

JUDICIAL REFORM INDEX

FOR SERBIA

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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.

Acknowledgements

Lisa Dickieson, Director, Judicial Reform Programs, the American Bar Association’s Central and East European Law Initiative (ABA/CEELI) (1995 to 2000), and Mark Dietrich, Member, New York State Bar and Advisor to ABA/CEELI developed the original concept and design of the JRI. Scott Carlson, Director, Judicial Reform Programs at ABA/CEELI (2000-Present) directed the finalization of the JRI. Assistance in research and compilation of the JRI was provided by Jenner Bryce Edelman, Program Associate at ABA/CEELI, and James McConkie, Student Intern, ABA/CEELI.

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Serbia Background

Legal Context

The Republic of Serbia is one of the two remaining republics within the Federal Republic Of Yugoslavia (FRY), along with the Republic of Montenegro. Both Serbia and Montenegro have their own constitutions and judiciaries. As a result of a schism that developed towards the end of the Milosevic era, Montenegro does not participate in federal institutions, has adopted a separate currency, and has otherwise acted in a manner consistent with de facto independence. As a result, while Serbia is not a sovereign nation, for the purpose of this analysis it is appropriate to consider its judiciary separately from that of Montenegro. The primary judicial body at the FRY level, the Federal Constitutional Court, is encompassed in this analysis. The Federal Constitutional Court's name and jurisdiction will change if the EU-brokered agreement to form a new country, called "Serbia and Montenegro," is ratified by the Parliaments of Serbia, Montenegro, and Yugoslavia.

Under the Serbian Constitution, the territory of Kosovo is an autonomous province within Serbia. However, as a result of the 1999 war and United Nations Security Council Resolution 1244, Kosovo currently is under interim international administration. Its judiciary therefore is not encompassed within this analysis.

History of the Judiciary

The judiciary in Serbia has its roots in the emergence of an independent Serbian constitutional monarchy in the second half of the nineteenth century after centuries of Ottoman rule. The most significant and enduring influence on the courts is the legacy of post-World War II communist Yugoslavia. All the major courts currently in existence, including the Federal and Serbian Constitutional Courts, the Serbian Supreme Court and the district and municipal courts date from the communist era. While Serbia and FRY adopted new constitutions in 1990 and 1992, respectively, they maintained the judicial bodies already in existence.

Structure of the Courts

The primary judicial body at the federal level is the **Federal Constitutional Court**. Comprised of seven judges, its primary function is to determine whether republic constitutions, statutes and other laws conform to the Federal Constitution and federal law. Any citizen may begin an initiative in the Court. The other federal judicial body is the **Federal Court**. It is the highest instance court in cases involving enforcement of federal law, and has jurisdiction over certain disputes between member republics. Given the political situation in the federation, the Federal Court plays only a marginal judicial role at present.

The **Serbian Constitutional Court** has a jurisdiction similar to that of its Federal counterpart. It determines whether Serbian laws, regulations and other enactments are in conformity with the Serbian Constitution. Any citizen may begin an initiative in the Court.

The new judicial laws adopted at the end of 2001 will result in a significant restructuring of the regular courts. At present, the **Supreme Court** is the highest appellate court. It also has an administrative law department with jurisdiction over all appeals of final decisions by administrative organs. As of October 1, 2002, a new intermediate appellate body is scheduled to become effective, the **Court of Appeals**. It will have jurisdiction over appeals from the municipal and district courts. The Court of Appeals will have its seat in Belgrade with branches in Nis, Novi Sad and Kragujevac. Its decisions may be appealed to the Supreme Court.



The second new court scheduled to become effective on October 1, 2002, is the **Administrative Court**. Located in Belgrade, it will provide first instance review of all final administrative organ decisions. The decisions of the Administrative Court may be appealed to the Supreme Court.

At present, the **district courts** are courts of first instance in serious civil and criminal matters, and courts of second instance in lesser matters. As of October 1, 2002, the district courts' jurisdiction will be limited to first instance matters. The courts will have jurisdiction to try criminal offenses punishable by ten years' imprisonment or more and other specified offenses, juvenile offenses, civil disputes of substantial value and in other specified areas, labor disputes and certain other matters. There are 30 district courts in Serbia.

The 143 **municipal courts** are the principal first instance courts, and they will remain so after the new judicial laws are in effect. The courts have first instance jurisdiction over all criminal and civil cases that do not fall within the first instance jurisdiction of the district courts.

Commercial courts have jurisdiction over a wide range of commercial disputes, including copyright, privatization, foreign investment, unfair competition, maritime and other matters. These courts also are responsible for the registration of commercial enterprises. There are 16 commercial courts, and their decisions may be appealed to the **High Commercial Court**, located in Belgrade. Decisions of the latter court may be appealed to the Supreme Court.

Conditions of Service

Qualifications

All judges must have formal university level legal training. However, there is no requirement that new judges have practiced before tribunals, nor are they required to take any specific courses before taking the bench. New municipal court judges must spend two years in a court apprenticeship and at least two years as court assistants before assuming their roles. Judges at higher courts are required to have between four and twelve years of post-bar exam legal experience to qualify for appointment.

Appointment and Tenure

All judicial nominations to republic courts are to be made by the High Judicial Council, whose choices are submitted to the National Assembly for formal appointment. Seven of the eleven members of the High Judicial Council responsible for all judicial nominations must be judges. All judges on republic courts have life tenure.

Federal Constitutional Court and Federal Court judges are appointed to nine-year terms by the Federal Assembly. Nominations to the Federal Constitutional Court are made by the Federal President.

Training

There is no formal judicial training program for judges and no requirement that sitting judges undergo continuing legal education courses. There are a number of judicial training courses offered on an ad hoc basis. The new Judicial Center for Professional Education and Advanced Training (JTC), a joint initiative of the Ministry of Justice and the Judges Association of Serbia, is expected to begin operating in 2002.



Assessment Team

The Serbia JRI 2002 Analysis assessment team was led by Nicolas Mansfield and benefited in substantial part from Maksic Dragoslav, Mirjana Golubovic, Alisa Koljensic-Radic, Blazo Nedic, John Phillips, and Terry Rogers. ABA/CEELI Washington staff members Scott Carlson and Sarah Warner served as editors. The conclusions and analysis are based on interviews that were conducted in Serbia in January 2002 and relevant documents that were reviewed at that time. Records of relevant authorities and individuals interviewed are on file with ABA/CEELI.

Serbia Judicial Reform Index (JRI) 2002 Analysis

The Serbia JRI 2002 Analysis reveals a new democracy moving forward in the reform process. Although the coalition government elected in 2000 has made some significant changes in the past year, many of the final steps needed to solve the most critical problems (such as the 150,000 case backlog) will require further difficult and perhaps radical reform in the coming years.

