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GOVERNMENT OF THE REPUBLIC OF SERBIA

ANTI-CORRUPTION COUNCIL

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Belgrade

THE RULE OF LAW AS THE BASIS OF THE FIGHT AGAINST SYSTEMIC CORRUPTION

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INTRODUCTION

The inclusion of Serbia in the circle of European countries with high levels of corruption requires that the Council deal with the issue of the rule of law, that is, violation of this principle.

When the Council, in its report, deals with recognizing, identifying and recording the causes that lead to systemic corruption, it does so to initiate action by the authorities to bring the state out of this infamous circle. The fight against corruption cannot be effective without the establishment of a functional rule of law.

The Council has produced dozens of reports for the Government, outlining the sources and the danger of systemic corruption, with recommendations for suppressing or preventing it.

The current Government (like the previous ones) did not provide the Council with any feedback on whether it accepted any of the recommendations in the reports submitted. In addition, the Council was denied information by the authorities. Documentation was mainly sought in cases of the use of enormous state resources. The Council faced a violation of the right from completely ignoring the request to obtain or access information to the non-execution of the Commissioner's decision.

Due to the lack of necessary documentation, the Council addressed the Commissioner for Information of Public Importance, which led to the initiation of some 150 proceedings. The decisions rendered by the Commissioner were not enforced, although the Commissioner informed the Government. Thus, the Commissioner's Report for 2018 demonstrates that out of a total of 238 requests for enforcement, as of 2010 submitted to the Government, it did not act on any of them, although it was obliged to do so.[1]

[1] Information from the Excerpt of the Report of the Commissioner for Information of Public Importance and Protection of Personal Data for 2018, which we enclose scanned in the attachment

2.А.2. Основне препреке у остваривању права на приступ информацијама

Препреке које су оптерећивале остваривање права на слободан приступ информацијама у 2018. години су готово идентичне онима из 2017. године, с тим што су неке биле израженије. **Суштина препрека остваривању права на приступ информацијама је одсуство подршке надлежних органа, на следећи начин:**

2.А.2.1. Немогућност управног извршења решења Повереника

У 2018. години је био присутан проблем управног извршења решења Повереника који датира из претходне године. Узрок томе је одбијање надлежности и сарадње других органа у достављању података неопходних за спровођење извршења, као и различита интерпретација одговарајућих норми о извршењу. Заправо, овај проблем је изражен у вези са применом новог Закона о општем управном поступку којим су прописане веома високе казне које би Повереник у поступку управног извршења требало у виду пенала да изриче органима власти као извршеницима, ради принуде да изврше решење.

Генеза овог проблема је детаљно приказана у Годишњем извештају Повереника за 2017. годину. Министарство државне управе и локалне самоуправе је закључило да питање извршења решења Повереника треба решити кроз измене Закона о приступу информацијама и то на „прецизан и применљив" начин. Међутим, Нацртом Закона о изменама и допунама Закона о слободном приступу информација од јавног значаја које је то министарство припремило и који је у 2018. години био на јавној расправи, проблем управног извршења решења Повереника није адекватно решен. Повереник је на то указао Министарству у писаном мишљењу на Нацрт закона, као и у каснијим комуникацијама поводом истог и очекује да Министарство прихвати предлоге Повереника засноване на аргументима и дугогодишњој пракси.

Други механизам који треба да доведе до извршења решења Повереника, којима се органи власти обавезују да жалиоцима доставе захтеване информације, а који је у надлежности Владе Србије, такође није функционисао ни у 2018. години. Ради се о законској обавези Владе да на захтев Повереника, непосредном принудом, обезбеди извршење његових решења[8]. Од укупно 238 захтева[9] за обезбеђење извршења колико је од 2010. године Повереник поднео Влади, она то није учинила ни у једном случају. Само у 2018. години, Повереник је од Владе затражио обезбеђење извршења у 65 случаја.

