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# JUDGES' PERFORMANCE EVALUATION IN THE FUNCTION OF STATUS, QUALITY PERFORMANCE AND IDENTIFICATION OF THE REQUIRED NUMBER OF JUDGES

**– Precondition for High Quality and Rational Judicial System–**

## RATIONALE

**The judicial system in Serbia is faced with a considerable number of problems. A considerable backlog, unbalanced caseloads in individual courts and with individual judges, cases not distinguished based on complexity, judges burdened with administrative activities, the lack of permanent trained legal assistants in courts, the lack of initial and permanent comprehensive training for judges, keeping records of statistical data instead of evaluation of the judges' performance, which is, however, done only in two cases – for promotion and for release from duty (in accordance with the criteria and indicators specified by several bodies, which are inadequately defined, unclear, imprecise, incoherent, unreliable and not harmonized and which do not take into account all the events that could influence the evaluation of the performance of judges and which cannot guarantee their uniform application in all cases), the lack of discipline and accountability – are just some of the problems.**

**It is obvious that there is a need for the reform of our system. That is why the Judicial Reform Strategy was adopted.**

## HOW DO WE COMPARE WITH EUROPE

**What is our position in relation to the judicial systems in more than 40 member states of the Council of Europe?**

**The comparative figures provided by the European Commission for the Efficiency of Justice (CEPEJ) are extremely useful. Based on the findings, it is clear that the ratio of 32 judges per 100,000 population in Serbia is among the highest in Europe. And even with such a high ratio we still have all those problems that were mentioned!**
**Not including the small population countries, which are, therefore, not comparable – Andorra (29), Lichtenstein (49), Luxembourg (36), Monaco (60), San Marino (54), only a few countries has more judges than Serbia – Croatia (43), Montenegro and Slovenia (39 each). The group of countries**

**closest to us in terms of the number of judges includes Austria (21), Belgium (24), Czech Republic (28), Hungary (27), Poland (26) and Germany (25).**

**However useful and informative these comparative figures may be, they have to be used very cautiously. Different countries have different judicial systems, depending on their legal tradition (common law or continental systems), whether they belong to the group of "old" democracies or transition countries, and their geographic (size, population), economic or historical characteristics. In different countries, even the most general terms (a court and a judge, for instance) may have different meanings.**

## HOW SHOULD COMPARATIVE ANALYSIS RESULTS BE INTERPRETED AND USED

**For the purposes of the CEPEJ Study, there are three types of judges identified: lay-judges, "judges consulaires", and "judges of the peace" who do not have to be lawyers, but who are authorized by law to rule and make rulings with the binding power for the respective parties.**

**There are also different types of non-judicial stall. In some countries, the judges have trained legal staff as their assistants. In as many as 16 countries (Armenia, Austria, Croatia, Czech Republic, Denmark, Estonia, Germany, Hungary, Ireland, Lichtenstein, Malta, Norway, Poland, Slovakia, Slovenia, Spain) there is a special type of non-judicial staff, or even a special judicial body called "Rechtspfleger", responsible for the activities that are in our system usually performed by judges, and their decisions are subject to appeal. They are reducing the burden born by the judges in terms of a whole range of less complex cases in family, custody, and inheritance law, legal protection of claims up to the agreed ceiling (the so-called minor disputes), in the area of annulment of identification documents, enforcement procedure (issuance of payment orders, seizure of moveable assets), maintenance of land books and company registries, granting citizenship, issuance of wanted circulars, criminal cases, substitution and enforcement of criminal sanctions, legal aide, and the like.**

**At first glance, according to these comparative findings, France and Spain, for instance, have only 10 judges per 100,000 population! And still their judicial systems are far better than those in many of the European countries.**

