

Review of the situation in the Serbian judiciary

– Updated short version (of 31 october/6 november) of the report of 27 June 2012 –

UPDATES

303 judges and 123 prosecutors (all those who lodged appeals against the decision of the SPC) were reinstated on 22 September 2012, through the application of the decisions taken by the Constitutional Court in July 2012. These decisions also applied to judges with respect to whom the HJC had formalized its decisions. Moreover, following the last formalizations of the decisions, against which the appeals were lodged, the Constitutional Court quashed 203 other decisions of the HJC.

After that decision, issued on 23 October 2012, all those who were “dismissed”, judges and prosecutors, who lodged appeals, will be reinstated to their offices, namely almost three years after their “non-appointment”!

GENERAL REMARKS

The legal path has finally been chosen after such a long crisis in the judiciary!

Is Serbia moving toward the establishment of a new, reliable judicial system?

Contrary to all expectations, the Constitutional Court has been successively taking reinstatement decisions. This high judicial body has made largely the same analyses presented in our report.

The political environment has significantly changed after Mr. Nikolic’s election as President of the Republic, Mr. Dacic’s appointment as Prime Minister and Mr. Selakovic’s appointment as Minister of Justice. The process of judicial reforms that were implemented earlier is now criticized in the public political discourse.

Authors of this report have too much experience to believe that a simple change of government can secure the necessary separation of powers between the legislature, the executive and the judiciary.

Hence, we remain vigilant observers. Our attention is all the more needed with regard to a society in which political authorities have historically strongly tended to instrumentalize justice and, in any case, put the society at risk of following this path all the time, regardless of their actual or verbalized intentions. Such vigilance is after all needed in many countries – actually in nearly all the countries – including even in «old democracies».

In that respect, we will recall our position, reiterated in our report several times: «While respecting political neutrality which we defined as our obligation, we do not pin the responsibility for this extremely serious situation in the judiciary 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.»

- *Therefore, it is necessary to change the system as we found it during our review.*

The new momentum, created by the decisions of the Constitutional Court, is to be largely credited for clearing up the situation of the dramatic crisis in the Serbian judiciary, which was dramatic for judges and prosecutors and the country alike. Now, particularly owing to the re-establishment of dialogue between organizations that represent judges and prosecutors and the Government, all agree beyond dispute in diagnosing the failure of the reform in all domains.

- *The need arises, more than ever, to establish a reliable judicial system, which will be truly independent and impartial in order to ensure the state governed by the rule of law.*

A BRIEF REMINDER OF THE 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 (the High Judicial Council and the State Prosecutorial Council) dismissed 837 judges and 220 prosecutors, which roughly equates to one third of judges and prosecutors in Serbia.

The basis for this dismissal was the implementation of general election of judges among the ones who 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 judicial 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, the Venice Commission, the 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 2011 and lasted until the end of May 2012 for judges, while it had 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 the 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 principle 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 principles were not observed, while the discretionary elimination of incumbent judges and prosecutors in 2009 was only marginally corrected. Only 141 judges and 55 prosecutors managed, in one way or the other, to have their non-appointment recognized as groundless.

None of the identified objectives has 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 was 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 good will, the process of "lustration", adopted in May of 2003, was not implemented at the level of the whole public administration.

Necessity of a full review of the state of the affairs

Our findings confirm the severity of the situation in the Serbian judiciary: the judicial 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 who have been "relieved of their judicial functions" without respect for the most fundamental principles. A need also arises for a comprehensive program 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 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 organization, due to which the good will of its actors cannot suffice.

THEREFORE, THE LEAF OF PAINFUL AND UNJUST HISTORY IN THE SERBIAN JUDICIARY HAS NOW BEEN TURNED OVER, BUT THE LEAVES OF ITS NEW FUTURE ARE YET TO BE WRITTEN.

UPDATES OF OUR PROPOSALS

Important notice: our proposals, just like the previous ones, have been made with full respect for the initiatives which are currently undertaken, or which will be undertaken in the Republic of Serbia.