Неки од предмета у којима је од Владе затражено обезбеђења решења Повереника у 2018. години, а да то није учињено, односе се на информације које су због тога остале ускраћене јавности, као на пример: *о износима новчаних државних субвенција и отписаних потраживања Ер Србији, бонусима које ова компанија даје и сл.; акт о систематизацији радних места у Градској управи града Београда; о поступцима које је Више јавно тужилаштво водило против Синише Малог, актуелног министра финансија; о радном ангажовању појединих народних посланика и функционера у својству предавача на Високој медицинској школи струковних студија у*

[8] Чл.28. ст.4. Закона о слободном приступу информацијама од јавног значаја
[9] Податак се односи на стање на дан 31. 12. 2018. године

1. THE EUROPEAN UNION ON THE RULE OF LAW IN SERBIA

Analyzing the fulfillment of the conditions for the accession of Serbia to the European Union, the European Commission noted that Serbia has problems with the rule of law, that it has to change, correct, eliminate or minimize a lot to become a regulated state based on this principle. The latest annual European Commission Progress Report on Serbia and other EU candidate countries, released in May 2019, indicated that Serbia must significantly accelerate the rule of law reform, especially in the area of judicial independence, the fight against corruption, and the prosecution of war crimes, and the fight against organized crime, as well as to ensure freedom of the media, in order to preserve the overall balance in the accession negotiations with the European Union.[2]

The European Commission's 2018 Report states that Serbia has shown slower progress in the area of the rule of law. A key message in earlier reports was a focus on the rule of law through building the rule of law, the independence of the judiciary and independent bodies, freedom of expression, etc.

The Council wishes to point out the correlation of the legal state, the rule of law, corruption and its suppression.

From theoretical debates, it is concluded that the rule of law is one of the highest standards of regulated states, that it represents the ideal of a just society that is achieved by limiting the power of government in all its forms. It is an integral part of international and national law.

It is prescribed as the basic principle in Article 1 of the Constitution of Serbia. Article 3 of the aforementioned constitutional norm is elaborated by prescribing: that the rule of law is exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary, and other constitutional and legal restrictions.

2. PRINCIPLES OF RULE OF LAW

The basic principles of the rule of law are:

- a legally regulated life, governed by regulations accessible to all without restriction and discrimination;

[2] Posted on RTS on May 29, 2019 12:13 PM -> 7:04 pm with the headline: “Han: Serbia's progress, but more determination needed”.

- prohibition of retroactive effect of the law, i.e. the obligation to apply to each particular case the law which was in force at the time when the case has occurred or is taking place, thus ensuring the stability and legal certainty of citizens and the state;
- intelligibility of the law - clarity of prescribed legal norms in accordance with real life and level of development of society and state;
- restriction on the arbitrariness of the authorities;
- applicability of law and its conformity with the spirit of time, life and truth, as well as the need to achieve justice. The laws must be harmonized with real life. The law must not be contrary to the social conditions from which it originates.

3. LAW AS A MEANS OF LIMITATION OF POWER

In recent years in Serbia, laws have been passed mainly by emergency procedure (in 80% of cases[3]), which is why there was no broader public debate involving a critical part of the public. Incomplete public debate consequently leads to a lack of competent analysis, which is confirmed by the fact that some laws have been amended several times in the short period following their adoption, regarding the same or similar areas of regulation.

a. Laws limit the power of government if adopted in the prescribed regular procedure. Adoption of the law in an emergency procedure should be the exception.

b. The Council had serious objections to the corrupt provisions of some laws. However, due to the urgency of their adoption, they were not considered. Analyzing a set of judicial and procedural laws, the Council found that in the last five years: the Law on Public Prosecutions has been amended ten times; The Law on Judges twelve times; The Law on the Organization of Courts eight times, the Law on the Judicial Academy twice, the Law on the High Judicial Council and the Law on the State Council of Prosecutors three times, the Law on Enforcement and Security four times, the Law on Civil Procedure three times, while the Law on Criminal Procedure had five changes.[4]

c. According to the Council's observations, some legal provisions copied from other countries did not correspond to the specificities of our society and current social needs. Due to a substantial parliamentary majority that primarily responds to ruling party discipline, the Government's legislative proposals are adopted virtually automatically. The most important

