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JUDICIAL REFORM IN SERBIA 2008–2012

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PREFACE

On the pages that follow the authors confront the legal community in Serbia with the recent legal history of failed attempts at improving Serbian judiciary, at restoring citizens' trust in it, at setting a sound base for the law ruling over politics – at least in the most important elements in the judicial domain; the authors also present the results of such failed reform and investigate the legal and political causes of this failure.

The monograph is divided into two parts – the first part entitled „Reforming the judiciary 2008–2010" was written by Vesna Rakic-Vodinelic, whilst the second one, entitled „The 2011–2012 Review Process" was written by Ana Knezevic Bojovic and Mario Reljanovic. The division is both chronological and logical – the authors wanted to analyse the constitutional and legislative framework of the judicial reform in Serbia systematically and comprehensively, as well as practice of the bodies that carried out this reform, and offer a final assessment on the success of this endeavour, which was formally ended in July 2012, but the final outcome of which remains unknown.

Consequently, the first part of the publication examines, at its very beginning, the legal theories behind what is considered good judiciary in a democratic state, and underlines the political independence of judges as a key element of this formula. The author then critically examines the legal reception of European standards concerning the judiciary in Serbia. A special part is then dedicated to the international, theoretic, constitutional and legislative basis of the judicial reform of 2008. The author scrutinizes the Serbian Constitution of 2006 and the Constitutional Act for the Implementation of the Constitution, and also the judicial organisation statutes, which were the normative grounds for the most invasive interventions in the judiciary in the democratic history of Serbia. The deci-

sions of the Serbian Constitutional Court and the corresponding separate opinions are analysed in detail. The author then describes the manner of work of the bodies which carried out the reform, paying special attention to the composition and modus operandi of the first composition of the High Judicial Council and deficiencies observed with regards to both these issues. She then analyses the normative framework for reviewing the decisions adopted by the first composition of the High Judicial Council and the State Prosecutors' Council, as an introduction into the second part of the publication.

The second part is a detailed critical analysis of the process for reviewing the decisions on non-appointment of judges, public prosecutors and deputy public prosecutors. The authors first describe, in detail, the work of the bodies conducting the procedures, analysing in particular the extent to which relevant procedural principles have been observed. They go on to analyse transparency of the work of the two bodies and assess whether they were truly independent bodies the actions of which were directed towards amending the mistakes made in the judicial reform. A part of the publication is dedicated to the analysis of the decisions adopted by the new compositions of the State Prosecutors' Council and the High Judicial Council. The authors then reflect on the role of various organisations which monitored the procedure and their influence on the course of the review process. At the very end, the authors analyse the decisions adopted by the Constitutional Court in July 2012, whereby the procedure was de facto restored to the stage prior to the 2009 appointment.

In their conclusion, the authors are sharp but justified in their criticism of the attempts at reforming Serbian judiciary in accordance with European standards, and also give some general recommendations that should be followed in order to achieve the goal any democratic state should strive for – to have a truly independent and highly professional judiciary.

In Belgrade, September 2012
Authors

ABBREVIATIONS

Courts and other state bodies

SPC – State Prosecutors' Council

ECrHR – European Court of Human Rights

PPO – public prosecutors' office

RPP – Republican Public Prosecutor

CCS – Constitutional Court of Serbia

SCC – Supreme Court of Cassation

HJC – High Judicial Council

Regulations and official journals

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms (SM Official Gazette, M–5/20)

CC – Criminal Code of the Republic of Serbia, (RS OG 67/2003)

RS OG – Official Gazette of the Republic of Serbia

FRY OG – Official Gazette of the Federal Republic of Yugoslavia

SM OG – Official Gazette of Serbia and Montenegro

SFRY OG – Official Gazette of the Socialist Federative Republic of Yugoslavia

CRP – Court Rules of Procedure (RS OG No. 70/2011)

BPA – Barristers' Profession Act (RS OG 31/2011)

SPCA – State Prosecutors' Council Act (RS OG No. 116/2008, 101/2010 and 88/2011)

PPOA – Public Prosecutors' Office Act (RS OG No. 116/2008, 104/2009, 101/2010, 78/2011 – other statute and 101/2011

CPC/2001 – Criminal Procedure Code (RS OG 13/2001)

CPC/2011 – Criminal Procedure Code (RS OG No. 101/2011)

JA – Judges' Act (RS OG No. 116/2008, 58/2009 – CC decision, 104/2009 and 101/2010)

STCPPOA – Seats and Territories of Courts and Public Prosecutors' Offices Act (RS OG No. 116/2008)

GAPA – General Administrative Procedure Act (RS OG No. 30/2010)

OCA – Organisation of Courts Act (RS OG No. 116/2008, 104/2009, 101/2010, 31/2011 – different statute, 78/2011 – different statute and 101/2011

ADA – Administrative Disputes' Act (RS OG No. 111/2009)

CCA – Constitutional Court Act (RS OG No. 109/2007 and 99/2011)

NCPA – Non-Contentious Procedure Act SRS OG, No. 25/82 and 48/88, RS OG, No. 46/95 and 18/2005

HCJA – High Council of the Judiciary Act (RS OG 62/2002, 42/2002)

HJCA – High Judicial Council Act (RS OG No. 116/2008, 101/2010 and 88/2011)

OA – Ombudsman Act (RS OG No. 79/2005 and 54/2007)

CS – Constitution of the Republic of Serbia (RS OG No. 98/2006)

CS/1990 – Constitution of the Republic of Serbia of 1990 (RS OG No. 1/1990)

Vesna Rakić-Vodinelić

PART ONE I
REFORMING THE JUDICIARY – THE 2008–2010 PERIOD

1. INTRODUCTORY OBSERVATIONS

On the pages that follow the authors confront the legal community in Serbia with the recent legal history of failed attempts at improving Serbian judiciary, at restoring citizens' trust in it, and at setting a sound base for having the law rule over politics – at least in the most important elements in the judicial domain; the authors shall also present the results of such failed reform and investigate the legal and political causes of this failure.

1.1 IS THERE A FORMULA OF „GOOD JUDICIARY"?

Is there a formula of „good judiciary"? Perhaps it is possible to prove so, in theory. What is evident in practice, and when it comes to Serbia, what is also quite sufficient, is the fact that there is a formulated European standard of judiciary – capable of responding to citizens' fundamental right to a fair trial and to the interests of the state ruled by the law, rather than political power alone.

This, European judicial formula was not a simple one to articulate, and it certainly was not a result of legislative interventions alone. Constituting a judiciary as the third branch of state power, one that a citizen can trust in and one that will ensure the rule of law, is more a result of political struggle than of successful legal formulas.

Despite considerable differences in the conceptions and normative treatment of the judiciary, during the XVII and XVIII centuries in particular, the leading states of the time – England, France and Prussia – have formulated the first supranational postulates of

judicial independence, which were then articulated in legislative terms in the XX century.

In the course of the XVIII century, in those European countries where the continental legal system was in force, the judiciary was established as a bureaucratic organisation, dominated by the executive. After the French Revolution, however, a fundamental change takes place. The French Constitution of 1791 *recognises judicial power as the third state power.* The French revolutionary legislators had firmly believed that the judicial power may not take on the role of a supervisor of political power, but can only control the abstract idea of law. „The Court of Cassation was not established so as to apply law to various individual cases, nor in order to decide on the merits of the case, but in order to protect the forms and principles of the Constitution and of the law from the attacks that may come from the courts. Its role is not to serve the citizens, but to protect the law" – said Robespierre in the Assembly, on May 25, 1790.[1] The ideal of the new regime was not the system of checks and balances, but a harmonious relation of the judicial and executive powers with regards to the legislative, which was the only direct expression of people's sovereignty.

It is essential to understand that the implementation of the separation of powers doctrine was instrumental, in historical terms, in differentiating between the judicial power and other state powers, and has resulted in the judicial power progressively gaining more independence. However, after this historical turning point, modern legal systems have shown that the systems of separation or the unity of powers do not *per se* affect the position of the judicial power in the state. Experience has shown that judicial independence can be compromised in both models. Moreover, in the systems based on the separation of powers, which is considered to be better suited for ensuring judicial independence, the true content of this independence differs – this is easily seen when analysing the differences regarding, e.g. the procedures for appointing judges, who are the most important direct holders of judicial power.

1 According to Braas, *Precis de procedure civil*, Bruxelles-Liege, 1945, p. 788.

The present constitutional and legislative regime in Serbia is based on the principle of separation of powers (Article 4, paragraphs 2–4 of the Serbian Constitution[2]), but still, when it comes to judicial appointment, very little has changed compared to the times when the principle of unity of powers was in force.

In the course of the XIX century the tension between the judicial and the executive powers became apparent in European countries, but the judiciary gradually emancipated. This political and legal change in the position of the judiciary was not accepted by the communist/socialist countries that were formed in Europe after the World War II. The key constitutional and factual difference in the position of the judiciary in communist/socialist states of the time was a result of the establishment of the so-called *unity of state power*, coupled with the ideological dominance of a single-party parliament, without any formal markings of a parliamentary democracy. In normative and real terms alike, this concept has had a decisive influence on the loss of independence and autonomy of the judiciary (if there ever were any) and created a habit of submission, subservience for the better, which has proven difficult to abandon.

Concurrently with the weakening of the social role of the judiciary in communist/socialist countries, after the World War II the idea of citizen's right to a fair trial and to an independent judge as a fundamental human right grew stronger in western European democracies. Within the legal and political system of the Council of Europe, this idea was codified in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and strengthened in the jurisprudence of the European Court of Human Rights. The setting of European standards of independent judiciary was also strongly influenced by the Recommendation (94)12 of the Committee of Ministers on the independence, efficiency and role of judges and the European Charter on the Statute of Judges 98/23. The section of the Charter relating to the principles gives special attention to a body the establishment of which is recommended to every European state, *transition* states in particular, a

2 Constitution of the Republic of Serbia, RS Official Gazette RS 98/2006.

body that would be independent of the executive. Its fundamental role would be to decide on the selection, appointment, promotion and termination of office of a judge. In recent legislative practice in Serbia, this role should have been taken by the High Council of the Judiciary, which had stopped operating in 2009, and the now existing High Judicial Council and the State Prosecutors' Council. The countries that meet the criteria of judicial independence and autonomy within the Council of Europe should be ready to meet the strict criteria related to the judiciary and the legal system set by the European Union in the Copenhagen Principles.

In historic terms, the formulation of a standard of „good judiciary", in its early development, was under the influence of the *Nurnberg trials* for war crimes committed in the Second World War; this is clearly reflected in Article 15, paragraph 2 of the International Covenant on Civil and Political Rights.[3] The legal base for the establishment of the International Military Tribunal competent to decide on individual criminal liability was the London Charter of 1945, and the legitimacy of the trial is based on the Hague Convention of 1907, which explicitly provided (despite attempts at revision) that, during the war, the laws and customs of war are in force and that these must be observed by all „civilized nations". The Nurnberg trial had undoubtedly influenced the adoption and the content of key international documents aimed at protecting hu-

3 SFRY has ratified the Covenant by a statute passed on January 30, 1971, SFRY Official Gazette.
Article 15 reads:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

man rights, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), Universal Declaration of Human Rights (1948), Geneva Conventions on rules and customs of war of 1949, with Additional Protocols of 1977, the International Covenant on Civil and Political Rights of 1966, ratified by SFRY in 1972, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, ratified in the Serbia and Montenegro State Union in 2004. All international documents previously ratified are now binding on Serbia, as one of the successor states of the former joint state.

1.2 ELEMENTS OF THE „GOOD JUDICIARY" FORMULA

We believe that by combining national legal standards of democratic societies and international European standards, a formula of *political independence of judges and the judiciary* can be reached. The key elements of this formula are the following: (1) legal definition of a court as an independent and autonomous state institution; (2) court and trial are based on legislative acts of highest rank; (3) judges are institutionally independent, which primarily means they are independent of political branches of state power and also independent of powerful individuals and social groups; (4) judges are personally independent (this mainly depends on the legislative provisions on judicial appointment and termination of office and on whether judicial office is permanent; it is achieved by ensuring that the judiciary has a dominant say in the procedure for judicial appointment and termination of office); (5) a decision on merits is passed in reasonable time, based on a fair and public hearing; (6) impartiality (achieved through recusal and rules on preventing the conflict of interest); (7) manifestation of independence of the court and of a judge; (8) the manner in which a judge is assigned in any given case (the right to a random, that is, to a „natural" judge).

According to *Monitoring of EU Accession Process*, the excessive influence of the executive on the judiciary, judges and trials in communist/socialist countries, until 1989, presented the largest threat

to judicial independence. This influence was particularly reflected in the key role taken by the ministry of justice and the only ruling party in the appointment, promotion and termination of office of judges, but was also evident in the contents of court decisions passed in politically delicate legal matters. It is estimated that until 2001, only Hungary and, in part, Slovenia, have managed to eliminate the institutional and extra-institutional influence of the ministry of justice on the judiciary, both normatively and practically.

1.3. JUDICIAL COUNCILS

The *representatives* (heads, leaders) of state power in any given state are determined based on the constitutional organisation of state power in that state. In this respect, the judicial power, as one of three branches of state power, has shown considerable differences when compared to the other two. This is primarily, but less importantly in terms of this publication, because it is the only branch of power that should be exclusively legal and therefore not *political*. Secondly, contrary to the case of the executive and the legislative power, the body that represents judicial power is not always clearly determined.

Historically, in the course of development of the judiciary, and particularly in the system of unity of powers, the ultimate representative of all state powers, including the judicial, was the parliament. In the system of separation of powers the role of the representative of the judicial power pertains or pertained, expressly or implicitly, to the highest court within the given jurisdiction. During the XX century an increasing number of states accepted a specific autonomous body as the constitutional or statutory representative of judicial power; this body is named differently in various countries, but the common name for it is – the *judicial council*. Judicial council is not an institute that is generally accepted – either in Europe or globally. Furthermore, the existence of a judicial council is not an international obligation of the states attempting to establish the rule of law – quite to the contrary, there are many European and non-European states that are considered to have a model ju-

diciary, but which do not have a judicial council or a similar body. True independence of the courts and the existence of a *Rechtsstaat* is *neither legally nor politically preconditioned by the existence, and operation of a judicial council and having the judicial council exercise its typical competences.* Practice has shown that judicial councils were established in times following major social turbulences and thus have had a positive effect in stimulating judicial independence. The important historical turning points for establishing judicial councils were the following: the time directly after the World War II (in France and Italy), the downfall of fascist authoritarian regimes (Portugal and Spain), the downfall of communism/socialism (countries of Central, East and South-East Europe). Judicial council is a serious and important instrument of judicial power, which reduces the consequences of the influence exerted by other branches of state power with regards to the organisation of the judiciary. This is the reason why, over the past two decades, a considerable number of states in so-called *transition* has opted for introducing the institute of judicial council in their legal systems. Although the judicial council is not a mandatory institute, the states that already have it or that are introducing it to their legal systems should observe certain standards, set in the recommendations of the Council of Europe and other international organisations.

Within the Council of Europe, the issue of a judicial council, a body independent of executive and legislative powers, which should have a decisive role in the selection, appointment and termination of office of judges, their promotion and disciplinary liability, is regulated by the Recommendation of the Committee of Ministers R(94)12 on the independence, efficiency and role of judges and by the European Charter on the Statute for Judges 98/23. In the preamble of the European Charter, the participants of the multilateral meeting on the statute for judges in Europe[4] invoked the COE Committee of Ministers Recommendation 94/12, and the UN Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly in November 1985 and also Article 6

4 Organized by the Council of Europe, between 8–10 July, 1998.

of the European Convention for the Protection of Human Rights and Fundamental Freedoms[5], to the effective application of which this Charter should contribute. Invoking Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and UN Basic Principles on Judicial Independence, the Committee of Ministers recommends member states to adopt all necessary measures to promote the role of judges as individuals and judiciary as a whole and strengthen their independence and efficiency, by adopting the principles listed in the Recommendation. The Recommendation is divided into 7 parts – the scope and six principles. It applies to all persons exercising judicial functions, irrespective of the subject-matter they deal with (constitutional, criminal, civil, commercial or administrative law matters). It also applies to lay judges and other persons exercising judicial functions, except where it is clear from the context that it can only apply to professional judges (e.g. regarding the principles concerning the remuneration and career of judges). Within *general principles on the independence of judges, special part is dedicated to an authority that should exist in every country and be competent for taking decisions on the selection, career and termination of office of judges.* This authority should be independent of the executive and legislative powers. In order to preserve its independence, rules should be adopted to ensure that members of this body are selected by the judiciary and that the authority decides itself on its procedural rules. However, given different legal traditions in Council of Europe countries, the Recommendation allows for certain divergences. Namely, where constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent. It is also requested that all decisions concerning the professional career of judges be based on objective criteria, without any other influences. This practically means that all decisions concerning the promotion of judges are to be based

5 Reading: „Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"

on merit, having regard to their qualifications, integrity, ability and efficiency. One way to ensure those guarantees is the existence of a special body independent of the government, having an advisory role. The other possibility is to establish the right for an individual to appeal to an independent authority, or it can be ensured that the authority that makes the decision on appointment at the same time safeguards against undue or improper influences.

Presently, the role of the representative of judicial power is executed by the *High Judicial Council* in Serbia. An additional role, which does not directly concern judicial power, but another segment of the judiciary – the public prosecutor's office, is executed by the *State Prosecutors' Council*.

One of good practical test of the normative grounds of the right to an independent judge is not constitutionally or legislatively elaborated in most transition countries: *the manner in which a judge is assigned in any given case.* At this point exactly is where the right to an independent judge is effected in practice.

In addition to the establishment of independent and autonomous judicial authorities, in many countries of Central and Eastern Europe judges and other state officials who had violated human rights under authoritarian regimes have been *lustrated*.[6] Lustration was not carried out in Serbia.

Numerous transition countries, Serbia not being one of them, have taken various legal, political and social measures in order to reduce the corruptibility of holders of judicial offices, as well as to reduce the influence of individuals and social groups to a tolerable level.

6 For more detailed comments on the prevailing formula of the standards that a good judiciary should meet, see: V. Rakić-Vodinelić, *Kojim putem ka vladavini zakona – anatomija razaranja treće državne vlasti u Srbiji,* Republika, (Beograd, mesečnik) 1–31. 05. 2010, (podlistak); V. Rakić–Vodinelić, *Čas anatomije,* web portal www.pescanik.net on 01. 09. 2010, V. Rakić Vodinelić, *Kad pojedinac tuži državu*, *Evropski forum* br. 4, April 2003, etc..

1.4 LEGAL RECEPTION OF EUROPEAN STANDARDS CONCERNING THE JUDICIARY IN SERBIA

1.4.1. A Brief History

After the early Middle Ages period – in the times following the downfall of the Western Roman Empire until the schism between the east and west Christian churches – which were dominated by tribal rather than state forms of promulgation of law – during XI and XII centuries the church becomes a state church, Roman law is received in its developed phase and this law is adjusted to new circumstances, in the form of canonical law. In XI century in particular the interest in Roman law is revived, given the discovery of the Digesta (the Pandecta), according to the records of the Byzantine emperor Justinian. This combination of secular Roman law and ecclesiastical law in Europe and in the Balkans, medieval Serbian state included, is designated in history as Roman-canonical law. From the end of the XII century until mid XIV century the principle of a ruler directly executing judicial power was preserved in old Serbian state. As in other European countries of the time, the judicial power, understood as a sovereign state power, was being executed with relative regularity only since the beginning of early middle ages. When the magistrates have acquired the characteristics of regular officials of judicial power rather than having this role being taken by the sovereign, they were not career judges in the very beginning. However, it is important to take note of the fact that the term *magistratus,* when referring to a judge, was accepted before it was accepted as a term referring to high administrative officials, which leads us to conclude that the court bureaucracy was established before the administrative one. Types of courts were not differentiated between in the present day sense – whereby difference would be made between courts of general jurisdiction as opposed to specialised courts (except for ecclesiastical courts). Consequently, there was no specialisation within the judicial profession in secular courts. However, a distant predecessor of commercial judiciary in Serbia can be found as early as XIII century, when one court of first instance was established for disputes between Serbs and Dubrovnik citizens, dealing with commercial disputes. The reason for

establishing such a court lies, on the one hand, in the existence of numerous commercial contracts between Dubrovnik and Serbian state of the time, and on the other hand, in the issuing of charters whereby the rulers have granted land to respectable noblemen, churches and monasteries, who have used such land, inter alia, for commercial activity. The court proceedings, as prescribed by the Dusan Code, were not differentiated – that is to say, the procedure was the same in civil and criminal matters with regards to the rules we now designate as the procedural principles, and also in terms of form and evidence.

After the Otoman conquests of the Balkans (which started in mid XIV century and for the most part were completed by the end of that century), the general organisation of state power, and hence, of courts, was governed by the law of the Otoman Empire; some ritual elements of custom law and custom trial were preserved on the territory of present-day Serbia.

At the time of the First Serbian Uprising, the judicial function was performed by both civil and military administrative authorities. As early as 1804 Karadjordje has ordered, when inviting the leaders/heads to the assembly, that each *vojvoda* (duke) be accompanied by „2 or 3 head men" to select judges, explaining that „it was unbearable not be held without court". According to L. Arsenijevic-Batalaka, at this time first judges were appointed for certain *nahija*s (districts). Once the *Praviteljstujusci Sovjet (*the council of ministers, the government*)* was established in 1805 it had immediately started to operate as a court, as well. In addition to conducting trials, the Sovjet had started to establish courts. It had called on the *nahijas* to organise assemblies and elect three most reasonable representatives among themselves; these would be appointed judges. Given that literate people were scarce, it was envisaged that each magistrate court must have a priest, who would act as a clerk. However, due to the war activities, most nahijas have failed to act on this Sovjet's instruction. This is why in 1807 the Sovjet had issued a new order – that courts are to be organised in each town and city. Town courts tried in so-called small matters, whereas the Sovjet was competent for the criminal offence of murder. This order was also used to or-

ganise the judges in Serbia, although their number and whether all nahijas were included remains unknown. According to the records of Vuk Karadzic (who himself was briefly a court president, but in later times, during the rule of knez (prince) Milos), each court had to have a president, members, a secretary and a clerk. In his report of 1808 Rodofinikin (the Russian envoy to Serbia) claims that the following courts existed in Serbia at the time: village, county and district (*nahija*). In addition, some towns had magistrates who tried in commercial disputes and also performed police duties.

After the central state power was reorganised in January 1811, the court organisation had also changed, whereby only village courts and magistrates remained the courts of first instance, whilst the role of the supreme court was taken by the Grand Country Court in Belgrade. Despite this limited construction of court organisation, the vojvodas (dukes), including Karadjordje himself, have continued to intervene in the work of courts, to exert pressure on judges, to pass decisions themselves or to annul court decisions.[7]

During the rule of knez Milos an unsystematic legislative activity began, which could have been of significance for court organisation, and for civil court proceedings in particular. Since Vuk Karadzic had returned to Serbia in 1828, he was offered to translate certain statutes into Serbian. The general plan of adopting modern statutes actually consisted in translation of selected foreign statutes, which would then be edited by the legislative commission, selecting at the same time the solutions appropriate for the circumstances in Serbia at the time. The following year Vuk Karadzic was appointed a member of the general peoples' court, and also the president of the legislative commission. There are some indications that he had translated the Napoleon's Civil Code, using commentaries in German and Polish.[8] The legislative endeavours and the status of judicial clerks in Milos's time have had little effect in improving court

7 Compare, with more detailes, in, *D. Janković and R. Guzina,,* Istorija države and prava jugoslovenskih naroda (do 1918. godine), Beograd, 1962, p. 192 and 193.

8 Compare, in particular, *Lj. Stojadinović,* Život and rad Vuka Stefanovića Kradžića, Beograd, 1987, p. 337.

proceedings – they largely remained the same as in the times of the First Serbian Uprising.

The judiciary in Serbia in the modern sense of the term can be traced back to mid XIX century. Until 1837, the judiciary was subordinated to administrative authorities – this was true for the first and second instance: magistrates were the first instance, whilst the role of the court of appeal was executed by the Sovjet (the council of ministers, the government) with an occasional and rather unclear role of the Grand Country Court. The majority of magistrates were not educated lawyers, but renowned citizens. As the second instance authority, the Sovjet did not have the relevant characteristics of a court, but of an administrative authority. A Government order had established the Grand Court in 1837 – it was established as a court of appeal. The head of state (the knez) had the power to decide on legal remedies that vaguely correspond to present-day extraordinary legal remedies.

In the middle of the XIX century (as of 1855) the judiciary in Serbia started to resemble the modern judicial organisation in European countries of the time. This was particularly facilitated by the adoption of the Serbian Civil Code in 1884 – this was, in fact, a shortened and edited version of the Austrian Civil Code. In time, the knez lost judicial powers, and a Supreme Court was established – ten years later (in 1865), based on the first modern statute on court organisation in Serbia, this court became the Court of Cassation. The first Court of Cassation comprised 15 judges and was specialised in rudimentary terms: it had two civil divisions and one criminal division. When it comes to procedure on legal remedies, the court was influenced by the French model. One of the most important novelties introduced by the Court Organisation Act, and the Court Procedure in Civil Cases Act of 1865 was the establishment of the first Commercial Court for the city of Belgrade. Rules of general civil proceedings also applied to cases before the commercial court, but there are some signs of specialised procedural rules.

After the World War I and the unification of south-Slavic states, which were in part formed due to the dissolution of Austro-Hungary, in 1918 there was an increase in the construction, modernisation and harmonisation of the judiciary, modelled after

the leading European states of the time. Several legal systems have merged: the so-called *Serbian*, which was under the influence of the French model, when it comes to court organisation and the role of the Court of Cassation; *the Otoman*, which was in force in some parts of Yugoslav territory until the end of the war; *the Austrian and Hungarian,* which were in force in northern and western parts of Yugoslav territory of the time, and also in Vojvodina. The Austrian model prevailed in the composition of the entire legal system (particularly with regards to court procedures) and court organisation had considerably changed and was modernised. However, the heritage of different legal civilizations proved to be a constant burden on the organisation of both courts of general competence and commercial courts. As a result, some provisions of the statute governing the organisation of courts included compromises that are now difficult to understand; some have never been fully applied in practice. The Organisation of Ordinary Courts Act of 1929[9] envisaged only two first-instance commercial courts, seated in Belgrade and Zagreb. The territorial jurisdiction of the two courts covered only the territories of these two cities, whereas in the remainder of the country's territory the county courts, as ordinary courts of general competence, tried in commercial matters.

After the Second World War the socialist/communist legal system was introduced and constituted. One of the dominant views of procedural law at the time was the doctrine of public-law nature of all court procedures and the notion that the protection of individual subjective rights, particularly those stemming from trade, should be carried out under strong control of the state. Commercial law had lost its previous meaning, since companies and real estate, particularly the construction land, were nationalised. So-called socialist companies were formed to replace the privately-owned companies, following the Soviet model. Commercial life, in the common sense of the word, had ceased to exit. In these times of early communism, the Main State Arbitration was of particular importance for the subsequent organisation of commercial courts – it was an

9 §27

administrative body that prescribed commercial customs (usages) in a specific, communist environment. At the beginning of the fifties, Main State Arbitration was transformed into the Supreme Commercial Court, the jurisdiction of which covered the entire territory of Yugoslavia and which was competent to decide on appeals and extraordinary legal remedies against decisions of lower commercial courts.

After 1948 and the political breakup between Yugoslav and Soviet authorities, and particularly following a considerable inflow of credits from Western Europe and the USA, trade between domestic companies and between domestic and foreign commercial entities began to develop. The discontinuity that was in place after World War II ended following the adoption of the Litigation Procedure Act in 1955 and the adoption of the Criminal Procedure Act the same year; they were preceded by the adoption of the Courts' Act in 1954, which established both courts of general jurisdiction and commercial courts, this time for the entire territory of Yugoslavia. In addition, the Foreign Trade Arbitration was established for resolving commercial disputes with a foreign element. Litigation Procedure Act envisaged special rules of procedure for proceedings before commercial courts. Internal organisation of the courts of general jurisdiction and commercial courts occasionally changed in the 1955–1991 period, when Yugoslavia had dissolved. The most important changes ensued after the adoption of the 1974 SFRY Constitution, that entailed differences in this respect between various member states, since the constitution had transferred the legislative competences from the federal state to member states. Occasional changes in ideology, internal political tensions and the like sometimes put forward motions for the abolishment of commercial courts, but they have managed to survive in all former Yugoslav republics.

1.4.2. Reception of European Standards on Judiciary in Serbia as a Transition Country

How were the ideas and formulas on judicial power and its independence received in Serbia, as a country of belated transition? Three periods can be distinguished over the *last fifteen years*.

a) *Mature age of Milosevic's authoritarian rule.* Key legal and judicial characteristics of this age can be brought down to several important traits:

Authoritarian and arbitrary interpretation of law. The statutes adopted in Serbia after the 1990 Constitution[10], particularly those passed after 1997, were characterised by a high degree of legal authoritarianism and failure to sanction the violations of the Constitution. Generally speaking, Serbian statutes passed in the last decade of the XX century were not in line with the standards of modern civilisation or comparative experiences, and – this must be underlined – were not harmonised with the legal system as formed within the Council of Europe and the European Union. The regulations of this age are, as a rule, sparse, numerous legal situations remained unregulated, which gave room to arbitrary and inadequate interpretation of law by the executive power.

Ideological character of the legal order. Time limits set out in constitutional statutes for the implementation of the former FRY Constitution of 1992[11] and the Serbian Constitution of 1990 were extended several times, and hence new or considerably revised statutes that would be in compliance with these constitutions were never adopted at all. This anti-constitutional mechanism had in fact reproduced the legal order of the former SFRY, which had the characteristics of a politically monistic legal order.

Political role of the judiciary. Normatively and practically, the judicial order was not perceived as an independent branch of power, equal to others. In addition, statutory provisions concerning the judiciary were often not in compliance with the Constitution. The judges who openly opposed political orders were illegally dismissed. The association of judges in transition countries, as an apparent tendency in the judiciaries in the countries of Central, East and South-East Europe at the end of the XX century is assigned to the awakening of the judicial profession after the idea of political

10 Constitution of the Republic of Serbia, RS Official Gazette RS 1/90.

11 "Constitution of the Federal Republic of Yugoslavia, FRY Official Gazette ....|"

unity of powers in communist/socialist ideological countries was derogated. In some countries, judicial associations emerged in the process of lustration of judges and public prosecutors, in some others it was precisely those associations that initiated the establishment of judicial councils and hence, at least formally, the transfer of competences for judicial recruitment from executive authorities (ministries of justice) to authorities of judicial power, as the only non-political (legal) state power. Judges' Association of Serbia was formed as a reaction to attempts at abuse of the judiciary by the authoritarian powers during mass demonstrations provoked by *electoral theft* in local elections in 1996. The Judge's Association had acted as an unregistered institution, even though the constitution that was in force at the time had allegedly guaranteed freedom of political, trade-union and other forms of organisation. The fight of the Judge's Association to be entered into the relevant register had finished before the Supreme Court of Serbia, who had denied such entry at the time of authoritarian power. The Association had a decisive role in the establishment of the High Council of the Judiciary in post-Milosevic Serbia.

Absence of judicial reaction to war crimes and organised crime. In wars and armed conflicts that took place on the territory of the former SFRY in the 1991–1999 period, mass war crimes were committed. Precisely due to the fact that the states involved, Serbia in particular, have refused to process war crimes, the international community had reacted by establishing the International Tribunal in the Hague. During the Milosevic regime only one procedure for war crimes was commenced before an ordinary court and several feigned procedures were initiated before military courts. Organised crime was not processed in court cases, but some instances were subject to police investigation.

„Predatory" privatization was accompanied by court protection of *tycoons* against small shareholders.

b) *Establishment of democratic power.* One of the promises of the democratic coalition given just before the downfall of the authoritarian regime was lustration, particularly the lustration of judges who had taken part in political trials, forgery of citizens'

will as expressed in the elections, political prosecution, concealing war crimes and illegal imprisonment of political opponents. This form of dealing with the past, which should have enabled fair recruitment of the judicial corps, was suppressed, alongside the beginnings of prosecution of organised crime, by the assassination of Prime Minister Zoran Djindjic.

The most important constructive activities of the time in the field of judiciary should have included: adoption of new judicial statutes, changing the role of the Supreme Court of Serbia and the Constitutional Court of Serbia, constitution of the High Council of the Judiciary, being admitted to the Council of Europe and awaiting the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which implies that citizens would be entitled to address the European Court of Human rights, the adoption of the Act on Cooperation with the International Tribunal in the Hague, the adoption of the Act on Responsibility for Violation of Human Rights (Lustration), setting up of institutions such as the Government of Serbia Judicial Reform Council and the Judicial Centre. However, it was as if the germ of indecent political deals that followed the adoption of these statutes or the implementation of these measures had overgrown the importance of the new and improved. The statutes were often changed and amended, the application of their provisions establishing new courts was delayed, the importance of new bodies, such as the High Council of Judiciary or the Personnel Council of the Supreme Court of Serbia (which was competent for examining the disciplinary liability of judges) was diminished.

After the state of emergency was declared, introduced due the assassination of Prime Minister Zoran Djindjic,, it became evident that the established independence of the Supreme Court was not of institutional but of personal nature. It is also important to note that in the period from the beginning of 2001 until the beginning of 2003, the Supreme Court paid a lot more attention to emancipation from the executive powers, disregarding the dangers coming from powerful individuals and social groups.

c) *New Serbian Legalism.* Invoking the new „legalism" as an excuse to do nothing is already well spotted and explained in relevant literature in Serbia: „The legalism in post-Milosevic Serbia is a practical and political position insisting on the necessity to observe legal norms and procedures. The legalists are those who identify themselves as defenders of law in a political context were law is jeopardized by practices of illegal behaviour, that is, by violations of the regulations in force. This is followed by an important self-legitimizing step: the position of legalism is self-recognized in tensions towards „the other side", that is, towards those political forces which do not respect the law. The recognition of the other side is done by legalists themselves. Legalism is not a political position that is deprived of content. However, I repeat – its identity is not determined by insisting on observance of the law. Oriented towards the past in the manner of XIX century romantic nationalism, the legalists have taken – probably contrary to their own honest intentions – the position of defending the institutional, legal and ideological heritage of the Milosevic's ressentiment nationalism."[12]

One should also add to this assessment, that the ideological and political continuity concerned could also be observed in the parts of the personal structure of the coalition that was in force until May 2012 (the side contrary to „the legalists"), which is attributed to deals directly preceding October 5, 2000, or that have followed in the times after it.

In the stage of new legalism, the *ministers of justice*[13] were the paradigmatic judicial figures. Under the guise of *reform*, which was sadly accepted by some representatives of the most important European institutions in Serbia, the *minister of justice* would ceremoni-

12 N. Dimitrijević, *Srbija kao nedovršena država, Reč (Beograd)* br. 69, 15. 03. 2003, according to an excerpt named *„Kako iz bezdržavlja"*, published in Republika No. 314–315, 1–31. 08. 2003, p. 59.

13 In Serbia, the official term for the competent ministry is not the Ministry of the *judiciary* and the Minister of the *Judiciary*, but the Minister and Ministry of justice. This differentiation is relevant and indicative in Serbian language, and both terms are common in Serbian legal terminology.

ally, almost ritually promote the adoption of the so-called judicial statutes, the application of which was never intended, and which were never applied.

One such statute was the High Council of the Judiciary Act – the expectations were high, but the results were scarce. Even though the establishment of a judicial council in Serbia was perceived *per se* as an important step towards the emancipation of the judiciary from other branches of power, the legislative concept was not commendable. Primarily, the competences that should, according to relevant European standards, be entrusted to the judicial council in Serbia were divided between two bodies – the High Council of the Judiciary and the Grand Personnel Chamber. Furthermore, the competences of the High Council were not as wide as those that should be granted to such a body, according to the European Charter on the Statute for Judges. Namely, the Council did not pass biding decisions on the selection, appointment, promotion or termination of office of a judge. At the time the High Council of the Judiciary was established in Serbia, the 1990 Constitution did not mention this body in any of its provisions. Article 73 paragraph 10 of this Constitution prescribed that judges and court presidents were appointed by the National Assembly. The conditions for appointment and the relevant procedure were governed by the Judges Act[14] and High Council of the Judiciary Act. [15]

Competence. High Council of the Judiciary was competent to propose to the National Assembly the appointment of court presidents, judges, public prosecutors and deputy public prosecutors, to appoint lay jurors and to engage in other operations prescribed by law.

Composition. The Council was comprised of five permanent members and eight members by invitation. The permanent members were the President of the Supreme Court of Serbia, the Republican Public Prosecutor, the Minister of Justice (all ex officio), one barrister appointed by the Serbian Bar Association and one mem-

14 RS Official Gazette 63/2001.

15 RS Official Gazette 63/2001.

ber appointed by the National Assembly among three candidates nominated by the Supreme Court of Serbia. The remaining eight members by invitation comprised six judges, appointed by the Supreme Court of Serbia and two public prosecutors, one selected by deputy Republican public prosecutors and the other by district public prosecutors, on a joint session. The term of office of the Councils' members was five years, with the possibility of re-appointment. The reasons for termination of office were regulated by the statute. When the Council decided on issues relating to judges, it included five permanent members and six members by invitation, who were judges, whereas when it decided on issues relating to public prosecutors, it comprised five permanent members and two members by invitation, who were public prosecutors.

Manner of work. Sessions of the High Council of the Judiciary were not public and administrative dispute could not be initiated against them.

Acts and internal organisation. High Council of the Judiciary had adopted its Rules of Procedure. Administrative and expert tasks were performed for the HCJ by the Ministry of Justice.

Criteria for Nominating Judicial and Prosecutorial Candidates. As soon as the Council was constituted[16] a debate was opened on the necessity to adopt the criteria for the nomination of candidates for judicial posts, in order to objectivise the process as much as possible. The *Decision on Norms and Criteria for Nominated Candidates to be Appointed Judges and Court Presidents* was adopted at the HCJ session in 2005, together with the *Decision on the Procedure for the Work of the High Council of the Judiciary when Nominating Candidates to be Appointed Judges and Court Presidents.* The adoption of these acts was an attempt to objectivise the nomination of candidates and elaborate statutory provisions on candidates' qualification and worthiness in a manner that would be binding on the HCJ and its members.

Statistical data. According to the report on the work of the High Council of the Judiciary for 2005, in the course of that year

16 In year 2004.

the HCJ had considered 1086 applications for judicial posts and 430 applications for court presidents, making the total of 1516 applications. A total of 159 candidates for court presidents and 209 candidates for judicial office were nominated to the National Assembly – therefore, a total of 468 proposals were drafted. This was a clear indicator of the difficulties the HCJ members have encountered, in terms of the scope of their work.

1.4.3 Serbian Constitution of 2006

Constitution of the Republic of Serbia, together with the most important act that should serve its implementation – the Constitutional Act – are characterised by manifest democratic deficit. The key deficit of the new Serbian Constitution of 2006 is the concealment of its Draft and Proposal and total lack of any debate on these texts. The democratic deficits of the constitutional procedure have culminated in a two-day referendum. Firstly, contrary to custom, the referendum was organised in two days. The electoral turnout during the first referendum day was unexpectedly low. In the second half of the second referendum day no effort, animation or „innovation" was spared to animate the citizens to vote. The irregularities identified and proven in some polling places were such that the body monitoring the referendum – the Centre for Free Elections and Democracy – had concluded that the achieved standard of free vote in Serbia was considerably reduced. The differences between the estimated percentage of citizens who actually voted at the referendum and the one finally established by the Republican Electoral Commission, avoiding to disclose the percentage and absolute number of invalid ballot papers, avoiding to disclose the percentage of those who have voted in favour of the Constitution relative to the number of citizens who have voted, bland reactions from foreign observers concerning the noted irregularities – are all indications that cast a shadow of doubt on the true outcome of the referendum, diminish the authenticity of the constitutional procedure, provoke the impression that the government, heads of parliamentary political parties and representatives of international organisations and bodies, as well as of foreign states, have congregated in some sort

of a constitutional conspiracy: to push forward the 2006 Constitution at any cost, despite the scepticism and lost energy of Serbian citizens. Consequently, *the parts of the Constitution relating to the judiciary were a secondary and an irrelevant topic at the time the Constitution was adopted.*

2. NORMATIVE GROUNDS

2.1 INTERNATIONAL LEGAL, THEORETIC, CONSTITUTIONAL AND STATUTORY GROUNDS OF THE LATEST JUDICIAL REFORM

2.1.1 International Sources and Theoretic Opinions on Independence and Autonomy of the Judiciary

Why does judicial power have to be *separated* from, that is, independent of other state powers? An answer that does not say much is the following: in order to ensure that the rule of law prevails over political arbitrary will. It would, however, say more if the independence and other important characteristics of judicial power, when compared to the legislative and the executive, were explained in a standard manner.

In theoretic terms, as a branch of state power in the separation of powers system, the judicial power must primarily be separated from the legislative power: „the legislative power may not perform judicial tasks."[17] The opposite is also true: the judicial power may not perform the legislative function. For, if the legislative power was able to implement laws, it would then be authorised, in order to resolve a specific dispute, to amend the existing legislation or pass a new statute, „which means that we would then be in the empire of autocracy, not of the law".[18]

Unfortunately, at least two cases of clear interference of the legislative in the work of the courts were noted in Serbia lately – the

17 Ž. Perić – D. Aranđelović, *Građanski sudski postupak*, Beograd, 1920, p. 16.

18 *Ibid,* p. 16, referring to Vareilles-Sommières, *Les principles fondamentaux du droit*, paragraph 226 and following.

legislator had passed special statutes in order to resolve individual disputes pending either before ordinary courts or the Constitutional Court. The first such case is the so-called *Milosevic's lex specialis,* which was used to terminate court procedures relating to the so-called electoral theft on the 1996 local elections – *Act on Declaring the Interim Election Results as Final*, and the second was – *the Act Amending the Judges' Act* of 2010[19], whereby the competence to consider appeals and constitutional appeals against the decision of the High Judicial Council and the State Prosecutors' Council was transferred from the Constitutional Court to the High Judicial Council and the State Prosecutors' Council.

In order for the judicial power to be independent of the legislative, it does not suffice for the legislative power to refrain from taking on the judicial function: there must also be constitutional guarantees that it may not affect the work of courts by appointing judges for a limited period, which was a characteristic of the judicial appointment system in Serbia (then a part of Yugoslavia) in the 1945–1990 period. Having the Parliament appoint judges for a permanent tenure is therefore not considered as impermissible influence of the legislative power on courts, although such competence regarding appointment has its drawbacks.

Judicial *independence* is ensured through legal, but also through social and socio-psychological independence of its direct holders – the judges. In legislative terms, judicial independence rests on the following: *firstly,* on the principle of *permanence* of judicial office – the possibility of a judge being re-appointed can considerably jeopardize the independence of a judge, since such judge may be subject to current ideology and thus to all other social influences that contradict independent trial; *secondly*, independence depends on the type of judicial appointment or selection; these systems differ considerably in comparative law; *thirdly,* independence is closely related to grounds for termination of judicial function and related legal guarantees; the 1990 Serbian Constitution prescribed the grounds for termination of judicial office by dismissal, whilst the

19 RS Official Gazette, 101/10.

2006 Constitution has left it to the legislator to regulate the grounds for dismissal of a judge; *fourthly*, independence is affected by the manner in which the recusal of a judge and the control of the conflict of judge's interest with public interest or other private interest is regulated. Social and socio-psychological factors that may affect judicial independence are numerous. We shall only mention the financial status of judges and (lack of) permission for judges to take part in the activities of political parties.[20]

Judicial power is *mandatory* – this means that when a right is violated or jeopardized or something contrary to the law is committed, legal protection must be sought through court. It has two forms. *Firstly*, from the standpoint of a court as the bearer of judicial power, this means that the court cannot refuse to decide on a matter within its competence. Denial of justice was prohibited in the major part of Europe, starting from the 1804 *Code Civile,* and was classified as a grave delict; hence, the obligation to adjudicate became not only a rule of custom (as it was in the Middle Ages), but an important characteristic of the judicial power and a constitutional principle in most modern laws.[21] *Secondly***,** from the standpoint of a party (or, more generally, a person authorised to initiate relevant court proceedings), this also implies that *self-help is prohibited.* Namely, a subject whose right is violated or jeopardized, or a subject authorised to seek court protection in cases of unlaw, must not resort to self-help, notwithstanding exceptional circumstances. Self-help, as a method of effecting a right by having an individual use physical force is allowed in modern legal systems only as an exception. Generally, it is prohibited, except in cases of self-defence and emergency.[22] The general conditions under which self-help is permitted are not expressly prescribed in our law, but it is consid-

20 On social status of judges in our country, in great detail, see. U. Zvekić, *Profesija sudija*, Ph.D. thesis, Beograd, 1983.

