

15 December 2011

**To: Sasa Jankovic
Ombudsman**

1. Acting on both the complaints of the Judges' Association of Serbia (JAS) and the complaints filed by the individual non-reappointed judges, you have had the opportunity to review the work of the High Judicial Council (HJC) on a number of occasions in the past two years since the judicial (re)appointment in December 2009.

1.1. In your decision No. 12694 of 3 August 2010, you found a number of deficiencies in the HJC procedure of appointing judges to courts of general and special jurisdictions in 2009 that affected the candidates for the judicial offices. These deficiencies, inter alia, include:

1. Deprivation of the candidates, who had already held judicial offices, of the opportunity to challenge the circumstances contradicting the established refutable presumption that they fulfilled the appointment criteria and standards;
2. Deprivation of the non-reappointed candidates of comprehensive and specified explanations of the reasons why they were not appointed;
3. Failure to notify the non-reappointed candidates of the legal remedies at their disposal;
4. Failure to fully implement the final enactments of the competent authority – decisions by the Commissioner for Access to Information of Public Importance and Personal Data Protection.

1.1.1. In order to eliminate the identified deficiencies and pre-empt their recurrence, you recommended to the HJC to

- Eliminate the identified deficiencies in the field of good governance (deficiencies listed under 1, 2. and 3) in a manner which is in accordance with the legal order of the Republic of Serbia and in accordance with the decisions of other competent authorities, particularly taking into account the decisions and views of the Constitutional Court.

- Consistently abide hereinafter by good governance principles, particularly those guaranteeing the transparency of work and notification of the parties to the procedure of the grounds for and reasoning of decisions rendered by public authorities, as well as the principles affording the parties to the procedure with maximally effective protection of their rights and legitimate interests, particularly with information about the facts on which the decisions are grounded and the opportunities to challenge them during the procedure.

- Improve the organisation of the work of the auxiliary services and, if necessary, ensure in another manner the more comprehensive enforcement of the decisions by the Commissioner for Information of Public Importance and Personal Data Protection and without delay enforce the unenforced decisions of the Commissioner, i.e. notify this authority of the enforcement of its decisions.

1.2. In another decision – Ref. No. 555 of 14 January 2011, you identified a deficiency in the work of the HJC which was in contravention of its obligation to respect the

constitutionally and legally guaranteed freedom of association and recommended to it to apologise in writing to the Judges' Association of Serbia for the deficiency.

2. Despite the letter to the Government of the Republic of Serbia of 18 February 2010 and the Ombudsman's decisions, the HJC still has not enforced all the orders and recommendations of the competent state authorities, particularly those regarding transparency and the enforcement of the decisions of the Commissioner for Information of Public Information and Personal Data Protection.

3. The deficiencies in the general judicial (re)appointment procedure in 2009 resulted in the extension of the payment of salary compensations to the non-reappointed judges, amendments to the set of judiciary laws on 29 December 2010 and the review of the entire (re)appointment procedure. The first stage of the latter procedure -- the review of the non-reappointment decisions taken by the HJC in its initial composition -- is currently under way.

3.1. Out of a total of 837 non-reappointed judges, the HJC has to date held 16 sessions within the procedure in which it is reviewing the decisions taken by its initial composition. It has reviewed 455 objections; it did not render any decisions with respect to 118 objections and ruled on 337 objections, out of which it upheld the judges' legal remedy in 82 cases.

3.2. Instead of eliminating the deficiencies in the reappointment review procedure, whilst abiding by Serbia's legal order and generally recognised rules of international law and European standards, the HJC has by its actions rendered illegal and illegitimate the entire procedure and all the decisions it has rendered, as well as its entire future work.

3.2.1. Pursuant to Article 17(1) of the Law on the High Judicial Council, when rendering decisions on the rights of (non-reappointed) judges, the HJC takes decisions by a majority of votes of all its members. In those cases, it is clear, HJC shall be a tribunal. Decisions by all members of the HJC have, however, been rendered only at one of the 16 reappointment review sessions – at the first one, held on 20 and 22 July 2011. The HJC has thus rendered decisions in the composition required by the law in only 86 cases, i.e. in slightly over a quarter of the decisions it has taken.

