

# Problems for a Judge in a Country in Transition

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I live in Serbia and Montenegro, a country that was a part of ex-Yugoslavia. It is in South East Europe on the Adriatic Sea. From one country Yugoslavia became smaller countries: Croatia, Macedonia, Slovenia, Bosnian Federation and Serbia and Montenegro Union. Part of Serbia is the province of Kosovo, which is now under international protection.

In the last 12 years we have been witnesses to great historical and political changes: we have passed through civil war, the regime of Slobodan Milosevic, sanctions of the international community, NATO bombing, war crimes, political murders, growing poverty, refugees and the significant absence of the rule of law. Throughout this period the judiciary suffered a great deal, for the division of powers among the executive, the legislative and the judicial branches was destroyed. It was a very hard period from which all our society is recovering and trying to find the best way for progress.

In order to understand the situation today, it is important to learn something about the position of the judiciary under the regime of Slobodan Milosevic. The basic problem of the judiciary in Serbia has been the lack of independence. All attempts to have an independent judiciary were suppressed. During the past ten years, the judiciary acted as a dispatcher of the will of the political centres. The executive branch imposed extensive control over the judiciary. The executive, through the presidents of the court, ensured that the judges who were “obedient” to the regime received significant cases and therefore the judges who remained

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independent did not have the opportunity to exercise their independence with important cases. Any serious legislative reform was systematically blocked, especially the ones that would guarantee the true independence of the judiciary.

Some judges took a different path to oppose the regime. The Milosevic regime had enacted laws to prevent freedom of the press and had used the courts to “win” the local elections which had actually been won in the large cities by the opposition. This manipulation of the electoral system through the judicial system brought thousands of people to the streets in nightly demonstrations that lasted for four months over 1996-1997. Among the marchers were judges. As a result, the Government recognized the opposition victory in the local elections. The presence of the judges meant a great deal to the marchers, including the students, and it was clear that we judges were marching not to be involved in politics, but to fight for the rule of law.

While the Constitution<sup>1</sup> proclaims independence of the judiciary, in reality the authorities have expressed great resistance toward the rule of law, the separation of powers, and respect for the fundamental human rights and freedoms. Politically significant cases, or those in which the interests of individuals from the governing parties were involved, were assigned to already chosen suitable judges. It was enough for every court to have one or two suitable judges, for the other judges in court never to have an opportunity to prove their independence and impartiality. Frequently, suitable judges were temporarily transferred to other courts, even to other towns, where they would deliver “correct” decisions under the instruction of the executive. Furthermore, the executive would obstruct or constrain the enforcement of legitimate decisions delivered by a court.

Issues of financial autonomy and personal safety of judges depended also upon the will of the executive. They have never been resolved in a way to protect the independence of judiciary and its dignity. Not only did judges not receive salaries according to their position, but those salaries could not satisfy the basic minimum of existence at a subsistence level. This led to the inclination of corruption in the judiciary. The ruling parties were involved in most cases of corruption.<sup>2</sup> They granted apartments,

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<sup>1</sup> *Constitution of the Republic of Serbia*, the Official Gazette of the Republic of Serbia, No. 1/90

<sup>2</sup> Ruling parties are the Socialist Party of Serbia (SRS), United Left (JUL) and Radical Party of Serbia (SRS).

loans, and promotions to obedient and suitable judges. The material status and other problems in the judiciary have contributed to more than 1000 experienced judges (1/3 of their total number in Serbia and 2/3 of judges from military courts) leaving the judiciary. Instead of experienced and qualified judges, young and inexperienced recruits came. The vast majority of them were elected on political grounds, as they were members of one of the ruling parties.

Political suitability was of great importance in the procedure of electing judges. The presidency of the courts has consisted of members or high officials of the ruling parties. Elections and dismissal of the judges are governed by the *Courts Act*<sup>3</sup>; however, the implementation of this act in reality was distorted. The election and dismissal of judges has taken place in the National Assembly. The majority in the Assembly, as the ruling party, have decided on the election and dismissal of judges, making this act truly political. The Ministry of Justice played a significant role in the preparation of proposals by giving its opinion.

Through this very bad period, the Association of Judges of Serbia played a significant role. The history of the Association of Judges is the history of the beginning of the serious fight for the judiciary. The Association of Judges of Serbia is a voluntary professional non-partisan and non-political association, established in 1997 by a group of judges from Serbia interested in the improvement of the judicial system and the independence of the courts. The grave violations of basic constitutional principles and the independence of the courts by the regime after the local elections in Serbia in November 1996 led to the establishment of the Association. Certain judges and court chambers, having succumbed to political pressure, had violated basic constitutional principles. Thus they failed in their role in the protection of rights and freedoms of citizens, causing the general deterioration of trust in courts, law and justice.

The main purpose of the Association is to promote the rule of law and an independent and impartial judiciary. It hopes thereby to improve the separation of powers, the judiciary's role in protecting freedoms and rights of citizens, and the organization of the judiciary. Its members also aim at returning dignity to their profession. From a total of 2,500 judges, 590 judges from the Constitutional Court of Serbia, Supreme Court of Serbia,

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<sup>3</sup> *The Courts Act*, the Official Gazette of the Republic of Serbia, No. 46/91, 60/91, 18/92, 71/92.

High Commercial Court of Serbia, and the district, commercial and municipal courts were the first members of the Association.