As far as trade unions, associations and other organizations in Serbia and, generally speaking its active forces, are concerned, we completely honor 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.

Reminder of several main ideas that guided our analyses and proposals:

- a judge or a prosecutor cannot be «excluded» from the disciplinary framework and procedure compatible with the requirements of «fair trial»;
- if there is a need to fight corruption in the judiciary, it is necessary to resort to instances in accordance with general law: disciplinary procedures which are in line with the above requirements and criminal proceedings which are also in line with the above requirements;
- reminder: the fight against corruption concerns society at large, not just the judicial system;
- unfairness: more than 10 years after Serbia's embarking upon democratic transition, the opinion that «lustration» pertains only to judges, and not state bodies in general still prevails, even to a larger degree;
- the necessity of establishing a stable status of judges and prosecutors because the permanence of office is one of the main guarantees of their independence.

REMINDER OF OUR PROPOSALS IN BRIEF

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 2009 reform of the judiciary, «from top/top-down», and swiftly so.

PREAMBLE

Judges are entrusted with the power to administer justice

The introduction of double confidence

The provision of Article 92 of Germany's Basic Law (Constitution) which sets out that: *«Judges are entrusted with the power to administer justice»* explains the situation which is common for all judicial systems, and which is necessarily based on double confidence that we want to point out in our proposals.

It is important that in Serbia, as in any country which claims to have a democratic system, double confidence¹ be established, which is necessary for the sake of sound functioning of the democratic judicial system:

1- *« – 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 if such confidence is missing, a citizen and a party to the proceedings ascribe a court's decision to an obscure influence, or even corruption.

2- *« – the confidence judges have in themselves and the task they are to carry out, the pride with which they perform their duty, professional honor, 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 it 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.»*

This thought, in an effort to establish double confidence, reflects the establishment of a European judicial culture.

However, during that period of crisis judges and prosecutors in Serbia experienced: a disorganized judicial system after the reform of the judicial network and organization of courts, intimidation, whose victims they are, obsession with statistics and the burden of the workload... so many situations experienced which hinder the necessary trust in their task and which deter them from thinking of their social role in their country.

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

- One should act concretely in order to finally open up the prospects for a democratic judicial system in Serbia. It should be said and repeated that Serbia has able jurists and that their expertise and the expertise of local 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.

1 In that respect, we quote Guy Canivet, first honorary President of the Court of Cassation in France and the incumbent member of the Constitutional Council, who commented on the situation in France in 2006.

VIEW OF OUR PROPOSAL FOR INSTITUTIONAL CHANGE

Envisaging the structural change of institutions

Reminder of the contents of our proposals: It is necessary to think about the prospects for the structural change of institutions (the HJC and the State Prosecutorial Council – SPC as a priority) primarily with the aim of truly breaking the connections between these bodies and the political authorities; this is, namely, about enabling real conformity with the requirements for establishing «*independent and impartial courts*».²

Furthermore, in view of the difficulties in the operation of the HJC and the SPC, we have insisted, as part of a new reform of judicial councils, that it is absolutely necessary to appoint their deputy members.

- The mentioned proposals have been made proceeding from the observation that it is impossible to immediately embark upon a revision of the Constitution:

- *launch re-election of representatives of judges and prosecutors on the HJC and the SPC.*

Namely, reasons for that are as follows. One proceeds from the observation, which suggests itself, about the nullity of the previous election. This observation arises from the decisions of the Constitutional Court, on the basis of which we come to the inevitable conclusion that offices of judges and prosecutors, who were illegally dismissed, have never been terminated in the first place. In that manner, the elections in which numerous judges and prosecutors, nearly one third of the judicial electorate, i.e., its considerable part, were unlawfully deprived of the right to participate, are invalid; in addition, those judges and prosecutors were also deprived of the legitimate right to run for office as candidates in those elections. The undisputable nullity of the 2011 elections rests on these two reasons. This annulment procedure enables and could lead to the situation in which judges and prosecutor, current members of HJC and SPC could again be elected as representatives of their peers.

