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INDEPENDENT AND IMPARTIAL JUDICIARY IN MONTENEGRO – CHALLENGES AND OBSTACLES-

Podgorica, June 2012

European integrations of Montenegro: Strengthening the independence and the impartiality of judiciary

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Abstract (Executive summary)

Independent and impartial judiciary constitutes an absolute prerequisite for establishing the rule of law, as well as the basic fair trial guarantee and equality of citizens before law. Where there is no judicial independence and impartiality it is almost illusory to talk about human rights and human freedom, since the fairness of proceedings depends mostly on the one who administers justice. The establishment of judicial authority, which will be independent from other branches of power and capable of protecting the rule of law principles, is the sole duty and responsibility of the state, which is not exhausted in establishing formal-legal mechanisms and procedures, but to prevent and eliminate, through constant efforts, any illegal influence on the holders of judicial functions.

Just like in the majority of post-transition countries, judiciary in Montenegro is faced with numerous challenges, like the ones of organized crime and corruption, backlog of court cases, inappropriate material-technical equipment, as well as the inheritance of strong influence exerted by the executive power. It also seems that these days, judiciary has been targeted and criticized openly more than ever before. But there are also other, subtle interference with its independence. On the other hand, the basis of judicial independence is clear; it requires from the courts to adjudicate impartially, without any constraints, illegal influences and pressures.

Having in mind the fact that the reform of judiciary represents one out of seven key priorities for Montenegrin accession to the European Union, the necessary changes must follow the direction of establishing functional and political independence of judges and prosecutors, as well as other authorities that can appear as a part of judicial proceedings, but also of securing the appropriate economic status of judiciary as a whole. Finally, these changes should result in the efficiency and quality of trials, but also in the trust of the citizens in judiciary.

I Introduction

The reform of Montenegrin judiciary, initiated in 2000, was intensified after the renewal of the state independence in 2006. The Constitution from the year 2007 strengthened the independent position of judiciary and state prosecution. The Strategy for the Reform of Judiciary was adopted for the period 2007-2012 with the Action Plan for the implementation of the same. The strengthening of the independence and the autonomy of judiciary was proclaimed as one of the principal objectives of the Strategy. Numerous legislative changes were enacted regulating the organization and the functioning of judiciary, but also societal relationships which judiciary

deals with in substantive sense. The institutional framework was improved, primarily through the establishment of special bodies, like the Judicial and Prosecutorial Council, which should contribute to the independence of judiciary.

However, the conditions for a complete independence of judges and prosecutors have not yet been met, as stated in the European Commission Progress Reports for 2008 and 2009, in the European Commission Opinion on the Montenegrin Request for the EU Membership and in the Council of Europe Monitoring Mission Reports. One should not neglect general public negative perception of the independence of judiciary, especially in relation to politically sensitive and other cases which attract high level of public attention. This perception is partly a consequence of cultural factors, but also of the lay approach of the public towards judicial actors, as well as of the lack of strict respect of the rules of ethics. Facing the opening of negotiations for the accession of Montenegro to the European Union, particularly disconcerting is the impossibility of reaching the political consensus about the necessary constitutional changes which should contribute to the strengthening of the independent position of judiciary in relation to other branches of power.

Starting from the facts stated above, the aim of this publication is to consider the issue of the independence and impartiality of judiciary in the context of European integrations and international standards of human rights, to identify key challenges in the implementation of the judicial reform and to define the recommendations for the improvement of the same, in a form of policy paper.

The publication primarily deals with the issue of the independence of judiciary through the sphere of institutional independence, which encompasses the legislative framework that regulates the independence, the appointment and the dismissal of judges, professional and career development, disciplinary responsibility and case allocation. Taking into consideration the position and the competence of judiciary in relation to other public institutions, but also the social context within which judges perform their duty, another issue that has been dealt with here is the one of the functional independence of judiciary, which concerns the compliance with the principles of the division of powers and the relationships between individual judicial actors, as well as the issue of personal integrity of judges. Besides the analysis of the normative framework, the text is also based on the results of the survey which covered the examination of views of legal community, including the representatives of judiciary and lawyers, as well as the ones of media and civil society organizations, on the independence and impartiality of judiciary and on the results reached so far in the reform of judiciary.

II Key concepts

This publication observes the principles of independence and impartiality in their mutual interaction, starting from the fact that court can be independent but at the same time also partial, while the phenomenon of the dependence of court can in no way be placed in the necessary context of its impartiality. In other words, the very presumption of dependence of a judicial authority can in no way make a court being impartial. Independence constitutes the autonomy given to a judge or a court to make a judgment by applying the law to the facts of a specific case. Seen in that context, independence belongs to a court as an institution which is independent within the framework of the division of powers *(institutional independence)* and to a judge as an individual (*personal independence*). Impartiality is observed through the relationship of a

judge towards a specific case and towards the parties in the proceedings, having in mind in the first place the fact that "judges must not have prejudices with regards to the case in which they should make a judgement, nor shall they act in such a way so as to promote the interests of one of the party to the proceedings"[1].

III Independence of judicial power

Independent judiciary is a paradigm of the control function of the court in relation to the legislative and executive powers, thus also a basic condition for the achievement of the division of powers, which should strengthen democracy and solidify the rule of law in every country. The absence of interference with the conducting of judicial proceedings[2], as the basic guarantee within the framework of the concept of the independence of judiciary, does not only mean that judiciary is independent from other branches of power, but also that these other branches are obliged to observe and enforce judicial decisions.

International sources

Fair trial before a court which is independent, established according to the law and impartial constitutes the standard of all international instruments safeguarding human rights. The international standards guarantee judicial independence starting exactly from the specificity of their function and from their duty to ensure legal order and the protection of human rights and freedoms.

Key international documents which guarantee and define the right to independent court as the fundamental principle of international law are: Universal Declaration on Human Rights, Fundamental Principles of the Independence of Judiciary enacted by the Seventh UN Congress and approved by the General Assembly; International Covenant on Civil and Political Rights; European Convention on the Protection of Human Rights and Fundamental Freedoms; Recommendation R (94) 12 of the Council of Europe Committee of Ministers on Independence, Efficiency and Role of Judges; Magna Carta 2010 (3) and the European Charter on the Law for Judges.