3.2.2 The legality and legitimacy of the work and decisions of the HJC in the reappointment review procedure has been seriously undermined by the continuing failure of the National Assembly of the Republic of Serbia to enforce a legally binding decision of the Anti-Corruption Agency of 9 December 2010 that Professor Dimitrijevic's "public office of HJC member shall be terminated by force of law and that a decision thereto shall be rendered by the National Assembly of the RS".

3.2.3. The HJC's legality and legitimacy has also been undermined by the fact that the HJC continued working and rendering decisions even after the detention of HJC member judge Bosko Jaksic on 23 September 2011 and the resignation of another member, judge Milimir Lukic¹, on 23 November 2011, who is in fact no longer working as a member of the HJC.

¹ "I believe that the day will come when we will have absolutely clear and precise rules and procedures for [judicial] appointments, promotions and dismissals, pursuant to which the most honourable and educated cadres will be appointed to courts, cadres that will thereafter be able to rise in the judicial hierarchy only on the basis of the achieved results, worthiness and authority.

I also want to believe that the day will come when the HJC will be guided by all of the above as its utmost principle and when it will vigilantly ensure that no one encroaches upon the independence and autonomy of the judges and the courts in any way. This would definitely

3.2.4. Given that four “old” members of the HJC² cannot render decisions on the correctness of their initial decisions and in the absence of judges Blagoje Jaksic and Milimir Lukic, the HJC lacks the 6-vote majority it must have to take decisions in the reappointment review procedure. Given that it is nevertheless rendering its decisions, it remains unclear how it has secured the 6-vote majority.

3.2.5. On the other hand, the explicit and public statement by Dejan Ciric, an “old” HJC member, that he now takes part in the voting³ and the HJC assertion in its letter of No. 7-00-136/2011-01 of 27 October 2011 that four “old” members have been abstaining from voting raise the issue of whether lawyer Ciric had voted for or against earlier as well and, if he had not, why he had started voting now. Therefore, there is reasonable suspicion that the “old” members of the HJC have been voting on the validity of the decisions they had themselves taken, not only since Lukic’s resignation.

3.2.6. Rendering of decisions by the members of the HJC in its initial composition on the validity of the decisions they themselves had taken constitutes a gross violation of the right to a fair trial by the HJC and is in contravention of both the Constitution of the Republic of Serbia and the European Convention on Human Rights and their guarantees of the right to a fair trial before an independent and impartial tribunal.

3.2.7. Given that the President of the Supreme Court of Cassation is an “old” member who may not vote, the HJC no longer has a majority of judges in its composition without judges Jaksic and Luksic. This means that the composition of the HJC does not satisfy the standard in Opinion No 10 of the Consultative Council of European Judges of the Council of Europe on the Councils for the Judiciary at the service of society, under which the composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions and that, in order to prevent any manipulation or undue pressure, a substantial majority of its members should be judges elected by their peers.

3.2.8. The inappropriate composition of the HJC, in which the judges are in the minority, renders all other decisions by the HJC illegitimate as well, including the ones on the appointments of court presidents which are now being adopted.

4. Judge Milimir Lukic’s statement regarding his resignation from the post of HJC member reinforces suspicions that the procedure of reviewing the decisions of the HJC in its initial composition is also conducted in an arbitrary manner and under pressures and reinforces the image of the work of the HJC as dependent and partial. This statement judge Lukic made after tendering his resignation is a serious indicator of how the HJC works and renders its decisions and can under no circumstances be perceived as a personal act, as the Justice Minister claims (in daily news paper Politika, 30 November 2011).

contribute to the authority of the courts and judges and public respect and trust of them and ensure the impartial enforcement of the law” – the statement of judge Lukic in daily newspaper Politika, 30 November 2011.

