. One respondent said that some court presidents would assign a sensitive case to a trusted colleague on the court, who would in turn “put it in a drawer” and not act on it.

Social pressures are probably the most widespread type of undue influence on judicial decision making, with citizens not infrequently asking members of the bench for special treatment. One respondent illustrated the phenomenon by describing how a close relative had attempted to influence his/her decision in a particular case. Another likened it to a shopkeeper who lets friends or colleagues into the front of the line in the shop—the same can happen in the court. Another judge respondent said he/she had refused initial attempts to influence his decisions and that this put an end to further attempts. The problem is particularly acute in smaller communities outside the capitol.

Many respondents felt that there is significant undue political influence, or political bias, in some cases. The system of providing some judges government housing is seen as inequitable and paves the way for governmental influence in court decisions (see Factor 11 above). Respondents also pointed to what they considered to be politicization of the judicial appointment and advancement process and said this resulted in a judiciary that would rule in favor of the administration on important matters. One respondent said that judges are inappropriately



influenced by a law that holds the government liable for the wrongful detention of any defendant who is acquitted at trial—because of the law, according to the respondent, judges are more reluctant to acquit defendants. At the same time, respondents pointed out that courts often do issue money judgments against the government. While it is difficult or impossible to ascertain the degree of political and government influence over the judiciary, it is safe to say that in the current politically charged atmosphere in Montenegro, with the legacy of a one-party system, significant influence or political bias is likely in some cases.

Respondents varied significantly as to the amount of private influence, or corruption, there is in the current judiciary. Some respondents proudly asserted that bribery does not occur in Montenegro’s courts, while others said it is frequent. One respondent recounted a case in which the court allegedly created and signed a full transcript from a proceeding which had not taken place; the respondent said that he/she had repeatedly reported the problem, but that authorities were unwilling to take action against the judge in question because of his/her political connections. Another respondent described how a judge might purchase items on credit in a local store and later find the creditor to be a party in a pending proceeding. The creditor might offer to forgive the debt for favorable treatment in the case, and some judges, giving in to the temptation, might be enticed into corrupt practices. A few respondents said that certain defense counsel are notorious for taking extra money from their clients under the pretense that they can buy better treatment for their clients. It is unclear whether these lawyers are engaged in judicial corruption, or simply in defrauding their clients. In any event, despite fairly widespread knowledge of this phenomenon, few, if any, steps have been taken to stop it.

Factor 21: Code of Ethics

A judicial code of ethics exists to address major issues such as conflicts of interest, ex parte communications, and inappropriate political activity, and judges are required to receive training concerning this code both before taking office and during their tenure.

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|--|------------------------------|
| Conclusion | Correlation: Negative |
| A bare-bones code of ethics exists, but there are no mechanisms for its enforcement. Training on ethics is not mandatory and has not been offered at the Judicial Training Centre. | |

Analysis/Background:

The Association of Judges of Montenegro has adopted an ethics code covering (in seven short sentences) some general ethics principles. See ASSOCIATION OF JUDGES OF MONTENEGRO, CODE OF JUDICIAL ETHICS OF MONTENEGRO. The Code, roughly half a page in length, applies only to members of the Association and not to all sitting judges. The Code touches on conflict of interest and prohibits “inappropriate behavior” generally, but it does not directly address *ex parte* communications. The Code has no enforcement mechanisms, and a violation of a code of ethics is not a grounds for discipline or removal under the new Courts Act.

While some respondents said that judges and counsel were aware of, and avoided, *ex parte* communications, it appears that *ex parte* communications are in fact frequent. One respondent even said it would be appropriate for one party to speak to the judge about the merits of a case, without the other party present, if this would help to reach a resolution in the matter.

While the Association of Judges is considering drafting a new code of ethics, many judges equate ethics with “morality” and therefore see little need for an ethics code. Drafters of such a code will have to illustrate how useful a code can be in addressing ethical conundrums that arise in the



every-day work of any judge, grapple with the issue of how to have the code apply to all judges in Montenegro (not just to Association members), and develop a mechanism for the enforcement of its provisions.

Neither prospective judges, nor sitting judges, are required to receive training on principles of ethics, and the Judicial Training Centre does not even offer such a course.

Factor 22: Judicial Conduct Complaint Process

A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct.

| Conclusion | Correlation: Neutral |
|--|-----------------------------|
| The public can, and does, address complaints about judicial conduct to the president of a court and/or to the President of the Supreme Court. Citizens cannot address complaints to the Judicial Council, and the strict time limits for beginning a judicial discipline proceeding might prevent meritorious citizen complaints from leading to disciplinary proceedings. | |

Analysis/Background:

Citizens have the ability to lodge complaints about judges with the president of their court, the President of the Supreme Court, and/or the Ministry of Justice. Citizens use this tool in practice, and most complaints appear to deal with the delay of cases. If a court president finds merit to the complaint, the court president will request that the judge correct the problem. If the problem is not corrected, the court president might warn the judge to avoid such conduct in the future.