ABA/CEELI would like to underscore that the factor correlations and conclusions possess their greatest utility when viewed in conjunction with the underlying analysis. 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 and evaluate 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 | Neutral |
| II. Judicial Powers | | |
| Factor 5 | Judicial Review of Legislation | Negative |
| Factor 6 | Judicial Oversight of Administrative Practice | Neutral |
| Factor 7 | Judicial Jurisdiction over Civil Liberties | Negative |
| Factor 8 | System of Appellate Review | Positive |
| Factor 9 | Contempt/Subpoena/Enforcement | Negative |
| III. Financial Resources | | |
| Factor 10 | Budgetary Input | Negative |
| Factor 11 | Adequacy of Judicial Salaries | Negative |
| Factor 12 | Judicial Buildings | Negative |
| Factor 13 | Judicial Security | Neutral |
| IV. Structural Safeguards | | |
| Factor 14 | Guaranteed Tenure | Positive |
| Factor 15 | Objective Judicial Advancement Criteria | Neutral |
| Factor 16 | Judicial Immunity for Official Actions | Neutral |
| Factor 17 | Removal and Discipline of Judges | Neutral |
| Factor 18 | Case Assignment | Neutral |
| Factor 19 | Judicial Associations | Positive |
| V. Accountability and Transparency | | |
| Factor 20 | Judicial Decisions and Improper Influence | Neutral |
| Factor 21 | Code of Ethics | Negative |
| Factor 22 | Judicial Conduct Complaint Process | Neutral |
| Factor 23 | Public and Media Access to Proceedings | Neutral |
| Factor 24 | Publication of Judicial Decisions | Negative |
| Factor 25 | Maintenance of Trial Records | Negative |
| VI. Efficiency | | |
| Factor 26 | Court Support Staff | Neutral |
| Factor 27 | Judicial Positions | Neutral |
| Factor 28 | Case Filing and Tracking Systems | Negative |
| 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 |
|--|------------------------------|
| Judges are required to have law faculty degrees, but there is no requirement that they have practiced before tribunals or taken any specific courses before taking the bench. An effort is underway to improve the quality of the court internship program that marks the first step in a judicial career. | |

Analysis/Background:

All judges must have obtained a university law degree before taking the bench. LAW ON JUDGES art. 41, O.G.R.S., No. 63/01 [hereinafter LAW ON JUDGES]. Law graduates seeking to enter the judiciary must spend at least two years working as a court intern in the municipal, district or commercial courts, after which they may take the bar exam (court interns are eligible to take the bar exam after two years, but generally may serve up to three years as an intern). LAW ON ORGANIZATION OF COURTS art. 62, O.G.R.S., No. 63/01[hereinafter LAW ON ORGANIZATION OF COURTS]; LAW ON THE BAR EXAMINATION, art. 2, O.G.R.S. 16/97. After successful passage of the bar exam, a court intern may assume the position of court assistant, in which he or she takes on greater substantive responsibility in assisting sitting judges. Candidates passing the bar exam with a “distinguished mark” are guaranteed a position as a court assistant, while others must apply in a competitive process. *Id.* at arts. 56 and 62. After a minimum of two years’ experience as a court assistant, a candidate is eligible for appointment as a municipal court judge. LAW ON JUDGES art. 41. There is no requirement that judges have practiced before tribunals or taken any specific courses before taking the bench.

There is significant competition among law graduates to obtain court intern positions. The selection of interns is entirely within the discretion of court presidents, and several respondents suggested that this has resulted at times in selections based more on connections than on merit. One respondent suggested that the new High Judicial Council should be responsible for selecting interns.

Most respondents believed that the internship program provides inadequate training to prospective judges. Although interns do rotate through the various departments of the court, there is little structure to the program and an intern’s experience depends entirely on the interest shown by his or her mentoring judge. For the most part, the emphasis is on how the intern can best serve the court and not on providing meaningful training to the intern.

The new Law on Organization of Courts requires the Supreme Court President to determine a framework for intern training, to be carried out by the court presidents. LAW ON ORGANIZATION OF COURTS art. 63. The Supreme Court President has expressed her seriousness about improving the internship program to all court presidents, and she has asked them to develop formalized intern program plans for her review. Several respondents suggested that each court would name a judge to be responsible for the intern program at the court and that judges selected to be mentors would receive a somewhat lighter caseload to allow them to devote more time to training



interns. In addition, the newly formed judicial training center (see Factor 4 *infra*) reportedly will include training programs for interns, although the law does not make such training mandatory.

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 |
|---|-----------------------------|
| Newly enacted legislation established a High Judicial Council composed of a majority of judges that will be responsible for judicial nominations. Implementation remains the challenge. In the past year, judicial appointments made under the old law were less politicized than those during the Milosevic era. | |

Analysis/Background:

The method by which judges are appointed has been revised substantially with the enactment of the new judicial laws that became effective on January 1, 2002. All judicial nominations are to be made by the new High Judicial Council, whose choices are submitted to the National Assembly for formal appointment. LAW ON JUDGES arts. 42-46; LAW ON HIGH JUDICIAL COUNCIL art.1, O.G.R. S. 63/01 [hereinafter LAW ON HIGH JUDICIAL COUNCIL]. The National Assembly may only appoint a candidate nominated by the High Judicial Council. LAW ON JUDGES art. 46. Under the old law, the Minister of Justice nominated candidates for appointment by the National Assembly. During the Milosevic era, this system resulted in a notoriously politicized judicial appointment process, with loyalty to the regime serving as the determining factor in appointments and scant attention paid to objective criteria.

The High Judicial Council, will be composed of five permanent members: the President of the Supreme Court, the Republic Prosecutor, the Minister of Justice, one member selected by the Serbian Bar Association and one member selected by the National Assembly. LAW ON HIGH JUDICIAL COUNCIL art. 3. When considering judicial appointments, the permanent members are joined by six "invited" members, all of whom are judges selected by the Supreme Court. *Id.* at art. 4. As a result, seven of the eleven members of the High Judicial Council responsible for all judicial nominations will be judges (the member selected by the National Assembly, who must come from a list of three candidates proposed by the Supreme Court, cannot be a judge. *Id.* at art. 3). As of March 2002, all, except one, High Judicial Council members have been named. The final member will be appointed by the National Assembly, the selection will be based on recommendations from the Supreme Court. The Supreme Court submitted recommendations in February, but as of April 2002 the 13th member has not been named.

The law does not identify specific objective criteria to be applied by the High Judicial Council in its nomination process, but it provides that the Council shall consider "only [a candidate's] professional ability and worthiness." LAW ON JUDGES art. 45. The law requires that the Council obtain "data and opinion" relating to these issues from the workplace of each candidate. *Id.* at art. 44.

Most respondents were optimistic that the new laws would result in an objective judicial selection process. Although the Ministry of Justice nominated a significant number of judges in the final



weeks before the new laws went into effect, most respondents felt that those selections were less politicized than had been the case under the former regime, and generally of good quality.

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 |
|--|------------------------------|
| Judges are not required to undergo any continuing legal education. It is expected that a newly created judicial training center will begin offering educational courses to judges in 2002. | |

Analysis/Background:

There is no requirement in the new judicial laws that judges undergo continuing legal education courses. Judges have a legal right to receive advance training at no cost to them, and the Supreme Court is required to prescribe the form of such training, but it is not mandatory. LAW ON JUDGES art. 8. Under the prior regime, there were very few opportunities for judges to receive training. The past year witnessed an increase in training opportunities, with a number of educational programs for judges sponsored by international organizations, NGOs, the Supreme Court, and the Judges Association of Serbia (JAS).