The Article 10 of the *Universal Declaration on Human Rights* guarantees to everyone "completely equal right to fair and public trial before independent and impartial court which will decide on one's rights and duties and on the justification of all criminal charges brought against him/her." The principle of institutional independence is also contained in the second paragraph of the principle 1. *UN Fundamental Principles on Judicial Independence*: "All public and other institutions are obliged to observe the independence of judiciary."

Equally so, the European Court of Human Rights held in its judgements, while examining the principles of judicial independence, that judiciary must be independent from the executive

1 International Covenant on Civil and Political Rights, Article 14, paragraph 1.

2 The Article 6 of the European Convention on Human Rights is also interpreted as an article that forbids the executive or legislative powers to issue binding orders to courts while they perform their duties *(see: judgement in the case Beaumartin v. France, 24th November 1994*).

power, as well as from the parties to the proceedings.[3] In the judgement *Campbell and Fell,* the Court stated the following criteria:

"*When determining whether an authority can be considered 'independent' from the executive power and from the parties to the dispute, the European Court takes into account the method of the appointment of its members and the term of office, the existence of the protection from outside pressures and whether the authority appears to be independent.*"[4]

In the *Recommendation of the Council of Europe Committee of Ministers no*. R. (94) 12 to the member states, on the independence, efficiency and the role of judges, it is stated that "the rule of law in democratic countries depends on the independence, efficiency and the role of judges", as well as on the existence of the desire "to promote the independence of judges" in order to achieve that objective.

In the *European Charter on the Law for Judges* (*European Charter*) the following guidelines were laid down: "The Statute for judges must aim at securing professionalism, independence and impartiality which everyone justifiably expects from the courts and from every judge who the protection of his/her rights is entrusted to".

The international standards also underline the duty of the legislative and executive branches to make sure judiciary receives adequate resources[5]. In the light of the duty of the state to protect the independence and the repute of judiciary, special concern is related to possible political pressure on judiciary through the reduction of financial means within the budgetary process, which would have serious consequences for the capacity of judiciary to process complex cases in an independent, fair and efficient manner. The European Charter also points out to the need for securing the necessary funds for judges in order for them to be able to perform their duties.

Legal framework in Montenegro

Following the principle of the division of powers, t*he Constitution of Montenegro*[6] divided the powers in the country to legislative, executive and judicial. The Constitution guarantees the independence of judiciary, which means that the legislative and executive powers may not exert control over it. The Constitution guarantees to everyone the right to a fair and public trial within a reasonable time before the court which is independent, impartial and established according to the law. Besides that, the Constitution prescribes direct application and the supremacy of international treaties over national laws, when these regulate certain issue differently than national legislation.

Also, the Constitution determines the principles of judiciary; the permanence of tenure; functional immunity; the incompatibility of judicial function with the membership in the Parliament or some other public function and with the performance of any other activity in a professional capacity; the position of the Supreme Court of Montenegro, as well as the composition and the

3 Judgement in the case *Ringeisen* v. Austria, 16th July 1971, series A13, paragraph 95.

4 Judgement in the case *Campbell and Fell*, 23rd June 1981, p. 40, paragraph 78.

5 See the UN Report which states that, according to the international and regional standards, "it is the duty of every member state to offer adequate resources so as to enable judiciary to perform its duties in a proper way" and "that, in line with the important domestic economic constraints, the needs of judiciary and of judicial system be given high level of priority in allocating resources."

6 ("OG of MNE" no. 1/07)

competence of the Judicial Council, as an autonomous and independent body the task of which is to ensure the autonomy and independence of judiciary, while exercising its competences. According to the Constitution, the Judicial Council is competent for the appointment and dismissal of judges; for determining the termination of judicial function; for considering the report on the work of courts, as well as the petitions and objections related to the work of courts and taking views about the same; for making decision on the immunity of judges; for making proposals to the Government of the amount of funds for the work of the courts and the performance of other activities established by the law.

The Law on Courts[7] regulates the establishment, the organization and the competence of courts, the conditions and the procedure for the appointment of judges; disciplinary responsibility; the termination of office and the dismissal of judges, as well as the organization and the financing of the work of courts. The number of judges is determined on the basis of the *Rulebook on Framework Norms for Determining the Necessary Number of Judges and other Employees in Courts*, passed by the Ministry of Justice of Montenegro, upon the proposal of the Judicial Council.

The Law on Judicial Council[8] regulates the method of work and the way how the Constitutional competences of the Judicial Council are exercised. The *Action Plan of the Judicial Council 2009-2013* laid down the measures for the enhancement of the procedure for the appointment of judges, then for ensuring financial independence, strengthening the capacities of the Judicial Council, for the improvement of the procedure of establishing disciplinary responsibility of judges, enhancement of the mechanisms for the evaluation of the work of judges and expert assistants, as well as for ensuring professional development of judges, expert assistants and trainees.

(i) Judicial Council

According to the *Constitution*, the Judicial Council has got its Chair and nine members, four of whom are elected from among judges who are appointed and dismissed by the Conference of Judges; two members come from among the MPs who are appointed and dismissed by the Parliament from the Parliamentary majority and opposition; two reputable jurists who are appointed and dismissed by the President of Montenegro and the Minister of Justice. The President of the Supreme Court is ex officio chair the Judicial Council.

Despite being constitutionally proclaimed, the institutional independence of the Judicial Council has been contested exactly because of the composition and the manner of the appointment of its members, as well as because of the manner of the election of the President of the Supreme Court and the lack of transparency in the appointment of other holders of judicial offices. One of the principal objections is contained in the fact that the composition of Judicial Council does not offer sufficient guarantees for the elimination of the political influence on the appointment of judges. One of the key recommendations of the European Commission expressed in the *Opinion on the Request of Montenegro for the Membership to the European Union* refers to the strengthening of the rule of law through depoliticised and merit based appointment of the Prosecutorial and Judicial Council.

