

Unworthy Election of the Worthy

Who has carefully read the annual report of the European Commission published in October, could have guessed from the part that refers to the situation in the Serbian judiciary that two months later would be executed “the biggest reform in the history of the judiciary”, the most important part of which is the general election of judges, prosecutors and deputy prosecutors. The European Commission estimated then that a **“hasty approach to reform is a huge risk for the independence, credibility and efficiency of the judiciary”**. In the report it was pointed out that **“the criteria for re-election of judges and prosecutors do not fully comply with the recommendations of the Venice Commission, which leaves room for political sway while the short deadline for re-election is causing serious concern and the impossibility for implementation of objective procedures, which bears the risk of long-term politicization of the judiciary”**. The European Commission has expressed particular concern **“when it comes to the autonomy of prosecutors, because despite some improvements of the new laws, the procedure of election of state prosecutors and their deputies is under the parliament influence”**. Two months later, when, on behalf of Serbia, the Serbian President Boris Tadic filed Serbia’s candidacy for membership in the European Union Chairman, and when the High Judicial Council and State Prosecutors’ Council published lists of elected judges, prosecutors and deputy prosecutors, it turned out that fears of the European Union were justified. The general election of judges, prosecutors and deputy prosecutors has turned into a scandal.

On December 17, High Judicial Council published the list of elected judges with names of 1 531 judges that would perform judicial functions in the higher courts, the Supreme Cassation and Appellate Court, and 876 candidates that would be elected by the Assembly of Serbia, while 46 seats remained vacant. On the ad for the election of judges announced on July 15, 2009 applied 5 050 candidates. A day earlier, on December 17, the

State Prosecutors Council elected 416 deputy public prosecutors and the proposed 88 candidates who will be elected by the Serbian Parliament, while 42 seats remained vacant in the prosecution. Thus, after more than four months of dubiousness, judges and prosecutors finally learned whether they had been elected or not, and what would they do in future. President of the High Judicial Council, Judge Nata Mesarevic, characterized the election process as historical and added that this election was **“the first time that the judiciary was given the opportunity for self-election and independently deciding on the fate of judges who had already had a judicial function”**, and noted that **“the main criteria for election were expertise, competence and worthiness of candidates”**. President of the High Judicial Council pointed out that this organ **“treated each case seriously and no decision was made by heart”**, and said to all those who doubted the objectivity of decisions **“that members of the Council are willing to engage in public discussion with those who believe that can challenge the decision on the worthiness of a candidate”**. President of the State Council of Prosecutors, Slobodan Radovanovic, after the publication of the list of elected prosecutors, pointed out that **“the criteria for selection of prosecutors and deputy prosecutors were primarily expertise, worthiness and competence of candidates”**, adding that **“the specificity of the election of Deputy Public Prosecutors is characterized by the representation of a large number of minority representatives - even one fifth of elected and proposed”**. Decisions of the High Judicial Council and the State Council of Prosecutors were expectedly supported by the Minister of Justice, Snezana Malovic, as well as State Secretary in the Ministry of Justice, Slobodan Homen, who is regarded as the true creator of judicial reform and the first operative of the ruling coalition in charge of the election of judges and prosecutors. Homen, who is conspicuously evading discussions with professional associations of judges and prosecutors that occurred after the publication of

lists, not wanting to further impair his or already impaired reputation, said that **“the criteria for election of prosecutors and judges were expertise, competence and worthiness, and that there was no political sway in the election, nor interference of the Assembly”**. Minister Snezana Malovic, unlike Homen, toured the media giving answers on the objections that appeared in public on the occasion of general election of prosecutors. Hence, in an interview for B92, the Minister said that **“it is not true that the candidates hadn’t been known from the first moment when the work on the criteria began, it was announced in the public”**, and added that **“the established criteria were submitted to the Venice Commission, which evaluated that they were in line with European standards”**. Responding to the complaints of professional associations of prosecutors and judges that the process of electing of judges, prosecutors and deputy prosecutors **“was not transparent”**, Minister Malovic said that **“there was no political eligibility involved because the law requires that a judge cannot be a member of political party”**, adding that **“judges were elected on the basis of their competence and worthiness”**.

While the government representatives and presidents of the High Judicial Council and the State Council of Prosecutors are trying to convince the public that the general election of judges, prosecutors and deputy was conducted for the benefit of citizens and more efficient judiciary, professional associations of judges and prosecutors, opposition parties and the public believe that election wasn’t conducted impartially and that not the best candidates were elected judges, prosecutors and deputy prosecutors.

