Republic of Serbia
GOVERNMENT OF THE REPUBLIC OF SERBIA
ANTI - CORRUPTION COUNCIL
72 No. 021-00-3296 / 2016
Date: 03.22.2016.
Nemanjina Street 11
B e l g r a d e

REPORT ON THE CURRENT STATE IN THE JUDICIARY

1. INTRODUCTION

The rule of law and judiciary are closely connected fields and they include judicial reform, combating corruption and the protection of fundamental human rights.

All of these fields are regulated by the National Strategy for Combating Corruption (hereinafter: the Strategy) which envisages the adoption of action plans aimed at the interpretation of the Strategy and at updating Strategy provisions per areas and within set deadlines. Ever since it was ratified in 2013, the Strategy's action plans are being adopted, changed, complemented, deadlines rescheduled, causing that we still do not have final, binding action plans adopted for all areas regulated by the Strategy. Problems related to the implementation of the Strategy are obvious, and have been indicated by the Anti – Corruption Council (hereinafter: the Council) while performing its duties set under the Strategy. To be precise, as set under the Strategy, the Council is a preventive body, assigned to monitor the implementation of the fight against corruption within state bodies and organizations, collect data provided by focal points within ministries and other institutions, analyze these phenomena and inform the Government by submitting its proposals for overcoming obstacles in the Strategy implementation *i.e.* fight against corruption. The Council requested relevant data from the Strategy obligors in a timely manner, but did not receive any reply in most of the cases, or received replies from requested parties stating that they could not act upon Council's request since there were no focal points due to the decrease in the number of employees and implementation of the employment ban, or pointing out that they did not have assets allocated for this purpose (premises being the one), or that without detailed action plans the Strategy was unclear and inapplicable, adding that deadlines set under the Strategy were too short.

Among all institutions the Council cooperated with in fighting corruption in line with the Strategy, very good cooperation was accomplished with the Anti-Corruption Agency, both in terms of commenting statutory provisions related to corruption and concrete events emerging in the course of the Council and the aforementioned Agency's work.

All listed areas fall under the EU negotiation Chapters 23 and 24, for which the Government's position is that they ought to be opened as soon as possible in order to accelerate the accession process. The Council was informed that a new anti-corruption body was established – The Council for the implementation of the Action Plan for Chapter 23, consisting of 10 members of which 8 are employees in the Ministry of Justice. Having in mind that the Council holds the Ministry of Justice as the most responsible for the failure in the Strategy implementation and adoption of action plans, there is a serious concern that this body will be yet another one serving only the purpose of presenting the seriousness in fighting corruption in line with the Strategy and comprehensiveness of judiciary reforms which essentially do not exist. The Council is of the opinion that the establishment of new bodies does not mean that there is an insufficient number of anti-corruption bodies, as the existing regulatory bodies are acting very responsibly and in accordance with duties vested upon them by the Strategy. However, the fight against corruption is not possible, unless all Strategy obligors are included in it. The situation where the majority of Strategy obligors do not have focal points anymore or that their duties have been transferred to state secretaries who show no initiative in fighting corruption, where the action plans are not finalized and deadlines are constantly rescheduled, points out that the Ministry of Justice - the key implementer of the Strategy related tasks and action plans does not understand the importance of judiciary reform, fight against corruption and protection of fundamental human rights.

2. JUDICIARY

Each state is obligated to organize its own legal system granting everyone the right of access to independent and impartial judicial institutions organized in accordance with the law. The rule of law and democracy requires arranging judicial institutions and making equal access to justice for all citizens, by establishing independent and autonomous judicial institutions, which are secured with financial and other resources and provided with a sufficient number of judicial officials, capable of rendering quality decisions as the basis for enforcement within reasonable deadlines, that is, the basis for exercising individual citizens' rights.

2.1. The access to judicial institutions and the number of judicial officials

Access to judicial institutions implies equal territorial, functional and material accessibility to judicial institutions for all citizens.

2.1.1. Territorial accessibility of judicial institutions and number of judicial officials

a. Territorial accessibility of judicial institutions

Territorial accessibility of judicial institutions implies that every citizen is entitled to exercise rights and to reach for justice in the easiest, shortest and most favorable way in judicial institutions closest to his place of residence. This right is enabled through proper establishment and work of judicial institutions *i.e.* network of courts and prosecutors' offices.

Territorial accessibility, *i.e.* the network of courts, must be determined according to objective criteria reached by analyzing the following elements:

- Distance of judicial institutions from the place of residence,
- Number of citizens under the jurisdiction of a court,
- Number of cases falling under the jurisdiction of judicial institutions within specific time frame,
- Economic and other types of development of areas falling under judicial institutions' jurisdiction,
- Tradition of judicial institutions - being a society where mediation is still not used in practice as a way of solving disputes, the existence of a network of judicial institutions is important for overall functioning of specific areas. Thus, the territorial accessibility of judicial institutions needs to be based on all of the above listed objective elements in order to allow approximately equal access to judicial institutions for all citizens, with no privileges for certain territories and certain citizens.

None of the above listed elements was objectively analysed prior to the 2009 judicial reform, and the network of judicial institutions mainly depended upon the strength and party affiliation of people from the local government, who were politically so powerful that they defined the network of courts, regardless of the above elements that had to be the basis for determining the

network of judicial institutions. The" law on seats of courts" dated 2008, abolished a large number of courts so that the number of 138 municipal courts existing before the reform was reduced to 34 basic courts having approximately the same jurisdiction.

Immediately after the 2013 reform it was stated that 34 was an unsustainably low number of basic courts, and thus the Law was amended and the number of basic courts increased to 67. However, the answer to the question of how many courts *i.e.* judicial institutions were required, was not provided at the time, because the analysis on the basis of objective criteria has still not been carried out, and it represents the only tool that could meet the realistic needs for provision of equal territorial accessibility to justice for all citizens.

Corroborating the need for this analysis is data showing that at the beginning of the 2009 reform there were 1.318.059 pending cases, at the end of 2014 there were 2.849.360 pending cases, while at the end of 2015 the number of pending cases was 2.837.468. This means that the reform did not give results as it neither made the judiciary more efficient nor the new network of courts decreased costs of the process of achieving justice, both in relation to citizens whose costs increased due to their travels to judicial institutions and in relation to the state which encountered increased costs due to judges' travels to locations of judicial services. None of the Governments has analyzed these costs so far, which is why the real costs the state incurred for the 2009 judicial network reform remain unknown.

The repeated changes to the law regulating the organization of courts which changed the network of courts did not give an answer whether the number of courts was large or small regardless of the increase in the number of courts, because the network of courts was again established without any analysis of the abovementioned elements.

The fact that the existing number of courts and prosecutors' offices does not provide equal accessibility to judicial institutions is indicated by the number of cases where jurisdiction was delegated, which according to the Supreme Court of Cassation's letter no. II Su-17 261/15 dated 12.10.2015. amounted to 6,888 in the period from 01.01.2014. until 12.10.2015.

The number of delegated cases does not necessarily mean that they were delegated only due to unequal accessibility to justice. It could also mean that it was done due to the possibility to intentionally assign a case for purposes of corruption, regardless of the fact that the terms for allocation of cases were explicitly set under the law. The problem is that the laws are not being applied. The Council had a very negative experience with the delegation of cases, especially in bankruptcy cases, where it was obvious that transfers were done upon requests imposed by the executive power. In its report the Council elaborated the transfer of the case Sartid (one of the 24 privatization cases) from the Pozarevac Commercial Court, which was one of the most efficient bankruptcy courts, to Belgrade Commercial Court, which was one of the most inefficient courts in bankruptcy procedures. The case was transferred in order to be assigned to a judge chosen by the executive power, because ministers and other representatives of the government at the time were interested in a sale to a specific buyer without implementation of the legal procedure. The Council launched the initiative for initiation of criminal proceedings against the judge and other participants in this transaction in 2005, however, the bankruptcy procedure is still ongoing, and a formal criminal proceeding has not been initiated yet but is still in the pre-investigation phase. This clearly points out that judicial institutions are not independent and autonomous, and for this reason the Council is of the opinion that the set of judicial laws needs to be based upon clear elements and criteria which will prevent executive power to fix delegated cases through courts' presidents, without respecting the principle of the „natural judge".

Therefore, in order to enable equal access to justice, the network of judicial institutions needs to be arranged on the basis of objective criteria, without the need to delegate cases, or to decrease the number of delegations to the lowest possible level in order to avoid the influence of executive power on the judiciary.

b. Number of judicial officials

The number of judicial officials seriously influences access to justice, given that there are institutions with a small number of judicial officials and large number of cases, and there are institutions with a large number of judicial officials and low number of cases, which means that the state does not provide equal access to justice for its citizens.

Just as the network of judicial institutions was not established on the basis of objective criteria, the number of judicial officials was not determined on the basis of objective criteria either. Therefore, we frequently hear complaints coming from the judiciary about the lack of judges and deputy prosecutors, which is also claimed to be the exact reason for very low efficiency (about 2.9 million unsolved cases in courts). Judicial institutions have never provided data on whether there are judicial officials who do not work as much as possible and as much as expected of them and whether this also is the cause of enormous backlog of cases.