The fact is that out of ten Council members, only four members are elected by judges, which is

7 ("OG of the Republic of Montenegro" no.5/02; "OG of MNE" nos. 22/08 and 39/11)
8 (OG of MNE nos. 13/08 and 39/11)

problematic in itself when one has in mind the fact that the remaining five members are the persons with evident political engagement or who can have political influence within the Council. Also, the competence of the Parliament to appoint and dismiss the President of the Supreme Court, as well as to appoint and dismiss the Supreme State Prosecutor, state prosecutors and Prosecutorial Council, has been recognized by the European Commission for Democracy through Law (*Venice Commission*) and by the European Commission, as a possibility of political influence on the independence of judiciary, especially when one has in mind the relation among political forces, as well as the fact that the Parliament decides on these issues by simple majority. Besides that, positive legislation enables high concentration of authorities vested in the person of the President of the Supreme Court who chairs the Council and the Three-Member Commission for the Appointment of Judges, with the authority to manage the Conference of Judges and organize its work, at the same time enjoying functional immunity, contrary to the Council members. The Law on Judicial Council does not contain the clause on the prohibition of the conflict of interest the objective of which would be to prevent the appointment of politicians and the persons associated with them, as Council members. The ban on political party membership of judges constitutes another constitutional guarantee of the independence of judiciary. However, this constitutional provision does not give the answer to the question what if some holder of a judicial office becomes a member of a political organization, nor has this situation been elaborated with an adequate sanction through the provisions on the termination of office and the dismissal of a judge from the office. The objections are related to the membership of the Minister of Justice as a representative of the executive branch, as well as to the insufficient transparency of the candidacy procedure for the Council members from among reputable legal experts appointed by the President of Montenegro, just like the fact that these persons are not subject of the ban on political party membership.

Finally, although the Judicial Council has got certain financial competences (proposing to the Government the distribution in annual budget which is related to the work of the Council and the disposal of budgetary funds) as well as the right to participate in the work of the Parliamentary sitting when budget proposal is discussed, one cannot yet speak about the financial independence and equality of judicial power in relation to the other two branches of power.

(i) Appointment and dismissal of judges

The Law on Judicial Council prescribes the conditions and the procedure for the appointment of judges, which encompasses the procedure of proposal and the selection of the candidates, the acquisition of opinions on professional and working qualities, the selection criteria, the interviews with the candidates, written testing and formulation of proposals by a special commission, publishing of the decision and the protection of the candidates' rights in relation to the selection procedure being carried out. Although among European judicial systems there is no unique mechanism for the appointment of judges, international standards give clear recommendations on the guarantees of independence which the appointment of judges should contain. In that sense, the report of the Venice Commission is rather direct: "The principle that the decisions concerning the appointment and professional career of judges must be based on merits, with the application of objective criteria within the legal framework is indisputable[9].

Judges are appointed by the Judicial Council, which constitutes a step forward compared to previous legal solutions, at which one should bear in mind the fact that the majority of Council members are selected by other branches of power. Although progress has been made in relation

9 Venice Commission Report, *Report on the Independence of the Judicial System,* footnote 24, *supra,* paragraph 27

to rendering objective the criteria and their elaboration by specific criteria, the parameters for the evaluation of the criteria and the sub-criteria have not been prescribed, which hinders the objective evaluation of the same. As regards the exclusion of public, it has not been prescribed by this law, leaving it to the provisions of the *Judicial Council Rulebook*[10] and to the discretionary authority of the Council to decide on the presence of the public, without clearly specifying the cases in which this can be done. With regards to the issue of safeguarding the subjective rights of the candidates for the appointment to judicial office, and since the decision of the Judicial Council on the appointment is final with the possibility of instituting an administrative dispute against the same, the question is raised to what extent in a specific case can the Administrative Court, as a judicial body, decide upon the merits and in and objectively way. Besides that, the law does not specify that the decision on the appointment is to be serviced to the unsuccessful candidates, with the legal remedy, but only that the Council is to inform the candidates about its decision, as well as that a candidate is entitled to inspect his/her documentation and the final assessment of other candidates.

The Constitution[11] prescribes the conditions for the dismissal of judges. A judge can be dismissed if he/she has been convicted for an act which makes him/her unworthy of judicial office; if he/she performs his/her duty in an unprofessional or unconscientious manner or if he/she becomes durably incapable of performing judicial duty. The *Law on Judicial Council* regulates more closely the disciplinary procedure and the procedure for the dismissal of a judge.

The constitutional provision according to which the President of the Supreme Court is appointed and dismissed by the Parliament upon a joint proposal of the President of Montenegro, the Speaker of the Parliament and the Prime Minister, can be challenged from the point of view of possible political influence of the ruling political party, especially if one takes into account the fact that the appointment and the dismissal is done by means of the majority of votes of all the MPs, as well as that he/she is the ex officio Chair of the Judicial Council. Such a solution fully excludes judicial power, leaving the appointment to the executive power, in particular when one has in mind the provision which envisages for the President of the Supreme Court to be appointed upon the proposal of the Parliamentary working body should the three presidents fail to come to an agreement.

(i) Permanence of tenure and immunity

The permanence of tenure constitutes another constitutional guarantee of the protection of judges from the illicit influences in decision-making process. This in no way means that a judge is to be outside any kind of supervision, especially of the control of references, which are necessary for the performance of judicial duty. The *Constitution of Montenegro* puts a limit to the principle of the permanence of tenure with the termination of judicial office in case a judge has been convicted for an act which makes him/her unworthy of performance of judicial duty; if he/she performs his/her duty in an unprofessional or unconscientious manner or if he/she becomes durably incapable of performing judicial duty. Even the *UN Fundamental Principles on the Independence of Judiciary* contain the principle according to which judges, either the appointed or elected, will have the permanence of tenure safeguarded until they meet the retirement requirements or until the termination of their terms of office.

10 ("OG of MNE no. 57/11"), Article 4

11 Constitution of Montenegro ("OG of MNE no. 1/07"), Article 121

Pursuant to the provisions of the *Constitution*, judges enjoy functional immunity and may not be impeached for his/her opinion and voting while judicial decision is made, except in a case of a criminal act. In case a criminal proceeding has been instituted against a judge for a criminal act committed during the performance of his/her judicial duty, the same may not be detained without prior approval of the Judicial Council. Pursuant to the *Law on Judicial Council*, when a competent court estimates that there are reasons for detention of a judge, it is obliged to ask from the Judicial Council, without delay, to make a decision as to whether it approves the detention, within 24 hours as of the receipt of the request.

