MEDEL
Magistrats Européens pour la Démocratie et les Libertés

REVIEW OF THE SITUATION IN THE SERBIAN JUDICIARY

THE CURRENT STATE OF THE AFFAIRS IN THE SERBIAN JUDICIARY IS NOT IN COMPLIANCE WITH EU STANDARDS

REPORT DRAFTED BY
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HONORARY JUDGES

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STATEMENT BY SIMON GABORIAU AND HANS-ERNST BOTTCHER[1] EXPERTS IN CHARGE OF THE REVIEW OF THE SITUATION IN THE SERBIAN JUDICIARY

THE JUDICIARY REFORM DOES NOT ALLOW THE ESTABLISHMENT OF AN INDEPENDANT JUDICIARY POWER THAT DESERVES THE TRUST OF SERBIAN CITIZENS

After holding numerous meetings - which will continue to take place until April 14 - and after reviewing numerous Serbian and European documents, among which the opinions provided by the European Union, Council of Europe and Venice Commission, the experts deliver the following opinion:

First, they declare:

- that the principle of independence of the judiciary was established in order to enable the citizens' trust in the judiciary in their respective countries;
- that this principle means, above all, that judges must enjoy a status which will guarantee their power of decision-making independent of any coercion, influence, order or pressure exerted by anybody.
- A strict respect of permanent tenure of judges is an essential element of such status.

⇨ Highlighting that the implementation of a "lustration" system in a country in democratic transition can be completely legitimate,

⇨ Highlighting that, in a democratic country, the establishment of a system of control over judges - with the obligation of respecting their independence - as well as the implementation of disciplinary action to investigate judges and prosecutors who failed to properly exercise their duties followed by the delivery of appropriate sanctions are justified,

- Remind that such actions can be compatible with the rule of law only if the fundamental principles recognized and guaranteed by the European Convention of Human Rights are respected during their implementation,
- Since only these principles allow the aforementioned actions to be considered "just" (respect of contradictory proceedings, equality of arms, and the prinicple of public hearings...)
- Since these actions otherwise represent provisory measures making the judiciary neither independent nor impartial, nor in the service of citizens.

- They state that the implementation of the judiciary reform, launched in Serbia in 2009, is not under any circumstances compliant to these principles, in spite of many recommendations provided by the European Union, Council of Europe and Venice Commission.

- They state that:
  - the Serbian people, which have a place in the community of European countries constituting the Council of Europe, deserve better than this reform. This reform is certainly not the one desired by the European Union.
  - the citizens of Serbia cannot have any trust in the judiciary system which failed to respect the most fundamental rights of its judges and prosecutors.
- They consider, in relation to the aforementioned fundamental principles, that the reform must be re-implemented:
  - in a manner that enables the overcoming of the current judiciary crisis.
  - and in a manner that enables this Institution required for the healthy functioning of every democratic society to chart a course towards peace and citizen trust.

- Special attention will be given to correct and impartial conduct of current criminal proceedings against the member of High Judicial Council, Mr. Jaksic.

- If desired, they are prepared to do what is needed in order for the European Judges and Prosecutors for Democracy and Freedom (Magistrats européens pour la Démocratie et les Libertés - MEDEL) to give its contribution to any process aiming to overcome the crisis in accordance with the values MEDEL advocates.

THE AFOREMENTIONED STATEMENT FROM THE PRESS CONFERENCE, HELD DURING THE LAST DAYS OF OUR MISSION, GIVES A TONE TO OUR CONCLUSIONS WHICH REMAIN UNCHANGED AFTER THE REFLECTION PERIOD WE HAVE DETERMINED FOR OURSELVES BEFORE STARTING TO DRAFT THE FINAL VERSION OF OUR REPORT.

FOLLOWING A BRIEF OVERVIEW OF OUR WORK, WE CONSIDER IT NECESSARY, BEFORE ADRESSING THE ESSENTIAL ISSUES OF OUR STATEMENTS AND DELIBERATIONS, TO PRECISELY IDENTIFY OUR INTELLECTUAL AND ETHICAL POSITION DURING OUR MISSION. THEN WE WILL PRESENT A BRIEF NEW HISTORICAL CONTEXT OF SERBIA.

THIS REPORT, FINALISED ON JUNE 18, CAN BE AMENDED WITH AN ANNEX, IF WE RECEIVE ANY ADDITIONAL INFORMATION, PRIMARILY DURING THE CONFERENCE -DEBATE, WHICH WILL BE ORGANISED IN BELGRADE ON JUNE 29, 2012.
AMENDED VERSION PRODUCED ON 06/27/2012.

Gratitude: We offer our most cordial gratitude to all those who took the time to meet us and answer to our frank and direct questions. We came to collect firsthand information, and generally speaking, all our interlocutors have fulfilled our expectations.
Our mission was conducted from April 8 to 15 of 2012, with the assistance of the interpreter Marijana Labus-Vukovic who was completely available to us at all times. She accompanied us throughout the week creating a pleasant atmosphere, and was an efficient mediator in our conversations.

A BRIEF OVERVIEW OF OUR REPORT

Shock caused by a brutal dismissal of more than a thousand of judges and prosecutors

By a complex and perverse action, in December of 2009, two Serbian judiciary councils (High Judicial Council and State Prosecutorial Council) have dismissed 837 judges and 220 prosecutors, which roughly equates to one third of judges and prosecutors in Serbia.
The grounds for this dismissal was the implementation of general election of judges among the ones which were already in office or new candidates, along with the reduction of the number of judges and prosecutors.
This revocation of judges and prosecutors (as it is called in Serbian: their non-appointment) was performed under the guise of the general judiciary reform requested by the European Union from Serbia as a potential candidate state.
As all European instances (the European Union, all instances of the Council of Europe, Venice Commission, Consultative Council of European Judges..) have pointed out, the implemented procedure failed to respect any of the fundamental principles of the European Convention of Human Rights (the dismissed judges and prosecutors were not allowed a hearing, they were not apprised of the facts potentially held against them, decisions were not explained, the procedure was completely opaque..)

The failure of the review process

A review of the "non-appointment/revocation" of judges and prosecutors was implemented due to the pressure from European instances. The procedure was launched in June of 2011 and lasted until the end of May 2012 for judges, while it ended a few months earlier for the prosecutors.
It became evident that the authorities implementing this "review" have severely disregarded the essential principles of fair proceedings: shifting of burden of proof (it is considered that judges and prosecutors who were already in office during the general elections, pursuant to the law, meet the appointment requirements), the violation of the principle of contradictory proceedings, equality of arms, the prinicple of public hearings, impartiality...
Not only did the colleagues who were "dismissed" ("non-elected") under the “review” procedure remain deprived of their rights, but some of the basic principals failed to be observed, while the discretionary elimination of incumbent judges and prosecutors in 2009 was only marginally corrected.

None of the identified objectives have been achieved

This procedure was presented as "lustration" of judges and prosecutors in the period following the fall of Milosevic's regime, and as an aspect of the modernization of an insufficiently efficient judiciary system. Actually, none of these objectives were achieved. It should be noted that the lustration as an objective was presented solely to the international community; such an explanation was not provided in Serbia, because, due to a lack of political

goodwill, the process of "lustration", adopted in May of 2003, was not implemented at the level of the whole Public Administration ("Accountability for Human Rights Violation Act")

Necessity of a full review of the state of the affairs

Our findings confirm the severity of the situation in Serbian judiciary: the judiciary system established as a result of the reforms implemented since 2009 with the brutal dismissal of a significant number of judges and prosecutors does not under any circumstances respond to the requests of an independent, impartial judiciary that serves its citizens. Thus the fact arises that the judiciary reform process needs to be revised and re-implemented in line with different modalities, with the priority request being to resolve the issues of judges and prosecutors which have been "relieved of their judicial functions" without respect for the most fundamental principles. A need also arises for a comprehensive programme of continuous education for judges and prosecutors facing wide scale changes at the level of the whole Serbian judiciary. The issue of court efficiency deserves to be comprehensively reviewed because in the eyes of many the reforms, including the reform of the judiciary network and court organization, have caused a chaos in the judiciary system. Many measures will need to be undertaken in order to establish the trust in the Serbian judiciary both on national and international levels, considering the fact that this institution is especially dependent on its statute, structure and organisation, due to which the goodwill of its actors can not suffice.

THE CURRENT STATE OF THE AFFARIS IN THE SERBIAN LEGISLATION IS NOT IN COMPLIANCE WITH EU STANDARDS

FOREWORD

HOW TO UNDERSTAND THE COMPLEXITY OF SERBIAN REALITY

We, the undersigned, Simon Gaboriau and Hans-Ernst Böttcher, have been assigned to conduct an analysis of the situation in the Serbian judiciary which has been a source of concern for the European authorities and MEDEL for several years. We were in Belgrade from April 8 to 15, 2012. We've reviewed numerous Serbian and European papers; held many meetings with representatives of Serbian and European authorities, institutions, trade unions and NGOs. We've met with our colleague, judges and prosecutors, and listened to what they had to say. For us this was a very hectic week, every conversation allowed us to add another piece in the mosaic of the Serbian situation, especially concerning the state of the affairs in the judiciary which had proven to be more complex than we had expected. Besides, we found the human dimension of the plight of our colleagues especially moving.

The case of Dragana Boljevic

As an example, we are citing the case of Dragana Boljevic, President of the Judges Association of Serbia and a member of MEDEL: she has been the Secretary General of MEDEL for more than six months. The Judges Association of Serbia was founded in 1997, as a response to the sycophantic behaviour of specific judges who were in charge of the control of the 1996 local elections[1]. Since the regime of Slobodan Milosevic had prevented the work of the Association, it was re-established in 2000.

Ms Boljevic was one of the judges with over 20 years of service who were not "elected". After filing several legal remedies, she appeared before the High Judicial Council (HJC) on November 28, 2011 during the "review" of her dismissal. Her defence was brave and decisive. During our stay in Belgrade she remained uninformed of the decision of the High Judicial Council. Owing to the review we had performed, during the conversations with HJC representatives we have found out, in an answer to one of our questions, that there were "additional information" of which Dragana Boljevic was not informed, which represents a violation of the rules of contradictory proceedings and equality of arms. On May 30 of this year, she found out, without having received a written decision, that she will not be returned to her position. She has undoubtedly paid a price for her tireless fight against such a reform. Many other irregularities related to her case will be presented in the further text.

ON US AS EXPERTS

Engaged experts

With regards to our "expert" status, we would like to clarify, paraphrasing Raymond Aron[2], that we have taken the position of "engaged experts". Namely, we were entrusted with this task not only for our 40 years of experience in the judiciary (primarily in the administration of judicial institutions) in our respective countries, but also for our activities in the French Judiciary Trade Union (Syndicat de la Magistrature - SM) and German Trade Union VER.DI (former ÖTV), organizations which have contributed to the establishment of MEDEL (Magistrats européens pour la démocratie et les libertés). Hence, our approach to the situation we were contracted to review is not strange in the context of this choice.

[1] The attempt at election fraud by the regime in power on the elections held on 11/17/1996 has caused the 1996/1997 demonstrations. Although the united opposition has triumphed on elections in all major cities and municipalities, the government refused to acknowledge the election results and used the judiciary in an attempt to falsify them.

[2] «Le spectateur engagé» ("The Engaged Observer"), Raymond Aron Julliard, Paris, 1981

The two of us[3] are, namely, honorary judges from France and Germany, founders of MEDEL together with other European colleagues, and our attitudes and analyses are necessarily inspired by the values for which the judges and prosecutors - SM and VER.DI members - as well as MEDEL itself, stand. We are convinced that these are the values of a progressive Europe and that they especially stem from the European Declaration of Human Rights. This makes our engagement nothing but a never-ending struggle for those values.

We are engaged, but also astute

On the other hand, we are guided and instructed by our professional knowledge and skills, gained during the forty years of work in the judiciary, with many of those years spent on the position of presidents of the court, as well as by the expertise we have gained in international missions which we have previously been conducting for different organisations, among which the Council of Europe.
We have performed this mission consciously and professional, inspired by the aforementioned values, attempting to get a clear grasp of the situation which was becoming more factually complex with each day.

