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Independent Justice?
Democratization and self-government the judiciary in Europe

Serbia – how to understand it and social processes within it

For the begging, Serbia is European country of around 7.4 million residents. Not so far ago Serbia was one of the six Yugoslav republics, with about 10 million out of 23.5 million inhabitants of the entire Yugoslavia.

Serbian state, however, existed since the eight century until mid of the fifteenth century. Serbs are Christians since the ninth century. The first Serbian king, Stefan Nemanjić, was crowned in 1217 with the blessing of the Pope. Serbian church became independent two years later (in 1219). From this year dates the written Constitution of Serbia (Nomocanon). Serbia was an empire in the fourteenth century (1345) and Serbian language was a diplomatic language in the fifteenth and sixteenth centuries in Turkish, Hungarian and Romanian court. During the Turkish campaign in Europe, in the late fourteenth century, Serbia fought two important battles with the Turks (in 1371 on the Maritsa River in the present Bulgaria, and on 28.06.1389 on Kosovo) and it suspended, for almost a century, the penetration of the Turkish Empire into Europe. Serbia lost its statehood in 1459.

Modern Serbian state was created in the nineteenth century (liberation uprisings in 1804 and 1815), after nearly four centuries under Ottoman rule (in 1815 it became Principality). Serbia created its own State by itself, despite the opposition of all major powers, including Russia. As it was enslaved during the four centuries under the Turkish reign, Serbia was not socially stratified - there was equality in poverty. After the Turks left Serbia in the nineteenth century, everyone was allowed to take as much land as they could cultivate. Restarting to build its statehood from the zero, Serbia enacted its Constitution in 1835 (only nine European countries had a constitution at that time), and the Civil Code in 1844 (it is the third Civil Code in Europe, after the French and Austrian). It became a kingdom in 1882.

In the Balkan War (1912), Serbia together with Bulgaria, Montenegro and Greece pushed the Turkish Empire out of the Balkans for good and reclaimed its cradle – Kosovo and Metohija. After the World War I, in 1918, Serbia along with Montenegro aligned its country in a common state of Serbs, Croats and Slovenes (from 1920, Kingdom of Yugoslavia). In both the First and Second World War, Serbia was on the side of the winners, sustaining great sacrifices - in the First World War 25% of the total population was killed; in the Second World War Yugoslavia had 1.6 million victims, mostly Serbian[1].

During the ninety-nineties, Slovenia and Croatia withdrew from the common state Yugoslavia (25.05.1991), as well as Macedonia (08.09.1991) and Bosnia and Herzegovina (06.04.1992)[2]. Serbia and Montenegro formed the Federal Republic of Yugoslavia (27.04.1992), and they remained in the common state until 2006 when, following a referendum, Montenegro became independent. Without a referendum, a secession of Kosovo occurred in February 2008.

Serbian freedom-loving spirit rests in few important things: the facts that it had so early its statehood and treasured the memory of it throughout four centuries of slavery under the Turkish reign, that Serbia independently won its statehood in XIX century and the fact that at the time of creation of the modern Serbian state all inhabitants enjoyed the same rights and when it came to the property, they were almost equal.

Serbia, within Yugoslavia, is cofounder of the League of Nations and of the United Nations; became the member of the Council of Europe in 2003 and a candidate country for the EU membership as from March 2012; formal accession negotiations started in January 2014.

This mini portrait shows that Serbia is actually Europe in every sense - geographically, historically, and culturally.

Serbia before 2000

Until 1990, Serbia had a unity of power system in which the legislative and executive and judicial powers were united in the Assembly and in which there was no multi-party system. Such a state in the Western world is qualified as a dictatorship. Paradoxically, in such a state, the judicial profession, besides the medical and military ones, has always been one of the three most esteemed professions. We lived in several decades of peace and stability, the laws were of good quality, applicable and mutually harmonized, and attention of politicians was directed to few specific criminal cases that put on trial those who were considered to question the constitutional order of the country.

[1] During both World Wars the only free territories in the occupied countries of Europe were in Serbia (Toplice uprising in 1917, Užice Republic in 1941).

[2] Slovenia, Croatia and Bosnia and Herzegovina were admitted to membership in the UN on 22.05.1992, and Macedonia on 08.04.1993.