## OBJECTIONS ABOUT THE SERBIAN JUDICIAL SYSTEM BASED ON THE COMPARATIVE DATA

**The objections stated by our state authorities about the judicial system, and their intentions to change the situation in the judiciary are all starting from the "large" number of judges in Serbia. They are often supported by the argument that, in Serbia, there are 32 judges per 100,000 population (2,400 judges per 7.5 million total population) while in Spain, for instance, that number is only 10 (4,200 judges per 43 million total population). This does not take into account the fact that Spain also has a considerable number of both "judges consulaires" (2.8) and "judges of the peace" (17.9). These two types of judges, authorized by the Spanish law to rule and make rulings equally as the lay-judges, while they do not exist in Serbia. However, if we take into account those figures, we**

**get a completely different picture about the number of judges in Spain (30.5 judges per 100,000 population).**

**In addition to that, while in Spain the judges also have their trained legal assistants (as many as 8.2 legal assistants per 100,000 population), that profession does not exist in Serbia. In proportion to the total population, Spain (5.7 times larger) has two times smaller caseload (1,862,966) in civil law cases than Serbia (756,758). It is often overlooked also that Serbia has the second highest number of civil and administrative procedures among the CE member states with 9,168 cases per 100,000 population (only Austria has more cases – 9,970), while Spain has only 1,926 of such disputes. In Spain, 23% of such disputes ends in a ruling, and in Serbia as many as 67%. According to some evidence, out of the total number of such cases, in Spain, 70% is still unsolved after 3 years, relative to 33% in Serbia.**

**Only 8 of more than 40 member states of the Council of Europe (Albania, Azerbaijan, Bulgaria, Georgia, Latvia, Lithuania, Moldova, Romania) have a lower spending on judiciary than Serbia. For example, countries with a [higher] spending per capita than Serbia include Montenegro with 11, Bosnia and Herzegovina with 15.5 Euros, Poland 21, Czech Republic 24, Hungary 27, Denmark 29, Croatia, Norway and France with 36 each, Finland 40, Italy and Netherlands with 47 each, and Slovenia with 56 Euros per capita.**

**The annual budget allocation for the judiciary in Spain is more than 2.2 billion Euros. If Serbia were to have the proportionally same spending (considering that its population is almost 6, i.e. 5.7 times, smaller) it should spend almost 440 million Euros. However, Serbia spends on the judiciary mere 70 million Euros. That is to say, Spain spends 52 Euros and Serbia 9.4 Euros per capita!**

**In that case, would the best remedy for the judicial system in Serbia be to reduce the number of judges? Should the same be done in Germany, where there is two and a half times more judges than in Spain (25 per 100,000 population)?**

**That single example is enough to illustrate clearly that the comparative analysis results need to be used carefully, with reservation, taking into account the specific circumstances, and in our case, primarily, understanding the circumstances in Serbia.**

## WHAT DETERMINES THE QUALITY OF JUSTICE

**In the judicial system, there are four main indicators that have to be taken into account:**
- **number of pending cases, or the caseload**
- **duration of the procedure, or the time necessary to close a case**
- **quality of the case handling procedure, and**
- **available resources in the system for the caseload handling: human recourses, equipment, courts (and their respective budgets and organization of courts).**

**We could try to reduce the caseload to a certain extent and in the short term through intensified efforts of the judges. We have seen that happen in the last couple of years, especially in certain areas**

**(appeals civil and administrative procedures). But that is short lived, and it cannot bring about the essential and long standing results.**

## SWIFT JUDGES AND A SLOW JUDICIAL SYSTEM

**Let us take only one example, the District Court in Belgrade, which is a representative example and which handles more than one third of all cases under the competence of all 25 District Courts in Serbia, and in which the caseload was increased by 84% from 2004 to 2007 (by 47% in 2005 relative to 2004, 21% in 2006 relative to 2005, and 3.3% in 2007 relative to 2006). The number of solved cases increased as well. Firstly, the judges solved 40% cases more (2005 relative to 2004), then 17.5% more (2006 relative to 2005), and finally, in the course of 2007, "only" 3.5% cases more. The overall increase in the number of solved cases from 2004 to 2007 was 59%! But, obviously, the judges are not able to go on intensifying their efforts indefinitely.**