- *When to envisage the new elections?*

The reinstatement procedure is now almost at its conclusion. The recent adoption of the last decisions of the Constitutional Court, which have ordered the reinstatement, should enable a reconstruction of the HJC and the SPC in order for these bodies to get legitimacy which is compatible with the current legal reality.

- *How to hold the new elections?*

- A special law («*lex specialis*») could be quickly adopted. There is no possibility to declare it unconstitutional because it would constitute a necessary sequel of the Constitutional Court decisions.

2 Excerpt from Opinion no. 10 (2007) of the Consultative Council of European Judges (CCJE):
8. The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law.

9. The independence of judges, in a globalized and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts.

- the consultative procedure of the Constitutional Court (if possible) could perhaps be provided for in order to eliminate any doubt.
- The Constitutional Court itself could take a decision on the nullification of the 2011 elections, if such proceedings were instituted before the Constitutional Court. However, due to the big caseload of the Constitutional Court, there is a serious risk that such elections for new members of the HJC and the SPC could not be organized quickly.

That should be an opportunity to introduce the modalities of elections which could not be contested.

Thus, such opportunity could be also used to change texts of the laws, in a manner that would provide for the election of chairpersons of the HJC and the SPC within those instances, and for the abandonment of the *ex-officio* appointment to these Councils of the President of the Supreme Court of Cassation and the Republic Public Prosecutor. That was the proposal of the Judges' and Prosecutors' Associations at the time of the drafting of legal texts on the HJC and the SPC, and the Venice Commission has characterized it as «reasonable», in order to ensure the independence of those bodies.

Likewise, provided that our proposals regarding deputies of elected members of the HJC and the SPC are assessed as constitutional, new elections could also be held for deputy members (each candidate presents himself/herself together with their deputy). We have come up with such a proposal because of the crisis context, which will certainly not be repeated; however, the HJC and the SPC in Serbia have broad powers, entailing difficult tasks as well. The number of members is relatively limited with the also relatively reduced quorum (6 persons); moreover, in an effort to protect the independence of that body, it is important that its work is carried out within a collegium despite unpredictable situations such as inability caused by illness or other cases of non-availability of their members (it should be noted that in Serbia “everybody knows everybody», so the «apparent» doubt about the absence of impartiality, according to the case law of the European Court of Human Rights, can very easily arise).

- *a solution should be found for the issue of the destiny of the judges appointed on a temporary basis*

Reminder of our proposals: It is important that these judges be fairly treated. The evaluation of their performance that should have been made on an annual basis was not performed. 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 of judges should be abolished. 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 (based, namely, on the fear of being dismissed).

We have, therefore, proposed for this «trial» status to be replaced by the system of education and the status of a «judge – student».³

We are currently unable to stick to these proposals, bearing in mind that this status is provided for by the Constitution, although we still hold that they are reasonable.

Even if the process of improving the situation regarding Serbian judges is launched, as we would like it to be, the timely abolition of such status should remain a strong objective. In addition to the danger of stigmatization that they were exposed to, due to the above described situation, remaining in the minds of many, and considerably disturbing their composure, independence of a judge must be based on the prospects for the permanence of his/her office. Moreover, if the disconnection between the political authorities and the authorities making the appointments is insufficient or simply uncertain, a judge whose status needs to be reconsidered in order for his office to become permanent, is faced with a strong temptation whether to take decisions which will not be to the liking of the political authorities; that is how the things would look like, at any rate, and the impartiality of a judge as sought for by the European Court of Human Rights would not be respected.