[3] From the Council's 2016 Judicial Status Report
[4] From the Council's 2016 Judicial Status Report

consequence is that such legal proposals go with the establishment of "new systemic solutions" without considering whether they are objectively applicable.

d. In order to prevent opposition, the parliamentary majority has submitted a large number of identical amendments to the draft laws, which are either praiseworthy of the current government or criticism of the former authorities, which precludes a meritorious parliamentary debate.

e. Amendments to the law are often worse than the original text. In amending the Criminal Code, it was proposed to impose a sentence of life imprisonment without parole. Neither these changes, nor many others, have undergone widespread public and professional debate. This has failed to take into account the attitude of the European Union, which is indisputable in this regard. Namely, the European Union is committed to include countries that do not prescribe the death penalty or life imprisonment without the right to release.

Dr Miodrag Majic, a criminal judge at the Belgrade Court of Appeal, has publicly spoken out against this (introduction of life imprisonment) amendment of the law, citing the practice of the Strasbourg court. Instead of taking that view as a matter of expert debate, the dissenting opinion that the government may or may not accept, the deputies of the ruling majority, at a parliamentary session, declared Judge Majić ignorant and dishonest. This is a way to discourage experts from expressing critical thinking. The attack on Judge Majic is an example of intimidation of those judges who rely on independence and expertise. Such intimidation from a position of authority directly compromises the rule of law.

At the meeting organized by the OSCE and the weekly Vreme on November 12, 2015, the judiciary was discussed. Then the judges present publicly stated that they were scared, because they are also humans who have to take care of their existence and the existence of their family.[5]

In the past five years, the Criminal Code has been amended six times. When a systemic law is amended six times in five years, it is clear that such a law cannot be classified as good law. Frequent changes to systemic laws completely compromise the harmonization of court practice, which has a direct impact on the existence of legal certainty.

f. The prosecution investigation was launched without the necessary preconditions for its efficient functioning, which is the independence of the prosecution itself. Since the independence of the prosecution has not yet been established, and the system of prosecutorial inquiry has been introduced swiftly, the effects of introducing this system speak more in favor of regressing the rule of law than promoting it.

Both citizens and the judiciary are publicly complaining about the passivity of the Public Prosecutor amidst many unsolved affairs.

[5] From the Council's 2016 Judicial Status Report

4. EXAMPLES THAT AROUSED PUBLIC ATTENTION DUE TO NON-IMPLEMENTATION OF THE CONSTITUTION AND LAWAS

4.1. PROMINENT EXAMPLES

4.1.1. TAXI BUSINESS

Ever since the jurisdiction of commercial courts in the process of registration of business entities was transferred to the Business Registers Agency, a system has been introduced that enables registration of business entities in a simple and economical way.

However, the introduction of such a registration system created the opportunity for a business entity to register for consulting services in the field of information technology, and in fact to deal with the public transport of passengers.

In this example, it is debatable whether the activity of transport, that is, innovations in the transportation of taxis, can be performed only by those who have received permits from the governing bodies, or also by those who do not have such permits. In a regulated state, the laws must apply. We witness that in the majority of the statements given on this occasion, the Prime Minister and the relevant ministers have admitted that they have a dilemma regarding the application or non-application of the law. The Prime Minister's claim that someone found “loopholes in the law” is an acknowledgment that the government ignores the rule of law.

If Serbia wants to meet new technologies and the advancement of public transport, it must amend the obsolete provisions of the laws and by-laws, in accordance with the new circumstances, and in accordance with the objective needs of citizens.

4.1.2. SAVAMALA

In the three years since the commonly known Savamala demolition case occurred, no one has been held accountable for a flagrant violation of citizens' rights. On the contrary, the mayor, whom the Prime Minister identified as a possible responsible person by the use of the words “Top city government”, has been promoted to Minister of Finance. Apart from the public, only Ombudsman reacted, who tried to initiate proceedings in the prosecution.