The Council does not question whether avoiding establishing objective criteria for the number of judicial officials in all institutions within the judicial network is deliberate, but believes that it represents a necessity given that these disarranged relations harm the judiciary. The elections of judicial officials are conveyed on the basis of unidentified criteria, which leads to discrepancy in work efficiency between domestic and foreign judges and prosecutors. To be precise, considering the total number of judges in Serbia, it turns out that we have largest number of judges per capita, which may be taken as an objective element necessary to determine the required number of judicial functions (data of the Fund for Justice Sector Support). We were able to determine the criteria for the evaluation of judges' and prosecutors' performance, performance results per types of cases, respecting deadlines for rendering and drafting decisions, the quality of first instance decisions, the quality of decisions rendered upon appeals and of other judges' and prosecutors' activities. Therefore, there is no reason for us not be able to objectively determine the total number of necessary judicial officials, which would be taken into consideration when evaluating the performance of judicial institutions and when electing judicial officials. A positive example in the region that may be followed is Montenegro. It determined not only the number of judges and prosecutors required per institution, but also the required number of court employees on the basis of the work needs assessment.[1] The High Judicial Council (hereinafter referred to as HJC) determined the number of required judges, but did not give concrete criteria based on which it rendered this decision.

Also discouraging is the fact that out of 3.092 planned seats for judges, 312 seats are vacant, out of which 196 judicial seats are vacant in basic courts.[2] If the claim that we do not have a sufficient number of judicial officials is true, then it remains unclear why elected judges and prosecutors are being delegated to work in the Ministry of Justice, which was elaborated in the Councils' previous Report on the Judiciary from 2014. The Council thoroughly elaborated this not

[1] The rulebook on approximate criteria for determining required number of judges, prosecutors and other court employees/Правилник о оријентационим мјерилима за одређивање потребног броја судија и осталих запослених у суду ("Montenegrin Official Gazette/Службени лист ЦГ", бр./no. 76/2008,46/2011, 49/2011 and/и 60/2013).

[2] State on 20.08.2015. (letter of the High Judicial council no. 7-00-1100/2015-01 од 21.08.2015.)

only because judges and prosecutors are being delegated to work in the Ministry of Justice although courts and prosecutors' offices are inefficient, but also because of conflicts of interest emerging in their performing the work in judicial institutions which are judicial power and Ministry of Justice which is executive power, to the detriment of judicial authorities.

The judiciary records a decrease in the number of new cases (according to the above stated Fund, the number of cases has fallen by one-third between 2010 and 2013, among other, due to a reduced jurisdiction over execution cases and the establishment of the Public Notary system), but also weaker performance in comparison with EU member states. To be precise, after the reinstatement of about 600 judges in 2013, the number of new cases per judge was around 350, while the average number of new cases in Europe was around 840 per judge, according to CEPEJ data.

Given the backlog of about 2.9 million cases regardless of the increase in number of judges after reinstatement, the Council tried to determine the reasons for discrepancy in efficiency between domestic and foreign judges and concluded this was impacted by the following:

- Large influence of the executive power over the work of the judiciary which causes behaviour of judges that is not in line with the judicial code of conduct;
- Long transition in all areas of our society;
- Difficult economic situation and widespread poverty preventing the possibility for professional representation, contrary to western countries where almost each citizen has a lawyer;
- Large number of cases originating from the time of wars, sanctions, or bombardments, when courts and prosecutors' offices were limited in their work;
- Bad legislation that is difficult to apply;
- Nonexistence of effective Judicial Academy able to provide continuous trainings to be delivered by experts for specific fields;
- Lack of good case law;
- Lack of transparency;
- Bad and ineffective statistical records;
- Problematic auxiliary services, *e.g.* postal services (ineffective delivery), institutions for court expertise (ineffective expertise), court experts without adequate certificates and education (unprofessional expertise) etc.;
- Paralysis of the judiciary through attorneys' strike due to the introduction of public notary system in a way that denied adequate provision of legal aid.

All of these reasons certainly led to our judges' and prosecutors' efficiency falling behind the foreign ones, however, the Council could not make an analysis based on which it could determine what of the above reasons and to which extent affected the work of judges and prosecutors, because there were no statistical records that could enable this to be determined.

c. Judicial administration

A common perception in the judiciary is that the number of judicial administration employees is insufficient and inadequate, so that judges and prosecutors cannot focus on the work for which they are paid. Equally common is the understanding that the administration's work is not appreciated enough, which is reflected in their excessive workload and low salaries. The

Council does not have any evidence of this, because no one has analyzed how big administration is needed, *i.e.* no criteria have been set which would help determine the number of employees truly required in relation to the number of cases, volume of work and number of judicial officials. Not only was this not done on the basis of actual criteria, but has not been done in terms of whether the number of administrative employees in judicial institutions was bigger, smaller, or in accordance with the Law on Methods for Determining the Maximum Number of Employees in the Public Sector; moreover, if the number of employees was in accordance with the Law, it was not explained whether the judicial administration should be exempted from general provisions due to the specificity of work performed in the judiciary. Meanwhile, through changes in the staffing table, typist offices are being closed down which decreases efficiency of these institutions. An additional problem is that the same jobs are performed by both civil servants and employees regardless of the large discrepancy in salaries, which decreases the work motivation of recording clerks and clerks, and consequently affects the efficiency. The problem with the number of employees is obvious. However, almost nothing was done in this regard even though this was one of the remarks related to the judiciary reform, which we pointed out in our previous papers. The Council is of the opinion that administration cannot hamper and slow down the work in the judiciary, and that until an analysis is made, positions should be filled when shortages are recorded and employment of skilled personnel enabled, which is a prerequisite for efficient functioning of judiciary. The real number of administrative employees needs to be determined by means of an analysis, because we are not a rich country so as to allow for the number of judicial officials and employees to be determined on the basis of the number of party comrades that are to be employed in judicial institutions. In particular, we are not rich enough to have a slow, ineffective and inefficient judiciary. Therefore, an order needs to be made in the judiciary in terms of number of employees, and not only of judicial officials but also of administrative employees in a way that it does not favor decrease in costs but favors access to justice within reasonable time.

All of the above would enable judicial institutions to have an equal number of judicial officials and other employees which would lead to approximately equal access to justice, as we would not have overburdened institutions with such a large inflow of cases preventing citizens from reaching justice within a reasonable time. Example of this is that Supreme Court of Cassation had an inflow of 1.100 cases per judge this year, while on the other side we have courts coping with a small number of cases. Unequal workload of judicial officials and administration has a negative impact on equal access to justice for citizens.

2.2. Functional accessibility to justice

Even though the Government claims that the opening of Chapters 23 and 24 is of utmost importance for the EU accession (fight against corruption, rule of law, judiciary, fundamental human rights, justice, freedom and security), none of the Governments has ever made an analysis of the situation in the judiciary that could, by means of comparative analysis, present the state of the judiciary after the alleged reforms, and whether the reforms are heading in the right direction.

The perception that the Council defined through a number of filed initiatives (verbal, written and anonymous) shows that the situation in the judiciary is very bad, not only due to trials within an unreasonable time, but also due to the enormous number of laws being frequently changed, and which do not mirror actual life but nevertheless need to be applied by judges.

The experts of the World Bank have produced the report "Functional Analysis of the Judiciary" in 2014. However, the Council is highly critical of the report, as it was mostly based on overviews of the foreign countries' practice, disregarding the specificities of our system and neglecting the fact that we are a country whose income per capita is almost the lowest in Europe; that a significant number of working age population is unemployed; that a large number of the population is functionally illiterate, all of which indicate much larger problems in the rule of law and the realization of rights before judicial institutions. Some parts of the report are totally unacceptable because the World Bank sees judiciary as a company (obvious even by the terminology it uses: "supply and demand", "excessive labor force", "performance management", "services, productivity", etc.) that needs to operate profitably in terms of costs, and in almost all parts of the report it focuses on savings in costs in the judicial system.

The Council believes that costs of the judicial system represent a serious aspect, but also that our problem with the rule of law and judiciary is far more serious. It begins with how the laws are passed, how they are implemented and if they are implemented at all, whether we have a legal framework that provides for independent and autonomous judicial system and what is the financial position of judicial officials and courts in general.

Therefore, the Council will try to carry out its own analysis of the functional access to the law and justice in order to assess if progress was made and in which areas during the past two years, as this will be the fourth report submitted to the Government in relation to issues the Council elaborated in previous reports (reports no. 07-00-3124 / 2012 dated 24.04.2012., no. 700-00-3178 / 2014 dated 17.04.2014. and no. 700-00-15645 / 2014 dated 04.12.2014.).

Functional access to the law and justice does not mean only reaching the justice within judicial institutions, but it rather means reaching justice in all segments of life, in administration, education, health, culture, etc. However, the Council will not cover all of these areas but will focus on judiciary.

2.2.1. The Constitution and the Prosecution

According to the Constitution prosecutors are autonomous but not independent. With the introduction of the prosecutorial investigation, a part of previously courts' jurisdiction was transferred to prosecutors (investigation), and the law gave them even wider autonomy to act than courts had while conducting investigation. However, along with the competence that belonged to the court, they were not given independence, which is a prerequisite for high-quality and lawful work. The fact is that at this moment, according to the method of election and its internal organization, the prosecution depends on the executive power and declarative autonomy of prosecutors does not provide sufficient guarantees either to prosecutors or to defendants. The Council believes that defendants' rights are violated given that public prosecutors are not independent, and especially because the prosecution office is organized with practically military hierarchy (Republic Public Prosecutor has the ability to practically lead all investigations). Also, the standards of the European Court of Human Rights state that one person may not be at the same time a prosecuting authority and an authority performing judicial functions, without serious guarantees protecting the rights of defendants. Independence of prosecutors represents a constitutional category, therefore, in order to enable independence of prosecutors it is necessary to change the Constitution.