21 *Denie de justice* – denial of justice is a criminal offence in some countries.

22 Compare Articles 19 – 21. of the Serbian Penal Code, RS Official Gazette 85/2205, 88/2005 – corrigendum, 107/2005-corrigendum, 72/2009 and 111/2009. – hereinafter: PC.

ered self-help is permitted in cases when court protection would be untimely or ineffective.[23] However, self-help, being an exception to a general rule, must be interpreted strictly, and hence may only be considered permitted only when expressly prescribed by positive regulations. For example, self-help is allowed in cases of self-defence and emergency,[24], in cases of autocracy, self-defence and emergency as defined in the Penal code,[25] restitution of property or dealing with the consequences of trespassing,[26] retention right,[27] and the like.

As opposed to self-help, the *objectivity* of court power ensures that, *primarily,* in a case of conflict, the decision is adopted by a third party organised and established so as not to be interested in the specific outcome of the proceedings in which the conflict is being resolved; *second,* the objectivity of court power is effected through the objectivity (impartiality) of judges, which is ensured by recusal and rules applicable to the conflict of interest.

Today, the direct holders of the judicial function – the judges – are *professionals,* educated and trained for the job, where the criteria of this professionalism mainly include relevant education, the fact that the candidate has passed the required relevant exam and has sufficiently long working experience. The participation on non-professionals – lay judges or jurors – is regulated in different ways and depends on the type of court proceedings.

The trial must be completed within *reasonable time*. Unjustifiably long proceedings have the same effect on the party as if court protection were denied to it. (*Justice delayed – justice denied).*

23 B. Poznić, *Građansko procesno pravo*, Beograd, 1991, p.8.

24 Articles 161 and 162 of the Act on Contracts and Torts, SFRY Official Gazette 29/78, 39/85, 45/89 and 57/89 and FRY Official Gazette 31/93 and SM Official Gazette 1/2003– Constitutional Charter) – hereinafter: CTA.

25 Article 330, Articles 19 and 20.

26 Article 76 of the Basis of Property Relations Act, SFRY Official Gazette 6/82 and 36/90, FRY Official Gazette 29/96 and RS Official Gazette 115/2002 – dalje: ZOSO.

27 Article 286. CTA

The court is, on the one hand, a state authority, organised so as to, inter alia, preserve the legal system by performing court power, whilst, on the other hand, it is the main protector of human rights and the rights derived from them.[28] This *ambivalent position* may result in lack of harmony between the two faces of judicial power in the situations of social crisis. As a rule, in such times the function of protecting the legal order prevails – it is then seen as conflicting with the protection of rights and freedoms as opposed to being co-ordinated with it. In addition to social crisis, the deficiencies in the organisation and systematics of the legal system may also result in such disharmony. The judiciary in former Yugoslavia and present day Serbia have often faced both situations.

2.2. THE CONSTITUTION AND THE CONSTITUTIONAL ACT FOR THE IMPLEMENTATION OF THE CONSTITUTION

Constitutional provisions relating to the judiciary may be classified in the following groups:

(a) Provisions relating to court power. In addition to the standard constitutional principle of the separation *of powers into the legislative, the executive and the judicial*[29], the Constitution also regulates the principle of checks and balances,[30] which, if only this formulation were preserved, would imply the constitutional possibility of having the executive power controlling the judicial one – and this would be in grave contrast with all modern principles of independence of the judicial power. However, in the same Article, the Constitution declares a special guarantee of judicial independence, presumably in order to mitigate the negative effect of the previously established system of mutual checks and balances between all three branches of power. Despite such formulation, firm guarantees for protecting the judicial domain from the interference of the executive have unfortunately not been provided by the Constitution. The

28 Compare. G. Mijanović, *op.cit*, p.139–141.

29 Article 4, paragraph 2. Of the Constitution.

30 Article 4, paragraph 3. Of the Constitution.

right to *independent, impartial and fair trial* is established in Article 31, paragraph 1 of the Constitution. However, some elements of the guarantees as provided in Article 6 of the European Convention for the Protection on Human Rights and Fundamental Freedoms are lacking. The provision that would guarantee the *right to a random (natural) judge* is also lacking.

(b) *Provisions on the protection of human rights in criminal proceedings.* The protection of personal freedom on the constitutional level is guaranteed in Articles 30 and 31 of the Constitution, related to custody. Police custody which may last up to 48 hours is a long one, from the comparative law perspective. Other provisions are standard and included in Articles 33 and 34 of the Constitution.

(c) *Independent judicial bodies as representatives of the judiciary.* Instead of a single body that would represent the judiciary as a whole and as a branch of state power, which was embodied in the High Council of the Judiciary, first established in Serbia in 2001, the 2006 Constitution envisages the High Judicial Council[31] and the State Prosecutors' Council.[32] The consequences of such constitutional organisation are the following:

- instead of having a single judicial body that would be competent for the appointment, promotion and education of all *magistrats* (judges and public prosecutors), two independent bodies are established; this may impede the application of the same or largely the same professional and personal criteria in both professions;
- public prosecutors are put under stronger control of the executive – the explanation offered is that they are only a party to the proceedings, which is true, but what is also true is that they are not private parties, and the principle of legality is equally applicable to them and the judges.

(d) *Composition, appointment and competence of the High Judicial Council.* The High Judicial Council has 11 members. The High

31 Article 153.

32 Article 164.

Judicial Council comprises the president of the Supreme Court of Cassation, the minister competent for the judiciary and the president of the competent Parliamentary Committee as ex officio members, and eight appointed members who are appointed by the National Assembly. Appointed members comprise six judges who hold permanent judicial office, one of whom is from the territory of one of two autonomous provinces, and the remaining two are distinguished lawyers with at least 15 years of working experience in the profession. One of those members is selected among barristers, the other among law faculty professors.[33] With regards to the *composition*, it must be stressed that the Recommendation of the Committee of Ministers of the Council of Europe whereby the judicial councils must represent judges of all types and degrees, was not observed. As far as *appointment* is concerned, it is in the competence of the National Assembly, [34] which is a step back compared to the legislative solution in the 2001–2005 period, when the High Judicial Council members from among judges were appointed by the Supreme court. The mentioned Committee of Ministers Recommendation rests on the assumption that judge-members of the High Judicial council should be *selected and appointed* by judges, not members of parliament. Comparative law provides an abundance of developed mechanisms for having judges select judge-members of the judicial council.

(e) *Supreme Court of Cassation.* Based on the terminology used and given that fact that the new Constitution lacks a standard provision on the role of the highest court, one could claim that the title of the Supreme Court of Serbia was changed into „the Supreme Court of Cassation" only to designate artificial discontinuity of the highest court instance and thus enable the change (and, naturally political control) of the composition of the highest court in Serbia. Paradoxically, the Constitution remains silent when it comes to the constitutional status of the Supreme Court of Cassation (e.g. taking care of uniform application of law and unification of jurisprudence) – except for the provision of Article 143, paragraph 4, which states

33 Article 153. paragraphs 2, 3. and 4. of the Constitution/2006.

34 Article 153, paragraph 3. of the Constitution/2006.

that the Supreme Court of Cassation is the highest court in the state. Moreover, the Constitution does not include even a marginal title on this court. The Constitution deals solely with the matters of appointment, term of office and discharge of president and justices of the Supreme Court of Cassation,[35] which is a direct testament of the political concerns regarding the personal composition of the highest court instance.

Provisions of the Constitutional *Act for the Implementation of the* Constitution are not only problematic, but some of them even change the very text of the Constitution.

(a) *Judicial appointment.* Article 147, paragraph 1 of the Constitution prescribes the following: „At the proposal of the High Judicial Council, the National Assembly appoints as a judge a person who is appointed a judge for the first time", whilst Article 7, paragraph 1 of the Constitutional Act reads: „President of the Supreme Court of Cassation and the justices of the Supreme Court of Cassation appointed for the first time shall be appointed within 90 days from the constitution of the High Judicial Council at the latest". The question arising from both of the above provisions is the following – why is it necessary to re-appoint the president and the justices of the Supreme Court of Cassation if there is continuity, i.e. identity between the Supreme Court of Cassation and the Supreme Court, except for the name of the court? Consequently, one may wonder whether the National Assembly has the power to amend the Constitution, to contradict its wording, in the form of a statute for the implementation of the Constitution. It is not difficult to answer the first question. If the authority concerned is the same state authority – and judging by all, the two are identical, except for the names – then there are no justified legal grounds to appoint the president of the Supreme Court of Cassation before the term of office of the existing president expires. As far as justices of the Supreme Court are concerned – their tenure is permanent, as the case is with all other judges appointed under the legislative regime of the 1990 Constitution, and hence possible re-appointment (or absence thereof) would be a violation of their acquired rights. If the government of

35 Up. Article 144. of the Constitution/2006.

the time had intended to carry out some form of lustration, it could have resorted to the Act on Liability for Violation of Human Rights. Human resources in the judiciary could have been legally and legitimately improved had the rules on lustration and discharge due to illegal, incompetent and unconscientious work of judges been applied. In addition, in Article 148, paragraph 1, the Constitution prescribes that a judge's tenure of office shall terminate at his/her own request, upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the statute, as well as if he/she is not appointed to the position of a permanent judge. At the time the 2006 Constitution entered into force, all judges in Serbia were appointed for an indefinite tenure, therefore their function was permanent, and hence this function could not have been terminated if they were not re-appointed to the same court, since all courts, except for the Administrative Court, the courts of appeal and petty offence courts had existed before, irrespective of the title assigned to them by the Constitution. Therefore, in Article 148, paragraph 1, the Constitution includes a guarantee and barrier against possible abuse by the legislator – a guarantee that was violated soon after the adoption of the Constitution, by the provision on Article 7 of the Constitutional Act for the Implementation of the Constitution; *under the excuse of changing the names of courts, this provision in fact envisaged the re-appointment of the entire judicial corps in Serbia,* which implies the collective termination of the capacity of a judge for all judges in Serbia. This termination was without any constitutional grounds. The initiative of the Judges' Association of Serbia for examining the constitutionality of the Constitutional Act was rejected. „Judges and presidents of all other courts shall be appointed within one year from the day of the constitution of the High Judicial Council at the latest." – stated Article 7, paragraph 2. The arguments elaborated above are also valid with regards to this provision. All judges in Serbia were appointed for a permanent tenure and consequently they all have their acquired rights. There can be no retroactivity, if the need to apply a statute retroactively was not established in the procedure for the adoption of such statute. Moreover, there can be no retroactive application given the constitutional continuity, which was clearly present when

the 2006 Constitution was adopted – because it was adopted following the procedure for changing the constitution as prescribed by the 1990 Constitution. It is therefore, safe to conclude that Article 7 of the Constitutional Act is contrary to the 2006 Constitution, because it introduces the principle of retroactivity, which is allowed only exceptionally and under restrictive conditions pursuant to that very Constitution.[36]

(b) *New constitutional position of a judge.* It must be expressly stated that the constitutional position of judges in the new Constitution and the Constitutional Act, in abstract legislative terms, is aggravated in comparison to the constitutional position of judges as per the 1990 Constitution. Again, this assessment relates purely to the legislative aspect. Even though in Milosevic's time the judges were appointed for a permanent tenure, the number of discharges of judges without constitutional grounds, when constitutional and legislative procedures were not observed, was by no means small. The claim relating to the normative exacerbation of the status of a judge is easily proven by analysing the constitutional provisions themselves. Let us repeat one of the arguments expressed above and add yet another one. The constitutional position of a judge has deteriorated primarily because the no-exception rule on the permanence of judicial function, established in the 1990 Constitution, was violated. Moreover, unlike the 1990 Constitution, the new 2006 Constitution does not regulate grounds for discharge of a judge, giving the legislator a wide margin of appreciation for prescribing these grounds and the possibility to change them easily – as the circumstances order, when the government or the competent minister change, with each change of policy.

2.3. JUDICIAL ORGANISATION STATUTES

2.3.1. Judges

The provisions used to replace the entire judicial corps in Serbia, in addition to the Constitutional Act for the Implementation of the Constitution, can be found in two other legislative acts:

36 Compare. Article 197, paragraph 2. of the Constitution.

High Judicial Council Act (hereinafter: HJCA)[37] and the Judges' Act (hereinafter: JA).[38]

At the end of 2008, when the judicial reform commenced, there were some 2400 judges in Serbia (petty offence judges not included); therefore, the average was 32 judges per 100,000 inhabitants. In terms of the number of judges compared to the total population, Serbia was the ninth state in Europe. However, it could not, as it still cannot, pride in the efficiency of its judiciary. According to the *Decision on the Number of Judges in Courts* (adopted by the High Judicial Council on June 1, 2009), as of January 1, 2010, Serbia was to have 1838 judges (petty offence judges not included), whereby the total number of judges would be reduced by 562. In the re-appointment procedure, some 830 judges, who were appointed to permanent judicial office at the time the 1990 Constitution was in force, were not re-appointed. The precise number of judges in Serbia at this time remains unknown, given the procedure on the appeal of non-appointed judges is still pending, and the Constitutional court has passed decision upon appeal against decision adopted in the review procedure.

The task of replacing the judicial corps in Serbia was not entrusted to the High Judicial Council in its regular, permanent composition, but to its *transitory composition.* The first HJC composition was regulated in the HJCA transitional provisions, when it comes to its appointed members.

The important controversial elements of such regulation are the following:

(a) Candidates for the transitory HJC composition were nominated by the existing High Judicial Council, which *fully exempts the procedure from the competence of judges as holders of judicial power,* thus also deteriorating the controversial constitutional solutions.

(b) The HJC transitory composition was entrusted with an extraordinary and capital task – to *nominate candidates in the pro-*

37 RS Official Gazette 116/2008, 101/2010 and 88/2011.

38 RS Official Gazette 116/2008, 58/2009 – Constitutional Court decision and 101/2010.

cedure of general appointment of judges appointed for the first time and also to *re-appoint existing judges who were already appointed for permanent tenure pursuant to the 1990 Constitution.* The general appointment of judges (appointment of first-time judges and the re-appointment of the entire judicial corps in Serbia) was to be completed within only one year. The main objection against these new solutions, as already mentioned, was that the judges who had acquired permanent tenure according to the 1990 system were exposed to re-appointment. However, it was the practice in the realisation of the powers granted to the HJC transitory composition that has proven to exceed the prognosis of even the fiercest critics.

(c) Transitional and final provisions of the HJC Act on the transitory HJC composition also include a highly corruptive provision: *HJC elected member from among judges, once his mandate in the first HCJ composition is terminated, shall continue to perform judicial function in a court directly superior to the court he had performed judicial function in,* provided he meets the necessary conditions.[39] Therefore, judges, as elected HJC members, appointed to the transitory composition of this body, were privileged compared to all other judges: their judicial function is guaranteed; moreover, they are, as a rule, promoted to a higher court.

In March 2009, the Judges' Association of Serbia has filed an initiative to the Constitutional Court to have the relevant provisions of the HJCA declared unconstitutional (inter alia), grounding it on the Serbian Constitution, international documents ratified by Serbia and also on the documents of the Council of Europe, to which Serbia is a member.[40] The Constitutional Court had rejected this initiative, with one dissenting opinion. The procedure of general appointment and re-appointment of judges had thus commenced.

The transitional and final provisions of the Judges' Act also include solutions the constitutionality of which is questionable. The Judges' Association of Serbia had filed an initiative for examining

39 Article 56, paragraph of the HJC Act.

40 The text of the initiative was published in the Journal of JAS, extraordinary no. 2, Belgrade, 2009 (Informator Društva sudija Srbije, vanredni broj 2, Beograd, 2009.)

the constitutionality of Articles 99–101 of this Act, claiming that the mentioned provisions mean that the office of judges who already perform judicial function, should they not be re-appointed pursuant to the Judges' Act, shall be terminated by the force of the law as of January 1, 2010, unrelated to the conditions for the termination of judicial office as prescribed in the Constitution and the law. Consequently, the initiator's opinion was that the contested provisions of the statute were contrary to the provision of Article 148, paragraph 1 of the Constitution, which states a judge's tenure of office shall terminate upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the statute, because it interrupts the permanence of judicial office guaranteed by Article 101 paragraph 1 of the 1990 Constitution, which was in force at the time of their appointment, and also contrary to Article 146, paragraph 1 of the valid 2006 Constitution. This initiative was also rejected by the Constitutional Court, with one dissenting opinion.

2.3.2. The High Judicial Council[41]

Concept. The High Judicial Council was established as a constitutional institute in Articles 153–155 of the Serbian Constitution of 2006. It is defined as an *independent and autonomous organ which provides and guarantees the independence of courts and judges.*[42] The Constitution does not define the High Judicial Council as a state authority, but only „an authority". In accordance with the usual role of judicial councils in the states they exist in, the High Judicial Council should also be understood as a state authority that represents judicial power. This is confirmed by the following: (1) the fact that the majority of its members (8 out of 11) are appointed by the National Assembly, which is the highest legislative authority; (2) its decisions are of constitutive nature, primarily those concerning the general appointment of the entire judicial corps in Serbia – the

41 The text on the High Judicial Council was almost entirely taken from V. Rakić-Vodinelić, *Pravosudno organizaciono pravo*, drugo izmenjeno and dopunjeno izdanje, Beograd, 2012, p. 51 – 65.

42 Article 153, paragraph 1. of the Constitution.

judges themselves, when adjudicating, perform *judicial state power*; (3) the salaries of the HJC members are paid from the state budget; (4) nine out of eleven HJC members are public officers – judges and HJC ex officio members.

Main source of law. The High Judicial Council Act does not include a provision that would define the notion of this authority more closely; in Article 2, paragraph 1 it only reiterates the constitutional definition stating that it is an independent authority entrusted with certain tasks.

Composition. According to the Constitution and the HJCA, the High Judicial Council must have eleven members, and it comprises three *ex officio* members and eight *appointed members. Ex officio members* are the president of the Supreme Court of Cassation, the minister of justice and the president of the competent National Assembly Committee (Judiciary, State Administration and Local Self-Government Committee). The *appointed members* comprise six judges with permanent tenure, one of which comes from the territory of one of the autonomous provinces, and *two distinguished lawyers* with at least fifteen years of professional experience, one of whom is a barrister and the other one a *law faculty professor*.[43]

When it comes to the *composition,* the *constitutional* solution, as mentioned before, is not in line with the Council of Europe Committee of Ministers Recommendation on the need to set a *guarantee that the members of the judicial council represent judges of all types and all instances.* This is not a *constitutional* guarantee, but there is a *statutory guarantee*, given that the HJC regulates the composition of the Council members selected and appointed among judges in more detail in Article 22, whereby care is taken of types and instances of courts. According to this provision, this composition is the following: one member is selected from the Supreme Court of Cassation, Commercial Court of Appeal or the Administrative Court; one member is selected from all the courts of appeal in Serbia (there are four such courts); one member is selected from

43 Article 153, paragraphs 2, 3. and 4. of the Constitution.

all higher courts of general jurisdiction (there are 26 such courts in total) and all commercial courts of first instance (there are 16 such courts); two members are selected from all basic courts (34 courts), petty offence courts (45 courts) and the High Petty Offence court; one member must come from the territory of one of the autonomous provinces, regardless of the type and instance of the court. The Constitution is express in prescribing that the judge-members of the HJC must be those appointed for *permanent tenure*. However, the practice of the implementation of the HJC Act was not in line with this cogent constitutional rule: judges whose tenure was interim – namely, the judges of the petty offence courts, which are new and whose judges, consequently, could not have been appointed for permanent tenure, were also selected to the HJC's first permanent composition.

Competence for selecting and appointing HJC members and selection/appointment procedure. All appointed HJC members, therefore, those who are not ex officio HJC members, are appointed by the National Assembly of the Republic of Serbia, according to the Constitution.[44] Such constitutional competence for the appointment of HJC members is a step back compared to the legislative solutions in the 2001–2005 period, when the judge-members of the HJC were appointed by the Supreme Court, the highest authority of the judicial power, as opposed to having them appointed by the National Assembly, which is a political authority, as prescribed by the 2006 Constitution. The Committee of Ministers Recommendation rests on the standing that judge-members of the HJC should be selected by judges, not members of the parliament. Comparative law offers a wide variety of mechanism for judicial appointment of the judge-members of the judicial council. The new HJCA attempts to mitigate these drawbacks, regulating in Articles 22–34 the *techniques for nominating judges, composition and competences of the election bodies, establishment of election results and formulation of the nomination for appointment,* the latter being in the competence of the National Assembly.

44 Article 153, paragraph 3. of the Constitution.

(i) Selection of judge members of the Council. The authorised nominator for the appointment of judge members of the Council is the High Judicial Council. [45] The procedure has three phases: (a) preparatory procedure, (b) nomination procedure and (c) appointment.

(a) Preparatory procedure, where the judges have the dominant role, is conducted in the following manner:

The decision on the commencement of the procedure for nominating candidates to be appointed HJC appointed members is passed by the HJC president at least six months before expiry of the term of office of the HJC appointed members, and this decision is published in the RS Official Gazette. As the authorised nominator, the HJC must forward the names of the candidates to the National Assembly at least 90 days before the term of office of the appointed judge members of the HJC expires. [46]

Any judge with permanent tenure can be a candidate.[47] Which candidates will be nominated is determined at the *session of all judges of the given court*, where the session of one court may nominate only one candidate. In addition, a judge supported by at least 20 judges per type and instance of the court may become a candidate. A court president *may* not be a candidate for a HJC member.[48] However, this rule was not observed in practice – judge members of the first permanent HJC composition include some *acting court presidents*; at the same time, the HJC has considerably exceeded the time limits for appointing court presidents, contrary to the Constitution and the law (in the time this text is finalised, there was only court president in Serbia – the president of the Supreme Court of Cassation. All others had the status of acting court presidents.) When it comes to candidates selected among judges of the Supreme Court of Cassation, Commercial Court of Appeal and the Administrative Court, the nomination is not established by the general ses-

45 Article 20, paragraph 2. HJCA.

46 Article 21, paragraphs 1, 2 and 4. HJCA.

47 Article 23, paragraph 1. HJCA.

48 Article 23, paragraphs 2, 3. and 5. HJCA.

sion of the mentioned courts – one becomes a candidate simply by *filing an application*, therefore, *the nomination is personal.*[49]

The judges elect candidates for the Council on the basis of a free, general, secret ballot. No one has the right to prevent a judge from voting or force a judge to vote, on any grounds, nor may a judge's liability for voting be invoked. However, the right to elect candidates for the Council is granted only to judges with permanent tenure, which means that the electoral right is not general after all. In addition – the judges can vote only for candidates from the list of candidates for a given type of court or court instance the voting judge performs his judicial office in (e.g. judges of the courts of appeal are entitled to vote only for the candidates from the list of candidates of the courts of appeal, which is not in line with the declaration of Article 24 of the HJCA, stating that all judges with permanent tenure have a *general electoral right;* it is evident that they, in fact, do not have such right*)*. A judge from the territory of one of the two autonomous provinces votes both on the list of candidates of the type and instance of court he/she works in and for the list of candidates from the courts on the territories of autonomous provinces.[50]

The voting procedure is technically managed by the High Judicial Council electoral commission, comprising the president, four members and their deputies, elected by the HJC among judges with permanent tenure, with their consent (deputy members of the electoral commission have the same rights and obligations as the members they replace). The *conflict of interest* rules are the following: HJC members may not be members and deputy members of the electoral commission at the same time, and, to an extent, vice versa – electoral commission members may not be candidates for HJC members. According to this provision, however,[51] deputy members of the electoral commission are *not prohibited* to be candidates for the post of a HJC member. Since deputies have the same powers

49 Article 23, paragraph 4. HJCA.

50 Article 24. HJCA.

51 Article 25, paragraph 6. HJCA.

and obligations as the members, statutory prohibition of candidacy for deputy members of the electoral commission should also be established. Otherwise it would mean that the Act does not prevent the conflict of interest fully and consequently.[52]

The candidacy application is forwarded to the Electoral commission within 30 days from the day the decision on the commencement of the procedure for nominating candidates for the appointment in the HJC is published in the RS Official Gazette. The candidacy application is accompanied by the candidate's signed statement whereby the candidate accepts the nomination, the decision of the session of all judges of the court or courts nominating the candidate or a form with the signatures of the judges supporting the candidate, and personal and professional data on the candidate. The commission examines whether the application was duly filled and submitted in time; untimely applications are rejected by a ruling. Within 24 hours from receiving an incomplete application the Electoral commission shall instruct the candidate to complete the application within 48 hours; otherwise the application shall be rejected. The Commission then establishes one final list of candidates for each court type and instance and one for the territories of the autonomous provinces – the candidates are elected from these lists. The candidates' order on the list corresponds to the order the applications were filed to the electoral commission. The date and time of holding the elections is determined by the Commission, which informs the court presidents thereof ten days before the elections. Seven days before the elections are held, the court presidents inform all judges about the day and time the elections shall be held. The judges vote on ballot posts so designated by the electoral commission. The Commission is under the obligation to prepare the voting material for each ballot post in due time; the material includes: required number of ballot lists and the established list of candidates. The Electoral Commission shall appoint the electoral board for each ballot post. The electoral board comprises three judges who are not candidates. On the voting day the established list of candidates must be on visible display in all ballot posts and in

52 See Article 25. HJCA.

all courts, in accordance with the type of court and court instance. Each judge votes in person. The ballot is secret, on certified ballot papers. The electoral commission establishes the total number of judges and the number of judges who have voted per ballot post, the number of ballot papers that remained unused, that are invalid and that are valid, the number of votes obtained buy each candidate per individual ballot post and the total number of votes obtained per candidate for each list of candidates.[53]

(b)Nomination procedure. The authorised nominator for the appointment of judge-members of the HJC is the High Judicial Council itself.[54] The High Judicial Council passes a decision on nominating one candidate, who obtained the largest number of votes, or a number of candidates, from each list, based on the record on establishing the election results, obtained from the electoral commission. If two or more candidates from the same list obtain the same largest number of votes, the HJC shall nominate the candidate who had performed judicial function longer, and shall forward the final decision on the nomination to the National Assembly.

(c) Appointment procedure. As mentioned before, the National Assembly appoints judge-members of the HJC, and also the other two appointed members of this authority, by majority vote of the total number of members of parliament.[55] Given this competence, the provision of Article 24 of the HJC stating that judges with permanent tenure have *the direct right to appoint* judge-members of the HJC remains an empty statutory declaration.[56]

(ii) Appointment of barrister – HJC member. This procedure also has three stages: preparatory stage, nomination procedure and appointment procedure. *Preparatory procedure* and *nomination procedure* have some specific characteristics compared to the same stages of the nomination procedure for judge-members of the HJC. The appointment stage is the same. The authorised nominator for

53 See Articles 28. – 34. HJCA.

54 Article 20, paragraph 2. HJCA.

55 Article 105, paragraph 2, item 13 of the Constitution.

56 See Article 153, paragraph 3. SC; Article 38, paragraph 1. HJCA.

the appointed HJC member among barristers in the Serbian Bar Association,[57] which organises and conducts the procedure so as to guarantee the *widest representation of its members*; this should be interpreted so as to have the Bar Association Assembly nominate the candidates – however, there are other interpretations and different practices. The practice of appointment of barrister-member of the HJC to both the transitory and the permanent HJC composition was such that the nominated and appointed candidate was nominated by the Bar Association Management Board, not the Bar Association Assembly. The procedure for nomination and appointment is conducted in the manner and within the time limits determined by the Serbian Bar Association in its acts. The candidate must be a „distinguished lawyer with at least 15 years of professional experience".[58] The Bar Association forwards the nomination to the National Assembly.[59]

(iii) Appointment of law professor – HJC member. Like the procedures explained above, this procedure also has three phases. In the *preparatory stage* the candidates are nominated by the joint session of deans of law faculties in the Republic of Serbia.[60] Candidates are nominated following a procedure prescribed by the joint session of all law faculty deans in Serbia (this body had adopted its Rules of Procedure when it was first established). The candidate must be „a distinguished lawyer with at least 15 years of professional experience".[61] The dean of the oldest law faculty in Serbia (Belgrade University Law Faculty) forwards the nomination, pursuant to the decision of the joint session of all law faculty deans, to the National Assembly.[62]

Assuming the duty of HJC member. If an appointed HJC member fails to assume duty within 30 days from the day of being appointed by the National Assembly, it shall be deemed that he/she

57 Article 20, paragraph 4. and Article 36. HJCA.

58 Article 153, paragraph 4. US; Article 5, paragraph 3. HJCA.

59 See Article 36. HJCA.

60 Article 20, paragraph 5. HJCA.

61 Article 153, paragraph 4. US; Article 5, paragraph 3. HJCA.

62 See Article 37. HJCA.

was not appointed at all. The grounds for failure to assume duty shall be established in a HJC decision; the HJC shall inform the National Assembly thereof. In such case, he HJC shall organise new selection and appointment procedure within 60 days.[63]

Status of a HJC member. With regards to criminal, disciplinary and civil liability a HJC member has the status similar to that of a judge.

Criminal liability. A HJC member enjoys the same immunity as a judge: he cannot be charged for the opinion expressed or the vote given in the decision-making process in the HJC. He/she cannot be arrested in procedure initiated in relation to a criminal offence committed in performance of the function of a HJC member without the HJC's approval.[64]

Disciplinary liability is not envisaged, but some of the grounds for termination of office can be considered as this type of liability.[65]

Civil liability. HJCA does not include provisions on liability for the damage incurred by a HJC member acting in such capacity, when performing the function of a member or in relation to this function. By analogy, the rules on the civil liability of judges and public officers should apply.

Other characteristics of the status.

(1) Earnings. Judge-members of the HJC „effect the rights from the labour relation" during their work in the HJC.[66] This, however, does not mean that judge-members of the HJC are employed by the HJC; the Act simply provides a declaration on their *rights* without referring to their obligations, which stem from the labour relation – this may lead us to conclude that in cases of violation of obligation, applicable sanctions as prescribed by labour-related statutes do not apply. The only right *expressly regulated* in the HJCA is the right of a judge-member of the HJC to receive salary, the amount of which

63 See Article 38. HJCA.

64 See Article 9. HJCA.

65 See the following subtitle.

66 Article 10, paragraph 1. HJCA.

is computed by multiplying the coefficient of 6.0 with the base, pursuant to the Judges' Act.[67] The coefficient of 6.0 corresponds to the sixth class of salary, and only the salary of the president of the Supreme Court of Cassation is in this category.[68] In other words – the salary of a judge-member of the HJC is basically equal to that of the president of the Supreme Court of Cassation. HJC ex officio members and HJC members who are barristers and law professors are entitled to a special remuneration for their work in the Council, which is determined by the competent National Assembly Committee.[69] On its ninety-first session, held in the May 17-June 14, 2011 period, the Administrative Committee had adopted a decision amending the previous decision on the amount of the remuneration for the work in the High Judicial Council. As a result of these amendments, the amount of remuneration of the HJC member – barrister and law professor shall be determined in the future by multiplying the coefficient of 6.0 with the base for the calculation of the salary; this means that their remuneration shall be equal to the salary of HJC judge-members. Moreover, this also means that their remunerations shall be equal to the salary of the president of the Supreme Court of Cassation. On its forty-seventh session, held on July 16, 2009, this Committee had determined the remuneration for the ex officio HJC members (president of the Supreme Court of Cassation, Minister of Justice and president of the National Assembly Judiciary and Administration Committee), but the manner in which it is calculated and its amount are not published.[70]

(2) Incompatibility of functions. An appointed HJC member who is a barrister or a law faculty professor may not hold a function in bodies that pass regulations, executive authorities, public services or autonomous province and local-self government authorities, whilst the judge-members of the HJC are relieved from perform-

67 See Article 10. paragraph 2 HJCA.

68 See Article 39, paragraph 6. JA in relation to Article 38, paragraph 7. JA.

69 Article 10, paragraph 3.

70 Data taken from http://www.parlament.gov.rs/aktivnosti/narodna-skup%C5%A1tina/radna-tela/odbori,-pododbori,-radne-grupe.955.html?offset=6, 01.09.2012.

ing judicial function for the duration of their term of office as HJC members. The Anti-Corruption agency has adopted a decision on these grounds against one HJC member, but he had remained in office contrary to this provision. The member in question is a law faculty professor.

The Judiciary and Administration Committee of the National Assembly, on its ninety-sixth session of December 15, 2011 had adopted a proposal of a decision on the termination of function of one HJC member – the law faculty professor. This matter was put on the agenda half a year after the Agency had forwarded its relevant decision to the National Assembly. Namely, the professor in question is dean of a law faculty established by the state. Previously, the Anti-Corruption agency had established the incompatibility of offices and proposed that this HJC member be discharged of function. However, on the session held on December 29, 2011 the National Assembly had refused the proposal for the discharge of this HJC member; this step was heavily criticized.

Termination of function of a HJC member. High Judicial Council is a body which is not subject to collective replacement. Individual members can be replaced. Therefore, even when it is evident that the HJC does not act conscientiously, even when it passes decision though it composition is not full, even when it is evidently bias, and when there are indications that it operates under political pressure, the National Assembly cannot replace it or discharge it *as a body.*

(1) Ex officio members. The function of *ex officio* members in the High Judicial Council is terminated once they no longer hold the position on the grounds of which they are HJC members (e.g. if the president of the Supreme Court of Cassation is discharged of that office, or his/her duty is terminated for other reasons, if the Minister of Justice or the entire government receive a vote of no confidence, if the president of the Judiciary and Administration Committee is discharged or loses such capacity for other reasons).[71] The wording of the relevant provisions is unclear as to the possibil-

71 See Article 39, paragraph 1. HJCA.

ity of having the function of the ex officio members terminated on the grounds of loss of working capacity, as applicable to appointed HJC members.

(2) Appointed members: The function of appointed members is terminated by: expiry of term of office, loss of working capacity, termination of capacity on the basis of which they were appointed and discharge.[72]

The original concept of the HJCA regarding the possibility of replacing HJC members was unusual and inappropriate. Although the National Assembly appoints the appointed members, it cannot discharge them. It all remained within the High Judicial Council: the decision on discharge was to be adopted by the High Judicial Council itself, at the initiative of a HJC member, possibly a president of the court in which the judge-member of the HJC had worked/the Bar/the session of law faculty deans, as applicable.[73]

Resignation of a HJC member. HJCA remains silent when it comes to the required form of resignation of a HJC member or the manner in which it should be filed. So far, one HJC judge-member had resigned.

The resignation was filed on November 23, 2011; the reasons for it are the illegal and unconscientious work of the HJC: in his resignation the judge wrote that the HJC, in its new composition „has failed to draft or adopt any minutes from any of the session"... *Politika* daily newspaper has had the opportunity to see the text of the judge's resignation... and the judge states he had chosen to resign, inter alia, due to the „lack of elementary liability for the opinions and judgments expressed by certain HJC members". The judge further stated he did not want to be a co-member of a body with irresponsible people. „Some HJC members, after the hearings are held before the HJC Commission, express one opinion and judgment, which is voted on, and a proposed decision is forwarded to the HJC, and on the HJC session, where the proposed decision is put to vote, the same member expresses a completely opposite

72 Article 39, paragraphs 2. – 5.

73 Articles 42. – 46. HJCA/2008.

opinion, even though the facts of the case have not changed in the meantime" – the judge wrote in his resignation. In addition, the judge said in his resignation that he could not agree with having the Ministry of Justice ignore the opinions of the HJC: „This prevents the HJC from exercising its competences, particularly when it comes to giving opinions, on amendments to existing or the adoption of new statutes concerning the judiciary, the High Judicial Council, and other system statutes which the judges apply or which are relevant for the performance of judicial function."[74]

When the function of a HJC member is terminated before the expiry of his term, the HJC president is under the obligation to pass a decision initiating the procedure for the appointment of a new member (Article 41, paragraph 1, in relation to Article 21, paragraph 1 of the HJCA). In the case in question this time limit was exceeded.[75]

Discharge of a HJC member. Grounds. An appointed HJC member shall be discharged of function prior to the expiry of the term he was appointed for, if the does not perform the function of a HJC member in accordance with law and if he is convicted for a criminal offence to unconditional prison sentence, or is convicted or a criminal offence rendering him unworthy to perform the function of a Council member.[76] In the practice so far, no HJC members were discharged.

Procedure. The procedure has two stages – preparatory procedure and the decision-making procedure. The preparatory procedure consists of the initiative for discharge and assessment of probability that the grounds for discharge invoked in the initiative have taken place. The decision-making procedure consists of the statement of the HJC member whose discharge is requested, adoption of a decision on initiating the discharge procedure, proposing

74 Source: http://www.politika.rs/rubrike/Hronika/Lukic-Ne-sedim-sa-neodgovornim-ljudima.lt.html, 01.09.2012.

75 See the notification on the HJC website http://www.vss.sud.rs/Saopstenja.htm, 01.09.2012.

76 Article 41. HJCA.

discharge and passing a decision on the proposal. The initiative for discharging an appointed HJC member may be filed by any member of this body, whilst the initiative for discharging an appointed judge-member of the HJC may also be filed by any court president, based on the decision adopted by the meeting of all judges. Initiative for discharging an appointed HJC member who is a barrister or a law faculty professor may be filed by their authorised nominators (Serbian Bar Association and the session of deans of all law faculties).[77] Within seven days from receiving the initiative the HJC assesses the probability of the grounds for requested discharge. If it deems that the grounds for discharge were not proven as likely, the HJC shall inform the petitioner that the initiative was not accepted.[78] If it accepts the initiative, the Council shall, prior to passing a decision on initiating the procedure, enable the HJC member whose discharge is requested to make a deposition on the grounds of the initiative. If it establishes that the grounds for discharge are likely to exist, the HJC shall pass a decision on initiating the procedure, within 15 days from the receipt of the initiative. HJC member must be enabled to make a deposition on all matters relevant for the decision on discharge. The HJC adopts a discharge proposal within 30 days from the day the procedure was initiated; the HJC member whose discharge is being requested is exempted from the decision-making process. The final decision on discharge is adopted by the National Assembly.[79]

Term of office of HJC members. The term of office of HJC members is *five years,* except for the ex officio members. Appointed HJC members may be re-appointed, but not for two consecutive terms. During the term of office, a judge-member of the HJC may not be appointed a judge of a different court.[80]

Suspension of a HJC member. Suspension may be *mandatory* and *optional*. A HJC member must be suspended if he is in police

77 See Article 42. HJCA.

78 See Article 43 HJCA.

79 See Articles 43. – 46. HJCA.

80 See Article 12. HJCA.

custody, and a judge-member must also be suspended if a motion for his dismissal from the office of a judge has been submitted. An appointed HJC member *may* be suspended if proceedings for his/her discharge are initiated or if he/she is charged in criminal proceedings with an offence the conviction for which may result in discharge.[81] The decision on suspension of a HJC member is passed by the HJC president. The suspension lasts until police custody is effective, until the discharge procedure is concluded or until the criminal proceedings are completed. [82] In HJC practice to date one judge-member was suspended due to having been remanded in police custody.

The current composition of the HJC. Over a rather long period the initial permanent HJC composition comprised 9 instead of 11 members – 4 were judges (one was suspended due to being remanded in police custody, one had resigned), 3 were ex officio members, and two were appointed members among barristers and law professors, where the membership of the latter was and still is questionable. The constitutional principle that the judges must comprise a majority of HJC members was not adhered to for a considerably long period, because the president of the HJC is an ex officio member and president, and hence, although a judge, did not acquire the position of the HJC president by being selected by the judges; the HJC had operated as if none of these deficiencies had existed.

HJC Competences. The competences of the High Judicial Council may be classified as follows: (1) elective and nomination actions related to the acquisition of the status of a judge (*status-related competences*); (2) *disciplinary competences*; (3) regulation of *professional, educational and ethical obligations of judges*; (4) *budgetary competences*; (5) *normative competences* and (6) other competences.

(1) *Status-related competences* include: (a) appointment and discharge of judges appointed as interim judges by the Parliament; (b) nominating candidates who are first appointed judges to the Parliament and their discharge; (c) nominating to the Parliament

81 See Article 9a. HJCA..

82 See Article 9b. HJCA..

the candidate for the president of the Supreme Court of Cassation and for court presidents; (d) conducting a part of the procedure for the termination of office of the president of the Supreme Court of Cassation and of court presidents; (e) together with the State Prosecutors Council, nominating ten candidates to be appointed Constitutional Court judges to the General Meeting of the Supreme Court of Cassation; (f) appointing lay jurors; (g) deciding on transfer, referral and on the objection against the decision on suspension of a judge; (h) deciding on incompatibility of other offices and tasks with the judicial office; (i) deciding in the procedure for evaluating the work of judges and court presidents; (j) deciding in other status-related matters (e.g. immunity of judges and HJC members, on objections in the process for selecting the judge-members of the HJC).

An important constitutional rule from the 2006 Constitution reads: the High Judicial Council is competent for later appointments (after the first appointment to judicial office, which is in Parliament's competence) and also decides on the promotion of judges. The 1990 Constitution had established the permanence of judicial office, which is considered to be a powerful guarantee of judicial independence; in Article 146, paragraph 2 the 2006 Constitution departs from that principle, envisaging that the first appointment to judicial office is for a three-year term. The authors of the constitution may point out that such solutions are not uncommon in comparative European law and that in countries that have recently come out of transition there are some similar solutions, that is, the concept of an interim judge is accepted. However, in these states, such interim judges are usually appointed by the judicial council, whereas our Constitution envisages[83] that this first and, beyond doubt, key appointment is in the competence of an immanently political body such as the National Assembly, which means that accepted and common political deals are likely to ensue.

(2) *Disciplinary competences regarding the disciplinary liability of judges* are the following: (a) determining the composition, dura-

83 Article 147, paragraphs 1. and 2.

tion and termination of office of members of disciplinary bodies; (b) appointing the members of disciplinary bodies; (c) regulating the manner of work and the decision-making rules in disciplinary bodies; (d) deciding on legal remedies in disciplinary proceedings.

(3) *Professional, educational and ethical competences* include: (a) granting consent to the programme of permanent training for judges and court staff and monitoring its implementation; (b) establishing the programme for the initial training of judges; (c) passing the Code of Ethics.

(4) *Budgetary competences* include: (a) proposing the scope and structure of budgetary assets necessary for the work of courts in terms of current expenditures and monitoring the way in which they are spent; (b) determining the number of judges and lay jurors for each court; (c) deciding on the existence of conditions for damages due to illegal or incorrect work of a judge.

(5) *Normative competences* include the adoption of general acts envisaged the HJCA, the Rules of Procedure of the HJC in particular, and also of the criteria and norms for the appointment and promotion of judges, and the like.

(6) *Other competences:* (a) performing judicial administration in HJC competence; (b) forming working bodies and appointment of their members; (c) providing opinions on amendments to existing statutes or adoption of new statutes governing the status of judges, the organisation of courts and access to justice, and to other system statutes the courts apply or that are relevant for the performance of judicial office; (d) taking care of the implementation of the National Judicial Reform Strategy; (e) submitting an annual report to the National Assembly; (f) other tasks envisaged by law.

Principles and method of work. The main principles of work of the HJC are proclaimed in both the HJCA and the SC, and are the followinIndependence – Article 2, paragraph 1 HJCA;

Autonomy – Article 2, paragraph 1 HJCA and

Publicity – Articles 14 and 19 HJCA, Article 154 of the Constitution, Article 172 paragraph 3 of the Constitution.

In addition to these, expressly prescribed principles, when passing its decisions, the HJC, just like any other public authority, must respect legality and decide conscientiously. HJC decisions must be reasoned if a legal remedy may be lodged against them and if so prescribed by the Rules of Procedure.[84] Unfortunately, these important principles were not observed in the HJC practice so far.

Independence and autonomy. From the beginning of work of the HJC doubts were expressed with regards to its independence and autonomy. First and foremost, one should recall the initial HJC composition. It was nominated and appointed under a special (extraordinary) procedure prescribed by the transitional and final provisions of the High Judicial Council Act, with the task of re-appointing judges previously appointed by the National Assembly. The candidates for the HJC transitory composition were nominated by the existing High Council of the Judiciary, *which means that the procedure was completely exempted from the competence of judges as holders of judicial power.* As pointed out before, the transitory HJC composition was entrusted with an extraordinary and a capital task – to nominate candidates in the procedure of general new appointment of judges appointed for the first time, and to re-appoint all existing judges, appointed for a permanent tenure pursuant to the 1990 Constitution.

