Ways towards Justice

IS THE JUDICIARY INDEPENDENT? (2)

RESISTANCE TO POLITICAL INFLUENCES

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In order to avoid the proclaimed independence of the judiciary to become just big words it is necessary to offer legal and genuine guaranties for its realization.

In this and the forthcoming issues we will analyze the existing safeguards for the independence of courts in Serbia, and then compare them to international standards. The answer to the question whether or not, and to which extent is the judiciary in Serbia independent, will come in itself.

One of the things that guarantee the independence of courts is also the procedure for the election of judges. Numerous international conventions and recommendations have established international standards in this regard.

We shall recall some of them. The Basic Principles on the Independence of the Judiciary (UN General Assembly 1985) say: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."... Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience."

Objective criteria

The Recommendation No. R (94) 12 of the Council of Europe's Committee of Ministers on the independence, efficiency and role of judges adopted in 1994 says: "The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. However, where the 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 in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following: 1) a special independent and competent body to give the government advice which it follows in practice; or 2) the right for an individual to appeal against a decision to an independent authority; or 3) the authority which makes the decision safeguards against undue or improper influences." The Explanatory Memorandum to this Recommendation specifies that "all decisions concerning the professional life of judges should be based on objective criteria and even though each member state has its own method of recruitment, election or appointment, the selection of candidates for the judiciary and the career of judges must be based on merit. In particular where the decision to appoint judges is taken by organs which are not independent of the government or the administration or, for instance, by the parliament or the president of the state, it is important that such decisions are taken only on the basis of objective criteria" and, also even "..in states where the judges are formally appointed by the government, there should be some kind of system whereby the appointment procedures of judges are transparent and independent in practice. In some states, this is ensured by special independent and competent bodies which give advice to the government, the parliament or the head of state which in practice is followed or by providing a possibility of appeal by the person concerned".

The European Charter on the Status of Judges (Council of Europe, 1998) says that in regard to any decision which influences the election, engagement, appointment, career or the termination of a judge's function, it shall be envisaged by law to have the intervention of an organ independent from the executive and legislative authorities, of which at least one half of members are judges, elected by their colleagues, in a procedure that guarantees the broadest representation of the judiciary.

Constitutional Framework

As we can see, international principles are defined in a flexible manner, so that it is possible to adapt the election of judges to the national systems, in accordance with legal tradition, needs and possibilities of each country. However, what these principles do insist upon, and what has to be applied in order to satisfy these principles, is that the criteria for the election (promotion) of judges must be objective and that bodies which decide on the selection shall be independent from the executive authorities. In case the decision is taken by organs which are not independent of the executive authorities or the parliaments, it must be secured that the decision is made on the basis of objective criteria and that there is a system which makes the procedures for appointment of judges transparent and independent in practice, which is ensured by special and independent competent bodies which give advice to the government, the parliament or the head of state, and which in practice is applied, or the person in question is enabled to appeal.

There are four main procedures for selection, i.e. appointment of judges: by organs of the executive or legislature; by citizens through direct elections; by judges themselves; by a specialized judicial body.

Serbia opted for a mixed system. A judge is elected by the National Assembly upon proposal of the High Judicial Council. It should be noted that we do not have a system of professional promotion, so that candidates who are already judges, in order to be elected to a higher ranking court must also go again through the entire procedure of candidature, proposing and eventually election in the National Assembly. The existing constitutional framework for the organization of the judiciary is obsolete and does not provide for an adequate basis for a complete implementation of international standards, and it is the fact that these standards, too, have not been persistently and completely applied even when this was possible according to the existing Constitution. Constitutional provisions related to this field are not sufficiently precise and made it possible to regulate crucial questions, including those pertaining to the selection of judges and presidents of courts, in essentially different ways, and still to remain within the constitutional framework. I will remind that since 2002, when they came into force, until today the so-called systemic laws which arrange the judicial system were changed many times. So, the Act on Judges was changed eight times, the Act on the High Judicial Council five times, and the Act on Organization of Courts four times. What is particularly concerning is that these changes were often going in the direction of reducing the already achieved level of independence (which is in direct contrast to international standards). This introduced instability into the judiciary and created the feeling of insecurity on part of the judges.

According to the Constitution of Serbia, the judges are elected by the National Assembly. Such a narrow constitutional provision on the election of judges has a number of deficiencies, two of which are particularly important. The first one is that the Constitution does not give even rough criteria for the election of judges, and the second one is that it does not guarantee in any way the participation of an independent body, with the majority of judges, in the procedure of electing judges.

Such a constitutional provision makes it possible to arrange by law the procedure and criteria for the election of judges with the omission of objective criteria in the election of judges, with expertise and the worthiness of the candidate for the judge not being decisive for their election, something which happened in practice. Thus, the Law on Courts (which was in force until January 1, 2002) entrusted the National Assembly and its judicial council with proposing and selecting judges, and the Minister of Justice was entrusted with the procedure preceding the proposal. Since the entire procedure was entrusted to the legislature and the executive, and as there were no objective criteria for the election, it was possible to have the election of judges not upon expertise and worthiness of the candidate, but on the basis of party interests. This enabled a big influence of the executive and the legislature (politics) upon the election of judges. On the one hand, this produced a corps of judges that were under big influence of politics (which jeopardized the independence of the judiciary), and on the other hand, those selected for judges were not the best candidates, and by their quality they often also did not deserve to be elected at all.

The role of the High Judicial Council

After a number of judicial laws were enacted, the situation changed. Thus, the Act on Judges says that the judges are elected by the National Assembly upon an elaborated proposal of the High Judicial Council. Elected as judge can be only the candidate proposed by the High Judicial Council, and if the proposed candidate is not elected, the High Judicial Council shall propose another candidate. The election procedure is conducted by the High Judicial Council, which proposes candidates only upon their expertise and worthiness.