2.2.2. The laws

Passing laws in Serbia is not difficult. The Government as the executive power and the Assembly as the legislative power are single minded at a party level and share uniformed party approach, thus enabling for almost all proposals submitted by the Government or an MP from ruling parties to be adopted.

The Council pointed out in several reports that experts do not have any influence over the quality of laws, because in 80% of situations laws are passed in emergency procedures without public professional debate.

On a number of occasions, the Council unsuccessfully tried to submit comments on draft laws, which, due to emergency procedure was simply not possible. The time span from the moment when the draft Law is published on the Assembly's website until it is adopted is very short, and sometimes it lasts only one day. Even when the Council managed to fit in this short time span and gave its comments to draft laws, these comments mainly were not adopted or taken into consideration, that is, the Council never received information whether these comments were considered or not.

Every law in its essence needs to reflect an intention for changing something in the society, but in a non-complicated way, understandable to an average citizen, because laws need to mirror the life of our citizens, to follow and to portray the spirit of the time. The laws cannot predict life, but also should not fall behind the course of life, because this creates gaps in existing regulations. During these periods, a judge needs to resort to justice on his own personal assessment due to the lack of statutory provisions, which causes inconsistencies in the case law.

We have very bad laws that are difficult to apply, and are changed frequently. The Council analyzed the set of judicial and procedural laws and determined that during the period of five years the Law on Public Prosecution was changed ten times, the Law on Judges twelve, the Law on Organization on Courts eight times, the Law on Judicial Academy two times, laws on High Judicial Council and State Prosecutorial Council three times, the Law on Enforcement and Security four times, Civil Procedure Code three times, while Criminal Procedure Code was changed on five occasions.

These frequent changes of basic, "umbrella" laws clearly demonstrate that laws were drafted by insufficiently skilled or experienced individuals, who do not know how to harmonize laws with life, which is also indicated by increasing requests for authentic interpretations and opinions requested within the professional public. As the Council has identified, *ad hoc* commissions formed to draft laws are frequently consisting of non-experts. This results into adopted laws to be unclear, imprecise and incomplete, against the Constitution, and contrary to other system laws. Therefore, the laws are frequently changed as they cannot be effectively applied. Laws like this cause continuous reform which harms the judiciary in particular.

It is true that those submitting the law proposals often claim that the drafts have received positive feedback from the international community, however, these opinions can relate only to compliance with the EU standards, which does not mean that the EU knows our living conditions and our problems, and that if it gives positive opinion it means that we have got laws that regulate our life, taking into consideration our specificities.

By providing positive opinions, the international community has so far shown a great deal of incompetence and ignorance in regard to our characteristics. In this manner our professional public did not agree with a number of opinions, especially with those related to the judiciary laws

under reform, which leads to conclusion that when passing laws which are often non-quality, the Government is hiding behind the opinion of the international community although these laws are often copied and do not reflect our reality.

There are a lot of copied laws that create problems for the judiciary, but for society as well, because they do not respect the level of the development of democracy, education, poverty, and our characteristics that need to be built-in our regulations.

Over-regulation and the lack of regulations, lack of system and analysis of reasons and effects they need to produce, corruptive provisions that greatly contributed to the present situation in the economy and stratification in the society, indicate that very often a goal of passing a legislation is just for legislation to be passed, rather than passing a quality regulation whose implementation is possible. A number of laws are passed through emergency procedure with delayed application, and thus some laws are changed several times before they have even been applied. This indicates that the legislative and executive authorities are interested only in adopting laws and not if they can be effectively applied. This is most probably done to show to the EU how responsibly and conscientiously we implement reforms, and to get praise for the adoption of reform laws even when the laws are not adopted. The latest such an example is the Law on the salary system of public sector employees, adopted by the Government, for whose adoption the Government was praised by the IMF, although the Law is still pending for adoption before the Assembly.[3]

2.2.3. Examples of legal provisions denying the accomplishment of justice

The Law on Misdemeanors violates the rights of individuals convicted for misdemeanors by preventing them to exercise their other rights, such as getting permits and certificates, registration of vehicles, registration of companies etc., if they do not pay a fine or costs of misdemeanor proceedings, which according to Article 336 represents an additional sanction for all of those that did not pay fine or costs of proceedings. The sanction is neither concrete nor explicitly stipulated by the Law, but is rather tentatively stated, as *exempli causa* which is contrary to the principle that no one can be sanctioned if the sanction is not explicitly envisaged by the law (*nulla poena sine lege*). Especially stigmatized is the fact that no appellate procedure is envisaged by the Law in relation to this sanction, meaning that neither the two instance procedure was stipulated in relation to this particular sanction, nor was conducting of court proceedings enabled.

The amendments to the Criminal Procedure Code envisage that injured parties shall be prevented to access the court in cases when the prosecution dismisses the criminal complaint, *i.e.* injured parties are denied to assume the criminal prosecution if the public prosecutor dismissed it. The exception to this is that once the indictment is filed, the injured party is allowed to assume criminal prosecution even if the public prosecutor dismisses the charges.

Article 228 of the Criminal Code factually stipulates debtors' prison. Paragraph 1 is disputable as it sets that whoever uses a debit card without coverage, or uses a credit card for which he fails to provide coverage within the contracted period, and thereby acquires for himself or another unlawful material gain exceeding ten thousand dinars, shall be punished by imprisonment up to three years. The crucial problem is that the intention to misuse a card or a cheque is not

[3] „Verheijen: The World Bank praise the adoption of the Law on salaries " Daily Politika dated 26.02.2016. http://www.politika.rs/scc/clanak/349989/Verhejen-Svetska-banka-pohvalila-donosenje-Zakona-o-platama

mentioned anywhere. This formulation is in contradiction to Article 1 of the Protocol 4 of the European Convention on Human Rights. Even if the formulation of this criminal offence included the aforementioned intention, there would be no need for such criminal offence to be set under the law, since the act already represents a criminal offence of fraud. Such formulation unjustifiably places banks as creditors in a privileged position in relation to all other creditors in contractual relations. The Council welcomes the initiative for this Article to be entirely deleted.[4]

The parties in the criminal proceedings are not equal anymore and a defendant without a defence attorney has less chance in fighting prosecutor who has experts at his disposal as well as the entire state apparatus. Given that proving the truth was completely transferred to the parties, the Council believes, considering the state's interest in criminal proceedings and in reaching the truth, that it should be the state's duty to provide adequate free legal aid to citizens that need it.

Prosecutorial investigation has not yielded the expected results. At this point the Council will not examine again subjects related to prosecutorial investigation which it already discussed in a report dated 2014. However, the Council believes that since prosecutorial investigation is being implemented for some time, the judiciary needs to perform the analysis of its effects and to answer whether prosecutorial investigation was a model suitable to the poverty of our citizens who are unable to pay for quality defense attorneys and if in this situation rights and justice were equally available to all.

The Law on Public Enterprises perpetuates particracy, since it abolishes the full implementation of two-instance procedure to elect CEOs of public companies. To be precise, the commission in charge to propose candidates for the election of public companies' CEOs is authorized to reject untimely, incomplete, unclear and incomprehensible applications (Article 37). An appeal cannot be filed against this decision. If a two-instance procedure does not exist and there is no possibility to conduct administrative procedure and administrative dispute, no one can guarantee the Commission will reject only untimely, incomplete, unclear and incomprehensible applications. Untimeliness and incompleteness are easy to be evaluated (deadline *vs.* date of the document). The question is who will evaluate what is unclear and incomprehensible, and whether the application was rejected only to enable selection of a previously chosen candidate, as the latter is the common practice here given that public companies represent the largest source of ruling parties' funds.

Numerous laws are corruptive as they bestow a lot of power upon a small circle of individuals. This is especially obvious in regards to laws regulating disposal of state property. The main authority for disposing state property in the privatization process was given to the Government and its members. They decide on methods and ways of privatization, on disposal of state property through direct arrangements, and they control the fulfilment of contracts, all without any effective control and obligatory transparency. Thus, the citizens have no knowledge on how and what property is alienated, under which contractual conditions and what effects these contracts will have on tax payers. All contracts on the disposal of state property are confidential, and if a single contract was publicly announced, numerous other contracts and documents representing integral part of the one published remain hidden from the public. Speaking about the confidentiality of contracts, it is important to distinguish whether it conceals money laundering, illegal contractual provisions or an onerous contract aimed at corruption (Belgrade Waterfront, Air Serbia, Fiat, Železara (Steal factory), a number of contracts on alienation of agricultural land *etc.*).

[4] http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php

2.2.4. Implementation of laws

The judiciary is interested in the quality of regulations, as good interpretation of laws and effective decision making depends upon regulations' clarity and precision. Especially important in this view are laws governing the work of the judiciary. However, these laws are not adequately addressed, public debates are not made possible and relevant experts' opinions are not taken into consideration.

Frequently, the laws are amended for a number of times even before the start of their general application. A good example of this is the Criminal Procedure Code which was amended on four occasions before its general application. Worth emphasizing is that the 2006 version of the Criminal Procedure Code, that never came into force, was amended on two occasions before it was finally repealed.