**The situation is even more drastic in the High Commercial Court – a republic level court competent for commercial law disputes that is deciding on the appeals against the first instance rulings by 17 Commercial Courts in Serbia. From 2002 to 2007, the case intake in the court was increased by 77% (from 8,771 to 15,522 cases). In 2006, the judges in that court solved 14,183 cases, and in 2007, they solved the total of 15,843 cases. All that work is done by some thirty judges and their number has not been increased practically for decades (except in 2006, when the number of established posts was increased by 3, totaling 32 posts). Since not all judges have the same caseloads, depending on their other activities, that means that there are judges in that court who are for years now solving over 500 cases annually, i.e. over 50 cases a month! And that is all happening in the legal matter in which the disputes ensue also from complicated transition processes, in which there has been a range of new framework laws adopted (often inconsistent and unclear), which all requires additional time for the judges to become familiar with the contents of those laws and to be able to interpret them in a systematic way, to ensure their adequate and equitable implementation.**

**Even a machine has to be turned off from time to time, let alone a human being.**

**Even with such intensified efforts, the judges are not managing to handle the case intake and reduce the backlog. The judges are becoming more and more swift, and the system is becoming slower and slower. The point is, actually, that we cannot expect to have the changes happen as a result of the efforts on the side of only one segment of the system (judges). The judges alone do not make the judicial system. That is why the overall system needs to be changed.**

**If we really wish to see the caseloads reduced, that can be achieved only if we take into account all the four elements that were mentioned at the same time (caseload, duration of procedure, resources available, and the quality of service provided). By changing one of those elements, the other elements would consequently change as well, for better or for worse. That is why we need to ensure that the changes are implemented in a careful, well designed and harmonized manner, with predetermined and projected impacts that would not come as a surprise.**

**The reduction of the caseload could be achieved either by shortening the duration of the case handling procedure (through mediation, reorganization of courts, introduction of a new profession,**

**i. e. legal assistants – lawyers who would be responsible for some less complex activities that are currently performed by judges, revision of the processing procedures, legal aide, etc.) or by increasing the number of staff handing the caseload (judges or lawyers and their trained administrative assistants), and, in any case, by increasing the funding. With respect to the funding, it can be combined with increasing the number of judges, whose work would then be more "expensive" for the budget, or by "adding" to the existing number a new additional profession of a trained lawyer, that would be entrusted by law with les complex court activities that would be subject to revision under appeals, which would present a smaller burden for the budget. Naturally, the professional work of the judges could never be entrusted to anyone else other that judges, since that would prevent the citizens to exercise on of the fundamental and universal human rights, the right to stand a fair trial before an independent and unbiased court.**

**If we do not have understanding of all of the above, and if do not identify priorities and adopt some key strategic decisions with that respect, which is necessarily linked also with increasing the funding, we will be just going in circles. Even if the number of cases stays the same, the backlog will keep accumulating, or the quality of court services will decline, and it is very likely that we will see both of those happen at the same time. That would naturally cause the dissatisfaction and lack of trust on the side citizens to grow.**

## WHAT KIND OF A SOLUTION DO WE NEED

**Is the key solution then to go through with what has been talked about a lot about lately – to "rationalize" the system and, primarily, to reduce the number of judges (even for one third) leaving only the "best" people?**

**Let us put aside, for now, the issue of how it would be done, i.e. the issue of the reappointment of all judges. The experts form the Council of Europe and the Venice Commission expressed their views on the very doubtful constitutionality of this "solution" on three occasions in the course of the last year. And exactly in the next couple of days we expect to have also the opinion of the Consultative Council of European Judges of the Council of Europe from the session that will be held in less than a week from now to adopt opinion on the compliance of the reappointment proposal with the European standards. Let us put aside also the message that that would send to both the judges and the public, in the country and internationally – that we do not care much about constitutionality, and, as both the new and the previous Constitutions guarantee the permanent judge function, that we do not care much about the legal security either. We wish to see the changes happen, we will select the right people, we give you our word, and our word is stronger even than the Constitution. Come to us, invest, do business, without any concern, you will be trialed by judges that we stand behind and guarantee for.**