Thus, the Board of Directors of the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, on November 14, 2009, addressed the State Prosecutors’ Council seeking answer to the question **“Is it true that the State Prosecutors’ Council brought decision according to which the reasons for the decision-making process and their decisions regarding election of prosecutors and deputy prosecutors were declared an official secret, that is, that entire work of the State Prosecutors Council should be kept secret?”** Association of Prosecutors asked the State Council **“whether the reasons for election or not electing of deputy public prosecutors and proposing or not proposing of public prosecutors will remain an official secret”**, and added that **“the transparency of**

work of the State Council of Prosecutors is of immeasurable importance for achieving the objectives of the judiciary reform, as well as the regularity of decision-making of the Council, and that the importance of transparency in the election process of holders of judicial functions was indicated by the Venice Commission and the European Commission in the final report on the progress of Serbia in the EU accession process”. The addressing of the Association of Serbian Prosecutors had not received publicity in the media, and the State Prosecutorial Council and its president, Slobodan Radovanovic, continued to work as they started - without the presence of the public. State Prosecutors’ Council refused to respond to objections and some foreign diplomatic missions from the EU countries **“that for some candidates for the prosecutors and deputy prosecutors was requested a checks by Security Information Agency (BIA)”**! If these states turned out to be true, serious abuses in the selection of prosecutors and deputy prosecutors would be confirmed, because the BIA is not authorized to check biographies of candidates, nor the BIA’s check was one of the conditions for the selection of prosecutors and deputy prosecutors. Anyway, this story further mystifies the election of prosecutors and deputy prosecutors and casts a shadow on the already compromised State Council President, Slobodan Radovanovic.

Immediately after the publication of the lists of elected judges, Judges’ Association of Serbia reacted, stating that they were **“stunned by the decisions, and sought from the High Judicial Council to provide to unelected judges an explanation of the reasons why it was concluded that these judges were not professional, competent and worthy, while abiding by the suggestions given by the Venice Commission on June 15, 2009”**. Judges’ Association of Serbia was a fierce critic of judicial reform, and as a result, this association’s president, Judge Dragana Boljevic, was not elected again for the judge.

Procedure for the election of prosecutors and judges was not the least transparent. Suspicion of judges and prosecutors turned into reality when the lists were published, because from these lists it was impossible to determine reasons why a candidate had been elected and the other not. Such a procedure is contrary to the recommendations of the Venice Commission, although the Ministry of

Justice claims to have the support of this commission for judicial reform. This was publicly announced by a judge who was re-elected and who is former president of the Society of Judges of Serbia, Judge Omer Hadziomerovic. According to his words **“the Venice Commission has never seen the transitional and final provisions of the law. We (Judges’ Association) issued a statement that we had informed the Venice Commission that after their opinion, the law was essentially modified. Then, the Venice Commission wrote a letter to our government saying: “We are at your disposal to give our opinion on the modified law”. However, these laws have never been submitted to the Venice Commission”**. Despite the advice of the Venice Commission, measurable parameters of evaluation of judges haven’t been defined, nor the right of appeal of those who were not elected. In addition, the Venice Commission recommended that **“if it is necessary to conduct the general re-election of judges, prosecutors and deputy prosecutors, due to the adoption of the new Constitution, it is also necessary for the process to be transparent, to be conducted on the basis of previously established and objective criteria, and to be clear how they are applied”**. None of this has happened. High Judicial Council and the State Prosecutorial Council were working far away from the public eye, in closed sessions, and accordingly, the process wasn’t transparent and not known how the criteria for election were being applied. The consequences of such governmental behavior will further result in not only long-term politicization of the judiciary, but will affect the process of Serbia joining the European Union, given the remarks about the election process by the European Commission, which were ignored. Sooner or later, the Serbian judiciary issue will appear as a problem in the joining process. According to the folk saying – *he, who doesn’t pay on the bridge, will pay after he crosses the bridge*.