In late 2001, the Ministry of Justice and the JAS agreed to jointly found a new Judicial Center for Professional Education and Advanced Training (JTC), which will provide continued advanced training to judges, prosecutors and other legal professionals. Under the terms of the agreement, the Ministry is obliged to provide the premises for the Center, and the JAS is to provide the initial capital. CONCLUSION OF THE GOVERNMENT OF SERBIA ON THE AGREEMENT ON FOUNDING THE JUDICIAL CENTER FOR PROFESSIONAL EDUCATION AND ADVANCED TRAINING art. 5, No. 011-15158/2001-12-01, November 22, 2001 [hereinafter AGREEMENT ON FOUNDING THE JTC]. As of late January 2002, the Ministry had identified the premises, and the JAS reportedly had obtained commitments of 1.5 million euros from international donors for the establishment and initial operating costs of the JTC.

The terms of the agreement suggest that judges will have substantial authority over the center's activities. The JTC will be governed by a management board of eleven members, at least six of whom will be judges. AGREEMENT ON FOUNDING THE JTC art. 10. Among other duties, the board will appoint the director of JTC and determine the plans and programs of the training to be offered. AGREEMENT ON FOUNDING THE JTC art. 13.

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: Neutral |
|--|-----------------------------|
| <p>Women are well-represented in the judiciary. They are in the majority in the lower courts, and they are at, or near, parity with men at the higher courts. While ethnic and religious minorities can be found in the judiciary, it is difficult to assess whether their representation is roughly proportional to their representation in the general population.</p> | |

Analysis/Background:

Ethnic and religious minorities are represented in the judiciary, particularly in areas such as Sandzak and Vojvodina with substantial minority populations. It is unclear whether their numbers are proportional to the number of such minorities in the general population. There are areas where minority representation is clearly not proportional to the population. In Nis, for example, where it is estimated that between 5 to 15% of the population is Roma, there reportedly is not a single Roma judge. The new law on judges does not contain any language relating to the desirability of minority representation in the judiciary. As a result of the purges of the Milosevic era, there reportedly are fewer minority judges today than a decade ago.

As for the issue of gender, there is no question that women are well represented in the judiciary. In the municipal and district courts, women comprise a substantial majority of judges. At the Supreme Court, there are approximately equal numbers of men and women. Women particularly dominate the ranks of the civil courts, while the majority of criminal court judges reportedly are men.

The most common explanation for the prevalence of women in the judiciary is the meager remuneration of judges: it is extremely difficult for men to fulfill their traditional role of family provider on a judicial salary. A former Minister of Justice during the Milosevic era is said to have once quipped that the judiciary was comprised of "inept men and well-married women." As one respondent noted, there was an unfortunate grain of truth in this remark.



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.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| While the Federal and Serbian constitutional courts have the right to review the constitutionality of legislation, they are still dominated by judges who are holdovers from the Milosevic era and as such have no credibility or effective authority. | |

Analysis/Background:

The Federal Constitution provides that the Federal Constitutional Court has the authority to determine the conformity of statutes and other laws with the Federal Constitution, and the Court's rulings are binding. CONSTITUTION OF THE FEDERAL REPUBLIC OF YUGOSLAVIA arts. 124, 129 [hereinafter FEDERAL CONSTITUTION]. Anyone can file an initiative with the Court asking it to review the constitutionality of a given law. FEDERAL CONSTITUTION art. 127. The Constitution of Serbia provides for a Constitutional Court with similar powers and procedures at the republic level. CONSTITUTION OF THE REPUBLIC OF SERBIA arts. 125-131. [hereinafter SERBIAN CONSTITUTION].

During the Milosevic era, the two constitutional courts were notoriously political bodies that pliantly did the bidding of the regime. Members of the court who sought to pursue an independent course were removed. At one point, the President of the Serbian Constitutional Court was a Milosevic ally who was not even a lawyer.

Both courts continued to be composed largely of Milosevic era holdovers for much of 2001. As such, the courts had little credibility with the legal community and the public. For example, the Federal Constitutional Court's decision suspending the government's decision to turn over Milosevic to the Hague tribunal was completely ignored.

The Serbian Constitutional Court today lacks an adequate number of judges, with more than half of its positions vacant. Only one new member has been appointed since the fall of Milosevic. Several respondents suggested that new members to the Court would be named shortly, but as of March 2002, the Court remains moribund. The Federal Constitutional Court also lacks judges. Like its Serbian counterpart, it has received only one new appointee since October 2000. As of March 2002, it has only four of the constitutionally mandated seven members. Moreover, its relevance is clouded by the ongoing uncertainty in the relationship between Serbia and Montenegro. If the EU-brokered agreement to form a new country is ratified, a new "Court of Serbia and Montenegro," with re-defined jurisdiction, will replace the Federal 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, but to date, courts have not compelled the government to act where a legal duty to act exists. | |

Analysis/Background:

The judiciary has the power to review administrative acts. Appeals of final administrative decisions may be filed in court within 30 days of receipt of the decision. LAW ON ADMINISTRATIVE DISPUTES art. 21, O.G.F.R.Y. 46/96 [hereinafter LAW ON ADMINISTRATIVE DISPUTES]. Challenges to the decisions of government agencies currently are filed in the Supreme Court, which has a separate administrative law division. *Id.* at art. 17. However, the new Law on Organization of Courts calls for the establishment of a new Administrative Court, effective October 1, 2002. LAW ON ORGANIZATION OF COURTS arts. 10, 12, 26 and 85. That court will have first instance jurisdiction over all administrative disputes, with the Supreme Court serving as the second instance forum. *Id.* at arts. 14, 26.

Under the Law on Administrative Disputes, the reviewing court may vacate an administrative ruling and remand it to the relevant agency or issue its own decision in the matter. If the court remands such a ruling, the relevant agency must act on the court's decision within 15 days. If the agency fails to do so, the challenging party may make an application to the agency, to which the agency has another seven days to respond. If the agency still refuses to act after this period, the party may file another motion with the court, which will ask the agency to explain its failure to act. If the agency fails to respond to the court within seven days, the court may make a final decision in the matter and direct the relevant authority to execute it. LAW ON ADMINISTRATIVE DISPUTES arts. 61-64.

Judicial review of administrative decisions typically has been plagued by delays and protracted proceedings. It remains to be seen how the new Administrative Court will work in practice. There is no tradition of judicial power compelling the government to act, although the basis for such authority arguably is implicit in the constitution.

Factor 7: Judicial Jurisdiction over Civil Liberties

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

| Conclusion | Correlation: Negative |
|--|------------------------------|
| Although enshrined in the constitutions, judicial jurisdiction over civil liberties has to date been little more than a theoretical principle. | |



Analysis/Background:

The Serbian Constitution contains 59 articles identifying various freedoms and rights of citizens. SERBIAN CONSTITUTION arts. 11-69. The Constitution also provides for the “judicial protection” of these rights and freedoms. *Id.* at art. 12. Similar rights and freedoms are identified in the Federal Constitution. FEDERAL CONSTITUTION arts. 19-67. 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.” *Id.* at art. 124(6).

