



**REPUBLIC OF SERBIA
PROTECTOR OF CITIZENS**

19-3635/11
Belgrade



Заштитник грађана
Zaštitnik građana

Ref. No. 542 Date: 11/01/2012

On the basis of Article 24 Paragraph 2 of the Law on the Protector of Citizens (LPoC) (*Official Gazette of RS*, Nos. 79/2005 and 54/2007), acting upon the complaint filed by the Judges Association of Serbia (JAS), 24 Alekse Nenadovića Street in Belgrade, about the work of the High Judicial Council (HJC) in the process of reviewing decisions of the first composition of the HJC on the cessation of judicial function, believing that by giving an opinion within his purview, he will contribute most appropriately to the promotion of the protection of guaranteed human rights and freedoms and to the improvement of work of the authorities that decide, in accordance with the law, about the rights, obligations and interests of citizens, the PoC issues an

OPINION

The HJC, which under the Constitution and the law should ensure and guarantee the independence and autonomy of courts and judges and perform other tasks of utmost importance to the judiciary in the Republic of Serbia, in the long period of time has been operating in the way that raises serious doubts about the legality and regularity/legitimacy of its work:

- The current composition of HJC does not provide the majority representation of judges, as envisaged by the Constitution (six out of eleven members should be permanent judges, which is not the case);
- By a Decision of the competent state body – the Anti-Corruption Agency (ACA), it has been established that one HJC member has accepted that public function, while already assuming another public function. Since the legally prescribed approval has not been granted for the HJC membership of that person, being his second function, the Agency has determined that his public function as HJC member is terminated by virtue of law, about which the decision will be issued by the National Assembly of the Republic of Serbia, within eight days of receiving the Agency's decision. However, the National Assembly has not decided for a year and when it did, the insufficient number of MPs voted in favour of the decision on the termination of public function by virtue of law. Hence, the HJC member, whose function was terminated *ex lege* by the competent state body, has continued to participate in the decision-making and work of HJC for over a year.
- One HJC member was detained in custody on suspicion of committing one or more criminal offences more than 10 years ago. One HJC member resigned from HJC membership, citing allegations of irregularities in the work of this body. Both of them accepted the above-average number of objections filed by non-(re)elected judges in the review process.

- By the amendments to the Law on Judges (LoJ), HJC got the competence to rule on appeals filed against its own decisions in the process of electing judges – appeals were converted to objections about which the same authority that issued the disputed decision should decide. However, despite the HJC competence established by the law, the HJC members who participated in the "first election" publicly pledged, at their own initiative, not to vote about the objections to their own decisions. They participate in all other stages of the procedure and constitute a quorum, but do not vote. One HJC member, who was elected before the end of the "first election", still participates in the voting about the objections. Such a composition in which HJC decides about objections is legally and logically inconsistent.
- **The HJC is not open to the public when it considers the proposals of its commissions, which is contrary to the explicit legal provision stipulating that the Council meetings shall be public.**
- **The HJC does not allow equal access to information during the review process to all candidates for judicial function, to which they are entitled as parties in the procedure.**

For all the above mentioned, the PoC considers that HJC should:

- **discontinue operating in its current composition,**
- **promptly take all measures and actions within its purview in order to complete its composition in accordance with the provisions of the Constitution and the Law,**
- **continue its work in its full composition,**
- **repeal the decisions made in the period in which permanent judges have not constituted the majority in that body and/or to recognise the merits of possible appeals.**

The PoC firmly believes that such HJC acting would be in the best interest of the lawful and proper exercise of the rights and legally based interests of candidates for a judicial function, but also that it would maintain the authority and legitimacy of HJC work.

In particular, it would be of interest to all citizens of Serbia because both judges and courts and HJC exist in order to enable citizens to exercise their rights to a fair trial and effective access to justice, the precondition of which is legitimate, entirely lawful and proper work of the body that, according to the Constitution, provides and guarantees the independence and autonomy of courts and judges.