Respondents differed as to whether this process provides citizens a meaningful avenue to complain about judicial misconduct. It appears that many citizens who are simply unsatisfied with a verdict lodge complaints about the judge who issued the decision. Often citizens complain in private, but they are unwilling to formally lodge a complaint. When they do, they rarely substantiate the claim with evidence of wrongdoing. Moreover, it appears that courts lack sufficient resources to fully investigate all such allegations.

Under the new Courts Act, which introduces to Montenegro a system for judicial discipline, only the president of the court on which the judge sits, the president of the directly higher court, or the President of the Supreme Court may submit a proposal for judicial discipline to the Judicial Council. COURTS ACT art. 46. Such proposals must be submitted within fifteen days “of the cognizance of the reasons” for disciplinary action and no later than sixty days from “the origin of those reasons.” *Id.* at art. 46. Proposals that are late or are submitted by an unauthorized person must be rejected. *Id.* at art. 45. Court presidents can theoretically propose that a disciplinary proceeding be initiated based on information they receive from a private citizen complaint, but the short time limits renders it unlikely that many complaints will be initiated in this fashion.



Factor 23: Public and Media Access to Proceedings

Courtroom proceedings are open to, and can accommodate, the public and the media.

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| Conclusion | Correlation: Positive |
| Despite ill-defined exceptions in the law and space limitations, court proceedings are in practice open to the public and media. | |

Analysis/Background:

The Constitution provides that trials are public and may be closed only in exceptional circumstances. CONST. MONT. art. 102. The civil and criminal procedure codes contain some rather vaguely worded bases upon which the public may be excluded, including for the defense of the State, to keep the confidentiality of information, to preserve public order, for the protection of morals, in the interests of a minor, or for the protection of the personal or family life of the defendant or the injured person. CRIM. PROC. ACT art. 292. See also LAW CIV. PROC. arts. 306-310. While the court’s order closing proceedings must be substantiated and made public, there is extremely limited ability to appeal such a decision. Decisions to close proceedings are not subject to appeal in civil cases, and in criminal cases, they may only be appealed with the verdict. LAW CIV. PROC. art. 309; CRIM. PROC. ACT art. 294.

While the above standards are rather ill-defined, there were no complaints from respondents that courts had used these exceptions inappropriately to exclude the public. In practice, when there are cases of public interest, judges schedule cases in large courtrooms so that the public and media may attend. Although many matters are heard in judges’ small offices, these tend to be cases in which there is no public or media interest. In practice, respondents, including journalists, felt there is adequate access to proceedings. Nevertheless, any future revision of the applicable procedure codes should take care to more precisely define the bases for closing a proceeding, and drafters should strongly consider allowing an expedited interlocutory appeal of such a decision.

Factor 24: Publication of Judicial Decisions

Judicial decisions are generally a matter of public record, and significant appellate opinions are published and open to academic and public scrutiny.

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| Conclusion | Correlation: Negative |
| Only interested parties or others who demonstrate a “justifiable interest” can obtain copies of court decisions. No court opinions are published. | |

Analysis/Background:

As a legacy of socialism, judicial decisions are not a matter of public record. While judgments in most cases are announced in open court, copies of the rulings and decisions are generally only available to the parties to the case. See CRIM. PROC. ACT art. 357 (announcement of verdict in criminal case); LAW CIV. PROC. art. 335 (most civil judgments announced in open court); COURTS ACT art. 122 (right of parties and their representatives to access court documents). Others with a



justifiable interest may request a copy from the president of the court or other authorized staff. See LAW CIV. PROC. art. 150 (parties and those with a “justifiable interest” may view and copy documents from court proceedings); CRIM. PROC. ACT art. 170 (those with “justified interest” may see and copy records in criminal case). Whether a court decision is eventually provided to a requester might then depend on the inclination of the particular court president. One court president indicated that he/she would provide a court decision to someone with a legitimate academic interest, but he/she would not provide a copy if a person wanted the decision only to “discredit his neighbor.”

Most courts lack a public viewing area, and photocopy facilities, for public access to court decisions and documents. Journalists said that they can generally obtain copies of court decisions, but do so from the parties, rather than from the courts.

The Constitutional Court is the only court in Montenegro to publish its decisions. Under the Constitution, decisions of the Constitutional Court are published in the Official Gazette along with dissenting opinions. CONST. MONT. art. 116. Nevertheless, perhaps as a holdback to the prior system, dissents are said to be relatively rare. The Supreme Court periodically issues a bulletin that summarizes some of its rulings, but it does not publish the full text of its decisions.

Factor 25: Maintenance of Trial Records

A transcript or some other reliable record of courtroom proceedings is maintained and is available to the public.