No legal patriotism

It is understood, but should be stated, that neither one of us wishes to impose the legal and judiciary system of our respective countries as a model, although different practices from our countries were occasionally mentioned during our review mission. The Judiciary Trade Union (SM), since its establishment in 1968, has offered constant criticism on the functioning of the court institutions in France, especially in the last few years. Thus the Consultative Council of European Judges has taken it into consideration, among other judiciary issues in EU countries (13) and the situation in the Serbian judiciary; however the situation in France was much less severe than the one in Serbia.
In its report provided on January 18, 2012 on the state of "judicial authority and judges in several EU member states" the Consultative Council of European Judges has emphasized that the "cooperation on judiciary level among states can exist only if a certain level of trust in personal and institutional independence of judges in those states exists. The fundamental principles which characterize such independence are essential to the rule of law". These principles have been stated in the European Convention of Human Rights. Of course, as we have previously highlighted, these are precisely the principles guiding our work.

Political neutrality

It is also understood, but better stated , that we respect the strict obligation of neutrality with respect to the political situation in Serbia, both before and after the last elections which took place in May of 2012. We are placing a strong emphasis on the need for political neutrality because we have quickly realised that the supposed political orientation of judicial actors has been often, even systematically, highlighted when providing rationale for different positions and decisions. Our work method is based on the belief that the judiciary and the rule of law form the foundations of democracy. Only in its name can we mention the political context in order to analyze specific data on the situation we were contracted to review.

[3] Simon Gaboriau, retired president of the Paris Appelate Court - France, and Hans-Ernst Böttcher, retired president of the Lübeck Landgericht– Federal Republic of Germany

INTRODUCTION

We cannot provide a clear analysis - especially for the readers of this report residing outside Serbia- of the situation in Serbia and Serbian judiciary without presenting a brief overview of the country's past.

THE PAST THAT DOES NOT GO AWAY

Late awakening of democracy

Out of all the East European countries, Serbia was the last to cross the so-called minimal democracy threshold, i.e. the first transfer of power from (ex) communist to democratic government. This lag is the consequence, after the fall of the Berlin Wall in 1989, of the specific traits of the Balkan region which was ravaged by nationalist and warmongering movements, marked primarily by the persona of Slobodan Milosevic. It took 10 years to put a stop to his regime - on October 5, 2000, under the pressure of the will of people. These wars in Europe, 45 years after World War II, have been a source of worry for the "new European international order" who, relying on the EEC which grew into EU, wanted to end the war in Europe. After many years of civil wars, which erupted in early 1990, Yugoslavia completely ceased to exist, and Slovenia, Croatia, Bosnia and Herzegovina , Macedonia and finally Montenegro (which was a part of the Federal State of Serbia and Montenegro) gradually gained their independence arbitrated by the international community (UN, EEC, USA). The last phase was defined by the conflicts in Kosovo, accompanied by an event that remains a painful issue for Serbian public: NATO bombing, an unfortunate event whose visible traces have been deliberately preserved in Belgrade. This is why KFOR, "Kosovo Forces" have been deployed for almost 13 years in the Balkans, the region were the mere presence of these forces confirms the existence of tensions left by the wars in former Yugoslavia. This whole period left still painful, but slowly healing wounds on the identity of the people.

These conflicts in the European continent gave birth to a new generation of International Tribunals, in the footsteps of the court dealing with World War II war crimes. Thus, the United Nations Security Council founded the Hague International Criminal Tribunal for former Yugoslavia (ICTY) in 1993. This tribunal, who is the forbearer of other international tribunal and undoubtedly the model for the International Criminal Court has been established with a limited mandate that was supposed to expire by the end of December of 2014. This court was the place of criminal proceedings against persons who had committed war crimes and crimes against humanity during the war that had ravaged the former Yugoslavia.[43] Its task remains incomplete; it should be stated that recently some of the persons with issued warrants were arrested (see further text).
Such circumstances emphasize the importance of creating reliable court space in the Balkans, and first and foremost in Serbia.

So, Serbia today has to face the double heritage of political authoritarianism: the Titoist communist political system and the warmongering dictatorship of Slobodan Milosevic during the ten years of civil war fire and blood. The first republican government after Milosevic, headed by Zoran Djindjic, was constituted in January of 2001. Precisely

[4] According to the latest data, 161 persons were indicted, 13 were acquitted, 64 were sentenced, and proceedings are ongoing for 35 accused.

during his mandate, Milosevic[5] was extradited to The Hague in order to stand trial before the ICTY. Zoran Djindjic, who was the initiator of democratic processes in his country, was assassinated on March 12, 2003[6].
This was a short summary of the Serbian history (see further text for more details) characterised by the rule of a single-party system and domination of political power over all institutions, among which the judiciary, where nationalism was very much present during the last decade of the twentieth century.

Turning of a new leaf became an essential issue in the beginning of the 21st century.

It was necessary to continue with the comprehensive process of privatization and efforts aimed at introduction of a true multi-party system... and Serbia turned to Europe.

THE LONG ROAD TOWARDS THE EUROPAN UNION

Serbia has annulled the death penalty for all crimes on February 26, 2002[7] exchanging it for a 40 year prison sentence. Serbia became a member of the Council of Europe (at the time 45th member state) on April 3, 2003. It ratified the European Convention of Human Rights on March 3, 2004[8].

Since 2000, West Balkan countries involved in the stabilization and accession process have been declared “potential candidates" for EU accession. Serbia has presnted its EU accession request on December 22, 2009 and received the candidate status on March 1, 2012; thus crowning the efforts for reconciliation with Kosovo and arrest of the last persons from the ICTY warrants. President Boris Tadic who has been highlighting his European orientation since he was first elected in June of 2004, and who had initiated the EU accession process, expressed his joy with the following words: "*citizens of Serbia bore the greatest burden of the reforms implemented in order to make our country a more democratic society which respects human and minority rights, and affirms European values".*

It should be said that, during the conversations we had with many persons during our mission, we have gained the impression that the Serbian people feels it has paid a steep price for the candidate status, that the position Serbia in relation to Kosovo is considered very painful, even unjust, and that the implementation of the harmful judiciary reform is placed on the shoulders of the candidacy. Many citizens feel that the democratization has not been truly implemented and that the rule of law remains inexistent in their country. The issue in question is not only the real democratic progress which exceeds the mere proclamation of its existence, but also the lack of trust in institutions established under the auspices of EU accession; this lack of trust tarnishes the reputation of EUROPE in the eyes of the people, while some of them are, however, honestly willing to integrate. This critical viewpoint (sometimes very critical) was encountered with many Serbian or international analysts we have talked to during our mission; each one of us talked to different individuals in order to collect as much information as possible.

[5] The Police had surrounded the house of Slobodan Milosevic and after 33 hours of siege, he was arrested on April 1, 2001 and the Serbian government extradited him to the UN authorities in June of 2001. The same year he was indicted by the International Criminal Tribunal for former Yugoslavia in The Hague for war crimes, crimes against humanity and genocide. His trial, which started on February 12, 2002 wasn't completed due to his sudden death on March 11, 2006 in his cell in the UN detention unit in Scheveningen.

[6] Twelve members of a paramilitary formation were sentenced for participation in that murder in 2007. Vladimir Milisavljevic, who was found guilty and sentenced in absentia to 35 years of imprisonment on that count of indictment (and to 40 years for other crimes), and who was at large after the assassination, was arrested in February of 2012 in Valencia (Spain). The extradition process is ongoing.

[7] One of our Serbian colleagues, a member of the State Prosecutors' Council, in order to provide information on the period prior to the death penalty annulment, spontaneously recounted that he had asked for the death penalty for a crime in the common law domain, and received the appropriate verdict, but the sentence was not executed, due to the annulment, but altered to a sentence of 40 years of imprisonment.

[8] From September 19, 2006, when the first sentence was pronounced, to January 1, 2012 the European Court of Human Rights has delivered 64 judgments - 54 confirming the violation of rights, 4 refuting it, and 3756 judgemnts on inadmissability; 6752 proceedings are ongoing.

Although its candidate status is now official, Serbia has a long way to go before joining the European Union.

In any case, the respect of Copenhagen criteria, and especially the establishment of citizen liberties and rule of law represent an important success factor.

The elections held on May 20, on which a new president was elected (and who was presented by the West European press as the people party leader transformed into a pro-European politician after he had long contested such an option for his country) have been a source of concern for many partisans of the European future of Serbia. Right after the presidential elections, Tomislav NIkolic has confirmed that Serbia will persevere on its European road.

Whatever the course of this candidacy may be, Serbian people deserve their place in the community of European countries constituting the Council of Europe, and respect of its fundamental principles and values is essential in order for Serbia to take that place.

WHY DOES THE SITUATION IN SERBIA CONCERN US ALL?

Little more than a decade after the end of the war, Western Europe, whose media were left without the war images from the region to broadcast, loses interest for the situation in Serbia, apart from occasional peaks of media attention paid to the arrests of war criminals from ICTY warrants. We witnessed this recently, during the arrest of Ratko Mladic, former military commander of Bosnian Serbs, as well as two months later on July 20, 2011, when Goran Hadzic, the last Serbian ICTY fugitive was arrested.

Serbian judiciary is viewed solely from this international aspect, while the fact remains that Serbian citizens, as all other citizens in the world, have a right to a judiciary system worthy of its name. This is why an event involving one of the very pillars of the democracy, the judiciary, without a similar precedent in any democratic or transitional country could take place and be completely overlooked by the western media.

As all other countries, Serbia has one foot in the past and the other in the future. Of course, any approach to the Balkans situation is complicated, and this is why we have humbly attempted to represent the current state of the affairs in Serbia through a historical lens. But, when we analyze the issues at hand, there are essentially no fundamental differences in relation to the problems faced by other countries.

Our common future is in the play

Explanation: MINI GLOSSARY

We will talk about the Judiciary Council (*Conseil supérieur de la magistrature (CSM)*), and with that term encompass both the High Judicial Council (HJC) and State Prosecutorial Council (SPC).

In order to mark the necessity of re-appointment of judges and prosecutors who are already in the office, we will talk about the general election. The term "mandate renewal" can also be encountered in some European papers; "re-election" is also occasionally used and we consider it as more appropriate for the situation of judges and prosecutors who have been appointed to a position for a certain period of time and then await a decision on that position becoming permanent, i.e. wait for "re-election ".

I THE CHRONICLES OF A BRUTAL DISMISSAL OF ONE THIRD OF JUDGES AND PROSECUTORS

Wide scale reform of the judiciary

After the proclamation of the "National Judiciary Reform Strategy" in 2006, Serbia has adopted a set of laws in 2008: Law on Organization of Courts, Law on Seats and Areas of Courts and Public Prosecutor's Offices (i.e. judiciary network reform). Law on Judges, Law on High Judicial Council, Law on Public Prosecutor's Office, Law on State Prosecutorial Council... alongwith essential changes in all legal domains.

We will especially mention the reform pertaining to judges and prosecutors, but it's important to keep in mind the wide array of reforms announced and implemented by the Serbian government since 2009.

1) UNSUSTAINABLE VIOLATION OF FUNDAMENTAL PRINCIPLES

Election process

Since the new Constitution adopted in 2006 provided for the "election" of judges and prosecutors, it has been decided that all judges and prosecutors already in office can participate in the general election, with the possibility for participation of new candidates: the status of candidates elected for the first time was uncertain, because they were elected for a three year mandate, folowing which period they could potentially be awarded permanent tenure. Being linked to the reduction of the number of employees in the judiciary, this process automatically resulted in the dismissal of judges.
The Judiciary Council announced these elections on July 15, 2009, and applications were to be submitted within a fortnight. 2483[9] positions for judges in courts of general and special jurisdiction have been opened, and 5030 applications were submitted, more than a half of which came from judges already in office, and only 1531 judges among them were elected.
Concretely speaking, one third of judges already in office were not elected, and a total number of judges was reduced by a quarter[10].

The judges who were not elected, and thus dismissed, failed to be even informed of that decision. Namely, they found out once they had seen their name was missing from the list of the "elected" judges, presented in the decision delivered on December 16, 2009. This decision lacked any rationale explaining the non-renewal of the judges mandate for those candidates who were absent from the said list. A collective decision presenting a general explanation for non-appointed judges followed on December 25, 2009.
This decision termineted the mandates of non-elected judges on December 31, 2009; apart from that they had a right to a compensation that was to be determined by the acting president of the competent court.

Unanimous criticism and reaction to the dismissal of 837 judges and 220 prosecutors

European instances (EU, all instances of the Council of Europe, Venice Commission, Consultative Council of European Judges), as well as Serbian institutions and NGOs have unanimously condemned this "non-election/dismissal" of judges and prosecutors as an act violating the fundamental principles.

[9] HJC and SPC have the authority to determine the number of positions for judges and prosecutors in an agreement (at least factual-wise) with the Government

[10] This reduction of the number of judges and prosecutors, due to a correlation quota between the two groups, automatically caused a reduction in the number of judiciary civil servants.