Rationale:

The JAS filed a complaint with the PoC on 15 December 2011, expressing its dissatisfaction with the work of the HJC in the procedure of reviewing decisions of the first composition of the HJC on the termination of judicial functions. The complaint argues that instead of using the review process to eliminate deficiencies, while respecting the legal system of the Republic of Serbia, including the generally accepted rules of international law and European standards, the HJC makes the entire process, all issued decisions taken and its future work, unlawful and illegitimate.

The HJC has violated legality and legitimacy of its work by deciding in its full composition only in one of the 16 sessions held during the review process, and by continuing to work after the detention of one of its members, the resignation of another member and the final decision issued

by the ACA establishing that its third member had a conflict of interest. The complainant believes that the HJC no longer reaches a six-vote majority for making decisions in the review process if the members of its first composition do not vote on the regularity of its earlier decisions, which represents the violation of the right to fair trial and contravenes the Constitution of the Republic of Serbia and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The fact that the Council no longer has a majority of judges in its composition does not comply with the standard included in the Opinion no. 10 of the Consultative Council of European Judges of the Council of Europe. In addition, it was pointed out that the HJC's commissions that consider the objections filed by the judges do not deliver their decisions to the judges, and that the Council does not allow public attendance at the sessions in which it considers the decision of its commissions before deliberating and voting. The letter that HJC submits to the judges whose objections have been rejected indicates that it used to happen that the commission's proposal to accept the judges' objections was not approved by the Council, which means that either the members of the first composition of the Council voted for the rejection of objections or the commission members changed their opinion in the meantime and voted contrary to their previous proposal, which raises the question of undue influence on their work. It was also stated that HJC members from among the judicial, executive and legislative authorities in their public performances call into question the independence of the HJC, by commenting non-final court decisions and influencing the judges. It was stressed that HJC continued with the practice of non-enforcement of the orders of the Commissioner for Information of Public Importance and Personal Data Protection (CIPIPD), and that it violated the unelected judges' rights to a fair trial and non-discrimination, threatened the judicial tenure of (re)elected judges guaranteed by the Constitution as the basis of independence of judges and compromised the right of Serbian citizens to independent and impartial courts. The PoC was asked to identify the shortcomings in the work of HJC, make recommendations for their elimination and recommend the establishment of accountability of HJC members, as well as to notify the National Assembly, the Government and the public thereof.

Article 153 Paragraph 1 of the Constitution of the Republic of Serbia (Official Gazette of RS, No. 98/2006) stipulates that the HJC shall be an independent and autonomous body that ensures and guarantees the independence and autonomy of courts and judges. Elective members shall include six judges holding permanent judicial function, one of which shall be from the territory of autonomous provinces, and two of them shall be respected and prominent lawyers who have at least 15 years of professional experience, one of whom is a lawyer and the other a professor at the Faculty of Law.

Article 14 Paragraph 3 of the Law on HJC (Official Gazette of RS, Nos. 116/2008, 101/2010 and 88/2011) stipulates that the Council may hold a meeting if there are at least six members of the Council present. Article 17 Paragraph 1 stipulates that the Council decisions are made by a majority vote of all members.

Article 5 Paragraph 1 of the Law Amending the LoJ (Official Gazette of RS, No. 101/2010) provides that the permanent composition of the HJC shall review the decisions of the first composition of the HJC on the termination of judicial functions of judges referred to in Article 101 Paragraph 1 of the LoJ, in accordance with the criteria and standards for assessing the qualifications, competence and integrity established by the permanent members of the HJC. Paragraphs 5 and 6 of this Article provide that the judge in the objection procedure referred to in Paragraphs 3 and 4 has the right to be informed about the case, supporting documentation during the procedure, and to present verbally his/her allegations before the permanent composition of the HJC. The decision of the permanent composition of the HJC shall be justified in accordance with Article 17 Paragraph 2 of the Law on HJC. An appeal may be filed to the Constitutional Court against the decision of the permanent composition of the HJC made upon

the objection referred to in Paragraphs 3 and 4, confirming the decision of the first composition of the HJC on the termination of judicial function of judges referred to in Paragraph 1 this Article, within 30 days of receiving the decision.