- We reiterate that judges who have been elected on a temporary basis cannot suffer because of the lack of evaluation and it would not be appropriate or just to decide on their status on the basis of pro forma evaluation, which would be performed with the only purpose of meeting the statutory obligation to annually evaluate their work, in all likelihood belatedly.
- We can anyway fear that, within the current context of large-scale reversals of decisions by the HJC and the SPC (which these bodies do not seem to have taken well), and reinstatement of a substantial number of judges and prosecutors into the judicial body, temporarily elected judges will not be evaluated with the required deliberation and even impartiality.
- Moreover, if those judges were not appointed to permanent duties, in a procedure which would make their removal possible, the requirements of «fair trial», to the respect for which they are entitled, would not be guaranteed.
- In that context, the prospect of automatic appointment to permanent position, bearing in mind all the mentioned reasons, is the one which should be the priority. As a basis for this, we can anticipate the creation of the presumption of «excellence» considering that with such an evaluation, the appointment to permanent office under the Law on Judges is full-fledged. Such treatment is justified by the lack of care in the system, which has not ensured the compliance with legal texts.
- It is also possible to provide for an additional deadline for them to "prove themselves". It is necessary for these colleagues, too, to have the right to adequate continuous

3 We added: *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 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 on the results they achieve, be appointed or not appointed judges on a permanent basis, with all the rights and obligations related to this position.*

education. Which new deadline would be acceptable: 1, 2, 3 years? Since the Constitution provides for a trial period of three years, we can ask ourselves if such proposals are compatible with the Constitution. In any event, it would be necessary to establish the modalities of evaluation on the basis of a consensus reached within the ranks of judges (for evaluation, see further text). But, wouldn't this solution make an already excessively uncertain situation even more uncertain?

No solution is in accordance with the Constitution. We are in a constitutional deadlock. We tried above to explore areas of possibility recalling our principled opposition to those «trial» appointments. However, one should not give up on the prospects for constitutional reform which appears as a very important objective, either with regard to these provisions or others.

- Among those judges who have been elected on a temporary basis are also *judges of misdemeanor courts, whose status was discussed in a conference held in Belgrade on 12 October this year, which we attended. It is described in the Annex to this updated report...*

SEVERAL PROPOSALS THAT ARE CURRENTLY PRIORITIES

- The objectives of evaluation of judges should be completely reviewed, 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).

To that effect a wider debate should be launched concerning the «autonomy and responsibility of the judges and prosecutors» in order to analyze the key issues of relevance to a democratic judicial system; the cult of performance⁴ actually results in distortion of both the essence of justice and responsibility of the judges. The purely managerial approach that is ascribed to the judicial system does not correspond to *either the ethics of a judge or deontology of the judiciary*, nor does it meet the expectations of the citizens, which are reflected in two requirements: a reasonable deadline in deciding the cases⁵ and, particularly, the *right* response of justice.

- This issue of evaluation is relevant more than ever, and is particularly related to the issue of the destiny of judges elected on a temporary basis. It will very quickly become pertinent to all, and it is important for this system of evaluation not to be transformed in some kind of continuous monitoring. It is necessary to promote the freedom of

4 In June 2011, MEDEL organized a seminar in Bordeaux, France, at the National Judicial Academy (Ecole Nationale de la Magistrature) with the topic «Justice in the Era of Performance». The purpose of this seminar was to analyze 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.

5 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.

judges which is a logical natural consequence of their independence. Anxiety and fear to which we have pointed in our report on the review should disappear and vanish. *It should be said that there is no good evaluation but only the least imperfect of all evaluations. Why?*

Evaluation is not ontologically linked to judicial office, in some countries the work of judges is not the subject of evaluation. That is to say, evaluation goes against the principle of independence of judges and from the historical perspective, in many countries it was an instrument for modeling judges. But in a democratic society, institutions, among them also being the judiciary, must be held accountable for their work (it is one element of the above mentioned double confidence), and evaluation of their employees is part of that enterprise. In that manner, one should meet two contrasting needs: evaluate the provided service and employees providing it, and guarantee the independence of judges, as a necessary logical consequence of independence of judicial power.