(i) Disciplinary responsibility of judges

The Law on Courts prescribes conditions for determining disciplinary responsibility, which, *inter alia,* is reflected in the *improper performance of judicial duty* when a judge: does not work on cases in the order of they have been registered; does not schedule hearings in the cases allocated to him/her or delays the proceedings in any other way; fails to ask for his/her exclusion in the cases when there are reasons for his/her exclusion; does not process the decisions within the legally stipulated deadline and does not comply with the backlog reduction programme, or does not act upon the decision on review request. The basis for determining disciplinary responsibility is also *contempt of judicial office* when a judge, while performing his/her duty or in public brings himself/herself in the position or behaves in a manner which is incompatible with the performance of judicial duty; when he/she treats inappropriately the participants of judicial proceedings and the court employees; when he/she does not refrain from inappropriate relations with the representatives and the parties to the cases where he/she is the acting judge or when he/she communicates the information he/she found out while acting in the cases; as well as when he/she uses judicial office in exercising his/her private interests and the interests of his/her family or the persons close to him/her, or accepts gifts, or does not submit the data on his/her property and incomes pursuant to the regulations which regulate the prevention of the conflict of interests. Similar conditions for determining disciplinary responsibility are envisaged also for court presidents.

Disciplinary responsibility, besides pecuniary sanctions towards the judges who breach discipline, envisages also the possibility of dismissal as the sternest punishment for disciplinary offences. It is in this way that one should understand the provisions of the *Law on Judicial Council* which prescribes the conditions of the incompatibility of duty, immunity and dismissal of judges, as well as the provision which envisages the possibility for a judge to request the opinion from the Judicial Council as to whether certain activities are incompatible with the performance of the judicial duty, which the Judicial Council makes a special decision on.

(i) Case allocation and exclusion of judges

Random case allocation method constitutes one of the instruments which should make it possible for any systemic assumption that would point out to the intention of the court administration to violate the concept of the impartiality of the court to be eliminated in a prior, rather technical procedure. Although this system cannot entirely eliminate the dilemma on the absolute neutrality and impartiality of a judge in a specific case, it gives the initial impetus to the fairness of the proceedings, which is based upon the fact that it is hard to envisage beforehand the identity of a judge who is going to be presiding in certain case. What is more, cases are processed in the order of their arrival to the registry. Even the *UN Fundamental Principles on the Independence of Judiciary* (principle 14) stipulates that the issue of case allocation to judges constitutes a question

of internal judicial administration. Naturally, even such a system can be discredited, but the final assessment about it must be given by the analysis of each specific case and subsequent acting of the judge in a specific case, which is the best way to eliminate the suspicion in his/her impartiality, thus consolidate the trust in the work of the entire judicial body.

The Law on Courts laid down the principle according to which everyone is entitled for a randomly selected judge to adjudicate in his/her legal matter, independently from the parties and the nature of the legal matter. According to the provisions of this law, cases are allocated to judges without delay, according to the annual work schedule, using the method of random case allocation which depends solely on the designation and the case number. The cases arriving on a daily basis are classified alphabetically, taking the initial letters of the names and surnames of the parties, and allocated according to the alphabetic order of the names and surnames of judges. Failure to comply with the principle of random case allocation is considered as unconscientious and unprofessional performance of the duty of the court president and constitutes the basis for determining his/her disciplinary responsibility. Random case allocation procedure is closely regulated by the *Court's Rules of Procedure*[12].

The institute of the exclusion of a judge from certain case and the institute of the exclusion of a judge upon the request of a party in the cases prescribed by law, as well as in case of other circumstances which raise the issue of the impartiality of a judge, have been regulated by procedural laws, the *Law on Civil Procedure*[13] and the *Criminal Procedure Code*[14], which are applied to other legal areas in a subsidiary manner.

The Law on Civil Procedure prescribes the procedure of the exclusion of a judge upon his/her initiative or upon the request of a party to the proceedings. According to the provisions of this law, a judge may not adjudicate if he/she is a party to the proceedings, a legal representative or a party's agent, if he/she is in the relation of a co-agent, co-obligor or co-recourse obligor, or in the same case he/she is to be heard or has been as a witness; if he/she is the next of kin or the in-law to the party, his/her legal representative or agent, and if he/she is a guardian, adoptive parent or an adoptee of the party, his/her legal representative or agent. The acting in the case in which court settlement has been reached the annulment of which is requested, as well as the participation in passing a decision of a lower instance court or another body, a and the participation in the mediation proceedings, also constitutes the bases for the exclusion of a judge, as well as the membership in a company which is a party to a proceedings. This law also prescribes for a judge, as soon as he/she finds out of the existence of some of the stated reasons for the exclusion, to be obliged to cease acting in that case and to inform the court president accordingly. A judge is obliged to act in this way if he/she considers that there are any circumstances that would challenge his/her impartiality. Until the decision of the court president is passed, the judge may solely undertake the actions which might be causes to delay.

The request for exclusion may be lodged by the parties to a proceeding as soon as they find out of the existence of a reason for exclusion, no later than the termination of deliberation before the first instance court, and in case there has been no deliberation, until final decision is passed. The request for the exclusion of a higher court judge can be lodged by a party in the legal remedy or in the response to the legal remedy, and in case of a hearing before the higher court, by the

12 ("OG of MNE" no. 26/11) Article 62-71

13 ("OG of the Republic of Montenegro", no. 22/04, 28/05, 76/06)

14 ("OG of the republic of Montenegro" no. 71/03, 07/04, 47/06, "OG of MNE" no. 57/09, 49/10)

end of the hearing. The parties may request the exclusion only of the judge who adjudicates in certain dispute, or the court president who is to decide on the exclusion. The request for exclusion is not allowed if it asks for the general exclusion of all judges of a court or of all judges who could adjudicate in a case, in the case in which such request has already been decided upon, as well as when the reason for exclusion is not substantiated.

The Criminal Procedure Code also prescribes the conditions for exclusion. A judge may not perform his/her judicial duty if he/she is a victim of a crime; if the defendant, his/her defence counsel, the prosecutor, the victim, their legal representative or the agent is his/her next of kin in the direct line of kinship of any degree, in the side line to the fourth degree, the spouse, former spouse or in-law to the second degree; if in relation to the accused, his/her defence counsel, prosecutor or the victim he/she acts as a guardian, or is a protégé, an adoptive parent, an adoptee, a foster parent or a ward, and if the same criminal case he/she was involved in evidence collecting process or was involved in the proceedings as the prosecutor, defence counsel, legal representative or the agent of the victim, or of the prosecutor, or if he/she was interrogated a witness or as an expert. Also, a judge may not perform his/her duty in case he/she participated in making first instance decision in the same case, or indeed of the plea bargaining decision, or if in the same court he/she was involved in making a decision which is challenged by the appeal, as well as when there are circumstances which cause suspicion to his/her impartiality, which is assessed in each specific case.

