



**JUDGES'
ASSOCIATION
OF SERBIA**

**SNAPSHOT OF
THE REAPPOINTMENT
OF JUDGES IN SERBIA**

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Belgrade, 2015
Written in March 2013

DEVELOPMENTS IN SERBIAN JUDICIARY

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 Assembly’s judicial committee) and 8 electoral members out of which: 6 judges, professor of law and a bar representative
- Critique of Venice Commission of the Council of Europe (VC)¹: 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 reappointment**²

¹ Opinion No.405/2006 from 19th March 2007 http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&OID=405

² Contrary to the HJC and Constitutional court that used the expression “general election” domestic public, judiciary and international public, especially EU institutions are using the expression: reappointments.

- “general election” – 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
 - Factual situation
 - Before 2010: around 2700 judicial posts³
 - 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 late 1920s)
 - After 2000 democratic changes, more than 2/3 of judges had been “checked” either by being elected for the first time, or by being promoted – elected for the judges of higher instance courts; the composition of the Supreme Court was changed by 80% since 2000 till 2006
 - Therefore, there was not a need to change judges

5. 2009 preparation for the reappointment:

- April 2009 – **establishing of HJC** in disputable way and in incomplete composition, (without one judge, the representatives of the Bar and the professors) as noted in EU Progress Report 2010 on Serbia
- June 2009 – HJC **decreased number of judges/prosecutors** for 849, almost 1/3 (31%)⁴

Serbian politicians presented “general election” as a kind of lustration within judiciary (in respects of judges who violated the human rights in performing judicial function) to the international community. This explanation has never been used in Serbia due the failure to perform general lustration of all public officials based on the 2002 Law which has never been implemented. Besides, one of the actual ruling parties is Milosevic’s party.

The criteria for the (re)appointment were: professionalism, capability and worthiness. So, “general election” was not a lustration. Anyhow, the “general election” was in fact the reappointment for sitting judges who already had lifetime tenure, or dismissal for those sitting judges who were not reappointed.

³ In fact, not all posts were fulfilled – there were approximately 2300 judges in the system. During the period 1998/2000, during the coalition Government (of Milosevic’s and Seselj’s parties) more than 500 judges were elected. Absolute majority of those judges has been reappointed in December 2009. After judicial elections in March 2011 for 6 judges’ posts in the permanent composition of HJC, half of elected judges-members were those ones who were elected or promoted in this period.

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

- 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
- **Neither transparent nor contradictory procedure**, lasted only from September to December 2009
- **5 minutes/per candidate**⁵ in an arbitrarily procedure, without hearing of the candidates, without proper data collection and method for data comparison

5.1. 17th December 2009 – reappointment's outcome

- Almost 1/3 of judiciary – 837 judges and 220 prosecutors was not reappointed
- No decision for non-reappointed ones, at the beginning
- General public mistrust in regularity of procedure (suspected political influence)
- All non reappointed judges remained members of Judges' Association of Serbia (JAS) till the final decision on their status (JAS decision was made before the announcement of the reappointments results)

5.2. 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 (mis)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

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 HJC had processed diligently, conscientiously and prudently 5,200 applications within 400 working hours.

- Relatives and friends of members of HJC reappointed and/or promoted
- Reappointed were a dozen of judges though a proposal for their dismissal had been filed to the National Assembly, or criminal proceedings were undertaken against them
- More than 50% of judges elected during coalition Milosevic/Seselj Government 1998/2000 were reappointed, and dozens of judges elected after 2000 democratic changes were not

5.3. 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 adopted on 14th June 2010 – they did not quash the previous ones from 25.12.2009, but “replaced” them, what ever it might mean; anyway, “replacement” is not legal term nor in accordance with legal procedure
 - Two decisions of the Constitutional Court (CC) – May 2010 (case Saveljic) and December 2010 (case Tasic); both quashed the HJC decisions stating that right for a fair trial of non-reappointed judge had been violated⁶
 - Fall 2010 – around 100 applications to the European Court of Human Rights – the cases are still pending
 - Extended payment of salaries for non reappointed judges/PP

5.4. External reactions to the reappointments

- EU constantly monitored the development, as well as the Council of Europe

⁶ Though the essence of both CC decisions was as if 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.