Another objection of professional associations of prosecutors and judges, and professional public, concerns the reduced number of judges and prosecutors, while at the same time, the government asks them to work faster and better!?! This is especially evident in public prosecution. According to the decision of the State Prosecutors’ Council, the number of holders of the prosecutorial functions is reduced to a hundred. It is not clear by which criteria the State Prosecutors’ Council decided to reduce the

number of prosecutors, if it is known that the amendments to the Law on Criminal Procedure and Law on the Confiscation of Property Derived from Criminal Acts and the Law on Criminal Liability of Legal Persons, impose new procedural obligations, that is, new jobs to prosecutors. Under the new law, prosecutors have taken a large part of authorities from investigation judges. Therefore, workload increases and the number of prosecutors reduce? However, not in all prosecutors’ offices. Likewise, the prosecutor for war crimes will have seven deputies, while a prosecutor for organized crime only four. The difference in the number of deputies was created because the war crimes prosecutor, Vladimir Vukcevic, is so well positioned that noone even dared to reduce the number of his deputies. Someone watching from the side could think that Serbia is once again preparing for war, instead of fighting against organized crime. There were also cases that some influential MPs of the ruling coalition managed to increase the number of judges and prosecutors in municipal courts they come from, while in other places it didn’t happen.

What is striking is that the representatives of the government are trying to prove that **“politics had no influence on the election of judges, prosecutors and deputy prosecutors, because the majority of members of the High Judicial Council and State Prosecutors’ Council is comprised of judges and prosecutors”** – the same expertise. It is precisely this claim that is fraud. Namely, the Law on High Judicial Council and the Law on State Prosecutors’ Council stipulate that the National Assembly should be given proposals of judges and prosecutors for the members of both bodies, which previously received the most votes from their colleagues on the board of the courts and prosecutor’s offices. In this way it was supposed to be secured that really the best judges, elected by their peers, would perform responsible duties in the High Judicial Council and State Prosecutors’ Council. However, the transitional and final provisions of these laws stipulate that this rule **will not be applied to the first election** (the general election of judges, prosecutors and deputy prosecutors in progress), but for the next regular election!?! Therefore, transitional and final provisions repealed this legal obligation, and so we had a case that members of these bodies who hadn’t been voted by their colleagues, became judges. Especially dramatic was the case of the representative of commercial courts to the High Judicial Council - the judge

Mladen Nikolic. He was proposed to the National Assembly as the only candidate for the High Judicial Council, although only twenty judges voted for him out of the 200 judges of commercial courts in Serbia. Nikolic's opponent, Judge of the High Commercial Court, Smiljka Matkovic, who had received the support of about 150 judges and all 13 basic trading judges, wasn't even proposed to the National Assembly! There are more of such examples. This means that the current members of the State Council and the High Council, regardless of their biographies, are representatives of the majority of the current National Assembly and not the profession. This is illogical if one bears in mind that the first convocation of the High Judicial Council and the State Prosecutors Council is the most important, since the general election is done. Therefore, it is precisely this convocation that should have uncontroversial professional, not political legitimacy.

Both professional associations of judges and prosecutors announced that until further notice, they will not erase from their membership unelected judges and prosecutors, and will launch a series of actions to protect the rights of their unelected colleagues. A legal team was formed whose task is to determine how the rights of judges can be protected, and it was announced that they would contact the relevant international institutions for advice and assistance. The former president of the Supreme Court of Serbia, Vida Petrovic Skero, which is now elected as a judge of the Supreme Court of Cassation, very picturesquely described judicial reform by saying that she **"often sees herself as a bean that stayed in the pot after boiling, and some of my colleagues, perhaps because they were at the bottom or top, got out"**. Skero believes that the election of judges wasn't transparent and that it is not known how they applied the criteria by which the judges were ranked. Former judge of the High Commercial Court and future judge of the Commercial Appellate Court, Goran Savic, said that two lists of judges, both elected and dismissed, show the real state of the judiciary. **"What is my figurative expression is that these two lists are two slaps to judiciary, not smacks from the mafia, tycoons, politicians or overweening statesmen, but from its own country"**, says Savic. Hence, what is only left to the unelected holders of judicial functions is to complain to the Constitutional Court by a separate appeal against the decision on termination of their

function which is provided by the Constitution, or by constitutional complaint for violation of rights. If they decide to complain, they will be able to use one of these two legal remedies. If the appeals are rejected, it remains to them to address the Strasbourg Court, although there are lawyers who think that they would not have the right to appear before this court. That it will not be easy to file these appeals, says one of the judges who is elected, Omer Hadziomerovic: **"To address the Constitutional Court in case I am not elected, I need to know why I am not elected – but, I do not know that. Therefore, we want and insist to be given an explanation. The competition is a race – I need to be explained why someone who was chosen is better than me. I need to know that to use legal remedies. We, at the Society of judges, decided to hold to our members who were not elected, until we get a written explanation, and until the process by available legal remedies is completed. And unfortunately, they can only use a constitutional complaint and, later, address to the European Court of Human Rights in Strasbourg"**.