On March 16, 2010, Viviane Reding, the European Commissioner for Justice and Human Rights, and Stefan Füle, European Commissioner for Enlargement, have written to the Serbian authorities and criticised this action.

In the EU Progress Report[11] it was published that there were *"significant shortcomings in the process of re-appointment of judges and prosecutors*" (See Human Rights Information Bulletin No. 80, March 1 – July 31, 2010, page 117)

➔Overview of the opinion of the Venice Commission

In order to assess the volume of shortcomings, it is useful to refer to the opinion of the Venice Commission: in its opinion CDL-AD (2007)004 the Commission has examined the justification of the process of reappointment of judges and prosecutors expressing *"concern over the process of reappointment of judges already in office who haven't committed any punishable acts. The fact that a presumption exists that already appointed judges meet the requirements presented in the draft criteria and benchmarks for appointment of judges is encouraging. However this assumption can be contested and has to be considered with utmost prudency"*
Apart from this, the Commission has also noted that *„such a process is acceptable only if there are sufficient guarantees of its fairness; it requires in particular for the procedure to be based on clear and transparent criteria so that only the past behaviour incompatible with the role of an independent judge may be a reason for not re-appointing a judge; it is also necessary for the procedure to be fair, carried out by an independent and impartial body and to ensure a fair hearing for all concerned: and, finally, the option to appeal to an independent court must be available."*

None of these safeguards have been respected

The wishes of the Venice Commission, who put its last hopes on the assumption of expertise of judges and prosecutors who were already in office, were completely disregarded, and the number of judges and prosecutors who weren't re-appointed is sufficient to confirms this, along with the reminder of the election criteria compared with the fact that the decisions were not explained.

In any case, these criteria, mostly mathematical, linked to the "performance" of judges and prosecutors have brought on serous risks not only in the form of erroneous, but primarily arbitrary assessment. How many European judges and prosecutors would be eliminated if analyzed on the basis of these criteria!

General criteria proclaimed by HJC: certain danger

According to the HJC decision delivered on July 15, 2009, criteria of the evaluation of a candidate's qualification, competence and worthiness are, briefly put, as follows. First and foremost, it is assumed that a judge who was elected in line with previous regulations, who was in office at the moment of election, and submitted a request to be elected to a same type of court and for same level position, meets the criteria and norms determined by this decision; this presumption can be rejected only if there are reasons for a "doubt" (a problematic concept from the aspect of rebutting a presumption) that the candidate meets the criteria and norms identified in this decision due to his failure to demonstrate qualification, competence and worthiness needed for performance of a judge's work; it is considered that the candidate failed to demonstrate the appropriate level of qualification if they had a certain number of annulled decisions in the last year which is higher than the average in the court in which they work; it is considered that the candidate failed to demonstrate appropriate competence if they failed to resolve a specific number of cases defined by the norms for the assessment of minimal performance efficiency in the last three years, or if the expiry of limitations of the proceedings can be attributed to an obvious mistake made by the candidate.

[11] "Judiciary reform continues,but serious shortcomings in the process of re-appointment of judges and prosecutors were identified." MEMO/10/560 Brussels, November 9, 2010.

In the context of general mobilization for the purposes of contesting this arbitrary procedure, judges and prosecutors have filed complaints with the Constitutional Court. They have also appealed to the European Court of Human Rights.

2) THE CONSTITUTION OF THE REPUBLIC OF SERBIA AND STATUS OF JUDGES AND PRODSECUTORS

A] Constitution

The Constitution of the Republic of Serbia was proclaimed on November 8, 2006. It formalised the end of the existence of the Federal State of Serbia and Montenegro, after Montenegro became an independent state in June 3, 2006. This Constitution followed the one delivered on September 28, 1990 (which for the first time in ''Yugoslavia'' established the principle of permanent tenure of office for judges whose ''mandate'' was previously for a limited period). After the fall of Milosevic's regime, in spite of various proposals and numerous debates, the adoption of a new Constitution has proven itself impossible.

General election of judges and prosecutors and 2006 Constitution: unbelievable fiction

Due to constitutional and government changes (adoption of this constitution needs to be viewed within the geopolitical framework referred to in the text above, which is linked to the reduced territory), the past of judges and prosecutors in office was supposed to be made a *tabula rasa*! This incredible piece of fiction is precisely what caused the current situation.
The Constitutional Court has approved this principle emphasizing that the adoption of the Constitution in 2006 has severed the continuity of permanent tenure of office for all judges appointed in accordance with the previous laws which were valid in line with the 1990 Constitution. It would be the same as imposing the re-appointment of all the judges and prosecutors on the basis on the French Constitution from 1958!

Autonomy of judges and prosecutors put into question by the 2006 Constitution

We should highlight that this Constitution very quickly became the subject of criticism by the Venice Commission especially with regards to the existence of real independence of judges and prosecutors [see Opinion No.405/2006, CDL-AD(2007)004]. The Commission has *"assessed it as worrisome that the Serbian Constitution fails to sufficiently guarantee the independence of judicial power and is concerned about the potential risk of politicization of judicial power due to the fact that the National Parliament is electing the judges and members of the High Judicial Council."* CDL-AD(2008)006) CDL-AD(2008)007) and furthermore, *"it seems that Serbian Constitution is damaging the independence of the judiciary and attempting to politicize it because the National Parliament is electing the member of High Judicial Council by unqualified majority vote"* CDL-AD(2008)006.

B] Inefficiency of the Constitutional Court

Huge inflow of cases and long judicial investigations

The Constitutional Court was soon overflooded with legal remedies used by non-appointed judges and prosecutors contesting the decisions that were proven arbitrary. Namely, almost all non-appointed judges and prosecutors addresses the Constitutional Court, using legal remedies and that Court declared on March 25, 2010 that the non-appointed judges and prosecutors had the right (the right which was contested) to appeal to the Constitutional Court.
In spite of the priority given to this dispute the Constitutional Court has delivered only two decisions, on May 28 and December 21, 2010. We will review their circumstances.

On February 24, 2010 the Constitutional Court sent a letter to the High Judicial Council, requesting for the Council the submit a report stating whether the non-appointed judges had received individual decisions on the revocation of their powers, which would list in detail the specific reasons for their dismissal: under the assumption that such decisions were not made, reasons had to be provided. HJC submitted such a report on March 11, 2010 stating that there were no separate decisions on dismissal: it was stated that all non-appointed judges have received an identical decision (delivered on December 25, 2009) declaring that their mandate expired on December 31, 2009. High Judicial Council has declared that it didn't deem it necessary to deliver individual decisions explaining individual reasons for non-appointment of each individual judge, since it was not a matter of temporary judges being re-elected or dismissed. The Constitutional Court refused to accept such arguments and ordered the HJC to deliver separate explanations to the applicants on the reasons for which they were not appointed and the rationale for the end of their mandate. Once the deadline awarded to HJC expired, the Constitutional Court delivered a ruling on May 28.

The Fallacy of the ruling

Finally, the decision adopted on May 28, 2010 failed to resolve the situation in question. It was, namely, an annulment of the decision delivered on December 25, 2009, i.e. its provision relating to the case in hand, due to violation of fair procedure safeguards, with a request to HCJ to review the issue in accordance with these safeguards within 30 days.

We respect the identity of any legal system which, necessarily, causes reciprocal bemusement regarding the judiciary decisions made in each respective country. However, there are international instruments which serve as common reference: these are the principles referred to buy the Venice Commission, and in this stage of proceedings "an appeal to an independent court". The Constitutional Court has accepted the right to appeal which has to be understood, in our opinion, as a new view on the procedure and its essential issues. Undoubtedly, such an approach cannot become a part of Serbian concept of Constitutional Court mandate; that is not abnormal since this is not a usual task of Constitutional Courts. However, it is unimaginable for a result of such an appeal to be reduced to requesting of one body, which is aware of the demanding nature of its task and was warned by the international actors, and which had still violated such fundamental principles as a right to fair trial, to reinitiate the procedure by determining the way in which those principles would be respected; how can we hope for any serious shift, especially a potentially different result!

Besides, the extended duration of the procedure is incomprehensible: it would be logical for the Constitutional Court to quickly receive the file on the disputed decision; then, once the absence of a rationale is determined, the determining of the absence of decision follows; thus, making it pointless to request separate explanations form HJC, which in any case, could no longer be provided within a fair framework and would necessarily lose legal meaning. Anyway, the Constitutional Court admitted as much in the Tasic case cited below.

Finally, the case was not complicated; by the very annulment of the decision on non-appointment, the assumption of professionalism was not refuted, and thus, the non-appointed judges and prosecutors should have been considered as appointed.

We would like to emphasize, concerning our objections to the decisions of the Constitutional Court, that we would have made the same objections in relation to institutions in our countries, invoking the principle on "free criticism" of judicial practice.

More on Saveljic ruling

The first decision delivered in May 28, 2010, "Saveljic" ruling, published on June 14, 2010, annulled the relevant decision delivered on December 25, 2009 and gave a 30 days deadline to HJC to review his candidacy for the position for which Zoran Saveljic, who has been a judge since 1985, had applied. Namely, according to the opinion of the Constitutional Court, Zoran Saveljic should have had a right to all process safeguards provided by the right to fair procedure during the election; inter alia, concerning the expiry of his mandate, his case should have been approached individually, and explanations referring solely to his case and detailing the reasons for his non-appointment should have been provided. During the whole election procedure, the constitutional right to fair procedure should have been respected.

Specific parts deserve special emphasis

Namely, after the report delivered by HJC on March 11, 2010, the Constitutional Court has determined its basic legal stand on the right to appeal of non-appointed judges and prosecutors on its session held on March 25, 2010, along with its stand on the lack of explanation for the decision on non-appointment. The Constitutional Court informed the HJC on the fact that it considered that the non-appointed judges had a right to appeal to the Constitutional Court and that the decision on the expiry of a judges mandate due to their non-appointment must contain clear reasons for such action. The Court has ordered the Council the act in accordance with this stand within 15 days from the delivery of the decision.

Tug-of-war with HJC

HJC failed to respect the delivered deadline and to act in accordance with the request of the Constitutional Court to deliver specific explanations for non-appointment to each respective appellant.

However, on may 19, 2010, after the end of the deadline, HJC submitted a motion to the Constitutional Court in which it suggested to the Constitutional Court that it must dismiss the appeal as ungrounded and confirm the disputed decision; apart from that the Council has supported its decision by providing elements questioning the competence of the judge during his work as the investigative judge in four cases dating back to 2002 and 2007, with these elements providing reasons to doubt his competence and qualification. The Council has also stated that appellant's requests were unfounded, believing that the HJC had implemented the procedure of general election of judges in accordance with the Constitution and the existing norms, primary the European Convention.

The Constitutional Court has assessed such a response from HJC as late and incomplete, and stated that it provided additional arguments but not a specific decision.

After the "Saveljic ruling" was announced on June 14, 2010. HJC delivered a total of 564 specific decisions on the expiry of judges' mandates. In the case of prosecutors, at least two thirds of SPC decisions remained without rationale. In any case, this is how the "spontaneous generation" of explanations came to appear!

The second decision was delivered in December of 2010 in the case of "MIlena Tasic" (announced on March 31, 2010) and followed the same course as the first one, explaining that HJC delivered an individual decision in the case of Milena Tasic after the Saveljic ruling, which was not considered by the Constitutional Court as a decision in line with the fair procedure requirements. Among other reasons, the Court has rightly assessed that the principle of public hearing represents an integral part of fair proceedings, even more so due to the fact that the public had already suspected the appointment of judges was arbitrary and politically biased.

II- IMPOSSIBLITY OF AN EFFICINET REVIEW

"NON-APPOINTMENT" REVIEW

Introducing the review

While the Constitutional Court continued with the appeal procedures (neither of the aforementioned decisions was considered as a "pilot decision" although Courts announcement was in that sense contradictory[12]) the European institutions, which have mobilised both Serbian and international professional judges and prosecutors associations, have invited the Serbian authorities to review the judges' dismissal and appointment procedures, due to severe violations of fundamental principles of the rule of law.

We believed that the situation could be rectified!
That's when the Law on Judges was amended by the adoption of a new Law on December 29, 2010.
The High Judicial Council and State Prosecutorial Council in their "permanent" composition were supposed to initiate the review of each individual decision on non-appointment.
Hence the procedure of "objection" (review, in a way) to the dismissal decisions was drafted, by deciding to consider all the appeals processed by the Constitutional Court as "objections"; the proceedings were terminated and transferred to the High Council to be processed as objections. Apart from that, the objection procedure was made available for those judges and prosecutors who hadn't filed an appeal with the Constitutional Court.
Anyway, that "review" was also to be implemented for all other judges and prosecutors appointed for a three year mandate in late 2009.
Finally, there was a possibility to file an "appeal" with the Constitutional Court within 30 days from the delivery of the said decisions.