**Is that the message that we should be sending? How much would that "cost" us?**

**And what do we stand to gain from such a "rationalization"? Especially if we take into account that that would be followed also by the rationalization of the administrative staff, which has, by the way, already taken the wrong turn, and that that should precede the official rationalization of the number of judges. And that we would still be left with a large caseload that has to be handled if not in optimum and foreseeable time, than at east in reasonable time.**

**The experience of others (Germany, after the Word War II, France after Petain, Spain after Franco, Portugal after the military junta, the East European countries after the fall of the Berlin Wall, with the exception of Czech Republic) goes to show that the system can be changed considerably for the better by changing the system itself, and not the people in the system. And that brings us to the key dilemma:**

## WHAT IS IT WE WANT TO CHANGE: THE PEOPLE OR THE SYSTEM?

**Even the European Commission Framework Program for Efficiency of Justice of the Council of Europe emphasizes that there are no easy, magical solutions or shortcuts fort he establishment of a sound judicial system and the rule of law. The system needs to be changed, but it has to be changed across the board, taking a general approach, by achieving a consensus of all the key stakeholders on efficient ways to measure and analyze and strike the right balance between the funds available for justice and adequate ways to manage those funds on one side, and the objective set in the justice sector, on the other. In addition to that, a balance has to be found very carefully between the process guarantees, which imply certain timelines that cannot be shortened and the need for swift justice, in accordance with agreed criteria applied in a clear, transparent, and fair manner, predetermined and known from the onset on the process, and, if necessary, with the consent of the opposing parties.**

**It is time we identified the priority changes needed in our society. It is time we realized that the outlays and spending for the judicial system should not be seen as expenditures, but rather as long-term investments that would ensure legality and legal security, investments, new jobs, and progress overall.**

## THE BASIS FOR THE CHANGE OF THE SYSTEM

**New draft laws on the judicial system present a good opportunity to solve many of these problems. The very core of the Law on Judges is the performance evaluation. This new mechanism needs to be further elaborated and defined in greater detail. It has to be recognized that is can have several functions and that it provides a sound basis for the judicial system.**

**Judges' performance evaluation – measuring the quantity (results) and evaluating the quality of the judges' work, i. e. their competence and capabilities, as well as their commitment and integrity would:**

**1. manage the judiciary as a system, to ensure:**

- **creation of high quality judicial personnel (through output based selection and promotion of judges)**
- **improvement of the overall capacities of the judicial personnel and individual judges, including adequate training program, more narrow specialization and various incentives**
- **optimal use of the capacities of each individual judge within the courts (through annual task and case allocation)**
- **identifying the required number of judges**

- **monitoring the efficiency and balanced workloads by judges and by courts.**

**2. determine the status of judges ad their professional movements**
- **vertical (selection, promotion, release)**
- **horizontal (appointment of judges to positions in which they can give their maximum contribution depending on their performance and competencies and their narrower field of specialization).**

**3. establishment of the personal accountability system for judges for the performance of judges' activities and protection of their independence in the procedure of the examination of their personal accountability (disciplinary accountability and release from duty).**

**Comparative experiences in terms of the measuring of the workload in courts and individual judges indicate that there is a possibility for the application of the time-sensitive measures of the judges' output performance through identifying the judges' available working hours, average time necessary to close a case (identifying the type and numbers of actions in each case and the average time necessary to perform each action) and making a correlation between the time the judges have available and the total number of cases and the average time and the actual time necessary for their handling. This would help us to classify the cases by complexity ("weights"), identify the required number or judges and other staff members, as well as the "norm" for judges, for as long as it is necessary to keep it, during the transition reform period.**

**As our earlier proposals, this roundtable is an attempt for us to recognize the seriousness of this issue, the benefits for all of us that could be gained by finding the right solution for it and the necessity to invest joint efforts in solving this issue, since this tasks goes beyond the individual capacities on the judicial institutions.**

**The main problem is not how much we could spend on the judicial system in Serbia. It is much more important to what extent we are willing to change it.**

**Belgrade,**
**April 18, 2008**

**Dragana Boljevic**
**Belgrade District Court Judge**
**Chairperson of Judges Association of Serbia**