REPORT CONCERNING THE ELECTION OF JUDGES IN SERBIA FROM THE 17TH OF DECEMBER, 2009

1. THE FACTS

According to the Law on Judges passed on the 22nd of December, 2008, judges who were at that time in office, with permanent mandate, had the obligation to take part in the new election organized by the High Council of Magistracy of Serbia, otherwise their mandate would be terminated in the 31st of December, 2009.

In article 153 of the Constitution of Serbia adopted in 2006, it is stipulated the structure of the High Council of Magistracy, yet the Council works in incomplete composition, without all the representatives being appointed, since the professor's of law representative has not been elected. The last judge (of eight judges) was elected in May, 2009, while the lawyer's representative was elected in October, 2009.

Regardless of the incomplete composition, in the 5th of June, 2009, the High Council of Magistracy decided to reduce the number of judges with more than 25%, meaning from 2413 judges to 1838 judges. In June, 2009, a number of 2230 places of judges were occupied.

Between 2002 and 2008 the number of cases in Serbia increased with approximately 54%, yet it appears that this fact was not taken into consideration when the reduction of the number of judges was decided. Although the Judges' Association of Serbia specifically asked the High Council of Magistracy to explain the grounds on which the new, downsized, number of judges has been determined, no clear answer was provided by the Council.

At the same date, the 5th of June, 2009 the High Council of Magistracy adopted its own Internal Rules of Procedure, which state the secret character of the works of the Council, and the obligation of its members to keep confidentiality over data regarded as secret by the High Council, and not to disclose any information concerning the proceedings and decision making of the Council.

On the 30th of June, 2009, before the beginning of the election of judges' process, the High Council of Magistracy adopted the Decision regarding determination of criteria and standards for evaluation of expertise, capability and integrity for election of judges and presidents of courts. In the adopting of this Decision, the High Council of Magistracy did not implement the suggestions of the Venice Commission, as they were stated in the Opinion no. 528/2009, since the Decision does not provide the possibility for judges whose qualities have been led into doubt to defend themselves, nor does it stipulate that the judges who were not re-elected could receive a grounded decision of rejection that could be challenged in court.

In the middle of July, 2009, the beginning of the election procedure was announced, and the assessment of the 5200 applications began in September, 2009. The list of elected judges was announced on the 17th of December.

From more than 2230 judges in function, with permanent mandate, only 1510 were re-elected. Basically, almost one third of judges in function, around 700 judges, were not re-elected.

The 700 judges who were not re-elected concluded they were not re-elected by simply not finding their names on the list of elected judges, and the President of the High Council of Magistracy, Mrs. Nata Mesarovič, stated through the media that every judge who was not re-elected could analyse himself the reasons for which he was not re-elected, since the criteria for selection were previously published. The Minister of Justice stated to the media that the High Council had obtained and used data provided by the Ministry of Internal Affairs and Security Information Agency in the (re-)election process.

Judges whose qualities, expertise, integrity and capability had been led into doubt did not have the opportunity to defend themselves in the assessment process, and the decision of rejecting their applications was not published, nor did it include any reasoning. Until this day, none of the 700 judges who were not re-elected knows the reasons for rejecting his/her application, because the High Council of Magistracy failed to provide judges with grounded decisions for rejecting their applications.

2. RELEVANT INTERNAL LEGISLATION PROVISIONS

The Constitution of the Republic of Serbia was adopted in the 8th of November, 2006, and Article 1 provides that "*Republic of Serbia is a state (…) based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values*". Separation of power, independence of the judiciary, the rule of law, are principles stated in Article 3 of the Serbian Constitution. According to Article 146 of the Constitution, a judge shall have permanent tenure, and exceptionally, a person who is elected judge for the first time shall be elected for a period of three years. Article 148 of the Constitution expressly and restrictively states the situation of termination of a judge's tenure of office.

According to the Constitution of 2006, the High Council of Magistracy is to have 11 members, among them, the President of the Supreme Court of Cassation, the Minister of Justice, and the President of the authorized committee of the National Assembly, as members *ex oficio*, and eight electoral members elected by the National Assembly, including six judges with permanent mandate, and two respected and prominent law experts (one of them, lawyer, and the other, a professor of a law faculty).

The Law on judges was passed on the 22nd of December, 2008, and it provides that all judges should be re-elected until the end of 2009, even those who already had permanent mandate according to the previous law, judges with permanent office having the obligation to file their applications for the new election process, otherwise their mandate would be terminated on the 31st of December, 2009.