With the adoption of the Constitution in 1990 Serbia broke up with the socialist regime, which was evident even from the new name of the state: instead of SRS (Socialist Republic of Serbia), as of 1990 the official name is the Republic of Serbia. The Constitution equated all forms of ownership (privatization began a year earlier), introduced a system of separation of powers and political pluralism; and the permanent tenure of judges - until retirement, instead of the previous eight year tenure. Pursuant to the Constitution, all judges elected in 1992 or later, by the Republic Assembly, held a permanent position. It was a classical Constitution of discontinuity.

As mentioned, during the ninety-nineties the former SFRY fell apart, there was a war in Croatia and Bosnia, politics infiltrated all social areas, social values were collapsing, enormous inflation occurred (until 1994). Nearly 800 judges left the judiciary, namely a third of judicial personnel. The abandoned judgeships were never completely filled thereafter. The void that followed was filled by inexperienced and insufficiently trained judges, and a substantial number of judges that remained was overburdened with work, underpaid and demoralized.

Judiciary in Serbia from 2000 to the 2009 reappointment

After fall of Milosevic regime in October 2000 till 2009 more than two-thirds of judges were elected – either by being elected for the first time, or by being elected to courts of higher instance, and the composition of the Supreme Court was altered by nearly 80 percent.

Despite the fact that the new Government "checked" in one way or the other almost complete judicial personnel, for years after 2000 politicians have led a planned and persistent campaign against the judiciary, accusing it for all the problems in the system, publicly expressing the need and intention to "replace" judges – by lustration[3] or reappointment – the manner was not particularly important.

The current 2006 Constitution lifted to the constitutional level self-governing judicial body: High Judicial Council (HJC) which already existed according to the 2002 law. The Constitution did not prescribe the reappointment of judges with permanent tenures, nor lustration of judges. However, there were permanent rumors that there will be a reappointment in Serbia, especially after the enactment of the new Constitution.

In order to justify the reappointment in Serbia, a comparison to the reappointment that followed the processes resulting from the fall of the Berlin Wall in countries where the social and constitutional discontinuity occurred could not be used, neither could the establishment of a different socio-political system (Poland, Czech Republic, Slovakia, Hungary, Romania, Bulgaria,

[3] „Lustration" in the ancient Rome meant religious, ritual cleansing from sin. In modern times the term was introduced after the fall of the Berlin Wall and means an administrative or judicial procedure that allows release of an official in the state administration who violated basic human rights in performing his/her public duties under the old regime, which was established during the proceedings.

East Germany) or the former Yugoslav republics that, coming out of Yugoslavia, only established their statehood. In all these countries the judges up to that time had limited tenure and by the reappointment obtained tenure until retirement (while the number of non-reappointed judges in those states was negligible). In contrast, as already mentioned, Serbia has gone through this process in the early nineties - the judges were given a tenure until their retirement in 1992, after the enactment of the Constitution of 1990; having enacted this Constitution, with previously initiated privatization process, Serbia equated all forms of property, abandoned socialist system, introduced a system of separation of powers and political pluralism. Thus, social and constitutional discontinuity in Serbia made, back in the early nineties of the twentieth century, the reappointment of judges constitutionally and socially justified and it was executed then – in the early nineties. At that time almost all judges were reappointed, without any significant social tensions, and the quality of justice was on a far higher scale than today.

Due to the above said, there was no justification for the reappointment procedure to be repeated after the enactment of the Constitution in 2006. Moreover, the development of legal systems in Portugal and Spain after the authoritarian regime, without any personnel changes in the judiciary, proved that judicial reform could and should be implemented by changing the system, not people.

The arguments of the politicians that the then president Slobodan Milošević "secured" for the lifetime "his" judges by the reappointment in 1992, and therefore the new reappointment should be implemented almost two decades later were wrong. The example of emergence of the Judges' Association of Serbia proves it.

Integrity of judges and the emergence of the Judges' Association of Serbia

Last year, 2017, Judges' Association of Serbia (JAS) celebrated its 20 years of existence. It was founded in 1997, under the slogan "I do not accept", by six hundred judges (one quarter of the total number of judges). The reason was the refusal of judges to legalize, by their rulings, the theft of the votes at the local elections in 1996. Nowadays JAS has almost 1.100 members out of less then 2.600 judges. After the JAS, the Prosecutors' Association was founded (in 2001). Misdemeanor judges (who were not part of the judicial system until 2010) established their association in 2003.