Proceeding from a short overview of the situation in Europe, we can say that there are two obstacles in the evaluation of judges: on the one hand, inefficiency caused by the fact that stereotypic formulations and «euphemisms» are used, which cannot describe actual professional capacities of a particular judge and, on the other, the instrument of control outside the area of the lawful disciplinary framework, which undermines the independence of judges; namely, that sub-disciplinary or even quasi disciplinary instance is aimed at establishing the rule of «command», not independence.

The essence is accountability. Being accountable not to your superiors, but to citizens (e.g. availability of texts on the Internet), such as: the court system which is the objective, a survey (or not) of a method to improve the provision of service to parties to proceedings, etc.

- *If we remain in the field of possible evaluation, what should be proposed? Proposals in the further text constitute only directions for thinking.*
 - First, it should be noted that the Serbian law sets out that evaluation is to be conducted by committees established within higher courts, comprising 3 elected judges. But that system – which makes sense – has not been implemented and, in particular, the objectives of the evaluation have not been formalized. The logic of «performance» appears in the evaluation (see in our report, criteria on the basis of which the election of judges has not been accepted)
 - We can do as in the county of *Schleswig Holstein*, where Hans-Ernst Bottcher comes from: provide for evaluation only at the request of a judge concerned (for instance, regarding a request of a judge to be transferred)
 - It would be desirable for evaluators to be outside the jurisdiction (that is how the judicial system in Portugal operates), and to clearly separate functions of evaluation from disciplinary ones, as well as from career management functions.
 - We can think about introducing an evaluation committee which would consist of colleagues coming to the spot and collecting maximum information on the basis of criteria which need to be defined, while abandoning the exclusively quantitative approach in order to be able to focus on the qualitative approach.
 - This evaluation could be associated with the evaluation of the service within which a judge who is evaluated performs his function and, if appropriate, associated with the evaluation of the entire court.

- 2. *Introducing a comprehensive program for initial and continued professional training of the judges and prosecutors with an emphasis on international exchanges*
 - *Initial and permanent education* should be effective, ample, versatile and open to acceptance of non-judicial disciplines, such as humanities. It should be part of an extensive program focused on judicial culture (see in the text below, objectives of education of judges) including the instruction in the field of European law.
 - *Among the themes that should be the topics of lectures, it would be desirable to envisage instructions in the field of foreign legal systems. MEDEL, which has the necessary know-how in that area could greatly contribute to the introduction of such instruction.*
 - *It is desirable to organize numerous exchanges within Europe* so that the Serbian professionals 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).
 - *This should be supplemented by practice* in the Council of Europe, the European Court of Human Rights, and, even without waiting for Serbia's accession to the European Union, in the Court of the European Union.

The term «Judicial School» is sometimes used to express the notion of «Judicial Academy» but the latter is not a judicial school in the proper sense of the word but more of an institute for judicial studies. Prior to its establishment, there was some kind of an equivalent instance (state /organizations of judges and prosecutors), which is thus replaced by this state instance (in all likelihood). It seems that Serbian judges and prosecutors are not too familiar with its operation (and Serbian citizens even less), and associations of judges and prosecutors are not consulted with respect to educational curricula and generally the main guidelines of that institution.⁶ In any event, it seems that changes are necessary.

- In the above text we particularly touched upon the issue of judges elected on a temporary basis and we particularly insist on the necessity of providing them with professional training which will enable them to become professionals.
 - *Among the above, we would like to highlight the situation regarding judges of misdemeanor courts who need to become part of the overall judicial body (see the annex)*
3. – 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 regard 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. The introduction of joint management of the operation of the court, decisions which would be drafted by the majority of judges, constitutes a factor for improvement of an accountable judiciary in which everyone accepts their rights and duties.
- *In the present context, in which the prospects for new reforms are announced, and in which several hundreds of judges will be reinstated, judges who suffered because they*

6 When we come to Serbia next time, we will visit that academy, at the invitation of its Director, whom we met on 12 October. On that occasion we will obtain new information about that institution.

had been excluded would now have an opportunity to be active again, and the establishment of real general assemblies and/or committees within courts would be a positive initiative with a view to presenting the needs and expectations of courts. Furthermore, it is important to obtain analyses and proposals from the field, in addition to ministerial working groups.