Article 31 Paragraph 1 of the Rules of Procedure of the HJC (Official Gazette of RS, Nos. 43/2009, 22/2011 and 33/2011) stipulates that the Council's decision shall be considered adopted if the majority of all members of the Council have voted for it.

Article 2 of the Rules for the Implementation of the Decision on Establishing the Criteria and Standards for Assessing the Qualifications, Competence and Integrity, and for the Procedure of Reviewing Decisions of the First Composition of the HJC on the Termination of Judicial Functions (Official Gazette of RS, Nos. 35/2011 and 90/2011) stipulates that the goal of the Rules is to ensure equal application of criteria and standards in the objection procedure and to guarantee the application of European standards in this procedure. Article 7 stipulates that the Rules of Procedure of the HJC shall apply to the work of the Commission, unless certain issues are separately regulated by the present Rules. Article 31 provides that the public nature of the review process shall be achieved through: issuing press releases from the Commission and Council meetings, publishing the decision on the appointment of the Commission, disclosing data about the rapporteur in each case, announcing the date of the hearing before the Commission and the date of the Council meeting, and opening the meetings of the Commission and the Council to the public. Article 32 provides that the review process shall be public, including the media, whereas the judge whose status is in consideration may request the exclusion of the public. The exclusion of the public shall not apply to the parties in the procedure and their representatives. The public shall be excluded from the process of deliberation and voting.

The Board of the ACA issued a **Decision** No. 012-00-00003/2011-02 of 9 March 2011, confirming the Decision of the ACA No. 020-00-00244/2010 of 09 December 2010, establishing that Predrag Dimitrijevic, Dean of the Faculty of Law in Nis, by accepting other public office - to be a member of the HJC - elected based on the decision of the National Assembly of the Republic of Serbia of 28 July 2010, without the consent of the ACA, acted contrary to Article 28 Paragraph 2 Law on ACA, and for that reason his public office as a member of the HJC shall be terminated by virtue of law, about which the National Assembly of the Republic of Serbia shall issue a decision within 8 days of receiving this Decision.

The CIPIPDP informed the PoC by the Act No. 011-00-00642/2011-01 of 29 December 2011 that 67 complaints were filed against the HJC in 2010, and that the procedure was completed in 56 cases, while 9 were still pending. In 38 cases, the decisions were issued ordering the provision of requested information, out of which 4 were still pending execution. During 2011, 53 complaints were filed against the HJC. In 3 cases, the decisions were issued ordering the provision of requested information, whereas HJC did not act fully in accordance with the orders from these decisions, so that it can be expected that the complainants would request the instigation of judicial enforcement proceedings. These data suggest that, in the opinion of the CIPIPDP, the work of the HJC was "burdened with serious problems when it comes to transparency".

The provisions of Article 25 Paragraphs 3 and 4 of the LPoC stipulate that prior to submitting a complaint, citizens are required to endeavour to protect their rights in appropriate legal proceedings and that the PoC shall not instigate proceedings until all legal remedies are exhausted, and that, exceptionally, the PoC may initiate proceedings even before the exhaustion of all legal remedies have been exhausted if the complainant would sustain irreparable damage or if the complaint is related to violation of good governance principle, particularly incorrect attitude of administration authorities towards the complainant, untimely work or other violations of ethical code of conduct of administration authorities employees.