Clarifications regarding the permanent composition

Each of the Councils, HJC and SPC, consisted out of three member per position; Minister of Justice, President of the relevant committee in the National Parliament, and President of the Supreme Cassation Court in HJC and Republic Public Prosecutor in SPC respectively. The representatives of lawyers, Faculty of Law professors, and 6 representatives of judges and prosecutors in HJC and SPC respectively are also among their members. All HJC members, apart from those who hold that position by virtue of their office are "elected" by the Parliament on the proposal of either lawyers, professors of law or judges or prosecutors. After the establishment of these new Judiciary Councils the appointment of members was gradual and in a way temporary, due to the lack of an election procedure for representatives of judges and prosecutors (which have been proposed in line with precise modalities, see the chapter on Judicial Councils below). These "temporary councils" made the disputed dismissal decisions, while not being in full composition, since the representative of law professors in HJC was not elected until July 27, 2010, as it is stated below: while the lawyer representative was elected on October 26, 2009.

The election procedure for representatives of judges and prosecutors was introduced in November of 2010. In that way, once established and then elected by the Parliament the HJC and SPC composition became permanent. Members holding that position by virtue of their office, who were previously regularly appointed, were not changed.

This "review" procedure was initiated on June 15, 2011 and notwithstanding the fact that it was supposed to end in September, and then in December, it dragged on until the end of May of 2012 for judges, while for the prosecutors it was finalized sometime earlier.

[12] During the presentation of the 2010 activities the president of this court has delivered the two aforementioned decisions as "pilot" decisions, but a later announcement claimed otherwise.

The review proceeded in a slow and difficult manner and was far from being without fault.

Shortcomings in the procedural concept

"*Mistakes already made cannot be corrected by committing new ones, which happened during the review of the re-appointment*". Or: *"When the train is heading in the wrong direction, it cannot stop on a right station".* This is what we were told in Serbia by many observers.

It should be stated that this action has caused an avalanche of criticism both in Serbia and Europe.

Thus, the Venice Commission has emphasized, in its opinion CDL-AD(2011)015, that this procedure of prequalification and successive exclusion of appeals pending before the Constitutional Court has raised " doubts with respect to the principle of the separation of powers. *The legislator should refrain from intervening into already commenced judicial proceedings and it will be up to the Constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court.*(…) »

The Constitutional Court has never provided any information on the fate of pending appeals, allowing for the "objection" procedures to take place without establishing the lack of its authority in these cases.

In this way, while the proceedings took place before the Constitutional Court, the laws were amended in order to abolish the legal remedies provided by the Constitution. Of course, the appeal to the Constitutional Court is possible as a last recourse, but this presently new legal remedy has yet to be defined. Theoretical safeguards the non-appointed judges could invoke are now further weakened.

⇨ **On top of all, the review of decisions HJC was supposed to perform was necessarily false due to their previous decision.**

This demonstrates even more than the analysis of the Serbian constitutional control system that, before the Constitutional Court, the body which has made the contested decision is, in a manner, considered as an active party in the proceedings: on the basis of the analysis of the decision delivered by the Constitutional Court it is clear that this body could be requested to deliver this or that evidence and even resort to tools of defence relative to the conformity of its decision. Having such a role in the procedure makes this body view its position as extremely well-grounded. In this respect, the precedent related to the fate of candidate Saveljic should have raised the alarm, because, even after the order form the Constitutional Court, HJC didn't change its decision on the non-appointment since it found reason for it.

Futile safeguards

It is true that hope arose, even among those judges whose mandate had expired, that their appointed colleagues would have to take a different approach because it seemed that they would have to be overwhelmed by such an important position.

Namely, it was planned for the six elective members - representatives of judges (who remain in permanent composition of HJC) to be the decision-makers during the review procedure. In that sense we should reiterate the

opinion of the Venice Commission on the HJC proposal with regards to the functioning of the procedure: "*This provision means that members of the first composition of the HJC, who remain members of the HJC in the permanent composition, will not participate in the review of their own decisions made in the election procedure. This is to be welcomed and is in line with European standards. Taking into consideration that the review procedure will be conducted by elected members of the permanent HJC only (paragraph 4 of the draft Decision of the HJC), this will help to avoid a conflict of interest and increase the fairness, as well as appearance of it, of the entire review procedure".* It remains to be seen whether this apparent safeguard will remain futile due to lack of respect in practice for the modalities analyzed by the Venice Commission.

The objective partiality and structural illegitimacy of the Judicial Council discussed in the further text contributed to the situation.

All the data we have collected regarding the practice implemented in this "review" are damning. Furthermore, the existence of procedural shortcoming has been recently acknowledged by EU[13] which had invested considerable fund in order to monitor the review procedure, especially owing to appointing of observers who held a significant role.

Devastating practice

Six elected judges were appointed to two commissions with three members each; they were in charge of reviewing the case, with an emphasis on the assessment of "performance". The "objectants" appeared before these commissions. Commissions' proposal had definitely influenced the decisions taken by Judiciary Councils which were to later to deliberate in full composition. We will see below that this was not always the case.

Specifically, the usual practice went as follows: a judge/prosecutor (if they were at least timely invited to appear) would be read the statistics on their work and then they would explain themselves as well as they managed (barely 10% of them had the assistance of "defenders" or attorneys). Some individual hearings were even scheduled for 2.a.m.! The "performance of judges/prosecutors remained the basic reference; few among them were not elected due to "not being worthy". i.e. (as that term is usually understood) due to allegations of a shortcoming that could be deemed as deontologically reprehensible (the examples of the disputable use of the term of worthiness are provided further in the text).

Generally speaking, (though the case reviewed above demonstrates the existence of exemptions) the facts for which they were charged took place between 2006 (the year of the adoption of the new Constitution) and 2008 (the year the judiciary law was adopted) which confirms the lack of "lustration".

[13] The letter of the Directorate for Enlargement to Dragana Boljevic dated to 06/15/2012, and expressing the concern over the course of the procedure

With such actions, these review bodies have severely disregarded all the fundamental fair trial principles: shifting of burden of proof (it is considered that judges and prosecutors who already held office during the general elections, pursuant to the law, meet the appointment requirements), the violation of the principle of contradictory proceedings, equality of arms, the prinicple of public hearings, impartiality...

It should be noted that EU observers were present at High Judicial Council session up to the deliberation, but were absent from the actual voting.

Request for impartiality

With regards to impartiality, we must highlight a stupefying fact: three members of Judicial Councils who held that position by virtue of their office remained the same from the beginning of the procedure: the Minister of Justice, president of relevant commissions in the National Parliament, and the president of the Supreme Court of Cassations in HJC (and the Republic Public Prosecutor in SPC respectively) - who hold considerable hierarchical weight and exert irrefutable influence. They were certainly involved in the review of the decisions on "election/dismissal", but they have also actively contributed to the preparation of the final decision, even though they had formally abstained from voting. The shortcomings in the request for impartiality were even more evident in the case of HJC since the representative of lawyers, who has been a member of HJC since 10/26/2009, has adopted the same stand as the members holding that position by virtue of their office. The fact that he abstained from final voting was presented to us by HJC as «an act of goodwill «! (See the chapter on High Judicial Councils further in text)

Memos from the Judicial Councils attached to this report represent an obvious example of this impartiality issue.

➔ **Excerpt from the letter from HJC to the Judges Association of Serbia dated 12/12/2011** ***« Regarding the request for the delivery of information on whether four Council members from the previous composition participated in voting, we would like to highlight that the Article 31 of High Judicial Council Rules and Regulations states that a Council member has a right and duty to make decisions, i.e. vote on every proposal deliberated on at the Council session. Voting is public*** *(i.e. in the presence of other voters)* ***by hand raising, and the Council member votes «for « or «against» the proposal or abstains from voting.***

During the procedure of reviewing the decisions of the first HJC composition, members who hold their position by virtue of their office abstain from voting.

Along with the absence of objective impartiality (in the sense of the practice of the European Court of Human Right[14]) the issue of structural partiality created by the existing system also arises[15]; the system produced a form of

[14] Principle determined by the European Court of Human Rights – and all national courts – is that the same judge cannot act upon a legal remedy related to the ruling they had previously made (Obershilekc/Austria 04/25/1991.)

[15] as previously analyzed, especially on page 16

intimate opposition (which could be subconscious) of HJC to that new procedure whose alleged purpose is to ensure the respect of the fair trial safeguards. This opposition has been discovered on the basis of the resistance to the application of the «fair trial» principle with respect to decisions on the election; this resistance is reflected in a unfavourable attitude towards the explanations of decisions on dismissal, which was repeated before the Constitutional Court (see in Chapter 1) and again before us (see further in the text) two years after the ruling of the Constitutional Court (see above).

Demands of the public

The audio recording of the sessions promised in order to ensure citizen control was not allowed[16].

The principle of public procedure was not respected during the plenary sessions of the State Prosecutorial Council, out of the aforementioned reason and alleged lack of space. In the case of HJC, which respected the principles of public procedure, we have to point to the practice of identity control where I.D.s were requested and kept during the hearing. As much as safety control at a court's entrance is normal, so is the necessity of an identity check incompatible with the respect of the public debate principle which implies the lack of previous triage of the public.

2) A FEW EXAMPLES

A) Before the hearing

All judges and prosecutors were invited on the basis of an automatic transfer of legal remedies, which were prequalified as "objections", from the Constitutional Court to Judiciary Councils.

The invitation:

One objectant was informed in the invitation to the commission hearing that:

- *the participants in the procedure are to declare on the disputed items relating to the reasons for dismissal;*

- *the participant is obliged to deliver all the dispute related evidence at their disposal within 8 days of the reception of the invitation, with the understanding that the hearing will take place and decision will be made even if the evidence isn't delivered;*

- *if the participant fails to appear without a valid excuse the hearing will take place in their absence.*

In this context, it is necessary for the appellant to establish the grounds for their "objection", and, hence, the grounds for the presumption in his favour. Whereas, according to the legal principle of assumption it is up to the one who wants to oppose them to prove the contrary, namely to HJC.

[16] Item 77 of the paper 12813 of the Parliament of the Council of Europe published on 0/09/2012.

A few cases

1) "Performance" which represents the main axis of the review procedure is unreliable (see the critique of this method further in the text in this and following chapters). Dysfunctionality in the data collection system lead to the situation where a judge is attributed cases processed by other ones. This is what causes huge difficulties for a large number of non-appointed judges "objectants" to prove the truth.

AN OVERVIEW OF THE EVALUATION OF THE WORK OF JUDGES

The evaluation of the work of judges in Serbia usually implies numerical measuring of the results of their work in courts. Every court produces monthly statistics as well as the reports on the work of the court and all individual judges. These trimonthly, six-monthly and annual reports are delivered to the Ministry of Justice, directly to a higher court and to HJC.

There is no system taking into account the complexity of cases nor a reliable comparison between judges (this remark does not under any circumstances encourage the system of competition between judges, its only purpose being to prove the lack of the expediency of the evaluation procedure established for the purposes of deciding on a potential dismissal of a judge).

The data on courts and judges are analyzed neither in the context of all results of the court in question, nor in the context of the whole of courts in Serbia.

With regards to the ratio (the principle of which we strongly criticise in any case - see below) of first instance decisions which have been confirmed and those annulled, neither the number nor the percentage of decisions who have been the subject of appeal have been taken into consideration.

2) Example: the objectant has appeared on 06/28/2011 at the beginning of the procedure; on 07/22/2011 HJC decides on the deferral of the deliberation. On 10/06/2011 the appellant finds out that he hasn't been elected and the decision is delivered to him in writing on 02/08/2012. He discovers that his conduct from December of 2009 is held against him, when he appeared at the seat of HJC shocked by his dismissal and expressed his displeasure in a fit of rage. This was analyzed as a lack of composure making it impossible for him to perform his duties as a judge!

Apart from this, in this case (as, undoubtedly, in many others identical to it) the question arises with regards to the decision elaboration process: how was it possible for this decision to be written in February of 2012, after his appearance in June of 2011, while in the meantime two elective HJC members representing the judges were not on that position out of different reasons (judge Blagoje Jaksic was arrested on 09/23/2011 and released from prison on 03/07/2012, with the decision clearly being made in his absence, while judge Mirko Jaksic had resigned his position on 11/23/2011 prior to the drafting of the decision)?

We can see that HJC itself fails to respect the very criteria it imposes on the judges; there is no efficiency in the processing of cases, since the drafting of decisions takes 4 months, as well as the delivery of the same decisions to the interested parties!