Despite these provisions, the judiciary does not play a significant role in the protection of civil rights. Citizens generally do not look to the courts as a vehicle to protect such rights, which is hardly surprising given the legacy of judicial subservience to the government. In a 2001 survey of residents of four major Serbian cities conducted by a respected NGO in Nis, respondents in each city ranked the judiciary last among institutions they trusted to protect their interests. In addition, the public (as well as many judges) has little understanding of the notion of civil rights, and a tradition of asserting one’s constitutional rights against the state simply does not exist.

Factor 8: System of Appellate Review

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

| Conclusion | Correlation: Positive |
|--|------------------------------|
| It is well established that judicial decisions may only be reversed through the appellate process. | |

Analysis/Background:

The law provides that only judicial bodies may reverse court decisions. LAW ON ORGANIZATION OF COURTS art. 3. Virtually all respondents confirmed that this principle is applied in practice. Effective October 1, 2002, a new Court of Appeal will have jurisdiction over all appeals from the municipal and district courts. LAW ON ORGANIZATION OF COURTS art. 23.

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 |
|--|------------------------------|
| While the law provides for judicial subpoena, contempt and enforcement powers, they are seldom invoked and, when utilized, they are often ineffective or disrespected in practice. | |

Analysis/Background:

The law provides judges with subpoena powers, but the process is ineffective in practice. Respondents cited the subpoena process as perhaps the single greatest cause of delay in civil proceedings. Civil subpoenas generally are sent by mail. Because people frequently fail to notify the authorities of address changes, such service often proves ineffective. The courts also use

process servers to serve subpoenas. However, many respondents suggested that these servers typically are unqualified and poorly trained, and their service of subpoenas is often legally inadequate.

The law provides that when a properly served witness fails to appear in court (in either a civil or criminal proceeding), a judge may order that the witness be brought to court by force and may fine the witness. LAW ON CIVIL PROCEDURE art. 248, O.G.S.F.R.Y 4/77; O.G.F.R.Y. 27/92, 12/98, 3/02 [hereinafter LAW ON CIVIL PROCEDURE]; LAW ON CRIMINAL PROCEDURE art. 237, O.G.S.F.R.Y 4/77, 26/86; O.G.F.R.Y 27/92, 24/94 [hereinafter LAW ON CRIMINAL PROCEDURE]. Nevertheless, judges rarely use such powers. When a properly served witness fails to appear, judges typically issue only a warning, or simply send another subpoena. This is particularly the case in civil proceedings. One municipal court civil judge stated that she was the only judge she knew who ordered the police to bring reluctant witnesses to court. Respondents offered a number of reasons for judges' reluctance to use these powers, including the lack of cooperation and respect for the court by the police, absurdly low fines, and judges' indolence or lack of self-confidence.

In civil proceedings, fines for the failure of a subpoenaed witness to appear were recently increased, effective January 26, 2002. The maximum fine was raised from 300 dinars (\$5) to 30,000 dinars (\$500). LAW ON CIVIL PROCEDURE art. 248. It remains to be seen how judges will use this new authority.

Judges also have contempt powers, but they rarely invoke them in practice. 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 ON CIVIL PROCEDURE art. 318; LAW ON CRIMINAL PROCEDURE art. 295. In civil proceedings, the fines for contempt were recently increased from 300 dinars (\$5) to 30,000 dinars (\$500). LAW ON CIVIL PROCEDURE art. 248. Disrespectful behavior by lawyers in court appears to be a particular problem in civil proceedings. According to several respondents, this is a result of the generally lesser professionalism of attorneys handling civil cases as compared to that of criminal lawyers, and a lower level of respect afforded civil judges as compared to that shown to their colleagues.

Enforcement of civil judgments is another significant problem area. 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 to virtually relitigate the original decision in the case, and to take other procedural steps to delay enforcement. This situation was improved somewhat in the area of debtor-creditor law as a result of legislative changes enacted towards the end of the Milosevic era, but it remains a problem in other areas of the law. Finally, the police are often uncooperative in the enforcement of civil judgments.

In general, the overarching problem in the areas of judicial subpoena, contempt and enforcement authority is a pervasive lack of respect for judicial power throughout society. This lack of respect is evident in the behavior of litigants, lawyers, police, other executive branch organs and the general public.



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: Negative |
|--|------------------------------|
| The judiciary has little if any ability to influence the decisions about its funding levels. | |

Analysis/Background:

The judiciary has no meaningful ability to influence the amount of funding it receives. The National Assembly determines the amount of funds allocated to the judiciary based on a proposal made by the Minister of Finance, which is based in turn on the proposal of the Minister of Justice. Once the legislature appropriates the money, the Ministry of Justice maintains authority over how it is spent. Even the most minor court purchases must go through the Ministry.

The money the courts do receive is generally insufficient to cover their expenses, and as a result, most courts have significant debts. One municipal court president reported that the monthly allocation of funds to his court barely covers the cost of heating. Courts deal with this problem by postponing the payment of court appointed attorneys and experts as much as possible. Several respondents noted that this practice makes it difficult for courts to obtain the services of qualified experts, with obvious implications for judicial proceedings.

In February 2002 the National Assembly adopted a new law that provides that up to fifty percent of sharply increased court fees would be earmarked for judicial use. LAW ON AMENDMENTS TO THE LAW ON COURT FEES art. 6, O.G.R.S. 09/02; LAW ON COURT FEES, art. 51, O.G.R.S. 34/01. It remains to be seen what affect this will have on the funds available to the judiciary.

The need for increased funding for the judiciary is evident, and it extends beyond the current operational shortfalls described above. The promised salary increase for judges (see Factor 11 *infra*) and the judicial reorganization mandated by the new court laws will require substantially higher funding levels. According to one well-informed respondent, it is estimated that 14 new court buildings will be needed to house the new courts.

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 unsatisfactorily low. The government has pledged to increase them in 2002, but it remains to be seen whether this commitment will be realized. | |

Analysis/Background:

Judicial salaries in Serbia are extremely low. The average salary for municipal and district court judges is approximately \$200-250 per month, and for Supreme Court judges, it is approximately \$300-350 per month. Moreover, these salaries frequently are not paid on time, with delays of a month or more not uncommon. It is extremely difficult to support a family with this income, a situation made all the more dire by the widely noted recent increases in the cost of living. Two court presidents reported that they are able to make ends meet only with the financial assistance of their parents. The result is that many capable judges have left the judiciary for significantly more lucrative opportunities in private practice, and many talented young lawyers never consider the judiciary as a career. In a very real sense, the judiciary today is composed of those unable to succeed in private practice, those with family wealth or other means of income, and those who simply have an undying passion for the judicial profession.

The new Law on Judges seeks to address this problem by establishing pay parity between judges and other government officials. The base salary of a Supreme Court judge may not be less than that of a government minister, with base salaries for judges of the other higher and first instance courts set at 6% and 10% less than those of Supreme Court judges, respectively. LAW ON JUDGES art. 31.