The Council was pointing out in all of its previous reports that even being as they are, the laws are frequently not implemented. Speaking about implementation, particularly apparent is that state authorities do not apply legal provisions, frequently change laws in order to adapt them to a specific buyer of state property, interpret imperative norms as discretionary, and take all necessary actions so as to provide privileged position to specific subjects. The Council drew attention to this in its reports and explained in detail violations of laws aimed at corruption, which was especially apparent in privatization procedures.

2.3. Material accessibility to justice (legal aid and access to court)

2.3.1. Legal aid and access to court

The long awaited legal system dealing with free legal aid has not been adopted yet, and the current draft law provides for a much wider range of free legal aid providers than envisaged by the Constitution. Instead of widening the circle of free legal aid providers contrary to the Constitution, the law should enable the widest possible range of people to get quality legal aid that they themselves cannot afford. The law does not address the quality of legal aid sufficiently, as it does not foresee a mandatory bar exam and specific work experience for the free legal aid providers. The legal aid is currently provided by the local self-government through scarce services covering about one-third of the Serbian territory. The majority of citizens, however, are not aware of the existence of legal aid, even in locations where these services have actually been established. A positive change is the application of mandatory defense by defense attorneys representing all defendants in criminal proceedings for offences bearing a statutory sentence of 8 or more years of imprisonment (previously10 years). However, this single change is not sufficient to enable full access to justice.

The right of access to court also depends on the amount of court fees. The jurisprudence of the European Court of Human Rights speaks of state's obligation to regulate the right of access to court, so to harmonize needs and resources of the community and the individual, and that this may not be to the detriment of the law itself nor it may be in contradiction with other rights guaranteed by the Convention. Costs of court fees in Serbia are extremely high when compared to average salaries. Costs of proceedings may be compared to neighboring Croatia, where prices for defense are practically the same, but the access to court is cheaper even though average net salaries are 43% higher than in Serbia.

2.3.2. Financial capacities of judicial institutions

In earlier reports, the Council extensively elaborated on the judicial budget whose establishment has been prolonged for a long time.

The Council identified two crucial problems related to judicial budgets: 1) insufficient funds allocated in the Republic of Serbia's budget and 2) jurisdiction over the budget is not fully transferred to HJC and State Prosecutorial Council (hereinafter SPC).

Due to budget constraints the SPC has limited payments of funds to prosecutors' offices for on-call duty and overtime compensation in a very specific way.[5] To be precise, the funds allocated in the budget have not increased and as some prosecutorial actions cannot be delayed and require constantly available prosecutor and administrative worker, a restrictive interpretation of stand-by duty was introduced in a way that some actions which *de facto* fall under stand-by duty are treated as on-call duty. The SPC is correcting all submitted requests for transfer of funds to fit the budget within the allowed limits. The Ministry of Justice, being in charge of administration's salaries, has assigned funds for civil servants' salaries in a restrictive manner. Thus, the Republic of Serbia does not provide even the minimum funds for the work of prosecutors' offices but rather sets financial limits and requests prosecutors' offices to fit into these limits, regardless of the fact that the work load is not proportionally decreased. Certain prosecutor's offices calculate the full amount, but are not paying them out as the funds are not transferred to them. Consequently, a large number of individual law suits may be expected against the Republic of Serbia.

The judiciary has no budget of its own, fully separated from the budget of the executive power. Therefore, one cannot speak either about the independence, autonomy and equality of the judicial power in relation to the executive and legislative powers, or about the independence of Public Prosecutor's Office. For a judiciary to be independent, separate budgets need to be allocated for the work of courts as well as for the work of prosecutors' offices. Apart from allocation of funds, full autonomy in managing funds needs to be transferred both to HJC for budget allocated for courts and to SPC for budget allocated for prosecutors' offices. It is essential that these authorities take full responsibility for both the planning and spending of allocated funds, while the state needs to provide necessary resources for the effective work of the judiciary.

The courts and prosecutors' offices do not have their own bank accounts, and as of 2016 their finances are managed through a single consolidated budget account. Although at first glance it prevents the possibility of judicial institutions' accounts blockage, which used to happen a lot, it actually additionally prevents any autonomy in managing funds. Moreover, the introduction of a single consolidated budget account did not significantly improve material independence, as judicial institutions have insufficient funds at their disposal. According to the Council's findings, judicial institutions need three times more funds in order to make the system function properly. Data on judicial institutions' blocked accounts are the best indicator of the judiciary's material capabilities. For example, on 19 November 2015, the accounts of 26 courts were blocked. For a three-year period prior to the latter date accounts of 116 out of 158 courts were blocked, and total number of days of courts' blockade was 8718. During the stated period the High Judicial Council was in blockade for 784 days, *i.e.* over 70% of time. On 19 November 2015, the account was

[5]SPC letter sent to all prosecutors' offices P-2 no. 30/15 dated 17.04.2015.

blocked for 70 days because of a debt of 50 million dinars.[6] Total courts' debt (excluding HJC) for the first half of 2015 was almost 840 million dinars. Numerous were the reasons for the blockade. The courts used to realize significant revenues from the fees charged for verifications and actions that at present fall under the authority of public notaries, out of which only 30% are allocated to judiciary budget.[7] The increased number of criminal offences for which mandatory defense is set under the law, consequently caused the increase in the number of *ex-officio* lawyers. Apart from incurred debts for *ex-officio* lawyers, the courts are paying court experts' fees with delay, as well. By failing to comply with payment deadlines, courts and prosecutors' offices generate large and increasing debt arrears.[8] When speaking about blocked accounts of prosecutors' offices, the situation was significantly better than with courts' accounts, but is still devastating. To be precise, 17 out of 90 prosecutors' offices were blocked in the period from 19 November 2012 to 19 November 2015, with a total number of 543 days of blockade.[9] Nevertheless, smaller number of prosecutors' offices and number of days in debt does not mean that they do not have any debts. At the end of July 2015, the Higher Prosecutor's Office in Belgrade owed 124.970.825 RSD to defense attorneys, court experts, institute for forensic medicine, agencies, interpreters, MoI, etc. The High Judicial Council proposes a part of the budget to be allocated for current expenditures, except for the expenditures for court staff and maintenance of equipment and facilities, as well as distribution of these funds. The High Judicial Council is also authorized to oversee financial and material operations of courts.[10] Speaking about the blocked accounts, the HJC[11] stated that it used to transfer fund to courts' sub-accounts when courts ask them to, in accordance with requests for enforced payments and quota available for that purpose. Since an increase of judiciary's budgets may not actually be expected in closer future, it is necessary to put efforts in effective use of available funds by means of a reform in funds management imposed by judicial institutions. Financial planning performed by the courts and prosecutors' offices is not of high quality.

The Council concludes that the Law on Organization of Courts and the Law on Public Prosecutors' Offices has not been adequately amended so to instantly transfer all the jurisdiction in relation to judiciary administration, including management of a part of a judiciary budget from the Ministry of Justice to HJC and SPC. Transferring of the jurisdiction was once again postponed until 1 January 2017. Transfer of the jurisdiction was not envisaged for the SPC. The Council pointed out on previous occasions that salaries of judicial officials were not adequate.[12] The situation at present is even further worsened by decreases in amounts judges and prosecutors receive. The position of prosecutors is additionally disadvantaged as they have an increased volume of operations to carry out, bestowed upon them when general application of the current Criminal Procedure Code began. The Law[13] envisages material independence of judicial officials and financial safeness of their families. The salaries need to be one of the guarantees to secure judges' independence and prosecutors' autonomy. Civil servants employed in courts and

[6] Data from the National Bank of Serbia website, section „Engine for Searching debtors in enforced payment" http://www.nbs.rs/rir_pn/pn_rir.html.jsp?type=pn&lang=SER_CIR&konverzija=no

[7] The Council observed the decrease in revenues coming from taxes as a problem in its Addendum to the Second Report on the Reform of the Judiciary 050-72 no. 700-00-15645/2014 dated 04.12.2014.

[8] Functional Analysis of the Judiciary in Serbia – Multi donor trust fund for the support to Judiciary sector in Serbia – Report no. 94014-YF dated October 2014.

[9] Data from the website of the National Bank of Serbia, section „Search engine for debtors in enforced collection of debts" http://www.nbs.rs/rir_pn/pn_rir.html.jsp?type=pn&lang=SER_CIR&konverzija=no

[10] Article 70 of the Law on organization of courts

[11] http://goo.gl/W3tuaa

[12] The Council's Report on Judiciary Reform 27 no. 700-00-3178/2014 dated 17.04.2014.

[13] The Article 4 of the Law on Judges and Article 50 of the Law on Public Prosecutors' Office

prosecutors' offices are poorly paid as well, and there is still a large number of volunteer trainees. Unfortunately, the practice of "between-two-contract work" is not abolished yet when associates and administration are engaged on the basis of unpaid contracts on professional advancement, and fear that they will not be hired again upon the expiration of these contracts.

2.4. Independence of judges and autonomy of prosecutors

The common opinion is that judiciary is not independent and this perception even worsened in comparison to 2009 (findings of the World Bank). Especially troubling data is that 25% of judges, 33% of prosecutors, and about 60% percent of lawyers have the impression that judges and prosecutors are not independent and autonomous, respectively. This concern originates from the fact that the very people working in the judiciary are of the opinion that even a basic standard and principle such as the one declaring that anyone has the right to a just trial by independent judiciary is not achieved. Perception of citizens on the independence of judiciary, based on the research on perception of the contents of the Chapters 23 and 24, conveyed by "Ipsos" is even more disturbing – over 80% of citizens does not believe that judiciary in Serbia is independent from politics and other interest groups. The Council believes that politicians should also be surveyed, as it would be very interesting to see politicians' perception of this topic.

