

1. **Before 1990 Constitution** the judges were elected on the 8 years tenure by the municipality or city assembly. **1990 Constitution - discontinuity**; broke up with socialism: obvious even from new name of the State which earlier was SRS – Socialist Republic of Serbia and from 1990: Republic of Serbia; made equal all forms of property; introduced the system of the division of powers and political pluralism; the life time tenure of judges; all judges were elected 1992 on lifetime tenure on general election
2. **2006 Constitution (continuity, as regards Judiciary):**
 - Tenure of judge stayed permanent, till the retirement age
 - High Judicial Council (HJC) is to appoint judges on permanent tenure
 - HJC - 11 members, all elected by National Assembly: 3 ex officio (president of the Supreme Court of Cassation, minister of justice and MP - chair of the judiciary committee), 6 judges, professor of law and a bar representative
 - Critique of VC¹ (high political influence on judiciary, i.e. Assembly itself elects judges for the first, 3 years probationary period, presidents of the courts, and all members of the HJC who, then, appoint all judges on the permanent tenure)
 - Neither re-appointment nor lustration are mentioned in the Constitution
3. **December's 2008 Judiciary Laws:**
 - imposed "general election" of judges: not lustration, but reappointment² - breaking the lifetime of judicial tenure by forcing all sitting judges to apply on the general election concourse, otherwise their tenure would cease to exist from 1.1.2010
4. **Factual situation**
 - 2300 – 2400 judicial posts³
 - After 2000 democratic changes, more than 2/3 of judges was "checked" either by being elected for the first time, or by being promoted to higher instance courts, and the composition of the Supreme Court was changed by 80% since 2000 till 2006
 - Therefore, specially because of the fact that Milosevic party is in current coalition government, there was not a need to change the judges from previous regime
6. **2009 reappointment:**
 - April 2009 - **establishing of HJC** on disputable way, in incomplete composition, (without the representatives of the Bar and the professors) as noted in EU Progress Report 2010 on Serbia

¹ Opinion No.405 from 19th March 2007

² The politicians explained to the international community that "general election" is a kind of lustration within judiciary but, according to the adopted criteria, it was not a lustration. Domestic public, judiciary and international public, especially EU institutions are using the expression: reappointments. Any how, the "general election" for sitting judges who already had lifetime tenure was in fact reappointment, and for those who were not reappointed it was dismissal.

³ In the period 1992 - 1994 several hundreds of judges (almost 800) went out of judiciary because of the poor material status (extreme inflation of domestic currency, equal as during World Crisis in 1920th s). In the period 1998/2008, during the coalition Government (of Milosevic's and Seselj's parties) more that 500 judges were elected

- June 2009 – HJC **decreased number of judges/prosecutors** for more than ¼⁴
 - June 2009 – HJC introduced **secrecy** of its work (Rules of Procedure of HJC)
 - Venice Commission's Opinion No.528/09 from June 2009 was not respected
 - **secret and no contradictory procedure**, from September to December 2009
 - **5 minutes/per candidate**⁵ in an arbitrarily procedure, without conversations with the candidates, without proper data collection and method for data comparison
- 7. 17th December 2009 Reappointments:**
- Almost 1/3 of judiciary - 837 judges and 180 prosecutors were not reappointed
 - No decision for non-reappointed, firstly
 - General public mistrust in regularity of procedure (political influence)
 - All non reappointed judges remained members of JAS till the final decision on their status (JAS decision before the announcement of the reappointments results)
- 8. Some of the flaws of the reappointment** (most noted in Progress Report 2010):
- Concerns about independence of the HJC/SPC
 - Non-transparent procedure; non-contradictory procedure
 - Concerns about application of objective criteria
 - Short timeframe
 - Secret services data (miss)used
 - Personal data misused - marital status of the candidate and spouse's occupation
 - Secret criteria applied - majority of judges whose spouses were attorneys were not reappointed
 - Relatives and friends of members of HJC reappointed and promoted
 - Reappointed were judges though it was submitted a proposal for their dismissal to the National Assembly, or criminal proceedings were undertaken against them
 - More than 50% of judges elected during coalition Government 1998/2000 were reappointed, and dozens of judges elected after 2000 democratic changes were not
- 9. Remedies:**
- Non reappointed judges were not provided by any decision, at first - almost all (1000) non reappointed judges/PP submitted Constitutional Appeal
 - January 2010 - HJC delivered its 25.12.2009 decision, the same for each of all 837 non reappointed judges - more than 630 judges submitted the second legal remedy
 - 564 "new" individualized decisions from 14th June 2010 which did not quashed the previous ones from 25.12.2009, but "replaced" them, what ever it might mean; any way "replacement" is not legal term or legal procedure
 - Only two decisions of the CC - May 2010 and December 2010; both quashed the HJC decisions stating that right for a fair trial of non reappointed judge was violated⁶

⁴ There were no reasoning for that, though number of cases in Serbia increased for 54% in the period 2002-2008 (from approximately 1.600.000 to about 2.450.000)

⁵ Regarding the announcement of reappointed judges, the President of the HJC herself stated on the press conference held on 17th December 2009 and later on that the HJC had processed diligently, conscientiously and prudently 5,200 applications within 400 working hours.