² “Old” members were members of the HJC in its initial composition.

³ “I see no reason why I should not take part in the rendering of the decisions. I am here as a representative of the lawyers, as I was in the initial composition. I am presenting the views that the lawyers have with respect to judicial appointments” – the statement of Dejan Ciric in daily newspaper Politika, 2 December 2011.

5. The transparency and public character of the work of any state authority, particularly an independent body such as the HJC, have a twofold purpose: to inform the public of the work of such bodies and to serve as a form of public oversight of the work of such bodies. Although the public character and the transparency requirements are noted also in the decisions of the Protector of Citizens and the Constitutional Court decisions in the Saveljic and Tasic cases of 28 May 2011 and 21 December 2011 respectively, and stipulated in Article 2 of the HJC's own Rules, as well as the provisions on the right to a fair trial in the Constitution of the RS and the European Convention, the HJC has systematically obviated the standard of the public character and transparency of its work, inter alia, in the following manner:

- The HJC Commissions do not forward their decisions even to the judges they concern. Under Article 25 of the Rules governing the reappointment review procedure (hereinafter: Rules), the Commissions shall recommend to the HJC to uphold or reject the so-called objection by the judges.

- The HJC does not allow the public to attend the sessions at which it reviews the HJC Commission decisions recommending that it adopt or reject the so-called objections of the judges (before it begins deliberating and voting on them).

5.1. Given that the HJC obviously does not think that its reappointment review should be public in character and transparent, one needs to recall the regulations on the transparency and the public character of the work of the HJC which are binding on the HJC. The legal grounds for the public character and transparency of its work are laid down in the HJC Rules of Procedure amended in the spring of 2011⁴ and the Rules⁵.

5.1.2. The initial provision in Article 5 of the HJC Rules of Procedure, under which HJC sessions were closed to the public, was amended on 24 March 2011. It now reads: "The HJC may decide to work in an open session, at the proposal of the HJC President or HJC member". The Article was also amended to include Article 5a, under which "A public session may be attended by the judge whose right or obligation is being decided on, interested persons or accredited representatives of the media. Their number shall depend on the number of available seats in the HJC office and their presence shall be approved by the order in which they registered their attendance with the Administrative Office."⁶

5.1.3. Under Article 7 of the HJC Rules, the HJC Rules of Procedure shall apply to issues not governed by the HJC Rules. Under Article 32(1) of the HJC Rules, "the public character of the review procedure" shall be, inter alia, achieved by "the public character of the sessions of the HJC Commissions and the HJC" with the exception of the deliberation and voting (Art. 32(4)).

⁴ The HJC Rules of Procedure were published in the Official Gazette of the Republic of Serbia No. 43/2009 and the amendments were adopted in 24 March 2011

⁵ The Rules for the Enforcement of the Decision on Criteria and Standards for Assessing the Worthiness, Qualification and Competence and for the Procedure of Reviewing the Decisions of the High Judicial Council in its Initial Composition on the Termination of Judicial Offices were published in the Official Gazette of the Republic of Serbia No 35/2011 on 24 May 2011.

⁶ The public character of the HJC's work is reinforced by the provisions on the calling of and participation in HJC sessions (Article 19(paragraphs 3 and 5), Article 22(5) and Article 24 (paragraphs 1 and 2), on session minutes (Article 29) and transparency (Art. 34(1)).

5.1.4.. Given that the Rules lay down that they “aim to ensure the enforcement of European standards in the objection review procedure” (art.2 of the review Rules), a fair and transparent procedure clearly entails forwarding the “Commission’s decision”⁷ also to the judge it concerns and that the parts of the HJC sessions, during which it reviews the decisions i.e. recommendations of the HJC Commissions to adopt or reject the so-called objections of the non-reappointed judges, are open to the public until the moment the HJC begins its deliberation and voting.