2.4.1. The influence of the executive power on judiciary's independence and autonomy

In its previous reports the Council was repeatedly raising awareness on the fact that members of the Government were violating the principle of the presumption of innocence and about problems prosecutors and judges were facing due to this behavior. The Council repeatedly appealed for the cessation of the practice of politicians speaking in the media about crimes and perpetrators, followed by the Minister of the Interior announcing the arrest of these perpetrators with the Prosecutors' office appearing at the very end.

This politicians' behavior continued. The Government did not accept the Council's remark to cease the violation of the presumption of innocence, imposed by the Prime Minister and other politicians, due to which the Council continued to monitor the appearances of the Government members in the media so as to determine whether the violations of the presumption of innocence have decreased. The Council monitored politicians' statements and determined that politicians' influence on judiciary and violations of the presumption of innocence have continued to the same extent as before. The most striking are the following examples.

a. Examples of politicians' influence on the judiciary

The examples of politicians' influence on the Judiciary are as follows: when Prime Minister labels Miroslav Miskovic as a criminal; when he labels Dragoslav Kosmajac as the largest drug-dealer even though the criminal procedure was not yet initiated; when he speaks about the people to be arrested as dangerous criminals; about Sinisa Mali who is not guilty of anything, who was neither the owner of apartments nor he bought any apartments in Bulgaria, that his signature was a "forgery", thus releasing him of any guilt and responsibility; about the helicopter, when he says that no one is guilty for the fall and that there was no mistake in the actions of Ministers and

Generals thus exculpating them of all responsibility. The Council monitored statements of politicians and determined that: politicians comment cases which are under judicial scrutiny; the Prime Minister announces severe actions; the Minister of Interior evaluates evidence as very strong; actions and deeds are qualified as abuses; polygraph testing is presented as prime evidence of investigative authorities. The Council cannot herein present all of these cases in this Report as these are too many[14].

When such politicians' behaviors are recognized, the question remains whether judges and prosecutors can stay totally aside and not be influenced by such stories which present *sui generis* politicians' requests for proceedings to be initiated against labelled persons, as politicians labelled them and see them as criminals, robbers, drug-dealers. Each of these statements represents a guideline and a warning of what and how judges and prosecutors need to do in order to please the executive power, as their existence depends upon it. In a meeting which was organized by the OSCE Mission and weekly "Vreme" on 12 November 2015, judges publically declared they were afraid, as they are also people who need to take care about their existence and the existence of their families. Without elaborating whether judges and prosecutors are justified in fearing for their existence (this question is not for the Council to answer), the Council wants to confirm that judges and prosecutors are intimidated and for what is worst, there are realistic reasons for their fear. HJC and SPC, as the supreme bodies of judiciary authority, neither deal with the protection of judges and prosecutors from potential politicians' pressures, nor work on enabling their peaceful and unhindered work by preventing different sorts of pressures. The judiciary does not have a body which would, as a supreme judicial authority, effectively request from the executive power to grant judges and prosecutors peaceful and unhindered work without any pressures imposed in any way. The Council cannot present all examples showing intimidations *sui generis,* but will show through some examples, how politicians affect the work of the judiciary and how judges are intimidated in their work.

b. The case of Judge Vucinic

Even before Mr. Miskovic was arrested and any proceedings initiated against him, the Prime Minister publicly spoke of Mr. Miskovic's crimes creating the impression that all of it was already and indisputably proven.

This was followed by the arrests, detention, indictment, security guarantee consisting of high financial deposit, seizure of passport and a trial.

The Special Department of the Belgrade Higher Court, colloquially called the Special Court for Organized Crime, is narrowly specialized for severe criminal offences, and is composed of judges with a long-term criminal law practice, proven to be high quality judges through their

[14] http://arhiva.alo.rs/vesti/aktuelno/vucic-naredio-udar-na-kosmajca/58927 ; http://rs.n1info.com/a98512/Vesti/Istraga-o-Dragoslavu-kosmajcu.html; http://www.blic.rs/Vesti/Politika/534974/Nikolic-preti-tuziocu--Razmisli-sta-kopas ; http://informer.rs/vesti/politika/2574/VUCIC-KOSMAJAC-JE-ZA-MENE-i-dalje-najveci-narko-diler-u-Srbiji; https://www.youtube.com/watch?v=YTX0VNW_-tc ; http://www.blic.rs/Vesti/Drustvo/546647/Vucic-Sigurno-je-bilo-tehnickih-propusta-pri-padu-helikoptera ; http://www.alo.rs/ako-mali-ima-24-stana-u-bugarskoj-ne-moze-da-bude-gradonacelnik/13880 ; http://rs.n1info.com/a102048/Vesti/Vucic-o-Sinisi-Malom-i-stanovima-u-Bugarskoj.html ; http://mondo.rs/a840716/Info/Srbija/Vucic-Laz-da-Mali-ima-stanove-u-Bugarskoj.html ;Prime time news TV H1 dated 04.12.2015.; Prime time news RTS dated 05.12.2015.; Prime time news H1 dated 08.12.2015.; News TV Prva dated 10.12.2015.; News TV B92 dated 26.12.2015.; News TV Prva dated 26.12.2015.; Prime time news RTS dated 26.12.2015.; News TV B92 dated 25.10.2015.; News TV Prva dated 12.10.2015., etc.

work. The case was assigned to Judge Vucinic, who, up until that moment, was considered to be a very experienced and high quality judge, which were also the reasons for his appointment to the position of the President of the Special Department (so called President of the Special Court). Upon the request of Mr. Miskovic, the Judge returned a passport to him for a period of three days, so that the defendant who is also a businessman, could do some work related to business abroad.

The troubles of Judge Vucinic began at that point. Acting President of the Higher Court in Belgrade, Mr. Stepanovic, calls Judge Vucinic and requests from him to revoke his decision to return the passport. Judge Vucinic refuses to do so even though President of the Court threatens to recall him from the position of the President of the Department and to send him back to the Palace of Justice to work on regular criminal cases.

The Judge addresses the High Judicial Council with a complaint requesting the pressure and threats posed to him by the acting President of the Court to be examined, and offers to show SMS proving the pressure he has been exposed to. The media campaign has been launched against the Judge, and since the acting President does not want to inform the public that Judge has passed an independent and autonomous decision to return the passport, which is his legitimate right, and that defendant Miskovic has returned the passport within set deadline, Judge Vucinic himself reveals the truth to the public. For appearing in the public without the permission by the acting President, the latter instigates disciplinary proceedings against Judge Vucinic.

Especially disturbing is that instead for HJC to determine whether the violation of judge's independence occurred on the basis of all available evidence (why the judge would have reported pressure that did not occur, why available SMSs were not taken into consideration, why pressures imposed through violation of presumption of innocence by politicians were not taken into consideration in this specific case of defendant Miskovic, why in fact the proceeding was not instigated at all), the HJC passed the decision that no pressure was exerted on the Judge's work.

HJC revised the first instance decision on disciplinary proceedings determining that there were no disciplinary violations by judge Vucinic, and found him guilty.

Final result is: - Judge Vucinic was expelled from the "Special Court"; - he was removed from the position of the member or president of the panel and replaced with a new judge,, in all severe criminal cases, which is why these trials need to restart; - he was deprived of the higher salary entitled to those working in the "Special Court"; - he was sent back to the Palace of Justice to work on regular criminal cases; - and finally he was relieved of judicial function upon his own request since the level of mistreatment was unbearable and the end of it could not be foreseen.

The Bar Association has welcomed a high quality expert, while the judiciary has lost an expert, brave and honorable judge.

The Council believes that no comments are needed here, except that it is clear that judges have the reason to be afraid for their position and the existence of their families.

c. Cases of Mr. Andrej Vucic

Very interesting are cases of Mr. Vucic, the Prime Minister's brother. Brother of the Prime Minister was registered in the Serbian Business Registers Agency in 2010 as the founder of the company "Asomacum". The company was active as of 2010. In 2014, almost four years after it was founded, Mr. Vucic instigated proceeding for the annulment of the registration of the company "Asumacum" claiming that the company was founded with his forged ID. The Council will not elaborate the *merits* of the decision regarding the annulment of the company registration four years after the initial registration, but will only elaborate how the president of the court decided on

recusal of the judge to whom the case was assigned in line with the right to a "natural judge". A year after the procedure was initiated, Mr. Vucic requested a recusal of the judge for delaying proceedings. The President of the court rendered a decision on the recusal of the judge in the expedite procedure for "delaying proceedings". Given that this is not a reason for a recusal in terms of the Civil Procedure Code, the President of the court rendered an illegal ruling on recusal. Having in mind that in the course of 2014 and 2015, 131 requests for recusal were submitted to the Commercial Court in Belgrade, out of which only five requests were approved, it seems obvious that the President of the Court has rendered an illegal ruling in order to assign the case to an obedient judge. Throughout this period, the Prime Minister was stating for the media that the company "Asomacum" was registered with Mr. Vucic's forged ID, and the same was done by the MPs of the ruling party before the Parliament. Violation of the independence of judges by the executive power and the President of the Court is evident.