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| Conclusion | Correlation: Negative |
| Courts do not create verbatim transcripts of proceedings, and the court records that are maintained are not easily obtained by the public. | |

Analysis/Background:

Courts do not produce verbatim transcripts of proceedings. Instead, the president of the court panel dictates a summary of witness testimony and the arguments of counsel to a court staff member who transcribes the minutes on a typewriter or computer. See LAW CIV. PROC. arts. 123-128; CRIM. PROC. ACT arts. 312-315; RULE BY-LAW ON INTERNAL TRANSACTIONS OF THE REGULAR COURTS arts. 121-124, O.G.S.R.M. 35/77. If counsel or a witness disagrees with the judge’s summary, they may register their objection on the record. This process results in a record that reflects the judge’s perception of the evidence and arguments, augmented by the objections of counsel or witnesses, rather than a verbatim record of what witnesses and counsel actually said. While many respondents were satisfied with the quality of the minutes produced, others said that they often contain errors and omissions.

Public access to the court records is very limited and falls within the discretion of court presidents. Anyone other than a party to a particular case must justify his or her reason for obtaining the records, and several respondents suggested that a specific academic or journalistic purpose usually is required. Moreover, most courts lack dedicated space for public review, and photocopying, of transcripts and other court documents.



VI. Efficiency

Factor 26: Court Support Staff

Each judge has the basic human resource support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| Many courts lack a sufficient number of legal advisors to assist with technical legal work, and existing staff would benefit from additional training. | |

Analysis/Background:

Many respondent judges said that they lack a sufficient number of legal advisors (expert associates) to assist in technical legal tasks such as drafting court decisions, preparing summonses, assisting in the investigation in criminal cases, and conducting legal research. Notably, respondents in one basic court said they had no legal advisors at all. Some respondents also felt that placing more judicial trainees in the courts would be useful and would help prepare more potential judges for the bench.

Court administrative personnel are very poorly paid and are susceptible to inappropriate influences. They receive no training prior to commencing their duties, and their on-the-job training is limited. Judicial staff of all levels would benefit from legal, administrative, and computer training.

Factor 27: Judicial Positions

A system exists so that new judicial positions are created as needed.

| Conclusion | Correlation: Positive |
|--|------------------------------|
| While the prior system for the creation of judicial posts was seen by some as slow, the new Courts Act could expedite the process by directly involving court presidents and the Judicial Council. | |

Analysis/Background:

Under the Prior Courts Act, the Assembly determined the number of judges, upon the proposal of the Government. The Government's proposal was formed after taking into account the opinion of the Supreme Court. See PRIOR COURTS ACT art. 19. Some respondents felt that the prior system for the creation of new posts was slow, and many felt that there are currently too few judges in Montenegro. On the other hand, Montenegro has a relatively high number of judges per capita, with 260 current judges for a population of approximately 650,000.

Under the new Courts Act, the Judicial Council defines the number of judges and lay judges for each court, "following the proposal of the Minister of Justice on the initiative of the president of the court." COURTS ACT art. 9. The Ministry of Justice establishes "benchmarks concerning the needed number of judges and other employees of the courts." COURTS ACT art. 109. This



change involves court presidents and the Judicial Council directly in the process for establishing judicial posts, and may help streamline the process. How it functions in practice remains to be seen.

Factor 28: Case Filing and Tracking Systems

The judicial system maintains a case filing and tracking system that ensures cases are heard in a reasonably efficient manner.

| Conclusion | Correlation: Neutral |
|---|-----------------------------|
| While Montenegro's manual case filing and tracking system tends to ensure the reasonably efficient handling of most cases, respondents complained of some delays. | |

Analysis/Background:

Montenegro currently plans to develop a republic-wide judicial computer network as well as local area networks in each court. For now, however, case filing, tracking and management are done manually. Respondents consider the manual system to be generally functional and adequate to handle current caseloads, but some complained of excessive delays in some cases.

Montenegro's court administrators are said to boast that no case in the Republic is more than three-years old. However, respondents pointed out that each time a case is remanded after an appeal, it is assigned a new case number and new commencement date. Therefore, old matters are still in the system, but they appear statistically as recent cases. One respondent said he/she was aware of two open cases that are more than twenty years old, and one that dates back to 1947.

There is no system indexing cases by subject matter within each court and no republic-wide case index of any kind. One judge respondent said it was difficult to find other cases by subject matter in his/her court, even though it would be useful to see how other judges had ruled in similar matters. While court registers may be searched manually by party name, one judge estimated that it would take a couple of hours in each court of the Republic to search for all cases involving a particular party. Initiation of a republic-wide electronic case network could make such a search possible in a matter of minutes or seconds.

While the current system is functional, automation of the system within each court, and an eventual republic-wide networked system would vastly improve case tracking.