5.1.5. This form of oversight of the HJC’s work gains even more in importance in view of the fact that the HJC failed to take decisions on over one quarter (118) of the cases it reviewed at its sessions. It is therefore clear that the HJC disagreed with the recommendations of its Commissions to uphold the objections of the judges in those cases. Furthermore, this form of oversight is requisite also with respect to the official HJC letters to judges whose legal remedies in the review procedure had been rejected and in which the HJC notified them that the HJC Commission’s decision was different from the decision of the HJC, i.e. that the HJC Commission suggested upholding the judge’s legal remedy but that the HJC decided to reject it (please find attached three such letters). Given that the three-member HJC Commissions take decisions unanimously or by a two-thirds majority, there is no doubt that an HJC decision, which runs counter to the recommendation of an HJC Commission, has been taken in one of the two ways: either the “old” members voted for it or the HJC Commission members changed their minds and voted against their own initial recommendations, which raises the issue of undue influence on the HJC members.

6. The HJC acted in contravention of the constitutional principle on the prohibition of discrimination in both the decisions in which it upheld and in which it rejected the legal remedies because it acted differently in same factual and legal situations. The statement by judge Lukic after resigning from the HJC leads to this conclusion as well

7. The Judges’ Association of Serbia already alerted the Ombudsman in its complaint of 20 October 2010 that the HJC members, particularly the *ex officio* members (Justice Minister Snezana Malovic, Supreme Court of Cassation President Nata Mesarovic and Chairman of the National Assembly Committee for the Judiciary and Administration Bosko Ristic), were acting in contravention of their obligation under the Constitution -- to guarantee the independence of the judiciary -- because they were intimidating the judges and exerting undue influence on them, noting all the things that could happen to them, which they already had, one thousand judges and prosecutors at once, including the president of the professional association, despite numerous reactions. In its complaint, the Judges’ Association of Serbia quoted the public statements the above officials gave the media in illustration.

⁷ Under Article 25 of the Rules:

“Upon the conclusion of the hearing, the Commission shall render a reasoned decision on the basis of the established facts and presented evidence.

In its decision, the Commission shall recommend to the HJC to dismiss, adopt or reject the petitioner’s objection.

Separate minutes shall be kept on the deliberation and voting and signed by the President and members of the Commission and the minutes-taker.

The Commission President shall submit to the HJC the completed case files with the lists of documents and suggest that the HJC President schedule a session.”

7.1. Unfortunately, the HJC has continuously failed to perform its constitutional duty⁸ and be independent itself, which is prerequisite if it is to ensure the independence of courts and judges.

7.1.1. First of all, Justice Minister Snezana Malovic, an *ex officio* member of the HJC, is abusing both of her offices. By commenting a court decision which is not final, and saying that she is “appalled” by it and that she will join in the initiatives for the dismissal of the judge whose decisions she is “dissatisfied” with⁹, the Justice Minister is sending a message of retaliation against a specific judge and a message of warning and fear to the appeals panel which is yet to rule on the appeal against the first-instance decision, as well as to all judges on what may happen to them if their decisions displease the political power-wielders.

7.1.2. Although the Justice Minister is violating the constitutional principles of the rule of law, division of power, independence of the judiciary, permanence of judicial office by her statements, the HJC has not only failed to take specific measures against the Justice Minister, who is a member of the HJC as well, for such unconstitutional conduct, but has failed to even publicly react to it as well.

7.1.3. Moreover, the HJC has failed to take any action after Justice Ministry State Secretary Slobodan Homen said the following with respect to the above-mentioned court decision which is not final yet. In one of his statements, he said the following:

*“This is precisely why the Ministry has joined the initiatives of the Otpor members from Požarevac to establish the accountability of a specific judge, whether any mistakes, and which, were made. The High Judicial Council is, of course, the authority charged with rendering such a decision and it will thereby send a message to all those judges not willing to work and act in specific proceedings, regardless of their personal and political convictions.”*¹⁰

“He said that the judge in that case was protected “as an endangered species” but that those times are over and that she would no longer be protected:

“This is why she should now suffer sanctions. She has only now formally committed a “foul” for which one can take her to task”, Homen assessed.