- Associations of judges of France, Germany, Italia, Netherlands, Portugal, Spain, Romania, as well as MEDEL, European Association of Judges, International Association of Judges, issued several declarations and resolutions asking of Serbia and EU authorities to annul bad consequences, repeatedly from 2008 up till 2012

- CCJE of Council of Europe issued three Declaration on Serbia in 2008, 2010, 2012

- Decreasing from 106th (in 2008/2009) to the 128th post out of 142 countries in respect of 1.06 Judicial independence, according to the World Economic Forum's Global Competitiveness Report⁷

5.5. 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 dismissing HJC decision introduced

- Retroactive proclamation that all appeals which already had been submitted to the Constitutional Court (CC) are to be considered as "objections"

- All proceedings before CC proclaimed as terminated and transferred to the HJC

- Both Supreme Cassation Court and JAS condemned such amendments of the law

- Public Appeal of 50 most prominent professors against such laws (professional public)

6. March 2011 judicial elections

- Elections for 6 judicial vacancies in HJC

- JAS disputed judicial elections

- Previous EC statements: "Until the review (of the reappointments) is completed any further consolidation of the situation resulting from the re-appointment procedure should be avoided" (EC letter C2/MVD(2010) from 7.12.2010)

⁷ <http://reports.weforum.org/global-competitiveness-2011-2012/> (page 395)

- JAS indicated that judicial elections, based on legislation changes from December 2010, considerably consolidated the consequences of re-appointment even before its thorough review⁸ as regards the new HJC and the composition of the Constitutional Court¹ (some newly appointed judges of the Constitutional Court had been elected or appointed in December 2009)

7.1. Review of the Reappointments – 15.6.2011-30.5.2012

- HJC adopted Review Rules on 23rd May 2011 – JAS objected to it
- No assessment of the Rules compliance with *acquis* as planned previously
- 4 “old” members of the first HJC composition remained in the current composition of HJC (3 *ex officio* members and a Bar representative)
- Suspension of the review 8.12.2011 till 8th March 2012
- Gross infringements of the Review Rules continued
- 7.2. Review of the Reappointments – results
- 752 resolved cases (out of total number of 837 non-reappointed judges)
- 109 positive decisions (which adopted legal remedies of non-reappointed judges)
- Total outcome: 139 cases (17% out of total number of 837) in which it was proved that 2009 non-reappointment was groundless (out of which, in 32 cases judges have been reappointed on additional concurs in July 2010)

⁸ <http://www.sudije.rs/en/actuals/public-statements/jas-statement-regarding-preliminary-analysis-based-on-available-results-of-judicial-elections-for-judges-candidates-for-hjc-elective-members>

It had been done in several ways, namely by:

Exclusion from the electoral process 837 non-reappointed judges, whose final legal status is not final yet.

Inclusion in the electoral process of 606 misdemeanor judges who did not have the permanent tenure.

Inappropriate representation, and not in compliance with *acquis*, of judges regarding the types and levels of courts and number of judges within the peers.

Failure to ensure the legitimacy and credibility of the new HJC due to the lack of appropriate campaign, single round elections, ballot was secret just on the paper (since it was conducted in the courts, it was easy to identify who voted for whom) and three times shorter periods for the elections (60 days instead of 6 months), thus providing political impact on election results.

7.3. Review of the Reappointments – shortcomings

- The numerous remarks of EC Delegation's observers present on each and every review hearing (officially not taken into account in EC Serbia Progress Report 2011) – “the review of the reappointments is travesty of Justice”

- HJC persistently didn't respect and arbitrarily applied its own Review Rules

- Compared to review results before the suspension of the review procedure, in the continued review (since 8th March 2012) there was significant decrease of positive decisions (3 times less): in the first part of the review HJC adopted 336 decisions, out of which 82 positive ones, that is **24%** (out of which 42% on the 1st session); in the second part of the review HJC adopted 447 decisions, out of which 25 positive, that is **6%**.

- Anti-corruption Agency's (ACA) Decision (9.12.2010) related to the professor – HJC member – professor is to be dismissed due to the violation of the ACA law; on its October 2011 press conference ACA invited state's officials and institutions for the enforcement of Agency's decisions; no enforcement of the decision till November 2012

- Arrest of a judge – HJC member (23.9.2011) under unclear accusations for the crime allegedly committed more than a 10 years ago; he had adopted the highest percentage of the objections of non reappointed judges on the first HJC review session (20/22.7.201); released from detention on 8.3.2012; still suspended till the end of criminal proceeding against him

- Resignation of judge – HJC member (23.11.2011)⁹

⁹“I believe that day will come when there will be clear and precise rules and procedures for selection and promotion, and dismissal of judges, under which the most moral and educated will be able to stand in the courts, and then and only then, on the basis of results, with attained dignity and authority, they will be able to progress in the judicial hierarchy.

Also, I want to believe in the day when the HJC will provide all the above mentioned as its most important principle, and the day when they will be watching closely that no one and in any way does not affect the autonomy and independence of judges and courts. This would certainly have earned authority, respect and trust of citizens in the courts and judges and the impartial application of the law.“ – daily newspaper Politika, 30.11.2011.