Night demolition in the city center, with the involvement of construction machines and masked men, who provided demolition by depriving the citizens, including the security guards of the objects in question, unlawfully imprisoned them, tied them up and seized their phones, has remained without epilogues to this day.

On a critical occasion, the police were passivated to such an extent that they did not intervene on the spot despite multiple calls from citizens. To this day, it is not known how the "suspension" of the state in connection with this event occurred, and who is responsible for it.

This indisputable example of the absence of the rule of law was accompanied by the then Prime Minister's comment that the demolition of buildings is good for the state if it is about illegally constructed facilities.

4.1.3. RECTORATE

The problem of the rule of law is also reflected in the attitude of the authorities towards the University.

The Committee for Professional Ethics of the University, on the 21.11.2011. determined non-academic behavior of the incumbent Minister of Finance when drafting his doctorate, due to plagiarism of parts of another doctorate. Although the University is autonomous in making decisions of this kind, Government officials violated this legally guaranteed autonomy by declaring the Board's decision political, thus undermining the University's reputation for "repairing" the Minister's reputation

This is another example of the absence of the rule of law resulting in the destruction of the well-deserved reputation of the University of Belgrade, its professors and students.

4.1.4. INDEX

Due to suspicion of corruption in education, at colleges and faculties, manifested through the purchase of exams, diplomas and doctoral theses, an investigation was launched in 2007 against professors at the Faculty of Law in Belgrade and Kragujevac.

The single criminal proceedings were conducted before the Smederevo High Court against 86 accused of 120 criminal offenses. At the same time, similar criminal proceedings have been initiated in Croatia. After several months, the trial in Croatia ended with convictions, while in Serbia it remained almost at the beginning.

The Council addressed the Smederevo High Court several times (4 March 2014, 4 April 2015, 29 December 2016, 3 July 2017), requesting that the proceedings be expedited as it was obvious that due to procrastination, they would become obsolete.

The rule of law implies not only proclamation but also realization. The "decay" of criminal proceedings for obsolescence effectively abolishes the rule of law - justice becomes elusive.

This does not mean that the statute of limitations on prosecution should abolish or extend the statute of limitations. Legislative provisions on obsolescence are a guarantee of the rule of law at a higher level of generality. They oblige the state to be effective in law enforcement.

4.2. DISPOSAL OF PUBLIC PROPERTY

The Law on Public Property defines in detail what constitutes natural wealth, which cannot be alienated from public property.

According to Article 16 of the Law, it is provided that a good in general use cannot be disposed of from public property. Article 41 of the same Law prohibits the entrustment of goods of public interest for private, party and other illicit purposes. If the Government decides to entrust some natural wealth for private purposes, it is obliged to analyze what is lost by such trust and what the state and citizens get.

4.2.1. MINI HYDROPOWER PLANTS

A number of investors have obtained construction permits for the construction of small hydropower plants on Serbian rivers, including rivers and streams flowing through the protected area of Stara Planina. Investors tried to start construction, but a large number of residents in the region objected. They demanded that the authorities immediately prevent construction. The investors did not give up. People protesting also reached the President of the Republic, demanding that construction be banned. The President of the Republic, though not in charge, promised that it would not be built, while the Minister of Mining and Energy said on the same day that construction would continue, but in the way it is done around the world.

It is obvious that the state did not comply with the Law on Public Property, practically donating natural wealth to private individuals, which is another example of disregard for the rule of law.

4.2.2. VENČAC

Venčac is a mountain near Arandjelovac, whose natural peak no longer exists due to the excavation of marble and stone. The height of the Venac is reduced (it is not known how much), because such information is not found in any available document. What happened to the top of the mountain, to whom, and in what procedure, the state gave the right to exploit stone and marble is unknown. The state has an obligation to inform the citizens about what general interests have been achieved by making the mountain available to private individuals and what interests the citizens have achieved through such actions. This obligation is not fulfilled.

The objectives to be achieved by the rule of law are:

- Limiting the power of the government;
- Protection of human and minority rights and freedoms;
- Build and strengthen institutions that will decide on specific rights independently, based on the Constitution and law, and not on orders and instructions of the executive or hierarchically higher authorities.