4. 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:

1. To raise awareness of the creative and normative function of justice, highlighting the importance of the law interpretation function. It is requisite to inspire a public debate on the method of applying the laws in order for the law to evolve.

It is necessary to point out the following:

- in case various solutions for addressing a legal issue are proposed, that is not a wrong direction, because «law» will arise from confrontations of different interpretations,
- so a restated decision – except in case the judge has (rarely) really made a mistake – is the result of a sound operation of the court system,
- finally, the annulment of a decision does not mean that the judge is to receive a low rating in his/her evaluation.
- *dialogue among judges is the driver of the building of vivid law in line with legitimate needs of the society which should be the main objective of court output.*

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 which will enable Serbian society to adopt all such imported laws with necessary modifications in order for this society to efficiently and effectively incorporate them in its judicial culture.

3. To take stock of the adopted legal texts over the recent years and their consequences. It is important to analyze, proceeding from the implementation of these legal texts, whether they correspond or not to the expectations of the population as regards law and justice. To that effect, working groups set up by the current government may constitute the first step forward to that goal.⁷

- *The present context has created an opportunity to initiate constructive thinking in order to start anew on new postulates, proceeding from new foundations, without necessarily going back to the previous situation, for instance, with regard to the network and organization of courts, professional practices, democracy in the judiciary, evaluation of judges (see the text above) etc....*

In that respect, it is necessary to refrain from any hastiness – analysis and thinking take time. Serbia is not able to go through poorly prepared reforms once again.

It seems that undertakings similar to those existing in France are not active in Serbia, such as: the Institute of Higher Judicial Studies, or the Law and Justice Research Mission or many other numerous research centers within universities. It seems to us that some-

⁷ One of us, Simon Gaborjo, should have attended a meeting of a working group during our last visit to Serbia, however, due to a last minute change in their schedule, that was not possible, so apart from our agreement in principle to its establishment, we cannot make any closer assessment of the working group as such.

thing like that would be desirable; therefore, the multidisciplinary meetings that we propose are all the more necessary.

This can be achieved through various forms, such as supporting and complementing working groups set up by the Ministry: meetings of authorized representatives, major conferences about the judiciary, conferences with the participation of experts...

Several elements of the proposal:

- The proposal by the MEDEL President, put forward on 29 June this year in Belgrade, to organize a big conference proceeding from the proposal for review and with our participation, could be updated and specified, so that all – judges, prosecutors, lawyers, university teachers... – could present their views regarding the situation of the judiciary in Serbia; discussion should be comprehensive, open to society, hence with the participation of civil society representatives. Such endeavor could be made in synergy with working groups set up by the Serbian Ministry of Justice.
- An important step toward this type of endeavor was made owing to the efforts of the French Embassy regarding the organization of a conference, to be held on 28 and 29 November this year, in Belgrade, entitled «*Efficiency and Quality of the Judiciary in Serbia*». It is a meeting – hopefully constructive – between associations (separate for each category, judges and prosecutors) of judges, prosecutors and the Serbian government, proceeding from draft laws resulting from the work of working groups, during which «experts» (we, together with Gerhard Reissner, the President of the Consultative Council of European Judges) should contribute to the formulation of "good proposals" arising from these confrontations of opinions; Paul Martens, the Honorary President of the Constitutional Court of Belgium will take over the role of the moderator.

Generally speaking, the emphasis should be placed on the daily work of the Serbian judiciary. This approach to the judiciary is very important for the citizens of Serbia, as well as for assessing courts' resolution of problems related to corruption and organized crime, which is often the perspective of international bodies on the Serbian judiciary. Moreover, and this is important in the context of Serbia's accession to the European Union, economic dynamism and the opening up of the Serbian borders, which will be necessary, should rely on the existence of a legitimate forum for conflict resolution and sanctioning of the violation of norms.