Contrary to the views of politicians, the judges had no intention to enter politics. The intention was and remained to persist with the requests for judicial independence and the principles of separation of powers and the rule of law. The period from the establishment to the year 2000 was actually a struggle to realize the constitutional rights of judges as citizens to form professional associations. JAS was under pressure and persecution, which culminated in 1999 and 2000 with illegal dismissal of several dozens of its most distinguished members. JAS Board was left without the majority of its members, and the work of the JAS ceased. After the so called democratic changes in 2000, JAS finally obtained its official NGO (not a trade-union) status and

increased its membership (now, 1.100 members, 46% of total number of judges, not including misdemeanor judges).

The emergence of the Judges' Association of Serbia is a clear indication that there was a healthy core of professional judges with integrity within the judiciary in Serbia. This example of "struggle" of the judges for their professional association is unique among societies "in transition", as in other countries the existence of such associations of judges was enabled by the new governments after the democratic changes.

JAS is a member of the European Association of Judges for Democracy and Freedom (MEDEL) since 2008, and the International Association of Judges (IAJ) since 2009. Since its establishment JAS remained forerunner in promoting the rule of law, application of *acquis* in judiciary and asking for the strategic and systemic reform of the judicial system[4]. JAS is convinced that the reform shortcuts and miracle solutions, including the change of persons instead of judiciary system, are not acceptable and that only systemic strengthening of the judicial institutions and system as a whole can enable the rule of law.

Reappointment in 2009

Reappointment (so called "general election") was prescribed by judicial laws adopted in December 2008 according which all sitting judges who already lifetime tenure had to apply for the reelection. Although politicians justified this solution with different reasons in different circumstances before different interlocutors, thus presenting it abroad most often as lustration, the reappointment in Serbia was not lustration.

Nearly 840 judges found out that they were not appointed by not finding their names on the list of appointed judges published in December 2009. In the beginning it was told publicly that not appointed (in fact - dismissed) judges had no right to a decision, so that they would not get it at all. Only at the end of January 2010 a decision was served on the non-reappointed judges, which

[4] Through the proactive insight into the problems in the judicial system, the JAS initiated in 2001 the creation of a centre for training of judges, and together with the Government of Serbia, with equal founding share, became co-founder of the Judicial Training Centre. In 2005, a year before the Government, JAS prepared and presented to the public its vision of the judicial reform strategy, participated in the work of the Commission for Judicial Reform (in a number of working groups, among others those for the development of guidelines for judicial laws, the Law on the High Judicial Council and the Law on Judicial Academy), organizing simultaneously numerous technical conferences for the purpose of public debate on constitutional and legal provisions. Code of Ethics, adopted in 1997, on the occasion of the establishment of the Judges' Association, was improved in 2003 by the Standards of Judicial Ethics, followed by the foundation of the Ethical Council of the Judges' Association.

JAS advocated the introduction of a judicial council as a judicial self-governace body (established by the law in 2002), a reliable system for evaluating the work of judges and the system of disciplinary responsibility, as mechanisms for improving the judicial system, with due respect for the judicial independence guarantees, which systems were envisaged by the Law on Judges of 2008 (although not adequately elaborated in the bylaws, but wrongly and simplistically understood as a system of "punishing" the judges).

contained, in addition to the statement on the termination of judicial duty for 837 former judges, only a general explanation, identical for all.

The (re)appointment procedure was conducted during an unreasonably short period, in a little more than three months, i.e. in 5 minutes per candidate. A dead judge was reappointed, a dozen of judges were reappointed to the judicial functions in two courts, and one judge found himself both on the list of appointed and the non-appointed. Several judges whose dismissal was proposed earlier were reappointed. Judges whose spouses were lawyers were not reappointed. The unauthorized personal data of judges were used, among other things on the marital status of candidates and occupation of spouses and data from secret cervices. All of that, and in such a way, was done not by executives, but by High Judicial Council, the self-governing judicial body whose constitutional role is to be independent in order to be able to safeguard the independence of judges and courts.

Review of decisions on (non) reappointment 2011 - 2012

Due to the public and EU pressure, the Government had to introduce a process of review of dismissal decisions made during the. The review process was conducted by eleven members HJC (3 *ex officio* members: President of the Supreme Court of Cassation, President of the Judiciary Committee of the National Assembly and Minister of Justice, six judges, a law professor and an attorney) out of which four were "old" members - the same ones who carried out the reappointment (*ex officio* members and an attorney). Six new members of HJC from among the judges were elected in March 2011. At judicial elections 837 judges who were not reappointed (a third of judges) could not vote for their representatives in HJC, nor be candidates themselves.