In late 2001, the Ministry of Justice announced its intention to raise the average judicial salary to approximately \$500 per month during 2002, and such an increase has been included in the state budget. However, several well-informed respondents expressed doubt that the government will have the resources to make good on its commitment, believing that the government has unrealistic expectations about the amount of new revenue that will be garnered from proposed higher court fees. The international donor community has expressed a strong interest in raising judicial salaries, and reportedly it has pledged approximately \$ 2 million to support such increases. However, the government has not announced a schedule for phasing in the implementation of the proposed salary increase. Unofficially, government officials claim the proposed increase will take effect as of July.

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.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| Convenience of court location and accessibility generally is acceptable, but the infrastructure in most courts is inadequate, with lack of space a particular shortcoming. | |

Analysis/Background:

For the most part, the location and accessibility of judicial buildings is adequate, particularly in smaller municipalities. A number of respondents stated that the Belgrade courts are poorly located and lack adequate parking.

With few exceptions, the infrastructure in most courts is inadequate. The biggest problem is a lack of space, with most judges having to share cramped offices with at least one of their colleagues. Poor maintenance, electrical and heating problems were also cited by several respondents.



In addition, judicial bodies to date have not been housed in a manner intended to emphasize judicial independence. Both constitutional courts are located in buildings of executive branch agencies. Until very recently, the Supreme Court also has lacked its own building (the President, Secretariat and some departments of the Court moved into a new Supreme Court building in early February 2002; although the building is not large enough to accommodate the entire Court, it is hoped that future reductions in the size of the court as a result of the planned judicial reorganization will obviate the need for more space). Moreover, in many municipalities prosecutors' offices are located in the same building as the courts.

Factor 13: Judicial Security

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

| Conclusion | Correlation: Neutral |
|---|-----------------------------|
| Some security protection exists in courts. While threats are relatively rare, most judges feel that additional resources for security are needed. | |

Analysis/Background:

Several respondent judges reported being personally threatened, and most respondents were aware of instances of threats to judges. Although most felt that threats were relatively rare, there was a consensus that insufficient attention and resources were allocated to judicial security. Most courts have a guard at the entrance to the building and in courtrooms, and some court buildings have been equipped with metal detectors (although several respondents noted that the metal detectors often were not vigilantly monitored and were easily evaded). There is no security provided to judges outside court buildings. The new Law on Organization of Courts provides for an armed and uniformed court guard service responsible for security in judicial premises. LAW ON ORGANIZATION OF COURTS arts. 73-76.

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 |
|---|------------------------------|
| With the exception of Federal Constitutional Court judges, who serve nine-year terms, all judges have guaranteed life tenure. | |

Analysis/Background:

The Serbian Constitution provides that judges shall have life tenure, and the new Law on Judges also guarantees the permanence of judicial appointments. SERBIAN CONSTITUTION arts. 101, 126; LAW ON JUDGES arts. 2, 10. Judges of the Federal Constitutional Court do not have life tenure; they are appointed to nine-year terms. FEDERAL CONSTITUTION art. 125.

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.

| Conclusion | Correlation: Neutral |
|--|-----------------------------|
| <p>The new judicial laws provide that judicial advancement will be based exclusively on “professional ability and worthiness,” as determined by the new High Judicial Council. The criteria for advancement under the prior regime lacked objectivity.</p> | |

Analysis/Background:

Under the new judicial laws, judicial advancement will be within the province of the High Judicial Council, as all sitting judges will apply to the Council for vacant judicial positions. LAW ON JUDGES art. 43. As noted under Factor 1 above, while the law does not specify objective criteria it does require that Council consider only the “professional ability and worthiness” of a candidate. *Id.* at art. 45. The law also provides that the Council shall be provided with the personal record of each candidate who is a sitting judge. *Id.* at art. 43.

During the Milosevic era, judicial advancement was based largely on political considerations rather than objective criteria. Most respondents were optimistic that the new laws would result in an honest, merit-based system of advancement.

Factor 16: Judicial Immunity for Official Actions

Judges have immunity for actions taken in their official capacity.

| Conclusion | Correlation: Neutral |
|---|-----------------------------|
| <p>Although judges have immunity for opinions or votes rendered in performing their duties, their immunity from detention can be lifted by the legislature in certain cases, and they can be held criminally liable for certain violations of law committed during court proceedings.</p> | |

Analysis/Background:

Pursuant to the new Law on Judges, judges have immunity “for an opinion or vote rendered in performance of judicial duty.” LAW ON JUDGES art. 5. In addition, judges may not be detained in custody for criminal offenses committed in performance of judicial duties without the consent of the National Assembly. *Id.* Similar protection appears in the Serbian Constitution. SERBIAN CONSTITUTION art. 96.



As several respondents noted, judicial immunity is weaker than legislative or executive immunity because its ultimate application is left to the determination of another branch of government (the legislature). By contrast, the National Assembly and the government have ultimate authority over the immunity of representatives and ministers, respectively. *Compare* SERBIAN CONSTITUTION arts. 77 and 91 *with Id. at* art. 96.

The precise limits of judicial immunity are somewhat unclear. The Penal Code includes the crime of “violation of law by a judge,” which makes punishable by up to five years of imprisonment an illegal act or violation of the law by a judge committed during court proceedings “with the intention to obtain material gain for another person or to inflict damage on another person.” PENAL CODE art. 243, O.G.S.R.Y 26/77, O.G.R.S. 16/90, 44/98. This ambiguously broad provision is not a dead letter. One respondent judge reported that a lawyer dissatisfied with a verdict filed a criminal complaint against him under this provision with the public prosecutor. Although a prosecution was not initiated in the case, the judge’s reputation was damaged by the charges. In addition, a recent press report indicated that the Yugoslav National Bank made criminal complaints against three judges for overturning several bank decisions. It should be noted that most respondents queried about this provision did not consider it a threat to judicial immunity.

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.

| <i>Conclusion</i> | <i>Correlation: Neutral</i> |
|--|------------------------------------|
| New removal and disciplinary procedures remain to be tested in practice. | |

Analysis/Background:

The new Law on Judges sets forth several grounds for the removal of a judge: conviction of a criminal offense with a resulting term of unconditional imprisonment of at least six months; conviction of a criminal offense making him or her unworthy of a judge’s function; negligent and unprofessional performance of judicial duty; and permanent loss of working capacity. LAW ON JUDGES art. 54. Negligent performance includes delaying a case, ignoring statutory deadlines, continuing functions determined to be incompatible with the judicial function (see below), or otherwise acting contrary to criteria prescribed by the Supreme Court. *Id. at* art. 55. A judge is deemed to have performed unprofessionally if he or she demonstrates “a lack of success” according to prescribed Supreme Court standards. *Id.*

Judges may be reprimanded for activities incompatible with the judicial function, including holding legislative or executive office; belonging to a political party; engaging in compensated work, offering paid legal services; and conducting any other activities that are “adverse to the dignity and independence of a judge or detrimental to the dignity of the court,” as prescribed by the Supreme Court. LAW ON JUDGES art. 27.