3) The case of Dragana Boljevic

Beside the issue of "supplementary" information cited above, we should highlight another serious shortcoming related to the issue of quorum. Actually, while, taking all accounts into consideration, we can notice a certain contradiction between the provisions of the law (*the Council can hold a session only if at least six of its members are present - Article 14, Item 3 of the Law on HJC - Council decisions are made by the majority vote - Article 17, Item 1 of the Law on HJC* - excerpt from the opinion provided in the Saveljic ruling), we must consider that no less than six HJC members have to participate in voting. However, in the case of Dragana Boljevic, a member was exempt and two others were unable to actually vote (due to resignation and detention); besides, three members holding that position by virtue of their office and the representative of lawyers were unable to actually take part in the voting process, since they were in the composition of the HJC which had made the decision in December of 2009. So this decision was delivered either by a majority of members who were not impartial viewed through the lens of the jurisprudence of the European Court of Human Right, or only 4 members decided on the fate of Dragana Boljevic, thus failing to meet the quorum requirements.

Notwithstanding the 6 months deadline for the delivery of the decision! This once again confirms that HJC fails to apply its proper criteria in its work!

4) Two randomly sampled HJC decisions have been sent to translation and attached to the annex of this report (in French). The readers will be free to form their own opinions.

One decision demonstrates the uselessness of the numerical performance criterion and the other the disputable use of the term "worthiness". The individual decision on the last mentioned case has been delivered on 06/14/2010 under the circumstances cited above (in chapter 1), while this was not the case with the first one. In both cases the decision was made to "reject" the "objection".

In the second case, the appellant was charged of offences stemming from the irregularities in the work of the court, whose president the judge in question was, and with regards to a sensitive criminal case where the suspect was arrested after the expiry of the statue of limitations of criminal prosecution. This judge was not personally in charge of this case and his "negligence" was determined on the basis of his failure to ensure the timely processing of criminal cases, as the Court president, and it was accordingly assessed that he fails to meet the worthiness requirement and could not be re-appointed. The events held against him have largely occurred before the adoption of the Constitution, and in any case prior to the adoption of the Law on Judges. Besides, the "dismissal" procedure against him was initiated on 11/13/2007, and the competent disciplinary body at the time had determined that there were no reasons for his dismissal.

We are appalled to discover that "negligence" is attributed to a judge, without proving that the said judge has incited the escape and impunity of the perpetrator and without a previous disciplinary action for the same offences having taken place.

We are also clear that in this case the favourable opinion of the disciplinary commission has not been acknowledged.

We can say that similar irregularities could be found in the work of every European court as well as of any other in the world: among hundreds, even thousands ongoing cases those that should have priority are not always efficiently processed. If reasonable search for causes of such irregularities is acceptable, it is definitely not, generally speaking, a cause for dismissal due to "unworthiness".

4) THE RESULTS ARE CLEAR

R E S U L T S OF THE R E V I E W

OF THE FIRST HJC CONVOCATION DESISIONS FROM DECEMBER 2009 ON NON-REAPPOINTED JUDGES

S O L V E D

Out of 837 cases of non-appointed judges

07/20/2011 - 05/30/2012 In total 40 HJC sessions			**Part I – prior to suspension** **07/20/2011 – 12/08/2011** In 4.5 months - 16 HJC sessions			**Part II** **03/08/2012 - 05/30/2012** In less than 3 months - 24 sessions		
Resolved according to the HJC 31.5.2012 public announcement	Out of those, by positive ruling	% of positive	resolved	Out of those, by positive ruling	% of positive	resolved	Out of those, by positive ruling	% of positive
752	**109**	**13%**	336	83	**25%**	447	26	**6%**

1. **141** (17%) out of the total of 837 judges dismissed in December of 2009 have **proven that their mandate was illegally annulled in December of 2009**: 32 were re-appointed on the additional call announced on 07/21/2010, and 109 have succeeded in passing the review procedure (either by being re-appointed after the fact, or by their legal remedy being confirmed as grounded - in 11 cases where those judges had already retired)
2. **HJC has denied the objection by Dragana Boljevic, president of Judges' Association on the last day of the review.**
3. **Acting as a tribunal, HJC has worked in full composition only on the first** of 40 sessions and delivered only 11% (86) decisions in full composition.

4. **The trend of a drastic decrease in the number of positive decision: from 42%** on the first session (36 out of 86 resolved cases), **to 25%** in the period prior to the review suspension, **to 6%** in the last three months
5. **The number of positive decisions - 26** delivered during the second part of the review on a total of 24 sessions is**:**
   - **four times lower in comparison to the period prior to the suspension** (when 83 positive decision were delivered, i.e. 25%)
   - almost by **1/3 lower than the number of decisions made on** just **one, first** session, when 36 positive decisions were delivered.
6. **One case still remains unsolved**. **HJC has delivered only 309 decisions in writing** (out of the 752 delivered)
7. **162 out of 220 non-appointed deputies of public prosecutors participated in the review.** Out of 220 non-appointed prosecutors, **55 (25%) has proven that their mandate had been annulled without grounds:** were re-appointed on the additional call announced in July of 2010, and 29 (17%) have succeeded in passing the review procedure.

We should note that new jobs became available during the procedure, making it possible for specific non-appointed judges to return to their positions without going through the review.

Although the precise related figures remain unknown, we can consider that specific judges and prosecutors whose "objections" have been sustained are close to retirement: this should be verified..

5) FAILURE OF THE REVIEW PROCESS

Not only did the colleagues who were "dismissed" ("non-elected") under the “review” procedure remain deprived of their rights, but some of the basic principals failed to be observed, while the discretionary elimination of incumbent judges and prosecutors in 2009 was only marginally corrected.

OVERVIEW OF GENERALISED CRITICISMS

EUROPEAN ORGANISATIONS REPRESENTING JUDGES AND PROSECUTORS (NATIONAL AND INTERNATIONAL)

European Association of Judges (AEM) and International Association of Judges, the Dutch Association Judges for Judges, Association of Portuguese Judges, many other associations/trade union organisations of judges and prosecutors and, naturally, MEDEL, all of which closely followed the process, have expressed their critical views.

Consultative Council of European Judges (CCJE), using the term «re-election» in connection with the Serbian situation, has recently taken a firm position that we fully agree with.

An excerpt from the above CCJE report: Strasbourg, 18 January 2012

«*Situation report on the judiciary and judges in different member states*»

This report is a follow-up to complaints submitted to the CCJE concerning some infringements of standards governing the status of judges, as identified in member states.

The present report was adopted by the CCJE during its 12th plenary meeting (7-9 November 2011).

It has been submitted to the Committee of Ministers for information on 18 January 2012 (1131st meeting) and will be reviewed regularly by the CCJE» (…)

« 6. The judiciary represents one of the pillars of the rule of law and democracy. In view of its importance for all citizens, justice cannot be subjected, in whatever country, to constant changes, in particular where these are the result of undue pressure and are aimed at subjecting judicial institutions to the executive, rather than the result of a concern for improving the efficiency and quality of justice.

7. Independence of courts and, consequently, independence of individual judges stems from Article 6 of the ECHR; it does not represent an abstract legal notion, and should be enshrined not only in legislation but also in practice.

III. Applying principles to the submitted facts

A. Infringement of the status, independence and security of tenure for judges

8. A corollary of independence is security of tenure for judges and their appointment until the statutory age of retirement. This implies that a judge's tenure cannot be terminated other than for health reasons or as a result of disciplinary proceedings – CCJE Opinion No. 1.

9. The election of judges, although it is not a widespread practice in Europe, must, in the states that have opted for this method of appointment, be resorted to with caution and without jeopardising the principle of independence.

10. Using the mechanism of re-election to remove a judge from office is against these principles. »

Position of non-governmental organizations and civil society representatives that we met in Serbia

They stressed their wish for the judicial institution in Serbia to be restored so as to ensure the establishment of the third power that would be composed of judges with strong legitimacy. However, according to these interlocutors, the reforms that have been carried out since 2009 failed to fulfil this democratic goal; quite the opposite.

6) FEAR AMONG JUDGES

Therefore, critical views of the brutal process of "non-election/dismissals" are prevailing, which has been merely superficially corrected with the review procedure.

The violation of the rule of law has taken such proportions that the procedure has raised a feeling of intimidation among judges, which is irreconcilable with their independence.

Lack of certainty for tenures of judges and prosecutors has resulted in real lack of security.

Uncertainty has become a principle:

- Through appointment of judges for a tentative period and the “review” of election of judges who were elected for a permanent tenure in December 2009 or for the first three-year term, jeopardizing the permanence of judicial tenure;

- We express regret for the facts that court presidents have not been appointed – although these appointments are long overdue – and that currently these offices are filled by «acting presidents», whereby they are put in an uncertain position, too.[17] This also violates the independence of court presidents.

We met with a great number of Serbian judges and prosecutors and can say that almost all in their ranks seem to be fearful. They are deeply concerned for their future, which they see as unstable. They feel threatened deep inside their hearts and with respect to the duty they are discharging; in view of all they have been through and what they are still going through, they feel that justice has become pointless; in a nutshell, they are feeling all the consequences of the violation of the principles of permanence of tenure and independence.

We can also say that this analysis is based on the statements of the persons we met with.

We also need to express regret for the suicide of our colleague Slobodan FANCIKIC, which had taken place a short while before the Constitutional Court considered his appeal.

III – PROBLEMATIC JUDICIAL COUNCIL

1) DUAL ILLEGITIMACY OF THE JUDICIAL COUNCILS

First, it should be stressed that this consideration does not bring into question persons but rather the institution's organization and, especially, the membership appointment method.

The work of judicial councils was analysed within the general election process and the review of this process.

The issue of judicial councils' legitimacy has arisen due to the fact that the judicial councils were main actors throughout the process.

It should be noted that the same issue arises in connection with many judicial councils in Europe.

The membership appointment method used for the first judicial council (here the term "judicial council" applies, *mutatis mutandis*, to the High Judicial Council and State Prosecutorial Council) and the second judicial council was such that it did not enable the councils to establish their legitimacy.

Without dwelling on an intervention by the National Parliament - which could be criticized - in the appointment of council members, which, to say the least, has the right to veto proposed appointments (a lawyer, a law professor and judges), one feels compelled to take into particular consideration the procedure for the appointment of judges' representatives.

The names of judges to be in the first composition of the HJC, which implemented the 2009 reform that is the cause of our concern, were proposed to the National Parliament by the Judicial Council (a joint body established under the 2001 law). Thus, six judges were *de facto* selected in advance to be elected as judges, without having to undergo the same procedure as their colleagues who had already been in office; therefore, these judges were appointed owing to

[17] They could also lack sufficient experience or competence.

the institution which was factitiously kept alive only for that purpose. This seems paradoxical in a process where the judges' «tenures» were believed to automatically terminated, and rightfully so, with the coming into force of the new Constitution. According to the same rule, the tenures of the then members of the judicial councils should have terminated as well. It would have been acceptable for this Council to survive only to «manage the current business» until the establishment of a new Council under a regular procedure. The things are completely different when it comes to the process of election/dismissal of judges which does not fall into this category. Even greater illegitimacy of that body is reflected in the fact that judges who were its members were accorded preferential treatment as they did not have to undergo election procedure; that is why we cannot deem them to be representatives of a judicial body, and the situation did not improve at all when they were elected by the National Parliament at a later date. On the contrary!

In addition, as far as the review procedure is concerned, without going into an analysis of the election method, it should be noted that the collective body was composed of «elected» judges who were beneficiaries of a system that had been put in place and who should have been entrusted with the task of making corrections in the system, if any. Such a body, essentially, should represent the interests of its electorate. This was not the case, however, and the "anointment" by the National Parliament did not help. We can see the extent of a mistake that was made by putting into place a system which resulted in dismissals, while the legitimacy of the body designated for that purpose was absolutely unfounded. This, certainly, comes in addition to other shortcomings stated in this report.

2) MEETING WITH THE HIGH JUDICIAL COUNCIL

We want to talk about this meeting because it was a very important point in our mission and, indeed, because the members of the High Judicial Council[18] wanted to present their position – which they are perfectly entitled to – about the media reports following our press conference referred to in the introduction to this report. (See annexes)

In response to our questions, we were told that the quality and efficiency of judiciary were in the focus of the reform; shorter times to disposition of cases and removal of judges who were not capable of meeting deadlines were needed. By way of example, an extreme case was presented of a colleague who was so much lagging behind in disposing cases that, according to the story, it was obvious that he should have been subjected to disciplinary proceedings.