When a judge finds out of the existence of some of the stated reasons for his/her exclusion, he/she is obliged to immediately cease acting in that case and to notify the court president who will allocate the case to another judge. If the court president is to be excluded, he/she will be replaced by the longest serving judge of that court, and if this should not be possible, the president of the immediately higher court will appoint a judge to replace him/her. When a judge considers that there are circumstances which justify his/her exclusion, he/she notifies the court president accordingly.

The exclusion of a judge may be requested by the parties, by the defence counsel and by the victims. Both the defence counsel and the victims can lodge the request by the beginning of the main trial, and if they have taken cognizance of the reason for exclusion at a later stage, they may lodge the request immediately upon taking cognizance. As for the request for the exclusion of a higher court judge, the parties, the defence counsel and the victims may lodge the same immediately upon taking cognizance, and no later than the beginning of the Panel meeting or of the trial. The parties, the defence counsel and the victims may request the exclusion solely of the acting judge, and in their request they need to specify the circumstances because of which they consider that there are reasons for exclusion prescribed by the Code. In their request, they may not state the reasons stated in the former unsuccessful request for exclusion.

The provisions on the exclusion of judges apply mutatis mutandis to state prosecutors and to the persons authorized to legally represent the state prosecutor in the proceedings, the minute keepers, the interpreters and professional persons, as well as court experts.

IV Impartiality as a fair trial guarantee

It is beyond doubt that impartiality lies at the base of every fair trial and procedures which reflect democratic capacity of a state to defend fundamental human values. Aristotle's expression "*going before a judge means going to get justice*" largely reflects the expectations of the public, especially of that part of the public which builds its relationship towards the court on its own experience, or its own case brought before the court in the form of a civil suit or criminal matter to decide on the issues of vital interests for the party to the proceedings. Therefore the trust in judicial institutions is one of the most significant issues of the functioning of every democratic society. It is built in continuous democratic processes and it is relatively hard to gain the same in the conditions of long lasting absence of civil tradition and the rule of law.

At the example of post-transition states, it is easy to establish all the complexity of the relations between courts and the public (general and party one). Legitimate expectations of the citizens constitute special external control of judicial institutions in the form of constant requirements for efficient and timely justice done by the independent and impartial court as a quality assurance in exercising justice. This is why the task of the court is extremely complex. Namely, the trust gained through thousands of court cases can be challenged solely on the basis of one or several cases in which one could observe the lack of procedural guarantees of fair trial. This additionally confirms the already firmly rooted maxim that justice, thus also impartiality as one of its essential elements, must not only be done, but also be visible.

Professional ethics prescribes to a holder of judicial office to perform the duty objectively, basing his/her work solely on law and adjudicating without paying attention to all external pressures and influences. Sometimes, they can be a result of the internal, subjective experience of a judge himself/herself, but this does in no way undermine the principle of judicial neutrality in relation to all the phenomena which discredit the very essence of fair trial. Besides asking from judges to behave in accordance with the principles of independence and impartiality, the additional request directed towards a holder of judicial office is reflected in the fact that his/her external manifestations (actions) must reflect the aspect of impartiality in relation to the adjudicated case. The very course of the proceedings is the sole time frame which requires from a judge to express a clear manifestation of impartiality. Conversely, having in mind the nature of judicial function, this duty for judges extends throughout the duration of the same, since a judge cannot envisage a party to the proceedings, or a dispute which will flow within the domain of his/her competence. This is why in relation to social and political fluctuations which might endanger the external impression of his/her (im)partiality, it is always expected from a judge to demonstrate certain degree of distance, except in the case of direct performance of his/her duty. Thus a relationship or behaviour which is contrary to the above can in certain instances raise the issue of partiality of the court even after the termination of the judicial office.

If certain equidistance is required from judges in relation to people and events in the society, especially at presenting political views and the activities of political and quasi-political organizations, then in relation to the personal interest in a case, the lack of, or the influence in the judicial proceedings, it does not even question. The principle *nemo iudex in causa sua* is only an umbrella concept which requires from a judge to distance himself/herself from the proceedings he/she has a direct interest in, or when such interest is on the side of the people close to him/her, or the people having relations with him/her. The concept of interest is rather ill-defined and it must be perceived from the circumstances of every individual case. In certain

cases, this can be any form of favouring towards a party to the proceedings, which harms the concept of the equality of arms before court. A constituent part of impartiality is the lack of illegitimate favouring of one of the parties to the proceedings by the court. Such behaviour of a judge is imposed as an imperative and it is such that it is supposed to eliminate every doubt in the performance of judicial duty, i.e. administration of justice. In no case should the parties feel subordinated before the court, or guilty in a criminal matter, and that this is not a consequence of a fair and legally based judicial proceedings and the acting of the judge in that case.

The right to impartial court means furthermore that a judge must not be burdened with prejudices in relation to a case and to the parties to a proceeding. This means that he/she must exclude any additional burden coming from external information which might harm or do harm the balance between the parties to a proceedings, rather he/she must stick to the facts established during a judicial proceedings. Naturally, this does not mean that a judge is totally excluded from social flows and events, since these, in the absence of other legally based and reliable indicators, can be of use at making a just decision in a specific legal matter. Finally, one of key features of the impartiality phenomenon is the fact that it is not only the court which expresses its view on the same. The impartiality of a court must also be perceived by the parties to a proceedings, upon whose requests (except for the own initiative of a judge) the exclusion can be founded from the acting in a specific case.

It is beyond doubt that theoretical principles and essential requirements of the parties for independent and impartial court must give substantive-legal expression, either within the national legal order (Constitution, law and secondary legislation), or as the principles contained in international legal standards. The country which accepts the method of implementation of international law through the recognition of its primacy in relation to national legislation and direct application of the ratified and published international treaties (as it is the case with Montenegro and its constitution) has got the opportunity to unify these two frameworks and apply international standards in a subsidiary manner in case it does not possess the same in its own law.