He explained that he could not assess whether someone judged well or not if everything was in accordance with the law and because he did not want to risk being accused of exerting influence on the judicial authorities.

“If I could, I would call that judge up and tell her ‘please convict them to the strictest prison sentence’ because I was a [defence] lawyer in that case. I know what happened. How it happened. I know how the medical findings were doctored. That, actually, Veljkovic and the other two ill-treated parties had assaulted and beat up Marko Milosevic’s guards. That is a forgery”, the State Secretary explained....

...Specifically – Požarevac. I think the solution to the individual problem lies in the dismissal of the judge, and there is, of course, another very important segment: I don’t think that the people who were the

⁸ Under Article 153(1) of the Constitution of the Republic of Serbia, “The High Judicial Council shall be an independent and autonomous body which shall provide for and guarantee the independence and autonomy of courts and judges.”

⁹ <http://www.blic.rs/Vesti/Hronika/291387/Pridruzicu-se-inicijativi-otporasa-iz-Pozarevca-za-smenu-sudije>
<http://www.naslovi.net/2011-11-24/njuz/snezana-malovic-lajkovacu-grupu-za-razresenje-sudije-koja-je-oslobodila-marka-milosevica/2979997>

¹⁰ http://www.b92.net/info/vesti/index.php?yyyy=2011&mm=11&dd=28&nav_id=561388

*heroes of 5 October and fought for democracy should be obtaining redress from the state through the Court in Strasbourg. I think it would be much more prudent if they did that directly with us. And that is the point of my meeting with my colleagues from Otpor today – people, you have your state. Let's do all we can. The judge is one thing, the redress the state realistically owes you is another”.*¹¹

7.1.4. Although the situation necessitates in the completion of the procedure reviewing the 2009 reappointments as soon as and as smoothly as possible to stabilise society and win the trust of the domestic and foreign public, six months have passed without the HJC taking any measures against Bosko Ristic, the Chairman of the National Assembly Committee for the Judiciary and Administration, another HJC *ex officio* member. On 8 June 2011, Ristic notified the HJC in written that the Committee had not received the Anti-Corruption Agency decision of 9 December 2010 and that “it would act in accordance with its remit upon receipt of the decision”. Given that the said decision was received by the Assembly precisely on 8 June 2011 (please see attached evidence)¹², the responsibility of both Bosko Ristic, who is a member of the HJC and thus fully aware of its work and the problems it faces, and the HJC itself is all the greater.

8. Finally, the HJC has continued with its practice of failing to enforce the orders of a competent state authority, the Commissioner for Information of Public Importance and Personal Data Protection, *inter alia*, and forward:

- Reasoned decisions on all cases in which it reviewed the decisions of the HJC in its initial composition, with the exception of the decisions on 81 cases which it had forwarded, and
- Reasoned decisions of its Commissions, in the event it possessed them, and, in the event it did not, to state its views on them (Decision No. 07-00-02334/2011-03 of 29 November 2011)
- Minutes of all HJC sessions held within the reappointment review procedure (therefore, the minutes of the 1st session held on 20 July and continued on 22 July 2011, the 2nd session held on 16 August 2011, the 3rd session held on 26 August 2011, the 4th session held on 9 September 2011, the 5th session held on 23 September 2011, the 6th session held on 30 September 2011, the 7th session held on 6 October 2011 and other sessions held until it acts as requested)
- Full agenda of all those session

¹¹ http://www.rtv.rs/sr_lat/politika/homen-za-rtv:-postupak-protiv-marka-milosevica-nije-zastareo_286030.html

¹² “On 19 and 25 May 2011, the High Judicial Council asked the Speaker of the National Assembly and the Chairman of the Committee for the Judiciary and Administration for information on whether the Assembly received the above-mentioned decision given that the National Assembly is to render a decision on the termination of office HJC member of Dr. Predrag Dimitrijevic in order to conduct the procedure of appointing a new member of the HJC from among the ranks of law college professors.