The concept of constitutional rule of law is based on ideas that come down to the obligation to obey the law, not the people, with restrictions on the rights of power-holders, because every government is subject to abuse and arbitrariness. It follows that every authority must be networked, controlled and monitored. Management functions must be clearly demarcated. In fact, it all comes down to the fact that the legislature is restricted by the Constitution, and that the executive power is strictly limited by positive law.

The rule of law has two inseparable aspects - formal and substantive.

That is why the Venice Commission has identified the necessary elements of the rule of law, which synthesize both aspects, both formal and material. Those are:

1) Legality, including a transparent, accountable and democratic process for enacting law;
2) Legal certainty;
3) Prohibition of arbitrariness;
4) Access to justice before independent and impartial courts, including judicial review of administrative acts;
5) Respect for human rights;
6) Non-discrimination and equality before the law.

5. THE CONSTITUTION AS A MEANS OF LIMITATION OF POWER

The most important limitation of power stem from the constitutional provisions.

Stepping out of the scope of the constitutionally prescribed competencies constitutes unconstitutional treatment, and therefore a compromise of the rule of law.

Article 112 of the Constitution provides that the President of the Republic:

"1. represent the Republic of Serbia in the country and abroad, 2. promulgate laws upon his decree, in accordance with the Constitution, 3. propose to the National Assembly a candidate for the Prime Minister, after considering views of representatives of elected lists of candidates, 4. propose to the National Assembly holders of positions, in accordance with the Constitution and Law, 5. appoint and dismiss, upon his/her decree, ambassadors of the Republic of Serbia, upon the proposal of the Government, 6. receive letters of credit and revocable letters of credit of foreign diplomatic representatives, 7. grant amnesties and award honors, 8. administer other affairs stipulated by the Constitution. In accordance with the Law, the President of the Republic shall command the Army and appoint, promote and relieve officers of the Army of Serbia."

The President of the Republic does not adhere to the strictly cited constitutional provision, which makes the constitutional order of the government ridiculous.

Thus, for example, it does not stem from the Constitution that the President of the Republic is authorized to give state aid, or to dispose of state funds, as well as to participate in negotiations regarding the conclusion of economic affairs; to arrange and promise subsidies (mainly to foreign companies), as it appears and is affirmatively presented to the public.

The subject of public speaking of the President of the Republic are also the current court proceedings. These statements often contain testimonies that violate the fundamental principles of Article 6 of the European Convention on Human Rights - the right to a fair trial, which also includes a prohibition on the violation of the presumption of innocence.

In its reports on the judiciary, the Council pointed to a violation of the presumption of innocence and demanded that it cease to practice that politicians in the media speak about the crimes of certain persons, and then the Minister of Internal Affairs would appear in public announcing that those persons had been arrested. The Government did not accept the Council's objections.

Here are some examples:

At the time of his being a prime minister, Aleksandar Vucic, now president of the Republic, at a press conference in the Serbian government, called Dragoslav Kosmajac the biggest drug dealer in Serbia. He said: "I wanted to check all the connections and see who was in connection with Kosmajac, to see why are you pretending crazy when you all know who is the biggest drug dealer in Serbia"..."I say hit Kosmajac ...". (SOURCE: Krik, October 1, 2015 2:08 and 3:12). https://www.youtube.com/watch?v=Mgcwd5Du0To

- At a press conference held on March 16, 2015, Aleksandar Vucic said: "We have evidence that the tycoon-mafia lobbies, from Zemun to the Miskovic clan, are fighting to change nothing, so they can continue robbing Serbia. (SOURCE: TANJUG, transmitted from Portal B92, Monday, 03/16/2015 | 17:54 -> 21:53)