The review process was conducted from June 2011 to May 2012 on the basis of retroactive rules (which introduced new criteria for evaluation of the work of judges, which were not valid before 2011). The procedure was carried out as a simulation, in order to justify the decisions on non-reappointment from December 2009 (only 17% of decisions on non-reappointment were annulled). One member of the HJC, from among the ranks of judges, who overturned most of the decisions on non-reappointment at the first session of HJC, was "punished" the very next day by transferring his wife, Deputy Senior Public Prosecutor in Belgrade, to another town; two months later he was arrested (after a controversial indictment) and held in custody for almost half a year; he remained suspended till the end of his tenure and finally convicted after two times being acquitted. The other member, resigned from membership in HJC due the unlawful and arbitrary work of HJC, as he stated. For the third member, from among the ranks of Professors, the Anti-Corruption Agency established that he violated the Law on Anti-Corruption and noted that his office at the HJC ceased by force of law, but he continued to perform it.

The Ombudsman, in January 2012, noted in his decision that HJC has worked over a longer period of time in a manner that has given rise to grave doubts about the lawfulness and regularity

i.e. legitimacy of the work of this authority, and the Constitutional Court in July 2012 annulled all the decisions passed in this procedure. Observers engaged by the European Commission to observe the daily work of HJC in the process of reappointment review assessed that HJC members themselves were incompetent, ill-equipped and unworthy.

Instead of being the guarantor of judicial independence, in line with its constitutional function, HJC created by its actions an impression of dependence, bias, arbitrary work under external, especially political influence and intimidated judges with its unlawful and arbitrary operations. The members of HJC who have not incurred any responsibility for proceeding in such a manner remained in HJC till the end of their tenure in 2016.

What did Europe do?

All the above mentioned related to the termination of judicial tenure in a European country took place before the eyes of Europe. Before the eyes of the Council of Europe which Serbia is a member of and the European Union, whose membership Serbia pursues.

The Council of Europe since 2003, in post monitoring, and especially the European Union since 2002, through its agencies, carefully observed the process of judicial reform in Serbia, even before the reappointment. In this process their role has changed, from the role of seemingly passive observer, through an entity that actively influenced the events, up to a factor willing to accept the arising consequences under the condition to resolve the issue of extradition of the accused for war crimes and the "Kosovo issue". European Commission has reported regularly (Since March 2002) to its Council and Parliament on progress made by the countries of the Western Balkans region, that means Serbia as well. These progress reports briefly describe the relations between Serbia and the Union; analyze the situation in Serbia in terms of the political criteria for membership; analyze the situation in Serbia on the basis of the economic criteria for membership; review Serbia's capacity to implement European standards, that is, to gradually approximate its legislation and policies with those of the *acquis*, in line with the Stabilization and Association Agreement and the European Partnership priorities.

Over the years, regularities in relations between the EU and Serbia were observed. Whenever the EU required certain actions from Serbia it immediately insisted on the rule of law in Serbia. And whenever Serbia met certain requirements, the EU would for some time "forget" about the rule of law in Serbia. In early October 2008, the draft judicial laws prescribing the reappointment of judges saw the light of day. JAS warned thereon the Venice Commission which has never even seen the final drafts of the laws, let alone given its expert opinion[5] but the Venice Commission and the Council of Europe nevertheless let the situation seem as if they can have no affect on it.

[5] In the electronic correspondence with the President of the Judges' Association, Thomas Markert, Secretary of the Venice Commission, stated (on 22.10.2008) that Commission offers expert opinion on legal acts only at the request of the member states of the Council of Europe, which Serbia did not submit, but that, after receiving

JAS informed Olli Rehn, the then Commissioner for Enlargement, about the planned precedent to carry out the reappointment of all judges, which was both unconstitutional and incompliant with the European standards and unnecessary for Serbia[6]. The European Commission has responded, but with restraint and only formally, evidenced by the correspondence of the Commissioner for Enlargement with the Minister of Justice at the beginning of 2009[7], and in fact enabled the reappointment to take place. In 2009 EU did not have any reaction to the reappointment undertaken in December 2009. Even if it did not give the "green light", the European Union certainly did not turn on a "red light".