The very composition of this transitory body was controversial in *legislative terms.* First – because judge-members were nominated by the former High Council of the Judiciary, not by judges themselves. Second, because these judge-members were guaranteed a promotion to the higher court once they complete their task, which is a provision of highly corruptible nature. Third, when it comes to the first HJC composition and its concrete composition in personal terms, it should be noted that one of the judge-members had conducted one enforcement procedure unjustifiably long, and as a result Serbia was convicted before the European Court of Human Rights for violation of the right to trial within reasonable time; moreover, a different judge-member had violated the presumption

84 Article 17, paragraph 2. HJCA.

of innocence in a process he had conducted and as a result Serbia was found guilty of violation of human rights before the European Court of Human Rights. A question ensues: is it likely that it was impossible to find six judges in Serbia whose decisions in the cases they tried in did *not* result in Serbia being found guilty before a high European authority? One HJC member, a professor of law, was appointed only in the end of the term of the first HJC composition; his appointment was followed by the question of compatibility of his position with the office of dean of a state-owned faculty. In short, using the arguments of the European Commission expressed in the 2010 Progress Report[85]: the re-appointment was conducted by bodies (HJC and State Prosecutors Council) in illegal compositions. Arguments: (i) their composition was transitory, not permanent; (ii) their composition was incomplete; (iii) the representation of the profession, i.e. the judges and the prosecutors in these bodies was in inadequate (*not in conformity with European standards).*

In the first permanent compositions two judge-members were absent for several months – one due to being remanded in custody, the second because he had resigned.

Specifically on appointment and nomination of judges.

(1) Nomination procedure for interim function. The appointment of judges is announced by the High Judicial Council. The announcement is published in the RS Official Gazette and in other public information media distributed on the entire territory of the Republic of Serbia. Applications are filed to the HJC within 15 days from the day of publication in the RS Official Gazette; evidence on fulfilment of appointment criteria is attached to the application. The HJC acquires data and opinions regarding the candidates' qualification, competence and worthiness. Data and opinions are obtained from the bodies and organisations where the candidate worked as a lawyer, and with regards to candidates who had worked in courts, the HJC must obtain the opinion of the session of all judges of such court, as well as the opinion of the session of all judges of the di-

85 European Commission, Brussels, 9 November 2010, SEC(2010) 1330, SERBIA 2010 PROGRESS REPORT, p. 49.

rectly superior court. The candidate has the right to inspect such data and opinions. When nominating candidates who are appointed to judicial office for the first time, in addition to assessing their qualification, competence and worthiness, the HJC also assesses the type of work the candidate was engaged in after having passed the Bar exam. A work assessment must be obtained for candidates who worked as judges' assistants. Prior to the nomination the High Judicial Council may (does not have to!) interview the candidate. The HJC *nominates* the candidates to the National Assembly. The decision on the HJC proposal must be reasoned. The National Assembly appoints the judges appointed for the first time among the candidates nominated by the High Judicial Council. The decision on the appointment is published in the RS Official Gazette.[86]

(2) The procedure for appointment to permanent tenure. Judges are *appointed to permanent tenure* by the HJC. A judge who was appointed to judicial office for the first time and whose work in the three-year term was assessed as „exceptionally successful in performing judicial office" must be appointed to permanent tenure, whilst a judge who was appointed for the first time and whose work in the probation period was assessed as „unsatisfactory" may not be appointed to a permanent tenure. Any decision on appointment must be reasoned and is published in the RS Official Gazette.[87]

Acts of the High Judicial Council. The Council has adopted the following general acts: Rules of Procedure, Decision on the Forming and Work of the Administration Office. Rulebook on Internal Organisation and Systematization of Jobs in the HJC Administration Office, Decision on the Number of Judges in Courts, Decision on Establishing the Criteria and Norms for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents, Decision on the Number of Lay Jurors in Courts, etc.

Internal Organisation.

(1) Administration office. The Administration office was formed for the purpose of performing professional, administrative and oth-

86 See Articles 47. – 51. JA.

87 See Article 52. JA.

er tasks; its organisations, tasks and method of work are regulated in more detail by a Council act. The rights and obligations of those employed in the Administration office are governed by the regulations governing the status of *civil* servants.[88]

(2) HJC Secretary. The Council has a secretary who is appointed for a five-year term, with the possibility of re-appointment. The secretary is appointed by the HJC. The Secretary manages the Administration Office and answers to the HJC for his/her work. He/she has the status of an appointed civil servant. The conditions for the appointment of a HJC secretary are determined by a HJC act.[89]

(3) HJC Working bodies. HJC has permanent and temporary working bodies. The following are the HJC *permanent working bodies*: the Commission for assessing the work of judges and court presidents, Appointment commission and disciplinary bodies. In order to have certain issues within its competence considered, the Council may form *temporary working bodies.* Their formation, composition and method of work are regulated in more detail by the Rules of Procedure. A judge may be referred to HJC working bodies in order to perform expert tasks. The decision on referral is passed by the HJC, after having obtained the opinion of the president of the court in which the given judge performs his offices, with the judge's written consent. Referral may last for three years at the longest.[90]

2.3.3. Public prosecutors (and their deputies)

In Serbia, the public prosecutor (deputies included) has a new, dual role in court procedure: the role of the *party* in court proceedings and the role of an *independent body.*

(1) Public prosecutor as a party to the proceedings. Until the adoption of the most recent Criminal Procedure Code of 2011[91] (hereinafter: CPC/2011), the main position of the public prosecutor was that of a *party to criminal proceedings before the court,* where

88 See Article 47. HJCA.

89 See Article 48 HJCA.

90 See Articles 15, 16. and 49. HJCA.

91 RS Official Gazette 72/2001 and 101/2011.

the public prosecutor could be a party, but also an *intervenient in public interest* in civil court proceedings, provided that the conditions prescribed by relevant procedural statutes are met. As a party to criminal and other court procedures, the public prosecutor has still differed from other parties (the accused in criminal proceedings, the opposing party in civil proceedings), due to being a judicial officer of the state, to whom the principles of constitutionality, legality, competence and the like apply.

(2) Public prosecutor as a judicial official in criminal investigation. Pursuant to the Criminal Procedure Code, instead of having the court be in charge of the investigation, the public prosecutor is now in charge of the criminal investigation (so-called prosecutorial investigation replaces the court-led investigation). The investigation is initiated by an order of the competent public prosecutor[92], and is also conducted by the competent public prosecutor. This is an important novelty in Serbian criminal procedure, the introduction of which was preceded by numerous theoretic and expert debates; its quality and practical implications cannot be yet assessed, since the CPC/2011 applies only to certain criminal offences. With regards to criminal investigation, the public prosecutor should be observed as an authority who decides on the investigation (initiates it), conducts it and concludes it.

The expressed principal arguments in favour of prosecutorial investigation as opposed to court-led investigation are the following:[93] (1) improvement of the overall efficiency of criminal proceedings; (2) the practice of passive attitude of the public prosecutor in court-led investigation is transformed into an active role in the prosecutorial investigation; (3) inadequately balanced liability of the public prosecutor in the normative formulation of court

92 Article 296 paragraph 2 CPC/2011.

93 All the arguments listed further in favour of prosecutorial investigation are advocated for by S. Bejatović, *Tužilačko-policijski koncept istrage (razlozi normiranja and očekivanja),* Zbornik radova XLIII redovnog godišnjeg savetovanja Udruženja za krivično pravo and kriminologiju – *Nova rešenja u krivičnom zakonodavstvu and dosadašnja iskustva u njihovoj primeni*, Beograd 2006, p. 294 – 303.

investigation, disproportional to his role in court-led investigation; (4) practice in comparative law, according to which the role of the public prosecutor and the police in the investigation should be increased – this is claimed to be a *worldwide trend*, also applied in the International Criminal Tribunal for Former Yugoslavia; in addition, in some states the prosecutorial investigation has shown better results than the court-led investigation, which preceded it; (5) supposed propensity of investigative judges towards so-called *cabinet work* and (6) avoiding repetition of evidence. An additional argument is that „the legal nature of investigation is not of judicial character, but is a prosecutorial and police activity."[94]

Arguments in favour of a cautious, neutral position with regards to the prosecutorial investigation, or some of the most commonly used arguments against it, are the following[95]: (1) instead of the prosecutorial investigation, the modern standards would be better met by so-called *party investigation,* which would allow the accused and his counsel to also conduct their own investigation, whereby the suspect, as a party to the investigative procedure, would in principle have an equal position as the prosecutor, who is also a party to court proceedings; the model could be taken from Italian law; it is recognised that the legislative solutions of the CPC/2011 grant sufficient rights to the defendant and his council to collect evidence and inspect the evidence of the public prosecutor, but such powers do not render the investigation a party investigation. (2) Equality of parties is violated because the suspect does not have the right to lodge a legal remedy against the public prosecutor's decision to open the investigation. (3) Even though the CPC/2011 prescribes that the order on the opening of the investigation is passed by the public prosecutor, it also allows for the possibility for the police to extort the order of the public prosecutor on the opening of the investigation, regardless of his position on the

94 *Ibid*, p. 301.

95 All the arguments listed further, suggesting caution with respect to prosecutorial investigation or arguments against it are advocated for by M. Grubač, *Nove ustanove and rešenja ZKP Srbije od 26. 09. 2011*, Pravni zapisi, broj 2, Beograd 2011, p. 491 – 495.

issue.[96] (4) CPC/2011 does not provide for an evidentiary hearing in order for evidence to be secured and preserved, if such evidence could not be presented again at the main trial before the court, even though other countries who have accepted prosecutorial investigation do envisage such a hearing. (5) The initiation of prosecutorial investigation, pursuant to the CPC/2011 is sufficiently grounded if there are reasons for doubt, therefore, the lowest degree of knowledge, instead of the former reasonable doubt.

Despite the fact that public prosecutors now have more powers than ever before, the method of their appointment is even more subject to the influence of the legislative and the executive powers then was the case in the autocratic Milosevic's times.

2.3.4. State Prosecutors' Council

Public prosecutors and deputies are generated via the State Prosecutors' Council (hereinafter: the SPC). The constitutional definition of the SPC is the following: „The State Prosecutors Council is an autonomous body which shall provide for and guarantee the autonomy of Public Prosecutors and Deputy Public Prosecutors, in accordance with the Law."[97] There is a certain difference between the constitutional definition of the HJC and the SPC. The Constitution defines the HJC as an *independent and autonomous body which shall provide for and guarantee independence and autonomy of courts and judges*.[98] The Constitution does not designate the High Council as a *state* body, but simply a „body". The same is done with regards to the SPC. However, I concluded that both the HJC and the SPC are in fact *state bodies*. This position, with regards to the SPC, is supported by the following: (1) the fact that the majority of its members is appointed by the National Assembly, the highest legislative body; (2) SPC passes decisions that are of constitutive character, primarily those concerning the appointment of a major part of the judicial corps – deputy public prosecutors; (3) salaries and compensations for the work of SPC members are paid from

96 Ibid, p. 491, 492.

97 See Article 164, paragraph 1 of the Constitution/2006.

98 Article 153, paragraph 1 of the Constitution/2006.

the budget of the Republic of Serbia; (4) the majority of the SPC is comprised of public officials – public prosecutors (deputy prosecutors) and SPC ex officio members. The composition, the appointment mechanism, the method of work, the status of the SPC members highly resembles that of the High Judicial Council. The SPC has 11 members, comprising: the Republican Public Prosecutor, the Minister of Justice and the chairperson of the competent National Assembly Committee, as *ex officio members*, and *eight appointed members*, who are appointed by the National Assembly. The appointed members include six public prosecutors or deputy public prosecutors with permanent tenure, one of whom comes from the territories of autonomous provinces, and two renowned lawyers with at least 15 years of professional experience in the legal profession, one of whom is a barrister and the other one is a law faculty professor.[99]

Competence for appointment. The appointed members of the State Prosecutors' Council are appointed by the National Assembly, at the proposal of authorised nominators. The Assembly is bound by the proposal of the authorised nominator, which means that it cannot appoint anyone who was not proposed by the authorised nominator. It goes without saying that the Assembly does not have to appoint the proposed candidate; in such case, the selection and appointment procedure is repeated.

The composition of the SPC appointed members who are prosecutors or deputy prosecutors. The SPC members selected among public prosecutors and deputy public prosecutors are selected from all types and instances of public prosecutors' offices. The main principles of the SPC work are not proclaimed in detail in the Constitution, as the case is with the HJC. Independence is not expressly envisaged as a principle of work of the SPC, whilst the principles that are expressly envisaged are the following: autonomy, envisaged in Article 164, paragraph 1 of the Constitution and publicity of work, which, according to the Constitution, applies to all state bodies – Article 14 of the SPCA, however, does allow for derogations from this principle. In addition to the expressly prescribed prin-

99 See Article 164 paragraph 2 – 4 of the Constitution/2006.

ciples, when adopting its decisions, the SPC, like any other public authority, must act lawfully and decide conscientiously. SPC decisions must be reasoned, if a legal remedy may be filed against them, and also if so prescribed by the Rulebook. In the SPC practice so far these important principles were not always adhered to – this was particularly evident in the procedure for the general reappointment of public prosecutors and deputy public prosecutors. The mistakes committed by the SPC were not as massive as those committed by the HJC, but some were committed nonetheless. When deciding on the appointment of deputy public prosecutors for permanent tenure, the SPC should have acted in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as an independent and impartial tribunal, but it did not. The sources of law governing not only the competence, but also the procedure for the appointment of public prosecutors and their deputies are the Constitution, the Public Prosecutors' Office Act and the State Prosecutors' Council Act. It should be underlined that the competence is different, depending on whether a public prosecutor or a deputy public prosecutor are being appointed, and also depending on whether a deputy public prosecutor is appointed to the office for the first time or not.

The Republican public prosecutor is appointed by the *National Assembly,* at the proposal of the *Government* and after obtaining the opinion of the competent National Assembly Committee. The Republican public prosecutor is appointed for a *six-year term* and may be re-appointed. The competence is regulated directly by the Constitution, in Article 158, paragraphs 2 and 3. All other public prosecutors – from the lowest ones to the appellate prosecutors, are also appointed by the National Assembly, at the Government's proposal, but, unlike the case of the republican public prosecutor, the opinion of the competent National Assembly Committee is not requested.[100] The term of office of a public prosecutor is six years.[101] The appointment of deputy public prosecutors is quite different. At the proposal of the SPC, *the National Assembly* appoints a deputy pub-

100 Article 159, paragraph 2 of the Constitution/2006.

101 Article 159, paragraph 3 of the Constitution/2006.

lic prosecutor who is appointed for the first time. Such deputy prosecutor's term of office is three years. *The State Prosecutors' Council* appoints deputy public prosecutors to permanent tenure. [102]

2.4. DECISION ON ESTABLISHING THE CRITERIA AND NORMS FOR ASSESSING THE COMPETENCE, CAPACITY AND WORTHINESS FOR THE APPOINTMENT OF JUDGES AND COURT PRESIDENTS

A bylaw with the above title is the most important source of substantive law in the procedure for the appointment and re-appointment of judges. It was adopted by the High Judicial Council, in co-operation with the Venice Commission.[103]

How should have the High Judicial Council acted when appointing judges to permanent tenure and how should have it applied the criteria for assessment of competence, capacity and worthiness of judges; what did it actually do in practice?

Instead of a list presented by the High Judicial Council, which consists only of the names and surnames of the appointed judges and the indication of the court they are appointed to, and the court where they had acted as judges before, it must be shown what competence, capacity and worthiness are related to those names.

(a) When it comes to *qualification* (in addition to the usual data regarding the duration of studies, average mark, success at the Bar exam, subsequent additional education, published papers) it is, first of all, necessary to present objective *data on the number of quashed or reversed decisions,* and not only the data on their number, but

102 See Article 159 paragraph 5 – 8 of the Constitution/2006.

103 The Venice Commission refers to the European Commission for Democracy through Law, which is the Council of Europe's advisory body on constitutional matters. Established in 1990, the commission has played a leading role in the adoption of constitutions in transitions countries – constitutions that should conform to the standards of Europe's constitutional heritage. The Commission meets for times a year in Venice – hence its colloquial name, which is more frequently used in modern communication than the official one.

also the information related to the question the Venice Commission insists on in particular:

„The fact that a judge has been overruled on a number of occasions is not necessarily followed by the claim that the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, any final decision would have to be made on the basis of an actual assessment of the cases concerned, and not on the basis of a simple counting of the numbers of cases which have been overruled. In addition, a distinction might be drawn between decisions made on the basis of obvious errors, which any lawyer of reasonable competence should have avoided, and decisions where the conclusion arrived at was a perfectly arguable one, which nonetheless was overturned by a higher court."

This task, entrusted to the High Judicial Council, was not fulfilled by the HJC, although it should have been.

(b) When it comes to *competence* (which, in the perception of the High Judicial Council, is more or less reduced to efficiency), each name and surname should be followed by data not only of the number of cases solved and the relation between that number and the estimated norm (all this was lacking when the HJC had published the list of judges appointed to permanent tenure), but also the criterion the Venice Commission insists on:

„With respect to the workload of the judge concerned, where he or she has concluded a lesser number of cases than required by the orientation norm, or where criminal cases have had to be abandoned due to delays the judge is responsible for, these are matters to be considered. It is important, once again, that the actual cases be evaluated. It cannot be ruled out that some judges may be given more difficult cases than others as a result of which their workload appears to be less than that of their colleagues."

The High Judicial Council has also failed to fulfil this task, which was entrusted to it, although it should have fulfilled it.

(c) When it comes to *worthiness*, a notion that the HJC should have specified in each individual case, the Criteria and Standards

envisage that *those who are already judges are presumed to be worthy.* How did the HJC refute the presumption of worthiness, and the basis of which criteria, cannot be seen from the re-appointment decisions. Neither the candidates nor the general public have learned how the HJC defined the standard of worthiness for performing judicial office, nor what evidence was supplied and demonstrated in order to refute this presumption. The statements made by certain HJC members refer to judge's personal file as the source of data for assessing worthiness. However, the Minister of Justice (who is an ex officio HJC member) had revealed that data obtained from the police and from the Security and Information Agency were used when deciding on applications for judicial positions. Was judges' *worthiness* also examined by collecting other personal data concerning the appointed and non-appointed judges, what data were obtained and from whom – there was ample opportunity and time to learn this, but, save for the mentioned statement (which was later negated, although given directly before a TV camera) – has not been officially established.

2.5. CONSTITUTIONAL AND LEGISLATIVE PROCEDURE BEFORE THE HIGH JUDICIAL COUNCIL

(a) HJC Status. When the High Judicial Council had passed decisions with regards to the applications the judges filed in order to be re-appointed to judicial function, it had the task of deciding on individual rights of judges, who are at the same time Serbian citizens. This means that the standards of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights had to be observed.

The term „tribunal established by law", used in this provision designates a body that has a judicial function and is eligible to pass a mandatory decision[104]. The power to give recommendations or advice does not suffice for a body to be considered „a tribunal es-

104 *Benthem v. Netherlands*, application no. 8848/80, judgment delivered on October 23, 1985.

tablished by law"[105]. A tribunal designated as „administrative" may be considered a tribunal in terms of Article 6 of the Convention, provided it is independent and impartial[106]. „Independence"refers to independence from the executive, from political parties and the parliament, where the relevant factors are the following: manner of appointment; freedom from external pressure and the appearance of independence. Appointment of professional judges is not the only way to ensure independence; namely, the fact that one professional disciplinary body comprises the members of the profession does not in itself imply that the independence requirement is met[107], but is usually a powerful proof of independence. The presence of judges comprising at least a half of the members, including the chairperson who has the right to vote, ensures independence[108].

The examples of bodies which the European Court of Human Rights (hereinafter: ECrHR) has found to have the capacity of „independent and impartial tribunal established by law" are the following: (a) *Demicoli v. Malta.*[109] Demicoli was found guilty by the *Parliament House of Representatives* for publishing an article in a satirical publication which criticized some members of the Parliament. The question raised was whether the House of Representatives can be considered to be a body covered by the term „independent and impartial tribunal established by law"; the ECrHR has found that Article 6 was violated, accepting the position that the House of Representatives had the capacity of a tribunal in that specific case. (b) *Van de Hurk v. Netherlands.* The questions was whether the In-

105 *Van de Hurk v. Netherlands,* application no. 16034/90, judgment delivered on April 19, 1994.

106 *Campbell and Fell v. UK*, application no. 7819/77; 7878/77, verdict on June 28, 1984.

107 *H. v. Belgium*, application no. 8950/80, judgment delivered on November 30, 1987.

108 *Le Compte, Van Leuven and De Meyere v. Belgium*, application no. 6878/75; 7238/75, judgment delivered on June 23, 1981.

109 *Demicoli v. Malta*, application no. 13057/87, judgment delivered on August 27, 1991.

dustrial Appeals Tribunal can be considered a body referred to in Article 6, paragraph 1, and the EcrHR answer was positive[110].

Having this case law in mind, *the High Judicial Council is a body covered by the term of „independent and impartial tribunal established by law", because it is established by the Constitution and regulated by a statute in more detail; because its decisions are mandatory, because it was conceived and established by both the Constitution and the statute as an independent body and because its majority is comprised of professional judges. Being such a body, the High Judicial Council must pass decisions based on a public and oral discussion, providing an opportunity for the person whose rights it decides on to participate in the procedure. This body is also subject to the rules regarding recusal otherwise applicable in court proceedings.* The same standards derive from Article 32 of the 2006 Constitution, which establishes that *everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them.* Again, this is a constitutional norm which regulates a human right and as such, it is directly applicable.

(b) Important rules of procedure. Based on the principles elaborated above, the procedure had to be *public,* the HJC had to provide the opportunity to every candidate for an *oral deposition*, it was necessary to make a *list ranking the appointed judges* based on the appointment criteria and standards applied, each decision on appointment and non-appointment *had to be reasoned using individual reasons.* The HJC has not done any of this. The Judges' Association of Serbia has published an analysis on the HJC procedure, showing that the procedure was secret, that the criteria not envisaged by the Decision on Criteria and Standards for qualification, capacity and worthiness were applied, that the HJC voiced different positions with regards to this issue to the public and to the Judges' Association of Serbia, that the working results of judges who were

110 *Van der Hurk v. Netherlands, op.cit.*

not re-appointed were falsely presented, that the candidates have never been ranked.[111]

3. IMPLEMENTATION OF THE REFORM

3.1 HOW WAS THE JUDICIAL REFORM IN SERBIA CARRIED OUT

(a) The contents of reformatory interventions. Judicial reform in Serbia was brought down to several groups of measures:

First, the organisation and competence of courts was changed. The number of courts of general competence has been drastically reduced. The courts of first instance (before – municipal courts, today – basic courts) have been considerably reduced in terms of numbers: the previous 138 municipal courts now comprise 34 basic courts. The former municipal courts have been given the status of court units. The number of these units, pursuant to the Seats and Territories of Courts and Public Prosecutors' Offices Act[112] (STCPPOA) is large – it amounts to 103. As a rule, former municipal courts have been transformed into court units, whilst a small number of them have preserved the status of a basic court. It is fair to assume that the realisation of this idea was preceded by the awareness of the reform actors that costs could be reduced, if court administration is reduced (the number of court presidents, deputy presidents, secretaries, administrative, financial and technical staff). However, they were also unaware of the detrimental consequences of such a solution, or, at least, such consequences have not been carefully considered. „Moving" the courts to one administrative centre has also caused the migration of barristers towards such centres. The initial costs borne by the parties in order to effect the right to court protection have increased and have been transferred to the parties as the „end users" of judicial activity. If there

111 Analysis available at: http://www.sudije.rs/sr/aktuelnosti/licni-paragraph/analiza-dokumenata-vss, 01.09.2012.

112 RS Official Gazette 116/2008.

was not for the costs borne by the state in order to pay the compensation to non-appointed judges, this solution may have shown to be more cost effective for the state; however, it has still remained a considerably higher burden for the parties, to the extent of compromising the elementary right which is a part of the system of the right to a fair trial – the right of access to justice. The number of higher courts (which, to an extent, have replaced the former district courts) today amounts to 30, compared to the former 26, pursuant to the Seats and Territories of Courts Act of 2001[113]. The number of courts of appeal is the same as prescribed by the 2001 Act, but they started to operate in 2010 – there are 4 of them. The number of commercial courts has also been reduced. Compared to the former 18 commercial courts, pursuant to the 2001 Act, today there are 16 commercial courts with the total of 5 court units. The Higher Commercial Court, which used to have 3 divisions, is now called the Commercial Court of Appeal. A new court, competent for the entire territory of the Republic of Serbia has been established – the Administrative Court, which has three divisions. The judicial power also includes the magistrate courts, all 45 of them (they used to be a part of the executive power, and have had to change status after Serbia, then a part of the State Union of Serbia and Montenegro had acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

The number of public prosecutors' offices has also been reduced in comparison to the 2001 statute. Instead of the 109 municipal public prosecutors' offices, today there are 34 basic public prosecutors' offices. Instead of the 30 district public prosecutors' offices, today there are 26 higher prosecutors' offices; in addition 4 appellate public prosecutors' offices have been formed, as well as two specialised public prosecutors' offices – for war crimes and for organised crime.

Had these changes resulted from meticulous approach that takes into account the usual parameters, such as the population density in certain parts of Serbia, the total number of court pro-

113 RS Official Gazette 63/2001.

cedures and their territorial distribution, the internal structure of court procedures and their movement over the last 10 years at least, in order to identify any reduction or increase tendencies, only then we could have used the term *reform.* As things stand now, however, this has only been a radical reduction of the number of the courts (and public prosecutors' offices) of first instance, which has so far only led to more difficult access to justice for the parties.

Second, general appointment of judges, or rather, general appointment and re-appointment of judges was conducted. It was a re-appointment because the only eligible candidates were those who already had the status of a *judge*, acquired before the Constitution/2006 entered into force. Again, all these persons were appointed to a permanent tenure and, despite that, were subject to re-appointment (euphemistically designated as *a general appointment)*. As already pointed out, this task was entrusted to the High Judicial Council and the State Prosecutors' Council in their *interim compositions*, pursuant to the transitional and final provisions of judicial organisation statutes of 2008. The principles these bodies have relied on in their work: secrecy instead of publicity; violation of the oral principle and the right of the candidate to be heard, lack of individualised reasoning were all presented a number of times in this publication. Among the reformatory interventions this one has attracted the most attention, primarily because of the violation of important procedural rules and superficial application (if any) of the criteria and standards for the appointment of judges and deputy prosecutors. It was precisely the violations of the principle of the rule of law in the process of appointment of judges and prosecutors that compromised all other reformatory moves.

Thirdly, the reform was closed, or at least it was so envisaged, by the adoption of procedural statutes – primarily the Litigation Procedure Act[114] (hereinafter: the LPA) and the Criminal Procedure Code of 2011. Both procedural statutes have seriously compromised the party's right to a fair trial, and the actual resolution of disputed situations or of situations caused by the unlaw, and have

114 RS Official Gazette 72/2011.

also increased the chances for the procedure being concluded in administrative manner, often without the dispute being resolved; this has compromised the citizens' right to access to justice even more than the organisational statutes. When it comes to the LPA, the party's status and the realisation of the right to a fair trial have been most compromised by the following: the number of procedural judgements, i.e. those passed without discussion has increased; if the party is not representing itself in the procedure, it has to be represented by a barrister; access to the Supreme Court of Cassation is much more difficult given the enormous value necessary in order for review to be allowed (the amount exceeds not only those prescribed in former Yugoslav countries, but also those prescribed in Austria and Germany); increased value of the object of dispute for the so-called small-value disputes, particularly before the commercial courts, which undermines fair trial in cases wherein small and medium sized companies are parties to the proceedings, politically favoured premature preclusion for the presentation of facts, misbalance between the plaintiff and the defendant, due to strict conditions for a valid rebuttal, and the like.[115]

When it comes to the new CPC, the most important, yet insufficiently thought out change, is the introduction of the so-called prosecutorial investigation, instead of the court-led investigation.[116]

Moreover, neither the organisational nor the procedural statutes were attentive towards the European standards of public prosecutors' role and function. Council of Europe Recommendation (2000)19 sets stricter requirements when it comes to the qualifications of public prosecutors than those existing in our law; they are formalised and reduced to a certain degree of professional qualification and years of work experience. „States should take measures to ensure that recruitment, promotion and transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach favouring the interests

115 Compare, in detail, Vesna Rakić-Vodinelić, *Novi Zakon o parničnom postupku 2011*, Pravni zapisi 2/2011, p. 515–567.

116 On arguments in favour and against, see 2.3.3.

of specific groups, and excluding discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of: *a.* the principles and ethical duties of their office; *b.* the constitutional and legal protection of suspects, victims and witnesses; *c.* human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention; *d.* principles and practices of organisation of work, management and human resources in a judicial context; *e.* mechanisms and materials which contribute to consistency in their activities. Furthermore, states should take effective measures to provide for additional training on specific issues or in specific sectors, in the light of present-day conditions, taking into account in particular the types and the development of criminality, as well as international co-operation on criminal matters."

(b) The Political Role of the Constitution maker and the Legislator. Constitutional solutions relating to the judiciary and the provisions of the Constitutional Act for the Implementation of the Constitutions were elaborated on above (under 2.2.).

According to the opinion of the Venice Commission CDL-AD (2007)004, opinion no. 405/2006 of March 19, 2007, Serbian constitution has the following political characteristics, which may be linked to the judiciary:

- The text was prepared quickly by a group of party leaders and experts and is the result of political compromise.
- Article 1 of the Constitution emphasises the ethnic character of the state.
- The constitution does not include reliable solutions for the conflict of international and internal law, particularly when

it comes to the position towards international integrations, such as the EU accession.

- The well-balanced list of human rights does not include efficient guarantees for their enjoyment and protection; moreover, the provisions on the restrictions of human rights are imprecise and do not fully correspond to international standards.

With regards to the constitutional provisions on the judiciary, the Commission has made the following critical remarks:

- The constitution reflects an excessive influence of the parliament to the judiciary.
- The first composition of the High Judicial Council is excessively powerful.
- The constitution gives too much attention to the president of the Supreme Court of Cassation, who, in the opinion of the Venice Commission, should only be *primus inter pares.* Moreover, it is not clear why the president is appointed by the National Assembly.
- No judicial appointments, including the first, interim mandate, should be in the competence of the parliament, because it raises concerns regarding political independence and autonomy of a judge appointed for a limited tenure.
- The constitutional solutions whereby all appointed HJC members are appointed by the National Assembly, in the opinion of the Venice Commission, is a „recipe for politicisation of the judiciary „.
- The need for reappointment process as provided for in the Constitutional Law with respect to all judges and prosecutors is not clear at all. It may be motivated by the wish to get rid of the judges who have compromised themselves with previous regimes or who are corrupt. The Venice Commission is not in the position to evaluate whether such reasons exist with respect to a large number of judges. A comprehensive and quick reappointment process is bound to be

extremely difficult and there is no guarantee that in the end better judges and prosecutors will be appointed.

- General reappointment procedure will prove justified only if it is fair, transparent and based on clear criteria. A High Judicial Council completely dependent on the parliament is not a body suitable for carrying out such a procedure – it should be entrusted to independent persons enjoying public trust, not party partisans.
- The appointment of the republican public prosecutors and of public prosecutors by the Assembly at the government's proposal politicises the entire procedure.
- The provisions regarding the accountability of the Republican Public prosecutors to the National Assembly „suggest political interference in prosecutions and are disturbing".

After such an assessment of the constitutional provisions governing the judiciary, it is not difficult to understand the political influence the legislator had over judges and public prosecutors (deputies included). The organisational statutes on courts, the HJC, the prosecutors and the SPC were changed a number of times over a short period, from 2008 to 2011. The HJCA was changed twice, whilst the Judges' Act and Public Prosecutors' Offices Act (PPOA) were changed three times each. The amendments were made in urgent procedure, whilst some of them were radical and questionable in terms of their constitutionality.[117]

(c) Role of the Constitutional Court[118] In subsequent proceedings concerning the appeals of the non-appointed judges, the Constitutional Court did not take the position of a consequent keeper of the rule of law; the exceptions were the judges who have separated and explicated their separate opinions.

One possible route for ending the unlawfulness caused by the manner in which the general judicial appointment and re-appoint-

117 See in particular amendments to JA, under 4.1.

118 The following text is taken from Vesna Rakic Vodinelic's article *Neustavna reforma „reforme" pravosuđa*, Pravni zapisi 2/2010, p. 412–434.

ment was carried out was offered in a separate opinion to the Constitutional Court Decision No. 102/2010 of May 28, 2010, published in the RS Official Gazette no. 41/2010 of June 15, 2010. By majority vote, the Court decided to sustain the appeal of non-reappointed judge *Zoran Saveljic* and to quash the decision of the High Judicial Council No. 06–00–37/2009–01 of December 25, 2009, and ordered the High Judicial Council to re-decide, within 30 days, on the appellant Saveljic's application filed for a judicial appointment in the Court of Appeal in Nis and Higher Court in Nis. The Constitutional Court based its decision on the following arguments: (a) the decision on judge's non-appointment must be specifically, not generally reasoned, as the case was with the judicial reappointment in 2009; that is, the „formal reasoning" is insufficient, since it is unlawful; (b) the right to a fair trial of the non-appointed judge was violated, because the court decision was not duly reasoned: „Hence the appellant should have been provided, in the appointment process, with all procedural guarantees covered by the right to a fair trial, which, inter alia, include that an individual, reasoned decision of the High Judicial Council should be passed on the termination of his judicial office, which decision should include individualised reasons due to which the candidate was not appointed, which are grounded on the conditions for judicial appointment prescribed in provisions of Article 45 of the Judges Act and regulated in more detail by the Decision on the Criteria and Standards for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents, and also on data and opinions obtained pursuant to this decision."

However, in the same decision the Constitutional Court took the position that it cannot pass decisions as a full jurisdiction court, but only as a court adjudicating on the lawfulness of an act: „Given all of the above, the Constitutional Court has found that the contested decision concerning the termination of judicial office of all non-appointed judges, with a summary and general reasoning, suffers from such procedural deficiencies that prevent the Constitutional Court from assessing its lawfulness with regards to the appellant in substantive terms, and also prevents the appellant from

exercising his right to appeal efficiently. Namely, even though the contested Decision, in formal terms, does include a part marked as „Reasoning", in the opinion of the Constitutional Court it cannot be considered to be a reasoned decision in terms of Article 17, paragraph 2 of the High Judicial Council Act, because it does not include specific and individualised reasons used to establish which appointment criteria the appellant does not meet, and due to which his judicial office was terminated. The contested decision, therefore, does not provide the appellant with sufficient degree of specificity necessary for it to be challenged by an appeal, which violates the appellant's constitutional right to access to justice, which is one of the procedural guarantees of the right to a fair trial; at the same time, it does not enable the Constitutional Court to decide on its merits and consider whether it was justified in the appeal proceedings."

The position the Constitutional Court has taken is neither convincing nor just, since the self-limitation set by this Court in examining the contested decision is detrimental to the appellant, not to the HJC, which has failed to duly reason its decision. In other words, if the reasoning is such that the challenged decision may not be investigated, then such deficiencies of the reasoning may lead to the conclusions the European Commission had reached in its report at least: that the procedure was not transparent, that the candidates were prevented from giving an oral statement before the HJC. On the other hand, if the lack of reasoning renders the appellant's appeal an inefficient legal remedy, the Constitutional Court's claim that it cannot examine the decision given the lack of reasoning is hypocritical. This position sends a devastating message: do not reason your decisions, since we will not be able to examine them and shall simply quash them. In addition, unlike the European Commission, the Constitutional Court found that the incomplete composition of the HJC was not relevant in the given case: „The Constitutional Court, however, has found that the incomplete composition of the HJC does not compromise the lawfulness of its work and that it was in the position to pass decisions even in such incomplete composition, which, however, cannot be legally accepted".

The explanation as to why this ground for appeal is *legally unacceptable* was not provided.

Three Constitutional Court judges have separated their opinions: Dragisa Slijepcevic, Marija Draskic and Olivera Vucic.

*(1) Judge Slijepcevic (*presently the president of the Constitutional Court) separated his opinion primarily because he took the position that the judges who were not reappointed: (a) do not have the right to appeal to the Constitutional Court, and that this right pertains only to judges appointed pursuant to the new Judges' Act. This position is difficult to defend, because the reappointment or general appointment of judges was carried out after the Judges' Act had entered into force, and hence its procedural provisions concerning legal remedies, as well as all other procedural provisions, are *instantly* applicable, if the subject-matter remains within the same jurisdiction, and in the case of the HJC – Constitutional Court (it does!).[119] Moreover, the Constitutional Court, at which he is a

119 *Tempus regit actum* – is an old rule determining the validity of procedural statutes in time: procedural activities are assessed pursuant to the statute that is in force at the time they are taken. In the given case, judge Saveljic filed an appeal to the Constitutional Court once the Constitutional Court Act (adopted in 2007) and the Judges' Act (adopted in 2008, amended in 2009) were in force. Pursuant to both these statutes, a judge who was not appointed (regardless of the body which had not appointed him – be it the National Assembly or the HJC) has the right to appeal to the Constitutional Court. An appeal is a *procedural* activity and is hence assessed pursuant to the statute that is in force at the time it is filed. The appeal was filed in 2010. The explanation lies in the fact that procedural statutes do not have retroactive effect, since they do not affect actions taken before they entered into force. Again, this action was taken *after* both relevant statutes had entered into force. Procedural statutes are immediately applied to actions taken *after their* entry into force – hence the term of immediate effect (*effet immediat)* of new procedural statutes. In order to avoid any confusion, I underline that all the appeals filed to the Constitutional Court and all the constitutional appeals the judges have filed were filed *before* the Act Amending the Judges' Act presented herein had entered into force. For more on the temporal validity of procedural norms, see: Triva-Dika, *Građansko parnično procesno pravo*, VII izmijenjeno and dopunjeno izdanje, Zagreb, 2004. Given that our authorities and

judge, had already taken the position that the judges who were not reappointed have the right to appeal to the Constitutional Court. The explanation of the Proposal of the Amendments to the Judges' Act recognises that the judges who were not appointed in 2009 have the right to appeal to the Constitutional Court, but this right is *transformed* into a petition to the HJC by that law, and only then does the mentioned appeal come into play. (b) In addition, he finds that the Constitutional Court is not authorised to order the HJC to re-decide on the appellant's appointment within the set time limit: „Pursuant to these statutory provisions the Constitutional Court, by its decision, can only deny the appeal or sustain the appeal and quash the decision on termination of judicial office. Hence, in the procedure upon the appeal filed against the Decision on the termination of judicial office, the Constitutional Court did not have any statutory grounds to order the HJC to re-decide, within 30 days, on the appellant's application filed with regards to the announced judicial appointment at the Court of Appeal in Nis and the Higher Court in Nis. Not only that! Such an order is legally impossible. This is because its execution would be possible only if the vacancies in the mentioned court were indeed announced, and it is clear that they were not. Moreover, for such an announcement to truly exist, the order could be executed only provided that the contested holding designates the number and date of such an announcement. None of these conditions have been met. There is no announcement relative to appointment to permanent judicial tenure. There was only the announcement for appointment to judicial functions in all courts in the Republic of Serbia, where both the candidates who held judicial offices at the time, pursuant to other laws, and

judicial bodies seemingly care for speedy adoption of EU rules, a good lesson on the *tempus regit actum* rule can be learned from: T. Heukels, *Intertemporales Gemeinschaftsrecht*, Baden-Baden, 1990, p. 49, which lists several cases from the case law of the European Court of Justice, where the court allows the application of a new statute, as immediately effective, with regards to legal remedies filed *after* the given statute had entered into force. Similarly, on the *tempus regit actum* rule in Austrian law, see. A. Vonkilch, *Das Intertemporale Privatrecht*, Wien/New York, 199, p. 224, 227.

other persons were free to take part in under the same conditions." – This position of the separated opinion is also difficult to defend. It is true that it is prescribed that the Constitutional court may deny the appeal or sustain it or quash the decision on the termination of judicial office, but *the fact that a legal act is quashed means that it no longer has legal effect, and hence a necessary consequence of an act being quashed is that the matter must be decided on again.* For the *request,* in this case the application is standing, and *no one* has decided on it. *Non liquet* – lack of decision on a matter a certain body is competent for is prohibited and is considered a denial of justice. If the HJC decision is quashed, the HJC must decide on the same matter again. Furthermore, the argument that the HJC could not have been ordered to decide on whether the appellant shall be appointed judge of the mentioned courts or not because a general announcement was not made can be seriously criticized, since it is clear that the appellant did not apply to be appointed judge of *any court*, but of very specific courts. Each candidate for permanent judicial tenure directs his/her application to the courts of those instances and types the criteria for the appointment to which he/she meets. This includes the candidates' decision to apply for a court in a specific territory – a decision that also implies certain risk. However, this specification *determines the judge's request.* The HJC may sustain or deny such a request, but must decide on it! (c) Finally, judge Slijepcevic finds that such a decision could not have been adopted without an oral hearing, since it is mandatory pursuant to Article 100 of the Judges" Act – this is the only acceptable argument in his separate opinion.

(2) Judge Draskic had separated her opinion for the following reasons. (a) The Constitutional Court had acted as an administrative court would act when assessing the lawfulness of an act, which is unprecedented in the practice of the Constitutional Court: „The decision of the High Judicial Council is not a typical administrative act, but an act whereby one body, which is not an ordinary state administrative body, but an independent and autonomous body entrusted with, inter alia, appointing judges, and the decisions of which are subject to direct appeal to the Constitutional Court,

without the possibility of addressing the Administrative Court, as otherwise envisaged concerning some other decisions of the HJC when it acts as a typical administrative body (e.g. the decisions on temporary assignment of judicial assistants or appointment of lay jurors). Had the authors of the constitution intended to introduce administrative dispute in the decision-making with regards to appeals against these HJC decisions, they would have most certainly done so and would not envisage a special appeal against the HJC decision, but a constitutional appeal against the decision of the Administrative Court. Since there are no such provisions, it is my opinion that the procedure should be continued before the Constitutional Court by forwarding the appeal to the HJC for the purpose of rebuttal and then by scheduling a hearing, as envisaged by Article 100 of the Constitutional Court Act". (b) The Constitutional court should have also acted by excluding the grounds for the constitutional appeal and applying relevant procedural rules envisaged for this legal remedy: „It is true that the procedure on the appeal filed by judges, public prosecutors and deputy public prosecutors against the decision on the termination of function, governed by Articles 99 to 103 of the Constitutional Court Act, is a procedure of instance control of the contested decision, which comprises a single procedure together with the first-instance procedure. However, it is also a procedure which consumes the procedure upon constitutional appeal (which is excluded in this case pursuant to Article 148, paragraph 2 of the Constitution), which also means that it has the character of a procedure against an individual act that violates or denies a human right, because in this case the only legal remedy is exhausted and no other legal remedy is envisaged. The fact that the appellant, as all other appellants, had contested the Decision in the procedure before the Constitutional Court, invoking evidence indicating his qualification, competence and worthiness (paragraphs 28 and 32 of the appeal) was sufficient for the Constitutional Court, after the HJC had forwarded its rebuttal, to schedule a hearing and ascertain all the relevant circumstances concerning his non-appointment in public and adversarial proceedings, and take a position on whether the HJC had lawfully refuted the presump-

tion of the candidates' qualification, competence and worthiness in a decision on the merits concerning the lawfulness of the contested decision. Of course, it is not the Constitutional Court's task to appoint judges, but it is most certainly its task to decide on the merits on whether the circumstances referred to as the grounds for non-appointment as a lawful cause for termination of judicial office based on the Decision Establishing the Criteria and Standards for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents were interpreted in a satisfactory manner. Therefore, the task of the Constitutional Court was not a particularly difficult one, and the possibility that in the course of the appointment process the rights of the applicants were violated, had by all means warranted urgent action and a decision on the merits. Finally, if it is true that the High Judicial Council refutes the presumption that the appellant Zoran Saveljic, a judge with 25 years of judicial career, is qualified, competent and worthy only by stating that „the appellant's actions in the capacity of the investigating judge in four cases before the District Court in Pristina, two of which date from 2002 and two of which date from 2007, indicate there are grounds to suspect the qualification and competence of the candidate", then, in my opinion, it would be relatively easy for the Constitutional Court to pass a decision on the merits and offer legal arguments as to why it finds that the High Judicial Council shall decide on this candidate's application again. A serious, comprehensive and thorough argumentation would bind the High Judicial Council to pass a different decision in the repeated process, instead of adopting the same one as already passed. In this way, the procedure of truly deciding on the merits is delayed for an unknown moment in the future, whilst the appellant Zoran Saveljic is put in the position to, first of all, obtain the same decision – this time supported by individual reasons for his own termination of judicial office and only then, after appealing to the Constitutional Court (?), he would have to wait for a decision on the merits in his case. It is my deep belief that the purpose of the proceedings upon the judge's appeal is not to make the High Judicial Council change its position and do what it was supposed to do five months ago, but to

render a fast and fair decision on whether the rights of judge Zoran Saveljic – and all the other appellants – were violated in the general judicial appointment process". These arguments are successful in refuting the positions taken in the decision of the Constitutional Court stating that the control concerning the appeal to the Constitutional Court is exhausted in controlling the lawfulness, as the case is with the Administrative Court. Although Art. 148 paragraph 2 of the Constitution excludes constitutional appeal if a judge has filed an appeal to the Constitutional Court, the reasons for which both legal remedies are filed must be taken into account. If a decision of the HJC, as an individual act, violates a human right (and the Constitutional Court itself states that an unlawful reasoning is a denial of the right to a fair trial), then, indeed, all HJC decisions must be investigated with a view to potential violations of human rights of the non-appointed judges, since this most certainly as a question covered by the *control of lawfulness of acts.* (c) In addition, the judge advocated for the decision in *Saveljic* case to be considered a so-called pilot decision: „Finally, the Constitutional Court has failed, when sustaining Zoran Saveljic's appeal, to adopt a so-called pilot-decision (resembling the practice sometimes resorted to by the European Court of Human Rights, when it establishes violations of systematic character) and resolve all other appeals filed by non-appointed judges in the same manner". The argumentation given in this separate opinion is convincing, self-explanatory and it is truly a shame that the Constitutional Court did not accept it.