The High Judicial Council, as an independent organ, has the task to eliminate, or at least mitigate, the influence of politics upon the election of judges. I think that in its activity so far it fulfilled this task to a very big extent. Evidence to this effect is also the fact that some changes in the set of judicial laws, which the Constitutional Court declared unconstitutional, went in the direction of reducing its jurisdiction (let us recall the changes by which the election procedure for presidents of courts was returned under the jurisdiction of the executive and legislature, changes by which the Assembly is not bound by the proposal of the High Judicial council for the election of judges), which indicates that this body represented an obstacle to the influence of politics upon the election of judges. However, this body has the task also to secure that the candidates with highest references be elected as judges. I think that the High Judicial Council did not fulfill this task in a satisfactory manner. This does not mean that this organ had dishonorable intentions when proposing candidates, but rather that there is a problem because until recently it did not establish and publicize clear criteria and parameters for the evaluation of expertise and worthiness of a candidate. This is the basic critical remark which can be addressed to this body. However, it must be said that there have been, and there still are, objective causes for these failures. This is a newly established body without any previous experience in these matters, it works mostly under big pressure of deadlines (for instance, it is necessary to propose to the Assembly candidates within a few days, because the next election of judges will be on the agenda only in few months), has no adequate premises and technical conditions for its work, nor the appropriate personnel for the preparation of the materials (technical and administrative work is performed by the expert service of the Ministry of justice, which is overburdened with other duties and does not have a sufficient number of employees, there is no unique and complete statistics, its members are not freed from their regular working obligations, etc.).

Under control

Although the present procedure represents progress in regard to the one envisaged in the Act on Courts, and at first sight it seems to be within international standards, it has many failures. The first group of failures relates to the election and status of the members of the High Judicial Council. Although judges make a majority of its members, the procedure for their election does not guarantee the broadest representation of judges from courts from all fields and levels, elected by their colleagues (which is an international standard), as they are elected only by the judges of the Supreme Court of Serbia. Further, this body must be independent of the executive and legislature, and one of the guaranties is that membership can terminate before the end of the mandate only on the basis of reasons and the procedure established by law. In practice, it has happened that the mandate of the members of the High Judicial Council which are judges ended regardless of conditions envisaged by law, by change of the Act on the High Judicial Council in 2003, which is an influence of the legislature upon the independence of this body that is not allowed. The second group of failures relates to the criteria and procedure for the election of judges. Criteria for the election of judges and the criterion for proposing candidates are not unified. Namely, the Constitution and the law do not oblige the National Assembly to elect judges only on the basis of expertise and worthiness of the candidate, while the Act on the High Judicial Council obliges this Council to take into account when proposing candidates only their expertise and worthiness. Also, until recently the High Judicial Council did not establish and publicize the objective criteria upon which it evaluates the expertise and worthiness of the candidates. The existing legal framework does not guarantee transparency of the procedure of proposing and electing judges, nor is it so in practice, and the mechanisms for the protection of the rights of candidates are also not secured. These inadequacies became visible during the two last elections. In the first case, candidates who were not proposed for election made the objection to the High Judicial Council that it is unclear for which reason certain candidates were proposed, and they expressed doubt that the proposal was not based upon objective criteria, but rather upon nepotism. In the second case the National Assembly did not accept almost one third of the candidates proposed by the High Judicial Council. The reason why the proposed candidates were not elected (mostly because the majority of members of the Assembly abstained from voting) raises doubts that this was a political deal among the political parties. This even more so, because no clear reasons based upon objective criteria were given to explain why the proposal of the High Judicial Council was not accepted.

These mentioned inadequacies exist also in regard to the election of the presidents of court. According to the Constitution, the National Assembly elects and dismisses the presidents of courts. Such a constitutional provision leaves huge space for regulating these matters by laws.

Legal provisions up to now arranged the jurisdiction of the presidents of court in such a way that it was possible to use them to exercise significant political influence upon the independence of judges. According to the Act on Courts (which was in force until January 1, 2002) the presidents of courts were elected by the National Assembly upon proposal of its judicial council. This created possibilities for the presidents of the courts to assign politically suitable and obedient judges, through which political influence upon the work of courts and judges was established, as was often the case in practice. This was feasible because the presidents of courts had big and uncontrolled authority due to absence or imprecision of legal provisions related to certain important questions. Thus, the president of the court was independent in distributing cases in the court for the entire year, with liberty to change it out of free will, which was used as a tool to punish disobedient judges; he/she could distribute the cases without clear criteria established in advance, or dismiss one judge from a case and transfer it to another one, which created conditions that certain cases be assigned to "suitable" judges; he/she was entitled to initiate dismissal of judges; he/she had significant influence upon personnel policy in that he/she independently decided without in advance established criteria on the admission of judicial apprentices – future judges, and thanks to personal "connections" with political structures influenced the election and promotion of judges, as well as the solving of their housing conditions.

After a number of laws on the judiciary were enacted, some of these authorities of the presidents of courts were put under control. Thus, the question of establishing and changing of the yearly work distribution in the court was solved in a satisfactory manner, as well as the distribution and transfer of cases. However, the problem is that in practice these provisions are not persistently respected, and without any sanctions for such behavior.

There was a persistent attempt to have the changes of the laws (which the Constitutional Court declared as unconstitutional) regulate the election of judges in such a way as to open mechanisms for political influence upon their election. The interest of political structures to have "their" presidents of courts indicates that they can continue to be an instrument for political influence upon the independence of judges and that legal provisions related to the procedure and method of their election should be regulated in a substantially different way, with respect of all standards related also to the election of judges.