Changing of the Constitution, referred to in the text above, was cited as an argument in corroboration of the necessity to have new elections, in line with the position of the Constitutional Court.

Furthermore, in response to our question about the reasons for issuing the decisions on non-appointment without explanations, we were told that the law did not provide for rationales and that there was no legal obligation to state reasons for the fact that a person had not been selected for a position they had applied for. When the legal situation in Germany - which is different - was mentioned, it was pointed out that in most countries a decision not to hire a person for a position in public administration did not include statement of reasons. It should be noted that the HJC expressed this position on the absence of rationales in April of 2012, whereas the Constitutional Court formally rejected it in its decision in "Saveljic" case in May of 2010 (see above).

Even if we could say that our impression was that the HJC was «committed» to the reform, it certainly does not mean that the HJC expressly approves of all the elements of the reform with all the methods which are subject to

[18] We met only with representatives of judges, but no one who is member by virtue of the office they hold.

our criticism in this report. Here again, it is the overall effect of the system that has led to the above analysis, as the HJC is a result of the system that, under the circumstances, the HJC cannot detach from.

3) PECULIAR ATMOSPHERE

It should also be noted that a series of incidents seriously disrupted the work of the HJC, creating peculiar atmosphere:

Odd events

As stated above, a judge who is a member of the HJC was apprehended on 23 September 2011 and kept in detention until March 7, 2012; the crimes – which he denies – (we met up with him) he is prosecuted for are from 2003; currently, he is «suspended» from the position of a HJC member, the case is pending and the court will adjudicate. As a matter of fact, let us mention that before his detention, his wife, who is a deputy public prosecutor, was transferred to other prosecutor's office, so that now she commutes more than 105km to get to work.

Also, as referred to above, on 23 November 2011, another judge decided he had to resign from the High Judicial Council due to pressures he was exposed to and the omissions by the HJC with respect to the principles of the procedure he identified despite the efforts he had made to ensure that the principles be observed. (We had a meeting with this colleague, too).

His was replaced by another judge who was elected by the National Parliament as late as February 27, 2012.

When he assumed his judicial office again, he was not deployed to the Anti-Organised Crime Department where he had worked before and, as a consequence, his salary was cut by half. We cannot help wondering how it is possible that salaries differ so much in one and the same court and how it is possible that deployment/re-deployment is decided by a court president (who is actually «acting president»), and how it relates to the independence of judges and whether it infringes on their independence.

However, these two judges (of the 6 elected) were evidently identified as judges who wanted to observe the principles of the review procedure, whereby a great number of judges could be reappointed; the percentages of reappointed judges, which were much higher in the beginning of the review process, testify to that.

Finally, members who are not judges are a lawyer (see above) and a university professor; Predrag Dimitrijevic was appointed on July 27, 2010; being the dean of the state university, he was required by the Serbian legislation to approach the Serbian Anti-Corruption Agency[19] on account of accumulating public offices; immediately after the appointment, he was supposed to ask for their permission, which would have been given without fail (as stressed by the director of the Agency during our meeting), but the ensuing show of strength prevented him for a while from participating in the work of the HJC; finally, the National Parliament, which has the final say (as it appoints the HJC members), did not recall this university representative from the High Judicial Council; so much wasted time … due to an oversight in formalities which could not hurt anyone! That's the point we would like to emphasize.

[19] Anti-Corruption Agency – which should be distinguished from the Anti-Corruption Council – deemed that the dean (from the legal point of view) was a "manager" due to the fact that he discharged managerial duties of a public official; this was an explanation we got in reply to our questions about the cause of the problem; we are of the opinion that the position of a law-school dean is primarily academic by nature, hence our astonishment at the problem.

Rule of technical and ethical complexity: quorum and impartiality

In the text above we have already mentioned a problematic issue of quorum. Following all the events that shook the HJC, which had a sensitive task to carry out, a complex situation has ensued due to technical and ethical issues in the decision-making process. The combination of two elements, quorum and impartiality, requires particular attention as one is led to conclude, following consideration of the decisions passed by the HJC, that the question put to vote was the following: Should we redress the complaint? The reduced number of votes due to abstention or unavailability of a member (or members) of the HJC had an adverse effect on non-elected judges. The situation would have been different had the following question been put to vote: Does the evidence contain elements that enable one to challenge the presumption of «qualification, competence and worthiness»? The problematic nature of these questions gains even more importance in the view of the fact that a new criterion of «lack of diligence» was introduced for prosecutors.

The issue of voting and its effects on the impartiality of a body becomes even more pertinent if one knows that deliberations were attended by members who had taken part in the making of contested decisions and who did not remain silent; they finally abstained from voting, but the voting itself was not secret (see above) and minutes were kept of deliberations and voting.[20] Theoretically, the purpose of this practice – although we cannot hide our amazement at it – is, among other things, to enable the high court to familiarize itself with the minutes, should some difficulties arise in connection with an issue that could be resolved by reading the minutes.

[20] Excerpt from the letter of the HJC dated 12 December 2012, as referred to above: *"In reference to your request to provide information about the majority the decisions were taken by (how many members voted for the decisions), please be advised that this information is included in the minutes of deliberation and voting. In our letter number 7-00-136/2011-01 of 27 October 2011 we informed you that it was the chairperson of the Council who scheduled the sessions to deliberate about and vote on complaints filed by judges who were dismissed on 31 December 2009, in keeping with Article 26 of the Rules on the Implementation of the Resolution Setting Criteria and Measures for the Assesment of Qualification, Competence, and Worthiness and on the Procedure for the Review of the Decisions to Terminate Judges Taken by the First Composition of the Hight Court Council (Official Gazette of the RoS, no. 35/11 and 90/11). Minutes are kept of the deliberation and voting sessions. As the minutes of deliberation and voting in a court case may be viewed by a court which decides on the legal remedy, then in the procedure for the review of the decisions taken by the first composition of the High Court Council, the said minutes may be viewed by the Constitutional Court in deciding on the appeals on the decisions of the standing composition of the High Court Council taken under the complaints procedure."*

CONCLUSION

BUT WHY DID SERBIA DISMISS ITS JUDGES?

We are obsessed with a question which does not give us rest: but why did Serbia dismiss a large number of its judges? We have not ruled out **the burden of the new history**. Besides, many of our interlocutors mentioned the past.

We have also thought about **the economic situation in Serbia** because in many countries, the crisis is quoted as a justification for the abolition of positions in state administration.

Strange enough, the Commissioner for Information of Public Importance was the only one to mention the economic reasons when speaking about the hypothesis of all dismissed judges being reinstated; on that occasion, he emphasized the financial costs of these measures and said that on the basis of the law from the end of 2010, dismissed judges received their salaries until a decision on the dismissal of objections by the High Judicial Council was adopted, whereas a complaint before the Constitution Court did not stall execution. As far as we are concerned, we could not obtain sufficiently reliable information about the financial balance of the reform; some believe that at the moment, it is expensive for the state. It is certainly expensive for all addressing the courts, given that the fees providing for access to the court are higher and that distances to be covered to reach the courts are greater. In any case, the economic situation in Serbia is certainly very disturbing.

This economic reason was not even mentioned in our talks with the Parilament Speaker who, at the time, was the acting head of state. To her mind, it was in the context of the need for incorporating European standards into Serbian legislation and ensuring greater efficiency and expertise in the judiciary sphere. According to her, by no means was it an attempt at reducing the influence of the judiciary or dealing with officers of judiciary bodies.

In the eyes of the European Union, two main objectives included "lustration[21]" and an attempt at achieving **greater efficiency** of the judiciary in the context of establishing **the rule of law**.

We now know that none of these obejctives have been achieved.

None of the persons we spoke to opposed the judiciary reform principle itself. It is reasonable to believe that the values which such a perspective and priorities of such a reform are based on should be established.

In the historical context of Serbia, the primary goal is the establishment of the rule of law.

[21] The term lustration [the term derives from Latin: Roman censors were public cleansers who performed the rite of lustration of the Roman people so that gods could forget individual sins (The Amorous Dictionary of Antique Rome by Plon Xavier Darcos)] is an expression introduced after the fall of the Berlin wall and denotes an administrative or judicial procedure which provides for a dismissal of an official of the state administration who was found to have participated in the violation of fundamental rights under the earlier regime; lustration was particularly conducted in Poland.

However, with the implementation of the reform in Serbia, the judicial system has sustained a series of blows which profoundly undermined the foundations of the rule of law and brought judges and prosecutors in an unstable position.

The Serbian society is well-aware of that. Thus, the Anti-Corruption Council pointed out that judiciary reform was expected in order to ensure formally established freedoms. Unfortunately, the reform that was implemented is not the key reform in Serbia. The situation is worse than before. The representatives of the body raised much criticism which is included in the Council's report delivered on April 23, 2012 and published on May 7 of the same year (see annexes) which sets out a very strict assessment of the procedure for the election of judges and prosecutors leading to the removal of a large number of judges and prosecutors from their offices, and which labelled "*the members of the High Judicial Council who took part in it as incompetent, inconscientious and unworthy.*"

It should be stressed that the corruption issue is in the focus of civil society and we shall not disregard it when discussing judicial reform.

In that respect, it is interesting to mention the minutes from a meeting with the rapporteurs of the Venetian Commission of February 21, 2008 (CDL-AD(2009)023). In the course of the meeting, the rapporteurs said they feared the re-election of existing judges could lead to a possible termination of the office of judges who committed no criminal offence (fear as premonition!). As representatives of the Serbian state explained, the corruption issue was raised with respect to certain judges who had been appointed during the former regime. In that regard, the rapporteurs assessed the proposed reform as inadequate. We are well-aware that the viewpoints of that commission of the Council of Europe are founded and that they corroborate our report as well.

Nobody referred to the dismissal of corrupt judges and prosecutors as the true reason for reform of election/dismissal and it seems that in decisions on "review" it is not a frequent reason or that it does not exist at all.

Just as in the case of lustration, calls for fight against corruption were only for international use.

In fact, practically everybody speaks of corruption without clearly describing that evil in the judicial sphere. If corruption is discussed in that context, we do not know at all whether at issue is suspected corruption within judicial bodies or the manner in which the judiciary treats (or deals with) corruption-related cases.

It seemed important to us not to shed light on this issue nevertheless, as we believed that it is impossible for a single institution, particularly judicial, to be the sole stronghold of corruption. This is a necessary evil which overwhelms many institutions and the society as a whole.

"The Anti-Corruption Council" pointed out that the number of filings forwarded to it had almost doubled since the launch of the reform. At the moment, it should be said that the complaints or actions taken by citizens invoking "corruption" do not necessarily reveal that the phenomenon does exist, but rather reflect the lack of confidence in the judicial system. Lost lawsuits are often perceived or deplored as a result of «the judge's corrupt actions» without seeking other causes, particularly those of legal nature. According to UNPD statistics, 83% of the Serbs have no confidence in the judicial system, particularly when it comes to the fight against corruption.

By all means, we have to quote part of the Council's report on this issue: *«The perception of corruption in the judicial system. The UNDP conducted a research into citizens' perception of the level of corruption in Serbia and their experiences with corruption. Comparing the findings of the corruption survey conducted in November of 2011 to that carried out in 2009 and March and October of 2010 respectively, it can be concluded that the perception of corruption in judicial bodies deteriorated. The opinion that the judiciary is too corrupt to deal with corruption is now*

more prominent given that in October of 2009, 79% of the respondents believed so; in March of 2010, 81% was of that opinion; in October of 2010 80% and in November of 2011 83% of the respondents believed so respectively. As for the institutions in which corruption is the most rampant, judges rank third, lagging behind political parties and health care»

This issue will be raised at a conference organized in Belgrade on June 29, 2012 where we will present the key aspects of our analyses and proposals.

Finally, we have just learnt that the judicial councils will continue the "review" applying the provisions of the law adopted in December of 2010 and that a new election of the provisionally elected judges will be made. All of this will take place after the completion of the procedure during which somewhat less than one-third of the judges and prosecutors who performed that duty in 2009 had been eliminated.

Prolonged uncertainty after a general wave of intimidation undermines the foundations of the independent judiciary and the judicial function, and the basic principles of democracy.

- ⇨ **Regardless of the reasons for the dismissal process we are addressing in this report, it is unacceptable in terms of the principles of the rule of law.**

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OUR PROPOSALS

Our proposals are part of our expert mission and are not final, but rather represent the point of departure for finding solutions in the elaboration of which we are prepared to participate, if required. We are guided by the idea that we should emerge from the crisis which affects the independence and composure of the judiciary in Serbia, seriously disturbed by the disastrous implementation of the reform, «from top/top-down, and swiftly so. The conclusion of failure is implied, as is demonstrated by the diagnosis which we provided and which conforms to the diagnosis of numerous national and international observers; also called for is the formulation of proposals, although we are well-aware of the complexity of changes.