(3) Judge Vucic had separated her opinion based on the position that the HJC was an incompletely and hence unlawfully constituted: „Namely, the structure of the HJC members is such that it corresponds to the structure of the criteria applicable in the appointment and to the structure of the capacities that he proposed judicial candidates must meet. For example, a renowned lawyer who represents law faculty professors effects his participation in the work of the HJC through competent evaluation of the conditions for appointment concerning the acquiring of legal knowledge, which is valued by the average grade attained

during studies, duration of studies, scientific and professional papers written during studies and after having acquired the diploma, postgraduate training and education, success in passing the Bar exam, overall special interest in scientific disciplines that present a special field of interest for the aspiring judicial candidate, and the like. Therefore, it is precisely the profession of a university professor who is a lawyer that should enable, in the overall result expected from the High Judicial Council, that this body shall scrutinize in the right manner this important aspect of competence to perform one of the most respectable professions – the profession of a judge. Together with other members of the Council, who will, in accordance with their knowledge or experience in performing judicial function, or their career of a barrister, the law faculty professor was supposed to contribute to the appointment of persons who have a comprehensive training and who are able to handle the challenges of the judicial calling". This position of the separated opinion is also acceptable, well-argued and, finally, confirmed in the European Commission Report.

Proposing that the decision in the Saveljic case should be treated as a pilot decision and that appeals to the Constitutional Court and the constitutional appeals should be decided on jointly in full jurisdiction, judge Draskic has paved the way the Constitutional Court could have opted for. This would also prevent the question of the constitutionality of the Act Amending the Judges' Act and other acts adopted in urgent procedure in the end of 2010. *The European Commission Report could be considered to be a new legal and political fact which could have given impetus to the Constitutional Court to decide in any one case concerning a non-appointed judge and set a pilot example.* This is an opportunity the Constitutional Court is reluctant to miss. With a few honourable exemptions, the Constitutional Court has become one of the (unwilling) actors of the unsuccessful judicial reform. The legal community is yet to witness the exasperating and constant *review* of this and that, based on statutes of dubious constitutionality.

3.2. POSITIONS OF THE EUROPEAN COMMISSION

In its Serbia Progress Report for 2010, the European Commission made the following assessment of the judiciary:

„The reappointment procedure for all judges and prosecutors was carried out under the lead of the Ministry of Justice in the second half of 2009 and took effect as of January 2010. The overall number of judges and prosecutors was reduced by 20–25%. More than 800 judges were not reappointed, out of previously around 3.000 judges and misdemeanour judges. A new structure of the court network was implemented as of January 2010. The 138 municipal courts were reorganised into 34 basic courts. In addition, there are 26 higher courts, 4 courts of appeal and the Supreme Court of Cassation. The organisation of the prosecution service was changed accordingly. The service was divided into basic, higher and appellate prosecution offices. Special departments exist for war crimes and for organised crime. The new Administrative Court became operational in January 2010. In July 2010, the appointment of members of the Constitutional Court was completed. However, major aspects of the recent reforms are a matter of serious concern. The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary. The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which neglected adequate representation of the profession and created a high risk of political influence. In addition, not all members had been appointed to either of the councils. Objective criteria for reappointment, which had been developed in close cooperation with the Council of Europe's Venice Commission, were not applied. Judges and prosecutors were not heard during the procedure and did not receive adequate explanations for the decisions. First-time candidates (876 judges and 88 deputy prosecutors) were appointed without conducting interviews or applying merit-based criteria. The overall number of judges and prosecutors was not calculated in a reliable way and adjusted sever-

al times after the reappointment had already been carried out. The right to appeal for non re-appointed judges was limited to recourse to the Constitutional Court, which does not have the capacity to fully review the decisions. Out of more than 1,500 appeals, only one case has been dealt with. In this case, the Constitutional Court, for procedural reasons, annulled the initial decision. The High Judicial Council and the State Prosecutorial Council have not yet been elected in their permanent composition. New court presidents have not been appointed. The respective legal deadlines expired in July and March 2010. The planned new Criminal Procedure Code, the new Civil Procedure Code, the law on enforcement of judgments and the law on notaries have not been adopted. The large backlog of pending cases remains a matter of concern, in particular as the recent reforms impacted negatively on the overall efficiency of the judicial system. The reduction of the number of judges and prosecutors was not based on a proper needs assessment. Under the new court system, courts which were closed continue to function as court units, in which civil cases are heard. This means that judges and judicial staff have to travel between courts and court units requiring significant resources and creating security concerns. A uniform system for organising the work of the court seats and the new court units has not been established. Case registration and the IT system connecting all courts and court units and allowing access to files are not fully operational. The Constitutional court faces a backlog of some 7,000 pending cases, including the appeals filed by judges and prosecutors who have not been reappointed. The setting up of the Judicial Academy still is at an early stage and vocational trainings have not yet started. Progress on domestic cases of war crimes continued to be slow. There are 20 ongoing court cases and investigations against 103 individuals. *Overall*, Serbia's judicial system only partially meets its priorities. There are serious concerns over the way recent reforms were implemented, in particular the reappointment of judges and prosecutors."[120]

120 European Commission, Brussels, 9 November 2010, SEC(2010) 1330, Serbia 2010 Progress Report, p. 49.

3.3. JUDICIAL NETWORK AND THE NUMBER OF JUDGES

As a rule, the major burden of adjudication is borne by the courts of general jurisdiction – formerly, these were municipal courts, today they are basic courts. None of the judicial reform actors had explained how it came to be that the number of 138 municipal courts has been reduced to 34 basic courts that exist today. What was the manner of calculation of the necessary number of courts: were the usual parameters, such as population, population density, the tendency of increase (or decrease) in the number of court cases, the structure of subject-matters (civil, criminal, others) considered? How and why was it concluded that the total costs of court proceedings are reduced, if court units are organised outside the seats of the courts, which implies that citizens (parties to court proceedings) will have to travel, as will the judges and public prosecutors, cases will have to be transported, and other costs shall be incurred. Did any of the reform actors ask themselves about the effect of reduction of the number of the courts of first instance on one of citizens' fundamental rights – the right to access to justice? There are sufficient grounds to claim that the calculation of the number of courts was characterised by *ignorance and approximation*, and that none of these actors had *paid any attention to citizens' right to access to justice.* Unlike the indifferent attitude taken by the judicial reformers in Serbia, the European Commission took note of the following in its report (quoted above): „Under the new court system, courts which were closed continue to function as court units, in which civil cases are heard. This means that judges and judicial staff have to travel between courts and court units requiring significant resources and creating security concerns. A uniform system for organising the work of the court seats and the new court units has not been established. Case registration and the IT system connecting all courts and court units and allowing access to files are not fully operational „

When it comes to the number of judges assessed as necessary for the Serbian judiciary – it was determined in the same manner in

which the number of courts, their competence and structure were determined – arbitrarily. Contrary to the position taken by Serbian „reformers", the European Commission took a note of the following with regards to this issue: „The overall number of judges and prosecutors was not calculated in a reliable way and adjusted several times after the reappointment had already been carried out. The reduction of the number of judges and prosecutors was not based on a proper needs assessment. „

3.4. COMPOSITION AND MANNER OF WORK OF THE FIRST HJC COMPOSITION DURING THE COURSE OF THE JUDICIAL APPOINTMENT AND REAPPOINTMENT

Incomplete and inadequate composition. At the time of general appointment and reappointment of judges, on the day the decision was published – December 16, 2009 – the High Judicial Council was incomplete, because the National Assembly did not appoint a HJC member who is a law faculty professor in the Republic of Serbia as long as the reappointment process was not completed. There was a dispute within the Serbian Bar Association whether the HJC member who is a barrister was selected by a representative body – which is the Bar Association Assembly. The current member was, instead, appointed by the Bar Association Administrative Board.

The members of the High Judicial Council interim composition, who have carried out the judicial reappointment process, are: Nata Mesarovic, ex officio member, president of the Supreme Court of Cassation and the president of the Council, Snezana Malovic, ex officio member, Minister of Justice in the Republic of Serbia Government, Bosko Ristic, ex officio member, chairman of the National Assembly Judiciary Committee, Jelena Borovac, appointed member, justice of the Supreme Court of Serbia, Mladen Nikolic, appointed member, judge of the Commercial Court in Belgrade, Vucko Mircic, appointed member, judge of the District Court in Belgrade, Djurdjina Bjelobaba, appointed member, judge of the District Court in Novi Sad, Biljana Tosovic, appointed member, judge of the Munici-

pal Court in Krusevac and Dejan Ciric, appointed member, a barrister from Nis.

The incomplete composition of the High Judicial Council was not the only problem with the first (interim) composition of this body. Out of the six of its appointed members, the actions of two of them, as pointed out before, resulted in Serbia being found guilty of violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In one case, the ECrHR established that the judge (a HJC member) had conducted the procedure for the enforcement of a litigation procedure unjustifiably long; in the second case, the judge (a HJC member) had violated the presumption of innocence of the accused in one case. The question for anyone implementing the judicial reform is – was it not possible to find six judges in Serbia whose actions did not result in Serbia being found guilty before the European Court of Human Rights?

Impartiality and the prohibition of conflict of interest. In addition to being incomplete and the fact that some of its members may be unworthy of participating in its work, it also cannot be claimed that this body had observed the principles of impartiality and prohibition of the conflict of interest. The president of the HJC had participated in the promotion of her son to the position of a judge of a higher court, one HJC member participated in the appointment of his wife to judicial office, one HJC member – in the appointment of his relative, and there are indications that one HJC member, who is a barrister, had participated in the appointment of a colleague with whom he worked in the same office.

In short, to use the terminology of the European Commission from the cited report: the reappointment was carried out by bodies (HJC and SPC) whose composition was unlawful. Arguments: (i) their composition was transitory, not permanent; (ii) the composition of both bodies was incomplete; (iii) the representatives of the profession were inadequately represented. Unfortunately, the Constitutional Court had taken an ambiguous position on this issue in its decision no. 102/2010 of May 28, 2010.[121]: „The Constitutional

121 Decision was published in the RS Official Gazette RS 41/2010 of 15. 06. 2010.

Court has, however, found that the incomplete composition of the Council does not compromise the lawfulness of its work and that it was able to decide in an incomplete composition, which, however is not legally acceptable." The explication of the Constitutional Court on the *legal unacceptability* of this position was not provided.

How did the High Judicial Council apply the criteria and standards on qualification, capacity and worthiness of judges? In the first place, it is unclear whether the Council applied only the prescribed criteria or resorted to some *unwritten* ones. The Judges' Association of Serbia claimed, and proved on certain examples, that the unpublished appointment criteria included the one that the candidate may not be appointed if his/her spouse is a barrister. Indeed, in the times of frequent conflicts of interest and poorly concealed corruption, this condition does not sound unreasonable. However, there are two problems in its application: (i) the condition was not made known in advance, but was *learned* only after the competition was ended, which means that the rules of the game were changed after the game had started, and it is clear that such a thing is unacceptable; (ii) if it is acceptable and justifiable to deny judicial position to a person whose spouse was a barrister, then it is equally or even more justifiable than if there was a parent-child relation between the judges, or if judges were married. In other words: if we strive to avoid the conflict of interest, let us strive to avoid it at all times.

It was already described above how the HJC had assessed qualification, competence and worthiness.[122] The Constitutional Court also had the opportunity to take its position on this – acting on the appeal of a non-appointed judge; it quashed the decision because it was not reasoned. However, it did not sustain the grounds of the appeal concerning the assessment of the judge's qualification, competence and worthiness, with one separated opinion.[123] An example from judge Draskic's separated opinion with regards to the Constitutional Court decision no. 28. 05. 2010, published in the RS Official Gazette 41/2010 of June 15, 2010: „Finally, if it is true that the

122 See under 2.4.

123 Decision of the Constitutional Court no. 102/2010 of 28. 05. 2010, published in the RS Official Gazette 41/2010 of 15. 06. 2010.

High Judicial Council refutes the presumption that the appellant, Z.S. whose judicial career lasted for 25 years, meets the criteria of qualification, competence and worthiness only by a claim that 'the applicant's actions in the capacity of an investigating judge in four cases of the District Court in Pristina, two of which date from 2002 and the other two of which date from 2007, indicate that there are grounds to suspect the applicant's competence and qualification', then, in my opinion, it would be relatively easy for the Constitutional Court to adopt a decision on the merits and offer legal arguments on why it finds that the High Judicial Council must decide on this candidate's application again."

The results of the alleged application of *criteria and standards on qualification, competence and worthiness* had the following outcome: one deceased judge was appointed; two judges were appointed to two judicial posts in different courts; one person was appointed both a judge and a deputy prosecutor at the same time; there is a conflict of interest with regards to at least three members of the High Judicial Council.[124] The list of reappointed judges includes the names of judges who were proven to participate in proceedings: which ended in what was colloquially referred to as *electoral theft; unjustified bringing into custody of political opponents,* mainly during the Milosevic's rule, but also during later governments; wherein the reappointed judges have *avoided to adopt decisions or have released the accused, under unusual circumstances,* in criminal cases against the members of security services („Ibar motorway" case, concealment of state security services files); judges who *applied criteria not prescribed by the law, most often political ones,* thus favouring certain and easily recognizable political parties, or in cases of fired University of Belgrade professors, where only one

124 The president of the HJC has offered, given that she is a lawyer, unacceptable explanations of these acts: she said there were plenty of examples of the children of judges appointed judges. It is difficult to believe that a lawyer, and a judge in particular, does not see the difference between the situation when a judge's relative is being appointed by the National Assembly and the situation when such relative is being appointed by a body (the HJC) which is presided by his relative or to which his relative is a member.

such case was resolved before the change of the authoritarian regime. The mentioned deficiencies cover one quarter of the justices of the Supreme Court of Cassation and judges of the Court of Appeal in Belgrade – and these were the only two samples this test was applied to.[125]

In addition, the question of ethnic composition of the judicial corps in the highest instances was almost completely neglected. With a reservation that these conclusions are made based on the sheer names and surnames and the geographic distribution of their former courts, one can still draw the following conclusions: (a) the list of reappointed judges of the Supreme Court of Cassation does not include any names that would sound any other than Serbian; (b) on the list of judges of the Court of Appeal in Belgrade there is only one name that does not sound Serbian; (c) the list of judges of the Court of Appeal in Kragujevac does not include any names that do not sound Serbian; (d) the list of judges of the Court of Appeal in Nis does not include any names that do not sound Serbian; (e) on the he list of judges of the Court of Appeal in Novi Sad, which is competent for the territory of Vojvodina, there are only two, perhaps three names that do not sound Serbian; (f) on the list of judges of the Administrative Court, which is competent for the entire territory of Serbia, there is only one name that may sound non-Serbian; (f) on the list of judges of the Commercial Court of Appeal, competent for the entire territory of Serbia, there is only one name that may not be Serbian. But, Serbia is the state of Serbian people and *all citizens* who live in it (Article 1 of the Serbian Constitution). As we go down towards lower court instances, the number of judges whose names at least indicate they are members of national minorities increases.

3.5. APPLICATION OF PROCEDURAL PRINCIPLES

Which procedural principles were applied by the High Judicial Council? Above we discussed the violation of the principles of impartiality and the judicial candidates' rights to a fair trial. In addi-

125 V. Rakić-Vodinelić, *Novo sudstvo u najnovijoj Srbiji,* web portal pescanik.net, December 18, 2009.

tion to the violation of these principles, the principle of contradiction (*audiatur et altera* pars), and publicity were also violated, along with a special form of right to a fair trial – the lack of individualised reasoning of the decisions on non-appointment.

Contradiction. Not one judge was invited to attend a HJC session wherein his/her appointment was decided on; the situation is the same concerning the first-time appointment. This practice is contrary to Article 32 of the Constitution/2006 and Article 6 of the European Convention.

Publicity. The operation of the High Judicial Council must be public, both pursuant to the Constitution and to the High Judicial Council Act.[126] The task of this body was to establish which judges are the best among the candidates who applied, by applying the criteria that can be briefly described as qualification, competence and worthiness, in a public procedure that would provide the candidates with an opportunity to declare on the contentious issues regarding the criteria, and end this task by supplying each candidate, whether appointed or not, with a reasoned decision. Instead, it is not difficult to prove that the work of the Council was *secret*, that there was no debate on whether each given candidate meets the appointment criteria, but that instead the lists of candidates were disclosed, whose origin cannot be deducted from the relevant minutes, and the reasoning of the decision on non-appointment was the same for all judges; this reasoning did not include any grounds for such a decision, particularly not individual ones. Despite the express statutory provision, the work of the first HJC composition was declared secret. Only following the ruling of the Commissioner for Information of Public Importance and Personal Data Protection the HJC forwarded to the Judges' Association of Serbia a decision whereby the work of the HJC was declared secret.[127] The same assessment

126 Compare Article 51 of the Constitution/2006.

127 This act is designated as *High Judicial Council number 021–02–17/2009–01 of 28. 10. 2009*, and was signed by Nata Mesarovic, president of the High Judicial Council, and stamped. Not only does the confidentiality cover the course of discussion and the decision taken, but all members of the HJC and the administrative staff were bound to confirm the confiden-

concerning the secrecy of the process was given by the European Commission: „The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary. The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which neglected adequate representation of the profession and created a high risk of political influence."

Unfairness. Despite the express provision[128] that any decision whereby a judge is appointed to permanent tenure must be reasoned, the first composition of the HJC had failed to do so. In addition, the decisions whereby the office of the judges who were appointed judges before, by the Assembly, but were not appointed now, lack individual reasoning. Instead of the reasoning, the High Judicial Council made a list of judges who were not appointed, listed the statutory requirements for judicial appointment, without an individualised reasoning for each individual judge. The Constitutional Court of Serbia took the following position with regards to the lack of individual reasoning at its session of March 25, 2010:

„The judicial function of judges who were not appointed to permanent tenure by the Decision of the High Judicial Council on the appointment of judges to permanent tenure in courts of general and specialised jurisdiction,[129] the legal consequence of which is the termination of the judicial office they have performed thus far, shall

tiality by their signature. The act is available at the Judges' Association of Serbia website http://www.sudije.rs, 01.09.2012. The competent authority – the Commission for Information of Public Importance and Personal Data Protection interpreted the statute as it is formulated: the work of the HJC is public, and ordered the Council to publish its decision whereby what should have been public was declared secret. The Commission has done the same with regards to the failure to provide the minutes on the course of the discussion and on the adoption of the decision by the HJC – he ordered they were to be forwarded to the Judge's Association. (Not all of them forwarded, those that were have been published at the Judges' Association of Serbia website.)

128 Article 52, paragraph 4. of the Judge's Act.

129 RS Official Gazette 106/2009.

be terminated on the day the newly appointed judges assume duty (Article 101, paragraph 1 of the Judges' Act), based on an individual reasoned decision of the High Judicial Council, which must, inter alia, include individualised reasons due to which a given person was not appointed, whose grounds are based on the requirements for judicial appointment prescribed by Article 45 of the Judges' Act and regulated in more detail by the High Judicial Council Decision on the Criteria and Standards for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents[130]."[131]

Based on the above-mentioned case law of the European Court of Human Rights, the High Judicial Council should have had the character of an independent and impartial tribunal, because it was devised and established by the Constitution as an independent body, and because its majority comprises professional judges. Being such a body, the High Judicial Council must decide on the basis of a public and oral discussion, providing that the person whose right is being decided on participates in the proceedings. This body is subject to all rules on recusal otherwise applicable in court proceedings. Was the High Judicial Council aware of its position and did it understand that it must make its decisions in writing, reason them individually for each individual judge and serve them individually – not only to judges who were not appointed (but particularly to them, in order for the constitutional right to legal remedy to be respected), but also to other, appointed judges? What did the Council members have to say about this? Unfortunately, they sent mix messages: that all non-appointed judges should be served individually reasoned rulings, or would not, but would be invited to an oral interview. In its decision quoted above, the Constitutional Court of Serbia states the following: „Therefore, the appellant should have been ensured to have all procedural guarantees covered by the right to a fair trial, inter alia, to have a reasoned, individual decision of

130 RS Official Gazette 49/2009.

131 Position was published at the Constitutional Court of Serbia website, http://www.ustavni.sud.rs, September 1, 2012.

the High Judicial Council on the termination of his office be adopted, and have the decision include the individualised reasons for his non-appointment, based on the requirements for the appointment of judges prescribed in Article 45 of the Judges' Act and regulated in more detail in the Decision on the Criteria and Standards for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents, and on data and opinions obtained pursuant to this decision". Similar position was taken by the European Commission: „Objective criteria for reappointment, which had been developed in close cooperation with the Council of Europe's Venice Commission, have not been applied. Judges and prosecutors were not heard during the procedure and did not receive adequate explanations for the decisions. First-time candidates (876 judges and 88 deputy prosecutors) were appointed without conducting interviews or applying merit-based criteria."

4. CHANGE OF NORMATIVE BASIS: ACT AMENDING THE JUDGES' ACT

4.1. SUBSEQUENT ATTEMPTS AT „ELIMINATING THE DEFICIENCIES"

4.1.1. Review by the HJC instead of appeals to the Constitutional Court

After the European Commission report was published and following the answers to the Questionnaire on its EU membership, it became clear to the authorities that measures must be taken in order to repair the damage. What was the aim of those attempts? „However, the core of the answer is to reveal the aims (not of the reforms, but of the post-reform measures. According to the Government, the aim of the planned steps is to eliminate any doubts as to the actions of the HJC and the SPC in the general appointment process. The aim, therefore, is not to correct the mistakes, but to justify those who had committed them. The 'review' has been started with the assumption that the suspicion was unfounded and that

it should be eliminated at any cost. The possibility that the 'review' may show that the suspicion was justified is not considered at all. Who is entrusted with that pioneer task? The permanent composition of the body which shall remain to be headed by and whose members will remain to be precisely those who have been most responsible for its work so far".[132]

Searching for methods that would correct the results of their own „reformatory" failure, the key actors of the reform – the Ministry of Justice and the HJC – have relied on the help of the European Commission, which will be requested as a future *modus operandi*. They also promised to act more speedily: the HJC president has publicly undertaken an obligation to appoint court presidents and the permanent HJC composition „by the end of December" (2011).[133] The promise has not been kept – court presidents were not appointed at the time this text is being concluded: save for the president of the Supreme Court of Cassation, all other courts in Serbia have *acting court presidents*. The permanent composition of the HJC was appointed after the expiry of the promised time limit. In order to speed up the process of deciding on legal remedies of the non-appointed judges, the Act amending the Judges' Act was adopted. It then became clear that the selected *modus operandi* was that of a party state. The legislator shall solve everything. The legislator shall terminate the procedures before the Constitutional Court, introduce a new legal remedy and a new competence for deciding on such legal remedy, the legislator shall provide that not only a statute but also one subordinate act (the contents of which were unknown at the time the Act Amending the Judges' Act was adopted) have retroactive effect. The model set up by the Slobodan Milosevic's authoritarian regime by adopting a legislative act the purpose of which was to conceal massive forgery of election results in 1996 (otherwise known as the *lex specialis*) was applied once again.

(a) Important contents of this Act are covered in its Articles 5 and 6, although some other provisions include novelties important

132 Compare. S. Beljanski on web portal www.pescanik.net, od 03. 02. 2011.

133 Politika, 14. 11. 2010.

for interpreting these two main provisions. These provisions read as follows:

„Article 5

The permanent composition of the High Judicial Council shall review the decisions of the first composition of the High Judicial Council on termination of judicial office of judges from Article 101 paragraph 1 of the Judge' Act (RS Official Herald 116/08, 58/09 – decision of the CC and 104/09), in accordance with the criteria and standards for assessing the qualification, competence and worthiness, which shall be adopted by the High Judicial Council permanent compositions.

The procedures upon the appeals or the constitutional appeals filed by the judges referred to in paragraph 1 of this Article to the Constitutional Court shall be terminated by the entry into force of this statute and the cases shall be relegated to the High Judicial Council.

Appeals and constitutional appeals referred to in paragraph 2 of this Article shall be considered a petition against the High Judicial Council decision.

The judges referred to in paragraph 1 hereof who have not filed an appeal or a constitutional appeal may file a petition against the decision from paragraph 1 hereof within 30 days from the day this statute enters into force. This petition shall be decided on by the permanent composition of the High Judicial Council.

In the procedure upon the appeal referred to in paragraphs 3 and 4 hereof, a judge referred to in paragraph 1 hereof shall have the right to inspect the case file, the accompanying documents and the course of procedure, as well as to orally present his case before the High Judicial Council permanent composition. The decision of the High Judicial Council permanent composition shall be reasoned, pursuant to Article 17, paragraph 2 of the High Judicial Council Act.

A judge may file an appeal to the Constitutional Court against the decision of the permanent composition of the High Judicial

Council adopted on the petition from paragraphs 3 and 4 hereof whereby the decision of the first composition of the High Judicial Council on the termination of judicial office is confirmed, within 30 days from the day the decision was served.

Article 6

Permanent composition of the High Judicial Council shall review the decisions of the first composition of the High Judicial Council on the appointment to permanent judicial tenure, and the decision on the proposed appointment of judges who are appointed for the first time, in order to establish the existence of grounds of suspicion with regards to the qualification, competence or worthiness of the judge in question, or the existence of reasons indicating that the procedure was violated when the decision on the appointment or proposed appointment of the given judge was adopted.

The decision of the permanent composition of the High Judicial Council establishing the existence of grounds referred to in paragraph 1 hereof shall be construed as special grounds for initiating the dismissal procedure.

The procedure referred to in paragraph 2 hereof shall be commenced by the High Judicial Council ex officio.

First evaluation of the work of judges appointed to judicial office for the first time shall be carried out by the permanent composition of the High Judicial Council."

The main provision on the *retroactivity* of the Act is included in Article, paragraphs 2 and 3, *ex lege*, all proceedings upon the judge's appeals to the Constitutional Court, and also upon the constitutional appeals, shall be terminated and the cases relegated to the HJC, and the mentioned appeals shall be considered petitions. Those who proposed the statute (the Government proposed the statute which was drafted by the Ministry of Justice) did not hide the retroactivity. In the explanation of this Draft (page 4) the procedure was initiated for establishing the general interest,, in accordance with Article 197 of the Serbian constitution which enables retroactivity exceptionally. Article 197 of the Serbian Constitution reads:

„Statutes and other general acts may not have retroactive effect.

Exceptionally, only some of the statutory provisions may have a retroactive effect, if so required by general public interest as established in the procedure of adopting the Law.

A provision of the Penal Code may have a retroactive effect only if it would be more favourable for the perpetrator. „

Ex lege, all procedures on appeals judges had filed to the Constitutional Court, and on the constitutional appeals,[134] are terminated and the cases are relegated to the HJC, and the mentioned appeals are considered petitions.

It should be underlined that only the provisions of the *statutes* but not of other acts may exceptionally have retroactive effect. It is self-explanatory that such provisions must be *known* to the body which had adopted the retroactive statute. However, the problem also lies in the fact that the retroactive *statutory provisions* included in Article 5 and 6 of this Act enable the retroactivity of a subordinate act, the contents of which were not known to the members of parliament at the time the statute was passed. Namely, Article 5, paragraph 1 of the Act Amending the Judges' Act envisages that the permanent composition of the HJC shall review the decision on judicial appointment *in accordance with the criteria and standards for*

134 Attention should be paid to the differentiation between the *appeal to the Constitutional Court* and the *constitutional appeal.* A judge's right to file an *appeal to the Constitutional Court* is governed by Article 67 of the Judges' Act. The procedure on this appeal is regulated by Articles 99 – 103 of the Constitutional Court Act (RS Official Gazette 109/2007). The grounds for filing the appeal to the Constitutional Court have not been regulated in detail in the Constitutional Court Act, and it is hence not certain which procedural statute is applicable in order for this legal void to be filled. *The Constitutional appeal* is a legal remedy which can be filed by individuals or legal persons whose human right guaranteed by the Constitution of Serbia or international agreements that are a source of law was violated. The procedure concerning a constitutional appeal is governed by Articles 82 – 92 of the Constitutional Court Act. As any other citizen the judge is also entitled to file the constitutional appeal.

assessing the qualification, competence and worthiness, which shall be adopted by the permanent composition of the High Judicial Council. The permanent composition was supposed to pass these criteria within 15 days from the appointment of its judge-members.[135] Consequently, pursuant to this Act, Serbia shall have judges appointed pursuant to one set of criteria and standards in 2009, and others, appointed pursuant to criteria and standards adopted in 2011. Furthermore, Serbia shall have judges whose appeals are transformed into petitions based on the 2009 criteria and standards, and these (new-old petitions-appeals) shall be judged according to some other criteria and standards, unknown at the time the Act was adopted. Such retroactivity is *unconstitutional.* Retroactivity which is allowed only exceptionally must meet certain requirements: (i) it must be *justified,* that is, the general social interest for retroactive effect must prevail over legal certainty, due to which retroactivity is prohibited in principle[136] (the contents and the manner in which the general interest supporting retroactivity was established with regards to this Act shall not be commented on here). (ii) even if the position that retroactivity is justified is taken, it can only relate to the effect of certain provisions of a *statute*; in this case, however, not only Articles 5 and 6 of the Act Amending the Judges' Act have retroactive effect, but such effect is granted to a subordinate act the adoption of which is in the competence of the HJC – the criteria and standards for assessing the qualification, competence and worthiness of judges, which is the main substantive source of law in the given field. As pointed out before, these criteria were unknown at the time the Act was adopted, which is clearly visible from its Article 7 "criteria and standards.....shall be adopted" – therefore, future

135 Article 7.

136 „When making the assessment one should particularly take into account whether the retroactive power: is detrimental to legal certainty, is detrimental to the addressee, violates constitutional rights, violates equality before the law, eliminates a solution that is contrary to law and morality", V. R. Vodinelić, Intertemporalno građansko pravo – o povratnom dejstvu građanskopravnih normi, Anali Pravnog fakulteta u Beogradu, 1-3/1991, p. 72.

tense was used. Legal certainty, however, warrants that the text of the norm that is supposed to have retroactive effect must be *known and clear*.[137] Therefore, even if a piece of subordinate legislation may have retroactive effect (which is prohibited by the Constitution), in this case such effect could not be recognised to it, even through a statute, since the act was *not known* to the legislator, and, moreover, the legislator (the Parliament) *does not have the competence* to adopt it (the competence pertains to the High Judicial Council). One of the criteria that might guide the legislator in recognising the retroactive effect of a new law would be contents of the old norm which should be replaced by the new one: if that norm is unclear or its application is uncertain and incoherent, retroactive effect shall be justified. The right of a judge to file the appeal to the Constitutional Court is expressly and clearly prescribed in two statutes – in the Judges' Act[138] and the Constitutional Court Act.[139] In addition, in its general position on this issue, and also in its decision in the *Saveljic* case, the Constitutional Court had established that an appeal to the Constitutional Court is admissible in case of a non-appointment of a judge. It is hence not convincing that it is justified to change this norm by a new norm, according to which the appeal to the Constitutional Court is transformed into a petition to the High Judicial Council.

(b) *Provision of Article 5, paragraph 2 of the Act is unconstitutional not only because it exceeds the limits of retroactivity allowed by*

137 „As a postulate, legal certainty means, inter alia, that the norms must be clear (specified). When deciding whether a norm should be granted retroactive effect, legal certainty as a postulate is not decisive, but the extent to which it is truly realised in the given case: to what extent the present norm, now being changed, was specified. If it was clear, or if its application was clear, unified and coherent, there are all the more reasons to extend the application of the former norm then in the case where there was no legal certainty, or where the norm was unclear and the practise was incoherent, and hence the addressee could not rely on a specific legal regime." Vodinelić, op. cit, p. 72, and also the references on the same page, footnote 19.

138 Article 67.

139 Articles 99-103.

the Constitution. It must be stressed that the competence for deciding not only on the appeals the judges filed to the Constitutional Court, but also on *constitutional appeals,* is thereby transferred from the Constitutional Court to the HJC. Namely, Article 166 of the Constitution prescribes the following: the Constitutional Court shall be an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms", whilst Article 170 of the Constitution deals with the conditions for permissibility of the constitutional appeal – all this within Part Six of the Constitution, entitled "The Constitutional Court". Linguistic and systematic interpretation of these provisions results in the conclusion that it is the Constitution that regulates the competence of the Constitutional Court to act on the *constitutional appeal* filed because of a violation of a human right. A statute, even if its retroactive effect is justified, cannot change the Constitution, and if it does – such statute or its specific provision are unconstitutional. In addition, the statute violates the constitutional rule on the separation of state powers, for it was the legislator, *not the court,* which had terminated court proceedings.

(c) *The statute was passed in urgent procedure, and has entered into force on the first day following its publication.* Such haste was explained by the intention to eliminate the objections made by the European Commission and the speedy harmonisation of Serbian legislation to European standards and prompt fulfilment of the requirements for EU candidacy. Let us analyse the projected dynamics. In order for the appeals to the Constitutional Court and constitutional appeals to be decided on as *petitions,* as prescribed by Article 5 of the Act, it is necessary to appoint judge-members of the permanent composition of the HJC. The minister of justice promised that this task shall be completed in March 2011. Then, 15 days from the appointment of these judges, if everything goes well and there are no procedural mistakes, the permanent composition of the HCJ is to adopt the new criteria and standards, so as to commence reviewing some 1000 (according to the EC report) petitions to which the judges' appeals to the Constitutional Court and the constitutional appeals were transformed. The decision-making process must be organised so as to guarantee every judge the "right

to inspect the case file, accompanying documents and the course of the proceedings, and to present his/her arguments orally before the permanent composition of the High Judicial Council. The decision of the High Judicial Council permanent composition must be reasoned in accordance with Article 17, paragraph 2 of the High Judicial Council Act."[140] Incidentally, in this very provision both the legislator and the initiators (the Government and the Ministry) have admitted that pursuant to the valid High Judicial Council Act the decision should have been reasoned, which it was not, which clearly undermines the claim of the reform actors that the process was carried out lawfully. The judge whose decision on non-appointment was served was entitled to file an appeal to the Constitutional Court again, within 30 days from the day the new decision of the HJC permanent composition is served. [141]

In addition to the questionable route opted for by the reform actors, their general attitude after the European Commission report was published testifies they did not wish to eliminate the mistakes made, but rather to find an excuse for themselves. How did the reform actors react to these assessments? The first thing that must be noted is that the reactions have changed – from verbal high appreciation of the EC opinion to its relativisation, which coincided with the lapse of time and proverbially short memory of the Serbian general public.

Not only because of the actors, but primarily because of the content of the measures taken in reaction to the EC report, it *seems that it was impossible to achieve a good result.*

4.2. THE REVIEW IN PRACTICE

The main problem with the application of the new method for reviewing the decision adopted of the HJC interim composition whereby some former judges were not appointed was the *incomplete* composition of the HJC, which had lasted for several months – in the second half of 2011 and during the first months of 2012.

140 Article 5, paragraph 5. of the Act.

141 Article 5, paragraph 6. of the Act.

One judge-member of the HJC was suspended due to being kept in custody (he was charged with a criminal offence allegedly committed in the end of the nineties), whilst the second HJC judge-member resigned. The constitutional rule that the judges must comprise the majority of the HJC composition was not observed during these times, for the president of the HJC is also an *ex officio* president and thus, even though a judge, she did not become the president of the HJC after being previously selected by her peers. However, the HJC was operational in these times and had adopted decisions on the petitions on the non-appointed judges, as if these deficiencies did not exist. The resignation of a judge-member of the HJC was filed on November 23, 2011. In his resignation, the judge wrote that the new composition of the HJC "did not make or adopt any minutes from any of the sessions", and that he resigned because of "the lack of elementary accountability for the position and opinion expressed by certain HJC members". The judge went on to state: "Some HJC members, after the hearings held before the HJC Commissions, express one position and opinion, which is used as the basis to vote and adopt a proposal which is forwarded to the High Judicial Council, and then, at the HJC session where the same proposal is decided on, the same member expresses a completely different opinion, whilst the state of facts has not changed at all in the meantime."[142]

As far as the operation of the HJC in the process for reviewing the decision on non-appointment is concerned, the European Commission has delegated experts to monitor the work of this body, which shall be elaborated on in detail further in the text.

4.3. CAUSE AND ORIGIN

If the historical lessons on differentiating between the cause and the origin were to be applied to the judiciary in Serbia, the cause for the *in vivo* experiment called "judicial" reform is a mixture of political arrogance and legal ignorance of the key actors in

142 Source: http://www.politika.rs/rubrike/Hronika/Lukic-Ne-sedim-sa-neodgovornim-ljudima.lt.html, 01.09.2012.

the "reform" – the Ministry of Justice, the High Judicial Council, the Government, and, to an extent, the Constitutional Court. The origins, however, lie in the conception of law and legal order in Serbia over a long period of time. What happened in Serbia in the end of 2009 was not a judicial reform, but a search for politically obedient judges. The expectations that the HJC would improve the principles and procedures for recruiting judges were not met. The advantages of judicial appointment carried out by a specialised body, advocated in theory, such as: that this will contribute to professionalism, since the assumption is that judges or specialised judicial bodies have the best insight into the candidates' professional qualities, that it would stimulate true *generation of the judicial corps* from *the judicial power itself* and thus improve the equality of the judicial power in its relations with other branches of state power, and also eliminate or reduce to a reasonable measure the influence of the executive on the courts – have not been met. The objections otherwise made with regards to this system: the candidates come from a closed judicial circle and the conditions are favourable for familiarity; lack of parliamentary control and denial of public control, which results in a guild-oriented approach and limited controllability of the appointment criteria – were in full force in the course of the appointment process. The outcome of the judicial appointments in Serbia in the 2009-2012 period is testament of the omnipotence of the executive power aided by caricatured parliamentarism, which is a result of the proven political power and influence of non-institutionalised social groups, which are a grey zone of the state. The reform actors have trodden heavily outside the constitutional framework, which raised the question of whether it is possible to carry out a judicial reform that would enjoy citizens' trust in Serbia within the existing constitutional framework.

„The constitutional technology" for replacing the judicial corps in Serbia and in former Yugoslavia, observed from the sixties to date, was always the same. In short, it consisted of the following: a new constitution is adopted; the new constitution openly or less openly declares that all courts that will be operational after the new constitution is adopted shall be new, and then, since the courts are

declared new, new judges are appointed to such courts. The same happened with the 1990 Constitution, and the situation is the same with the 2006 Constitution. (After the Second World War, in the era of the so-called administrative socialism, the replacement of judges was openly ideological and did not even have the appearance of legal form).

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II
REVIEW PROCEDURE 2011 – 2012

As already mentioned, the Delegation of the European Union in Belgrade (hereinafter: the DEU) engaged a monitoring team in July 2011; their task was to follow the hearings and all other activities of the HJC and the SPC related to the process of reviewing the decisions of these bodies' initial composition. The monitors started to work on July 4, 2011 and were engaged until July 13, 2012. The authors of this part of the publication were members of the DEU monitoring team. All the comments, accounts and assessments are part of the conclusions they have reached as individuals having considerable experience in a number of activities related to judicial reform in the Republic of Serbia since 2002. All data presented in the text is public and available to anyone wishing to research the review process. Some documents which include the data used can be obtained on the websites referred to in the text; others may be obtained by filing a request to relevant authorities, associations and institutions, pursuant to the Free Access to Information of Public Importance Act.[1] The authors were independent and free in forming their opinions. Their opinions should not be understood as the official positions of the DEU or the European Commission, or any other institution or entity, or any official or employee of the European Union. The authors were engaged on this task in their personal capacity. In this text, the authors tried to express their experiences and assessments, primarily as citizens of the Republic of Serbia, deeply concerned with the direction in which the judiciary has been "reformed" over the past years.

1 RS Official Gazette 120/2004, 54/2007, 104/2009 and 36/2010.

1. INTRODUCTORY OBSERVATIONS

The procedure for reviewing the first-instance decisions of the HJC and the SPC is based on statutory amendments made at the end of 2010. As explained before, these amendments entailed a "conversion" of constitutional appeals and appeals to the Constitutional Court into petitions which were to be decided upon by the same bodies that had adopted the initial decisions in 2009, albeit with somewhat changed personal composition. These amendments, although quite unacceptable in view of the standard of fair trial, were implemented in two rulebooks, adopted almost simultaneously by the HJC and the SPC in May 2011, so as to enable the *review* of initial individual decisions these bodies have adopted. The HJC adopted the Rules for Implementing the Decision on Establishing the Criteria and Standards for Assessing the Qualification, Competence and Worthiness and for the Procedure for Reviewing the Decisions of the First Composition of the High Judicial Council on Termination of Judicial Office (hereinafter: the Rules) on May 23, 2011, whereas the SPC adopted the Rulebook on the Procedure for Reviewing the Decisions of the First Composition of the State Prosecutors Council and Application of Criteria for Assessing Competence, Capacity and Worthiness (hereinafter: the Rulebook) on May 25, 2011.

The Rules adopted by the HJC are divided into five parts. The first part deals with introductory provisions, including the statement made in Article 2, which declares that one of the objectives of the Rules is the application of European standards in the review process. Article 3 sets out the principles and the main activities the procedure is based on, including the assumption that the petitioner meets the appointment criteria, and the prohibition for new criteria for the assessment of the petitioner's work to be introduced. The work of the judges who had filed the petitions was assessed only for the 2006-2008 period, based on official court reports. The provisions regarding the HJC activity included the obligation to publish the work results of *all* judges in the observed period on the HJC website – this has never been done in practice. The second

part of the Rules deals with the criteria – their definition and more detailed elaboration on what is considered worthiness, competence and qualification. These criteria shall be elaborated further on in the text. The third and fourth part of the Rules deals with the reviewing process, which shall also be analysed in detail. The procedure is envisaged as a combination of the work of HJC Commissions, the forming of which is possible under the HJC Rules of Procedure, and work of the HJC full composition. Finally, the fifth part regulates the publicity of the procedure and the participation of monitors. This part is completed by a final provision on the entry into force of the Rules.

The Rulebook adopted by the SPC also has five parts, and its provisions regulate similar matters as the judicial Rules, but are grouped and conceived in a somewhat different manner. The first part includes basic provisions; unlike the HJC Rules, the Rulebook does not invoke "European standards" – this, however, is of no practical consequence, since such provisions (or lack thereof) are just declaratory and cannot influence the fact that these standards apply as a part of the general corps of human rights guaranteed by the Constitution (invoked by the Rulebook), international law and generally accepted standard of a fair trial. The main participants in the procedure are the SPC and the petitioners – as will be explained later, the SPC had completely disregarded these provisions of the Rulebook. Article 3 prescribes a *possibility* (as a discretionary right) for the SPC members who have participated in the adoption of the first-instance decision to select a possible way of recusal from the procedure or one of its parts. The second part of the Rulebook deals with participants in the procedure, the parties to the procedure and their powers. It envisages the presence of monitors, where special significance is given to the Association of Public Prosecutors and Deputy Public Prosecutors (hereinafter: the PPA, SPPA). The third part regulates the course of procedure, but, as mentioned before, these provisions were not fully observed in practice – "working bodies" were formed to conduct the first part of the procedure (collecting data on the case, but also conducting the central part of the procedure – holding the hearings with the petitioners). Any and

all such irregularities and their consequences shall be analysed in detail further in the text. The fourth part includes the definitions of the criteria of worthiness, competence and qualification, whilst the fifth part comprises transitional and final provisions.