The PoC has stated that an appeal to the Constitutional Court is an effective remedy against HJC decisions on the objections against non-(re)election, which is available to all candidates whose objections were rejected (both to the members of the JAS, as well as those who are not its members). This body considers that the objections to the work of HJC, presented in the complaint of the JAS, are primarily of general nature and relate to the composition, legitimacy and legality of HJC work in general, with the same legal consequences to the legality and regularity of decision-making about the rights and interests of all parties to the procedure of reviewing decisions of the first HJC composition, regardless of the fact whether they have used or will use available legal means. The PoC did not find that members of the JAS are at risk of irreparable damage or that the complaint is substantially related to the violation of the principle of good administration or to any other reasons in the manner and to the extent that would justify the control procedure before the exhaustion of all legal remedies available for the protection of the rights of the parties in the procedure before HJC.

However, in addition to the right to initiate and conduct proceedings, the PoC has the right to act preventively by providing good services, mediation and giving advice and opinions on matters within its purview in order to improve the work of administration authorities¹ and promote human rights and freedoms.

Bearing in mind that certain deficiencies in the work of the HJC have been established in the procedure initiated by the PoC upon complaints of a large number of participants in the general election of judges and that the Recommendation No. 17-32/10 of 03 August 2010 was referred to HJC with the aim to eliminate the identified deficiencies (HJC has not informed the PoC about its implementation so far); since the identified deficiencies in the general election caused the need for its review; having assessed on the basis of new complaints and knowledge gained otherwise that deficiencies in terms of regularity and legality may be possible in the review of (re)election conducted by HJC, and given that for over two years the candidates have been facing uncertainty regarding their status, rights and obligations (for the citizens of Serbia it implies the expenditure for the extended payment of benefits from the budget to non-(re)elected judges), the PoC has assessed that it should take a stand on the HJC work in the review process and inform thereof the HJC, the National Assembly, the Government of the Republic of Serbia, the CIPIPDP (for reference purposes), the complainant and the public.

By the Constitution of the Republic of Serbia and the Law on HJC, the Council is established as an independent and autonomous body that ensures and guarantees the independence and autonomy of courts and judges. In order to fulfil this role substantially, it is necessary for HJC to create and maintain confidence among experts and the general public regarding the legality and regularity of its work, particularly having regard to the objections and deficiencies identified in the general election process, and the need to eliminate them through the review process in an unquestionable way.

Out of 11 members, as many as HJC should have according to the Constitution and the Law, and most of whom are judges with permanent function, their number was reduced to five or four, due to the suspension of one member and resignation of another member from among the judges, which is below the number prescribed by the Constitution. HJC decides on the rights and duties of citizens and in that sense has the status of *tribunal*, which obliges it to decide in its prescribed composition. Decisions of this kind of bodies, if brought in an inappropriate

¹ HJC is one of those bodies and organisations that the LPoC calls “administration authorities” for easier reference, though imprecisely (see Article 1 of the LPoC).

composition, are null and void regardless of whether they were deciding with the prescribed majority of votes.

The experts also point out that HJC has been working in its incomplete composition for a long period of time, which is not in compliance with its nature. Article 14 Paragraph 3 of the Law on HJC, in fact allows the Council to hold a meeting with the presence of at least six members. Bearing in mind that the members of the Council, because of the election method, come from various institutional and social spheres (judiciary, executive and legislative powers, legal practice...), the consequence of working in an incomplete composition is that in the process of deciding, the Council did not include those institutional and social segments, which the Constitution authors considered necessary in order for the Council to fulfill its basic function – to guarantee the independence and autonomy of courts and judges. Thus it can happen that there is only one judge in the Council, among those six members required for decision making, although the intention of the Constitution is to have the majority of judges in the Council. According to available information, HJC worked in its incomplete composition in the majority of meetings, which, however, is sufficient for decision-making according to the Law.