PREAMBLE

The purpose of our proposals: the introduction of double confidence

It is important that double confidence be established in Serbia, which is necessary for the sake of sound functioning of the democratic judicial system:

In that respect, we shall quote Guy Canivet, first honorary president of the Court of Cassation in France and the incumbent member of the Constitutional Council. He said the following was necessary:

" - *citizens' trust: in order to accept a court's decision, it is necessary to believe in the moral authority, humanity, independence and objectivity of the institution rendering the decision. In the absence of the foregoing, justice loses all legitimacy, all trust and the sanctions it pronounces are perceived as unjust and arbitrary*; » and in that respect, we shall add that taking into consideration the situation in Serbia, if such confidence is missing, a citizen and a party to the proceedings ascribe a court's decision or reversal of the first instance judgment to an obscure influence, or even corruption. More specifically, the first aspect of Guy Canivet's thought is in line with Article 92 of Germany's Basic Law (Constitution): "*Judges are entrusted with the power to administer justice"*. This thought reflects the establishment of a European judicial culture.

"- *the confidence judges have in themselves and the task they are to carry out, the pride with which they perform their duty, professional honour, everything that boosts their efforts in performing their duty. To be able to administer justice, we should believe in what we do and be confident of the purpose of the institution we serve – that it is adequate, that it uses the relevant means, that if functions in the best possible manner, that it strives, to the highest possible extent, to the truth and equity and finally, that a personal activity we pursue under its aegis is affirmed by a socially-recognized goal. »* In that regard, we should set out all factors which constitute a background against which Serbian judges and prosecutors work and which prevents such confidence: a disorganized judicial system after the reform of the judicial network, intimidation, whose victims they are, obsession with statistics and burden of the workload… so many situations experienced which deter them from thinking of their social role recalled by Guy Canivet and which hinder the necessary trust in their task so well described by G. Canivet.

Of course, this double confidence primarily rests on independence and the request constitutes the basis of the necessary reorganization.

Multiple recipients of our proposals

It is clear that the legal system established in the framework of the general election of judges did not operate in accordance with the rule of law. One should act concretely in order to finally open up the prospects for a democratic judicial system in Serbia. We believe that the complexity of the problem calls for the involvement of all – citizens, non-governmental organizations and other members of the Serbian civil society, responsible politicians of the country, the organization of the judiciary (judges, prosecutors, judicial officers…) and the international community in its intergovernmental and non-governmental aspects…

It should be said and repeated that Serbia has able jurists and that their expertise and the expertise of non-governmental organizations dealing with human right issues and the operation of society, may serve as the backbone of that dynamics which is to be kick-started.

As for the European Union, it was too easy to ascribe to political power the negative consequences of such reform! While respecting political neutrality which we defined as our obligation, we do not pin the responsibility for this extremely serious situation on this or that political group, but on the system itself; likewise, we do not have a decisive opinion as to the competence of this or that political party to boost the positive development of such events. All this concerns the whole Serbian nation.

FOCUSING ON ESSENCE AND URGENCY OF SOLUTION

We clearly say that the criticism of this reform and a massive non-election of judges and prosecutors are based on the democratic principles of the rule of law, advocated by the EU, relying on the powerful aspirations of the Serbian civil society. Serbia's EU candidate status will be able further to develop only if the confidence in judicial power and its independence and objectivity are established in this country. In that respect, the EU is interested in the developments and we believe it is high time a concrete solution were reached without resorting to yet another «x x» review. It is in this perspective that we wish, absolutely modestly, to make our contribution to the creation of such a solution.

As far as trade unions, associations and other organizations in Serbia and, generally speaking its active forces, are concerned, we completely honour the freedom of giving proposals (either joining our proposals or complementing our proposals or contributing, with their constructive opposition, to a fruitful result) and actions.

PROPOSALS

I- <u>Full review of the judicial reform process conducted since 2009</u>

In that respect, given the extensive nature of the task, it is important to set out the priorities.

⇨ **The first priority is to provide a concrete, efficient and worthy answer about the fate of our colleagues who have not been finally elected following the decisions by the High Judicial Council and the State Prosecutorial Council.**

We believe that the outcome of the legal process is destined to failure or, to say the least of it, the likelihood of fresh disappointments is too high for new risks to be assumed.

It is enough to recall the inability of the Constitutional Court to confront appeals filed to it against the decision delivered on December 25, 2009. Accepting the fact that a legal remedy may be re-filed to the Constitutional Court and without re-emphasizign the evident lack of objectivity of some of its members, we must acknowledge that the decision-making procedure of the Constitutional Court does not allow us to hope for any efficient solution. If, on one hand, as we were explained during our talks with representatives of this high court instance, the Constitution Court does not intend to announce pilot decisions, and if it is going to nullify the decisions of the High Judicial Council, returning them to the HJC for re-deliberation, on the other, the appeals procedure may take forever. Namely, if we take the example of the French system, then we will find ourselves before the Court of Cassation and the return of the case is theoretically a never-ending process. All of this gives us no reason to hope that something good will emerge in the light of the disastrous experience of the review process.

1) Abolishing the necessity of election (re-election) of the judges who performed the judge's duty in July 2009

The Parliament may repeal the laws based on which the application of the poor principle of general election was decided; in this manner, it would correct its past mistake.

The current situation, which was created under the influence of the formerly effective laws, should be considered in the light of the fact that the previous state cannot be restored, particularly without bringing into question the election of judges and prosecutors elected for a trial term of office. Injustice is not undone by doing another injustice. In accordance with the same logic, the election of these judges should be permanent (see additional data on this issue below). As for judges who were dismissed and who do not wish to be reinstated, an rehabilitation procedure should be organised, or at least, if they wished so, a symbolical satisfaction. Naturally, later on it will be

necessary to assign judges and prosecutors to courts to which they are to return; truth be told, certain positions were abolished due to the reform of the judicial network.

If some of these judges and prosecutors were suspected of disciplinary omissions in the past, the issue should be resolved by disciplinary instances in accordance with general law (the system which is now being introduced – at least for judges – given that, to all intents and purposes, it is not the case in the office of the prosecutor – and whose purposefulness should be reviewed). In that respect, it would not be unusual if disciplinary procedures, conducted in 2009, resumed in relation to the newly-elected judges who are to be reinstated, provided that the disciplinary procedure is purposeful (see the previous text in brackets).

Besides, pursuant to the applicable laws, certain judges and prosecutors who performed the duty in the past should be subject to “review”. That obligation which transforms "uncertainty" into a system among judges and prosecutors, particularly among the former, must be fully invalidated. It is absolutely pointless. This is resolved by simply adopting a single provision.

The Serbian Parliament should fulfil its obligations concerning the invalidation of the election of judges who performed the duty of a judge in July of 2009 (re-election).

We are aware of the fact that this recommendation is both ideal and uncertain. Therefore, we propose another subsidiary possibility directed towards the mediation process and only for the purpose of avoiding fresh deterioration of the situation at the expense of the rule of law and the condition of the relevant persons.

For this new guideline, we took into account, among other things, the information that we have obtained: only about one-half of the dismissed judges and prosecutors expressed their wish to be reinstated, while the other half, this way or other way, opted for other duties and they would be satisfied with the symbolical restoration of their compromised reputation.

2) Subsidiary, mediation process (as a further alternative)

The establishment of this procedure would encompass another two measures: **the possibility of early retirement and introduction of a more efficient legal instrument before the Constitutional Court.**

A] Scheme of the framework of such new procedure that is recommendable:

The following terms are defined further below: the body that is to be in charge of mediation, parties, the procedure and regulatory support:

a) the body in charge of mediation: **the collegium of persons**, where each party shall elect one person and the two persons such appointed shall agree on the election of the third person. It is specified that each member of the collegium should have his/her deputy in case such member is not able to perform his/her duties (various inconveniences, disease, etc. or in case of resigning from the position …)

b) Parties:

b-1)* the representative of the National Parliament (newly elected); it is legitimate, on one hand, because the judges and prosecutors in Serbia have been "elected" and, one the other hand, because the reason for the present situation that needs to be resolved is the disputed, conducted reform, which was approved by the Assembly and which led to the violation of basic principles;

b-2)* the representative of the Judges' Association of Serbia and the representative of the Prosecutors' Association of Serbia (depending on the case subject to consideration) ; each party would represent the interests of either the judges or the prosecutors and, at this point, we want to underline that the associations concerned are autonomous, which is contrary to the system applied in other countries, and that the intention of the associations of such type is, among other things, to protect the common interests of the profession they represent ;

c)- procedure :

c-1)*the judges and prosecutors, who wish that their cases be presented in the process of mediation should inform the **body in charge of mediation** thereof**,** which would temporarily terminate the appellate proceedings under way and suspend their limitations periods (in compliance with the common rules governing mediation procedures).

c-2)*They would be heard by the **body in charge of mediation if it is deemed necessary and/or at the request of the applicant**. In this respect, the associations should meet the interested persons in order that they could be their spokespersons;

c-3)* the request submitted to the mediation instance could be:

¤ any request for resuming the office with possible negotiations about the assignment to a specific work post

¤ any request for early retirement (see B)

¤ any request for regaining the "lost reputation", which would be published in the Official Herald (along with the pecuniary compensation that could be only symbolic)

d) mediation:

d-1)* the body in charge of mediation would be entitled to have full access to any documents as it may deem useful

d-2)*mediation: owing to the amicable role of the mediation body, "the parties" would negotiate on how to further resolve the requests made by the judges and prosecutors as «applicants», and such requests could be altered during the mediation depending on the status of negotiations (which is characteristic for each mediation).

d-3)* In case the mediation process fails, other procedures, if any, would continue.

e)- Regulatory support:

*this process would be established under **the law.**

⇨ **WE INSIST THAT THE MEDIATION PROPOSAL SHOULD HAVE A PURELY SUBSIDIARY CHARACTER**

B] **The early retirement on a voluntary basis** should be approved**.** In order to establish the effect of such proposal, it is necessary to know the demographic profile of the judges and prosecutors, also including the dismissed judges and prosecutors who wish to return to the courts.

C] due to the inefficiency of appeal instituted before the **Constitutional Court,** it is proposed to **modify its judicial effect** by qualifying this legal instrument as an operative «appeal» (as defined above), which would make it possible for a case to be reconsidered in full regarding both the formal procedure and the very context. Thus, there would be no further orders for sending back the cases to the HJC. In order to facilitate the operation of the Constitutional Court– and we know about its big caseload – it is suggested to introduce the procedure known as «*amicus curiae*» that would apply to this dispute. Besides, there are doubts that some of its members are obviously not impartial (based on the court practice of the European Court of Human Rights), due to the fact pointing to direct links with the

said reform[22], since they were appointed by the Supreme Cassation Court; it is important to find the solution with respect to the composition of the court when passing judgements in this type of cases. In our opinion, this should not happen frequently thanks to the establishment of the mediation process. If the Serbian Constitution could not provide for a full jurisdiction of the Constitutional Court, there would be no other solution except for the establishment of an « ad hoc » instance with the composition to be agreed by way of consensus.

3) Envisaging the structural change of institutions

Further on, since the institutions (the HJC, the State Prosecutorial Council and even the Constitutional Court) were part of this issue, it is necessary to think about the prospects for their structural change (the HJC as a priority), primarily with the aim of breaking the connections between these bodies and the political authorities. It is an illusion to believe that a change of their members would be sufficient for success in such efforts. Anyway, according to our opinion, and with due observation of the principles that we apply, it is not about terminating the terms of office of the members of the judicial councils, except in the case of consensus. We feel that the adverse effects of the system must be addressed. In view of the difficulties in the operation of the HJC, we insist, should a new reform of judicial councils be conducted, that it is absolutely necessary to appoint **their deputy members.**

Such institutional change would certainly lead to the contemplations regarding the method of appointment of judges and prosecutors that would help avoid the repetition of past mistakes. The HJC should not be recognized as a body which would overpower the judges, but rather as a body in the service of justice which is capable of hearing the voice of all judges and prosecutors.

II- Introducing a comprehensive programme for initial and continued professional training of the judges and prosecutors facing the wide scale changes in the Serbian legislation.

As for this task, it is desirable to organize numerous exchanges within Europe so that the Serbian professsionals could meet (especially through practice) their peers from other European countries and vice versa. In that respect, it would be useful to organize the lessons in European languages (not only the English language).