The provisions of both these documents shall be analysed in detail through certain aspects and stages of the process; special attention shall be given to the interpretation of some solutions and violations of the relevant rules of procedure.

The courses of both procedures were declared transparent and open for the monitors and the general public. In reality, however, there were several problems with the realisation of the principle of transparency, which shall be explained in detail. Moreover, the procedures seemed to be clearly defined by the mentioned act, which represents their normative formulation. As will be shown in a detailed analysis, these rules were frequently breached and interpreted in a way that is contrary to the purpose of the procedure; the general impression is that this was done in order to justify the 2009 appointment before the general public both in the country and abroad.

In addition to the fact that the prevalent criteria in the review process were the "hidden" ones – meaning the criteria that did not relate to qualification, competence or worthiness, but to other personal characteristics or opinions of the petitioners, certainly the most striking impression in the review process was left by the arbitrariness, arrogance and incompetence with which the members of these two judicial bodies acted for the most part of the process, blatantly disregarding the main legal standards and norms. This assessment, however, does not apply to the exceptional members who advocated for the dignity of their profession and legal sustainability of the entire procedure conducted before the HJC and the SPC.

When it comes to the standards mentioned in this part of the book, they derive from the decades of practice of formulation of the right to a fair trial by the European Court of Human Rights, pursuant to applications based on violations of Article 6 of the European Convention on Human Rights. These standards and rules, stemming from a wide and comprehensive interpretation of this article, which guarantees the right to a fair trial before any court or tribu-

nal which decides on the rights of individuals or groups of persons are also accepted by other institutions of the Council of Europe, by the EU, the OSCE, numerous international non-governmental organisations engaged in human rights protection, and also by national state authorities, particularly the judicial institutions, in the civilised world. Having this in mind, the claim that the European Union does not have clearly established standards of procedure in the field of the judiciary, which could be heard during the review process, in the context of a benevolent assessment of the irregularities noted in the procedure, can be considered a rather clumsy attempt to justify their violation and/or a malevolent attempt at mitigating the consequences of failure to observe the fundamental rules of civilisation which clearly determine the character and quality of a fair trail conducted with regards to any person and before any authority.

Unfortunately, the epilogue of the entire process described in the second part of the book, which is ongoing at the time this text is being written, is that the legal completion of the review process is still not visible, and that in the future there certainly will be grounds to extend this analysis to the next stages, envisaged in the statutory changes, and also by international law.

2. INTERVIEWS/HEARINGS WITH THE PETITIONERS – THE WORK OF THE SPC "WORKING BODIES" AND HJC COMMISSIONS

2.1 PROCEDURE BEFORE THE STATE PROSECUTORS COUNCIL "WORKING BODIES"

2.1.1 State Prosecutors Council „Working Bodies"

The procedure before the "working bodies" was defined as a *sui generis* administrative procedure, and consequently, the rules of the General Administrative Procedure Act apply in it. Hence the answers to any and all issues not expressly regulated by the Rulebook should be looked for in this statutory text.

The Rulebook on the Procedure for Reviewing the Decisions of the First Composition of the State Prosecutors' Council and Application of the Criteria and Standards for Assessing the Qualification, Competence and Worthiness (hereianfter: the Rulebook) envisages holding of hearings, i.e. interviews with the non-appointed prosecutors and deputy prosecutors before the full composition of the State Prosecutors' Council. The Association of Public Prosecutors and Deputy Public Prosecutors of the Republic of Serbia (hereinafter: PA) was awarded the status of a "special monitor", with the right to ask questions directed at the petitioners and the right to object to the minutes and the procedure as such. In addition to the PA, the status of monitors (without the mentioned rights) was granted to the monitors of the European Union Delegation to Serbia, the OSCE and the Council of Europe.[2] As a rule, the interviews were public, unless otherwise requested by the petitioners, which happened in several cases.

The interviews with the non-appointed holders of prosecutorial office were not carried out as prescribed by the Rulebook. Even though Article 3 envisages that the hearings are to be held before the SPC in its full composition, the interviews were held before newly-formed bodies, which were called differently until the designation of "working bodies" was finally settled on. The petitioners were never informed of the decision such changes to procedure were based on; those who objected and requested to be interviewed before the full composition of the SPC (as a rule, these objections were denied without any explanation) were given the answer that these are bodies formed pursuant to Article 12 of the SPC Rules of Procedure.[3] This Article does indeed envisage the possibility of forming special bodies having limited tasks within the SPC competence. However, the same Article envisages that these bodies must have four members, whilst the "working bodies" had only three members, selected among prosecutors and deputy prosecutors –

2 Article 5. of the Rulebook.

3 Article 12, paragraphs 1. and 2. of the State Prosecutor' Council Rules of Procedure, RS Official Gazette 55/09 .

members of the SPC. One of the members was the chairperson, and a rapporteur was assigned for each individual case.

If one made a comparative analysis of the Rulebook and the practice of these bodies, one would find it clear that all the rules envisaged for the procedure before the SPC full composition were applied by analogy. This gave rise to double ambiguity: which body had conducted the procedure, and what procedure was it?[4] The fact that the relevant rules were applied as if the entire procedure was carried out before full SPC composition has no bearing on the fact that this, actually, was not the case. The lack of legal grounds for the existence of these bodies and the improvised rules they applied have by no means contributed to the quality of the procedure or the realisation of minimal standards of legal certainty and fair procedure.

Having all that it mind, what is particularly striking is the lack of any explanation as to why the SPC did not act in its full composition and why was the newly-adopted Rulebook violated practically before the beginning of its application. Practical reasons and procedural economy could justify this practice only to a certain extent – the number of petitioners before the SPC was considerably lower than that before the HJC (162 petitions as opposed to 837 before the HJC). It remains unclear why the SPC had decided to violate the Rulebook rather than have it changed at one of its sessions. Finally, it remains fully inconceivable how can a Rulebook adopted less then two months before the procedure prove to be so useless. All of this rendered the procedure before the "working bodies" *illegal* or, more precisely, was conducted without legal grounds before bodies that the SPC did not have legal grounds to establish, or more precisely, established contrary to its own Rules of Procedure.

When it comes to the work of the "working bodies" in technical terms, aside from a detailed analysis of the interviews given

4 It is by no means easy to answer either of these two questions, given that the members of the "working bodies" have changed both the name of the body they were members to and the formulation of the interview – hearing, deposition, interview for the purpose of collecting information.

later in the text, it should also be mentioned that the very organisation of the interviews was considerably worse than that of hearings before the HJC Commissions. The minutes were dictated in the course of the interviews, without recording, which slowed down the work. Articles 64-69 of the GAP prescribe the manner of drafting minutes in administrative proceedings. Even though these rules were mainly adhered to, and there was no obligation to make audio or video recordings of the interviews, the interviews were often reduced to having the petitioner dictate his/her deposition for the minutes directly. This was particularly the case where there was no initial individual decision. In such cases the "working bodies" had remained completely passive, and even the petitioners and their counsellors objected to this, qualifying this as offensive behaviour on the part of the working bodies, since nobody had paid any attention to the petitioners' monologue. Moreover, agenda for the interviews was scheduled very tightly – delays were inevitable and customary, sometimes taking up as long as several hours. In some cases the petitioners would wait full 10 hours for their interview to be held; sometimes the interviews were held two or three hours after midnight. Bearing in mind the exhaustion both on the part of the petitioners and on the part of the "working bodies" members, it is clear that these circumstances could have considerably affected the quality of the depositions given and of the procedure as a whole. Given that the venue where the interviews were held was inadequate, and the petitioners waiting for their interviews to start had nowhere to sit, and had no access to food and water, such attitude and organisational drawbacks get a new dimension and can be qualified as demeaning behaviour.[5]

5 In this respect, Article 142, paragraph 1 of the General Administrative Procedure Act FRY Official Gazette No. 33/97 and 31/2001 and RS Official Gazette No. 30/2010, hereinafter: the GAP is relevant; it states that the body conducting the procedure *shall take all measures necessary to ensure that the oral hearing is held without procrastination.* Evidently, this rule was not applied, because the SPC was determined in scheduling more interviews with the petitioners than was physically possible to hold within a timeline that would be in line with the rules of procedure.

2.1.2 A General Overview of the Interviews with the Non-Appointed Holders of Prosecutorial Offices

The interviews with the non-appointed holders of prosecutorial offices were conducted mainly following the same pattern. A rapporteur was assigned for each of the petitioners – this was one of the "working body" members, who would summarize the "situation as found in the case file" – in fact, would read the summary of the initial individual decision (if there was one) and the petitioner's work results.

The first interviews held were mainly based on the existing reports and documents. Nonetheless, a few days into such interviews, the "working bodies" started to reschedule the hearings until additional reports were obtained from the competent public prosecutor's offices the petitioner had worked in. In further course of proceedings these reports were read out in detail, and, as will be shown later, were given special importance in the decision-making part of the process. However, the reports obtained from the public prosecutors' offices related to the petitioners' work were, as a rule, imprecise, and often considerably incorrect. There was a series of cases where the non-appointed petitioners had filed numerous objections to such reports – starting from the reports having formal deficiencies (the reports did not have a title and heading, signature, date or stamp – it is hence surprising they were accepted as evidence at all), to substantial objections relating to them being presented incorrectly or maliciously, as well as reports including logical contradictions or nonsense.[6] Pursuant to Articles 149 and 151 of the GAP, in administrative proceedings, a public document, defined as

6 For instance, a date would be entered in the report incorrectly, and hence it would seem that the criminal investigation had lasted for a year and half, even though during that period the entire procedure was completed and a first-instance judgment was passed. Such apparent inconsistencies were, as a rule, a sign for the "working body" chairperson to request that the report be corrected by the public prosecutors' office that had drafted it – however, this had no effect to the valuation of the report as a whole as valid evidence, where all the unchallenged data it included were considered absolute truth.

a document issued in the prescribed format by a state authority, or company or other organisation within the scope of the public powers conferred to it, is considered evidence; such document may be adjusted to electronic data processing. In practice, however, the documents used were sent by e-mail in their original format (were not scanned) and hence could not be signed or stamped. What is worrying is the fact that these documents were awarded the force of a public document, despite the lack of heading, name of the issuing authority, date or other elements that would help establish whether they were issued by a competent authority and whether they correspond to the truth. Occasionally the petitioners were assigned cases they did not work on in the reports, sometimes the dates mentioned in the reports were incorrect, creating the overall impression of the petitioner's inaccuracy, etc.

Concurrently with the start of the practice of acquiring additional reports, the practice of introducing accuracy as a special criterion, although it was not envisaged by the Rulebook, began. The rapporteurs gave special attention to accuracy and emphasised the number of cases in which the petitioners were inaccurate, which created a completely different picture of the petitioner's work results than the one based solely on the relevant reports used in the initial process in 2009.

As a rule (only one case being an exception), the rapporteur's expose would finish with a conclusion that there are no grounds to apply Article 14 of the Rulebook, although it was clear from the expose that it could in fact be applied in at least 25% of the cases.[7] This problem will be elaborated in more detail in the part of the text concerning the failure to observe standards and norms prescribed by the Rulebook.

Once the rapporteurs had finished reading the exposes, the "working body" chairperson would invite the petitioner to declare on the data presented. This automatically shifted the burden of proof on the petitioner, which is a violation of the Rulebook.[8] The very purpose of the interview with the petitioners was to es-

7 Application of Article 14 was proposed and accepted in only one case.

8 Article 3, paragraph 6. of the Rulebook.

tablish the facts that may affect the decision on non-appointment passed in the initial procedure – to have the petitioner explain or challenge such facts, present other evidence, documents or circumstances that may be significant for a final decision. The "working bodies" have exhausted their role in the process in merely repeating the wordings of the initial decisions and by presenting additional reports and evidence, without pointing out the facts they consider particularly relevant for the final decision and thus providing the petitioner with the opportunity to address such facts in the deposition – it was generally unclear what the petitioner was in fact "charged with". Consequently, the petitioners were forced to defend themselves from all the facts presented, particularly from those that were obviously collected with the sole purpose to show that the petitioner did not meet the criteria for appointment – such as the mentioned reports, which included lists of several tens or even several hundreds of cases the petitioners were allegedly inaccurate in.

There are more issues relevant for understanding the procedural position of the petitioners, which will be elaborated in detail later, but which should be mentioned here – such as statements that anything not expressly refuted by the petitioner shall be considered to be established as the truth, regardless of the source of such data or fact; the fact that the petitioners had to inspect the case files of numerous cases they worked on in order to correct the incorrect reports. As a result, the petitioners' procedural position was exceptionally unfavourable – such procedure can hardly be assessed as fair; it was characterised by grave violations of the right to fair process and the assumption that the petitioner meets the relevant criteria from the Rulebook.[9]

The petitioners' depositions usually consisted of long monologues, sometimes exceeding one hour. Sometimes the "working body" members would interrupt them by asking questions – but this was seldom the case, as the "working body" members were generally not interested in the petitioner's depositions. The entire course of the procedure was directly entered in the minutes, which was an additional difficulty, which considerably slowed down the process.

9 Article 3, paragraph 5. of the Rulebook.

The only exception from the "working body" members' inert behaviour were the cases where even the additional reports obtained from the public prosecutors offices did not provide any grounds to object to the petitioner's work results. Two changes from the usual behaviour would then take place. Firstly, the rapporteur and the chairperson would go into irrelevant details of individual criminal cases the petitioner had acted in, focusing only on the form of the procedural acts taken. They would go so far as to evaluate the justification of every procedural action taken, whilst the petitioners were examined as if they were the accused in criminal proceedings; the details with regards to which the questions were asked were quite impossible to remember, particularly in cases of petitioners who were engaged in over 1500 cases in the observed 2006-2008 period. Secondly, the attitude of the "working body" members was exceptionally hostile and inquisitorial (hence the impression that the petitioners were treated like the accused in criminal proceedings), and often the attitude towards the petitioners who were not confused and who gave precise and concise answers to questions asked was demeaning, prejudiced and biased.[10] This had not only undermined the concept of due process conducted by an objective authority, but constituted a direct violation of the right to dignified treatment of the petitioners. In formal terms, the "working bodies" have thus far exceeded their competences.

After the petitioner's depositions, provided there were no further questions, the "working body" chairperson would conclude the interview, stating that the petitioner would be duly informed of the decision taken.

The repeated interviews, mainly held in order to correct the newly obtained reports or so as to enable the petitioners to examine certain case files with regards to which the "working bodies" have found errors in their work, were considerably shorter and were focused on the petitioner's deposition, whilst the "working bodies" have assumed the same passive attitude, as explained before.

10 Such behaviour includes the instances when the petitioners were addressed in a raised voice, sarcastic comments verging on being insulting, and the overall patronising attitude, which was particularly apparent in the behaviour of the working bodies' chairpersons.

In cases of petitioners who did not have the initial individual decision, the interviews and the entire process was quite senseless, since the petitioners could not focus on what was considered as a bad result in their case. Given that the rapporteurs' activity was exhausted in reading the newly obtained reports, which – provided they were accurate – did not include anything that would be considered a bad work result, the burden of proof was completely shifted on to the petitioner, rendering any interview quite senseless. The petitioners' reactions to this situation have differed, whilst the "working bodies" usually remained passive, unwilling to direct the petitioner's depositions towards what they considered relevant. The analysis of the new individual decisions adopted by the SPC in such cases, provided in the text below, reveals that any denial of the petitioners' objections in such cases was unsubstantiated and unjustified.[11]

2.1.3 The Analysis of Adherence to Certain Rulebook Provisions in the Course of the Procedure before the "Working Bodies"

The Rulebook that was adopted as the base for the review procedure before the SPC was drafted with the assistance of the EU Delegation to Serbia and the OSCE Mission to Serbia. However, its provisions, as described above, were not always adhered to, or were interpreted in a rather surprising manner.

Article 2 of the Rulebook sets the main principles of the procedure and the manner the SPC should operate in. It is safe to say that the majority of these principles were not observed, which is clearly shown in the analysis of the interviews and the SPC second-instance decisions. Neither the SPC nor its "working bodies" have shown objectivity or fairness, they all failed to respect rights and freedoms guaranteed by the Constitution, their actions and decisions were not objective or based on facts. The circumstances objectively established during the interviews were, as a rule, changed at will, complemented by additional evidence the petitioners were

11 See *infra*, II-4.

not given a chance to declare on, or were simply interpreted so as to justify the decision (most often a negative one). Moreover, even though this Article prescribes that the procedure must be conducted pursuant to the Rulebook, the Rulebook was violated both during the interviews and with regards to other aspects of the procedure – these deficiencies were already elaborated or shall be elaborated further.

Pursuant to Article 3, the procedure is conducted before the full SPC composition. The Rulebook does not mention the "working bodies" – however, the collecting of evidence and the holding of interviews with the petitioners was entrusted to these organisational units established without legal grounds. In addition, the provisions of Article 3 of the Rulebook concerning the participation of SPC members who also participated in the work of the first SPC composition and in the adoption of the 2009 decisions *are not a guarantee of the right to a fair trial*, that is, to a fair review process. The discretion left – that these members *may* recuse themselves from a part of the procedure or the entire procedure – actually meant that this decision shall be passed in accordance with their personal affinities, that it can be changed in the course of the procedure and they may have a decisive say in certain (or all!) cases with regards to the discussion on the case and the adoption of the decision.

Article 3 includes two exceptionally important decisions that were not applied in the procedure, which represent the very core of the petitioners' procedural position. Failure to observe the assumption that the petitioners meet the appointment criteria and that the SPC has to prove otherwise, if it is to deny their objections, has resulted in the petitioners practically having the same procedural position as an accused in criminal proceedings (not as a defendant, since the presumption of innocence is in force in criminal proceedings). This rule was not incorporated in the Rulebook by accident. Not only was it the way to introduce a classical presumption of innocence and justifiably transfer the burden of proof to the SPC – there are some additional points that need to be made with regards to this rule. A considerable number of non-appointed prosecutors and deputy prosecutors have never received the initial individual

decision and did not know the reasons for their non-appointment; a number of individual decisions stated that the petitioners met all the required criteria but that some other candidates "meet better conditions". Although the statement was illiterate and imprecise to the point of being incomprehensible, its interpretation was that the candidates in question were not appointed only because there were no more vacancies in the public prosecutors' offices they applied for, whilst the fact that they meet the appointment criteria was never in question. Unfortunately, this standard was completely neglected in the review process, and the "guilt" of the petitioners was subsequently established, using additionally obtained data in the manner that will be described in the part analysing new SPC individual decisions.

Article 7 of the Rulebook was not only misapplied, but was often abused; the SPC took a standing that this rule is a source of its power, within the review process, to "re-examine" whatever it wishes, which is related to the work of the prosecutor, often disregarding the relevant and objective timeframe set in the Rulebook. Consequently, the procedure for reviewing the initial decisions was in fact turned into a new procedure for deciding on the appointment and reviewing the entire work of the non-appointed prosecutors and deputy prosecutors, which by far exceeds the competences the SPC was awarded in this process. This, misinterpreted, paragraph 7 of Article 4, moreover, includes a clear self-limiting determinant, which was fully neglected (italics added by the authors:"The documents shall be submissions and evidence relating solely *to the clarification of facts considered by the initial SPC composition* before December 17, 2009. Leaning precisely on this provision, and also referring to Article 12 of the Rulebook which allows the SPC to "collect additional documents, as necessary, until the review process is completed", as of July 26, 2011, the chairpersons of "working bodies" informed the petitioners who objected to the SPC "working bodies" collecting evidence far beyond their competence, that the SPC had adopted an opinion at its session held the day before that collecting such evidence is in full compliance with the Rulebook. This opinion has never been made available to the public,

the monitors or the petitioners; it has never been published and its very existence is hence questionable – the only possible conclusion is that this was a case of malicious interpretation of the Rulebook to the petitioners' detriment, with the sole purpose of providing the "working bodies" with a *carte blanche* to collect any documents they considered relevant, regardless of the intrinsic limits of the process they have conducted. It is therefore not surprising that all documents so obtained were used only to the petitioners' detriment, or, more specifically, as a tool to present their work in the worst possible light.[12] In addition, Article 12, paragraph 2 prescribes the obligation to serve the newly collected documents to the petitioner, which was not always done – the documents would be handed to the petitioners at the interview, which was then postponed in order for the petitioner to be able to examine them. Additional confusion was caused by the fact that the petitioners were interviewed by the "working bodies", because the documents were, pursuant to Article 12, collected even after the interviews were concluded but the petitioners were not summoned again. The Rulebook does not expressly regulate this situation, but this is no excuse for such a course of action, primarily because it was the SPC itself that had not only violated the Rulebook, creating a position in which Article 12 is deprived of meaning, but also because one of the fundamental rules of due process is that both parties should have an equal procedural position and be informed of all the evidence in the procedure, and be given the opportunity to challenge such evidence or otherwise declare on them.[13]

12 This was the general manner in which the "working bodies" have conducted their duty. In addition to the mentioned violations, several other irregularities related to the newly obtained evidence can be singled out – they were often irrelevant, lacked the necessary formalities (signature, date, stamp, heading, and the like) and were interpreted in a manner that will be described in more detail when analysing the new SPC individual decisions (see *infra*, p. II-4).

13 In its decision in the *Tasic* case (Constitutional court case VIIIУ-189/2010, date of judgment 21.12.2010. Official Gazette 27/2011), the Constitutional court refers to the jurisprudence of the European Court of Human Rights, which took a standing in the cases of *Lobo Machado v Portugal*

Article 5, as well as a series of subsequent articles[14], prescribes that the review procedure is conducted by the SPC, not by the "working bodies". This violation of the Rulebook was already analysed. Special powers of certain participants in the procedure were mainly observed, but the provisions were applied to the procedure before the "working bodies" by analogy instead of the procedure before the SPC, as envisaged.

The publicity of work, proclaimed by Article 8 of the Rulebook, was also observed, and only a small number of petitioners requested the public, including the monitors, to be excluded. [15]

The next interesting provision is Article 14 of the Rulebook. The power thereby vested with the rapporteur appeared quite logical, particularly so given the considerable number of cases wherein there was no evidence or arguments justifying the non-appointment. Pursuant to Article 14, in each individual case the rapporteur would examine the petitioner's efficiency and whether there are grounds to form doubt as to the petitioner's qualification and worthiness. If the work reports from 2009 were favourable and there were no documents in the case file that would indicate that there were some drawbacks. i.e. that one of the remaining criteria is not met, pursuant to the Rulebook the rapporteur was *under the obligation* to propose that the petition be sustained without discussion. It

(application no. 15764/89, date of judgment 20.06.1992.) and *Vermeulen v Belgium* (application no. 19075/91, date of judgment 20.02.1996.) that the party to the proceedings must be given the opportunity to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision. In certain proceedings before the SPC and also before the HJC, as will be shown later, this principle was not observed.

14 Article 9 prescribes the phases of the procedure before the SPC, whilst the following Articles elaborate these phases.

15 This is an application of the Rulebook provisions by analogy. Namely, the Rulebook prescribes that the public may be excluded based on a reasoned ruling of the SPC (Article 8, paragraph 4). In these situations, the „working bodies" have completely substituted the SPC and had taken over its role by passing such procedural solutions, which is also a grave violation of the rules of procedure.

is estimated that some 25% of the total number of cases were eligible for the application of Article 14, since there were no individual decisions and the work results were satisfactory (i.e. the appointment criteria were met beyond any doubt), or the individual decision was negative because all the vacancies in the public prosecutors' offices the candidate had applied for had been filled, which did not constitute an obstacle or grounds for another non-appointment in the review process. However, this possibility was applied in only one out of 162 cases. The circumstances under which Article 14 was applied this once imply that the rapporteur's true intention was not to observe the provisions of the Rulebook – the facts of the case were identical or similar in tens of other cases where the rapporteur would categorically refuse to apply this solution – and it is quite evident that the criteria used for its application were not those prescribed in the Rulebook. Namely, as a rule, the rapporteurs would state that there were no grounds to apply Article 14 and would not deal with Article 14 again in any other way. An explanation for such statements has never been provided, not even if the petitioners insisted on obtaining one during their interviews with the "working body".[16] If one was to explain this practice, one can go just as far as state that it was a continuation of violation of Articles 4 and 12, as described, coupled with the introduction of a new appointment criterion – "accuracy" – despite the fact that "accuracy" is not mentioned in the Rulebook or other relevant regulations.

The "working bodies" have consistently violated Article 18 of the Rulebook as well, since they did not have any data on who, where and how had comprised certain documents introduced in the proceedings as evidence (often the final decision in the review process was based on that very evidence), despite the fact they lacked the basic characteristics of official documents (heading, name, stamp,

16 As a rule, in such cases the chairperson of the "working body" would state that no explanation is necessary, or intervene in some other way, leaving the petitioner without an answer. This is not surprising, given there were several tens of cases where an explanation, at least one based on regulations and common sense, could not in fact be provided.

signature, date and the like). In certain cases, most often following the petitioner's objection against the use and consideration of such documents, the "working bodies" have reassured the petitioners that the documents of the same content shall be sent to the SPC and later, reiterating at the same the position that the petitioner need not declare on the facts mentioned in these documents, but that in such case all the facts the petitioner had not disputed shall be considered true; this is also a serious violation not only of Article 18 but of the standard of fair trial as such.

As of Article 19 of the Rulebook, the provisions applied to the SPC in full, and hence the analogy of application in the operation of the "working bodies" had stopped, and the articles governing the SPC session, discussion, deliberation and voting were applied as envisaged by the Rulebook. It is not certain whether minutes on the deliberation and voting were kept, as envisaged by Article 21, paragraph 3 of the Rulebook; if kept, they could be used to ascertain how each individual SPC member had voted. This part of the procedure had remained closed to the public until the very end; the SPC had never accounted for this failure to observe the rules, although there were clear indications that members of the first SPC composition had a prominent role in the decision-making and consequently have compromised the entire procedure, which at any rate did not include sufficient guarantees that would ensure their role in the process was a passive one.

Articles 23-26 of the Rulebook shall be analysed in more detail in the part of the text relating to the SPC second-instance decisions.[17]

Finally, Heading IV of the Rulebook deserves special analysis in the part relating to the failure to observe the prescribed criteria and the introduction of "accuracy" as a part of efficiency in prosecutorial work, and therefore, an element of capacity, which is one of the three appointment criteria. Even though the chairpersons of the "working bodies" have explained the acquisition of new reports from the competent public prosecutors' offices, where accuracy was

17 See *infra*, II-4.

the main issue, using the above-mentioned argumentation, this practice raises a series of issues, which were not responded to by the "working bodies" in a satisfactory manner, or to which they provided answers resorting to a wide and often malicious interpretation of the Rulebook:

Accuracy as such is not mentioned in the Rulebook and is not a criterion per se. Moreover, it is not even mentioned as a component of the existing criteria.

Accuracy is not defined in any existing statute or in subordinate legislation. Consequently, inaccuracy cannot be defined either. Is the public prosecutor inaccurate, if he exceeds the instructive time limits in one, five or a hundred a fine cases? Does that represent 0.1%, 1%, 5% or 25% of his work in the period under observation? These questions cannot be answered since they are not a part of the valid legal framework in Serbia, nor were they ever regulated.

How can accuracy be a criterion, if it did not exist as a criterion in 2009, and the review process is expressly limited to the facts considered then?

Finally, why would accuracy be investigated by the SPC, when an assessment of the petitioner's work was made, if inaccuracy is, in fact, the exceeding of instructive time limits, which means that it does not imply any procedural consequences either for the public interest or the accused in the cases in question?

All these, and some other objections were raised both by the non-appointed prosecutors and deputy prosecutors and the PA monitors. These objections were also included in the monitoring reports issued by international organisations. This practice of the working bodies is a testament of their general arbitrariness, which may even be called arrogance and legal violence. It also constitutes a violation of the prescribed SPC's mandate in the review process; one could conclude that the petitioners were de facto discriminated against compared to their colleagues appointed in the 2009 process, since they had to meet stricter and unfair criteria in order to effect the same right, prescribed by the law. The right to a fair trial was

also completely disrespected, and legal certainty was quashed by such wide, unclear and "creative" interpretation of the rules governing the review process.

2.1.4 Conclusion

The review procedure conducted before the SPC was conceived as the collecting of evidence relevant for assessing the work results of the non-appointed prosecutors and deputy prosecutors, identifying the problematic issues in initial individual decisions and having the petitioners declare on such facts. In those terms, interviews with the petitioners were an opportunity to both present the full case, all relevant documents included, to the petitioner in question and to establish beyond doubt whether the initial SPC composition had made substantive or procedural errors when adopting the initial decisions.

The SPC "working bodies" have failed to accomplish any and all tasks and objectives. Based on the analysis of the procedure as conducted in practice, it is safe to claim that its only objective was to justify the initial decision and, in cases where this was not possible or such decision was not passed, to find and present evidence relating to the petitioner's work that may justify a future negative decision. In that respect, the observation made by the PA representatives, who claimed that the review process had in fact changed into a new procedure for assessing whether the petitioner meets the appointment criteria, is quite true. A simple task of identifying the contentious issues in the initial decision and enabling the petitioner to declare on them and offer arguments in his favour was transformed into an interrogation concerning the petitioners' work results. Any reference to the standards of fair trial or due process was rendered pointless – the Rulebook was violated so often and so gravely, and, as a rule, to the petitioners' detriment, that this cannot be characterised as a procedure equally participated in by both parties. The "working bodies" have conducted the procedure applying the rules of a criminal investigation, assuming the petitioners were "guilty" (do not meet the appointment standards), and shifting the burden of proving otherwise fully to the petitioners.

In addition, a new criterion – accuracy – was introduced, becoming the focal point of the discussions; this, in turn, resulted in all other work results, and the opinions of the directly superior public prosecutor and the prosecutors' college being disregarded. The "working body" members acted hostile towards those petitioners who were not confused by the factual change of procedural rules and whose depositions were convincing and well-argued, thus leaving the " working bodies" without any grounds to deny the petition.

Failure to consider even the facts so collected, and/or the selective use of such facts is a special feature of the procedure; it will be analysed in more detail in the part of the book dedicated to the analysis of the new individual decisions passed by the SPC.[18] Failure to rely on the evidence collected and the selective use of data, in addition to disregarding the evidence presented by the petitioners have rendered the interviews pointless – they seem to have been held only in order to satisfy form (and not even this was achieved, given the abundance of procedural shortcomings).

Finally, the hearings were also relativized because additional data was collected after the interviews were concluded; the petitioners were not informed of them and were unable to declare on such data, which is another violation of the right to a fair trial.

Having all that in mind, the procedure conducted before the "working bodies" can be characterised as contrary to the Rulebook, to the purpose of the review process and in some segments, as a violation of the dignity of the non-appointed prosecutors and deputy prosecutors. This "interrogative" process is, in fact, an example of travesty of justice, and it fails to meet even the minimum of due process standards.

2.2 PROCEDURE BEFORE THE HIGH JUDICIAL COUNCIL WORKING BODIES

The procedure before the High Judicial Council Commission is also an administrative procedure *sui generis*, which means that, as in the case of the procedure before the SPC, the provisions of the

18 See *infra*, p. II-4.

General Administrative Procedure Act apply. Hence the answers to all issues not regulated by the Rules must be sought in this statute.

2.2.1 High Judicial Council Commissions

The procedure for reviewing the decisions of the first High Judicial Council composition had started on June 15, 2011. Pursuant to the Rules[19], the Commissions comprise HJC judge-members who were appointed to the HJC, following judicial elections organised in all Serbian courts, pursuant to relevant statutory provisions. Presumably, the guiding principles the authors of the Rules relied on when opting for the establishment of the Commissions were twofold. On one hand, having in mind the fact that decisions in 837 cases were to be reviewed, reasons of procedural economy render it more feasible to distribute the work to two commissions rather than just to full HJC composition. Such work organisation is also in line with the HJC Rules of Procedure,[20] wherein Article 16 prescribes the possibility to have the HJC entrust a part of the tasks in its competence to occasional working bodies, which include commissions. It is reasonable to assume that the second motive for entrusting a considerable portion of the review process to judge-members of the HJC selected by their peers was the need to exempt those HJC members who were also members to the initial HJC from the procedure, so as not to compromise the observance of the principle of a "fair and impartial tribunal" referred to in Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This has also enabled the observance of the principle that the status of a judge should be decided on by a body made up of majority of his peers, prescribed in Section 1.3 of the European Charter on the Statute for judges[21]; this principle could have been compromised had the procedure been conducted before commissions that also comprised other HJC members – not only the ex officio members (president of the Supreme Court of

19 Articles 8-10. of the Rules.

20 RS Official Gazette 43/2009, 22/2011 and 33/2011.

21 *European Charter on the statute for judges* DAJ/DOC (98) 23, available at http://www.judicialcouncil.gov.az/Law/echarte.pdf, September 1, 2012.

Cassation, the minister of justice, the chairman of the competent Parliamentary Committee), but also the HJC members who are a law professor and a barrister. The rule that the Commissions are to comprise only judges was not observed in several cases only, when the HJC law professor-member replaced the arrested judge Jaksic. However, this practice was soon abandoned and the petitioners did not object to the fact that one Commission member was not a career judge.[22]

The work of these Commissions was managed by the chairperson, and a rapporteur was assigned to each case.

The presence of both the general public and legal professionals at the hearings was allowed; the hearings were audio– and visually recorded, and hence there was no need to dictate for the purpose of keeping the minutes. The petitioners were allowed to request that the public be excluded, and to refuse visual recording; this happened in several cases. In general, when it comes to the time, venue and general formal conditions related to holding of the hearings, the standards of fair trial from Article 6 of the ECHR have been observed.

However, after judge Jaksic was arrested and judge Lukic had resigned, the president of the HJC merged the two Commissions into a single, four-member Commission, contrary to the rules; three members of this Commission acted in the hearings using a rotation principle.[23] This constituted a double violation of the Rules, which had a considerable effect on the further course of the hearings and interviews with the petitioners:

Firstly, the Commissions cannot be merged by a simple decision of the HJC president – a decision of the HJC full composi-

22 However, there were some objections against the work of this HJC member, due to the previously established conflict of interest, whereby his function as a HJC member was terminated by the force of law. This problem will be analysed in more detail further in the text; here it suffices to say that such objections were probably one of the reasons why this HJC member had stopped to participate in the commissions during the hearings.

23 The relevant decision was published on the HJC website, but was not available to the public for several days.

tion is the only valid way to do so. However, given that after the resignation of judge Lukic the work of the HCJ should have been blocked – a development that will be explained further in the text[24] – presumably a more "practical" solution was applied, enabling the hearings to continue with only four judges at disposal.[25]

The hearings should have been repeated in a number of cases – these are the cases where the commissions in which judges Jaksic and Lukic, who were no longer available, had acted, did not pass a reasoned decision on whether the petition is sustained or not. This, however, was not done, and in many cases the hearings simply continued, whilst the new members of the (only remaining) commission passed decisions as if they had acted in the case from the very beginning.

2.2.2 A general outlook on the interviews held with non-appointed judges

As pointed out before, the interviews with the non-appointed judges were held before two HJC Commissions, established by the Rules, pursuant to the HJC Rules of Procedure; after the HJC had lost its two members, two Commissions were merged into a single one, but the quality of the hearings and the manner they were conducted in remained the same.

The hearings started by the establishment of the general conditions for the holding of the hearings; a relatively small number of judges used their prerogative to have the hearing closed to the general public, whereas the monitors representing international organisations (primarily the EU) were present at almost all the hearings.[26] Once the hearings, which were audio– and visually recorded

24 See *infra*, II-3.2.4.

25 The fact that only one Commission acted in the procedure had no bearing to the petitioners' rights; the number of the commissions is therefore not problematic, what is problematic is the manner in which the commissions were constituted and dissolved, which was contrary to the Rules.

26 EU monitors have attended all the hearings as of June 15, 2011. OSCE and CoE monitors attended certain hearings. The Judges Association of Serbia did not have its official monitors, although some of their members

– this facilitated and sped up the process considerably, started, the chairperson would give the floor to the rapporteur, one commission member whose task was to present "the case file" in each individual case.

The rapporteur's exposes have changed over the course of the process, and gained quality in time. Approximately one month into the process the rapporteurs adopted an almost uniform practice (with minor discrepancies), which was quite satisfactory in terms of informing the petitioner, the public, but also the other two commission members, on the case. As the case was with the prosecutorial "working bodies", in time, new reports from the petitioners' courts, the so-called T1 and T2 forms covering the 2006-2008 period were added to the case file.[27] In the report, the rapporteur would reflect on the petitioner's career, read excerpts from the reasoning of the initial individual decision (if there was one), the claims made in the constitutional appeal and appeal to the Constitutional Court, and read out the most important data from the newly obtained court reports. Even though this practice was efficient and sufficient for all those present to be informed of the case, the rapporteurs seldom gave special attention to the facts they considered to be the very core of the case and the focus of the hearing. Sometimes the rapporteurs would state that the data referred to in the initial decision were incorrect, and were fully refuted by the new court reports. However, as a rule, not even this has been sufficient to help identify the issues that would be relevant for the adoption of the new decision. This practice has undoubtedly shifted the burden of proof to the non-appointed judge, by requesting from the petitioner to give a statement on the circumstances reported by the rapporteur.

did attend the hearings in the capacity of the general public. Only a few petitioners have opted for fully closing the hearings to the public – this also meant that the monitors were excluded, as well.

27 Unlike the case with prosecutorial reports, the non-appointed judges did not object to such practice, mostly because the new reports were far more plausible than the data referred to in the first-instance individual decisions. In a number of cases the petitioners have challenged even such data and presented statistical data they claimed to be correct.

The concepts used by the petitioners in their depositions varied. The majority focused on refuting the claims referred to in the initial decision, if there was one it their case. In addition, some found it was necessary for them to comment the newly obtained statistical data included in the T1 and T2 forms and on other facts mentioned in the rapporteur's report. The situation was far more difficult in cases where there was no initial reasoned decision. The petitioners' position in such cases was absurd, since they were unable to declare or comment on the grounds for their non-appointment, since neither the commission nor the petitioners knew what such grounds were. In such cases the hearings would be brought down to the petitioner's monologue, where the only Commission's reaction was to discuss certain statistical parameters found in the newly obtained court reports, if there was a manifest deviation, in negative terms, from the court average and/or the prescribed norm. Was this the same mistake made by the SPC "working bodies", whereby the review process was transformed into a process of deciding on whether the petitioner met the appointment criteria? It may be possible to claim so, primarily because the mentioned reports were not used by the initial HJC composition when the decisions were made in 2009, and the forms used for such reports were not the same. The process of reviewing the decisions should have consisted of establishing whether the initial HJC could have, having in mind the information available to it at the time, passed a correct and fair decision, or not.

Once the discussion was over, and the questions asked by the Commission members were answered, the Commission chairperson would conclude the hearing with a phrase that all the materials shall be reviewed once again in the non-public part of the session and that a proposal for a decision shall be presented to the HJC. One more fault committed by the Commissions was the failure to give any statements regarding the evidence presented at the hearing, either by the rapporteur or by the petitioner.[28] The instances where

28 Which is logical, to an extent given that Article 150, paragraph 1 of the CPA clearly states the purpose of presenting evidence: Evidence, as a rule, is presented once it is determined what the contentious facts are and

the rapporteur or the commission chairperson would comment on a document, its relevance, admissibility and its bearing on the final decision were exceptionally rare. This was also the case when the petitioners provided evidence directed at refuting the claims made in other documents, presented by the rapporteur.

Generally speaking, the hearings before the HJC Commissions were not characterised by any major deficiencies, except for those described above. Shifting of the burden of proof and lack of rational use of the hearings in cases where there were no initial individual decisions are the major objections. However, the dominant impression, which will be elaborated further in the text, is that the hearings were organised as the most public, most transparent part of the process, and were of the best quality compared to other stages of the process before the HJC, but that they had no bearing whatsoever on the final decision. This impression is supported by numerous irregularities that repeatedly happened once the hearings were closed, and took place in the non-public parts of the procedure, which was closed to the general public and monitors alike. Further developments, including the analysis of the decision-making process at the HJC sessions and of individual reasoned decisions have shown that this, first stage of the procedure, was rendered irrelevant.

2.2.3 Analysis of Commission actions during the procedure concerning certain provisions of the Rules

Just as in the case of the rules governing the review process before the SPC, the Rules applicable to the procedure before the HJC were adopted with the assistance of the European Union Delegation to Serbia and the OSCE Mission to Serbia. The Rules were adequate to their purpose and, except for a couple of shortcomings, the text was better than that of the prosecutorial Rulebook. The procedure itself, as described above, was also characterised by fewer negative aspects. However, the analysis of the manner in which the commis-

what needs be proven. The Commissions have failed to establish which facts were disputable and which were indisputable through their lack of critical perspective concerning the documents, data and information presented by the rapporteur or the petitioner.

sions have acted compared to the norms prescribed in the Rules will show both positive and negative aspects of the hearings held with the non-appointed judges.

Article 3 of the Rules includes provisions crucial for the course of the procedure before the commissions. These principles were observed, for the most part, but the assumption that the petitioner meets the appointment criteria was not prominent in the hearings, primarily because the burden of proof was shifted to the petitioners, as explained before. Even Article 3, paragraph 2, item 1 expressly prescribes that the assumption that the petitioner meets the competence, capacity and worthiness criteria is preserved in the review process, the commissions relativized this assumption in the course of the hearings in the manner explained above; this became even more apparent after the analysis of the reasoned decisions adopted in the review process. By failing to identify the facts that can be considered unfavourable for the petitioner and having the discussion at the hearings focus at their clarification, the burden of proof was shifted to the petitioners, who were forced to "defend" themselves from the rapporteur's statements, even when these were not negative. Discussion was particularly difficult in cases where there was no initial individual reasoned decision; the passive attitude taken by the commissions was most evident then, and the assumption that the petitioner meets the appointment criteria was rendered relative.

When it comes to the appointment criteria, regulated by Articles 4 to 6, the following points can be made:

- First, when it comes to worthiness as a criterion, it was investigated in cases that constitute an exceedingly wide interpretation of Article 4 of the Rules. This shortcoming was not as prominent at the hearings as much, as it became apparent (allegedly as a consequence of the facts established at the hearings) in the reasonings of the second instance individual reasoned decisions adopted by the HJC. This phenomenon shall be investigated in more detail later in the text, when analysing the HJC decisions. Unverified information, anonymous letters addressed to the HJC and the complaints against the non-appointed judges regarding their actions in certain cases

(which often proved to be unjustified at the hearing and were not sustained by the court presidents even at the time they were filed, but have somehow ended up in the petitioners' case files) were all recognised as "evidence" of the petitioners' alleged unworthiness. When it comes to the source of information, what was most puzzling at the hearings were the "facts" referred to in the initial individual decision, with regards to which it was utterly unclear how they became known to the HJC members during the appointment process – they often resembled the security check reports supplied by security agencies. The Commissions remained silent with regards to the sources; instead, they simply stated the existence of certain "documents" in the case files or allegations made in the initial decisions. Interestingly enough, these information often proved to be partially or completely untrue, as successfully demonstrated by the petitioners. A special problem with regards to such wide interpretation of worthiness, which also constitutes a violation of the main rules of evidence, are the cases when unworthiness was based solely on the evidence "established" at HJC sessions when the petitions were decided on, which means that the petitioners have never had the opportunity to view such evidence, comment on them and possibly explain the relevant circumstances.