Court presidents are authorized to initiate procedures for removal or reprimand before a newly established High Personnel Council, comprised of nine Supreme Court judges. *Id. at* arts. 28, 36-40 and 56. The High Personnel Council determines relevant facts in a case in a closed procedure, in which the accused judge has the right to review documents relating to the case, produce evidence and provide an explanation. *Id. at* art. 59.



In a dismissal procedure, the High Personnel Council may decide to remove a judge temporarily, for a period from one month to a year, rather than to dismiss the judge permanently. *Id. at art. 58.* A judge may appeal that decision to the General Session of the Supreme Court. *Id.* If the Council determines that there are reasons for dismissal, the National Assembly must vote whether or not to dismiss. The decision of the National Assembly may be appealed to the Serbian Constitutional Court. *Id. at art. 63.*

It remains to be seen how these new provisions will be implemented in practice. Under the prior law, removal actions could be initiated by the court presidents or the Ministry of Justice; formal dismissal could be effected by the National Assembly, but only after a determination by the Supreme Court.

In 2001, the Minister of Justice called for the dismissal of approximately 150 judges for fraudulent or illegal activities or for poor performance. The Ministry publicly announced the names of the judges in forwarding the cases for review by the Supreme Court. The Minister also dismissed 21 minor offense court magistrates for convicting and fining independent journalists under the notorious Public Information Law (these magistrates are not considered judges and can be removed by the Ministry of Justice without review). Although many respondents believed the judges named by the Ministry deserved to be removed, most were very critical of the manner in which the Ministry sought their dismissal. In particular, the Ministry's public naming of the judges was viewed as inappropriate and prejudicial. Some respondents felt that the Ministry's criteria for including judges on the list was somewhat arbitrary and that insufficient justification was provided for each judge.

In any event, as of January 1, 2002, when the new judicial laws went into effect, the Supreme Court had only agreed to remove one of the named judges, a judge on the Court itself (some judges named on the list had left voluntarily or taken extended leave). The Court refused to approve the dismissal of another member of the Court, widely acknowledged to have been implicit in Milosevic-era election fraud. The reluctance of the Court to remove corrupt judges is a result of the continued predominance on the Court of Milosevic appointees. As the new High Personnel Council now responsible for ruling on dismissal initiatives is composed entirely of Supreme Court judges, there is little reason to expect any significant removal of judges in the near future.

It is difficult to estimate the number of judges who deserve to be removed for incompetence or illegal or unethical behavior. Simply given the number of judges appointed during the eleven years of the Milosevic regime (not all whom were undeserving, of course), the number of unfit judges in all likelihood is not insignificant. In contemplating the specific courts with which they are most familiar, respondents suggested that from ten to fifty percent of sitting judges should not be on the bench. Regardless of the appropriate percentage within that range, the continued presence of these judges in the judiciary will present an ongoing obstacle to effective reform.



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: Neutral |
|--|-----------------------------|
| New court rules relating to random case assignment called for in the new law have yet to be drafted. While manipulative case assignments occurred during the prior regime, the new court presidents apparently have curtailed this practice. | |

Analysis/Background:

During the prior regime, the manipulation of case assignments was a common way in which court presidents directed politically sensitive cases to trusted judges loyal to the government. In addition, several respondents noted that in the past a party could insure his or her case's assignment to a particular judge by bribing the clerk in the court registry.

The new Law on Judges provides that a judge shall be allocated cases "according to an order independent of personalities of the parties and circumstances of the legal matter," and deviations from the order of case allocation are only allowed if a judge is "overworked or legitimately hindered." LAW ON JUDGES arts. 21-22. The law provides that the manner of allocation is to be prescribed in court rules of procedure. *Id. at 21.* Such rules have yet to be promulgated. A case may not be removed from a judge except in the case of a prolonged absence or "protraction of proceedings." *Id. at 22.*

Many respondents suggested that a method of random case assignment is already in practice, through the sequential assignment of incoming cases. Others suggested that the distribution of cases is still in the hands of court presidents and is not done randomly. It is not clear if this discrepancy is a result of varying practices from court to court or simply differing characterizations of the same process. In any event, the vast majority of respondents suggested that the new court presidents had largely eliminated the manipulative case assignments of the past.

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.

| Conclusion | Correlation: Positive |
|---|------------------------------|
| A reform-minded judges' association exists and is active. | |

Analysis/Background:

A judicial association exists and is active. The Judges Association of Serbia (JAS) is based in Belgrade with 17 branches located across the country. The precursor to the current organization was launched in 1997 by several prominent independent-minded judges, in reaction to the complicity of the courts in facilitating the election fraud engineered by the Milosevic regime. By 2000, as a result of the relentless persecution of its membership by the government, the



association had all but ceased to exist. In 2001, the JAS reestablished itself, registering as a professional organization and opening an office in Belgrade. It currently has approximately 1600 members, or roughly 60% of all judges.

The JAS has been active in the past year in conducting educational seminars for judges, with technical and financial assistance provided by ABA/CEELI. In conjunction with the Ministry of Justice, the JAS has launched a new judicial training institute (see Factor 3 *supra*). It has also advocated for higher judicial salaries. Its managing board, which includes many of the founders of the original association, is composed of genuinely reform-minded judges. The organization is widely respected and considered to have influence with the Ministry of Justice and in the reform process generally. A few respondents suggested that the association was too close to the current government, but others suggested that it maintained its independence. One judge outside of Belgrade complained that judges in his area were not kept appropriately informed of the association’s activities. Nevertheless, most judges gave the association high marks for protecting their interests.

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: Neutral |
|---|-----------------------------|
| <p>The political influence channeled through court presidents, so prevalent during the former regime, has been substantially reduced. The legacy of judicial subservience, the influence exercised through personal connections, and the informality of judicial practice still play a role in decision-making.</p> | |

Analysis/Background:

Political influence on the judiciary was endemic during the Milosevic years. With few exceptions, the courts loyally enforced the government’s will in politically sensitive cases. The central conduits of this influence were the court presidents. Through the manipulation of case assignments or direct pressure on individual judges, they insured that their courts remained firmly in line with the regime.

Since the appointment of new court presidents in the past year, most respondents believe that political influence on the courts has been largely eliminated, or at least substantially reduced. In general, the new presidents are praised for their professionalism and independence.

In assessing the current independence of judges from political pressure, one must not overlook the effect of the legacy of socialism and the Milosevic era on the mindset of judges. In order to survive, judges over the years have developed an acute ability to sense the wishes of the ruling power and act in a way that avoids conflict and carries favor with such forces. Some human rights lawyers have indicated that judges have treated them much more respectfully, even solicitously, since the fall of the former regime, but they expressed concern that this may be out of a sense by the judges that such lawyers must be close to the new government.



Most respondents believed that non-political influence by private interests was not a significant problem. Nevertheless, attempts at influence do exist. One municipal court judge stated that he had been offered bribes on more than one occasion, as had his colleagues. Several respondents suggested that the influence of private interests was most significant at the commercial courts, because of the high stakes involved.