- We certainly stand ready to perform a review of the daily work of the judiciary.
 - It would be anyway good to encourage dialogue between the judiciary and citizens, in an effort to contribute to the awareness of the Serbian citizenry, on the one hand, and on the other to provide the judiciary with a better perception of expectations of their beneficiaries (e.g. victims). It seems that steps are taken in that direction, which have to be encouraged and supported.
5. the establishment of a «reform council» should be envisaged, which will be independent and 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.

- It seems that such an institution exists in theory, but has never been actually put in place.

Reminder: The professional training of judges is not just any training

To judge is a job which has its techniques, subtle points, characteristic difficulties. The term “technique” used in this text should not be understood in 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 favor the gaining of the appraisal qualities helping in the observance of contradictions and equilibrium between the parties.
- 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.
- to encourage the sensitivity to juridical humanism, which is in the center 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.
- of course, the act of trying should not be separated from law, but joined with general principles which carry human values set out in the European Convention on Human Rights.
- to encourage the ethical reflex and all deontological guidelines that are necessary for the performance of the judge’s duty.
- 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.

ANNEX

SITUATION OF JUDGES IN MISDEMEANOR COURTS

*The situation of those judges*⁸ is overshadowed by the general judicial reform which is the subject of this report.

Within the endeavors to establish a judicial system in Serbia which will be truly independent and impartial, a need arises to include the judges of misdemeanor courts as well, in order to ensure the state governed by the rule of law.

Thus, the text that follows refers to the issue that has rarely been pointed out, and is related to courts that have jurisdiction over minor offences.

These misdemeanors are not really totally minor. Namely, those judges exercise control of the behavior of the entire population, including political leaders,⁹ owing to, in all likelihood, the least repressive criminal remedy; namely, they can impose prison sentences of 60, even up to 90 days, although all the studies show that these short prison sentences are not harmless.

It is not a minor court, these are not judges for juveniles, that is, minors.

These are major, more significant cases for the persons concerned. It is an important court, and these judges perform the function of criminal control of the population.

Data indicates so: 606 judges of misdemeanor courts impose a million sentences a year, compared to the population of 7.5 million!¹⁰

The idea of judges who are nowadays called misdemeanor judges was developed by King Aleksandar I, in 1926, in relation to the law on police which governed everyday life in all dimensions (economic and social police and police in terms of «co-existence»). That institution has undergone various changes and for a while judicial functions were performed by reputable citizens – without having the actual status of a judge as explained further in the text – and during Tito’s times, those were «more prominent» figures from the Communist Party. These judges were gradually professionalized. Then, as of 1990, often instrumentalized by Milosevic’s regime (particularly for the purpose of controlling the press); after 5 October 2000, certain judges, under suspicion that they were discredited by cooperating with the said regime, were relieved of duty.

8 These judges can intervene in urgent proceedings, pronounce prison sentences (60, and even up to 90 days), impose mandatory treatment of alcoholics and drug addicts in limited-access institutions, a number of penalties, precautionary measures or procedures which do not correspond to the field of activity of French judges in the Police Court, and particularly not since the adoption of the new Criminal Code, implemented as of 1 March 1994, which has abolished detention as a misdemeanor punishment.

9 For instance, Mr. Tadić, former President of Serbia, was prosecuted for a misdemeanor related to the ban on alcohol consumption in sports events: he was photographed with a glass of champagne in his hand at a football match between Serbia and Romania, which Serbia won. After admitting his responsibility, he received a fine.

In addition to that anecdote, the mentioned courts have the jurisdiction to sanction – by imposing fines – persons responsible for execution of public expenditures which were not aligned with the budget allocations.

10 A comparison with France: a population of 65 million: 1 053 251 convictions and sanctions pronounced for 2 706 serious criminal offences, 650 699 for minor criminal offences and 46 407 misdemeanors of the fifth class, 353 439 misdemeanors from the first four classes.

