

**JUDGES' ASSOCIATION OF SERBIA'S RESPONSE TO QUESTIONNAIRE ON
"DISGUISED" DISCIPLINARY ACTIONS AGAINST JUDGES**

1. Please provide detailed information, including disaggregated data, on the number of judges that have been subject to disciplinary proceedings in the last ten years. How many of them were found guilty of a disciplinary misconduct? How many of them were removed from office?

Disciplinary liability of judges was first introduced into Serbian legislation in January 2010, by means of the Law on Judges. However, the disciplinary authorities envisioned by the Law were only formed in late 2010, and started their operation in January 2011.

Requests for disciplinary action against a judge can be filed by anyone, but only the disciplinary prosecutor, acting upon these reports, decides whether a procedure will be initiated before the disciplinary commission.

Since their introduction, until 2020, a total of 5.576 requests have been filed against judges, out of which 128 resulted in initiating procedures; on 53 occasions, judges faced disciplinary sanctions (17 cases of public reprimands, 32 cases of salary reduction, 2 cases prohibition of advancement and 2 cases of both salary reduction and prohibition of advancement), while 10 judges were dismissed.

Due to the fact that disciplinary proceedings are not open to the public (unless the judge charged requests that the proceedings be open to the public, of which there is no formal data), we are not able to provide individual details.

2. Has any judge belonging to your association been subjected to any form of sanctions that were not previously established by law or that were imposed through a procedure that did not meet the procedural requirements established by the law? If yes, please provide information on the case(s).

These types of cases have not occurred. We would, however, like to mention that there was one case in which the High Judicial Council, as the second-instance authority deciding on appeals filed on decisions of the Disciplinary Committee, while the disciplinary proceedings was still underway, during the appeal procedure, amended its own Rules of Procedure (which is a by-law) and found a judge, who was previously relieved of disciplinary liability in the first-instance proceeding, responsible, and imposed a sanction, which was not possible before the Rules of Procedure were amended, which instead only prescribed possibilities of confirming the decision, or repealing the decision and returning it to the Disciplinary Committee to re-initiate and decide on it.

3. Apart from disciplinary proceedings, are there any other measures that may be used to interfere with the capacity of a judge to adjudicate cases before him or her in full independence? Are you aware of any case in which a judge has been promoted, transferred to

another court, forced to take a training course, a vacation or medical leave, or coerced or pressured in similar ways in order to abandon a case pending before him or her? If yes, please provide information on the case(s).

- 1) Election of judges for the first time, performance evaluation of judges and criteria for advancement of judges

According to the Serbian Constitution, the National Assembly (legislative body) shall elect as a judge the person who is elected to the post of judge for the first time, following the proposal of the High Judicial Council (competent and expert body), and this tenure of office shall last three years. These provisions leave space for political influence on election of judges, as there is a possibility that a candidate proposed by the HJC can end up being non-elected, as well as due to limitation of the tenure of office, which is followed by evaluation of a judge. Those judges that are evaluated positive will be elected to a permanent position by HJC. However, judges elected to temporary positions may find themselves in dread over the final outcome of their position, which creates danger of a lack of autonomy and independence in their performance. For the same reason, parties to procedures can not have equal access to justice, when it comes to the right to an independent judge, should such a judge perform in their case.

As of July 1st 2005, judges' performance is being evaluated by virtue of a Rulebook adopted by HJC. This Rulebook contains relevant statistical data on performance of a judge. Other than evaluating judges' performance in this way being completely inappropriate, this system of evaluation affects the way decisions are being passed – they have to be passed quickly, they have to be rendered in a certain deadline, and, in appellate proceedings, they need to be confirmed by a second-instance authority, in order for a judge to be graded positively; this may influence judges and force them to make “tactical manoeuvres” in their performance, and, ultimately, it affects their (in)dependence. The task of a judge is to deliver just decisions, based on good laws, in an optimal timeframe (which depends on the complexity of a case), with an obligation to be independent and impartial, not to pass as much decisions as possible without enough deliberation.

Concerning advancement of judges, the main problem is the absence of clear criteria. Decisions on advancement are adopted by HJC, and they mostly include the elected candidate's professional and personal biography, but they do not contain the **true reasoning** of that specific candidate's advancement, in relation to other candidates who also fulfil the conditions, as the HJC is not required to rank the candidates and elect those who are better ranked. This can lead to suspicion that only “obedient” candidates may be given advantage, while truly independent judges are being discouraged.

The procedure of the first election of judges is missing the most important test – whether candidates are ready to perform their duty independently, as this important criterion is not subject to grading, or evaluating.

