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JUDICIAL INDEPENDENCE AND IMPARTIALITY IN SERBIA: BETWEEN LAW AND CULTURE

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On July 11, 2012, with sentence n. VIII-U-534/2011, the Serbian Constitutional Court overturned the decisions of the High Judicial Council dismissing a group of judges because they did not satisfy the requirements for being elected to judicial office with permanent tenure. As a consequence, the Court ordered the Council to re-elect the judges within 60 days.

This decision put an end to a complex procedure, which involved the Parliament, the High Judicial Council and the Constitutional Court, concerning the so-called judges' "re-appointment", put in place following the judicial reforms adopted in Serbia since 2006. The case is particularly interesting because it demonstrates how difficult is the implementation of reforms introducing in a country, by legal instruments, principles that have been almost ignored in the past, such as, in the case at stake, judicial independence and impartiality. By the point of view of the European observers, this case is even more interesting, considering that those reforms have been adopted in order to comply with the rules and standards imposed by the European Union in the context of the Eastern enlargement. Therefore, it represents a test for the evaluation of the effectiveness of European conditionality in the field of judiciary reforms.

Before analyzing the ruling, I will provide an introduction on the judiciary

reforms adopted in Serbia in the last years, focusing on the new procedure for the appointment of judges. My aim is to show both how European conditionality influences the processes of legal transitions even with reference to the basic principles of the judicial systems and the limits and the weaknesses of this system. In fact, as this case shows, the adoption of reforms introducing completely new rules without a parallel process of transformation of culture risks to be useless or, even worse, to produce adverse effects.

Serbia became a candidate country to the European Union on March 1st, 2012 and the European Commission started to monitor its progresses in 2005, concerning, *inter alia*, "judicial capacity". In Serbia, the importance of judicial reforms as a condition to join the European Union has been clearly declared in the key principles of the 2006 National Judicial Reform Strategy, stating that, through the implementation of the principles of independence, transparency, accountability and efficiency of the judicial system, the EU association process will be facilitated.
On the basis of these principles, a number of new rules have been introduced in the 2006 Constitution and the legislation. In fact, the Constitution and the laws adopted on the basis of the 2006 National Judicial Reform Strategy declare the principles of independence, transparency and liability of judges, in line with all the European and international standards. In particular, all the documents state the principle of independence of Courts and judges. The principles of immunity of judges and financial independence are considered as preconditions to judicial independence. The principle of transparency is enshrined in the Constitution and the Law on Organization of Courts; finally, accountability is guaranteed by the principle of liability of judges and efficiency is the aim of all the laws.
Judicial independence is one of the main standards of judicial capacity and its implementation has been a major concern in Serbia, considering that, during the previous regimes, it was completely rejected: with the aim to strengthen this principle, in the reforms, a new self-governing body, the High Judicial Council (HJC), has been introduced.The introduction of this institution, holding constitutional status, has been considered positively

by the European Commission. Nevertheless, the simple introduction of a self-governing body is not enough in order to guarantee the effective independence of the judiciary, or might even produce adverse effects, as it is demonstrated by the controversial case of the procedure for judges' appointment.

In the context of the wide reform of the judiciary system in Serbia, a new procedure for judges' appointment was introduced. In fact, according to art. 147 of the 2006 Constitution and 46 of the Law on Judges, the judges should be elected by the National Assembly, on the proposal of the High Judicial Council. Art. 45 of the Law of Judges then specifies that «the High Judicial Council, when nominating a judge, takes into consideration only his/her professional ability and worthiness. Every nomination for election shall be reasoned».

Already during the process of adoption of the Constitution and the law, this procedure has been considered with concern by the Venice Commission, that stated that «the involvement of Parliament in judicial appointments risks leading to a politicisation of the appointments». On the contrary,«the main role in judicial appointments should be given to an objective body such as the High Judicial Council» and «proposals from this body may be rejected only exceptionally». Nevertheless, the Serbian Constitution was adopted and the mechanism for judges' appointment was not modified: in its opinion on the final text, the Venice Commission confirmed the view expressed before, underlining the risk of politicisation of the process of judges' appointment.

The major concern of the new procedure for judges' appointment was the fact that the rules had to be applied not only to new judges, but also to judges already in office. In fact, a general judges' election was planned, including all of them. The judges already in office able to pass the selection, would have been be "re-appointed", while the other simply dismissed.

The risk of violation of the most basic principles of judicial independence, at least indirectly, by breaching the rule of irremovability of judges was evident, as the Judges' Association of Serbia openly denounced it. Therefore, the Association required the Consultative Council of European

Judges to deliver an opinion on the mechanism for judges' re-appointment, since this procedure – which, according to the Serbian judges, was not based either on the Constitution or on the law – seemed to be oriented by political rather than legal objectives.The CCJE responded with a declaration, issued on November 24, 2008, in which it stated, quoting the Venice Commission Opinion on the Draft Law on Judges and the Organisation of Courts in the Republic of Serbia, that «the need for a re-appointment process with respect to all judges (…) was not at all obvious» and that «the principle of irremovability of judges and tenure until a mandatory retirement age or the expiry of a fixed term of office is a fundamental tenet of judicial independence».