Perhaps the most common form of influence is that based on personal connections. Many judges indicated that it was not uncommon for friends or colleagues to ask them to expedite a particular case of personal interest (most judges contended this practice would not affect the ultimate decision in the case). In general, a certain air of informality persists in the courts, particularly at the lower levels. Judges frequently solicit the views of their colleagues on cases, and ex parte communications between judges and lawyers are not uncommon.

It should be noted that the new Law on Organization of Courts prohibits the “use of any public office, media and any public appearance that may influence the course and outcome of a court proceeding,” as well as “any other form of influence on the court.” LAW ON ORGANIZATION OF COURTS art. 6. In the past, the government used bellicose statements in the media to influence judicial decision-making.

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.

| Conclusion | Correlation: Negative |
|---|------------------------------|
| While a code of judicial ethics exists, it is voluntary, applies only to JAS members, lacks specificity, and is not widely understood in the judiciary. There is no requirement that new judges receive training in the code. | |

Analysis/Background:

The JAS adopted a code of ethics during its original incarnation under the former regime. The code is comprised of ten short “canons,” which are broad principles of conduct. Among other things, it directs judges to perform their duties “expertly, conscientiously [and] impartially,” to “resist threats [and] blackmail,” and to “restrain from improper political activities.” JAS CODE OF JUDICIAL ETHICS canons 3, 5 and 9. The code does not address ex parte communications, nor does it deal explicitly with conflicts of interest (it does require that judges “resist . . . private and family interests,” *Id.* at canon 4). In sum, the code is more of a general statement of principles than a detailed description of prohibited conduct.

The code has not been incorporated into law, and it applies only to members of the JAS. The code does not include penalty provisions or provide for an enforcement mechanism. The JAS reportedly has plans to initiate a “Court of Honor” to enforce the code, but to date, no judge has ever been disciplined for violating the code. Since the change in government, the JAS has sent a copy of the code to each of its members. Some judges reportedly have a framed version of the code on their office walls. Nevertheless, most respondents believed that the majority of judges are either unaware of the code or unfamiliar with its provisions.

The Law on Judges prohibits judges from belonging to political parties and from engaging in any “functions, engagements or activities that are adverse to the dignity and independence of a judge



or detrimental to the dignity of the court.” LAW ON JUDGES art. 27. The Supreme Court has yet to promulgate the required rules identifying such prohibited activities.

There is no requirement that judges receive training in the JAS code or in judicial ethics generally. There reportedly has been a high level of interest among judges in taking training courses on judicial ethics offered by ABA/CEELI.

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 |
|---|-----------------------------|
| A process by which complaints may be registered exists, but there is a question as to how meaningful it is in practice. | |

Analysis/Background:

The new Law on Organization of Courts provides that a party or other participant in a court proceeding has the right to complain about judicial conduct “when they consider the proceeding delayed, irregular or that there is any influence on its course and outcome.” LAW ON ORGANIZATION OF COURTS art. 7. The president of the court involved in the case is required to consider the complaint and inform the complainant of its resolution within 15 days of receipt of the complaint. *Id. at* art. 52. If the complaint was originally filed with the Ministry of Justice or the president of a higher instance court, the president of the court at issue must notify them of the resolution of the complaint. *Id.*

The new law essentially maintains the complaint procedure in practice in the past. Complaints about judicial conduct are relatively common, and usually involve charges that court procedures have been unduly delayed. The Ministry of Justice reported that in 2001 it received approximately 7,000 complaints about court proceedings.

Respondents differed over how meaningful the process is in practice. Court presidents stated that dealing with complaints takes up a substantial amount of their time, even though most complaints are groundless. Some court presidents schedule weekly hours during which parties and interested people can meet with them and complain about the handling of their proceedings. Most respondent lawyers stated that their complaints about judicial conduct were rarely taken seriously or produced any results. One respondent suggested that the written responses of court presidents to complaints typically include a generic recitation of statistics and do not reflect a serious investigation of the conduct at issue.



Factor 23: Public and Media Access to Proceedings

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

| Conclusion | Correlation: Neutral |
|--|-----------------------------|
| While court proceedings generally are open to the public and media, exceptions to this principle are broadly worded and ill-defined. Lack of courtroom space also hinders public access. | |

Analysis/Background:

The Serbian Constitution provides that trials shall be public, but allows for statutory exceptions “for the purpose of preserving a secret, protecting morals and the interests of minors, or protecting other public interests.” SERBIAN CONSTITUTION art. 97. Similarly worded exceptions are found in the civil and criminal procedure codes. LAW ON CIVIL PROCEDURE arts. 306-310; LAW ON CRIMINAL PROCEDURE arts. 287-290. The public specifically is excluded from divorce, adoption, paternity determination and guardianship proceedings. LAW ON MARRIAGE AND FAMILY RELATIONS, O.G.S.F.R.Y. 22/80, O.G.R.S. 29/01, arts. 173, 351, 373.

The media’s access to the judicial process has increased noticeably since the end of the Milosevic era. One journalist with substantial experience reporting on the courts suggested that it is now much easier for journalists to talk to judges, obtain information and attend trials. One municipal court in Belgrade reportedly has designated a judge to be responsible for media relations. Nevertheless, the small size of most courtrooms continues to impede the ability of journalists and the interested public from attending proceedings in cases with significant public interest.

Television coverage of a court proceeding is only allowed with the approval of the President of the Supreme Court. The current President generally refuses such requests.

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.

| Conclusion | Correlation: Negative |
|--|------------------------------|
| Only the Supreme Court and two of the district courts regularly issue bulletins, and these typically only include excerpts of certain decisions. | |

Analysis/Background:

Most appellate decisions are never published. The new Law On Organization of Courts does provide that Supreme Court decisions deemed “relevant for case law” must be published. LAW ON ORGANIZATION OF COURTS art. 30. The Supreme Court issues a bulletin three times a year that contains excerpts from the Court’s most important decisions. The Court usually publishes 500 to 1000 copies of each bulletin and distributes them to every court in the country. The Belgrade and Novi Sad District Courts also publish bulletins that include excerpts from important district court decisions and selected Supreme Court decisions involving cases originating in their districts.



These bulletins are distributed to judges in their respective districts. Other district courts have published bulletins in the past, but they no longer have the financial means to do so. For example, the Nis District Court has not published its bulletin in over five years. The High Commercial Court also publishes a bulletin including its important decisions. Finally, certain bar association publications include court decisions.

In terms of access to unpublished decisions, a litigant receives a copy of the decision, but, as in the case of court records, a scholarly researcher or interested third party would have to get approval from the court president. If it is a case involving privacy concerns—juvenile, divorce or family law—specific restrictions may apply.

Both FRY and Serbian Constitutional court decisions are published in the respective official gazettes, but usually the date of publication is months after the decision is announced.

Factor 25: Maintenance of Trial Records

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

| 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. The official record of any court proceeding consists solely of the judge's oral summary of the testimony of witnesses and the argument of counsel, which is transcribed by a court staff person. In addition to consuming considerable time, this process results in a record that reflects the judge's perception of the evidence and arguments.

While the official record is maintained in the court archives after a case is completed, it is only accessible to parties to the proceeding. Others seeking to see the record must demonstrate their interest in the matter to the court president. There is no system in place to allow for public access to trial records, and courts are not accustomed to handling such requests.