- Furthermore, the Commissions were somewhat inconsistent in the very beginning of the procedure, when the working results were read out differently (per year and per subject-matter) and it was not clear whether the same selective approach, whereby only such elements of the petitioners' working results that are potentially negative were presented, which was used in the first instance, shall again be resorted to in the second instance. In the course of the process the practice concerning the three-year averages of the working results also varied.[29]

- Similarly, with regards to an important segment of the capacity and competence criteria – drafting of the decisions in excess

29 Unfortunately, the reasonings of the new decisions suffer from the same deficiencies which characterised the first-instance decisions, relative to the presentation of the three-year average and the norm.

of the 30– and/or 60-day time limits after the main trial was concluded, the Commissions and the rapporteurs were inconsistent in presenting and commenting such data. For instance, some rapporteurs would disregard the category of "decision drafted in the time frame of up to 30 days" from the court reports, even though it is a special category used for the appraisal of judge's work according to the Criteria, whilst others would read it aloud as relevant. Often a commission member would comment that the only relevant aspect of this category were the decisions drafted within the 60-day timeframe. This discrepancy, although evident at the hearings, did not constitute a major violation then, but it became particularly important once the individual decisions were analysed – the reasonings offered different interpretations of this criterion, as a rule, tailored to the needs of justifying a positive or a negative decision.[30]

When it comes to the provisions concerning organisation and rules for conducting the procedure, they were mainly observed. Article 8 of the Rules was violated when the two Commissions were merged into one, as explained before. Interestingly enough, the HJC did not make a formal decision in terms of Article 16 of the Rules when judge Jaksic was arrested. As mentioned before, it is unclear how the cases in which this judge had acted as the rapporteur, which were not concluded, or were concluded but the Commission decision was not adopted, continued without the procedure being restarted. This situation was repeated when judge Lukic resigned. The Commissions had also violated Article 25 of the Rules if they failed to adopt written reasoned decisions, as officially declared by the HJC.[31]

Pursuant to Article 22 of the Rules, several motions for the recusal of certain Commission members were filed; these were decided on by the HJC president. Interestingly, not one such motion was sustained, but this did not seem to affect the quality of the procedure before the Commissions. However, the petitioners were not informed of the decisions on the motions filed pursuant to Article

30 See *infra*, II-4.

31 See *infra*, II-3.2.1.

27 of the Rules, which envisages the recusal of HJC members from the decision-making – this is logical, since the motions were, as a rule, filed at the hearings, but were decided on by the HJC president. Presumably, the ruling of the HJC president was subsequently forwarded to the petitioners – failure to do so would constitute a violation of the mentioned Article.

2.2.4 Conclusion

Compared to the procedure conducted before the SPC "working bodies", the hearings before the HJC Commissions were of far better quality, in technical terms. The objections related to the forming of one commission instead of the previously existing two, as mentioned before, primarily concerns the formal manner in which the commissions were merged. The very forming of a single commission did not violate any of the petitioners' rights, in the situation when it became clear that the procedure may not continue at the same pace without the presence of the two judge-members. What could have later resulted in a violation of the right to a fair trial is the continuation of certain hearings before a commission in changed composition, even in cases when one of the missing judges was the rapporteur in the case, even though a new rapporteur was formally assigned for the case by a HJC decision (but only after Predrag Dimitrijevic had refused to act as a rapporteur and commission member)[32].

Probably the most important deficiency, which was manifest and common for all the hearings, was the shifting of the burden of proof from the Commissions to the petitioners. Depending on whether an initial reasoned decision was adopted in the first instance or not, the hearings would truly present an opportunity for the non-appointed judges to present their defence or were an opportunity for the commissions to learn more about their working results; the latter was by no means the original intention when the review procedure was devised.

32 Decision made at the session of 30.09.2011 available at: http://vss.sud.rs/Postupak-preispitivanja-odluka.htm, 01.09.2012. The decision applied as of 06.10.2011.

Moreover, the hearings in the cases of the petitioners who did obtain a reasoned individual decisions cannot be characterised as successful either in terms of the collecting of facts or finding out which data and criteria shall the HJC take into account when deciding on the petition, or what will the Commission decision be, and what will it be based upon.

Another aspect of the hearings remains unclear – why were some cases returned after the HJC session and why were the petitioners summoned again, if the commission did not know the reasons for such action. This is also interesting in the light of the (non)participation of those HJC members who took part in the initial decision-making; namely, at the hearings, the Commissions offered an oral explanation for this, stating that the Commission had proposed a positive decision, but that one of these members found that certain cases the petitioner had acted in must be investigated in more detail. It is not clear how these members obtained data on such cases, or what their specific objections were. This only leads us to conclude that the data was collected outside the hearings, by using channels and sources unknown[33], and also that the influence of certain members, who should have refrained from participating (not only from voting!) was far stronger than appropriate.

The overall impression is that the hearings were of little bearing to the entire process. Namely, as the analysis of the reasoned decisions will show, the same tendency noticed with regards to the practice of the SPC is evident: a decision is passed on the petition, whereby it is either sustained or denied; then, the facts of the case and the reasoning of the decision are fine-tuned to justify the final outcome, instead of the only justified practice – having the facts established at the hearings be critical for the adoption of the final decisions. Different issues can be raised with regards to this shortcoming, the most important of which concerns the decisive crite-

33 This is particularly indicative in some decisions where the source of data is not referred to; instead a vague formulation such as "the Council has learned" is used. Such data were not discussed at the hearings, the petitioners were not given an opportunity to declare on them, which constitutes a grave violation of due process and the right to a fair trial.

ria for the adoption of the decision. In addition, such practice has relativized the importance of the hearings and the facts established therein, even though these were the only public part of the process, open to the widest public, the media included.

3. TRANSPARENCY AND INDEPENDENCE IN WORK AND DECISION-MAKING OF THE "WORKING BODIES" AND THE COMMISSIONS, AND SPC AND HJC SESSIONS

Transparent work of an organ, institution or a body implies publicity in the actions of the members of such body, and informing the public fully and timely of the decisions it makes. Transparency also implies the possibility for everyone to inspect the documents that contain information of public importance, and the possibility to freely analyse and criticise them.

Independence in the work of judicial bodies primarily refers to their independence from the executive and independence in their decision-making. This includes not only the formal independence, which is, as a rule, a part of modern constitutions and statutes, but also the actual independence, which is reflected in true separation of powers and no undue political or other influence coming from the executive authorities, whether such influence be exerted in writing or, more often, orally. This independence is achieved by ensuring that the relevant formal mechanisms are in place – provisions relating to the appointment, work and permanence of judicial offices[34] – and by developing control mechanism that will enable the widest public insight into any possible abuse and undue pressure exerted against the holders of judicial offices. This is precisely the point where transparency and independence meet and intertwine.

In addition to this classical meaning, the phrase "transparency and independence" shall be viewed from a special perspective, in-

34 Article 6 of the European Convention on Human Rights; Articles 1-5 of the Judges' Act; Articles 2 and 5 of the Public Prosecutors' Offices Act (RS Official Gazette 116/2008).

cluding the legality and legitimacy of work, independence in operation and in decision-making, and *de facto* independence from the executive in the procedures for reviewing the decisions adopted by the initial SPC and HJC compositions. Article 32 of the Serbian Constitution defines the right to a fair trial as "the right to a public hearing before an independent and impartial tribunal established by law within reasonable time which shall pronounce judgement on their rights and obligations". Its Article 153, paragraph 1 proclaims the independence and autonomy of the HJC, whilst Article 164, paragraph 1 establishes the autonomy (but not the independence) of the State Prosecutors' Council. [35]

As mentioned above, the review process consisted of three components, or three stages: the hearings, the adoption of the decision, the drafting of the reasoned decision and its service to the petitioner. Transparency, understood in the widest sense, can be scrutinised in all three phases of the process, and also having regard to

35 Independence and impartiality of a tribunal are a part of the right to a fair trial, protected by Article 6 of the European Convention on Human Rights. The impartiality of a tribunal is clearly determined in the jurisprudence of the European Court of Human Rights, where one of the most frequently quoted judgments is the one adopted in the case of *Findlay v United Kingdom* (application number 22107/93, judgment of February 25, 1997), according to which a tribunal (i.e. its members) must, on the one hand, be *subjectively* free of any personal prejudice or bias, but must also be impartial from an *objective* viewpoint, that is, must offer sufficient guarantees to exclude any legitimate doubt in this respect. The independence of the tribunal is also set in the comprehensive EcrHR jurisprudence, particularly in the cases of *Findlay v the United Kingdom,* op.cit and *Incal v Turkey*, (application number 22678/93, judgment of June 9, 1998). They clearly determine that an independent tribunal may not comprise such individuals who are in any manner connected to the other side which may have an interest in the specific case, by the system of subordination; further, the proclaimed independence must be *objectively* verified in such tribunal's practice; there must be mechanisms in place ensuring protection from outside influence. When ascertaining whether a tribunal is independent, the *independence of each of its individual members* must be taken into account – are their guarantees sufficient to exclude legitimate doubts concerning the judges independence in the given case (italics added by the authors).

certain preliminary, procedural issues raised concerning the work of the HJC, which are also, to an extent, applicable to the work of the SPC.

3.1 THE WORK OF THE SPC "WORKING BODIES" AND THE SPC GENERAL SESSION

3.1.1 The Problem of the Existence of the "Working Bodies"

The Rulebook on the Procedure for Reviewing the Decisions of the Initial State Prosecutors' Council Composition and Implementation of Criteria and Norms for Assessing the Competence, Capacity and Worthiness envisages the holding of hearings i.e. interviews with the non-appointed prosecutors and deputy prosecutors before the full composition of the State Prosecutors' Council. The Public Prosecutors' and Deputy Public Prosecutors' Association was awarded the status of a "monitor with special privileges", entitling them to ask the petitioner questions and file objections against the minutes and against the procedure as a whole. In addition to the PA, the status of monitors (except for the mentioned privileges) was granted to the representatives of the European Union Delegation to Serbia, OSCE Mission and the Council of Europe.[36]

The reviewing procedure, as envisaged by the Rulebook, encountered some serious problems even before it started, as explained before[37]. Namely, it was uncertain whether the collecting of documents relevant for the SPC to decide on the petition, which included the interviews with the non-appointed prosecutors and deputy prosecutors, is carried out by the entire SPC or only by its "working bodies". Article 3 of the Rulebook envisages that the hearings with the non-appointed prosecutors and deputy prosecutors are to take place before the full SPC composition. In fact, they took place before the so-called "commissions" or "working bodies", as referred to by their chairpersons in various phases of the procedure. Despite the filed objections concerning the very existence of these

36 Article 5 of the Rulebook. The participation of monitors shall be discussed in more detail further in the text.

37 See *supra*, II-2.1.

bodies, the SPC took the position that these were working bodies established pursuant to Article 12 of the SPC Rules of Procedure. [38] However, the mentioned article only allows the SPC to form ad hoc working bodies comprising four members. The working bodies formed for the purpose of the review process had three members and were inconsistent with the wording of the relevant Rulebook article.

All three members of such "working bodies" were public prosecutors or deputy public prosecutors; one member acted as the working body chairperson, and a rapporteur was assigned for each case, with the task of presenting the case and the relevant documents.

The result of such failure to observe the Rules adopted by the SPC itself was that it is impossible to determine which body had conducted the review process. It is also unclear why was it not conducted by the full SPC composition. If the reasons were of practical nature, it is very unusual that the SPC had opted for violating the Rulebook instead of amending it at its session, thus adjusting it to the actual possibilities and capacities available for the review process, particularly given that the HJC Rules envisage a similar solution. Not even the members of the "commissions" or the "working bodies" were able to define the name of the body conducting the interview, or the form of the interview envisaged by the Rulebook – a hearing, an interrogation, an interview for the purpose of collecting information. In addition, the requests of the petitioners who wished to give their depositions before the full SPC composition were denied – either by being rejected with any explanation or by being outright ignored by the "working bodies". This constituted a violation of numerous provisions of the Rulebook (practically all referring to the review process, save for those on the decision-making[39]) and, in addition, of procedural provisions in the review process.

38 Article 12, paragraphs 1 and 2 of the Rules of Procedure of the State Prosecutors' Council, RS Official Gazette 55/09.

39 Articles 3, 5-9 and 11-19 of the Rulebook.

3.1.2 Independence in the work of the SPC full session

Whether the SPC is an independent and impartial tribunal in the process where the second-instance organ is identical to the first-instance one is arguable. Even though some personal changes to both the SPC and the HJC were made in the time between the decisions in the first and second instance were adopted[40], they are not a sufficient guarantee that would ensure that these bodies act as impartial and that the main purpose of reviewing a decision shall be accomplished – and that is having the case decided on by a body that can view it objectively, not being burdened by circumstances that may affect the understanding of facts second instance decision shall be based on. Even if one was to accept the possibility that the so-called "old" (ex officio) SPC members in fact do not vote (which cannot be corroborated, since the majority of sessions was closed to the public, and even the public sessions were closed in the part consisting of the deliberations and voting), their sheer presence and the possibility of them taking part in the discussion is incompatible with the request for impartiality. Pursuant to Article 3 of the Rulebook and Article 27 of the Rules, these members could have been recused from the SPC and HJC sessions. This, however, was not the case in practice, which leads us to believe that the impartiality of the bodies making the final decision was seriously compromised.[41]

40 SPC had appointed six new members (compared to the previous composition, the members who remained the same were the Republic Public Prosecutor, the Minister of Justice and Chairman of the National Assembly Judiciary Committee). When it comes to the HJC, the members of the first composition who also decided in the second instance are the president of the Supreme Court of Cassation, the Minister of Justice, the Chairman of the National Assembly Judiciary Committee and the representative of barristers. The representative of law professors was re-appointed by the National Assembly, but the Anti-Corruption agency had found him to be in a conflict of interest and proposed his dismissal to the National Assembly. Even though the Agency decision had become final in March 2011, the National Assembly did not discuss it, and this member participated in the work of the HJC and voted on the petitions.

41 On the independence of a tribunal in a procedure in light of the EcrHR please refer to *supra*, II-3.

At the sessions that were open to PA and EU monitors in the part dedicated to the reporting on individual cases and discussions regarding the final decisions, it became clear that the SPC members were unable to ascertain, from the summary report given by the rapporteur, whether the petition should be sustained, or not. Given that the discussion on each individual case was sparse, the guiding principles relied on by the SPC members when voting remains unknown. This indicates that certain cases were discussed even after the formal conclusion of the discussion – therefore, in the part dedicated to deliberation and voting, during which the monitors have had to leave the session. The other possibility is that the SPC members were provided with information regarding certain cases prior to the sessions and relied on those when voting, whilst the session was only a formality.

In addition, it should be stressed that the presence of the monitors, although a positive step and welcome one in principle, could not have had a bearing in terms of strengthening the independence and impartiality of the SPC, since the influence of the representatives of the executive, and of other members who should not have voted still could have been considerable – it could have taken place either prior to the session or during the deliberations and voting.

3.1.3 Deciding on the Petitions

The petitions were decided on at the SPC session in full composition; the process comprised a brief expose of the prosecutor who acted as the rapporteur in the given case, which was followed by a discussion and the voting. As a rule, the sessions were attended by all SPC members, including those who had participated in the adoption of the initial decisions appealed against.

What characterises this phase is the sparseness of the rapporteur's expose and almost no discussion on the case. Unlike the rapporteur at the HJC session, the rapporteur at the SPC session was not under the obligation to file a written decision to the session. Article 13 of the Rulebook prescribes that the rapporteur shall make a written report on the state of facts in the case file (this report was read in all cases at the very beginning of the hearings),

followed by an explicit statement that this report does not include a reasoned decision on the case. Even though the Rulebook itself includes this provision, which refers to the procedure before the SPC, in practice the SPC had invented the hearings before the "working bodies", hence the report was read out before the petitioner, whilst a brief account of the report was used at the SPC session. Due to such interpretation of the Rulebook, the SPC also violated its obligation referred to in Article 15, paragraph 2 of the Rulebook in each individual case – the provision envisaged the presence of the non-appointed prosecutor or deputy prosecutor or his/her counsel at the *SPC session* (italics added by the authors). In practice such presence was allowed only during the interviews conducted before the "working bodies", which had a considerable bearing on the transparency of the process. In addition, this practice constitutes a violation of Article 20 of the Rulebook, which governs the manner of the adoption of the decision. Namely, this provision envisages that the decision must be made within three days from the conclusion of the session at the longest. By analogy in misapplication of the Rulebook, this time limit was taken to commence on the day the SPC was in session, irrespective of the date when the "working body" had interviewed the petitioner, even though the clear intention of this rule was to give the SPC a rather short time limit to decide on the petitioner's case, which results in more efficient proceedings, less uncertainty with regards to the final outcome and adoption of the decision, whilst the impressions from the interview with the petitioner are still fresh. All this was compromised by the introduction of a special part of the procedure which was not envisaged by the Rulebook, whereby the full composition of the SPC practically became isolated from the process of establishing the facts.

Therefore, the rapporteur would briefly inform the SPC of the petitioner's work results; the reports were interesting for at least two reasons. Primarily, in some cases the rapporteurs had referred to work results which have never been an issue at the hearing – the petitioners have never been given the opportunity to declare on them or refute them; in addition, the presentation was prejudiced and it was possible to assume, from that part of the session,

which petitions would be sustained and which would not. Such incomplete and arbitrary reports lead us to conclude that the rapporteur's exposes were only a formality. This is primarily because the SPC members who were not present at the petitioner's hearing were unaware of all relevant data, and the data presented were not presented objectively. In addition, the regular lack of discussion or discussions concerning irrelevant formalities could not have contributed to the creation of an opinion necessary for casting a vote in order to pass a final decision.

Article 21 was also not an instrument that could contribute to greater independence of the SPC in the decision-making, since it envisages that *all SPC members* vote and that the majority of all members present is necessary to pass a decision. Having in mind the two provisions of Article 3 of the Rulebook, envisaging that the SPC members who have participated in the initial process shall decide on the modality of their participation in the review process before its beginning and that they *may* (instead of must) be recused from a part or the entire review process, it is clear that the entire concept of the process being conducted by the second instance was undermined; these rules also do nothing to serve the independence of the other members of this body. Given that the decision with regards to Article 3 was never publish concerning any of the SPC members who were also members to the initial SPC, the only possible conclusion is that they have fully and equally participated in the review process.

Having all that in mind, it seems that the voting was based on the criteria not known to anyone but the SPC members, and that the very same SPC members participated in the decision making, both in the first and the second instance. This conclusion is also supported by the fact that the new individual reasoned decisions were written in the manner that resembles the rapporteurs' expose – new evidence was introduced, the evidence presented by the petitioner was ignored, no evidence was presented whatsoever, statistical and other parameters established at the hearing were interpreted in an arbitrary manner.[42]

42 See *infra*, II-4.2.

3.1.4 Conclusion

At first glance, the procedure for reviewing the individual decisions – or more precisely, its phase relating to the discussion and voting at the SPC sessions – was far better organised and more efficient than that conducted before the HJC. Although formally correct, this observation does not correspond to reality. The reason for such efficiency is by no means a well-conducted procedure; quite to the contrary, the only reason for more transparency in the SPC work was precisely its complete lack of independence, which was particularly prominent in this part of the procedure. Unlike the judicial body, where judges have resisted the undue influences of the executive directed against their independence and relating to the decision-making, the prosecutorial body yielded to such pressure and dutifully applied the will of the executive in its decision-making and the drafting of the individual reasoned decisions.

These claims are supported by the facts stated before – the attitude taken with regards to the petitioners, repeated violations of procedural rules, automatic decision-making, which all clearly indicate that the purpose of this procedure was not to establish facts or to objectively consider the work of the non-appointed prosecutors and deputy prosecutors. Irrespective of the motives behind such actions, it is safe to say that prosecutorial independence in this process was reduced to the very minimum, or, more precisely, to the verge of non-existent, which is a dangerous precedent that will surely reflect on the actions of appointed prosecutors and deputy prosecutors, who will learn from the examples of their non-appointed colleagues and make themselves more susceptible to the influence of both central and local politicians.

3.2 THE WORK OF HJC COMMISSIONS AND HJC FULL SESSION

3.2.1 Transparency of commissions' work after the hearings were concluded

As a rule, the hearings conducted with the non-appointed judges would end with a statement of the commission chairperson that the commission members shall inspect all the documents in

the non-public part of the session and based on that data draft a proposal for the HJC session. In addition to the general remark that this has rendered the hearings an instrument for technical collecting of data, without investigating the merits of the case and with no clear investigation of the claims made in the initial decisions (in cases where there was one), another major problem was the Commission decision. Namely, even though Article 25 of the Rules envisages that "the Commission shall adopt a decision which must be reasoned" and that the minutes of the deliberations and voting are signed by the chairperson, the commission members and the recording clerk, following the request of the JAS that all commission decisions be forwarded to it, so that it could be established what their proposals to the HJC were[43], the HJC stated that such decisions did not exist and that they were *orally* explicated at the HJC sessions. [44] Therein the HJC invoked Article 28 of the Rules, which prescribes that the rapporteur presents the Commission decision at the HJC session. The grounds for such interpretation of Articles 25

43 In the course of the review process, based on the decisions made by the Commissioner for information of public importance and personal data protection, a number of petitioners were provided with official statements that the commission had proposed a positive decision to the HJC, but that a negative decision was adopted nonetheless. In order for something like that to happen, in order for that to be mathematically possible – under the assumption that HJC members who were members to its first composition do not vote – the commission members have had to change their opinion at the session. Given that there were no cases additional circumstances were found in, which would imply the need for the commission members to change their opinion (and even if there were any, this would constitute grounds to schedule a new hearing rather than change the commission decision), the question of how and why did the commission members change their opinions was raised. Suspecting that this may be a consequence of the influence exerted by the ex officio HJC members, the JAS requested to obtain all commission decisions; the official answer was that no such written decisions exist.

44 Information from the HJC to the JAS of January 30, 2012, number 7-00-001 13/2011-01, with regards to the Ruling of the Commission for information of public importance and personal data protection of November 29, 2011 (HJC registry number 07-00-02334/2011-13).

and 28 are unclear, and it certainly constitutes a violation of the transparency principle.

Namely, if true, such practice constitutes a violation of Article 25 of the Rules, a violation of the General Administrative Procedure Act[45], and also has adverse effect to the transparency of the work of both the commission and the HJC. It is difficult to imagine that there is no written decision stipulating which non-appointed judges were supported by the commission in having their initial decision be annulled and having them reinstated; such practice would result not only in the possible confusion as to what the commission decision was in the first place (given the sheer number of the petitioners and the time elapsed between the hearings and the sessions the petitioners were discussed in, and also the fact that it remains unknown whether the minutes referred to in Article 25 were kept), but this would also preclude the existence of any written trace on the quality analysis of the hearing conducted and the subsequent deliberations of the commission members, who are the most competent in ascertaining whether the petitioner meets the required criteria or not. Such practice would also prevent the petitioner from inspecting the commission analysis and finding out how their

45 If the HJC position that the review process is an administrative procedure *sui generis* is accepted, then the following provisions of the General Administrative Procedure Act (FRY Official Gazette 33/97 and 31/2001 and RS Official gazette 30/2010) would apply accordingly: Article 64, which envisages that minutes must be kept or that at least an official note must be recorded on the document if the action is less important; Article 60 envisaging that minutes must be made of the deliberations and voting; Articles 193 and 194 governing the cases of adoption of so-called complex rulings, when the ruling is jointly adopted by more than one body, or when the ruling is adopted based on the proposal of or with the consent of a different body – the final ruling must always refer to the previous act. Even if only the last two articles mentioned are analysed (given that the previous ones refer to the existence of the minutes, which was not an issue directly addressed by the HJC), coupled with Article 25 of the Rules lead to an unambiguous conclusion that a written trace of the commission decision must be made, even if this is only a proposal which shall be *orally presented* (read out or explained) by the rapporteur at the HJC session.

working results, evidence and other circumstances presented at the hearings were assessed.

It is also indicative that the minutes from the HJC sessions do not include any information on the Commission report (either written or oral) or on the Commission decisions. However, the minutes from the HJC session of November 24, 2011 state that the HJC member who had resigned on November 23, 2011, judge Milimir Lukic, had "forwarded the proposals for the decision on the petitions that are on the agenda today" the previous week. Although this statement was given in a different context, it is directly contrary to the official HJC statement on whether the Commissions draft proposals for the HJC or not. [46]

3.2.2 Decisions on important procedural issues; how did the HJC full session interpret the Rules

The minutes from certain HJC sessions provide valuable insight into the course of the discussion, deliberation and voting at the sessions, even though the data on these procedures are very general and sparse.

What seems to be of particular importance are the issues concerning the manner in which the review procedure was conducted before the HJC, both in terms of substance and the manner of deciding on sensitive issues with regards to which the opinions of the ex officio and appointed HJC members considerably diverged.

One of the main issues raised at the very first HJC session, or, more precisely, during a continued session of July 22, 2011, was that of whether the sessions would be recorded pursuant to Article 28 of the HJC Rules of Procedure. Even though the motion for having the sessions recorded was supported by six judges, which constitutes the majority necessary for a decision to be adopted pursuant to Article 17 of the High Judicial Council Act, acting on the protests made by the ex officio HJC members, the HJC president adopted a

46 Minutes from the XXI session of the High Judicial Council permanent composition, held on November 24, 2011, act number 06-00-49/2011-01. See *infra*, II-3.2.5.

decision that the sessions shall not be recorded, since the procedure is confidential.

The second example of disagreement also took place at the same HJC session. Namely, a comment was made to the effect that a petition cannot be considered denied, if the majority of HJC members have cast an "abstain" vote, the HJC president explained that in order for a Commission proposal to be sustained, six "yes" votes must be cast. If the proposal does not obtain six votes in its favour, it shall be considered denied and there is no need to vote on whether the proposal to deny the petition would indeed obtain the necessary votes. Consequently the petitions were denied, even though the majority of the HJC members did not vote for such denial, which constitutes a grave violation of due process.

Such violations of the HJC Act and the unusual interpretations of the voting rules, coupled with other examples of disagreement, visible from the minutes that were made available to the public, testify of the lack of independence in the work of the HJC judge-members, whose objections were systematically refused and who were put in the position to merely observe the adoption of incorrect and unlawful decisions, even though they constituted a majority that could have independently adopted decisions regardless of the influence of the ex officio members.

3.2.3 Undue pressures exerted against HJC judge-members

The main parameter used to establish whether a state authority is independent in its actions and operations is the investigation of its relations with the executive. The very composition of the HJC – as prescribed by the relevant statute – is problematic, given the considerable influence of its non-judicial members, two of whom are appointed, and three of whom are ex officio members (including the president of the Supreme Court of Cassation, who is also a judge). Judge Jaksic is still a member of the HJC and may not be dismissed until a finally binding decision is adopted in criminal proceedings (of course, only if he is found guilty); however, in practice, he was prevented from participating in the work of the HJC during the time he spent in custody. Given that judges selected by

their peers comprise a majority in the HJC, which is sufficient for adopting a decision (six members), it seems that in formal terms this deficiency is not impossible to overcome.

However, the review process is a clear indicator that he HJC failed the independence test. The extent of the influence of the ex officio members is apparent in the standstill caused in the work of the HJC following the resignation of judge Milimir Lukic; as mentioned before, judge Blagoje Jaksic was previously arrested under suspicion he had committed the criminal offence of misconduct in public office.[47] The minutes from certain sessions are indicative of the manner in which the HJC had operated in times when these two judges also actively participated in its work or were its members, and of the pressures and undue influence the arrested judge had warned of. Without focusing on the details of the criminal offence this judge is being charged of and irrespective of the criminal proceedings against him that are likely to start soon, some details published in the HJC official documents must be presented, given they show the extent of the undue influence exerted against the judge-members of the HJC.

The Minutes from the HJC regular session held on August 16, 2011, show that judge Blagoje Jaksic protested against the undue pressures exerted *on him in his capacity of a HJC member*, of which he had informed the other judge-members of the HJC. The same minutes show that he was informally invited to a conversation at the Ministry of Justice with regards to the events concerning his wife, who worked at the First Municipal Public Prosecutors' Office in Belgrade, which he interpreted as indirect pressure on him. Regardless of the subsequent statements made by the HJC president in an attempt to mitigate the statement repeated by judge Jaksic – that his family is suffering due to his engagement with the HJC – the reaction of judge Jaksic clearly shows that such pressure did

47 Blagoje Jaksic continues to be a HJC member and may not be dismissed until a finally binding decision is adopted in criminal proceedings (provided he is found guilty) but is de facto prevented from participating in the work of the HJC, since he was suspended pursuant to the latest amendments to the High Judicial Council Act.

in fact exist, or rather, that he felt he was being unduly pressured by the executive concerning his engagement in the HJC, or, more precisely, concerning his engagement in the review process.[48] After that judge Jaksic left the session, and the HJC continued to pass decisions in the review process. As soon as the following session, held on August 29, 2011, all HJC members stated they were not subject to any pressures regarding the adoption of decisions on the petitions.[49] The Minutes show that judge Jaksic did not attend this session, but this did not prevent HJC president from issuing a statement on August 31, which reiterated that the HJC judge-members were not subject to undue influences from the executive when voting on the petitions filed by non-appointed judges.[50]

At the HJC session held on September 9, 2011, the HJC president informed the session that she had talked to the President of the Republic "regarding the situation which has caused the standstill in the HJC work"[51]. Interestingly enough, the term "standstill" was used, even though the HJC had not stayed either the hearings or the adoption of decisions on the petitions. Judge Jaksic attended this session but was unwilling to elaborate on the problem raised at the session held on August 26. Prior to the following HJC session, held on September 23, 2011, judge Jaksic was arrested.

Furthermore, the resignation of judge Milimir Lukic is also a testament of the irregularities in the work of the HJC and an indirect confirmation of the undue pressures exerted at its judge-members. Judge Lukic had filed his resignation on November 23, 2011;

48 Quote, page 3 of the Minutes "Once again Blagoje Jaksic pointed out that the fact that his wife was referred to the Higher Prosecutors' Office in Sremska Mitrovica constitutes undue influence on his work in the Council, and that he is unable to work under such circumstances and cannot participate in the decision-making process until this situation, which has brought unrest to his family, is resolved."

49 Minutes from the X regular HJC session of August 29, 2011 (registry number 06-00-25/2011-01).

50 Full statement available at: http://vss.sud.rs/Arhiva-saopstenja-2011.htm, September 1, 2012

51 Minutes from XI regular HJC session (registry number 06-00-27/2011-01), p. 3.

his resignation was read at the session held on November 24, and it was concluded that, given the resignation was not addressed to anyone, it is not in the HJC competence to forward it to the National Assembly.[52] The statements made in the resignation were later published by the media. Judge Lukic resigned because the provisions of Articles 24, 26, 27 and 29 of the HJC Rules of Procedure were violated at the HJC sessions, the minutes were not forwarded regularly, whilst at the HJC sessions *commission members voted contrary to the way they voted at the Commission sessions*; *the HJC was unable to secure the independence of its members, whilst the Ministry of Justice interferes in the HJC competences*.[53] Even though in the continuation of the session a number of ex officio HJC members attempted to minimise the claims made in – as the Minutes read – judge Lukic's "address", it is evident that his resignation is a consequence of undue influence, previously exerted to judge Jaksic, being now exerted on him and possibly on other HJC members.

All this has a considerable bearing on the assessment of whether the HJC is an independent and autonomous body or not. Two out of six judges who are its members expressed complaints with regards to its operation and claimed to have been unduly influenced. Even though the minutes provide no indication as to who had exerted such pressure and for what reasons, their testimonies must suffice to constitute reasonable doubt with regards to the decisions adopted by the HJC in the review process. How effective were such pressures and whether judges (all six judges, not just the two judges who had publicly protested) had indeed changed their opinions because of the undue influence, is impossible to ascertain. What, however, is certain, is that this had serious implications on the operation of the HJC – it was in a standstill, the legality and legitimacy of some of its decisions are questionable; new judicial elections were organised. Some of these consequences shall be analysed further in the text.

52 Minutes from the XXI regular HJC session (registry number 06-00-49/2011-01), p. 5.

53 *Ibidem*, p. 3-4.

3.2.4 Quorum for the work and decision-making at HJC full sessions

After judge Jaksic was arrested and judge Lukic resigned, the HJC continued to operate taking the position that the HJC Act prescribes that the presence of six members is sufficient for its operation and the adoption of decisions. However, the pressures of the legal community, the DEU and the publishing of the Ombudsman's opinion rendered the opinion that such position is illegitimate if not unlawful, prevailing. Different interpretations were also voiced with regards to what is to be considered the HJC quorum necessary for the session and what constitutes a quorum for decision-making; also, raising the question of whether such quorum applied to all situations or should apply to the review procedure as special regime, given its importance.

Article 153 of the Serbian Constitution envisages, in rather general terms, that the HJC comprises 11 members, where the ex officio members are the president of the Supreme Court of Cassation, the Minister of Justice and the Chairperson of the competent Parliamentary Committee. The remaining eight members are appointed by the National Assembly, pursuant to law – six of them are judges, one is a barrister and one is a law faculty professor. In addition to limiting the selection of judge-members, in as much as court presidents may not be appointed HJC members, the Constitution does not regulate other issues relevant for its work.

Article 14, paragraph 3 of the High Judicial Council Act prescribes that "the Council may hold a session if at least six Council members are present". Therefore, the quorum for holding the session and for discussing certain issues is explicitly regulated. The statute is far more imprecise when it comes to the decision-making. Namely, Article 17, paragraph 1 reads: "Council decisions are adopted by majority vote of all members". The statute does not regulate the quorum necessary for voting, but rather only the qualified majority necessary for a decision to be adopted. Further provisions of the statute do not provide any additional solutions, and it is hence only certain that at least six members must be present at

the HJC session in order for it to be held, and that at least six votes "yes" are necessary for a decision to be passed.

Article 2 of the Rules explicitly states that observance of European standards in the course of the process must be provided to the petitioners, and that this primarily relates to the observance of the criteria clearly established in the case law of the European Court of Human Rights with regards to the right to a fair trial. Except for the rules on the recusal of certain HJC members, prescribed in Article 27, the Rules do not further elaborate on the issue of quorum for the holding of the session, discussion and voting.

In its decision in the *Saveljic* case concerning the objections that the HJC composition which had decided on applications in the 2009 process was incomplete, the Constitutional Court had taken the position that it was not mandatory for all the members of this body to be appointed in order for the judicial appointment to be carried out. However, this decision concerns the interim composition of the HJC, which was a rather unusual solution in the first place. Heading VII, *Transitional and Final Provisions* of the relevant statute completely changed the purpose of the Act – in formal terms, only temporarily, until the permanent composition is appointed. Such interim composition was responsible for conducting the so-call general judicial appointment in 2009, which rendered this interim body a very important one, although it was initially envisaged as a transitory solution of limited duration. Perhaps this is why the president of the Constitutional Court issued a statement warning that the decision in the *Saveljic* case was applicable only to the interim HJC composition, whilst any and all issues related to the lack of quorum in the permanent HJC composition should be scrutinised and decided on when the appeals of the non-appointed judges against decisions passed in the review process are considered.[54] In addition, it is worth remembering the separate opinion of professor Olivera Vucic, who disagreed that the cause of the lack

54 Statement of the president of the Constitutional Court of February 3, 2012. For complete information please visit: http://www.ustavni.sud.rs/page/view/sr-Latn-CS/89-101549/ustavni-sud-dobio-259-novih-zalbi-sudija-and-tuzilaca, September 1, 2012

of provisions prescribing that the HJC must operate in its full composition was their notoriety, and that it was not justified to take the position that lack of explicit statutory regulation can be interpreted so that the HJC may operate, even if some of its members were not present.[55] Finally, in its decision in the Tasic case[56], the Constitutional Court referred to two relevant decisions adopted by the European Court of Human Rights[57] and found that "the procedure in which the contested HJC decisions is subject to the fair trial requirements in terms of Article 32 of the Constitution since it was conducted before a *tribunal*" (*italics added by the authors*).

The HJC has not once declared on the interpretation of the mentioned provisions, save for some of its members reiterating in their press statements that there were no problems with the quorum necessary for the sessions and for the decision-making even though judge Lukic had resigned.

In addition to the above-mentioned sources, it is necessary to take into account the relevant international standards considerably affecting the *fairness* and *legitimacy* of the procedure conducted. This primarily refers to Section 1.3 of the European Charter on the Statute for Judges, which prescribes that all issues regarding the status of judges must be decided on by a body comprising at least a half of their peers. This rule must be interpreted as having the judges effectively participate in the work of such body, in the discussions and the decision-making.

The second standard – that no one who participated in the work of the body which had adopted the first-instance decision may participate in the decision-making in the second instance is one of key standards related to the right to a fair trial (due process). Applied to the voting within the HJC, this would mean that,

55 Decision of the Constitutional Court in case VIIIУ-102/2010 of 28.05.2010; separate opinion of professor Olivera Vucic.

56 *Eskelinen and Others v Finland* (GC, No. 63235/00, judgment of 19.4. 2007) and *Olujić v Croatia* (GC broj 22330/05, judgment of February 5, 2009).

57 Constitutional Court case no. VIIIУ-189/2010, judgment of December 21, 2010, Official Gazette 27/2011

even though there is no explicit obligation for certain members to abstain from taking part in the process, four HJC members (three ex officio members and the barrister) may not in any way affect the work of the HJC, save for ensuring the quorum needed for the holding of the sessions by sheer presence.

The fact that the appointed HJC member who is a law faculty professor is in a conflict of interest, according to a decision adopted by the Anti-Corruption Agency on December 9, 2010, which become final on March 3, 2011, further complicates the situation. However, when, a year after the decision was adopted, the National Assembly put this issue on the agenda, the Assembly had *refused* to confirm this decision and formally dismiss this HJC member. This undermined the independence of the Anti-Corruption Agency, and was a sad testament of lack of any political culture and awareness, but in fact had no bearing to the fact that the conflict of interest existed in this case and was established to exist by a competent body; moreover, the office of the mentioned HJC member *was terminated by the force of law*[58]. How will the future actions of this HJC member be viewed and will they affect the legitimacy of the decision-making in this process and in other cases within the HJC competence?

There are three interpretations of the quorum in the HJC.

According to the first theory, adopted by a part of the legal community, when the HJC decides on status issues related to judges, in order for the HJC to operate *the presence of all 11 members is necessary.* In his opinion, attached to the application filed by the Judges' Association of Serbia to the Ombudsman related to the situation in the HJC after judge Lukic's resignation, Professor Zoran Ivosevic claimed that the HJC had lost its constitutional identity. In order for it to accomplish its constitutional task, the *HJC must always decide in its full composition.* Each body deciding on the rights of others should be treated as a court, and Article 17 should be in-

58 Opinion on the work of the HJC of January 11, 2012 is available at: http://www.zastitnik.rs/index.php/lang-sr/2011-12-25-10-17-15/2011-12-25-10-13-14/2105-2012-01-12-12-56-47, 01.09.2012.

terpreted so that the norm whereby decisions are adopted by a majority vote of all members means that *all HJC members* must participate in the decision-making process. This position is supported by relevant case law of the European Court of Human Rights. [5960] In her separate opinion, the Constitutional Court judge Professor Olivera Vucic also takes this position – unless it is expressly prescribed that a body may take decisions even though its composition is incomplete, it is assumed that such body may pass decisions only if all of its members are present.[61]

The second theory, repeated in the statements the ex officio HJC members have given to the media, is that six HJC members suffice both for the holding of the session and for the adoption of any decision. This theory relies on a specific interpretation of the ambiguous Article 17 of the HJC Act. However, even if we accept that only six members are sufficient to vote, a part of the HJC work would still have to be assessed as *illegitimate.* This is where the third theory, which seems to have majority support within the legal community, comes into play.

According to the third interpretation, when assessing the legitimacy and the legality of the decisions passed and when establishing whether the quorum for decision-making existed, all the

59 Zoran Ivošević, *Problemi stalnog sastava Visokog saveta sudstva u preispitivanju odluka o prestanku sudijske funkcije zbog nereizbora*, p. 5.

60 The mentioned Ombudsman's opinion of January 11, 2012 relies on different arguments, but the consequence is the same. The Ombudsman finds that the purpose of the existence of the HJC as an institution is to have judges decide on the status of their peers themselves and thus defend and maintain independence and autonomy, or rather, the integrity of their profession. Having this in mind, the operation of the HJC violates the Constitution of the Republic of Serbia, which explicitly envisages the participation of the six appointed judge-members in its work, which is reiterated in the HJC Act, and hence any and all decisions passed after judge Lukic's resignation (arrested judge Jaksic is still a HJC member since there are no legal grounds for his dismissal) are *unconstitutional and illegal.*

61 Decision of the Constitutional Court in case VIIIУ-102/2010, *op.cit*; separate opinion of Professor Olivera Vucic.

mentioned problems in the HJC operation must be taken into account. Namely, if all members of the HJC whose engagement would automatically render the entire process pointless, and the member whose office was terminated by the force of law are taken into account, two critical moments in the HJC operation can be singled out – the arrest of judge Jaksic and the resignation of judge Lukic. It is evident that after judge Lukic had resigned, it was impossible for a decision to be voted upon by six members who had not participated in the first-instance procedure (the members eligible to vote were the four remaining judges and the law professor). Therefore, as of judge Lukic's resignation, the voting quorum does not exist; moreover, the standard of a decision taken by a body comprised of at least one half of judges, which does not affect the voting but does affect the legitimacy of the entire operation of the HJC, the review process included – is not met. Before judge Lukic resigned, six members were eligible to vote in order for the notion of the review process being a second instance was to be maintained; in addition, there were six judges comprising the majority (the five appointed members and the HCJ president). However, given the situation concerning the law professor member (the conflict of interest), the decisions adopted after judge Jaksic was arrested cannot be considered valid, since the actions of law professor-member for the time the conflict of interest was in place (formally, from the time the mentioned Anti-Corruption Agency decision had become final) are *contrary to law* – his office was terminated automatically and the National Assembly was only to verify this termination. Therefore, according to this theory, the HJC lost its legitimacy regarding the decision-making on September 24, 2011, and all the decisions adopted after that date cannot be considered to be in conformity with relevant European standards and the right to a fair trial, as guaranteed by the Constitution.

In the light of these three theories, the validity of the decisions adopted in the review process is also assessed differently. If the interpretation offered by the HJC members, according to which there was nothing wrong with the review process, is dismissed, it is clear that the remaining two theories regarding the quorum necessary

for voting are compatible when it comes to the decisions passed after judge Jaksic was arrested, on September 24, 2011, when the HJC operated with five appointed judge-members (and a total of six judges, the president included), four members who had participated in the first-instance decision-making process (three ex officio members and the barrister) and one member whose office had been terminated by the force of law. These decisions are illegitimate since the HJC could not comprise the majority of six votes necessary for the adoption of any decisions. The only way to provide six votes was for the member whose office was terminated by the force of law to vote – which renders these decisions *unlawful,* or by having one of the members who had participated in the first-instance process vote – which renders the decisions *illegitimate* and compromises the idea of the second instance procedure and the right to a fair trial, which are guaranteed by the Constitution and reiterated in Article 2 of the Rules.

After judge Lukic had resigned on November 24, 2011, any and all activities of the HJC can be assessed as unlawful, since the standard whereby the judges must comprise a majority of the body deciding on status issues related to judges and the constitutional provision that the HJC must comprise six judges, were not observed. In addition, the quoted minutes from the HJC session held on November 24, 2011, clearly show that the HJC member who is a barrister had stated he would vote – which is contrary to Article 2 of the Rules and constitutes a grave violation of the right to a legal remedy and the right to a fair trial, which both are a part of the Serbian legal system and are guaranteed human rights.

Even though the HJC composition changed as of March 8, 2012, inasmuch as the new judge-member had replaced judge Lukic, the issues concerning the quorum and the legitimacy of the decisions taken have still not been resolved, since only the five judge-members are eligible to vote.

3.2.5 Deciding on the petitions

Given the problems elaborated above and other details recorded in the minutes, the course of the HJC sessions, when it comes to

the passing of the decisions on the petitions, cannot be described in detail. As mentioned before, the sessions were not recorded given the decision passed by the HJC president; the minutes are imprecise when it comes to individual cases and the course of the procedure. The minutes refer only to the petitioner's name, the registry number of the case file, the name of the rapporteur, the date the hearing was held on, and the final decision – the petition is sustained, denied, rejected, or the procedure is suspended. The decisions are not reasoned and the minutes do not include the voting results (how many "yes", "no" and "abstain" votes were cast). If the decision is a positive one, it also includes the name of the court to which the petitioner is appointed.

It is also unclear whether the Commission decision was forwarded in writing or if it was only orally presented by the rapporteur at the session; what happened after the reporting, was there any discussion, who participated in it and why the HJC was unable to pass a decision in certain cases and returned them to the Commissions. There is no information as to who voted – or, more specifically, did the HJC members who had participated in the initial process also vote in the review process? [62]

It is evident that transparency was compromised, even though we recognise that the deliberations and voting were confidential and that the application of these provisions did not depend on the existence of the will to make the HJC work open for the public. There is no evidence that the procedural standards related to due process were observed. Quite to the contrary, there is a series of circumstances testifying otherwise:

62 Which is a direct violation of Article 69 of the GAP, which reads: "(1) If a collegiate body passes the decision in the process, separates minutes of the deliberations and voting are made. If the decision on the appeal was unanimous, the minutes of the deliberations and voting need not be drafted, but note thereof shall be made in the case file.
(2) The minutes of the deliberations and voting shall include the personal composition of the collegiate body, the designation of the case in question and a summary of the decision taken, and the separate opinions, if any. The minutes are signed by the chairperson and by the record keeper.