International standards

Besides belonging to fundamental human rights, as a part of the wider concept of the right to fair trial, the impartiality of a court, or of a judge, constitutes one of the fundamental procedural assumptions without which no judicial proceedings can have the necessary quality. In both cases, international law offers appropriate standards which have become a part of general legal principles and accepted as such, in virtually any legislation. Naturally, having in mind the method of creation of international norms it is clear that these principles were basically created through the activities of national institutions the experience of which was transferred to international legal framework.

Depending on the character of the norms of international law, the principle of impartiality is contained in the legally binding norm – international treaty, as well as in numerous instruments of the so called soft law, which is not binding solely with regards to its form, but in relation to its effect it has most certainly become a very important instrument in the creation of general principles which regulate substantive-legal aspect of human rights law, or procedural safeguards in all types of judicial proceedings.

Already in the *Universal Declaration on Human Rights*, i.e. in its Article 10 it was written that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her".

The International Covenant on Political and Civil Rights in its Article 14 prescribes that "everyone shall be entitled to a fair and public hearing by a *competent, independent and impartial tribunal* established by law in the determination of any criminal charge against him, or of his rights and obligations in a suit at law".

UN Fundamental Principles on Independence of Judiciary[15] prescribe that "judiciary resolves cases impartially, on the basis of facts and pursuant to the law, without restrictions, illegal influences, impetuses, pressures, threats or interferences, direct or indirect ones, from any side and for any reason".

Clarifying the essence of the principles of impartiality in the case *Arvo O. Kattunen v. Finland*[16] the Human Rights Committee underlines that the impartiality of courts and the publicity of proceedings are important aspects of the right to fair trial which means that a judge may not succumb to any prejudices with regards to the case he/she acts in and that he/she may not act in such a way so as to promote in any way the interests of one of the parties to the proceedings. According to the same case, where there is a legal basis for the exclusion of a judge, it is up to the court to examine the case ex officio and to exclude the panel member or the judge who is subject to this criterion.

The European Convention on Human Rights in its Article 6 prescribes that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* established by law".

The Recommendation R (94) 12 of the Council of Europe emphasizes that in the procedure of adjudication judges should be independent and capable of acting without restrictions, inappropriate influences, instigations, pressures, threats or interferences, direct or indirect, from any side and for any reason whatsoever. This requires, furthermore, that the distribution of cases must be under the influence of desires of any party or persons interested in the outcome of a case, as well as a case must not be taken from a judge without a valid reason, like the situation of serious illness or conflict of interests. All the reasons for exclusion of a judge, as well as the exclusion procedure must be prescribed by the law and must not be under the influence of any interest of the government or any other body of the executive branch. The decision on exclusion of a judge should be passed by an independent body which enjoys equal judicial independence as judges do.

The European Charter on the Law for Judges prescribes as its general principle the objective of this document to ensure professionalism, independence and impartiality, which everyone justifiably expects from courts and from every judge who is entrusted with the protection of one's rights.

15 Adopted at the VII UN Congress on the Prevention of Crime and Treatment of Offenders (Milan, 1985), accepted by the Resolutions of the UN General Assembly 40/32 (1985) and 40/146 (1985)

16 Case no. 387/1989, *Arvo O. Karttunen v. Finland* (23rd October, 1992), UN doc. GAOR, A/48/40 (vol. II), p. 120, para. 7.2.

This excludes every provision and every procedure which would lead to the reduction of trust in such professionalism, independence and impartiality.

According to this document judges must refrain from every behaviour, procedure or opinion which might influence the trust in their independence and impartiality (Chapter 4, para. 4. 3.).

The Opinion number 3 of the Consultative Council of European Judges (CCJE) on the Principles and Rules for the Performance of Judicial Duty, Ethics in particular, Inappropriate Behaviour and Impartiality addressed to the Council of Europe Committee of Ministers[17] states that the power vested in a judge is closely linked to the values of justice, truth and freedom. Such trust given to a judge cannot be perceived solely as the expression of the will of a public authority, instead it must be estimated from the aspect of international law and justice recognized by all modern democratic societies. Public trust in and respect of judiciary are the guarantees of its efficiency, while it is reasonable to expect for the behaviour of the holders of judicial office in the performance of their duties to be essential basis of that trust. The behaviour of a judge must always be such that it does not cast any doubt in relation to his/her impartiality (Paragraph 21). Therefore, it is up to a judge to perform his/her duty without any favouring of the parties, without expressing prejudices or showing partiality. This assumes the principle of equal treatment of the parties, avoiding any partiality or discrimination whatsoever, maintaining the necessary balance between the parties in utilizing their procedural rights.

Due to the fact that a judge cannot be absolutely isolated from the public, he/she is expected to behave appropriately even outside his/her judicial duty. There are no precise standards of behaviour for judges outside their offices, but there certainly needs to be certain limit by means of which a judge must express the necessary neutrality. That standard in every social context should be observed from the point of view of an objective observer of public circumstances with average level of information. Special form of balance should be ensured in relation to media which concentrate their attention to judicial proceedings. In that sense, although journalistic activity is of crucial significance for democratic societies, a judge must maintain a distance when commenting on cases and be weary of the inappropriate media appearances. On the other hand, media are obliged to respect the significance of the court and to protect the guarantees of judicial proceedings from any inappropriate external influences (paragraph 40).

The jurisprudence of the European Court of Human Rights, which constitutes the important substantive legal source even for Montenegrin legal framework, offers the content of the element of the right to fair trial which makes the request for the impartiality of the court. In the case *Pirsak v. Belgium,* the European Court concluded that:
"… as a rule, impartiality designates lack of prejudices or favouritism, its existence in the sense of the Article 6, paragraph 1 of the Convention can be tested in various ways. In that context, it is possible to differentiate between a subjective approach, by means of which personal conviction of a given judge is established in a given case, and an objective approach, by means of which it is established whether that judge has offered guarantees that are sufficient for the exclusion of any legitimate doubt in that respect."[18]

In the case *Findlay v. United Kingdom*, the Court concluded that:

17 CCJE (2002) Op. Nº 3 dated 19th November, 2002
18 Judgement in the case *Piersack v. Belgium*, 1st October, 1982, paragraph 30.