Thus, under the previous law on judges of 6 November 2001, all these judges and their judicial bodies should have ceased to exist on 31 December 2006. However, the Serbian government, while waiting for the establishment of misdemeanor courts, continued to appoint those judges even after 31 December 2006, thus reactivating the old law of 30 September 1989. Along the lines of the law of 6 November 2001, new judicial laws of 22 December 2008 have also provided for the establishment of misdemeanor courts.

Namely, the status and powers of misdemeanor judges, prior to the judicial reform, were the following:

- They acted as a body for petty offences. Each autonomous local unit – a municipality in a way – had its "own" misdemeanor body (162 in total) – judges were appointed by the Government of the Republic of Serbia for a term of 8 years with a possibility to renew mandates.

As part of the implementation of the above laws which reform the judiciary, the number of judges of misdemeanor courts was determined at 606 in total, while before that their number had been 804. The number of judges who were posted to the Higher Misdemeanor Court was 61 with the President of that Court (currently the «acting President¹¹»); that court, a single one, second-instance, comprises several panels which are situated on different locations; in order to ensure the uniformity of court practice, plenary sessions of all Higher Court judges are organized, so in case there is disagreement, a majority declares themselves on the choice that has to be made on the basis of case law. In these 45 first-instance courts functions are performed by 541 judges.

The number of judges, as well as the number of courts, relative to the period before 1 January 2010, has thus been considerably reduced, while the jurisdiction of these courts has been extended.

- *The situation in relation to misdemeanor judges warrants short-term as well as long-term recommendations because essential issues are raised.*

short-term proposals: appoint to permanent judicial duty those judges that were «elected» for three years, who need to be the subject of a possible decision on their final appointment at the end of «their mandates»; it is important, within the logic of the above analysis and proposals related to all judges who have been elected on a temporary basis – and they are all implementable – for these judges to be fairly treated. The evaluation of their performance that should have been made on an annual basis was not made. Their terms of office are about to expire and it should not be reasonable to have them suffering due to the shortcomings of the system, that is, the shortcomings of the state. On expiry of their temporary mandate, they should be automatically appointed to permanent positions with the access to “continuous education”, on a priority basis.

11 We would like to recall that all presidents of courts were not «elected» in conformity with the modalities provided for by the Law on Judges (election not later than end-March 2010, for a four-year term with the possibility of mandate renewal, by the National Assembly at the proposal of the HJC). Those who currently perform those functions were appointed («on a temporary basis») by the HJC; so the «temporary» performance of the function should have ended on 31 March 2010. Hence, with the exception of the President of the Supreme Court (*ex officio* Chairperson of the HJC), elected by the National Assembly, all court presidents are «acting court presidents».

One should be realistic, what will happen with those courts if those judges are not finally «elected» on 31 December 2012?

But it is also necessary to admit that this three-year period prior to the appointment to permanent judicial office arises from a provision of the Constitution which is very much open to criticism. No solution is in accordance with the Constitution.

We make a reference here to all our proposals related to judges elected for a period of three years, with the main proposal among them being for temporarily elected judges to be appointed to permanent positions. It is only a short-term solution.

Then initiate institutional change

In the foreseeable future (but thinking about that should start immediately, there is no need to wait), a systemic change of institutions should be envisaged with integration of misdemeanor judges in the judicial body, without them occupying any special place in that body.

Namely, we respect the Serbian tradition, but wonder whether it would be more appropriate to envisage elimination of an autonomous judicial class which these courts constitute, by integrating them into the overall court system? That would satisfy the unitary concept of judicial organization which is the most appropriate for a state governed by the rule of law. Germany and France have abolished these separate categories of judges. On that occasion, it would be possible to revise the competences and powers of these courts, while relying on full-fledged judges – with real powers to individually impose penalties.

- Our colleagues, judges of misdemeanor courts, would thus become full-fledged judges with adequate continuous education. They would be able to perform all the functions, while their colleagues could perform the duties now carried out by them. It seems that it is not sound to maintain a court system with separate «castes».