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: Neutral |
|---|-----------------------------|
| The courts have support staff, but the adequacy of their numbers appears to vary from court to court. | |

Analysis/Background:

Judges are supported by professional and administrative staff. Court assistants (see Factor 1 *supra*) help judges with legal research and in preparing drafts of court decisions. LAW ON ORGANIZATION OF COURTS art. 55. Court interns provide more limited professional assistance. The number of court assistants and interns varies from court to court. In general, court assistants are more prevalent in the higher courts than in the municipal courts.

In the municipal courts, most judges have their own typist, while at the district courts judges typically share typists or make use of a centralized typist pool. Court decisions are almost all produced through dictation; judges either dictate their decisions directly to the typist or use a dictating machine. Delays in typing decisions are not uncommon. Several respondents reported having experienced delays of one month or more. Some respondents suggested that court employees are generally experienced and able to perform their jobs satisfactorily, while others suggested they were relatively unskilled.

The requisite number of court support staff per judge is set forth in the court rules drafted by the court presidents and submitted to the Ministry of Justice for approval. Under the new laws, the framework for determining the number of court employees will be prepared by the High Judicial Council. LAW ON ORGANIZATION OF COURTS art. 54. Some respondents suggested that judges needed additional staff, while others suggested that the current numbers were adequate and in some cases excessive.

There currently are 2,410 judges in Serbia, supported by 8,704 professional and administrative support staff, a ratio of 3.59 staff workers per judge. The number of support staff in each employment category is as follows:

| | |
|--------------------------------|-------|
| Court Assistants | 693 |
| Court Interns | 571 |
| Court Secretaries | 69 |
| Typists | 2,858 |
| Administrative Employees | 1,700 |
| Financial Task Employees | 460 |
| Information Services Employees | 51 |
| Enforcement Task Employees | 406 |
| Land Registry Employees | 262 |
| Court Guards | 292 |
| Court Interpreters | 8 |



| | |
|------------------|-------|
| Drivers/Couriers | 414 |
| Housekeepers | 275 |
| Cleaners | 586 |
| TOTAL | 8,704 |

Factor 27: Judicial Positions

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

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|--|-----------------------------|
| Conclusion | Correlation: Neutral |
| A system exists such that new judicial positions are added as needed, but it has not been applied objectively in the past and is based on judicial performance quotas. | |

Analysis/Background:

In principle a system exists such that new judicial positions are added as needed. Based on a calculation of the appropriate number of cases per judge, a court president may file a request with the Ministry of Justice that additional judges be added to his or her court. The number of judges allocated to each court in principle is calculated by dividing the number of new cases filed in a given year by the quota of cases a judge is required to complete during the year, with consideration also given to the population of the relevant jurisdiction. The quota is set forth in local court rules, which establish monthly “norms” of completed cases that each judge must meet. During the prior regime, decisions to add new judges were often made more as the result of political considerations than by applying the above formula. The result was that certain courts did not have enough judges while others were overstaffed.

The notion of calculating a judge’s performance by the number of cases completed is deeply ingrained in the judicial culture, and it perpetuates a quota mentality that undermines the administration of justice. Judges are always aware of the precise monthly norm they must meet, which results in an inherent pressure to sacrifice quality for quantity in decision-making.

There is a widely acknowledged backlog of cases, particularly in the civil courts. The assessment team was not able to review any statistics relating to this issue, and therefore, it is unable to address the nature of the problem. Several respondents suggested that it currently takes over a year to resolve a typical civil case, and one official estimated that there are 150,000 cases in the system that are two years old or more. One well-informed observer stated that no one has any reliable statistics about the true nature of the judicial backlog.

Whether the case backlog is the result of an insufficient number of judges or inefficient laws and practices is a matter of debate. As noted in Factor 9 above, judges often cite the problems surrounding subpoenas as the single greatest cause of delay.



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: Negative |
|---|------------------------------|
| The current system of case filing and tracking is rudimentary, and it is very difficult to calculate the time between the initial filing of a case and its ultimate conclusion. | |

Analysis/Background:

The standard case filing system is set forth in the internal court rules for each court. Each new case is entered into a register maintained by the court registry office and then assigned to a judge. The register is updated to reflect developments in the status of a case. Entries into the register are done by hand – there is no computer case filing system. Once the case is assigned to a judge, the progress of the case is left to the discretion of the judge. There is no mechanism to ensure that cases are heard in a reasonably efficient manner.

In addition, the number of registered cases pending in all courts does not necessarily coincide with the total number of actual cases in the system. When an appeal is filed, a case is re-registered as a new case with a new case number. If the case is remanded to the original court (as is typical), it is again re-registered as yet another new case. As a result, it is extremely difficult for the judicial system to track the time between the original filing of a case and the issuance of a final decision.

The new Law on Judges introduces a new procedure to help monitor the duration of cases. If a first-instance proceeding has not been concluded within a six-month period, the responsible judge must notify the court president and explain the reason for the delay in the resolution of the case. LAW ON JUDGES art. 25. The judge must then provide the court president with monthly updates on further developments in the case. *Id.* One judge worried that strict application of this provision might place a substantial new reporting burden on judges and thereby reduce efficiency, noting that in his court 70% of pending cases are more than six months old.

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 |
|--|------------------------------|
| The vast majority of courts have very few computers, and other modern office equipment is limited to the basics. | |

Analysis/Background:

Most municipal and district courts have very few computers. Those that do exist usually are used by the court registry or finance office, while the typists' pool in some courts have computers.



Almost all municipal and district court judges lack their own computers. The situation is somewhat better at the Supreme Court, but even there fewer than half the judges have computers. The only court in the country that reportedly is adequately computerized is the municipal court in Pozarevac, invariably favored under the prior regime as the hometown of Milosevic.

Even if the courts were to obtain computers, judges would be ill prepared to use them effectively. Most judges lack basic computer skills and would need substantial training as part of any computerization initiative. Several respondents noted that the few computers currently available to the courts are not well used as a result of this problem.

Each court in Serbia has one photocopier, and all judges' offices have telephones.

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 |
| Most judges do not have adequate access to new laws. Those systems for identifying and organizing changes in the law that do exist are unavailable to all but a handful of judges. | |

Analysis/Background:

While judges have access to new laws, the situation is far from ideal. All laws are published in the official gazette, but most courts can only afford one or two subscriptions for the entire court. As a result, judges typically must rely on photocopied versions of the gazette for their own use. Some courts have "court practice" departments responsible for reviewing the official gazettes and alerting judges about important changes in the law. Even where such departments exist, some judges suggested that they cannot be relied upon to provide each judge with changes in all relevant laws. Important laws are often published in bound form with commentaries written by relevant experts. These volumes are expensive, and therefore, they are unavailable to most courts and judges.

Some private companies have developed CD-ROMs and Internet-based programs that provide an organized compilation of laws and regulations with regular updates. The texts of a number of new laws are also available on the government's website (www.srbija.sr.gov.yu). While such resources are used by lawyers in private practice, they are unavailable to almost all judges because of the expenses involved and the judges' general lack of computers (and computer skills).

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.