The Director of the ACA on 9 December 2010 issued a decision on terminating the function of one HJC member by virtue of law, which became final on the basis of the Agency Board' Decision of 9 March 2011, because the function was assumed without the Agency's consent as provided by law, although he already had a public function – he was a Dean of the Faculty of Law in Nis. The Law on ACA stipulates that in such cases, the function shall be terminated by virtue of law, but that the body that has elected such official – in this case the National Assembly, shall make a decision thereof. However, the National Assembly has not decided for a year about this matter, after which the case was included in the agenda for 29 December 2011, but due to the insufficient number of votes, the decision has never been passed. During all this time, the HJC member, whose function was terminated by virtue of law on the basis of the final decision of the competent authority in accordance with the Law, has participated in the work of the body that protects the independence and autonomy of courts and judges.

There is a separate question, which HJC cannot be criticised for, but which adversely affects its work in this situation: why does the Law on ACA stipulate in Article 28 Paragraph 7 that a function, when the Agency determines a conflict of interest, shall cease "by virtue of law", while the next Paragraph establishes that the appointing authority shall issue "a decision" on the termination of function?

In September 2011, a HJC member from among the judges was arrested (for misdemeanours), by order of the Special Prosecutor for Organized Crime, on suspicion of having abused his office more than 10 years before. HJC lifted his immunity and he was detained in custody. In November 2011, one HJC member from among the judges resigned, claiming, *inter alia*, that since he started working in the new composition, HJC has not drafted or adopted any minutes from any of the meetings they held, and that some members present one opinion and view at the meetings of HJC Commission, according to which the proposal of decisions are prepared, and then at the HJC decision-making meetings, they vote otherwise, although the facts have not changed!

A HJC member, the judge who was detained in September 2011, as rapporteur had the highest percentage of proposals to adopt the objections (60%), while a HJC member – the judge who resigned, suggested in 44% of his reports that the objections should be accepted. At the first meeting, HJC adopted 45% of reviewed objections, while three months later, the percentage was four times smaller – about 11%. At the first HJC meeting, 86 cases were solved – out of which 36

objections were accepted, while at the following six meetings a total of 128 cases were solved - of which 25 objections were accepted.

Given that the same criteria and rules were applied, it is difficult to explain the difference in the percentage of proposals for the adoption of complaints/objections between the two HJC Commissions or in the rapporteurs' proposals to adopt objections. Such differences in decision-making outcomes lead to a question whether the same criteria were applied to all complainants/objection submitters and whether HJC treated everybody equally at the beginning of its work with complaints/objections and at a later stage.

By the Law Amending the LoJ, the appeals filed against the decisions of the "first election" are converted into objections decided by HJC. A remedy of remonstrative type, where an authority reviews its own decisions, is not unfamiliar to our legal system. However, the unfavourable fact is that the Law was amended when the appeals had already been filed, and the Constitutional Court had decided upon some of these appeals, which placed the appellants in an unequal position. In addition, the Constitution (Article 148, Paragraph 2) guarantees to the judge, whose judicial office has been terminated, the right to appeal to the Constitutional Court. Hence, it is an unappreciable legal interpretation according to which the appeal already filed in accordance to the right provided by the Constitution can be converted, by virtue of the law - a lower legal act, into an objection which is decided by the authority that issued the contested decision. HJC, of course, did not pass this law, but the implementation of the Law, in conjunction with other circumstances, burdens the overall legitimacy of HJC work.

When, by the Law, an appeal to the Constitutional Court was converted into an objection to HJC, HJC members who participated in the "first election" publicly pledged not to vote in appeal/objection procedures. They further clarified that they had agreed to "abstain from voting," which means to participate in all stages of process and make a quorum, but - not to vote. Such personal and, at the same time, group decisions can be understandable from the perspective of fairness principle - HJC members did not want to vote about the objection to their own decision, but if that perspective is dominant, it discredits the Law which stipulates that HJC member (all of its members, without distinction) shall decide upon objections. HJC members, who thus "self-pledged", took upon themselves a thankless role of correcting the Law by which the highest legislative authority has prescribed the manner of their work. On the other hand, if they had not done it, they would have suffered other types of criticism.