Factor 29: Computers and Office Equipment

The judicial system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.

| Conclusion | Correlation: Negative |
|---|------------------------------|
| While a program to equip all courts with computers has begun, at the time of the JRI most courts were without computers and suffered other equipment needs. | |



Analysis/Background:

The European Agency for Reconstruction (EAR) has begun a program to equip all courts in Montenegro with computers. As of March 2002, the first stage of the program was near completion, with computers having been delivered to the courts in Podgorica and Bijelo Polje. Subsequent stages of the EAR program have yet to begin, and courts in other areas of Montenegro remain largely without computer equipment. Eventually, courts' computers will be linked through local area networks, and there are plans for a possible republic-wide computer network for the judiciary. Given the move towards computerization, there is a strong need for training of judges and staff on computer skills and applications to assure that the new equipment is used effectively.

Many courts could benefit from additional office equipment such as fax and copy machines (particularly if courts begin to provide court documents to the public—see Factors 24 and 25 above). Moreover, if Montenegro were eventually to modify its system for the taking of court transcripts, recording devices would be needed.

Factor 30: Distribution and Indexing of Current Law

A system exists whereby all judges receive current domestic laws and jurisprudence in a timely manner, and there is a nationally recognized system for identifying and organizing changes in the law.

| | |
|--|------------------------------|
| Conclusion | Correlation: Negative |
| Not all judges receive a copy of the Official Gazette, and only the decisions of the Constitutional Court are published. | |

Analysis/Background:

Respondents said that all courts timely receive copies of Montenegro's Official Gazette, containing new laws and subsidiary instruments. However, most courts receive only one or two copies, leaving it incumbent upon the court president to make sure each edition is copied for, or made available to, all judges on the court. It appears that some court presidents are efficient at doing so, while others are less so. Although perhaps costly, a better system would be for each judge to be directly provided one copy of the Gazette free of charge.

Respondents diverged as to whether judges timely receive copies of the FRY Official Gazette. Some respondents said that the courts regularly receive the federal gazette, others said that it had not been distributed for years, while others were uncertain.

Nationally recognized indices track changes in both Montenegrin and Federal laws and subsidiary instruments.

The Constitutional Court is the only court in Montenegro to publish its decisions. Neither the Supreme Court, nor other courts of the regular court system do so. This detracts from the transparency of the judicial process, reduces the accountability of judges, and makes it difficult for judges and litigants to benefit from prior judicial practice.

While most judges have collected their own legal materials, many courts lack a legal library. Judges felt that comparative materials from the West and from other countries of the former Yugoslavia would be extremely useful, particularly in implementing new legislation or suggesting revisions to current legislation but said that they lacked sufficient access to such materials.



Notes



Notes

In 2001, ABA/CEELI put the finishing touches on its Judicial Reform Index (JRI), an assessment tool designed to examine a cross-section of factors important to judicial reform in emerging democracies. In an era when legal and judicial reform efforts are receiving more attention than in the past, ABA/CEELI believes the JRI will prove to be a valuable tool for legal professionals working on judicial reform throughout the globe.

ABA/CEELI designed the JRI around fundamental international norms, such as those set out in the *United Nations Basic Principles on the Independence of the Judiciary*; *Council of Europe Recommendation R(94)12 "On the Independence, Efficiency, and Role of Judges"*; and the Council of Europe's *European Charter on the Statute for Judges*. Drawing on these norms, ABA/CEELI compiled a series of thirty statements setting forth factors that facilitate the development of an accountable, effective, independent judiciary.

With each JRI, the thirty statements are evaluated to determine whether they correlate with the local conditions, and the results of the thirty separate evaluations are collected in a standardized format. For each factor, there is a description of the basis for this conclusion and an in-depth analysis, detailing the various issues involved. Cataloguing the data in this way permits users to easily compare and contrast performance of different countries in specific areas and—as JRIs are updated within a given country—over time. ABA/CEELI intends to capitalize on this feature with the development of a proprietary database that will house the entire collection of information.

In developing the JRI, ABA/CEELI drew upon a diverse range of experts, and ABA/CEELI acknowledges that this finished product owes an incredible debt to a long list of professionals. Many hours of pro bono time were devoted to this project over the course of the last several years, and ABA/CEELI thanks all of those who took part in this process. In addition, ABA/CEELI would like to recognize the United States Agency for International Development (USAID) for its support, which has been two-fold. From the very beginning of this project, USAID has provided intellectual support for the JRI concept, and, most recently, the USAID Missions in the field have been forthcoming with financial support for the completion of the country-specific reports. Without the support of all involved, the JRI would not have been possible. In the months and years to come, ABA/CEELI hopes to build upon these contributions seeking constructive feedback from these original supporters—and those who will use the JRI—to make this an even better tool in the future.