The above listed cases clearly demonstrate that court presidents are executors of what politicians say. When someone representing the executive power is giving such statements in which citizens believe, the issue is raised on how a judge can work, allow presentation of evidence that does not correspond to the statements of politicians, and adjudicate on the basis of such evidence. Not only do representatives of the executive power individually represent a problem, but also do MPs who speak of criminals, thefts, robberies during Assembly sessions. In democratic societies, the commission of offenses is reported to the police and to prosecutors after which criminal proceedings are conducted by the judiciary.

Given this behavior, the Council wonders whether our country needs courts and prosecutors' offices if we have executive and legislative powers that sue, conduct proceedings, present evidence, evaluate them and adjudicate. As long as the executive power underrates, depreciates and intimidates the judiciary, the judiciary will be dependent, scared and ineffective. The Council appeals again to representatives of the executive power to cease non-institutional arbitrary adjudications and to enable the judiciary to do its job freely and pursuant to the Constitution and the law.

d. Liability of judicial officials

Judges' Ethics Code was adopted but there is no effective oversight mechanism. The Ethics Code will remain a dead letter unless public awareness is raised as to which judges' behaviours are acceptable and which are not. Public awareness is not only the awareness of judges but also of the public that needs to be able to express its views on acceptable and unacceptable behaviors of judges.

Judges and prosecutors cannot be held liable for opinions they express, and judges also when voting during deliberation, unless it involves a criminal offence – Violation of Law by a Judge or a Public Prosecutor. Criminal liability of judicial officials is foreseen for cases when they issue unlawful acts or otherwise violate the law while performing an official duty with an intention of acquiring benefits or causing damages to others, and is punishable with a sentence of up to 12 years of imprisonment. However, the Council is not familiar with whether any judge or prosecutor was ever prosecuted for committing this offence. The problem can be found in the formulation of the offence which includes proving the intention of acquiring benefits or causing damages, which is hard to prove with such a specific circle of subjects involved in this criminal offence.

All judicial officials have to be prosecuted and sentenced without exemption, if they committed a disciplinary offence. A positive development, for example, is the dismissal of the

judge of the Court of Appeal in Belgrade for unjustified delays in court proceeding which led to the obsolescence of the case a well-known repeated offender. Disciplinary bodies should work more efficiently and should filter the judiciary from unprofessional personnel. Disciplinary proceedings should not be misused, which was detected, as well.

An interesting case is that of the judge who rendered a ruling on the rehabilitation of Aleksdandar Karadjordjevic, put the ruling in the frame and gave it as a birthday gift to Karadjordjevic at the celebration at the Beli Dvor.[15] The court president terminated the contract of a judicial trainee who labelled this act as indecent on social media. The violation of the principle of impartiality of judges, and engaging in inappropriate relationships with clients (which are also disciplinary offences[16]) was not mentioned and thus President of the court failed to file disciplinary charges. This is yet another failure in maintaining the trust in the independence and impartiality of judges and courts.

2.4.2. Court presidents as an extended arm of the executive power

The court must have a president, and only under extraordinary circumstances, by exception, shall an acting president be elected to a period of up to six months. Nevertheless, in September 2015, six courts in Serbia had acting presidents for longer than six months.[17] The Council explained on previous occasions the unpleasant position of the acting President of the court and his exposure to the influence of other branches of power. Commendable is that the number of acting presidents was significantly reduced, but the Council needs to stress that the current situation is unacceptable.

The Council acknowledges that court presidents are acting in accordance with the will of the executive power. The status of acting president, which many of current presidents have been kept at several times longer than statutory deadline, has left consequences. Obedient candidates were elected for posts and they had to prove their loyalty. One additional indicator, besides the above mentioned cases of failing to maintain the trust in the independence and impartiality of courts and judges, is the aforementioned recusal of the judge due to suspicion in her impartiality when acting in the lawsuit instigated by the brother of the Prime Minister.

2.4.3. Constitutional Court

The Constitution does not state precisely enough whether the Constitutional Court is an autonomous and independent body that protects constitutionality and legality, as well as human and minority rights and freedoms. Jurisdiction is well defined and widely set, but the accessibility to justice expected from this Court is absolutely insufficient.

According to the latest publicly announced data in 2013, the Constitutional Court worked on a total of 24.791 cases, out of which 96% were constitutional complaint cases, while just over 4% (1036 cases, including 45 cases upon appeals from not appointed judges, public prosecutors and their deputies) were cases falling under other competences of the Constitutional Court. In

[15] http://www.politika.rs/scc/clanak/334007/Otkaz-u-sudu-zbog-poklona-na-Belom-dvoru

[16] Article 90 of the Law on Judges

[17] Higher Court in Vranje, as of 05.02013; Higher Court in Prokuplje, as of 24.12.2014; Basic Court in Prokuplje, as of 01.01.2014; Higher Court in Pancevo, as of 23.03.2015; Basic Court in Pancevo as of 23.03.2015, Misdemeanor Court in Negotin as of 08.08.2014. (letter for the High Judicial Council no. 7-00-1100/2015-01 dated 21.08.2015.)

2013, the Court had a total of 839 cases requesting the assessment of the constitutionality of the laws and constitutionality and legality of other general acts, respectively, out of which 517 cases were transferred from previous years, while 322 cases were formed in 2013. 383 cases were solved while 456 cases remained unsolved.

With such a large number of cases and only 15 judges, it is practically impossible to expect from the Constitutional Court to operate efficiently and effectively.

However, a far more serious problem than inefficiency is the Court's lack of autonomy and its dependency upon authorities. The Constitution explicitly envisages the Court's autonomy and independence, however, the way judges are elected into office does not secure either autonomy or independence, because ten judges are elected by the Assembly and President of the Republic. As we are still a party-state it is clear that these ten judges are elected by the ruling parties, *i.e.* the ruling authority. Only five judges are elected by the Supreme Court of Cassation upon HJC's and SPC's proposal, which mirrors direct dependency of the Constitutional Court judges' positions on the authorities.

By presenting concrete cases the Council will point to the lack of independence in the Constitutional Courts' decision making:

a) Amendments to the Laws on Judges and Public Prosecutor's Office detracted the jurisdiction of the Constitutional Court, set by the Constitution, to decide upon appeals of judges who were not re-elected in the reform Instead of initiating the procedure for assessing the constitutionality of these amendments on transfer of jurisdiction to the HJC and SPC, the Constitutional Court has accepted this transfer and submitted the complaints to the HJC and SPC, and jointly with the executive power deprived judges and prosecutors of their right to access justice.
b) Without any changes to the Constitution and laws, the HJC and SPC have banned the work of judicial institutions in Kosovo and Metohija. The Constitutional Court did not find it necessary to protect constitutionality and legality, that is, to protect the rule of law which, according to the Council represents a direct violation of the Constitutional Court's jurisdiction *i.e.* violation of the rule of law.
c) The procedure for the assessment of the constitutionality and legality of certain laws lasts for a long time (two/three years). Among others, the procedure on the assessment of the constitutionality of provisions of the Law on Planning and Construction (2009) which refers to the procedure on conversion of the right of use to the right of ownership without compensation for buyers of privatized entities lasted for three years and ended in 2013. Such lengthy proceedings in this field indicate that *de facto* there is no access to justice.
d) The Constitutional Court does not enforce its decisions, even though it is required to supervise their execution. An example of this is the aforementioned controversial conversion of the right of use to the right of ownership, which was re-introduced with the new law. The Constitutional Court neither prevented the implementation of this law nor instigated the procedure to assess its constitutionality.
e) In case of deprivation of pensions, the Constitutional Court unprofessionally decided not to go into the *merits* of the discrepancy between the Law on Temporary Arrangement of Payment of Pensions and the Constitution, and rendered a procedural decision determining that the prerequisites for deciding on the *merits*, and the assessment of the constitutionality of the Law, are not met. All media broadcasted the information that the Law complied with the Constitution, but it is still the open question for which the Council has launched the initiative for the assessment of the constitutionality.

f) The Constitutional Court has fully complied with the remark given by the Minister of Justice when deciding on compliance of the Brussels Agreement with the Constitution and when it stated that it was a political and not a legal act, regardless of the fact that the act was in total contradiction with the Constitution.
g) Although the professional public often criticizes bad statutory solutions very loudly and launches initiatives for the assessment of their constitutionality, it takes a long time to declare numerous controversial legal provisions as unconstitutional. The Constitutional Court found that provisions of the Law on the Judicial Academy, Law on Judges and Law on Public Prosecutor's Office were contrary to the Constitution and annulled them. Those provisions were favoring Judicial Academy graduates over other candidates when electing judges and deputy prosecutors. Even though commendable, this decision was being waited for years. Provisions obliging HJC and SPC to convey elections of judges and public prosecutors to permanent positions were declared as unconstitutional with a delay of more than a year and a half. Even more disturbing is the fact that in the reasoning, the majority of judges accepted this act of the legislative and executive powers, with the latter proposing the bill, as the act of salvation of the judiciary. While shying away from taking a more pro-active approach in the protection of the constitutionality, the Constitutional Court has agreed to justify unconstitutional activities by evaluating them as necessary for the purpose of maintaining the existing system.

This means that the executive power does not respect the decisions of the Constitutional Court, exerts political pressure on its work, and by proposing bills that are automatically adopted by the Assembly , it takes the jurisdiction away from the Constitutional Court with regard to the complaints of unelected judges and prosecutors. When we add the fact that cases last for several years, it is clear that the justice which is expected to be delivered by the Constitutional Court is not available.