According to Article 148 Para. 2 and Article 155 of the Constitution, against the Decisions of the High Council of Magistracy, an appeal can be filed with the Constitutional Court.

3. REMARKS OF INTERNATIONAL ORGANIZATIONS CONCERNING THE RELEVANT INTERNAL LEGISLATION

According to the Report of the European Commission concerning the Progress of Serbia from the 14th of October, 2009, the new set of judicial laws of December, 2008, contains major weaknesses, the appointment procedure of the members of the High

Council of Magistracy, including members representing judges in the first composition of the Council, does not provide for sufficient participation by the judiciary and leaves room for political influence.

Also, the European Commission considered that the recommendations of the Council of Europe's Venice Commission were not completely observed in the adoption of criteria for reappointment of judges, while the short deadline set for implementing the procedure and for election (by the end of 2009) raises serious concerns as to the possibility to carry out an objective procedure, which creates a risk of long-term politicisation of the judiciary, and of affecting the independence, accountability and efficiency of the judiciary.

The Venice Commission of the Council of Europe adopted the Opinion No. 405/2006 on the Constitution of Serbia, and Opinion No. 464/2007 on the drafts of the Law on Judges and the Law on Organisation of the Courts, in which it was pointed out that it is not obvious at all that the need for the process of repeated appointment (re-election) of all judges exists. The Venice Commission also adopted Opinion No. 528/2009 regarding the draft of the criteria and standards foe election of judges, whose suggestions do not appear to be incorporated in the Decision adopted by the High Council of the Judiciary.

In the Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despuy to the General Assembly of the United Nations of 19th of May, 2009, it was pointed out that there are two substantive areas in the reform of the justice system that give rise to concern in relation to the above-mentioned procedures from the point of view of compliance with international standards on the independence of the judiciary: the requirement of re-election of sitting judges, and the procedures governing the membership of the High Council of the Magistracy, including the establishment of its first composition. The Special Rapporteur drew attention also on the necessity of establishing some specific safeguards, in order to ensure the compliance with international standards.

4. INTERNATIONAL DOCUMENTS REGARDING THIS MATTER

According to the international relevant documents concerning the independence of the Judiciary and the status of judges, in order to maintain the independence of the Judiciary, the appointment and promotion of judges must be independent, beyond influence of the Legislative or the Executive, and there must be a total transparency in the conditions for the selection of candidates, so that judges and society itself to be able to ascertain that an appointment is made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency. Also, it is stated that transparency in the actions undertaken by the Council of Magistracy must be guaranteed, as transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and a guarantee against the danger of political influence.

To this purpose, we enumerate:

- The Fundamental Principles of the Independence of the Justice System, adopted by the seventh Congress of the United Nations in 1985
- Recommendation no. 94 (12) of the Committee of Ministers of the Council of Europe to the Member States on the independence, efficiency and role of judges
- Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges
- Opinion no. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of the society
- The European Chart concerning the Statute of Judges, adopted in 1998

5. CONCLUSIONS

- The obligation of judges who had already obtained permanent mandates, according to the provisions of the previous law, to take part in the election

process, while assuming the risk of not being re-elected in function, represents a violation of the principle of irremovability of judges. The judges' independence is lead into doubt, since their mandate might be terminated for a reason not stipulated expressly in the Constitution, provided by adopting a new law that states that judges in function with permanent mandates according to the previous law must apply for the new election process.

- The complete lack of transparency of the election process favours speculations regarding possible political influence in the election process, and generates public distrust in the independence of judges and the efficiency of the justice system. The not grounded Decision of the High Council of the Magistracy to drastically reduce the number of judges, the omission of publishing the list of judges who were not re-elected, the omission to explain and provide the reasoning for the decisions of rejecting the application of judges, the omission to communicate to every judge who was not re-elected the decision concerning the concrete and relevant reasons for rejecting his application, are incompatible with the principles of the rule of law, independence and irremovability of judges.
- The omission of complying with the suggestions of international organizations that monitor the evolution of reforms in Serbia raises doubts on whether the Serbian Justice System has the capacity to fulfil its obligations regarding international judicial cooperation, fighting corruption and organized crime.
- The unfair character of the re-election procedure, that does not allow the judge whose expertise, integrity, abilities are questioned to defend him-/herself, and does not stipulate the possibility to file an appeal against this decision of rejecting his/her application is bound to infringe the independence of judges.

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