Only when the judicial and afterwards prosecutorial association reacted strongly after the publication of the results of reappointment, which was joined by part of domestic and foreign experts, the European Union reacted as well. In February 2010, the European Union five-member expert mission came, and on the basis of its report the EU Deputy Prime Minister Viviane Reding and the Commissioner for Enlargement Stefan Füle sent to Serbian authorities a

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the information by the JAS on the events related to the judiciary, the Commission addressed the Government of Serbia in the second half of October 2008, offering to deliver expert opinion on the final drafts of judicial laws as soon as possible, to which the Government has not responded. Serbian officials claimed in public that the Venice Commission agreed to the decision to implement the reappointment of judges. Although the Secretary of the Venice Commission, in the e-mail to the JAS President of 5.12.2008 denied such claims, bitter impression remains that the unofficial approval of the Venice Commission however existed.

[6] In the letter of the JAS to Olli Rehn, dated 16.12.2008, the following was stated: „*Whilst realising that the urgency of adopting laws related to the judiciary in Serbia is motivated, inter alia, by the need to join the European Union as soon as possible, please let us reassure you that, although we indeed share that goal, we are of the view that these laws must also be of high quality, applicable and in accordance with international standards, which are and ought to be part of Serbia's reality – both in legal terms and in real life.*

... There is no doubt that Serbia's judiciary is in need of improvement. That improvement can, however, be achieved only in a constitutional manner, in keeping with European principles and values which are a composite part of Serbia's constitutional system, because only that can constitute reliable foundations for the rule of law. What overriding goal could justify such disrespect of the Constitution and European standards on our road to Europe?" Complete letter is available at: http://sudije.rs/sr/aktuelnosti/vesti/pismo-g-oliju-renu-komesaru-za-prosirenje-evropske-unije

Although the Commissioner for Enlargement replied to the letter only after two days, on 18.12.2008, saying: „Many *thanks for your important e-letter. I shall give it due attention and have asked my colleagues in DG Enlargement to study it carefully. It is indeed essential that the judicial reform in Serbia will soundly respect European standards, as your country is on its road to become an EU member state*" nothing, in fact, ever happened.

[7] In a letter (2009) 30 of 5.2.2009, addressed to the then Minister of Justice, Snežana Malović, the Commissioner for Enlargement stated that he shared some concern with the Judges' Association, with whom he is in contact, especially as regards the provisions concerning the reappointment of all judges and procedures for the election of members of the first composition of HJC. The letter emphasized that the permanence of judicial tenure is the basic assumption of judicial independence and that it is protected by the Constitution of Serbia, while the new Law on HJC does not provide for adequate representation of the judiciary, although it is of particular importance given that the HJC should conduct the reappointment. He stressed that he had observed risk of political influence that could jeopardize the independence and impartiality of Serbian judges, which was pointed out in the Venice Commission Opinion and European Commission Report on the progress of Serbia in 2008.

dramatic warning letter, dated 16 March 2010. The EU has carefully monitored events in the Serbian judiciary throughout 2010, demanding that the deficiencies should be eliminated and until then not to consolidate the established situation.

But, during the time, it seemed that in the eyes of the European Commission the elimination of the defects of the reappointment took too long and it did not seem that it would be solved soon. As of December 2010, the European Commission, which seeks visible results and efficient operations from others, and therefore cannot allow itself to be slow and fail to resolve the problems, took a different position in terms of "judicial reform". The European Commission has opted to support the changes to the judicial laws that prescribe the review of reappointment procedure. New judicial laws "turned" legal remedies of non reappointed judges (constitutional appeal) already filed before the Constitutional Court, into another, so far non-existent remedy filed before the HJC and prescribed that Constitutional Court should transfer all its cases to the HJC – so, the same HJC which dismissed those judges was authorized to decide on the legal remedy against its own decisions. The laws which were unconstitutional, retroactive and retrograde, were put into parliamentary procedure less than 24 hours before the start of the debate, under urgent procedure on the grounds that the laws are *„completely prepared in cooperation with the representatives of the European and the Venice Commission, who gave a positive opinion about them".* Professional associations of judges and prosecutors, on this occasion, addressed several times the President of the European Commission. Only a month and a half later, after the letter of the president of the European Commission dated 7.12.2010, which stressed: „*Until the review is not fully completed, it is necessary to avoid any consolidation of the situation that is the result of the conducted reappointment",* the presidents of professional associations received a letter dated 27.1.2011, stating that the European Commission believes that, with the amendments to the law, the authorities *„made a compromise and an important step toward correcting the situation, bearing in mind the shortcomings of the reappointment process and the elapsed time that to some extent already consolidated the situation".*