Continuous education as a mandatory condition should be organized, on a priority basis, for the judges and prosecutors appointed on a temporary basis, whom we naturally wish to be appointed on a permanent basis, and for all newly appointed judges and prosecutors.

III- Performing a review of the efficiency of the Serbian system of justice and its current organization in agreement with all relevant bodies in judiciary – with regards to both the territorial (judicial network) and internal (the operation of courts) organization. As regards the latter, the Serbian system of justice should be organized in the manner so as to provide for more efficient peer system on the model of, for example, the German « praesidium » or the similar Spanish model.

In that context, for the purpose of ensuring a better court operation, it is necessary that the presidents of the courts should be finally appointed.

Finally, there are good grounds for initiating a process, in line with the actual social dialogue system, which would make it possible for the judges and prosecutors to adequately and competently deal with all court-related matters

[22] It should be clearly indicated that the entire composition of the Constituional Court is subject to the reform and that we can reconfirm the assessment of the European Council Parliament provided early this year (as set out above), « *the composition of the Constitutional Court remains political*». The standing composition of this Court include 15 judges appointed for a nine-year term of office with the possibilty of renewal, of whom five judges were appointed by the parliament, five were appointed by the President of the Republic and five by the general assembly of the Supreme Court.

generally addressed in a court (civil proceedings, criminal law, family law, etc.). To that end, it is necessary to organize comprehensive and general education as part of the initial and continued education; yet, this would not exclude specialist trainings. Namely, every judge and prosecutor must be capable of providing their own contribution for the purpose of ensuring a proper and efficient operation of the court. All these requirements should be implemented in practice based on the above mentioned peer instances.

IV- <u>The procedure of evaluation of the judges and prosecutors should be completely reviewed</u> by breaking the genetic link between the evaluation and the statistics (to abolish the cult of "performance") and to remove from them the ratio related to the confirmation or annulment of decisions. It is a paradox - to accept this as a reference in a country where a dissenting opinion is possible (which is good).

A wider debate should be launched concerning the « autonomy and responsibility of the judges and prosecutors» in order to analyze the key issues of a democratic judicial system; the cult of performance [23] actually results in distortion of both the essence of justice and responsibility of the judges and prosecutors. The purely managerial approach that is ascribed to the judicial system does not meet the expectations of the citizens, which are reflected in two requirements: a reasonable deadline in deciding the cases[24] and, particularly, *the right* response of justice.

V- <u>A wider debate is to be launched between the expert community and the civil society, within the lines of the measures to be adopted by all relevant parties, related to the Serbian legal system with a triple objective</u>:

1. To raise awareness of the creative and normative function of justice, highlighting the importance of law interpretation function. It is requisite to inspire a debate on the method of applying the laws in order for the law to evolve and, in case various solutions for addressing a legal issue are proposed, to say which one is good; so, a restated decision– except in case the judge has really made a mistake – is the result of a sound operation of the court system and, finally, the annulment of a decision does not mean that the judge is to receive a low rating. This law debate is more than ever necessary for a society in which political authorities strongly tend to instrumentalize justice and, in any case, put the society at risk of following this path all the time, regardless of the verbalized intentions (which is the case in many other countries, even in «old democracies»)

2. The Law should be adjusted to the Serbian society and should not depend on various inputs coming from abroad. The « borrowings »coming from other countries must be used in the manner so as the Serbian society could adopt all such imported laws with necessary modifications in order that this society could efficiently incorporate them in its judicial culture.

3. A set of new regulations should be prepared envisaging their possible adverse effects relative to the judicial demands and justice for all the citizens. In this respect, the critical opinion of the Anti-Corruption Council seems to be quite appropriate, particularly with respect to the role of the judge attempting to establish the facts. The same also applies to the criminal proceedings and introduction of the accusation model for the criminal proceedings

[23] In June 2011, MEDEL organized a seminar at Bordeaux, France, in the National Judicial Academy (Ecole Nationale de la Magistrature) with the topic titled « *Justice in the Era of Performance*». The purpose of this seminar was to analyize the consequences of the "new public management" and general application of the mechanisms used as the means of management such as: performance, evaluation, results …
After the exchange of opinions and based on the presentations made, a conclusion was reached that the judicial systems in all countries faced the organizational logics that place focus on «the productivity» and efficiency. It seems that such managerial influence undermines the autonomy of judicial systems in many countries.

[24] In other words, neither prompt, nor too lengthy, i.e. the deadline that would definitely correspond to the necessity of serenity of justice and reasonable complexity of the case.

(*accusatoire*) ; as for this issue, the study of Milan Skulic and Goran Ilic represents a solid basis for further contemplation.

VI- the establishment of a «reform council» should be envisaged – this council should be an independent body which would provide support to the reforms keeping distance from the political structures, and which will be capable of proposing amendments or adjustments to such reforms.

VII- A solution should be found for the further destiny of the judges and prosecutors appointed for the first time (three year term)

Following our talks with the lawyers, we heard some criticisms on account of the competence of these judges. As far as we are concerned, we have not met these colleagues and we restrain from giving any opinion. We would just like to underline that it is important that they be fairly treated. The evaluation of their performance that should have been made on an annual level was not made public. Their terms of office are about to expire and it should not be reasonable at all to have them suffering due to the shortcomings of the system. On expiry of their temporary mandate, they should be automatically appointed to permanent positions with the access to "continuous education", on a priority basis.

This is only a short-term solution.

⇨ **We deem that this method of appointment should be abolished.**

Being aware of the fact that there is a legitimate fear of the risk that the appointment might not be adequately conducted, we propose the following way of thinking:

It would be recommendable to introduce initial education by setting up a "Judicial Academy (Ecole de la Magistrature)" (postgraduate studies with the qualification exam) instead of appointing a judge for a trial term; therefore, the future judges and prosecutors would have the status of a "judge –student", while the lessons would encompass both the theory and practice in the courts. On completion of such "education", the judges-students would, depending of the results they achieve, be appointed or not appointed judges on a permanent basis, with all the rights and obligations related to this position. Although other democratic countries, theoretically, have the systems that are very similar to the existing Serbian system (such as Germany), the system established in Serbia cannot last for a long period of time due to the overall impairment of the institution of court and overwhelming fear of the judges, particularly the fear of being dismissed.

In that respect, it is necessary to set the goals for the appointment of judges and prosecutors. It is important that the appointment of judges be conducted in accordance with the terms of election procedure that will exclusively be based on the competence criteria; it is useful to encourage social diversity and pluralism of cultural expressions and philosophical attitudes of future judges, which is, among other things, a very significant goal.

The professional training of judges is not just any training.

There is no «wonder-working» method that would help "make" perfectly qualified judges. In all countries there are gaps in the operation of the judicial system and there is a constant risk of having such gaps (while best possible measures should be taken in order to avoid them). Besides, such gaps are not necessarily the consequence of the omissions made by the people, but can frequently be ascribed to the shortcomings of the system itself, where the responsibility falls to the political authorities.

Almost everywhere there is a risk that the appointment of judges might be inadequate. All the more so, it is necessary to have the efficient and high-quality, initial and continued education. Any solution that would bring uncertainty to the position of judges on the pretext that this will help resist the risks is a worse evil than the evil we fight against; this always opens the door to possible deviations from the procedures which undermine the principles of autonomy and security of the judge position.

To judge is a job which has its techniques, subtle points, characteristic difficulties. The term “technique” used in this text should not be understood as a ”modern” meaning of this word (because the studies of this technique cannot and should not lead to “judicial technology”), but rather as the acquired knowledge needed for the purpose of judging.

It is required to develop the expertise requisite for judging

Key expertise

In this respect, it is important to insist on four aspects referring to the “judge’s persona” that should determine the direction of the professional training of a future judge:

- to favour the gaining of the appraisal qualities helping in the observance of contradictions and equilibrium between the parties necessary for making a good and fair final judgement, and these qualities do not exclude the juridical imagination– anyway, how did we come to “big court practices” ?.

- to help raise the awareness of the environment influencing the act of judging because the intention to instrumentalize justice is an everlasting process either through the political power or by way of some other pressures (of economic groups), no matter whether ”official” or secret forces are concerned. Thus, it is necessary to acquire the skills in order to identify possible pressures and keep away from them; such pressures are often insidious and for that reason it is difficult to resist them. This no way means that we recommend that a judge should be absorbed in his own world; on the contrary, a judge is required to be open to the world because it is useful for making a judicial decision, and because such open approach provides a better protection against futile protectionist leanings.

- to encourage the sensitivity to juridical humanism, which is in the centre of the act of judging; namely, even if the act of «judging» falls within the domain of reasoning and intellectual activity, we face the problems from the lives of the people who need to be heard, to be spoken to and, finally, who need to be judged. Certainly, the act of judging should not be separated from the law, but should rather be associated with the general principles underlying the human values highlighted in the European Convention of Human Rights.

- to encourage the ethical reflex and all deontological guidelines that are necessary for the performance of the judge’s duty. Raising awareness of the deontology should help a future judge to recognize the risky situations and respond to them in an adequate manner. Ethics primarily refers to the issues and experience that are constantly recurring, and are related to the specific judge’s duty and his immersion in the society. As compared to deontology, ethics is a wider concept since it arises from the professional discipline which is based on the rules constituting consensus – independence, impartiality and integrity as the three main pillars - and which is used to punish the severe, flagrant and deliberate faults. Ethics has a predominantly personal dimension (although it needs to be the subject of collective and multiple considerations) and it, therefore, concerns the responsibility of the judge entrusted with the power to administer justice.

SYNTHESIS OF THE PROPOSALS

I –A full review of the process of reform of the judicial system that has been conducted since 2009

⇨ The first priority is to provide a concrete, efficient and right response as regards the further destiny of our colleagues that were not definitely elected upon the decisions made by the HJC and SPC.

1) Abolishing the necessity of election of the judges who performed the judge's duty in July 2009

2) Subsidiarily, mediation process (as a further alternative)

A] The scheme of the framework of such new procedure that is recommended:
a) body in charge of mediation: the collegium or persons,

b) Parties :
b-1)* a representative of the National Parliament
b-2)*a representative of the Judges' Association of Serbia and a representative of the Prosecutors' Association of Serbia (as the case may be)

c)- procedure:
c-1)*the judges and prosecutors who wish that their particular cases be presented in the mediation procedure should inform the body in charge of mediation thereof
c-2)*They would be heard by the body in charge of mediation if it deems it necessary and /or at the request of the applicant.
c-3)* the request submitted to the mediation instance could be...

d) mediation: ...

e)- Regulatory support:

B] to envisage the approval of early retirement on a voluntary basis.

C] due to the inefficiency of legal remedies before the Constitutional Court, it is proposed to modify their judicial effect by qualifying this legal instrument as an operative "appeal"

II- To establish a comprehensive program for the initial and continuous professional training of judges and prosecutors facing wide scale changes in the Serbian legislation.

III- To perform a review, of the efficiency of the justice in Serbia and its current organization, in agreement with all relevant bodies in the judiciary

IV- Complete review of the procedure for evaluation of judges and prosecutors

V- To launch a wider debate, within the lines of the measures to be taken by all interested parties, between the professional community and the civil society regarding the Serbian legal system with a triple goal:

VI- To envisage the establishment of a «reform council»

VII- To find a solution for the further destiny of the judges and prosecutors who are appointed for the first time (three year term)

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Simone GABORIAU Hans-Ernst BOTTCHER

We met or contacted the following persons and entities in Serbia and other countries:

High Judicial Council-HJC
State Prosecutorial Council– SPC
Anti-Corruption Council
Ombudsman
Commissionaire for Information of Public Importance and Personal Data Protection
Anti-Corruption Agency
EU Delegation to Serbia: H.E. Vincent Degert, Ambassador, Head of the EU Delegation to Serbia,
EU observers
Judiciary trade Union of Serbia
Organization for Security and Cooperation in Europe– OSCE
Transparency International
Committee for Supervision of Public Finances
Constitutional Court of the Republic of Serbia
Open Society Fund
Deputy to the …… of the Faculty of Law in Belgrade
Professor of the UNION Faculty of Law in Belgrade
National Parliament of the Republic of Serbia, Mrs. Slavica Djukic-Dejanovic, the Lady Speaker
State Auditor
Our peers –judges and prosecutors in : Smederevo, Novi Sad, Sombor, Pozega, Bor, Zajecar and Belgrade
Constitutional Court
Bar Association of Belgrade
Serbian Bar Association
Journalists' Association of Serbia
Blagoje Jaksic, judge
Milomir Lukic, judge
Branislav Isailovic, lawyer
Alain Birot, legal expert
Florence Hartmann, journalist