- Fall 2010 ‘ around 100 applications to the European Court of Human Rights
- Extended payment of salaries for non reappointed judges/PP

10. External reactions to the reappointments

- EU constantly monitored the developing, as well as Council of Europe
- Associations of judges of Italia, France, Germany, France, Spain, Portugal, Romania, Dutch Judges for Judges foundation, as well as MEDEL, European Association of Judges, International Association of Judges, issued several declarations and resolutions asking of the Serbia and EU authorities to annul bad consequences
- CCJE of Council of Europe issued two Declaration on Serbia in 2008 and in 2010

11. Reaction of Serbian officials to the EU 2010 Progress Report on Serbia

- Judiciary laws were changed and amended on 29th December 2010
- New legal remedy “objection” against the dismissal HJC decision was introduced
- Retroactive proclamation that all appeals which already had been submitted to the Constitutional Court are to be considered as “objections”
- All proceedings before CC proclaimed as terminated and transferred to the HJC
- Supreme Cassation Court as well as JAS condemned such amendments of the law
- Public Appeal of 50 most prominent professors against such laws⁷

12. After March 2011 elections for 6 judicial posts in HJC, disputed by JAS Review of the Reappointments

- HJC established 2 commissions with 3 newly elected judges-members each
- HJC Commissions are to hold hearings with non reappointed judges and to propose to HJC whether to adopt the “objection” or not; then, HJC is to adopt the decision
- 4 “old” members of the first HJC composition remained in the current composition of HJC (3 ex officio members and a Bar representative)

⁶ Though the essence of both CC decisions was as they were the pilot decisions Serbian authorities, including the new president of Constitutional Court, denied that the legal consequences of those decisions are to be applied in all the cases

⁷ Late December 2010 and January 2011, more than 50 most prominent law experts in Serbia, most of them the university professors of the constitutional law, the statehood law and of the legal theory, have signed and published an open Appeal to the Public, guided by the expert opinion that the above mentioned measures of the justice reform are threatening the very concept of the rule of law and the legal system in Serbia. Such initiative was unprecedented in Serbia.

It never happened before that the most competent experts in this field, otherwise very different by their social and scientific engagement and their opinions and position on the questions of the state and politics, have taken such uniform position and decided to appeal to the public and warn of the devastating consequences if these amended laws are implemented:

“This is completely opposite to every idea of law and basic legal security as well as to the idea of division of powers. That is the abolishment of individual’s legitimate will by the retroactive unconstitutional collective will of legislator. That is the omnipotence, i.e. the arbitrariness, the opposite of the constitution of Serbia as modern state with rule of law. It is a denial of basic individual rights – including the right to an effective remedy – and denial of the basic principles - including the prohibition of retroactivity that jeopardizes the legal security.”

- Conflict of interest of the professor – HJC member and proposal to be dismissed
- 9.3.2011 final decision of Anti Corruption Agency, no reaction of National Assembly
 - HJC adopted Review Rules on 23rd May 2011 - JAS objected to it⁸
 - No assessment of the Rules compliance with acquis as planned previously
 - Review started 15th June
 - Till 20.9.2011 HJC held four sessions and decided in 159 cases (out of 837), 65 cases (29% of considered cases by HJC) in which HJC didn't make the decision
 - Still more than 600 unsolved cases
 - Not one written decision (out of 159) was provided, contrary to the Law, 52 adopted remedies; up till now 84 judges (who were non reappointed in 2009) have been reinstalled (32 of them HJC reappointed July 2010 in an additional concurs)
 - HJC persistently don't respect its own Review Rules
 - Arbitrarily application of the Rules - obvious even from the percentage of adopted remedies (18% - 65% pre HJC judge rapporteur)
 - The percentage of adopted remedies is decreasing (consecutively on each of 4 sessions of HJC) due to the pressure of political part of HJC⁹
 - As regards JAS president:
 - o HJC changed not only the judge rapporteur, but the Commission as well
 - o Hearing was scheduled for 1st September 2011, than postponed without any explanation some 30 hours before the scheduled time
 - o HJC rejected claim for the recusal of the president of the Commission in which JAS president's case was transferred in
 - o Hearing is rescheduled for 3rd October; there will be an international observer

⁸ HJC Rules comprise a series of unacceptable shortcomings. They:

- discriminate non reappointed judges; it would be fair if every worthy, non re-appointed judge with the same or better results than a re-appointed judge is reinstated
- expand the criteria of unworthiness to the level at which ANY judge may be dismissed, in contravention of the Venice Commission Opinion and European standards
- allow for introducing new reasons for dismissal, other than those listed in the decision

⁹ The utmost pressure is subdued on the judge – HJC member who adopted the largest number of objections (55%) on the first HJC review session. Among other, his wife (Deputy Prosecutor in the Higher Prosecutors Office in Belgrade) was displaced to work in High Prosecution Office in other town the first working day after that HJC session.

In an interview with Blic newspaper of 08/12/2011 (4 days before the second session HJC) Minister "announced" that the percentage of adopted objections could/would be reduced:

".... Is the return of some non reappointed judges to work an indication that the process of re-appointments was not good?

No! Firstly it cannot be based on the conclusion of the first decisions to make about the whole process. Things can be observed in different ways. So far, only 0.5% of the total numbers of judges who have submitted applications have returned to work. So in 99.5% of cases in the general election there were no mistakes. So the situations appear now, but let's not deal with percentages"

...

<http://www.blic.rs/Vesti/Politika/271102/Snezana-Malovic-Nece-bit-i-zasticheni-sadasnji-i-bivsi-funkcioneri>