• Amendments of the Rules of Procedure of March 24, 2011, pursuant to Article 14, paragraph 1 of the HJC Act, adopted by the HJC, include an additional provision to Article 5, whereby the HJC may pass decisions in a public session, at the proposal of the president or a HJC member. According to the amended Article 24 of the Rules of Procedure, the session may be public only in one part, and a decision thereof is passed at the beginning of the session. New Article 5a elaborates on the provisions of Article 5 and even allows presence to accredited members of the press. This enables full transparency in the work of the HJC, without infringing the confidentiality of the deliberations and the voting, provided that the HJC members wish so. However, despite this possibility, the monitors were allowed to attend HJC sessions only as of March 8, 2012, whilst this right was denied to the petitioners, the general public and the press. An additional aggravating circumstance is the fact that the international organisations which monitored the process (EU, COE, OSCE) and some petitioners requested to attend the HJC sessions as early as July 2011. The HJC had never officially responded to such requests; the indirect explanation offered by some HJC members through the press was that the sessions are closed for the public "pursuant to the Rules of Procedure", disregarding the fact that the very Rules of procedure do allow for the sessions to be open.

• The assessment that the HJC was intentionally conspiratorial and did not favour transparency is supported by heavy opposition to leaving any trace of the discussion (which may be public), deliberations and the voting. In formal terms, the audio recording and the transcript from the sessions could have been declared confidential, which would mean that the provisions of the Rules of Procedure and the confidentiality of a part of the process were adhered to.[63] However, the resistance of the non-judicial part of the HJC to such actions, as already mentioned, was adamant, resulting in decision on the recording, which had already been voted in favour of, being unilaterally changed by the HJC president.

63 As prescribed by Articles 28 and 29 of the HJC Rules of Procedure.

- The voting itself is characterised by different ambiguities, which are partially a consequence (or perhaps a cause) of the procedure being closed to the public. The quorum needed for the voting and other issues compromising the legitimacy and/or the legality of the decisions passed will be discussed further in the text. In addition, the standard whereby no one can decide in the second instance on the case he had already decided on in the first instance was possibly violated. The second-instance process is based on the premise that a different body, having a different personal composition, shall decide on the legal remedy. This was not the case in the review process, and this fact seriously undermines its plausibility. In order to eliminate the possibility of the entire process being compromised, the Rules envisage for the possibility (but not an obligation) to have the HJC members who have participated in the adoption of the initial decision refraining from voting or fully exempted from the procedure or parts thereof.[64] However, it was not rational to expect that the ex officio members and the barrister-member shall recuse themselves from all cases by their own free will, especially given that lack of transparency prevents any external control.

In practice, the available documents – primarily the minutes from the HJC sessions – show that this indeed was not the case. Statements to effect that voting is an act of personal will[65], coupled

64 Article 27 of the Rules, which establishes the rules on the recusal of the HJC president and HJC members. This Article does not list the reasons for recusal directly, but refers to Article 13 of the Rulebook which stated that the HJC president or HJC member shall be recused, inter alia, if there are circumstances raising suspicion with regards to their impartiality.

65 Concerning the statements that the voting and/or any participation in the decision-making process of the HJC members who were also the members of the initial HJC composition, the quoted minutes from the HJC session held on July 20 and 22, 2011 are indicative – namely, the HJC president had informed the HJC members of the recommendation of the Serbian Prime Minister that the members should abstain from voting, immediately adding that in her opinion, voting constitutes an act of personal will and that each ex officio member of the HJC shall decide on his/her own whether to vote in each particular case. The same minutes

with an open admission of one of the HJC members that he would vote in all the cases[66], undermine the very concept of the two-instance procedure and return it to the very beginning – before the Constitutional Court, which shall decide on its compliance with the general principles. The right to a fair trial, let us repeat, is a part of the internal legal system of the Republic of Serbia and is also guaranteed by Article 6 of the European Convention on Human Rights. The right to a trial before an independent and impartial tribunal, which was confirmed in the comprehensive case law of the European Court of Human Rights was here undermined, because the HJC's independence and impartiality were seriously compromised. There is not a single court or administrative procedure in the Serbian legal system (or in comparative law) envisaging that the same persons may decide on citizens' rights both in the first and in the second instance.

record a statement of one of the ex officio HJC members that he had told the DEU chief of mission, who had insisted on the rule that the same members may not vote on the same matter both in the first and the second instance, that he found that such position was tantamount to pressure being exerted on the HJC. All these statements clearly indicate that the HJC members who had participated in the initial decision-making process were determined to play an active role in the review process.

66 After judge Lukic's resignation the HJC barrister-member stated (as published in the media and as recorded in the Minutes from the XXI regular HJC session of November 24, 2011, registry number 06-00-49/2011-01) that he would vote in each of the following cases considered by the HJC so as not to block the work of this body, even though he had participated in the adoption of the initial decisions in 2009. This member's lack of knowledge and understanding of the standards of fair trial is evident. Namely, he claimed that his decision does not constitute a violation of the right to a fair trial, since he is not an ex officio HJC member. This a clear switch of argument – the problem is not whether someone is an ex officio HJC member or not, the problem is whether someone had participated in the initial decision-making. The fact that the concerned HJC member is an appointed member is irrelevant; moreover, it raises doubt with regards to the legitimacy of all decisions adopted at the mentioned HJC session. This matter will be analysed in more detail in the part of the book dealing with the decisions adopted in the November 24 - December 8, 2011 period.

The number of decisions made on the petitions at each HJC session was lower than the number of cases scheduled; this was easily ascertained by comparing the data published on the HJC website before and after each HJC session. The HJC has never issued an official statement whereby it would explain this occurrence, nor had it offered an explanation as to what had happened to the cases that were not decided on at the sessions. After some time repeated hearings were scheduled in some of these cases (sometimes several months would lapse between the session and the scheduling of the hearing); however, even at the hearings the precise reasons for rescheduling were not provided – as a rule, the hearings concerned "new circumstances", that is, individual cases the petitioners had worked on in the 2006-2008 period. The HJC never stated how it had obtained data on these cases, why they were of particular importance and what is their bearing to the reviewing of the initial decision, given that the initial decision does not refer to these cases. In several cases the Commission explicitly stated that its decision in the case was positive, but that the hearing in the case was scheduled again at the express request of the ex officio HJC members.[67] These facts are a testament that the HJC members who had participated in the initial process not only participated in the review process, but had an important role in it; moreover, it is also testament of the lack of transparency and lack of clear criteria in the decision-making process. In that respect the procedure before the HJC largely resembles that conducted before the SPC, where the formal review of the initial decision became a new assessment of the prosecutors' work and their de facto appointment, whilst the arguments and even the very existence of individualised reasons in the initial decision were disregarded (or successfully refuted by the petitioners at the interviews).

3.2.6. Enabling monitors' presence at the HJC sessions as of March 8, 2012

Following the judicial elections and the replacement of HJC member Milimir Lukic (who had resigned), the monitors representing certain organisations were allowed to attend the High Judi-

67 Commission members explicitly informed the petitioners thereof at the repeated hearings.

cial Council Sessions. Since this decision has no valid legal grounds (for more details please refer to section 5.2.2), it must be considered that the monitors have actually attended non-public sessions, which were selectively opened only in order to satisfy form (agreement with the representatives of the European Commission Directorate General for Enlargement) and that hence, with regards to the data presented at the sessions, the monitors are bound by confidentiality. In full observance of their statutory obligation, the authors, who attended the sessions in the capacity of monitors, still feel the need to share their general impressions with regards to these sessions:

- the sessions were carried out without regards to the applicable rules and standards, and their quality was generally below any standards of the legal profession;
- all the assumptions with regards to the undue influence the HJC ex officio members had on the decision-making process have proven to be true, whereby the entire process is compromised and the soundest part of the process in legal terms – the hearings before the Commissions – were marginalised;
- HJC members have shown an unacceptable lack of competence, capacity and worthiness for the performance of their functions.

3.2.7 Conclusion

The procedure conducted by the HJC when deciding on the petitions, therefore, after the hearings were concluded, has a series of drawbacks. As the analysis of official HJC documents shows, the procedure was violated on several grounds. The influence of the ex officio HJC members on the judge-members is evident. The concept of the HJC as a body performing some of the most important functions related to the work of the judges and courts in Serbia is to be as independent of the executive as possible. The separation of these two branches of power, in general, is one of the main postulates of a democratic system, and is, at the same time, one of the highest principles of the Serbian Constitution. [68] This principle was heavily tested and undermined in the review process, and it seems that this was most manifest in the decision-making phase.

68 Article 4. of the Serbian Constitution.

Notwithstanding the truthfulness of the accusations against judge Jaksic and without insinuating possible relations between these accusations and the judge's advocacy for more independence in the HJC work, it must be noted that the quoted minutes from the HJC sessions clearly show that undue influence was present and that the procedure was politicized to the point of the law being broken. It is unclear why the HJC had opted for such an approach to the review process and why are some details regarding the process still kept secret from the public under the excuse they constitute a state secret. It is particularly worrying that many violations and awkward interpretations, which are in direct contrast to the nature and purpose of the process, could have been avoided had there been good will to adjust certain rules of the Rules and the HJC Rules of Procedure to the practice, and to change the practice in accordance with the main applicable principle in standards, so as not to compromise the right to a fair trial, which is an unalienable right of every non-appointed judge.

However, it must be stressed that the judge-members of the HJC demonstrated a considerably higher degree of independence when compared to prosecutors and deputy prosecutors who were members of the SPC. Unfortunately, these efforts seem to have been fruitless in the most sensitive part of the process – the decision-making. The decision-making process was halted after December 8, 2011, thanks to the reactions of the legal community and the general public, the position taken by the EU Delegation to Serbia and the opinion of the Ombudsman, who voiced his concerns with regards to the developments at the HJC sessions in his opinion of January 11, 2012, addressed to the National Assembly.

Unfortunately, the monitors' presence at the sessions resulted in the confirmation of the worst suspicions, and has even exceeded them. It became evident that the very HJC members who had participated in the initial appointment of 2009 had a decisive say in the adoption of the decisions in the review process as well. In addition, all HJC members have shown unacceptable lack of competence, capacity and worthiness to perform their functions – unfortunately, this was most evident in their thorough ignorance with regards to the legal rules and standards.

4. ANALYSIS OF THE CONTENT OF THE DECISIONS

As explained before, the procedures conducted before the State Prosecutors' Council and the High Judicial Council are considered administrative proceedings *sui generis*. It is therefore necessary to examine the decisions adopted in these proceedings from the standpoint of compliance with the rules of the General Administrative Procedure Act[69], and corresponding rules applicable to the proceedings in question.

This is particularly important because of:

- time limits for passing decisions in the proceedings
- the obligation to pass the decision in written form
- adoption of procedural decisions in the course of the proceedings
- correction of mistakes in the decisions
- re-examination of the first-instance decisions adopted before.

At the time this text is written, decisions are adopted in all cases in the proceedings conducted before the State Prosecutors' Council – therefore, a total of 162 decisions are adopted, whilst a total of 752 decisions are adopted in the procedure conducted before the High Judicial Council. Statistical data regarding the number of decisions in which the petition was sustained or denied, the number of petitions rejected and the number of cases in which the procedure was suspended shall be provided in detail in parts of the text analysing the quality of decisions of both these bodies.

4.1. GENERAL OBSERVATIONS REGARDING THE DECISIONS

The General Administrative Procedure Act[70] prescribes that administrative matters are decided on by a ruling, unless otherwise

69 General Administrative Procedure Act, FRY Official Gazette No. 33/97 and 31/2001 and RS Official Gazette, No. 30/2010.

70 Article 196, paragraph 1.

stipulated by special regulations. The Rulebook on the procedure before the State Prosecutors' Council[71] prescribes that, in the review process, the State Prosecutors Council passes a decision, whilst the Rules of Procedure before the High Judicial Council[72] indicate only in the title of the relevant article that the administrative act adopted in this procedure should be called a decision, not a ruling. Both bodies have consistently referred to the relevant administrative act as a decision.

As far as the form of the decisions is concerned, the relevant provisions of the General Administrative Procedure Act relative to the ruling were observed. [73] Namely, the decisions of both bodies include the name of the body adopting it, the holding, the reasoning and the instruction on available legal remedy.

However, it should be borne in mind that the final decision is not necessarily the first decision adopted in either of the two proceedings.

Article 14 of the Rulebook on the procedure before the SPC prescribes that the rapporteur, should he/she find that there are no grounds for suspicion with regards to the petitioners' qualification, worthiness or competence, is to make a list of such petitioners, and the SPC then passes a decision on whether to sustain or deny their objections. If the rapporteur's proposal for the petition to be sustained is adopted, the procedure is concluded, and a written copy of the decision is forwarded to the petitioner. If the rapporteur's proposal is not sustained, a session is scheduled, to which the petitioner is also summoned.[74] Consistent application of the Rulebook and of the General Administrative Procedure Act would require making of corresponding minutes of the SPC's decisions not to support the rapporteur's proposal[75]; additional interpretation of the provision of Article 195 of the GAP results in the conclusion that the rapporteur must provide a draft of the ruling and forward it

71 Articles 20. and 21.

72 Article 29.

73 Articles 192-209.

74 Article 14, paragraph 4 and Article 15. of the Rulebook.

75 Articles 21. and 22. of the Rulebook.

to the SPC. Moreover, given that, in practice, the procedure before the State Prosecutors Council was not conducted in compliance with the Rulebook, since the sessions were held before the so-called working bodies, consistent application of Article 195 of the GAP would mean that the rapporteur is to provide a written draft of the decision in every case. This conclusion is additionally supported by the Rulebook provisions prescribing very short time limits for adopting the decisions and serving the written copy of the decision – namely, according to the Rulebook, the SPC must inform the petitioner about the decision orally, with a brief explanation, on the same day or within 3 days from its adoption at the latest,[76] whilst a written copy of the decision, which must be reasoned, is served within eight days from the day of its publication.[77] In practice, however, the State Prosecutors' Council had acted quite differently – decisions were published on the SPC website without the reasoning, whilst written copies were served in time limits exceeding the prescribed eight days by far.

On the other hand, the High Judicial Council had held interviews with the petitioners before its Commissions (later one Commission) formed especially for subject purpose, pursuant to the Rules; the Commissions then proposed a decision that was to be taken in each individual case to the High Judicial Council[78] – these decisions should have been forwarded to the HJC members together with the agenda of the HJC sessions wherein they were voted on.[79] The High Judicial Council would then adopt a decision on the petition.[80] In this decision, the petition can be sustained or denied, but the case may also be returned to the Commission for additional work, with an explanation. Article 25 of the Rules expressly prescribes that the decision adopted by the Commission must be reasoned; what remains unclear, however, is whether the High Judicial Council receives the full reasoned decision or only the holding

76 Article 20.

77 Article 22.

78 Article 25. Pravila.

79 Article 26. Pravila

80 Article 29,

of the decision in written form. The reason for this unclarity lies in the information number 7-00-0013/2011-01 of January 30, 2012, issued by the High Judicial Council, acting on the conclusion of the Commissioner for Information of Public Importance and Personal Data Protection[81] wherein the HJC stated that, given that Article 25 does not prescribe that the Commission decision is to be submitted in writing, the HJC Commissions did not do so. The reason why the Commission decisions are important in examining and assessing the review process was already elaborated in the part of the book analysing the transparency of the process; here we shall briefly remind the reader that the public had learned from the documents marked as information of public importance, at the order of the Commissioner for Information of Public Importance and Personal Data Protection, that some final decisions passed by the High Judicial Council in the review process were contrary to the Commission decisions, which raised concerns regarding the decision-making process before the High Judicial Council. It is therefore necessary to examine closely the legal nature of the Commission decisions and establish whether the concerns regarding the extra-legal reasons behind the Commission and HJC actions are justified or not.

Is it necessary for the entire reasoned Commission decision to be forwarded to the High Judicial Council? This does indeed seem to be necessary, given the very nature of the procedure, and given the Rules. Namely, the Rules expressly prescribe that the Commission adopts a decision, which it presents to the High Judicial Council. Although the procedural role of this decision is a proposal for the HJC final decision – in formal terms it is not a proposal or a draft, but a decision in its own right. Consequently, pursuant to the provisions of the GAP, the Commission decision must be reasoned, written, and forwarded as such to the High Judicial Council, since there are no grounds that would enable the adoption of an oral ruling pursuant to Article 204 of the GAP, nor is it possible to pass a ruling consisting only of the holding, which does not include a reasoning, in terms of Article 203 of the GAP. The interpretation provided in the abovementioned information – that Article 25 does

81 Conclusion number 07-00-00036/2012-03 of 24.1.2012.

not prescribe for the Commission decisions to be submitted to the HJC in written form and that hence the Commissions did not do so – is therefore manifestly incorrect and unacceptable.

As far as the individual reasoned decisions are concerned, the first ones were adopted in the process before the HJC in July 2011, and started to be served during November 2011 – ergo, after full five months. This time limit is clearly contrary to the provision of Article 208 paragraph 3 of the General Administrative Procedure Act, which prescribes two months as the longest possible time limit for writing a decision in administrative proceedings. After the HJC sessions were resumed, as of March 8, 2012, similar practice continued – the first decisions were served only during May/June 2012. At the time this text is written, some 180 HJC decisions are available on the HJC website – the written copies of the decisions were scanned and posted on the website in .pdf format. The petitioners' names have been left out, and the decisions only indicate their initials. This seems to have been done in order to protect the petitioners' privacy; however, this aim has not been achieved, because the scanned written copy of the decision still includes other data that can be used to establish the petitioners' identities – such as the number of the HJC decision adopted in 2009 and the number of the paragraph the petitioner's name is mentioned in, information about the court the petitioner had worked in, and the like. Criteria for selection of published decisions remain unclear, given that this is not the total number of decisions adopted at HJC sessions as of March 8, 2012 onwards. It is also unclear whether additional decisions shall be published in the future. The High Judicial Council has, once again, resorted to uncommon and selective practice.

The analysis of the reasoned decisions adopted by the State Prosecutors' Council and the High Judicial Council shows that the latter are of somewhat better quality, and that the rules of administrative procedure, particularly those relating to the valuation of evidence, were more consistently applied in them. The decisions of both bodies show numerous deficiencies, many of which are constantly repeated. It is best to analyse the contents of the decisions adopted by each body separately, paying special attention to the observed irregularities.

4.2. STATE PROSECUTORS' COUNCIL DECISIONS

The State Prosecutors' Council completed its work in the procedure for reviewing the decisions of the first SPC composition by the end of December 2011. This means that the decisions on all petitions were adopted and served to the petitioners. As mentioned before,[82] the written copies of reasoned decisions were written and served in time limits that by far exceed those prescribed by the Rulebook; this did not directly affect the petitioner's rights, but has unjustifiably procrastinated the procedure.

It should be noted, however, that the engagement of the permanent SPC composition in the process has not yet been fully completed. Why is that so?

Even before all the decisions on the objections were adopted in the review process, the petitioners who have obtained negative reasoned decisions have filed complaints/appeals to the Constitutional Court. Acting on this legal remedy, the Constitutional Court has, pursuant to Article 99 paragraph 2 of the Constitutional Court Act, forwarded the complaint to the State Prosecutors Council, which had the right to forward its rebuttal within 15 days. The State Prosecutors' Council has, however, opted for a different approach – invoking Article 226 of the General Administrative Procedure Act,[83] it adopted new decisions in five cases, now sustaining the petition. What remains unclear is how did the State Prosecutors'

82 See *supra*, II-4.1.

83 If the authority which has adopted the first-instance ruling finds, in view of the appeal, that the procedure conducted was incomplete and that this may have affected the resolution of the administrative matter in question, it may supplement the procedure pursuant to the provisions of this statute.

(2) The authority which has adopted the first-instance ruling shall supplement the procedure also when the appellant indicates, in the appeal, facts and evidence that may have affected a different resolution of the administrative matter in question, if the appellant should have been given the opportunity to take part in the proceedings preceding the passing of the ruling, but this opportunity was not provided, or was provided but the appellant had failed to utilize it for reasons justified in the appeal.

Council supplement the procedure, was new evidence collected and presented in it, and how was such evidence assessed. It is also unclear, since the texts of these new decisions were not made available to the authors, whether the SPC had applied Article 226 in all these cases or had it resorted to Article 225 of the GPA, which enables the first-instance authority, should it find that the appeal is founded and that no supplementary procedure is necessary, resolve the matter otherwise, and replace the old ruling by a new one.

Although the mentioned practice resulted in an increased number of positive decisions, and in that respect can be assessed as a positive step, what remains problematic is the inconsistency in its application and the lack of transparency in this part of the process with regards to all SPC decisions a complaint has been lodged before the Constitutional Court against. Given that a considerable number of cases are being processed by the Constitutional Court at the time this text is being written, it is reasonable to expect that the State Prosecutors Council will again chose to apply the possibility envisaged in Article 226 of the General Administrative Procedure Act. On the other hand, the authors have no information with regards to the date the last deadline for filing the complaint to the Constitutional Court expires on[84] and consequently, when will the last deadline for the SPC rebuttal expire; it is hence equally reasonable to assume that the SPC had decided to leave it to the Constitutional Court to adopt the final decision.

As far as the holdings of the decisions adopted by the State Prosecutors' Council in the review process are concerned, it is fair to say that a disproportionally low number of positive decisions have been adopted in this process. This impression was reinforced once the reasoned individual decisions were read (at the moment,

(3) Pursuant to the results of the supplementary proceedings, the authority which has adopted the first-instance ruling may, within the limits of the party's request, resolve the administrative matter in question differently, and replace the challanged ruling with a new one.
(4) Party shall be have the right to file an appeal against the new ruling.

84 This deadline shall start as of the moment the written decision is submitted to the appellant.

the authors have 126 out of 162 decisions at disposal). A peculiar trait of the negative decisions, although just as valid with regards to positive ones, is that the reasonings were written so as to suit and justify the holding (sustained/denied) previously adopted at the SPC plenary session, rather than having the reasoning include a comprehensive and fair examination of all the facts of the case and any and all evidence presented. Interestingly enough, almost every SPC decision includes a phrase to the effect that the final decision was adopted "based on fair assessment of evidence individually and in relation to other evidence". Unfortunately, the contents of the analysed decisions show that this was not the case after all. The impression that the reasonings were written so as to justify the holdings, as opposed to having the holdings be a result of a thorough examination of facts and assessment of evidence, is supported by the fact that the SPC had acted contrary to Article 20 of the Rulebook – the petitioners were not orally informed of the decisions – instead, the decisions were published on the SPC website; moreover, only the holdings were published, without a brief reasoning.

After having read individual reasoned decisions, the authors have concluded that the State Prosecutors' Council had disregarded the evidence presented by the petitioners at the hearings, both in the form of their oral depositions (and often the identical or largely similar written deposition) and also in the form of additional evidence, such as prosecutorial agendas, certificates regarding sick leaves and holidays, and in the form of exhausting and exhaustive explanations and clarifications of their actions in as much as 100 cases. The reasonings written by the State Prosecutors' Council, in negative decisions in particular, do not even include an outlook on the petitioner's depositions at the hearings/interviews. Quite to the contrary, whatever was stated in the reports of the competent public prosecutors' offices, which, as already mentioned,[85] often proved to be incorrect and which had formal deficiencies, was accepted by the State Prosecutors Council, and was used as the grounds for its decision.

85 See *supra*, II-2.1.2.

Generally speaking, the quality of the reasoned decisions adopted by the SPC is low. In technical terms, the decisions include numerous mistakes and shortcomings – e.g. refer to several different names, even in the wrong sex, the reasonings refer to different petitioner's statistical data. One decision has not even been signed. It is clear that these shortcomings can be easily corrected pursuant to Article 209 of the General Administrative Procedure Act. However, what the frequency of these mistakes indicates is a heady and careless approach to the writing of individual reasoned decision (often using the copy-paste technique).

Clearly, the substantive shortcomings are much more important. They are also abundant in the SPC decisions. The violations or shortcomings in application of both the Rulebook and the proclaimed European standards (whatever these amount to in the interpretation of the SPC) can be classified into the following types; it should be noted that a single decision often included several such violations:

1. *Violations related to evidence,* which include both violations with regards to the rules on the collecting of evidence (formal deficiencies of the official reports, incorrect data in the reports, collecting additional evidence after the hearings were concluded) and the violations with regards to the assessment of evidence. In numerous cases, after the petitioners have successfully refuted the accuracy of the official reports, the facts and data from these reports were still considered as established to be true. The reasoned decisions provide no answer to the question whether the SPC had taken the petitioner's depositions and their evidence into account at all, and if it did, why did it chose to disregard them. It is therefore necessary to examine whether the minutes relating to instructive inspections and excerpts from the records relating to the observance of statutory and instructive deadlines should be considered a public document or a certificate issued by the competent authority, in terms of Articles 154 and 161 of the General Administrative Procedure Act. *It is our opinion that there are no sufficient grounds to consider such documents anything other than documents that do not have the character of public documents.* In any case, at the hearings, after

having directly inspected individual cases, the petitioners indicated the mistakes in the documents forwarded by the competent public prosecutors' offices; some of these mistakes were evident. In addition, the petitioners indicated that the documents had formal shortcomings – there was no heading, signature, stamp, and the like. The SPC working bodies have adopted only one procedural decision to that effect, accepting the petitioner's objection against the formal shortcomings of the reports on the presence at work related to one petitioner, and exempted them from the case file. In other cases, the reasonings do not include any reference to that, only a statement on what is considered as established. The situation is similar to other statements given by the petitioners – the reasonings are vague as to whether these statements were assessed in the decision-making process and if so, what was the assessment made.

Moreover, in several reasoned decisions the SPC expressly refers to evidence obtained after the hearings were concluded – therefore, these were evidence with regards to which the petitioner was not provided the opportunity to declare on. The SPC plenary sessions have also shown that, when the rapporteurs had reported on the case, they referred to facts that were not an issue at the hearings at all; in some cases such facts were the main grounds for the SPC decision.

2. *Introducing accuracy as a criterion and lack of clear criteria as to what is considered to be "gross inaccuracy"*

As explained before[86] accuracy was introduced as an additional criterion at the hearings; it was used to determine whether the petitioner was competent. A major part of evidence presented at the hearings concerned the explanations of the actions taken by the non-appointed prosecutors and deputy prosecutors; the starting point for this were the excerpts from the official records of the public prosecutors' offices regarding the movement of the case with a view to the statutory and the instructive deadlines. The petitioners would indicate the mistakes in the reports or explain their actions. In numerous cases the established inaccuracy or gross inaccuracy was the

86 See *supra*, II-2.1.3.

sole reason or one of the main reasons for the SPC to pass a negative decision in the review process. This raises several questions.

First, at the time the 2009 decisions on non-appointment were taken, accuracy was not a particularly important element of the qualification criterion. All the reports obtained concerning the petitioners' actions with a view of the observance of certain time limits were acquired only in the review process. It is hence sensible to ask – can such evidence be obtained at all and how can it affect the final decision? As far as the collecting of evidence goes, after many objections against such evidence filed both by the petitioners and the monitors of the Prosecutors' Association, the working body members have referred to a position that was adopted, but not made public, by the State Prosecutors' Council, according to which the collecting of such evidence in the review process is allowed, since it constitutes an additional explanation of the facts of the case. Even if this interpretation is accepted (without the decision on it having been published), it is still not clear what exactly is being established by these reports. Namely, the hearings were postponed so that the petitioners could inspect individual cases and explain the actions they have taken with regards to them. It would be reasonable to assume that the working bodies had not only intended to establish the fact that the statutory and/or instructive deadline was not complied with in certain cases, but also to establish whether such infringements were justified. However, the reasoned decisions clearly show that the SPC had only established the fact that the deadline was exceeded, and was not at all interested in whether there were objective and justified reasons for doing so. As far as the second question is concerned – it is not clear why would the exceeding of instructive deadlines, which was also considered as "gross inaccuracy", constitute grounds for non-appointment, given that the failure to observe instructive deadlines has no procedural consequences either for the public prosecutors office or to the parties. It seems that the SPC had introduced a new criterion and used it in abundance in order to refute the assumption of petitioner's qualification.

An additional problem arose in this wide interpretation of the criteria of qualification and the collecting of evidence – a lack of clear standards.

It is clear that accuracy was introduced as a d*e facto* new criterion, and that hence there are no rules as to what is to be considered as gross inaccuracy. A responsible and conscientious authority would be expected to set or at least indicate such a standard when deciding in a considerable number of cases. The State Prosecutors' Council, however, has failed to do so. The reasonings of the decisions offer no guidelines as to the number of cases the deadlines were exceeded in, which shall be considered gross inaccuracy, nor do they additionally quantify the criterion – in terms of the number of days the deadline was exceeded by. Often the reasoned decisions refer only to the registry numbers of the cases gross inaccuracy was established in – these numbers, as such, mean nothing, particularly given that the number of cases referred to in different decisions varies from 7 to 90. Moreover, the SPC remains silent with regards to the explanations offered by the petitioners. In certain cases the reasoned decisions refer to the dates certain procedural actions were taken on, as a confirmation of the established inaccuracy. Again, it remains unknown whether the petitioner had provided an explanation for such actions.

One, therefore, has to conclude that, contrary to the practice shown at the interviews, the State Prosecutors' Council had only intended to collect evidence from the records of the competent public prosecutors' offices on the fact that the deadlines were exceeded in some cases and use such facts to justify a negative decision. It is then even less clear why the working bodies have undergone the exhausting procedure of interviewing the petitioner on the details of numerous individual cases. The reasoned decisions clearly show that, for the most part, the petitioner's depositions are irrelevant for the SPC.

3. *Objections and comments from the instructive inspection reports and the opinion of the superior prosecutor as an important or sole ground for a negative decision*

In many cases the reasoned decisions are based on the lack of qualification established on the basis of objections expressed in the reports on instructive inspection, performed by the superior public

prosecutors' office. These reports have been used selectively – only the negative comments are referred to, even in cases when certain actions the superior public prosecutor's office had objected to was standard practice, or a position adopted by the public prosecutors office the petitioner had worked in. Just as in the case of accuracy, the reasoned decision offers no indication as to whether the SPC had at all taken into account the petitioner's statements related to the objections and comments made in the report.

In the second group of cases, the important ground for a negative decision in the review process is the negative ("unsatisfactory") mark of the competent public prosecutor, even if there is no evidence to support such a mark, whilst statistical data and evidence presented at the hearing are completely disregarded.

Such intentionally selective practice in presenting the evidence supporting a negative decision in the review process shows that there were serious drawbacks in the decision-making process, and confirms the assessment that the SPC had adopted the holdings of the decisions based on different criteria, and then wrote the reasonings only referring to data which support the negative decision.

4. *Selective use of Article 14 of the Rulebook*

As mentioned before, Article 14 of the Rulebook enables for a positive decision to be adopted in the review process without having conducted the interview with the petitioner, provided that the evidence collected show that there is no suspicion with regards to the petitioners qualification, competence and worthiness, and that the assumption that the petitioner meets the election criteria is not refuted, or that there are justified reasons for the petitioner's under-the-norm efficiency. This Article was applied only in one case, even though the estimate is that it could have been applied in almost one fourth of the total number of cases examined. The reasoning behind the SPC's decision on whether to apply Article 14 or not in each specific case remains unknown. The reasoned decision in the only case where Article 14 was applied is sparse and insufficient, in as much as it does not provide a satisfactory answer to this question, nor to the question why was Article 14 not applied in

another case with the almost identical state of facts. On the other hand, there are reasoned decisions wherein the SPC showed in a satisfactory manner why the assumption of the petitioner's qualification, competence and worthiness was not refuted. Why wasn't Article 14 applied in such cases? Why were the interviews held? It remains unclear.

4.3. DECISIONS OF THE HIGH JUDICIAL COUNCIL

The High Judicial Council adopted the total of 752 decisions.

The last session held by the HJC in 2011 was on December 8; it was followed by the announcement of judicial elections to select a candidate, among the judges of the courts of appeal, to be appointed a member of the HJC[87] by the National Assembly. The next HJC session the petitions of the non-appointed judges were discussed on was held on March 8, 2012. The last session the petitions in the review process were decided on was officially held on May 30, 2012; the HJC announced that the review process was completed. However, one more decision was subsequently adopted at the session held on July 4, 2012; the composition of the HJC which acted at this session is unclear, since, in the meantime, due to the elections and the new composition of the National Assembly, the term of office of the minister of justice, Snezana Malovic, and president of the National Assembly Judiciary Committee, Bosko Ristic, was terminated. Neither the monitors nor the general public were informed of this session in the usual manner, on the HJC website.

In addition to causing a three-month break, the resignation of the HJC member Milimir Lukic had another important consequence – the decisions adopted by the HJC at the sessions held on November 24 and December 1 and 8 – the total of 50 decisions – must be considered invalid, since they were adopted by a body which had not acted in the constitutionally prescribed composition, comprising at least one half of the judges. This position was accepted by the HJC only after it had been expressed by the Ombuds-

87 So as to replace judge Milimir Lukic, who had resigned.

man[88] at the request of the Judge's Association of Serbia; the position was supported by the legal community and the EU Delegation to Serbia.[89] The fact that the High Judicial Council had proceeded with the adoption of the decisions, even though it is impossible that its members were unaware of the shortcomings with respect to its composition, is worrying; moreover, such actions have affected the validity of the decisions adopted at the three mentioned sessions. These decisions must be considered invalid. So far, it is not clear whether the HJC also considers these decisions invalid, and, if so, which formal route will it opt for in order to pass new decisions. One option would be to wait for the decision of the Constitutional Court upon the appeal of a person whom the decision concerns.

The authors have had the opportunity to analyse 411 individual reasoned decisions adopted at the HJC sessions by July 4, 2012.

The first assessments on whether the holding of the decision in each individual case is justified or not, show a high level of discrepancy between the statements given at the hearings and the evidence presented therein and the holdings. After the analysis of reasoned decisions, this number had further increased to 329 out of 554 decisions, or 60% decisions the authors were able to assess based on the available data. This is a clear indicator that the HJC had grounded its decisions on inconsistent, wide and sometimes even wrong interpretation of the Rules it had adopted itself; in addition, the reasonings are incomplete inasmuch as the data referred to in them are presented selectively. A general impression is that, as in the case of the State Prosecutors' Council, the reasonings of the individual decisions were written so as to justify the decision adopted at the HJC session.

The quality of the HJC decisions is better than that of the SPC decisions, mainly because they, as a rule, present the petitioner's

88 Opinion on the work of the HJC of 11.01.2012. available at: http://www.zastitnik.rs/index.php/lang-sr/2011-12-25-10-17-15/2011-12-25-10-13-14/2105-2012-01-12-12-56-47, 01.09.2012.

89 *EU zabrinuta zbog stanja u VSS*, http://www.rtv.rs/sr_lat/drustvo/eu-zabrinuta-zbog-stanja-u-vss_294679.html, 01.09.2012.

claims stated in the previously filed legal remedies (the constitutional complaint, complaint to the Constitutional Court), present their statements given at the hearings and the evidence presented by them, and also provide an assessment of such evidence. As far as technical drawbacks are concerned, they are somewhat rarer then in the case of the SPC decisions, but there are some cases when the petitioners were referred to in the wrong gender, and mistakes regarding the date the hearing was held on.

On the other hand, we should reiterate the general impression, particularly with regards to negative decisions, that the reasonings were written in order to justify the decision already taken, as opposed to what would seem to be the required practice – first to have all the evidence conscientiously examined and assessed. It is hence that the decisions of the High Judicial Council suffer from numerous substantive deficiencies, which can be classified in the following manner; just like the decisions of the State Prosecutors' Council, some decisions include several types of violations:

1. *Selective use of statistical data and drawing conclusions thereof*

In order for a good quality decision to be passed in this procedure, it is necessary to collect and fully analyse all statistical data, and then assess the overall work performance of the judge. This is reiterated in the HJC reasoned decisions. It is therefore unclear why numerous reasoned decisions refer to incomplete statistical data. As a rule, the statistical data relating to the work of courts are expressed year-by-year and subject-matter by subject-matter, and the cases when information is expressed on the three-year level, which was the decisive criterion from Article 13 of the Decision on Establishing the Criteria and Standards for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents, [90] are scarce. At the same time, Articles 4 and 6 of the Rules of Procedure for the review process refer to individual years (2006, 2007 and 2008) rather then to a three-year period, which should be taken to mean "in the three-year period", using the logical interpretation. However, the decisions of the High Judicial

90 RS Official Gazette No. 49/2009.

Council are inconsistent in that respect – some decisions expressly state that the criteria used to assess qualification and competence must be fulfilled each year individually, whilst in others it is evident that the decision is based on the data as a whole. Even if the strict linguistic interpretation of the Rules of Procedure were to be adopted, resulting in the conclusion that the work results are observed only on annual level, basing the decision only on the fact that the qualification and competence criterion were not met on the annual level is beyond doubt contrary to the idea of analysing overall performance of a judge; moreover, such interpretation is in contradiction with the standing the HJC has expressly taken – that the overall work of the judge is under scrutiny. The actual problem lies in the following – the presentation of judge's work results only on a year-to-year basis and subject– matter– by– subject– matter basis is more susceptible to negative interpretation of the results, and hence, it is much easier to conclude that a judge is incompetent or incapable.

The High Judicial Council was also inconsistent in interpreting the rule that the judge must meet the criteria, where at the same time their work results must not deviate from the court average. In some decisions the HJC expressly states that the court/department averages are a "correctional tool" taken into account when there are deviations from the norm; on the other hand, some decisions are based exactly on the deviations from the court averages, even when the norm is met. In certain decisions the court averages were not examined at all, nor was it mentioned whether the HJC had, for instance, considered the possibility to apply the small number of appeals rule prescribed by the Criteria, or, if the judge did not resolve a sufficient number of cases, had the HJC examined the court average and the inflow of cases into the court. It must therefore be concluded that the HJC did not fully establish the state of facts, or misapplied the law.

2. *Lack of clear criteria as to what is considered a "gross deviation" from the court/court department average, and the failure to apply alternative criteria more favourable to the petitioner*

One of the key problems regarding the HJC reasoned decisions lies in the fact that this body fails to give any indications as to what will be considered gross deviation from the norm and/or court average, whilst at the same the HJC based a considerable number of decisions precisely on the fact that the assumption of qualification and/or competence was refuted by evidence of gross deviation from the norm or the court average. It is true that conscientious and comprehensive assessment of evidence in each case precludes the setting of firm standards – but it still remains unclear why did the HJC assess the same percentage of deviation as gross deviation and consequently refuted the assumption of qualification, whilst in other cases the same percentage was viewed together with other petitioners' work results and the final decision adopted by the HJC was positive. In some decisions the percentage of deviation with respect to the quality of work, used to establish a gross deviation, ranges from 0.18% to 18%, without any indication as to whether the HJC had also considered the possibility that the number of decisions adopted on appeal was small.

There is a special problem with regards to the issue of writing the decisions in excess of prescribed time limits.[91] Already at the hearings the Commissions have failed to take a uniform position on whether only the judgments written after the expiry of a 60-day limit following the passing of the decision shall be considered, as expressly stated at some hearings, or would they consider all judgments written after the expiry of a 30-day time limit, as prescribed by the Rules. At the same time, in certain cases the Commission have requested additional reports from the courts, with precise dates, in order to establish the exact excess of the time limit. This was not, however, done in all cases, and it is hence apparent that in some cases the prevailing criterion was the number of decisions, whilst the duration of the default was also significant. Bearing in mind the fact that in one case the only reason used to refute the assumption of petitioner's qualification was the fact that he was in default in writing 3 judgments out a total of 1500 cases he had

91 These are the decisions the petitioners have written in excess of the prescribed time limits at the time they excercised judicial office.

acted upon in the three-year period, and given that numerous other examples testify that this criterion was applied inconsistently, it is clear that the standard of gross deviation was often adjusted to the circumstances of the cases, or, more precisely, fine-tuned so as to justify the holding of the decision whereby the petition is denied.

3. *Failure to observe the assumption that the judge who held office at the time of the initial elections meets the criteria of qualification, competence and worthiness*

In numerous individual decisions the High Judicial Council expressly states that "its starting point was the doubt as to whether the petitioner meets the criteria of qualification and competence, based on the initial decision of the HJC first composition". It is visible that the HJC has taken this as its starting point in the entire review process when the reasonings of the other decisions are read – where the HJC presents evidence or draws conclusions contrary to those expressed in the decision of the first HJC composition, and then asserts that the assumption of qualification or competence are not refuted. The practice of the HJC Commissions during the hearings regarding the shifting of the burden of proof to the petitioners is, therefore, confirmed, and the general impression is that it existed in all cases. The problem is that such practice seems to have existed, expressly or implicitly, even in cases when the first HJC composition did not serve the individual reasoned decision, nor has it forwarded individualized reasons for the petitioner's non-appointment in its reply to the legal remedies filed before the Constitutional Court.

4. *Wide interpretation of the worthiness criterion*

There are two types of irregularities concerning the criteria of worthiness. The first one relates to the fact that the HJC has often interpreted certain elements of the criteria of professional competence and ability – such as the time for drafting the decisions, resolution of old cases, actions taken in certain cases – as unconscientious behaviour, and consequently established that the petitioner is unconscientious and hence, unworthy. The reasonings often include a statement that disciplinary proceedings could have been initiated against the petitioner and that serious disciplinary measures could

have been pronounced in such proceedings, whereas the fact that such proceedings were never initiated is completely disregarded. In one case the HJC had expressly admitted that, when deciding, it had considered the petitioner's actions in cases from 2009, explaining that the criteria of worthiness were not observed only in the mentioned period (2006-2008). This had already enabled the HJC to take into account, when deciding, the petitioner's actions in the periods that have considerably preceded the period under observation. The second type of irregularities relates to all facts that were considered by the HJC within the criteria of worthiness – e.g. the fact that the petitioner's brother and father own a restaurant, the fact that in criminal proceedings the accused has engaged as his counsellor the petitioner's daughter-in-law, after which the petitioner had requested to be recused, the fact that one of the accused in the proceedings conducted before the Special Organised Crime Chamber had mentioned the petitioner's name as the name of a judge with whom the so-called "Zemun clan" had cooperated, even though proceedings have not been initiated against the petitioner with regards to this, and the like.

4.4. CONCLUSION

The general assessment is that the quality of the reasoned decisions adopted by the State Prosecutors Council is unacceptably low and is a testament of the carelessness and arrogance with which this body had conducted the review process. With regards to the decision of the High Judicial Council the assessment is somewhat milder, but by no means favourable. It is evident that in both cases the entire decision-making process, in addition to being characterized by exceptional lack of transparency, as described before, also shows serious drawbacks with regards to the observance of the main principles of procedural and substantive law. Often was the procedure for reviewing the decisions of the first composition transformed into the process of deciding once again on the eligibility of the petitioner to be appointed public prosecutor. In the procedure conducted before the State Prosecutors' Council, the hearings were held only in order to satisfy form – the reasonings of the final

decisions, even of the positive ones, seldom refer to the petitioner's depositions and submissions. The situation is somewhat different with regards to the procedure before the High Judicial Council, but there are examples where the petitioner's statements given at the hearings were completely disregarded and assessments and conclusions from the initial decision were simply reiterated. The reasonings in the decisions adopted by the State Prosecutors Council were written tendentiously, selectively and with a clear intention to justify the decision that had been adopted either under considerable political pressure or for reasons which remain unknown to the petitioner and the general public, or both. The same is also valid for a considerable number of HJC decisions. Therefore the assessment that the review process, as conducted by the SPC, is a schoolbook example of travesty of justice, formulated by the monitors engaged by the EU Delegation to Serbia[92] is disappointingly true, both with regards to the procedure before the SPC and to the reasoned decisions. As far as the reasoned decisions adopted by the High Judicial Council are concerned, selective use of statistical data and wide interpretation of the criterion of worthiness lead us to believe that the reasoned decisions were written so as to justify the holdings of the decisions adopted in a non-transparent manner, at High Judicial Council sessions, where ex officio members, who had considerable political influence, have exerted pressure on the appointed members, particularly those who were judges. Even though the quality of the HJC reasoned decisions is better than the quality of the State Prosecutors Council decisions, it still cannot be assessed as good, whilst numerous omissions in the application of substantive law open the doors for further complaints and further proceedings before the Constitutional Court. In that respect, therefore, the examination of the quality of reasoned decisions, which will be relied on by the Directorate for Enlargement[93] when assessing the reform (as will be explored in more detail further in the text) shall make little difference.