"Judges must not only meet objective criteria related to impartiality, but they must also leave the impression of being impartial."[19]

In order for *subjective* impartiality to be proved, the European Court of Human Rights (hereinafter referred to as the *European Court*) requires evidence of specific partiality. Until proven otherwise, it is assumed that there is personal impartiality of a duly appointed judge. In the case *Lavents v. Latvia*[20] the European Court criticized the presiding judge for his commenting on the case in the newspapers prior to the end of the trial. The judge talked about the possibility of conviction or partial acquittal, but ruled out the possibility of the complete acquittal of the accused, and in that way by means of his comments breached the impartiality requirement.

In the case *Kyprianou v. Cyprus*,[21] the judges who tried the applicant for the contempt of the court said amongst other things that they were "deeply hurt as persons" by the applicant's conduct in the court, which they adjudicated as being equal to the delict of the contempt of court. The formulation of the judges' statements in the applicant's judgement, coupled by expedience of the proceedings, indicated the lack of impartiality according to the subjective test.

Likewise, in the case *Belukha v. Ukraine* from 2006, the European Court held that the president of a domestic court can be considered as being justifiably partial in the case involving a construction company which had formerly refurbished the court building free of charge. In another case, the European Court also held justified the fear of the representatives of a school that the judge in their case was partial. The reason for that was the fact that the judge's son had formerly been expelled from the very same school, and the judge had threatened by retaliation.

With the *objectivity* test, in the case *Fey v. Austria*[22] the European Court held that it must be established whether, completely separately from the personal behaviour of the judge, there had been provable facts which could cause suspicion in his impartiality. In this respect, even the impression left by the judge can have certain significance. This means that when deciding on the existence of a justified reason for the fear that certain judge is not impartial in a case, the opinion of the accused is important, but not decisive. What can be decisive is the fact whether such fear can be considered as objectively justified. The European Court clearly said that every judge whose impartiality is justifiably challenged must withdraw from a case. The Court underlined this principle once again in the case *Sigurdson v. Iceland* (judgement dated 10th July 2003).

An important aspect for the assessment of (im)partiality of the court is the question whether **in the internal legal order there are procedures in place which ensure the protection from partiality.** Although the Convention does not prescribe expressly that there must be mechanisms by means of which the parties to proceedings can challenge the impartiality, there is greater likelihood that the violation of the Article 6 will be found if there are no such procedures in place. In case the accused raises the issue of impartiality, it needs to be examined, except if it is "obviously unfounded" as it was concluded in the case *Remli v. France* (judgement dated 23rd April 1996, paragraph 48).

The European Court also dealt with the issue of structural impartiality of judges and courts, as

19 Judgement in the case *Findlay v. UK*, 25th February 1997, paragraph 73.
20 Judgement in the case *Lavents v. Latvia*, 28th November 2002
21 Judgement dated 15th December 2005
22 Judgement in the case *Fey v. Austria,* 24th February 1993

it is the case when the same panel of judges that had passed the decision *in absentia* becomes competent to act in a reopened proceeding when the presence of the accused is ensured. Also, the existence of a factual situation in which a party to a proceedings or a person close to it is a person who is superior to the acting judge leads the other party to the conclusion that there is objective reason for impartiality to be questioned. Such a case was recorded in the case *Daktaras v. Lithuania*[23], where the Chair of the criminal department of the Supreme Court lodged a cassation request for the appeal court decision to be quashed and for the first instance decision to be substantiated. In the same case, procedurally, he formed the court chamber and appointed a rapporteur in the case.

In the case *Hauschildt v. Denmark* (1989) the Court found the violation of the Article 6 paragraph 1 in the case in which the judge had previously decided to remand the accused in custody, in a situation when he had been requested to establish the existence of the "reasonable doubt" that the accused had committed the offence he had been charged with. The Court underlined that the very fact that certain judge had been competent for the subject proceedings in its investigative stage, including the stage when the decision on detention had been passed, would not in itself justify the fear for his impartiality. However, since in the subject case he was requested to establish in the preceding stage of the proceedings, with a high degree of probability, reasonable doubt that the accused had actually committed the crime, the difference between the situation in which this question would be addressed to the investigation judge and the situation where he decides upon the same question in the capacity of the trial judge was significant, thus his impartiality could seem problematic. In the concrete case, when a judge had been involved not only in the making the detention decision, but also in the investigation through the preliminary decision on criminal prosecution, which included the statement approving the proof of the guilt of the accused, the fact that the sane judge later on participates in the trial constitutes the violation of the Article 6 paragraph 1.[24]

Legal framework in Montenegro

The Constitution of Montenegro guarantees to everyone the right to fair trial within reasonable time before independent and impartial tribunal established according to the law.

The principle of impartiality is prescribed in the *Law on Courts*, as the fundamental organizational-procedural regulation. A judge is obliged to refrain from giving statements or comments because of which in the ongoing proceedings the impression of partiality could be created, thus endanger the fairness of trial. Inappropriate relationship of a judge with the representatives and the parties to the proceedings, as well as the dissemination of information he/she has taken cognizance of while acting in the cases, involves disciplinary responsibility of judges. What is more, even a court president must refrain from the allocation of cases contrary to the provisions of the Law on Courts and the Rules of Court Procedures, in order not to create the impression of partiality. *The Criminal Procedure Code* also contains the provisions related to trials before independent and impartial court, as an element of the right to fair trial.

23 Judgement in the case *Daktaras v. Lithuania,* 10th October 2000

24 Example taken from the publication "Right to Fair Trial Pursuant to the European Convention on Human Rights (Article 6) Lawyers' Manual" Interights, 2006

The Code of Judicial Ethics for Montenegrin judges approved at the *Conference of Judges* in July 2008 prescribes the norms of ethical behaviour of the holders of judicial office. At the general principle of independence, in the Article 3, the Code prescribes that a judge is obliged to adjudicate on the basis of his/her own assessment of the facts, in accordance with the conscientious interpretation and application of regulations, without restrictions and influences from the legislative and executive branches of power, media and other public institutions, political parties, social groups and individuals. A judge is obliged to refrain from every action which might raise doubts in his being apolitical and compromises the independence of judiciary. The behaviour contrary to the abovementioned need not be the proof solely of his dependence, but also of partiality depending on a concrete case.