Notwithstanding the criticisms on the risks of politicisation of the procedure and the possible violation of the principle of the independence of judges, on July 15, 2009 the procedure for judges' appointment was opened, on the basis of the rules provided in the reform. A total of 5030 applications were submitted, while only 2483 positions were available; as a consequence, a huge number of judges were dismissed. The procedure was conducted in a very obscure way, as it was not public, criteria and standards for evaluation were not clear, non re-appointed judges weren't clearly informed about the reasons of their dismissal and didn't have the possibility to raise any objections to the decision.

The judges' dismissal – that caused a serious judicial crisis in Serbia – has also been hardly criticized by the European Commission, which in the 2009 and 2010 Progress Reports on Serbia observed, in particular, that the criteria for the re-appointment of judges were not fully in line with the Venice Commission's recommendations, as they left space to political influence over the procedure. Considering these concerns, the Commission carried out an assessment mission, whose findings confirmed that this procedure «showed important shortcomings regarding the composition and independence of the High Judicial Council (…) the application of objective criteria and the transparency and reliability of the overall process». Later, the Commission specified that the Serbian authorities had to review the procedure and that this process would be monitored in the progress reports as well as in a possible opinion on the

application of Serbia to the European Union.

It is easy to observe that the body that had been introduced in order to protect and implement the principle of judiciary independence in Serbia was one of the first responsibles for its indirect violation, by disregarding judges irremovability, without adequate guarantees. It is even more worrying that the acts by which these principles were violated had also been adopted on the basis of a procedure that was particularly questionable with reference to the respect of other basic rules of the judicial process, such as the right to a fair trial and judicial impartiality. All these concerns have been at the basis of several appeals that the dismissed judges submitted to the Constitutional Court.

The Court adopted the first ruling on the process of judges re-appointment on March 25th, 2010. In this case, it stated that the 2009 appointment procedure had not been conducted according to the general customary procedure and the right to a fair trial had been violated. This opinion was confirmed by the rulings of May 28, 2010 and December 21, 2010, where the Constitutional Court allowed the appeals of judges Zoran Savelijć and Milena Tasić, affirming, in both cases, that the right to a fair hearing was infringed.

In all cases, the Constitutional Court allowed the appeals and ordered the HJC to rule again on the applications of the candidates for appointment as judges. On the basis of these rulings, therefore, the review procedure was put in place, according to the rules of the Amendments to the Law on Judges and the *Decision on the criteria and standards for the evaluation of qualification, competence and worthiness and of procedure for the review of decisions on the termination of judgeship*. In particular, according to art. 5 of the Amendments to the Law on Judges, the decisions on dismissal had to be reviewed by the HJC not in its full composition, but only by the members *ex officio.* Nevertheless, the implementation of the review procedure did not solve the problem, as it resulted in the confirmation of most of the decisions on judges' dismissal, with a procedure that did not respect, again, the right to fair trial, but also the principle of judicial impartiality.

On these grounds, a huge number of judges submitted new appeals to

the Constitutional Court which, finally, adopted the decision n. VIII-U-534/2011 of July 11, 2012.

With the July 2012 ruling, the Constitutional Court annulled the HJC decisions, considering that not only, as in the previous cases, the principle of fair trial had been infringed, but also the principle of judicial impartiality, due to the composition of the Council at the time of the adoption of the decisions on review. In fact, according to the Court, both principles must govern the activities of the High Judicial Council, because the Council, when deciding directly on questions concerning the status and position of judges, has the character of a "tribunal" and is obliged to respect all the rules concerning the judiciary.

With particular reference to the impartiality of judges, the Court found that, in the specific case, the principle was infringed, since the decisions on the objections raised by the dismissed judges were adopted by the same members of the HJC who participated in the decision on the election. This was considered unconstitutional by the Court, which, quoting as a precedent the European Court of Human Rights case-law, stated that «impartiality has been challenged when the same member who decided in the procedure in the first instance decides on the legal remedy». In particular, according to the Court «the presumption of qualification, competence and worthiness in the review procedure may be regarded as overturned only on condition that at least six members of the permanent composition of the High Judicial Council from among judges with permanent tenure who had not been members of the first composition of the High Judicial Council had voted in favour of overturning the objection».

For these reasons, the Court allowed the appeal and ordered the HJC to elect the appellants to serve as judges.

This decision might finally put an end to the sad story of judges' dismissal in Serbia. However, it only applies to those judges who submitted an appeal and, even though it states a general principle, it has not general effects; in fact, in order to become effective towards all Serbian judges, it should be provided with pivotal character by the Constitutional Court. Nevertheless, even in this case, this seems to be only a partial remedy. As

the CCEJ pointed out, in fact, legislation is the only possible full remedy.