During a meeting in May 2011 in Belgrade, when discussing the rules for the review of the reappointment, a changed attitude of the European Union was expressed in terms of fundamental corrections of reappointment deficiencies. The meeting was extremely bizarre, as it came to the composition of participants, its duration, and its nature. It was attended by representatives of HJC, including the Minister of Justice and the President of the Parliamentary Committee for the Judiciary, the European Commission, with the judge - EU expert, EU Ambassador to Serbia, representatives of the Council of Europe, OSCE and the Judges' Association. The meeting lasted for 15 hours straight - from 09:00 am until almost 01:00 in the morning the next day. Almost as it was a politicians' meeting, a portion of an unnamed document was analyzed, the so-called non-paper, and in English language. According to the previous agreement the draft Guidelines for the review should have been discussed as well, designed by the Judges' Association, which were positively evaluated and recommended for approval by the EU representative a week before, but that did not happen. After that meeting it was wrongly presented to the public that the rules were adopted with the approval of the Judges' Association.

In a public statement Judges' Association denied this information and indicated that the burden of responsibility for implementing the Rules that are based on arbitrariness and non-objectivity shall also fall on the European Commission. Subsequently, like many times before, such strange conduct of the EU representatives was clarified. A few days later the accused Ratko Mladić was arrested and handed over to the Hague Tribunal (31.05.2011), and soon after, on the day of the first hearing for in the review of the reappointment (20.07.2011) Goran Hadzić as well. A critical view of the European Union on the problems of reappointment, altered in late 2010, was most clearly depicted in the uncritical and unrealistic Progress Report for 2011. The Report subordinated all the issues, including the issue of the status of judiciary, to the Kosovo issue (i.e. the expectation that the authorities in Serbia will come closer to formal recognition of Kosovo's independence) and "presented" an argument to politicians that judicial reform was carried out in a satisfactory manner.

Nowadays, during almost a whole year, Serbia is in a process of changing its 2006 Constitution. Serbia committed to amending the constitutional provisions on the judiciary in its 2013-2018 National Judicial Reform Strategy, which was adopted by the National Assembly back in 2013, and in its EU accession Chapter 23 Action Plan, which the Serbian Government adopted in 2016. The explicit reason to amend the 2006 Constitution is to depoliticise i.e. strengthen the independence of the judiciary. However, the populist tendencies which are raising in some EU members countries are present in Serbia as well. The Draft Amendments are based on the view that the executive and legislative authorities will “improve” the judiciary through their control, justified by the legitimacy they obtained from the citizens at (political) elections. In fact, that means that the principle of separation of powers is misunderstood, because the legislative and executive powers are based on political legitimacy stemming from the citizens’ will expressed at the elections, while the judiciary’s power stems from the profession, professional qualifications and type of work, the character of which precludes its performance by the people and thus its representatives (NA, the President). The organisation of state government based exclusively on the legitimacy stemming from the citizens’ will expressed at the elections leads to the unity of powers, is in violation of the principle of separation of powers, precludes the independence of the judiciary and results in the judiciary’s political accountability to the legislative and executive authorities, thus undermining the concept of the rule of law. The “checks and balances” rule applies to the relationship between the legislative and executive. It does not apply to the judiciary because that would eliminate the independence of the judiciary, and consequently divest the people of meaningful protection of their human rights. For the first time in Serbian recent history, the highest judicial institutions – the Supreme Court of Cassation, the High Judicial Council, the State Prosecutorial Council, numerous courts and associations of judges and prosecutors, leading constitutional law experts, a large share of attorneys, as well as renowned NGOs that have for years focused on human rights protection and the judiciary, have concluded that the politicians are fighting to preserve their power and subordinate the judiciary by the draft amendments. Once again, European Union is unjustifiably silent. As a stronger party in the negotiation process for Serbian accession, European Union should not afford itself

to be passive and to wait for the Venice Commission expertise on Serbian Constitutional amendments. And once again, such a stand of European Union coincide with its expectation of final solution of Kosovo issue. Every judge and prosecutor, and significant part of Serbian public as well are assured that, unfortunately, in order to achieve certain interests the European Union is ready to "trade" Fundamental Principles and rights defined in the Copenhagen criteria, among others - stability of institutions guaranteeing democracy, the rule of law and human rights.