2.4.4. The professionalism of judicial officials – Judicial Academy

Professionalism implies increasing the quality of the judiciary by strengthening the knowledge and skills of judicial officials or of those that are about to become ones. In order for this strengthening to be achieved, two conditions need to be fulfilled: existence of an independent institution that has all available resources to provide a variety of training programs and existence of needs assessments on the appropriate and relevant trainings corresponding to the needs of the judiciary, which will enable systematic training of judicial officials. The state has vested the role of the key educator of future judges and public prosecutors upon the Judicial Academy which, although it began to work in 2010, still did not achieve the expected results. The organizational setting of the Judicial Academy prevents essential independence of this institution, and the lack of quality criteria for selecting mentors prevents professional work, as the Council already stressed in its Report on Judiciary Reform, dated 2012. The Judicial Academy is underequipped, lacks premises and human resources, and it relies on the assistance of the international community and donors. Budgetary allocations for Judicial Academy are not planned adequately. The Council believes that Judicial Academy is not competent to plan the work by itself in regard to professional

trainings and that the role of the HJC and SPC in this view needs to be more serious than it currently is.

2.4.5 Improving the efficiency of the judiciary's work

a. Dealing with backlog

The improvements in the efficiency were made when the Supreme Court of Cassation's adopted the Program for solving the backlog of old cases for it envisages the progress of old cases on a monthly basis. This significantly accelerates judges' work in these cases. The program and the accompanying acts for the implementation of measures have already given certain results and thus the backlog was decreased.

b. The Law on the protection of the right to trial within reasonable time

The Council considers that the adoption of the Law on the protection of the right to trial within reasonable time was a good move at attempting to hold more efficient trials. However, the Council believes that some provisions of the Law endanger the independence of judges and judges' access to the law and justice when their work is discussed, *i.e.* that the principle of efficiency and protection of the right to trial within reasonable time was favored over the independence of judges and autonomy of prosecutors.

The Law bestows an unlimited right of decision making upon Presidents of Courts in proceedings where trial judges do not take part.

The Law does not clearly define criteria as how to evaluate if the violation of the right to fair trial occurred. This means that the Court President is to determine these criteria without the participation of the trial judge or the prosecutor acting in the case. Not only is the judge not participating in this part of the procedure (he/she provides only a written report) but also when the Court President decides that the right to trial within reasonable time has been violated, the judge or the prosecutor have no right to legal remedy although it is about their work for which they could be held legally liable for damages arising from regressive responsibility.

The Law allows for hierarchical subordination of judges to the Court President (contrary to Article 149 paragraph 2 of the Constitution), which is envisaged for prosecutors limitedly to the prosecutorial system, but not for judges. The Court President may order a trial judge to take measures to speed up the proceedings, and may even set deadlines for measures to be taken. Consequently, the trial judge is not independent, as he/she must act in proceedings conducted pursuant to orders issued by the President of the Court, regardless of the fact that the trial judge may consider these measures as totally unnecessary. The trial judge has no right to appeal against these measures, and if he/she fails to comply with them, the Court President can initiate disciplinary proceeding that could end up with the dismissal due to negligent performance of duties.

The decision of the Court President may affect the independence of the Disciplinary Committee. To be precise, when the President determines the violation of the right to trial within

reasonable time and initiates disciplinary proceedings, the question is to what extent this affects the Disciplinary Committee, and whether or not the Disciplinary Committee has the right to control criteria set by the President based on which decision was rendered, and also whether measures imposed to the judge were aimed at accelerating the proceedings or if they were arbitrarily imposed by the President even though they could not possibly lead to acceleration of the procedure.

All of the above listed issues remain without solution, and based on all of them a judge or a prosecutor are denied the access to law, justice and the right to appellate proceedings. This approach causes problems to judges and prosecutors and endangers their independence and autonomy, respectively, while Court Presidents, without any control and arbitrarily, may cause a situation of leading to their dismissal. Additionally, since presidents act as an extended arm of the executive power and their position (election), work and existence depend upon the authorities, it becomes clear that the law does not provide any protection for judges.

The Council believes that a year after the Law came into force, its effects should be analyzed. It would also be necessary to verify if judges' and prosecutors' rights to access justice were endangered, given that President's arbitrary decision making, without judge's and prosecutor's right to participate and use legal remedies, may undermine their right to appeal to second instance and thus further deteriorate their position before disciplinary bodies.

2.4.6. The quality of judicial officials' work

Compared to the previous report, where the Council criticized the lack of and pointed out the need for passing the rules for the evaluation and improvement of judicial officials' work, the situation improved, and the Council is pleased to report that these rules were adopted in the meantime.

a. Rules on criteria, standards, procedure and bodies for performance evaluation of judges and court presidents

The Council welcomes the adoption of the Rules, but expresses concern that the evaluation of judges' work is not done in a holistic manner as it does not take into consideration the complexity of judicial work. Criteria for evaluating the performance are quality and quantity[18], and are not sufficiently elaborated as they are narrowed down to statistics treating all cases equally regardless of their complexity. Judges' caseloads are not taken into consideration, even though differences in caseloads per judge significantly differ between courts having the same subject matter but different territorial jurisdictions. An increased case load leads to less efficient case clearance rate. Also, it is not possible to determine on the basis of the adopted Rules whether the methodology determining the number of cases was adequate. Additionally, other aspects of judges' work are not taken into consideration when their work is being evaluated. These aspects are: deliberations, decision making which do not end trials, preparations for department sessions on controversial legal issues, work with judicial assistants and trainees, work in other judge panels,

[18] Article 14 of the Rules on Criteria, Standards, Procedure and Bodies for Performance Evaluation of Judges and Court Presidents

work as a supervisory judge on the international legal aid issues and in the department for documents' verification, getting acquainted with new laws and other. Justified absence of the judge from work is overseen, and this period is also taken into consideration when evaluating their work. Judges' Association of Serbia informed the High Judicial Council about this[19], but views of the professional association were not taken into consideration. The Rules do not clearly demonstrate whether the Court President, when acting as a trial judge, is evaluated both as judge and Court President, or the assessment of his/her work as a judge is not included in the evaluation.

b. Rules on the criteria and measures for the assessment of qualification, competence and worthiness of candidates in the procedure of nomination and election of the public prosecutors

A noticeable change is visible in nominating and selecting the best candidates for prosecutors and deputy prosecutors, but parts of the Rules deserve special attention as they are susceptible to corruption.

The candidates are assessed by a committee formed by the SPC, consisting of five members out of which three are public prosecutors, and the two qualified professionals without clear specification of their qualifications. The situation is somewhat better when assessing the candidate for the Republic Public Prosecutor, as the panel is comprised of four members that are public prosecutors, and only one is a qualified professional. There are no rules that govern the impartiality of the committee members, or that prevent conflicts of interest or any other category of relationship that could be the basis for the exclusion of some of the committee members. Problems also exist in evaluating the candidates. Namely, a large number of candidates who do not have to take the test, used to receive the highest marks during the earlier assessment, and therefore the number of points that they are attributed is 50. Rating of the candidate's oral exam accounts for 20 out of 70 points, and in a situation where most candidates already have 50 points, the oral assessment becomes crucial. For this part of the exam there are no criteria for evaluation, but essentially it depends upon a personal impression of the committee members. An additional issue in the selection of Public Prosecutors and the Republic Public Prosecutor is how can a member who is not a public prosecutor, but the deputy or other "qualified professional", be skilled enough to evaluate the candidate's ability to organize the work of the public prosecutors' office and his knowledge of the prosecutorial administration?

The Council further concludes that the transparency of the oral exam is not sufficiently ensured. Considering the importance of this part of the exam, as well as the necessity of ensuring that a subjective assessment does not prevail over the objective one, we find it necessary that audio and video recording of the oral examination should be made available for viewing on the SPC web portal on the same day, thus ensuring full transparency. The composition of the committee and

[19] The letter from the Serbian Association of Judges dated 07.04.2014. to the High Judicial Council – Remarks and suggestions in relation to the draft Rules on Criteria, Standards, Procedure and Bodies for Performance Evaluation of Judges and Court Presidents dated 27. March, 2014.

scoring, separately have a significant corruptive potential, but together they represent a possibility for biased selection of all public prosecutors.

At the very beginning, numerous complaints were filed against the interim rank list, mostly for the committee members' lack of objectivity. An awkward fact is that SPC was submitting to the Government lists of candidates, including more than one candidate, which enabled the executive power to choose the most desirable candidate and to propose him/her to the National Assembly. Equally exemplary is the fact that for many prosecutors' offices the SPC did not even submit a list of candidates at all. The interim rankings of candidates for the election of prosecutors for organized crime and war crimes showed that a maximum number of points were scored by a judge and a lawyer. It is indisputable that, according to the regulations, a lawyer or a judge could be elected, which eventually happened with the appointment of the lawyer as the prosecutor for organized crime. What is confusing is the assessment of the Committee that the candidates from public prosecutors' offices were less familiar with the functioning of the prosecution than a judge or a lawyer. Even their program for organization and improvement of public prosecutor's offices work was deemed worse than the programs presented by a lawyer or a judge. Specifically, in order to create a high quality and achievable plan, logical prerequisites are familiarity with the specifics of the prosecutor's offices work, organization, case workload, *etc.* Logically, these parameters should be best known by the prosecutors, so the question remains whether the work of the committee was unprofessional, biased and/or corrupted. If the answer is negative, then the Serbian judiciary has an even bigger problem - the lack of competent public prosecutor officials to hold the most responsible prosecutorial functions.