92 http://pescanik.net/2011/12/evropa-ignorise-mane-srpskog-pravosuda/,01.3.2012. godine

93 http://www.danas.rs/danasrs/politika/brisel_ozbiljno_zabrinut_zbog_reforme_pravosudja.56.html?news_id=234993, 1st September 2012

Interestingly enough, all the decisions adopted by the State Prosecutors' Council and one number of decisions adopted by the High Judicial Council include, in the reasonings, a statement to the effect that the procedure was public and that the petitioners were given the opportunity to exercise the rights guaranteed by the Rulebook or the Rules. It seems that both bodies have attempted to preclude any future petitioner's claims, in legal remedies filed to the Constitutional Court, with regards to the violation of any aspect of the right to a fair trial in the course of the review process. However, a wish list is one thing, and the reality quite another – even in earlier stages of the judicial reform process, both bodies have claimed that any and all aspects of the right to a fair trial were duly observed in the process. However, as confirmed by the Constitutional Court in its decision in the *Saveljic* case, such proclamations do not constitute sufficient grounds to establish that the right to a fair trial were indeed not violated – such an assessment must be based on facts, which, we firmly believe, shall be the case in the appeal process before the Constitutional Court.

5. ORGANISATIONS WHICH MONITORED THE PROCEDURE AND THEIR ACTIONS

As rightfully expected, the procedure for reviewing the decisions of the first SPC and HJC compositions was monitored by national and international organisations, as well as the widest legal community. It was mentioned before that the procedural provisions that were to be applied in the procedure were written in cooperation with the EU Delegation to Serbia and the OSCE Mission to Serbia. Both organisations were also interested in monitoring the interviews/hearings in the procedure. Whilst OSCE monitors have attended a small number of hearings, often those in particularly interesting cases, the EUD monitors have attended all hearings held after July 4, 2011. It is no surprise that national professional organisations and international professional organisations, such as

MEDEL[94], and also the Dutch *Rechters voor Rechters*[95] were interested in monitoring the process.

The procedures before the State Prosecutors Council and the High Judicial Council were quite different, and the degree of attention they caused within the general public and the legal community had also differed. The relevant provisions of both the Rulebook and the Rules also differ, and it is hence advisory to examine the procedural role of the monitors at the hearings separately, and then investigate the wider implications of the monitor's presence at the hearings.

It is clear that given the importance of the process, the professional organisations – Prosecutors' Association and Judge's Association – were directly interested in monitoring the hearings, because the rights of their members were at stake. However, the two organisations have opted for different approaches.

5.1. MONITORING THE HEARINGS BEFORE THE STATE PROSECUTORS COUNCIL AND THE STATE PROSECUTORS COUNCIL SESSIONS

The Rulebook on the procedure before the SPC expressly states that this procedure is public.[96] In addition, Article 5 provides the definitions of certain expressions, and states that the monitors on behalf of the organisations such as the Prosecutors' Association, the EU, OSCE, the Ombudsman, are participants in the proceedings, and that the SPC shall allow them to monitor the proceedings at their request. However, Article 7 of the Rulebook grants procedural powers only to the PA monitors, whilst the other monitors have none. In that respect the latter have the same procedural position as the general public.

With regards to the PA monitors, the Rulebook prescribes that the PA monitor has the right to inspect the case file and all the

94 Magistrats Européens pour la Démocratie et les Liberés, www.medelnet.org.

95 http://www.rechtersvoorrechters.nl, 01.09.2012.

96 Article 2.

documents, to attend all phases of the review process, except for the deliberations and voting, to ask the petitioner questions through the Council chairperson, make a report on the course of proceedings, which includes an assessment of the fairness and objectivity of the SPC work and the final decision passed by it. In addition, paragraph 4 of the same Article that the competent prosecutor must grant leave from work for the purpose of monitoring, and that the time spent monitoring shall be considered as time spent at work.

It is evident that the aim of these provisions was to grant the professional prosecutors' organisation, which had de facto assisted the non-appointed prosecutors and deputy prosecutors in the defence and realisation of their rights in the course of the reform process, a clear procedural role, at the same time ensuring a more transparent and fair procedure. It is particularly important that the PA monitors were guaranteed direct access to the case file, and the possibility to improve the procedural position of the petitioner by asking him questions during the interview/hearing. The Prosecutors' Association of Serbia has taken its procedural powers in the process very seriously[97], and, as mentioned before, PAS monitors attended all the interviews/hearings. They have also used the possibility to inspect the case files, which means that they monitored the hearings having the same information that was available to the petitioners. The PA monitors were prosecutors with rather long work experience, and mostly prosecutors or deputy prosecutors from district, special or republic public prosecutors' offices. This was particularly important given the previously described attitude the working bodies' members have taken towards the petitioners – inquisitive and on the verge of being rude.

PAS monitors seldom exercised their right to ask the petitioner questions, but have, as a rule, filed three types of objections – one related to the subsequent collection of evidence and their use at the interviews, the second one related to accuracy as a new criterion, and the third related to the fact that in the given case there are grounds to apply Article 14 of the Rulebook, but that it had not

97 The Association had adopted a decision on its participation in the process on May 22, 2001, relevant notice available at http://www.uts.org.rs, 01.09.2012.

been applied. At the very start of the interviews the PA monitors had also objected when the working body chairperson would ask the petitioner whether he/she was employed or not; such practice was soon abandoned.

There is not a single reasoned decision that refers to any objection lodged by a PAS monitor, nor to the fact that the monitor had asked questions to the petitioner.

It is rather surprising that, despite their somewhat privileged position in the procedure when compared to other monitors, the PAS monitors were not allowed to attend the SPC sessions wherein the petitions were voted on, until the moment when attendance was allowed to the DEU monitors, at the time when the SPC was left to decide in 33 cases. The SPC had therefore not only violated the Rulebook with regards to the interviews, but had also disregarded the procedural powers of the prosecutors' professional organisation, which it had granted them in the Rulebook it had adopted.

Since the Rulebook does not expressly prescribe any procedural powers of the PAS monitors when the petition is decided on, their procedural role at the SPC sessions they were allowed to attend was that of the general public.

The Prosecutors' Association had made a final report on the course of the review process. The report includes the following assessments:

- the principles of directness, fairness, publicity and contradiction were violated in the procedure before the SPC
- actions taken in the procedure have compromised the assumption that the petitioners meet the appointment criteria[98]
- monitors were denied the right to attend all phases of the procedure
- the state of facts in the case files was mainly presented objectively, but the assessment that the conditions to apply Article 14 do not exist is incorrect.

98 This was particularly true with regards to those petitioners assessed as "unsatisfactory" by the Republic Public Prosecutor.

The report was made after all the interviews were concluded and decisions were passed on 126 petitioners – the PAS report could not have improved the procedural position of the petitioners, nor could it motivate the working bodies to start applying Article 14 of the Rulebook. It is not certain whether the assessment the PAS had formulated in the report had motivated the SPC to open its sessions to monitors.

As far as the European Delegation to Serbia monitors are concerned, they have also attended all interviews/hearings before the State Prosecutors Council, and from the moment the SPC had allowed them presence at their sessions, they have attended all of them. OSCE monitors attended a few interviews and no SPC sessions. Given that neither the EU nor the OSCE monitors had any procedural powers, it is clear that their role in the process was that of the general public. DEU monitors made detailed daily, weekly and other reports, the influence of which shall be explained later.

Curiously enough, the interviews before the SPC working bodies, as a rule, were not attended by the general public – there were no representatives of the media, no family members or friends. Truth be told, it is uncertain that any such requests could be met, given that the interviews were held in two medium-sized offices, with a small number of seats. At the same time, bearing in mind the fact that a number of hearings were held at rather unconventional time, it is not surprising that they were attended only by those most directly interested in the proceedings. The overall impression is that the public was generally less interested in the process conducted before the State Prosecutors' Council, whilst at the same time the media and the legal community had closely monitored the procedure before the High Judicial Council.

As could be reasonably assumed based on the part of this publication dedicated to the procedure before the State Prosecutors' Council, the presence of the monitors had not affected the course of the procedure at all, despite the procedural powers granted to one category of monitors. The general impression is that the State Prosecutors' Council working bodies have conducted the procedure ei-

ther unaware of the violations they were committing, or fully aware of them, but completely uninterested in the fact that they were being committed before the monitors. The monitors' presence had in no way improved the procedural position of the petitioners, nor had it motivated the working bodies to implement the prescribed procedural rules more consistently. As far as the SPC sessions are concerned, it is indicative that the members of this body had continued to violate both the Rulebook and the standards of fair trial at these sessions, showing the same disregard and lack of interest.

5.2. MONITORING OF HEARINGS BEFORE THE HIGH JUDICIAL COUNCIL AND OF HJC SESSIONS

5.2.1. General remarks and monitoring of hearings before the HJC Commissions

As mentioned before, the general impression is that the procedure before the High Judicial Council was more closely observed by the general public and the media. As far as the monitors are concerned, this increased attention was reflected in the presence of more representatives of the general public – petitioner's family members and friends, as well as representatives of associations which did not monitor all the hearings, but requested to attend the hearings in certain, particularly controversial cases. This is also true for the media representatives.

However, one should first analyse the provisions of the Rules governing the presence of monitors.

As already mentioned, unlike the procedure before the SPC, the procedure before the HJC was clearly separated into two phases – the hearings before the Commissions and the decision-making process at the HJC sessions. The Rules expressly prescribe that the hearings are public; moreover, Article 31 prescribes special measures enabling the publicity of the proceedings – e.g. issuing statements related to the Commission and Council sessions, publication of the rulings on the appointment of the Commission and the rapporteur in each case, the publication of the date on which hearings and Council sessions are to be held, and by publicity of Commis-

sion sessions and Council sessions. It should be noted that the HJC had interpreted publicity of the procedure solely as the publicity of hearings with the petitioners, and had allowed presence of monitors delegated by national professional organisations and international organisations as late as March 8, 2012. The petitioners and the general public were not allowed to attend the HJC sessions even then – this shall be discussed in more detail later in the text.

Just as in the case of monitors following the procedure before the SPC, the Rules have made a distinction between the representatives of the EU, Council of Europe, OSCE, Judges' Association of Serbia and other judges' professional organisations, to whom the HJC allows to monitor the process at their own request, and the general public. Monitoring of the procedure implies monitors' direct presence during the procedure, except during the voting. In addition, the monitors are granted one procedural power – to submit written notes from the hearings to the Commission within three days from the day the hearing was held. Presumably, this provision is intended to provide the monitors with procedural powers matching those granted to PAS monitors in the procedure before the State Prosecutors' Council. However, at the same time this provision of paragraph 5, Article 33 is less effective with respect to the case in question, but more effective with regards to the entire course of the procedure. Why is that so? The Rules do not further elaborate on the exact effect these written monitors' notices have on the course of the proceedings in the specific case – the purpose of this power therefore remains unclear; it is also not clear why is the submission of written monitors' notices time-limited (three days after the hearing). The only influence written notices could have with regards to the specific hearing would be to influence the Commission – in theory, when deciding on the specific case, the Commission should take into account all the shortcomings in its work noted by the monitors and consequently make the decision. The Rules do not provide for additional hearings to be held before informing the Council of its decision – therefore, in each given case it's the Commission's conscience that should be relied on. Moreover, the Rules do not oblige the Commission to inform the Council of the moni-

tor's comments, which renders this procedural power quite pointless. It is therefore easy to assume that this power was incorporated in the Rules only to formally demonstrate the HJC's willingness to hear the opinions relating to the process formulated by the professional organisations and other monitors.

On the other hand, the existence of the possibility to submit their comments relating to the hearings and HJC sessions was used by the European Union Delegation to Serbia in its direct communication with the HJC president and the Commission chairpersons, and through occasional meetings with OSCE representatives, using the daily, weekly and ad hoc reports delivered by its monitors. The same was done by the OSCE mission. This communication had contributed, beyond doubt, to improvement of the quality of the procedure at the hearings during the first months of the process. Interestingly enough, in their press and other releases the HJC[99] and some of its members,[100] regularly claimed that the DEU monitors have never expressed any objections relating to the procedure before the HJC – presumably, relying on the lack of written notes on individual hearings, which were not submitted by the monitors in person in terms of Article 33 of the Rules. The truth was, however, quite different – from the very beginning of the process the DEU had established a practice of submitting written comments and objections regarding the irregularities noted at the hearings directly to the HJC president. It is, therefore, clear that the HJC had intentionally misinformed the public, creating a distorted image of the monitors' opinions regarding the process. This only supports

99 For example, HJC press release, available at http://www.vss.sud.rs/Saopstenja.htm, of January 18, 2012, reads "EU Delagation monitors who attended the hearings have not expressed any objections regarding the work of the High Judicial Council Commissions, nor relative to the procedure for reviewing the decisions of the first HJC compositions on termination of judicial office".

100 For example, Nata Mesarovic, http://www.tanjug.rs/novosti/21800/revizija-odluka-gotova-do-kraja-januara-2012-.htm, 01.09.2012.–„I underline that, so far, the monitors have not expressed any objections regarding the Commissions' work".

the conclusion that the HJC was not an independent and impartial body and was subject to political pressures of the executive.

As far as the Judge' Association of Serbia is concerned, as explained before, its procedural powers were considerably reduced compared to those granted to the PAS in the procedure before the State Prosecutors' Council. Perhaps this was the reason why the JAS had adopted a different approach to the monitoring – the hearings were occasionally monitored by the JAS hearings; however, they regularly attended particularly interesting cases. Similar approach was adopted by the OSCE monitors. However, it was precisely the JAS activity that was central in stopping the HJC's illegal operation, which shall be discussed in more detail later in the text. Bearing that in mind, the fact that JAS and OSCE monitors did not attend all the hearings should not be interpreted as their lack of interest in the process. On the other hand, as in the case of the process conducted before the SPC, DEU monitors have attended all the hearings held after July 4, 2011, wrote detailed daily and weekly reports, and ad hoc reports on particularly important issues and problems observed. It is important to note here that the increased interest of the DEU for the review process was a necessary consequence of the stage Serbia was in at the time and still is with regards to the EU accession. The assessment regarding the success of the judicial reform was an important factor when the decision on whether the European Commission shall recommend that Serbia be granted the status of candidate or not was made. This shall also be discussed in more detail further in the text.

5.2.2. Monitoring the HJC Commission sessions and HJC sessions

The Commission sessions had remained closed to the public. Let us remember that Commission sessions, pursuant to the Rules, are used to conduct preliminary procedure, where it is also possible to propose for the petitioner to be sustained, based on the case files, without holding the hearing.[101] Furthermore, if a hearing or

101 Which would correspond to Article 14. of the Rulebook on procedure before the SPC. This possibility is envisaged in Article 20 of the Rules; the

hearings are held, and the state of facts is sufficiently examined and the hearings are concluded, the Commission adopts a decision on whether the petition should be sustained or not. Even though this is not expressly prescribed by the Rules, it is reasonable to assume that the Commission adopts such a decision in a separate session. The monitors were not allowed to attend any Commission sessions. This not only constitutes a violation of Article 33 of the Rules, but raises concerns with regards to the transparency of the entire procedure. Namely, the Rules lead us to conclude that the main part of the procedure, where the facts that will be used as the basis for the decision are established, is the one conducted before the Commissions. This is precisely the reason why the Commissions are comprised of judges. The Commission sessions were therefore supposed to be the very base and the key element in the impartiality of the process, and a guarantee that the professionals' assessment of evidence shall be critical in the adoption of the final decisions. Practice has, however, shown that this was not the case. The only part of the procedure before the Commissions that had remained open to the public were the hearings, where no decision on the case was made (even the procedural decision adopted therein mostly related to the publicity of the proceedings and/or the postponing of the hearing). This means that the monitors were excluded from what was supposed to constitute the very core of the review process – the Commission sessions, where, after carefully examining the facts of the case, the Commission adopts its decision on the petition.[102]

This HJC attitude with respect to the Commission sessions may indicate some of the following:

- Commission members were subject to pressures when the Commission decision were adopted
- it was not advisory for monitors to know how many Commission decisions differed from the final HJC decision and what are the grounds for each of these decisions

rapporteur may propose to the Commission to adopt a decision that the petition should be sustained.

102 The importance of this decision and the non-existence of written reasoned decision were explained before.

- in a number of cases the Commissions have not adopted any decisions, which means that the only decision adopted was the one passed at the HJC session.[103]

The sessions of the High Judicial Council, as explained before, had remained closed to the public due to an unusual interpretation of the Rules of Procedure, until March 8, 2012. As of that date, the DEU and the OSCE monitors, and the monitors representing relevant professional organisations[104] were allowed to attend the HJC sessions; this right was, however, not granted to the petitioners, representatives of the media or the general public. This came as a surprise to the petitioners – only a few days before, the media have announced that this HJC session shall be public.[105] Even though this solution was intended as a positive step towards increasing transparency of the process, unfortunately, it does not have any legal justification. The relevant provisions of the HJC Rules of Procedure do not envisage a session that is partially closed (or, optimistically speaking, partially open) to the public. The authors have no knowledge of the existence of a formal decision on the opening of the HJC session to the public (formal deficiencies) and, as said before, there are no legal grounds a decision on selective publicity of HJC sessions could be based on (substantive deficiencies), it is rather shocking to witness such omissions in the work of the highest judicial body in this country.

Since the Rules do not include special provisions regarding the HJC sessions, it must be assumed that the monitors attending the sessions are not allowed to forward their written comments concerning the sessions to the HJC; this means that their procedural role at the sessions was equal to that of the general public, as the case was with the SPC sessions. Furthermore, the only legally viable position is that the monitors have actually attended HJC sessions

103 Please note that there is written evidence that the Commissions have indeed adopted decisions in a certain number of cases.

104 http://www.vss.sud.rs/obavestenje-14-03-2012.pdf, 01.09.2012.

105 http://www.politika.rs/rubrike/Hronika/VSS-preispituje-izbor-and-neizbor-sudija.sr.html, 01.09.2012.

that were *closed to the public* and are hence bound by confidentiality. It is indicative that, once again confirming her thorough ignorance of both the Rules and other regulations, the HJC president had failed to warn the monitors thereof.

The hearings before the HJC Commissions have also been attended by the representatives of international professional organisations, such as MEDEL. In addition to monitoring the hearings, MEDEL has also raised the issue of the quality of the judicial reform process in Serbia in its communication with the European Commission and the European Parliament, as will be explained below.

5.3. ACTIVITIES OF PROFESSIONAL ORGANISATIONS UNRELATED TO THE HEARINGS

As mentioned before, different professional organisations have participated in the hearings before the SPC and the HJC in different modes. Their activities outside the hearings have also been different.

As far as the Prosecutors' Association is concerned, it had issued a public call to all petitioners to forward the decisions concerning them adopted in the review process to the PA, regardless of whether the final outcome was positive or negative. The collected decisions were analysed by the PA and also forwarded to the DEU monitors. In addition, on March 13, 2012, the PA had informed its members that its representatives shall attend the hearings before the Constitutional Court in cases concerning the appeals against SPC decisions. According to the information the PA had requested from the Constitutional Court, until February 3, 2012, a total of 126 appeals and 8 constitutional appeals were filed to this court.[106] The Prosecutors' Association was, therefore, intent on following the next phase of the process.

On the other hand, given the problems explained in more detail in the part of the publication dedicated to transparency, the Judges' Association had opted for taking different steps – not di-

106 http://www.uts.org.rs/index.php?option=com_content&task=view&id=592&Itemid=106, 01.09.2012.

rected to individual cases, but the entire process. Surely the most important step taken by the JAS was filing of an application to the Ombudsman concerning the work of the High Judicial Council. [107] The direct cause for the filing of the application was the fact that, even after Milimir Lukic's resignation, the HJC had continued to pass decisions on the petitions of the non-appointed judges[108]; however, the application related to the overall work of this body in the review process. The Ombudsman's had issued an opinion on January 11, 2012, which resulted in the decision-making process being suspended – it seems that it was only then that the HJC had become aware of the fact that its composition was not only illegitimate but also contrary to the law; it had hence initiated the procedure for the appointment of a new HJC member who would replace judge Lukic. In addition, necessary steps were taken in order for the National Assembly to declare on the ruling whereby the Anti-corruption Agency had established that a HJC professor of law – member is in a conflict of interest situation. This activity of the JAS had yielded very good results – the HJC was prevented from passing more decisions whilst in illegal composition. It is, however, rather discouraging to know that the other issues expressed in the application and in the Ombudsman's opinion, relating to problems analysed in this paper – lack of transparency, the influence of the executive, lack of criteria in the decision-making process – have remained open and unresolved.

As indicated before, the review process conducted by the SPC and the HJC was closely scrutinized by international professional organisations, such as MEDEL and the Dutch *Rechters vor Rechters*. The representatives of these organisations were in a working visit to Serbia at the beginning of October 2011, after which they have sent a joint letter to the European Commission President, warning him of the deficiencies and irregularities observed in the process before the High Judicial Council; their warning had arrived im-

107 The text of the application is available at: http://www.sudije.rs/files/file/pdf/14%2012%202011%20prituzba%20zastitniku.pdf, 01.09.2012.

108 This was also analysed in the text above, in the part relating to transparency.

mediately before the European Commission issued its opinion on whether Serbia should be granted the status of a candidate. In April 2012, MEDEL has sent its two representatives to Serbia with the task of writing a report on the condition of the Serbian judiciary. These former (retired) judges[109] have interviewed all key actors in the process, including the members of the competent bodies, representatives of professional associations and members of the legal community, and issued a report, which is available on the MEDEL website in full.[110] The report concludes that the state of Serbian judiciary was not in accordance with the European Union standards and proposed for the entire re-appointment process to be annulled – therefore, restored to the state prior to December 2009. At the same time, the authors have expressed their reservations with regards to the readiness of the Serbian Constitutional Court to take this step, particularly given the previous jurisprudence of this court with regards to the entire judicial reform process, from 2008 onwards. The Constitutional Court, however, has risen to this challenge, as will be explained below.

5.4. EUROPEAN COMMISSION ASSESSMENT OF THE JUDICIAL REFORM IN SERBIA

In its 2009 Serbia Progress Report[111], the European Commission has criticized judicial reform in Serbia rather severely. The overall assessment was that Serbia has made moderate progress in the field of judicial reform, and that the current reform and its rather rushed implementation present a considerable risk for the independence, accountability and the efficiency of the judiciary. The 2010 Progress report[112] has pointed out the numerous irregu-

109 *Simon Gaboriau*, retired president of the Court of Appeal in Paris and *Hans-Ernst Böttcher*, retired president of the Lubek District Court.

110 http://medelnet.org/images/Audit%20SerbiaEN.pdf

111 http://ec.europa.eu/enlargement/pdf/key_documents/2009/sr_rapport_2009_en.pdf and http://www.seio.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/godisnji_izvestaj_sa_statistickim_aneksom_2009_cir.pdf, 01.09.2012.

112 http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/sr_rapport_2010_en.pdf and http://www.seio.gov.rs/upload/documents/

larities relating to the process of appointing judges and prosecutors, and the Commission has expressed its serious concern in this respect. Bearing in mind the course of the procedures before the State Prosecutors' Council and the High Judicial Council, and the objections with regards to the latter expressed by national and international professional associations, the lukewarm assessment given by the Commission with regards to this process was rather surprising. Namely, in its Analytical Report[113] the Commission had stated that the review on judges has been so far conducted in a satisfactory manner, whilst as regards to prosecutors, certain procedural shortcomings occurred and remaining doubts on the observance of the guidelines will have to be dispelled by written decisions. The general assessment was that the initial shortcomings are being dealt with through the review process, following the guidelines which include clear and transparent criteria. It seems that the European Commission had wilfully neglected and relativized the numerous shortcomings observed with regards to the review process, as expressed by both professional associations and the general public. The media attention caused by the leaked report written by monitors engaged by the European Union Delegation to Serbia, [114] which was considerably more critical with respect to both processes, was therefore not surprising. The contents of the monitors' report were revealed through an announcement of the Greens in the European Parliament, stating that "the European Commission had withheld important information in its Progress report related to judicial reform in Serbia", and that the Greens shall address a parliamentary question to the Commission. In the question, the two European Parliament MPs stated they had directly asked the European Union Delegation to Serbia for the monitors' report, but that it had not been made

eu_dokumenta/godisnji_izvestaji_ek_o_napretku/izestaj_o_napretku_srbije_2010_sa_%20aneksom.pdf, 01.09.2012.

113 http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/sr_analytical_rapport_2011_en.pdf and http://www.seio.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/analiticki_izvestaj_2010.pdf, 01.09.2012.

114 For more information visit http://pescanik.net/2011/12/evropa-ignorise-mane-srpskog-pravosuda/, 01.09.2012.

available to them; the MPs, however, obtained the report through other channels. The question refers to the considerable discrepancy between the monitoring report and the Commission's statements, and the Commission was hence asked to admit that it had withheld important information from the Parliament and to explain the measures it would take to address the shortcomings in the work of the High Judicial Council. [115]

The Greens MP also requested from the European Commission to give a fair assessment of the judicial reform in Serbia.

This development was an indication of the extent to which the assessment of the European Commission regarding Serbian judicial reform became a political rather than a legal issue in 2011. This is easily seen in the answer provided to the abovementioned parliamentary question by the European Commissioner for Enlargement, Stefan Füle, who said that the Commission based its assessments on various sources, not just the work of individual experts who may not always have as complete an understanding as the Commission of all issues at stake, and, furthermore, that the local monitors' report was produced for internal use only, and it expresses only the views of the monitors, not the opinions of the Delegation or the Commission.

However, it seems likely that in the future the European Commission shall take a more critical position relative to the judicial reform in Serbia, having regard to the opening of negotiations for EU accession. It was announced[116] that the reform process would be closely monitored and that only the insight into individual reasoned decisions adopted in the review process would enable a final assessment on the success of the judicial reform in Serbia. The presence of the EU Delegation monitors at the High Judicial Council sessions was requested once again, in order to alleviate at least some procedural shortcomings related to transparency. As mentioned be-

115 Parliamentary question available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2012-000006+0+DOC+XML+V0//EN (01.09.2012.), a direct link to the answer is also available.

116 Source: http://www.danas.rs/danasrs/politika/brisel_ozbiljno_zabrinut_zbog_reforme_pravosudja.56.html?news_id=234993, 01.09.2012.

fore, EU and OSCE monitors were allowed to attend HJC sessions as of March 8, 2012.

How come that the Commission has changed it course? It seems to have happened for the following reasons:

- manifest shortcomings in the work of the High Judicial Council and the State Prosecutors' Council;
- the pressure of the legal community in Serbia, particularly after the publication of the Ombudsman's opinion;
- EU Delegation to Serbia openly criticized the process;
- public pressure and criticism in the European Union, coming from the European Parliament in particular.

5.5. CONCLUSION

Providing a clear and unambiguous assessment of whether the monitors' participation in the process had contributed to the quality of the review process seems to be impossible. Some conclusions, however, can be made.

A general impression is that the overall quality of the process conducted before the HJC and the SPC would have been lower, had the monitor's presence not been enabled. Participation of the professional association was more direct in the procedure before the SPC; however, their presence at the hearings, and the same goes for presence of the DEU monitors, has had little effect on the quality of the procedure before this body. The changes made in work of the HJC Commissions following the monitors' comments, addressed to the HJC through the EUD Head of Mission, were obvious and welcome. However, as shown in the text, the High Judicial Council had violated the principles of the right to a fair trial in a different manner, and had changed its practice only after the Ombudsman's intervention – which was, incidentally, synchronised with media reports on discrepancy between the monitoring report and the European Commission assessment of the review process; it was also issued close to the date when the decision on whether Serbia shall be granted the status of a candidate in the EU accession process was made.

In principle, as far as the legal community and the general public in Serbia are concerned, particularly given the ambition for Serbia to be a true *Rechtstaat*, a state where the rule of law is in force, it is rather upsetting that the highest and, at least in theory, the most independent judicial body in Serbia, the High Judicial Council, had made efforts to adjust some parts of the process conducted before it to the legal rules applicable to it only after the explicit reaction of the Ombudsman, led by political pressures relating to the accession to the European Union.

6. DECISIONS OF THE CONSTITUTIONAL COURT OF SERBIA OF JULY 2012

In its decision adopted on July 18, 2012, the Constitutional Court sustained the appeals of all non-appointed public prosecutors and deputy public prosecutors whose petitions were denied in the review process. This decision, whereby 122 non-appointed prosecutors were being reinstated, was explained by the Constitutional Court practically using the same arguments expressed by the legal community when warning of the grave shortcomings of the process and clear derogations from the right to a due process. These shortcomings were so manifest, that the Constitutional Court had heard the parties only in a small percentage of cases and found that the same violations are symptomatic of all cases in question; the Constitutional Court has therefore opted to adopt a single decision, using analogy. The adoption of a single, group reasoned decision is a shortcoming in terms of legal technique, the same one addressed by the Constitutional Court in its decision in Tasic and Saveljic cases – there are no individual grounds the decision refers to in each given case. However, this shortcoming is somewhat relieved by the decisions' reasoning – it is clear that the reasoning is applicable to each individual case.

When explicating its decision, the Constitutional Court starts from the normative and factual framework of the cases and states the following:

- The SPC is a court or a tribunal, since it directly decides on the rights and obligations of the non-appointed prosecutors and deputy prosecutors (their status and position), and that therefore its decisions and the procedure for adopting them are subject to the requirements of a fair trial. This statement is exceptionally important for further analysis of the SPC actions, since the SPC is therefore expected to act as an independent and impartial court or a tribunal, established by the law, in terms of the ECrHR jurisprudence relative to Article 6 of the ECHR, the right to a fair trial, and to discuss the petitioner's rights and obligations publicly, that is, whether the petitioners meet the criteria for appointment, and make a decision thereof within reasonable time.

- The court also found that the review process was conducted by the SPC as a collegiate body, which was the only body entitled to do so, according to the law, and that this power was not vested in the commissions subsequently established in order to hold interviews with the non-appointed prosecutors and deputy prosecutors.

- Considering SPC's impartiality further, the Constitutional Court concluded that impartiality is primarily reflected in the actions of a judge (in this case, SPC members) who has no reason to favour any party to the proceedings. Impartiality is reflected in absence of any bias and personal neutrality in work and decision-making. Given that the second (permanent) composition of the SPC comprised some members who were also members to its initial composition and who have participated in the adoption of the initial decisions, the Constitutional Court found that this clearly affected the impartiality of such members. The right to a fair trial is *incompatible* with having the same persons decide both in the first and the second instance. All SPC members who have participated in the work of its first composition should not have participated in the work of its permanent compositions. The Constitutional Court clearly stated that participation in the SPC's work included the very presence at the sessions, discussion, deliberation and voting, no matter whether the members in question had actively participated in the discussion or have voted at all.

In addition to these violations, which in themselves constitute sufficient grounds to sustain the petitions, the Constitutional Court had the need to analyse three more types of procedural violations observed with regards to certain groups of cases.

The first group of cases was related to the petitioners who were never served the initial reasoned decision on non-appointment. Since it was never established which appointment criteria they did not meet, the SPC *could not have re-examined the facts* the decision on non-appointment was based on – because such decision has not been made. This is why the Constitutional Court had considered the review process before the SPC with regards to such petitioners as the *initial appointment process.* However, given that, in legal terms, this procedure was a second-instance procedure, the SPC *could not have made a decision that is detrimental to the petitioner* (the prohibition of *reformatio in peius*) – and hence the only possible solution was for the SPC to pass a decision on their appointment. In all instances where the SPC had failed to do so, it had violated the right to a fair trial.

The second group of cases concerns the petitioners who were served the initial reasoned decision, which stated that they met the appointment criteria, but that they were not appointed because "other candidates meet better conditions" (as explained before, we assume that this means that the other candidates had better working results, although *none* such initial decision was corroborated by any evidence supporting this claim). The Constitutional Court established that in such cases the SPC was under the obligation to render a decision on appointment, unless it was unambiguously shown that the petitioner did not meet some of the appointment criteria *based on the facts that were known at the time the initial decision on non-appointment was made.* Contrary to this, the SPC had focused on establishing new facts entirely, which were either not known or were not a criterion at the time the decision was made. This is particularly related to accuracy, which was a new criterion introduced in the course of the review process, contrary to the Rulebook, as explained before. The Constitutional Court concluded that in these cases, instead of finding new facts that refute the as-

sumption that the petitioner met the appointment criteria at any cost, the SPC was *bound* to apply Article 14 of the Rulebook and pass a positive decision.

Finally, the third group of petitions, according to the Constitutional Court classification, comprises the cases in which the SPC had adopted the initial reasoned decision and provided detailed reasons for non-appointment. Although it mentioned that in such cases the petitioner's lack of competence, qualification or worthiness was established, the Constitutional Court reduced these cases to those in which the new decision is based on the analysis of accuracy, and, refusing to accept the interpretation according to which accuracy was a component of qualification or competence, it rightfully stated that accuracy, as such, did not constitute a deciding criterion, neither in the initial nor in the review process, and, moreover, that accuracy was not precisely determined or defined in any regulation and as such is too vague and not eligible for evaluating the work of public prosecutors and deputy public prosecutors. The Constitutional Court further stated that the assessment of the prosecutors' work given by the competent public prosecutor or the college of public prosecutors, which was a part of the case files used in the decision-making process, also included an assessment of the petitioner's efficiency and, therefore, accuracy, and that consequently there was no need (or possibility) to reinvestigate this assessment by collecting reports on accuracy. The Court further indicated that the collected reports were imprecise and underlined the lack of any standard in the application of the accuracy criterion, stating it was applied arbitrarily. The SPC had not inspected any of the cases which it referred to as the instances of exceeding the instructive time limits, and it had failed to establish the circumstances leading to such excess. Having all that in mind, the Constitutional Court concluded that the non-appointed prosecutors and deputy prosecutors were *discriminated* against, since accuracy was applied only in the review process, whereas it was not applied in the 2009 appointment process.

In addition to these three groups of cases, the Constitutional Court also referred to two more types, although, for some reason,

it did not include them in the main classification. The Court first stated that all decisions based on the fact that the non-appointed prosecutors did not exercise their function in the 2006-2008 period and hence did not meet the qualification, competence and worthiness criteria, were not grounded in any regulations governing the appointment process or the review process. Lack of work engagement cannot be considered to be the petitioner's' fault, and they cannot suffer any consequences thereof. Quite to the contrary, the Constitutional Court has taken the position that the SPC was under the obligation to ensure the working engagement of such persons based on Article 62, paragraph 3 of the Public Prosecutors' Offices Act, by transferring them to such public prosecutors' offices where there was a need for their work. The second group is made of cases of petitioners' unworthiness. The Constitutional Courts that the "equality of arms" principle was not observed, and that the petitioners were not given the opportunity to refute the facts conclusion on their unworthiness was made on, and that hence their right to a fair trial was violated.

Having all that in mind, the Constitutional Court concluded that the assumption that the petitioners met the appointment criteria was not refuted in any of the cases. This is why it ordered the SPC to apply Article 14 of the Rulebook and use summary proceedings to *appoint all the petitioners* to prosecutorial offices they had applied to. The Constitutional Court also reminded that such appointment does not prevent the SPC from exercising the competence referred to in Article 55, paragraph 2 of the Public Prosecutors' Offices Act and conduct envisaged proceedings in order to investigate, with regards to certain prosecutors or deputy prosecutors, whether they meet the general statutory appointment criteria.

Acting on the appeals filed by non-appointed judges whose petitions were denied in the review process conducted in 2011 and 2012, the Constitutional Court adopted four decisions[117] whereby it

117 Decision in case VIIIУ-534/2011, adopted at the session held on July 11, 2012, and decisions in cases VIIIУ-364/2011, VIIIУ-570/2011 and VIIIУ-727/2011 adopted at the session held on July 18, 2012,

had sustained all the petitions, and ordered the High Judicial Council to appoint the petitioners to judicial offices within 60 days.

Resorting to the similar technique used when deciding on the appeals of non-appointed prosecutors and deputy prosecutors, the Constitutional Court decided not to investigate individual cases but, finding that the same issues concern all the petitioners, decided to join cases and pass a number of "group" decisions. Interestingly enough, although public hearings were held in a number of cases, they were not attended by representatives of the HJC, although duly summoned.[118]

The Constitutional Court based its decisions on the same objections regarding the work of the High Judicial Councils that were expressed before by the legal community.

It is of particular importance that the Constitutional Court took the standing that, when it acted on the petitions on non-appointed judges, the High Judicial Council acted as a tribunal established by the law and consequently was bound by the standards of fair trial, and was under the obligation to observe the assumption that the petitioners met the appointment criteria. The Court emphasised that only the facts and reasons already established by the initial HJC composition when making the decision on non-appointment could be subject to scrutiny in the review process.

In addition, the Constitutional Court of Serbia had adopted the position that the permanent composition of the High Judicial Council, which acted in the review process, did not in principle compromise the character of this body as a "court established by the law" in terms of Article 32 paragraph 1 of the Serbian Constitution and Article 6 paragraph 1 of the European Convention on Human Rights, but then examined its composition with a view to the impartiality of its members. In doing so, the Constitutional Court found that the participation of the HJC members who were also members of the initial HJC composition and who participated in making decision on candidates' applications in the general appoint-

118 http://www.blic.rs/Vesti/Drustvo/333137/Ustavni-sud-Iz-VSS-se-nisu-odazvali-na-rasprave-o-zalbama

ment process – these are the ex officio HJC members and a renown legal expert who is a barrister – is contrary to the requirement of court impartiality. The Constitutional Court underlined that in order to achieve observance of the principle of judges' impartiality, it did not suffice for the mentioned HJC members just to refrain from voting, and reminded that, in the light of the practice of the European Court of Human Rights, they should not have been present when the decision was being made, since their sheer presence created the impression of lack of independence and impartiality.[119] Furthermore, the court assessed that a person who cannot participate in the decision-making should not participate in the work of the body conducting the procedure which is concluded by the decisions, which also means that such person may not constitute the quorum necessary for the work of such body.

The Constitutional Court then reflected on the controversial issue of the status of a HJC permanent composition member – a law professor, and with regards to whom the Anti-Corruption agency had established the existence of conflict of interest and consequently, the termination of membership in the HJC, whilst the National Assembly refused to discharge him from his office. The Constitutional Court took the position that, given the relevant normative framework, the office of this HJC member can be terminated only by a decision of the National Assembly, being the body which had appointed him, and that hence the fact that he remained in office is not questionable. However, bearing in mind the requirement of HJC being impartial in objective terms, the Constitutional Court found that the sheer adoption of the decision by the Anti-Corruption Agency compromised impartiality of this member and that hence he should not have participated in the work of the HJC or in the passing of decisions.

The Constitutional Court had thus concluded that only the appointed judge-members of the HJC who have permanent tenure could have participated in the decision-making process relative to the petitions of the non-appointed judges.

119 Constitutional Court decision in case VIIIУ-534/2011, p. 14

Consequently, the Court also concluded that the assumption that the petitioner meets the appointment criteria (qualification, competence, worthiness) in the review process could have been considered refuted only provided that at least six members of the HJC permanent composition who are judges with permanent tenure and who were not members of the initial HJC composition, have voted for the petition to be denied.

After having inspected the minutes of the deliberations and voting of the HJC permanent composition, the Constitutional Court established that not only did the members which, in the Court's opinion, were not entitled to participate in the decision-making process have done so, by refraining from voting, but their votes were treated as votes "against" the petition being sustained, which resulted in the petition being effectively denied. The Constitutional Court reminded that the vote on the petitioner must be viewed in the light of the assumption that the petitioner meets the qualification, competence and worthiness criteria which, in order to be refuted, must be supported by the votes of the six newly appointed judge-members. In any other case, in the opinion of the Constitutional Court, this assumption cannot be assumed to have been refuted.

The Constitutional Court has further assessed that the review process was characterised by additional shortcomings, which render the mentioned assumption not refuted even in the cases when the permanent HJC composition had adopted its decisions on the basis of legally valid votes. Namely, the Constitutional Court found that the principle of equality of arms was violated in the review process, and that the decisions whereby the petitions were denied were based on manifestly arbitrary application of substantive law. The Constitutional Court went on to indicate several paradigmatic examples of interpretation of the criteria of qualification and competence, finding that in their interpretation, the HJC had used a too wide margin of appreciation and was selective, and furthermore had failed to give the petitioners the opportunity to challenge the claims with regards to their unworthiness in a public hearing. The Constitutional Court thus found that the equality of arms, one of

the key aspects of the right to a fair trial, was violated in the review process.

It is hence the Constitutional Court's position that the assumption the petitioner meets the appointment criteria was not refuted with regards to any petitioner. Given that the burden of proof concerning the existence of grounds for non-appointment was borne by the High Judicial Council, the Constitutional Court had sustained the appeals, thus quashing all HJC decisions adopted in the review process, and ordered the High Judicial Council to appoint the petitioners to judicial offices in courts which have taken over a part of the competence or full competence of the courts where the petitioners' had worked prior to the 2009 appointment. The Constitutional Court also emphasised that, prior to acting on its decision, the High Judicial Council must establish whether there are statutory grounds for termination of judicial office regarding each individual petitioner, to establish whether there are sufficient judicial vacancies or to previously amend the Decision on the number of judges in order to enable the petitioners to be appointed to adequate courts. Furthermore, the Constitutional Court reminded the HJC that this decision does not prevent the HJC from exercising its competence referred to in Article 6 of the Act Amending the Judges' Act and re-investigate the grounds for suspicion relative to judges' qualification, competence and worthiness.

7. HOW TO END THE JUDICIAL REFORM IN SERBIA?

Even in the present day, in the very 2006 Constitution and even more so in the Constitutional Act for its implementation, the legislator's intention to declare the existing courts new and appoint new judges to such courts is evident. This intention resulted from the notion of new legalism, as explained in the text, the formal framework of which was set up in the 2004-2007 period, in the times of Vojislav Kostunica's government. The framework was changed in 2008-2011, during the mandate of the Government dominated by the Democratic Party. The judicial reform was also defended (with-

out authorisation) by the president of the Republic of Serbia, Boris Tadic.

Over the past ten years the lack of a serious public debate on what kind of judiciary Serbia should have and whether it may meet the elementary need for legal protection of citizens is evident. It is also worth asking whether the judiciary in Serbia can change in a satisfactory manner within the existing constitutional framework, or should such framework be abandoned. Changing the judiciary by departing from the constitutional framework is criticized in theory and practice as derogation from the principles of *Rechtstaat*. Although we uphold the Rechtstaat principle, the answer to this question must be negative. Therefore, can the Serbian judiciary change for the better within the existing constitutional framework? Our answer is: no, it cannot.

The first reason leading us to believe that it is impossible to change the judiciary within the existing constitutional framework is the fact that this framework itself is not legitimate; there are elements that perhaps even render it illegal – the numerous indications that the required majority for changing the constitution was not achieved at the referendum.

The second reason lies in the fact that the 2006 Constitution is in continuity with the constitutional, political and legal order of an authoritarian regime, whilst at the same time there are pleas for creating an independent judiciary – which cannot originate from one such environment.

The following reason is the fact that a considerable number of judges have failed to even appear independent and unbiased, not to mention true independence and lack of bias.

This is where any mention of a Rechtsstaat must stop – a Rechtstaat may not be built on techniques or mechanisms developed within an illegitimate constitutional framework. But, when something like this is said or written, it is immediately followed by an assessment that this means advocating for revolutionary laws, contrary to the Rechtstaat. And, as a result, we would end up on the very road followed by the actors of this reform.

However, we must not forget that between the Rechtsstaat and the revolutionary laws there is such a thing as *transitional justice*. The very purpose of transitional justice is to bridge the times between a legally disorganised and confused partocratic state and the rule of law in that state. The rule of law cannot emanate from itself, and particularly cannot stem from an illegitimate constitutional framework, and it cannot be protected by people who have never been seriously scrutinized with regards to their professional liability for violations of human rights. When there is no bridge towards the Rechtstaat, when the chance to select the new judicial corps made up of credible people, in a public and credible procedure, is wasted, what is left is just a group *effecting* an illegal state. This is the core difference from the actors of the reform: *they have been avoiding and are still avoiding lustration and other legal methods of coming to terms with the past*.

The damage caused by the alleged reform so far is too large – both in financial and ethical terms. Serbian citizens have the right to be aware of its financial outcome. How much did the "reform" cost so far, including all expenses paid for the salaries of non-appointed judges and prosecutors, and for the travels between the courts and court units, misplaced and lost case files included? What is the estimated cost of reforming the "reform", that is, of reviewing the decisions on non-appointment? What is the estimated amount Serbia will pay to all those who initiate procedures before the European Court of Human Rights due to unjustifiably long court proceedings, and succeed? The citizens of Serbia may be able to sum up the results of the *moral* damage. What are the consequences of Serbia permanently avoiding to deal with its warring and authoritarian past? What is the meaning of the lie concerning judicial reform? True enough, lies are commonly used in politics, and not only in Serbia; but even in politics, one cannot lie all the time without being punished.

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