Judges associations and judicial cooperation as a safeguard of the judicial independence

Fortunately, Europe is not only the EU institutions and politicians with their agendas. Europe is made of intellectuals and experts, and their associations, without prejudices or willing to give up their prejudices, who apply professional rules and do not behave according to the principle that all are equal but they are still more equal, who consider that principles belong to everyone alike. For, what else are the European legal standards, but the *acquis communautaire*, civilization heritage that belongs to every man, every country that aspires to democracy and the rule of law?!

Europe are people who believe that everyone has the right to require the application of the rules of logical and rational behavior that are crystallized through long-standing democratic practice, in order to improve the judicial system of their country and the rule of law in it. And in the manner which EUcrats often ignore, not by copy-paste solutions, but through the interpretation and creation of its rules of "good behavior" while considering their own legal and social traditions and their own capabilities, because only such an approach successfully "commissions" the *acquis*. Just because of these people and organizations, due to their enthusiasm and assistance, judges and prosecutors in Serbia, and Serbia as a country, managed to resolve dangerous and incorrect exercise related to reappointment of judges. There is no European expert, and there were many of them in Serbia, who had a different opinion related to the reappointment than this which is now expressed. Experts, no matter where they come from, speak the same language.

CCJE passed the declaration on Serbia for times (even before the reappointment – in 2008, than in 2010, 2012, and now in May 2018). International and European Association of Judges also repeatedly dealt with the situation in the Serbian judiciary, including in May 2018. Based on the decision of the European Association of Judges of 11.5.2012, the then president Gerhard Reissner addressed the President of the European Commission and other European officials on 5.6.2012, in a letter which stated, inter alia: *„From the very beginning the re-election process, which included all judges even those with permanent tenure of office, was not in line with international standards... Therefore it is absolutely necessary to proof that a fair solution corresponding to international standards and to Article 6 of the Convention finally eliminates the results of the political games and tricks which happened in the review process so far.“*

Dutch Foundation Judges for Judges in a practical and innovative way showed that the standards apply to all and that double standards should not apply. In December 2011 Dutch judge Tamara Trotman, president of Judges for Judges, initiated for the MPs of the European Parliament, Maria Cornelissen (the Netherlands) and Franziska Katarina Brantner (Germany) to pose a parliamentary question to the European Commission[8]. The question was "packed" as the problem of functioning of the European institutions: the European Parliament is supposed to pass long term decisions regarding the future of Europe based on reports submitted to it by the European Commission, so it is necessary for the institutions of the European Union to be able to have mutual confidence in one another. Since the Commission disposed of two contradicting reports on the same thing (problems in the Serbian judiciary created by the reappointment), one which stated that „*everything will, hopefully, turnout well*" (Progress Report for Serbia for 2011) while the other that „travesty of justice" was taking place (the Report of the EU observers from 2011), the MEPs asked the Commissioner for Enlargement Policy how would the European Parliament be sure that is passed reliable and long-lasting decisions if it was not sure whether the reports of the European Commission were reliable. The Commissioner responded within less than 24 hours (late December 2011) that the whole process would, of course, continue to be monitored.

Last but certainly not the least, MEDEL provide various assistance as well. Already in January 2010, the then president of MEDEL, Vito Monetti participated in Belgrade in a round table, and in early February 2010 to Belgrade came monitoring mission of MEDEL and the Dutch foundation Judges for Judges to investigate what actually happened in the Serbian judiciary. And since then, for almost three full subsequent years, assistance did not cease - it was consistent, diverse, and creative, out of the heart. Since November 2011 an audit of Serbian judiciary was prepared, according to the model designed by Antonio Cluny, the then president of MEDEL. In April 2012, two independent experts engaged by MEDEL, Simon Gaboriau and Hans Ernst Boettcher, conducted the audit. During six days they held twenty meetings with dozens of representatives of the highest state institutions (president of Parliament, who was at that moment acting president of Serbia as well, Ombudsman, President of the Constitutional Court, representatives of High judicial council, State prosecutorial council, Anti-Corruption Council, Anti-Corruption Agency, State reviser, Commissioner for Information of Public Importance and Personal Data Protection), deans of two law faculties, President of the Trade Union of Judicial Workers, representatives of Bar Associations of Belgrade and Serbia, associations of journalists, judges, prosecutors, Transparency Serbia, Fund for an Open Society and several ambassadors. At the end of the visit they held a very well attended press conference. In June 2012 the experts presented, again in Belgrade, their written report on the audit, at the acclaimed and well-attended