The case described here seems to be a failure of European conditionality in the field of judicial reforms, since the most important principles that have been formally introduced – judicial independence and impartiality – have been substantially violated by the same body in charge with their protection. On the contrary, judicial independence and impartiality require, before the introduction of legal principles, the creation of a culture. Moreover, these principles can work properly only in an environment where all the other fundamental principles of the constitutional state are respected. When judicial reforms, introduced by legislation, are not supported by cultural – and constitutional – ownership, the risk of a gap between *de jure* and *de facto* judicial independence and impartiality is very high.
In conclusion, this case demonstrates that the evolution of a State, according to new principles and values, cannot be considered as a pure legislative and fast process. This does not mean that legislative reforms – supported by European conditionality – in "new democracies" are useless. They are indeed fundamental, even if they have to be considered only as the very first step. After them, cultural education and dissemination of values, on one side, and laws' implementation, evaluation, discussion, and adjustment in the domestic culture, on the other, are needed. To this aim, the efforts of all national institutions – such as Parliaments, Courts and self-governing bodies – as well as political actors are essential, in an on-going "dialogue" with supranational legal and political institutions.

On judicial capacity as a standard to join the European Union, see Open Society Institute, *Monitoring the EU Accession Process: Judicial Capacity*, 2002.

Art. 142-2 Const.; art. 1 and 3 Law on Organization of Courts, in *Official Gazette* of the *Republic of Serbia*, n. 116/08, 27th December 2008.

Art. 149 Const.; Art. 1 Law on Judges, in *Official Gazette of the Republic of Serbia*, n. 63/01, 42/02, 17/03, 27/03, 29/04, 35/04, 44/04, 61/05, 101/05.

Art. 151 Const.; Art. 5 Law on Judges.

Art. 4 Law on Judges.

Art. 142-3 Const.

Art. 7 Law on Courts.

Art. 6 Law on Judges.

On judicial independence as a European standard, see: Open Society Institute, *Monitoring the EU Accession Process: Judicial Independence*, 2001; Seibert-Fohr, A., *Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle*, *German Yearbook of International Law*, 52/2009-2010, 405-436.

Art. 153 Const.

A High Judicial Council was not provided in the Yugoslav Constitutions, the 1990 Serbian Constitution, nor in the Constitutional Charter of the Union of Serbia and Montenegro. On the introduction of the High Judicial Council and the implementation of the principle of judicial independence, see Lilić, S., *Independence of the Judiciary and the High Judicial Council in Serbia*, in *Diritto pubblico comparato ed europeo*, 4/2010, 1676-1685.

See, for example, the 2007 Progress Report on Serbia.

Venice Commission, *Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia*, 24 October 2005, CDL-AD(2005)023.

Venice Commission, *Opinion on the Constitution of Serbia*, CDL-AD(2007)004, 17-18 March 2007.

Letter of December 24, 2007, sent by Dragana Boljević, President of the Judges' Association of Serbia, to Raffaele Sabato, Chair of the CCJE, available at http://www.coe.int/t/dghl/cooperation/ccje/cooperation/LetterCCJE_serbie.pdf.

Available at http://www.coe.int/t/dghl/cooperation/ccje/cooperation/LetterCCJE_serbie.pdf.

In fact, an advertisement for the appointment of judges was published on the Official Gazette of the Republic of Serbia n. 52/09 of 15th July 2009.

Letter of April 27, 2010, sent by J. M. Barroso, President of the European Commission, to Dragana Boljevic, President of the Judges' Association of Serbia, Vito Monetti, President of *Magistrats Européens pour la démocratie et les libertés* and Goran Ilic, President of the Prosecutor Association of Serbia, available at http://www.coe.int/t/dghl/cooperation/ccje/cooperation/LetterCCJE_serbie.pdf.

Answer given by Mr Füle on behalf of the Commission, June 1, 2010, available at http://www.coe.int/t/dghl/cooperation/ccje/cooperation/LetterCCJE_serbie.pdf.

Official Gazzette of the Republic of Serbia n. 101/2010.

Adopted by the High Judicial Council and published in the *Official Gazette of the Republic of Serbia* n. 35-90/2011.

Judges' Association of Serbia, *Statement with regard to the Constitutional Court Decision from July 11, 2012.*

Declaration of the Consultative Council of European Judges on the Review of the Decisions of the High Council of the Judiciary on the Election of Judges in Serbia, June 18, 2012.

Shetreet, S., *Creating a Culture of Judicial Independence: the Practical Challenge and the Conceptual and Constitutional Infrastructure*, in Shetreet, S., Forsyth, C., *The Culture of Judicial Independence*. *Conceptual Foudations and Practical Challenges*, Leiden-Boston, Marthinus Nijoff Publishers, 2012, 17-67.

According to Das, C., *The Threats to Judicial Independence. Experiences from the Commonwealth*, in Shetreet, S., Forsyth, C., *The Culture of Judicial Independence*, *supra* at 24, 139-152, as the experiences of the failure of legal transplants in the Commonwealth show, «a culture of judicial independence has to go hand in hand with a culture of constitutionalism».

On the distinction between *de jure* and *de facto* judicial independence, see Guarnieri, C., Piana, D., *Judicial Independence and the Rule of Law*, *supra* at 24, in particular 113-114. According to the authors, «de jure indicators refer only to legal rules concerning the status of judges and their competences and powers, while de facto indicators try to catch the empirical dimension of judicial independence and deal with both the status of judges and their powers in practice».