Connoisseurs of the situation in the judiciary are confident that the constitutional complaint of unelected judges and prosecutors will be easily overruled in the Constitutional Court. They believe that it will be so because the Constitutional Court this summer already refused the initiative of the Judges' Society on assessment of the constitutionality of re-election, and knowing the composition of the Constitutional Court in which the majority of the members was "satisfied" by general elections by having been chosen daughters, sons and other relatives as judges and prosecutors. Precisely because of this, this re-election is called "buddy" election. Unfortunately, these spice info in terms of who is elected and who is not, interest primarily the public, but the details speak exactly how the election of judges, prosecutors and deputy prosecutors was incompetently conducted and under the influence of politics. The public has remained ignorant that the son of the president of the High Judicial Council, Nata Mesarevic, was elected judge, while a judge who will be president of a court in Belgrade promoted both himself and his wife ... For the judge was not elected judge Dragana Boljevic, president of the Judges' Association of Serbia, but is Sonja Brkic, judge at the Supreme Court of Serbia, who, together with Justice Minister Snezana Malovic, a few months

ago has been found in a serious conflict of interest, when, violating the Law on Judges, she was President of the Republic Electoral Commission, thus making the double income. Therefore, the judge who has flagrantly violated the law is rewarded by being re-elected to the Supreme Cassation Court. When the journalists asked her about that, Mrs. Mesarovic only referred to the income of Mrs. Brkic in RIK. Dumbfounded by the representatives of seventh force, she said that **“the high council has not found that it was unworthy behavior of judicial office”?**

It is interesting that all who worked on the case Mladic's accomplices were not elected judges and prosecutors. The prosecutor for organized crime, Jovan Prijic, who was removed during the DSS on power, was hardly elected Deputy Prosecutor of the Republic. He wouldn't have been elected at all, if the Liberal Democratic Party hadn't announced that it would be considered a scandal. Judge Bojan Mistic, who was trialed in the case of “Ibar highway”, as well as the famous Deputy Prosecutor Zoran Jakovljevic, known for having been the first and only one in Serbia for years who worked on the cases against football hooligans, were not elected. Aleksandar Milosavljevic, who interrogated the killer of Prime Minister Djindjic, Zvezdan Jovanovic, now the Deputy Prosecutor for high-tech crime, also wasn't elected. Neither was Krsta Bobota's wife, lawyer of the former mayor of Zrenjanin Goran Knezevic. Many prominent judges and prosecutors who have spent their entire lifetime in the judiciary were not elected, but a dead man was! Only a day after the publication of the list of judges, the media discovered that among the elected judges was former Municipal Court judge in Pozega, Judge Ljubisa Djuric, who passed away on October 28, this year. What else is to be expected when as early as summer, Judges' Association of Serbia calculated that the High Judicial Council would have about 10 minutes to review a biography of each candidate for a judge?

Thus conducted judicial reform has already created a lot of problems. From the beginning of December until the end of January the judiciary is paralyzed, all processes are aborted, court cases are packed awaiting for their renaming and reassignment to the new judges. Even then, the trials will not begin until the judges are familiar with the cases, and in some cases presentation of evidence will be repeated, although the new Law

on Criminal Procedure provides the ability to read records of evidence before the new court. Other consequences are likely, but the most severe degradation of the judicial system is labeling of unelected judge with the words: **“All who are not elected are not professional or not trained or are not worthy”**. **“The entire court system, judges and their personalities were degraded. There is a judge who, three days ago, passed a sentence of 30 years in prison. That judge was not elected. Therefore, he is either unprofessional, or unworthy, or unqualified. Can anyone say in the complaint now: “Well, please, abolish the verdict, I was sentenced by the man who is unprofessional”**, asks Judge Omer Hadziomerovic, adding that this procedure **“brings people who have been elected, including me, in a situation to be ashamed because I have been elected and to seriously consider whether I really belong to the this reformed judiciary”**.

In the new, reformed judiciary, there's no longer place for many prominent judges and prosecutors. Comfortingly enough, there are a lot of good judges, prosecutors and deputy prosecutors, among the elected, though there are party cadres respectively. The problem is that the authors of the reform of the judicial system, intentionally or accidentally, killed all the authority of the judiciary and fully put it under the operation the executive power. All the critics of this reform by the ruling majority remain a consolation that it is not possible to enter the EU without an independent judiciary, so, accordingly, the control of judges and prosecutors is to be short-lived. That is why the Serbian application for EU membership is the hardest blow to those who would shut down the lights in the country and wield power without any control.