[8] Article published at the end of December 2011, in the Sueddeutsche Zeitung stated that *"European Commission does not control too closely the development of the rule of law in Serbia, in order to enable faster convergence of Serbia to the EU ". A confidential report referred to by the German newspaper is about "a mockery of law" in Serbia, as well as "unacceptable political influence on the judiciary." "In any case, there is a clear discrepancy between the confidential report of legal experts of the Commission and the official position that Serbian made a "huge" progress in judiciary, as recently stated by the Commissioner for Enlargement, Stefan Fule",* wrote Sueddeutsche Zeitung.

conference. In their extensive report it was concluded, inter alia, that, even after the completion of the audit, the reasons for the implementation of the "general elections" and the reasons why certain judges and prosecutors were dismissed remain unknown because there was no lustration; proceedings before the HJC did not involve corruption and a very small number of cases discovered ethical failures; decisions taken on the basis of performance statistics... are unconvincing because the available data are incomplete and of poor quality, and the quality of the judges' performance cannot be reduced to simple statistics. Such a situation led to a major disruption in the functioning of the entire judicial system: the offices of presiding judges are filled by "acting" judges who are "vulnerable" due to their position; HJC has no legitimacy; fear reigns among judges and prosecutors; suspicion and mistrust are omnipresent among citizens. The report was further exchanged among the European institutions and used and it facilitated in November 2012 a meeting of representatives of MEDEL and the Commissioner for Enlargement.

In a rather surprising turn, in July 2012, the Constitutional Court upheld the appeals of the non-reappointed judges and prosecutors, and overturned the consequences of an unconstitutional and contrary to international standards interruption of judicial tenure. Thus, the rule of law in Serbia was preserved primarily due to the activities of professional associations of judges and prosecutors, with the help of their colleagues from abroad.

In conclusion

Serbian reappointment exercise is clear example of the failure of judicial council to perform its duty and safeguard the independence of the judicial system. On the contrary, the council served as a cover for the not obvious yet strong undue political influence on the judiciary. That is why the very institution of the judicial council became the target of the critics and mistrust not only of public but of judges themselves. Still, neither judges nor democratic societies should abolish the idea of establishing and protecting the existence of the council for judiciary.

The principles of separation of power and independence of judiciary, as pillars of the rule of law, are deeply rooted in many European countries even though they do not have established councils for the judiciary. On the other hand, by their mere existence, judicial councils cannot ensure essential independence of judiciary. Not only horrifying experience of Turkey, but bitter and disappointing experiences of some EU member countries (Hungary, Poland) and fundamental impotence of EU in regards to that problem are vivid examples of it.

However, the judicial council is paradigm of the separation of power and the independence of judiciary, and makes legally visible and justified the existence of concrete mechanisms which enable prevention of legislative and executive pillars of power's influence on the judicial one and

develops necessary social awareness of the need for a division of power and independence of judiciary. That awareness is a social support and real guarantee for an independent judiciary.

In the real life the valuable achievements, such is independence of the judiciary, do not come as a gift from the heaven. Individuals and societies have to put strong, long lasting and never ending effort in order to accomplish them. International support can only help in it. Judges' Association of Serbia, together with MEDEL, International Association of Judges, the Dutch association and CCJE jointly acted in striving for the equal standards for Serbian judiciary as in other EU countries and for the strengthening the rule of law in Serbia. By being together throughout the past years, each and every one of us learnt about the other and was able to estimate whether we could trust one to other, since the confidence amongst judges from different countries is very important. And we successfully acted as the controllers and correctors of undemocratic deeds of state institutions. The circumstances now are different, the problems EU is faced with now a days are new and different, so the way of striving for the goal might be different as well. It is up to each of us to determine what it should look like. AS relates to Serbia, hopefully we will be as successful in the attempt to preserve and improve the constitutional safeguards of the independence related to the forthcoming amendment of the Serbian Constitution.