Due to these controversial provisions, professional associations have filed an initiative for the assessment of the constitutionality and legality of the Rules, on which the Constitutional Court in the current situation would have to decide upon in a prioritized manner in order to avoid repetition of mistakes committed earlier.

c. Rules on the criteria and standards for evaluating the work of public prosecutors and deputy public prosecutors.

The Council welcomes the adoption of the standards and the criteria for evaluation of the work of prosecutorial officials. However, some of the provisions of the said Rules should be questioned.

Evaluation of a public prosecutor by the immediately superior public prosecutor who previously obtained the opinion of the collegium of the immediately higher public prosecutor's office is inappropriate, since all deputies of the immediately higher prosecutor rarely have adequate information on the work of lower instance prosecutors' offices.

Evaluation of the work of deputy public prosecutors is made on the basis of the following criteria: efficiency in the work, expertise and success in work and professional dedication and cooperation. Efficiency is incorrectly placed first. The highest score for the criterion of efficiency is acquired when in more than 80% of cases, one of many prosecutorial acts is rendered, among which, an order for instigating investigation or filing indictments are equally valued as, for example, a request for collecting or providing the necessary information. Expertise and success in the work is measured by the number of final convictions rendered on the basis of indictments filed

by the deputy public prosecutor. As the success of a criminal proceeding does not depend solely on the indictment but also on the procedure, the question is who will be evaluated when more deputy public prosecutors work on a case at different times, which is not a rare occurrence.

Also, problematic is the provision that allows the adoption of the evaluation system applied in institutions or organizations to which the deputy prosecutor is sent. For the time spent, for example, in the Ministry of Justice, the work assessment criteria will be the one applicable to all employees of the Ministry of Justice.

This is just the beginning of the process of determining the criteria for work evaluation. The Council believes that the competent authorities should supplement these criteria in time with decisions related to specific questions, such as: how the prosecutors will be evaluated in cases involving a greater number of judicial officials; how the prosecutors' performance will be measured if they do not bear any responsibility for courts' unsuccessful conduct of procedures, etc.

2.5. Conclusions and recommendations

1. The rule of law is exercised through a system based on the division of powers among the three branches - executive, legislative and judicial. The relations between the mentioned branches of government are based on checks and balances provided that the judicial authority is independent from the other two authorities. These relations mean that a judicial reform cannot be done, if it does not carry over the reform to the other two branches of government in the areas that significantly affect the work of the judiciary. Furthermore, because of the transfer of courts' competencies in the area of investigation, in order to ensure quality work by prosecutors, it is necessary to ensure their institutional independence.

   The main function of the judiciary, as a branch of government, is the institutional control of the rule of law, however, in order to effectively and professionally perform this function, it is necessary that the executive and legislative branches establish a legal framework that reflects our life, the level of our economic development, education and morality, that is - to portray what is to be further legally regulated or modified. In any given country one of the most responsible state affairs is to pass regulations, and that requires vast expertise, knowledge and experience to ensure their application will lead to the improvement of social conditions.

   The executive and legislative branch pass laws through urgent procedures, with no public debates and discussions by experts, regulations do not reflect our reality, our peculiarities, leading to the laws being changed sometimes even several times in a single year. Due to frequent changes in legislation, citizens experience problems in finding out their rights and obligations, and not only because of the frequent changes but also because the government does almost nothing to ensure transparency, consolidation of legislation and free access to consolidated legislation. Bad legislation that is often passed for a single use (abuse) is constantly changing, not only preventing the knowledge of the law but rather creating the inability to establish uniform judicial practice, which as a rule facilitates the work of judges, and more importantly creates legal security in society.

The wrong thing is that the executive power is hiding behind the majority in the legislative power, when the executive power passes bad legislation through urgent procedure. This does not mean that the adopted bad legislation will come to life, be implemented and thus make the necessary change.

Therefore, the state would have to change the practice of adopting regulations through urgent procedure, without public and professional debate, without the participation of experts in certain fields and the participation of civil society. Laws have to be passed through regular procedure with the opinion of the experts, regulatory bodies and civil society.

2. The reform of the judiciary cannot be exercised by the executive and the legislative powers without active participation of the judiciary, which is what happened with the 2009 judiciary reform.

It is necessary for the executive and judicial powers to carry out a thorough analysis of the situation in the judiciary (something that has never been done entirely) with the precise elements of the network of courts, the number of judicial officials, the number of old and newly received cases, the actual quality of judicial decisions, that is, to establish all the elements which will be continuously used as a comparison and to monitor and evaluate the work of each judicial institution as well as every judge and prosecutor individually.

When performed, a detailed analysis of the situation in the judiciary will clearly show what kind of court network is necessary, how many judges and prosecutors are needed per average inflow of cases, in relation to economic development and population size, as well as in relation to other elements that are essential to the effective access to law and justice.

3. The executive and legislative powers are obliged: - To carry out their duties specified by the Constitution and the laws; - To enable the judiciary to be independent and autonomous in performing the duties under their jurisdiction and to stop making statements and give instructions pertaining to persons against whom criminal prosecution should be initiated, and refrain from labelling them as criminals, robbers, drug dealers; - To refrain from assessing the validity and importance of certain evidence obtained by the police; - To stop violating the presumption of innocence; - To stop interfering with the jurisdiction of the court in determining who is and who is not responsible; - To provide the necessary office space according to the determined network of courts, realistic and sustainable judiciary budget (courts and prosecutors' offices cannot perform their activities with blocked accounts); - To provide free legal assistance in accordance with the Constitution and under conditions that shall be envisaged by the law;

4. The Council has carried out a comparison of the recommendations from previous reports and found that there was an improvement in solving old cases and that the following bylaws have been adopted: Rules on the criteria, standards, procedures and authorities for evaluating the work of judges and court presidents; the Rules on the criteria for evaluation of qualification, competence and worthiness of candidates in the procedure of nomination and election of public prosecutors; the Rules on the criteria and standards for evaluating the work of public prosecutors and deputy public prosecutors; as well as the Law on the

protection of the right to trial within a reasonable time. It is further necessary to continue with the control of the implementation of the said bylaws, because the Council has noted certain shortcomings in these regulations that may limit the independence and autonomy of the judiciary, as well as prevent judges and prosecutors from accessing law and justice.

5. Strengthen the responsibility of judges and prosecutors through strict application of all legal and disciplinary measures, in accordance with the law and regulations.

6. It is necessary to establish a clear procedure for HJC and SPC to publicly react in cases of political influence on the judiciary and public prosecution.

7. The state is obliged to carry out a detailed analysis of the work of the Constitutional Court, as it is not possible to determine from its previous work whether the Constitutional Court is a judicial institution or is a part of the executive power. According to the Constitution, the Constitutional Court should be a legal institution and the last in a series of institutions in decision making and protection of human rights, as well as the first institution in a series that will react to a regulation which is contrary to the hierarchically higher regulation. However, the Constitutional Court is not an independent institution primarily because of the way of election of its judges, as 10 out of 15 judges are elected by politicians, and only five are elected by the judiciary. The impression that the Constitutional Court leaves is not the one of independence, but more so of dependence on the executive power. Accordingly, this body lingering between the judicial and executive powers is not a body that can achieve the expected law and justice.

8. Compared to earlier recommendations, the Council has determined compliance with a very small number of recommendations. Due to the importance of these measures, the Council recalls its priorly given recommendations and emphasizes what has not, and should be done:
   - The dismissal of members of the HJC and SPC was not carried out, but the elective members have been changed during regular elections;
   - The judiciary would be strengthened by the abolition of the membership in HJC and SPC by function, or through the abolition of their right to vote, with the latter not even requiring changes to the Constitution;
   - The final selection of members of the HJC and the SPC has not been transferred from the National Assembly to judicial officials;
   - Although the number decreased significantly, there are still functions of the acting court presidents with a longer appointment than envisaged by the law;
   - Competencies of the judiciary administration have not been transferred from the Ministry to the HJC and SPC, but, on the contrary, the deadline for the transfer of jurisdiction has been extended;
   - The first election of judges and deputy public prosecutors has not been transferred from the Parliament to the HJC and SPC (without abolition of the trial period);
   - The election of court Presidents and Public prosecutors has not been transferred to the HJC and SPC;
   - Civil servants in the justice system have not been transferred under the jurisdiction of the HJC and SPC, as a special category of "judicial employees";

- Wages of workers in the judiciary have not increased;
- Joint sessions of Appellate courts have not been introduced to ensure consistency of the jurisprudence;
- The adoption of Courts' rules and procedures has not been transferred to the jurisdiction of HJC;
- It is still not possible for judicial and prosecutorial assistants with years of experience to take the final exam at the Judicial Academy free of charge;
- A transparent and impartial selection of candidates for the initial training at the Judicial Academy has not been provided, as well as the quality or general continuous training of judges and prosecutors;
- Full transparency of the work of SPC and HJC has not been provided;
- The representatives of the executive power have not refrained from making statements and using other methods which interfere with the independence of the judiciary, as well as from overall influence on judiciary's work.

9. To achieve a quality access to justice, particularly in terms of the application of the Criminal Code, which includes the prosecutorial investigation and the absence of the principle of material truth, it is urgent to adopt an appropriate law on free legal aid.

Although a large number of recommendations include changes of the Constitution, the Council deems this necessary in order to ensure the quality work of the judiciary and full access to justice.

VICE PRESIDENT OF THE COUNCIL

Professor Miroslav Milicevic, PhD.