According to the *Code*, a judge performs his/her duty impartially, objectively and without prejudices or discrimination in relation to race, skin, religion, nationality, age, marital status, sexual orientation, social-property condition, political orientation and any other difference, respecting and protecting fundamental human rights laid down by the Constitution of Montenegro, the law and the *European Convention on the Protection of Human Rights and Fundamental Freedoms*. Besides that, outside the court, he/she is obliged to refrain from the contact with lawyers and the parties in the proceedings of whom he/she is the acting judge, with relatives, friends and acquaintances of the parties, as well as with all other persons for whom the impression of partiality could be created. Failure to respect the Code of Judicial Ethics constitutes the basis for the institution of a disciplinary procedure or the dismissal procedure, pursuant to the Constitution and the law.

V CONCLUSIONS AND RECOMMENDATIONS

In Montenegro, during the past decade, significant progress has been made in the strengthening of the public integrity of judicial institutions, through the harmonization of structural and legal framework for the work of judiciary with the European and international standards. However, it is evident that certain steps in the implementation of the reform of judiciary have not given the expected result, at least not in the part which should convince the public that judiciary cannot fall under the influence of others, be those dominant political actors, criminal groups or wider social pressure. It is questionable to what extent the Judicial Council, from the moment when it started working, in April 2008, within the framework of its competences, has managed to profile itself as an independent and depoliticized body, capable of protecting judges not only from the political, but also from all other illegal influences. The views that judiciary is still not fully independent from political influences, could easily be justified in current circumstances by the general features of the Montenegrin political system and the relations among political forces within the same, but one must also take into consideration the fact that the awareness that the independence of judiciary exists for the purpose of social function it performs and that it must necessarily encompass the dimension of accountability and responsibility has not been developed to a sufficient degree yet.

When the impartiality of courts is considered, the standards stated in this publication constitute normative framework which sometimes is insufficient to clarify every life situation. At any rate, because of that discretionary right has been left to the Judicial Council to assess in specific situations the influence of social connections and movements which might point out to or indeed point out to partiality, to the necessary distance of judges, which in the context of the relatively small territory and the articulated personal and family relations, constitutes a special challenge. Another important element in determining this standard in the concrete case is the right and obligation of judges and courts to apply Convention standards, i.e. the jurisprudence of the *European Court of Human Rights*, in understanding these concepts. The latter standard points out exactly to the need for individualization of every case, meaning that the course of the proceedings and the judicial decision in relation to (im)partiality as such cannot be generalized, but unified in practice and applied literally, which is another of the important indicators of fair and legal treatment and the work of courts.

Besides the legislative framework which guarantees independence, it is necessary to meet all other assumptions, which concern the appropriate organization of courts – in the sense of sufficient number of judges, professional and technical staff – as well as financial independence. Without adequate financial resources, judiciary cannot perform the entrusted functions properly. Besides that, in order to b independent, the holder of judicial office must possess high personal, professional and moral dignity and perceive themselves as independent and impartial. For this, there is a need for the appropriate change of cultural paradigm, which will certainly not come about easily and which must encompass the change of educational and staffing policy, since judicial crisis in certain sense represents the crisis in the overall legal profession.

Finally, the opening of negotiations for the chapters 23 and 24, which comprise judiciary and fundamental rights, with the continuation of the initiated reforms and the existing democratic mechanisms, offers the opportunity for the building of accountable/responsible and transparent judiciary, capable of ensuring the rule of law in all the segments. The basis for all this is the existence of clear political will for the creation of conditions for judicial independence, but also the need for joint and coordinated action of the overall legal community and civil society.

Starting from the abovementioned, and from the intention of the authors to give their contribution to the achievement of these objectives, this publication contains the recommendations which are related to the following aspects of judicial system:

a) Composition and method of the appointment of the Council members

The appointment of the members of the Judicial Council should be harmonized with the European Charter in such a way that the majority of the Council members be appointed by their colleagues and that the Council members appointed from among judges represent all the levels o judicial power. In that sense, it is necessary to ensure full transparency and the opening of the Council members' appointment procedure towards general and professional public. The role of the Parliament of Montenegro should be linked to the appointment of the Council members who do not com from among the ranks of judges. The Constitution should envisage the immunity for the members of the Judicial Council for the opinion expressed while performing the duty of the Council member. It should be ensured that the Council Chair be elected among the members themselves. Besides that, the Constitution should prescribe mandatory dismissal of a judge in case when he/she has been convicted by means of an enforceable judgement for an offence committed by premeditated abuse of judicial office, while other reasons for the termination of judicial office and the dismissal of judges should be prescribed by the law.

b) Staffing policy in judiciary

The appointment of judges must be based on objective criteria, starting primarily from the merits and personal integrity of future judges. The former criterion of non-conviction for a crime, which would make a judge be unworthy of judicial office, should be prescribed by the Law on Courts as one of the appointment criteria. It is necessary to specify the parameters for the evaluation of individual appointment criteria. In all the cases where a candidate for judge has not been appointed, it is necessary for the decision to contain detailed explanation, especially in the cases when the Council decided to appoint a candidate with lower overall mark than the others or when the appointment was made among the candidates with the same average mark, as well as to ensure that the obligation to timely submittal of the decision to the candidate in a transparent way, together with the legal remedy, be stipulated by the Law on Judicial Council. The President of the Supreme Court, as the "*the first among the equal*" (primus inter pares) should be elected by the qualified majority of the Judicial Council. The issue of staffing should include continuous efforts in securing conditions for professional development and career promotion of judges, but also the insisting on all the criteria of independence and impartiality and literal compliance with judicial ethics, which can partly be addressed through the training on judicial ethics.

c) Material-technical equipment

It is necessary to work on securing material and financial positions of judiciary. The construction of the necessary number of courtrooms which can accommodate the interested public should be on a priority list, in order to prevent the holding of trials in the offices, which raises the issue of informality and *ex parte* communication which is still present in smaller courts and which harms the perception of the independence of judiciary.

As regards the judicial information system JIS, it is necessary to continue with the practice of inputting the decisions into the database, with the purpose of ensuring their public accessibility, but in such a way which will not endanger the efficiency of the work of courts. Namely, the

views of the interviewees among judges indicate that the JIS, despite the fact that it facilitates the monitoring of trials, has not been developed sufficiently, and that due to the time needed for the inputting of the data, the work of court administration may slow down.

d) Relationship towards public

The relationship towards the general public should be profiled in the way that it strengthens the trust in judiciary, timely informs the public and prevent possible abuses by the media in a transparent way. It is necessary to work on the continuous training of journalists with regards to the elements of right to fair trial.