Since its inception, because of the circumstances under which it was established, the Association has confronted various forms of opposition, primarily by the authorities. The Association has criticized the laws violating the Constitution and basic human rights, and has therefore been subjected to increased pressure by the authorities. Members of the Association have been harassed, and their persecution has been announced by certain members of the Serbian Government, by the Minister of Justice, the President of the Supreme Court, and presidents of district and municipal courts. The regime attempted to deter any public criticism addressed by the Association and caused by violations of the independence of the judiciary, the rule of law, equality of citizens and human rights. Repeatedly, the ruling parties have publicly attacked the Association and accused its prominent members of being “traitors and foreign hirelings”. The authorities also threatened that the judiciary “would be put in order”, and judges re-elected, although the office of the judge is for life. Presidents of courts directly threatened the Association members, who were harassed in various forms, including sudden transfers and withdrawals from cases.

A decision of the Supreme Court of Serbia on February 17, 1999 prohibited in effect the work of the Association. This decision violated the freedom of association, which is guaranteed to judges by the *International Covenant on Civil and Political Rights*, ratified by Yugoslavia; by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; and by point 9 of the Basic Principles on the Independence of the Judiciary, from the *Universal Declaration on the Independence of the Judiciary*.

On December 21, 1999, the National Assembly of Serbia dismissed three prominent members of the Association of Judges: one judge of the Constitutional Court of Serbia, one judge of the Supreme Court, and one judge of the Fifth Municipal Court in Belgrade. It was done without any legal procedure and in violation of the Constitution and laws. One of the dismissed judges was the President of the Association of Judges of Serbia, while the other two were members of its Governing Board. The dismissed judges were blamed for being politically active because they publicly criticized violations of the independence of judiciary, the rule of law and human rights. Furthermore, membership in the Association of Judges and its Governing Board was considered as political activity, and therefore a

violation of the constitutional provision<sup>4</sup> that proscribes political activities of judges that are incompatible with their position.

In July 2000, twenty judges were dismissed in the same manner (among them, one from the Supreme Court of Serbia, one from the High Commercial Court and seven from the circuit courts); all remaining judges who were members of the Governing Board of the Association of Judges were among them. The direct motive for dismissal was an open letter which discussed the situation in the judiciary and the influence that the executive had over the judiciary. Hence, the principle of irremovability of judges was disregarded and the Association of Judges of Serbia was practically unable to operate.

The members of the Association of Judges of Serbia believed, and still believe, that it is their duty to take part in the process of the democratic transition of the country, and to promote the independence of the judiciary in order to protect the rights and freedoms of citizens. Their activities have been professional and apolitical, aimed at pointing out the increasing influence of the organs of the executive on the election and removal of judges, an influence that essentially jeopardises the democratisation of society and the functioning of legislative powers. By fighting for an independent judiciary, the rule of law and respect for human rights the dismissed judges sacrificed their safety and financial existence, and showed true dedication to their honourable profession. On the other hand, the former regime in Serbia did everything to threaten the independence and dignity of the judiciary.

The recent events after the fall of the regime of Slobodan Milosevic have completely changed the political scene, bringing democratically oriented parties and social groups to power. In that context, judges hope that the new ruling political parties will change the attitude toward the judiciary and will understand the essential need for the separation of powers. The transitional period effectively started two and a half years ago and the main focus is identified as the transformation of the judiciary. Many new laws have been enacted and many are awaiting enactment. It is big and complicated work, and influences all segments of life. For the judiciary the most important laws were ones concerning the organization of courts, the *Law on Judges* and especially the provisions of the *Law of High Judicial Council*, the new body in charge of proposing the election and dismissal of judges.

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<sup>4</sup> *Constitution of the Republic of Serbia, supra* note 1, arts. 100, 126(4).

In the transitional reform process, the role of judges is extremely important, in order to achieve and maintain a democratic system, and the judges must be better prepared to cope with this difficult task. But in the case of Eastern countries, the judges are not sufficiently prepared to carry out their duties for they are “victims” of the institutional weaknesses within which they work, or they are anchored to stereotypes of justice which came from a concept belonging to a State organisational system that does not exist any more.

The basic democratic principles have been formally adopted, but there are still many difficulties in their application. The judges must learn how to best use the instruments at their disposal to defend their right of independence from the other national institutions. A few months ago Serbia and Montenegro became a member of the Council of Europe, and before that the *Declaration of Union and Declaration on Human and Ethnic Rights* with the new provisions that are in accord with international law, and human rights were enacted.

The big ongoing process is the continual education of judges, which is helped considerably by the international community, and also by the Canadian Section of the International Commission of Jurists, with a special project to support the independence of judges in Serbia and Montenegro. One year ago, the Association of Judges together with the Ministry of Justice founded the first Judicial Training Centre which established a new program for the education of judges.

Many things are to be done in Court organization and management, and computerization of courts, but still the main focus is on increasing judges’ awareness. Through many international meetings and travelling, we try to provide some international experience and a comparative way of thinking for our judges. The long isolation of our country caused great damage. Judges in Serbia are usually well educated but they lack knowledge of international law. The Association of Judges is still very active and has initiated many projects with domestic and international organisations. In today’s world there is a great need to develop international relations that are not limited only to economic exchanges, but that also involve a wide range of institutional activities among which are jurisdictional ones.

Organised crime, which we are fighting now, relies on a wide range of illegal activities which are developed, or elaborated, in a plurality of countries. The judiciary is faced now with many cases involving high organized crime. These judges have been trained by EU experts, and the cases that are going to trial soon will be a great task for the Serbian judiciary.

In Serbia now we have about 2,600 judges, for about 7 million inhabitants. There are 750 prosecutors. Under the new law we have 4 appeal courts and one Supreme Court, 30 district courts and 138 municipal courts, which are of general jurisdiction, and 16 commercial courts, 1 high commercial court, and the new Administrative Court. There is also the Constitutional Court of Serbia, which has started to play an important role in our judiciary.

The reform of the judiciary is still a live process, and there is still a long way to go. Judges must be aware of the power they have, the power of law and justice, and they must not be afraid to use it.