On 8 June 2011, the Chairman of the Committee for the Judiciary and Administration notified the High Judicial Council that the Committee had not received the decision of the Anti-Corruption Agency of 9 December 2010 and that it would “act in accordance with its remit upon receipt of the decision.” HJC statement of 5 December 2011, available at □ HYPERLINK "http://www.vss.sud.rs/SaopstenjeVSS-05-12-2011.htm#"<http://www.vss.sud.rs/SaopstenjeVSS-05-12-2011.htm#>

- Data on which members attended the sessions
- Data on the majority with which the decisions were rendered
- Data on whether the four HJC members who were members of the HJC in its initial composition took part in the voting
- Data on the reasons why the HJC rendered a decision at its session on 30 September 2011 that “Prof. Dr. Predrag Dimitrijevic, an elected member of the HJC, shall be relieved of the duty of deputy to the second member of Commission I Blagoje Jaksic, with the exception of the following cases in which he was rapporteur (12 cases were listed in the below text)”
- Data on the agenda of that session and which HJC members attended it, the majority with which the decision was taken and whether members of the HJC in its initial composition took part in the work and decision-making at that session, and the minutes of the session.
- Data on whether and when the HJC reviewed the motion HJC member Prof. Dr. Dimitrijevic submitted at the hearing on 3 October 2011 to be recused from participation in the case of Dragana Boljevic, the President of the Judges’ Association of Serbia, and
- A reasoned decision on the motion HJC member Prof. Dr. Dimitrijevic submitted at the hearing on 3 October 2011 to be recused from participation in the case of Dragana Boljevic, the President of the Judges’ Association of Serbia (Decision No. 07-00-22594/2011-03 of 30 November 2011)

9. The High Judicial Council is the supreme authority of the judiciary, which has the privilege and duty to be independent if it is to be a constitutional guarantor of the independence of courts and judges. However, by the above conduct in the past two years, by its violations of the principles of the rule of law and judicial independence, the HJC has, inter alia:

- Violated the right to a fair trial and the constitutional prohibition of discrimination of the non-reappointed judges,
- Undermined the constitutionally guaranteed permanence of judicial office, which forms the basis of judicial independence, of the (re)appointed judges, and
- Jeopardised the right to an independent and impartial tribunal of the citizens of Serbia.

The HJC has thus destabilised the judicial system in Serbia instead of contributing to its improvement.

10. Given that the HJC has continuously demonstrated illegality, arbitrariness, ignorance and superficiality to such an extent that the complainant has all grounds to conclude that it would be impossible to eliminate the deficiencies in the work of this body and all the necessary and important decisions it renders, the complainant proposes that the Protector of Citizens identify the noted deficiencies in the work of the HJC, issue a recommendation on their elimination forthwith, recommend that the responsibility of the HJC members be established and notify the public, the Assembly and the Government of all the undertaken steps.



President of the Judges’ Association of Serbia

Attachments:

1. Opinion No 10. of the Consultative Council of European Judges of the Council of Europe on the Council for the Judiciary at the service of society of 23 November 2007
2. Anti-Corruption Agency Decisions No. 0202-00-00244/2010 of 9 December 2010 (first-instance) and No. 12-00-00003/2011-02 of 9 March 2011 (second instance)
3. Confirmations of receipt of the decision by the National Assembly and Prof. Dimitrijevic
4. HJC letter No. 7-00-136/2011-01 of 27 October 2011
5. HJC letters No. 7-00-136/2011-01 of 9 November 2011, No. 7-00-118/2011 of 7 October 2011 and No. 7-00-140/2011-01 of 18 October 2011
6. Commissioner for Information of Public Importance and Personal Data Protection Decision No. 07-00-02334/2011-03 of 29 November 2011
7. Commissioner for Information of Public Importance and Personal Data Protection Decision No. 07-00-22594/2011-03 of 30 November 2011