The situation was further complicated by an isolated example of HJC member, elected towards the end of the "first election" (i.e. who did participate in making some decisions against which the objections were filed), who decided not to join those who have pledged not to perform the part of the work that the Law mandates them to do. Thus, ultimately, the composition of the body deciding on objections of non-(re)elected judges is a result of the simultaneous but diverse and "unusual" legal provisions, the group decision that not to apply the Law in one aspect and the personal decision of the group member to follow the letter of the law, whatever position on the same letter is taken by the group of HJC colleagues. It is needless to emphasise how much better it would be if the question of legal and factual composition of the body deciding on the rights and lawful interests of citizens were less burdened with all these interpretations, group and personal observations and attitudes.

Although prescribed by the Law Amending the LoJ (Article 5, Paragraph 1), the fact that HJC found itself in the position to decide about the appeals/objections against its own decisions and the criteria and standards adopted by itself when the objections have already been filed, i. e. retroactively, does not have a fortifying effect on the legal system and rule of law, or even on the authority of HJC.

Article 31 of the Rules for the implementation of the *Decision on Establishing the Criteria and Standards for Assessing the Qualifications, Competence and Integrity and for the Procedure of Reviewing Decisions of the First Composition of the HJC on the Termination of Judicial Functions* stipulates that public nature of the review process shall be achieved, *inter alia*, through the opening of Commission and Council meetings to public. Although the Commission meetings are open to public, the rule is not respected when the Council considers the Commission's proposals since the Council makes a final decision on accepting or rejecting the objections in a closed session. The selective application of the principle of publicity, or its limitation to only one part of the process during which the final decisions on the merits of objections are not made, makes room for the possibility of influencing the members of the Council, whereas the allegations from the resignation of one HJC member are particularly disturbing because he claims that in a certain number of cases the Commission members voted differently in the Council meetings than in the previous Commission sessions on the occasion of which they had different opinion and viewpoint.

The opinion delivered by the CIPIPDP notes "serious problems" in the work of the HJC as regards transparency. The PoC reminds that in its Recommendation No. 17-32/10 of 03 August 2011, he pointed out to the HJC that it needed to improve the work of supporting services, in order to ensure full implementation of the decision of the CIPIPDP, as well as prompt implementation of decisions still unexecuted at that time. The lack of transparency that is still present, in the procedure that is much more complex compared to the Council activities in 2010, further erodes the confidence of the review participants in its lawful conduct.

The HJC composition has been encountering difficulties since the very beginning of its work, which, together with the difficulties that appeared at a later stage leaves too much room for disputing its legitimacy. The first composition of HJC worked without the representatives of university professors and, for quite a while, without the representatives of legal practice. The National Assembly has twice rejected the proposal of a joint session of law faculty deans, while the representative of legal practice was elected at the end of the (re)election period in a manner that leaves serious doubts as to whether on the occasion of proposing the nomination, the widest possible representation of members of the Bar Association of Serbia was provided, as required by the Law on HJC. Precisely, the proposal for a HJC member from among the legal practitioners was established by the Board of Directors of the Bar Association of Serbia, and not by its Assembly, although the Assembly is the body of the Bar Association with the broadest representation of membership. Experts were warning that even the President of the Supreme Court of Cassation, who chairs HJC, was elected without previously obtained opinion from that Court's general session, which contravenes Article 144 Paragraph 1 of the Constitution.

For these reasons, the PoC, on the basis of Article 24 Paragraph 2 of the LPoC, gives this opinion and informs the competent authorities and the public thereof in order to enable them to take a stand on the problems pointed out in the Opinion and undertake the proposed and other appropriate measures in a timely fashion and within their competences with the aim of resolving them.

Protector of Citizens

Saša Janković

Send to:

- HJC
- National Assembly of the Republic of Serbia

- *Government of the Republic of Serbia*
- *JAS*
- *CIPDP, for reference purposes*
- *The public, through the media*