Without clear criteria and acceptable reasonings contained in election decisions, disclosing why one candidate was given advantage rather than the other, it is not possible to check whether the best candidate was proposed and elected by criteria of competence, independence, impartiality and worthiness. The entire election process is flawed without the key criterion of independence, which

would disclose whether a judge is prepared to resist pressure while performing his/her duty. This type of “checking” candidates could be performed by means of a “judges’ independence test”, of which results would be included in reasonings of candidates’ election.

2) Court presidents – election and role

Presidents of all courts in Serbia are elected by the National Assembly, following a proposal by HJC. This makes it obvious that there is a possibility of political influence on court presidents, and on judges, indirectly. Although a court president should be “the first judge among the equals”, legal and practical mechanisms of internal influencing the judges still remain. The Courts’ Rule of Procedure (which was not adopted by the HJC, who is supposed to be in charge of guaranteeing independence of judges and courts, but the Minister of Justice, who is a part of the executive power) stipulates that court presidents will determine judges’ annual working schedule, without being obligated to explain such a decision. This leaves possibilities for court presidents to influence the judges inappropriately, as the schedule can be based on personal motifs and, eventually, can affect judges’ independence negatively.

Court president has the practical power to decide on judges’ positions in other ways, via decisions allowing or denying training, allocation of premises and equipment required for judges’ work, distribution of cases and judicial interns, assistants and members of staff, which may affect a judge’s final performance result, and the possibility for a judge to advance. Without clear guidelines on what should belong to a judge and a with a shortage of material and human resources, this practical power can be used to grant or deny working resources against all good principles, as there are no clear guidelines on what should belong to a judge, with a lack of material and human resources.

3) Other types of pressure within the judicial system

Serbia’s legal system is that of the continental type. According to the Constitution, the Law on Organization of Courts and the Law on Judges, judges shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts. Following results of the evidence hearing, based on judge’s free assessment of evidence and by applying the rules of burden of proof, judge determines relevant facts and decides by applying material law. Loopholes, if encountered, are to be resolved by interpretation of laws, in accordance with scientific standards in legal interpretation. In order to check their own understanding and interpretation of law while deciding on a specific case, judges will use other relevant court decisions, which makes the case law useful as an overview for the specific legal and practical situation. A judge will pass decisions based on the principles of judges’ discretion, which is possible only by free interpretation of facts and law. According to the Courts’ Rules of Procedure, the case law department of the second-instance court can return the decision to the judicial panel, should it consider that there has been a deviation from case law (not specified which one), along with an obligation to attach the opposite decision. If the panel decides not to amend the decision, because it considers it to be lawful, the case law department can take the decision to a session of the civil department. If the panel does not accept this department’s decision, the case will be taken to a session of all judges. There is no legal mechanism that would bind the panel to amend its decision, as this would be opposed to judicial independence which is guaranteed

by the Constitution and law. However, the panel can be sanctioned in another way, by means of courts' president's competences to amend the annual schedule and dissolve the panel, deny judges their right to advance within the court, or discredit them in another way.

4) External pressure

Unfounded criticism of the judiciary and judges following their decisions can often be heard from representatives of the two other powers, supported by media campaigns through media associated with them. There is no lawful definition of judges' right to address the public, although the predominant interpretation suggests that a judge does not have that right, not even as means of defending his/her own independence and dignity of personality.

4. What measures have been put in place in your country to enable judges to decide matters before them impartially and without any pressure or interference?

By means of Constitution, Law on Judges, and Law on Organization of Courts, good economic and legal guarantees for internal and external independence of judges were established, their dispositions prescribing that judges are independent while acting and deciding, and bound only by Constitution and laws, that they can freely interpret facts and laws, that they are not required to explain their understanding of law and interpretation of facts to anyone, except in the reasonings of their decisions, dispositions guaranteeing permanence of their positions and non-transferability of judges without their consent, except in cases of revocation of a court or a substantial part of the jurisdiction of a court, and dispositions on economic independence of judges.

However, there are no dispositions on efficient mechanisms for protection of these rights, which were predominantly established in the interest of parties to procedures, in situations of them being jeopardized.

Law on judges prescribes possibilities of addressing HJC by means of a complaint, should a judge deem that his/her right, which is not protected in another way, is endangered, as well as concerning acts undertaken by court president, but these mechanisms did not produce any results, maybe due to the fact that the composition of HJC includes representatives of legislative and executive powers.

Serbian Criminal Code includes a criminal offence named *Obstruction of Justice*, but it is not known if anyone was indicted for obstructing justice by pressurizing a judge in the process of decision-making, in the sense of endangering judicial independence.

Constitutional and legal guarantees of economic position of judges have not yet been applied consistently and mostly depends from assessment and will of executive and legislative powers.

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