- Continuation of the deliberation of HJC decisions after arrest of one and resignation of the other HJC member
- Lack of quorum in HJC for rendering review decisions and lack of legitimacy of HJC review decisions¹⁰
- 2011 Serbia EC Progress Report subordinated all issues primarily to Kosovo issue
- Discrepancy in the assessment of review procedure in EU experts report and EC Progress Report 2011 on Serbia¹¹

8. Reactions of the international institutions

- 25.1.2012 Resolution 1858 (2012) on Serbia of the CoE Parliamentary Assembly¹² the Assembly expressed its concern over the political influence exercised by the parliament and the President over the judiciary and called for further progress in four key areas: among others, in full implementation of changes to the justice system
- European Parliament Resolution of 29 March 2012 (2011/2886 (RSP))¹³ on the European integration process of Serbia – “EP:... 17. Regrets the lack of transparency and a number of shortfalls and deficiencies in the judicial review procedure and in the appeal procedure concerning judges and prosecutors who have not been reappointed, including violations of procedures and standards, and the impact that these deficiencies might have on the independence of the judiciary, the

¹⁰ HJC as tribunal must be working and deciding in the full composition. Nevertheless, HJC worked in full composition only on one session (the first one held on 20/22.7.2011) out of 40 review sessions and adopted only 86 (11%) out of 752 decisions in full composition.

Decisions of HJC must be taken by at least six of its eleven members, as stipulated by the Law on HJC. In December 2010 it was promised to EU that only new members of the HJC, not the four “old ones” who initially decided on the reappointments, would be taking the decisions in the review of the reappointments.

¹¹ <http://euobserver.com/15/114714> <http://www.sueddeutsche.de/politik/vertraulicher-bericht-ruegt-serbien-eu-ignoriert-schwere-maengel-in-serbiens-justiz-1.1245004>

¹² <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta12/ERES1858.htm>

¹³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2b20120329%2bTOC%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

separation of powers and the rule of law as well as the right to impartial treatment for all members of the judiciary, including those removed from office;”

9. Reactions of domestic institutions

- Commissioner for Information of Public Importance and Personal Data Protection adopted JAS appeals ordering to HJC to provide JAS with all the information that JAS has asked for

- Since HJC failed to comply with Commissioner’s orders, JAS addressed to the Ombudsman who adopted opinion¹⁴ from 11.1.2011: “HJC... has over a longer period of time worked in a manner that has given rise to grave doubts about the lawfulness and regularity i.e. legitimacy of the work of this authority”

- As from 11.7.2012 till December 2012 Constitutional Court (CC) annulled all the HJC review decisions ordering the reinstatement of all non-reappointed judges

- 539 non-reappointed judges were reinstated till the end of 2012 (out of 837 judges dismissed in December 2009: 132 were reinstated before 2012 on additional concourse and during the review procedure; some are retired, some did not want to be back in judiciary; some died, one committed suicide)

- HJC didn’t enforce CC decisions in two important aspects: judges are not reinstated according to their 2009 application (for the 2009 (re) appointment) neither decisions from 25.12.2009 and on 14.6.2010 termination of their judgeship were pronounced null and void as ordered by CC

- National Assembly elected (15.11.2012) new HJC member from the rank of professors (previous law professor – HJC member resigned on 15.10.2012)

- CC decided (20.12.2012) as unconstitutional the provision of the Law on Judges based on which president of the High Cassation Court had been elected 30.11.2009

¹⁴ <http://www.ombudsman.rs/index.php/lang-sr/2011-12-11-11-34-45/2104-2012-01-12-10-56-39>; informal translation is on the JAS website: <http://www.sudije.rs/en/actuals/news/opinion-of-the-ombudsman-of-the-republic-of-serbia>

- CC rejected (27.12.2012) the appeals of reinstated judges who claimed that their electoral judicial rights (active and passive) were violated in March 2011 (1/3 of judicial corpus was not allowed to vote or to be voted for HJC member) and asked for the new judicial elections

- HJC appointed (28.12.2012) almost 900 judges who had been elected in 2009 on three years probationary tenure on the permanent tenure (till the retirement age); not once those judges were evaluated, though they should have been evaluated three times (HJC failed to adopt bylaws on criteria and standards for evaluation of judges work and on procedure of evaluation)

- 20.2.2013 National Assembly noted that function of the president of Supreme Court of Cassation ceased due to the 20.12.2012 CC decision

- 21.2.2013 judges of the Supreme Court of Cassation elected acting president of that Court

- Current HJC (11 members) has 7 "old" members – 6 judges (one is still suspended) and a Bar representative (4 new members are: acting president of Supreme Court of Cassation, Minister of Justice, chair of the Judicial Committee of the National Assembly, professor of Law)

- HJC with 6 judges – "old" HJC members lacks the legality, legitimacy and capacity to perform its demanding legal duties as noted in numerous experts' documents (the latest is one from December 2012 – recommendations of the European experts submitted to the Minister of Justice)

- Ministry of Justice ignores JAS initiative for the new judicial election and, meanwhile, for sustaining of adopting the strategic judicial decisions (appointment of acting presidents of all courts, transferring the judges, adopting the National Strategy for Judicial Reform, new laws on judiciary, etc).

* All data in this brochure are as of March 2013