- "Gentlemen of the Judges, I am asking you what the people of Serbia are asking themselves every day - when will you start judging by the laws of the Republic of Serbia, law and justice, and not by the amount of money you receive from the DOS thieves who carried out the most monstrous robberies of privatization? Gentlemen Judges, I would say honorable judges, but my honor and our people do not allow me, because how do you expect to be respected while you release the most obvious thieves from the biggest thieves and make the people crazy? Gentlemen Judges, finally tell the citizens of Serbia, to whom do you serve, the people or proven thieves?" (SOURCE: TANJUG, Uploaded by RTS Portal on Tuesday, December 26, 2017 3:26 PM -> 4:20 PM)

- Another example of interfering with the work of judicial authorities is the statement of the President of the Republic, who stated: "Milan Radoicic accepted polygraph examination. Passed

on the polygraph. Passed for the murder of Oliver Ivanovic. Not only did he not kill him, but he did not participate in organization, logistics, aiding, abetting, anything." (SOURCE: RTS - Interview "Oko specijal" 11/26/2018 30:45). https://www.youtube.com/watch?v=jtk2WpHPzR8

- There is an interesting statement from Vucic, who stated: "We think we have both the name of the killer and the name of the perpetrator. Albanians do not have it, they have no idea" ... "Milan Radoicic is not "a flower", but Milan Radoicic, certainly, with everything we received from the Ministry of Internal Affairs of the Republic of Serbia and the Security Information Agency, did not participate in any way in the liquidation of Oliver Ivanovic". (SOURCE: Tanjug - live announcement by the President of Serbia, published 03/07/2019 | 54: 29 and 54:47). https://www.youtube.com/watch?time_continue=3288&v=rjKFQOe9ioI&feature=emb_title

- In relation to Aleksandar Obradovic on the Krusik affair, Vucic made a guest appearance on Pink in the New Morning show: "Do you know why they carry stickers for pressure on prosecutors? They do not carry it because of this unfortunate man, who wanted to defend his mother, and then brought everything out so that mom would be satisfied and justify trusting with this other, not to be pejorative, mother not to be dissatisfied, to take to this new company, this is now a weapons trade, a competition ..." "The martyr is sitting in his house, and according to prosecutors, he has committed all kinds of crimes." https://www.youtube.com/watch?v=UlOBFZBrxnM

This is only a small part which shows that the executive power takes the right to accuse, convict, present and evaluate evidence, although it is certainly not subject to criminal proceedings under the Constitution or the Law.

6. RESTRICTIONS OF POWER AUTHORIZED BY THE CONSTITUTIONAL COURT

a) Constitutional Court judges are elected and appointed in the manner prescribed by the Constitution. Article 172 of the Constitution provides that the Constitutional Court consist of 15 judges who are elected and appointed for a term of nine years. Five judges are elected by the National Assembly, five are appointed by the President of the Republic, and five are elected in the general session of the Supreme Court of Cassation of Serbia. The National Assembly elects five Constitutional Court judges from among 10 candidates proposed by the President of the Republic. The President of the Republic appoints five judges from among the 10 candidates proposed by the National Assembly. The General Session of the Supreme Court of Cassation appoints five judges from among the 10 candidates proposed by the High Judicial Council and the State Prosecutorial Council at a joint sitting.

The Constitutional Court judge is elected and appointed from among prominent jurist, must be at least 40 years old and have 15 years of experience in the legal matters. Since the general session of the Supreme Court of Cassation is limited by the proposal of 10 candidates, given by the High Judicial Council and the State Prosecutorial Council, and since both the High Council and the State Council have 50% of members elected by the Assembly (politicians), this practically means that not even 5 judges of Constitutional Court are not elected by judges, but overwhelmingly elected by politicians.

b) An analysis of the biographies of current Constitutional Court Judges reveals that more than half of the judges are barely 40 years old, which means they are young judges, nine of whom have not completed internship in the judiciary. Of the total number of judges, election to the Constitutional Court is the first judicial employment for 9 of them. When one looks at their practice, one can see that they have previously worked in administrative bodies, executive branches or at the University.

This type of election might be fine if the Constitutional Court were to decide only on the subject of reviewing the constitutionality and legality of general legal acts, but since it is competent to decide on constitutional appeals, the question arises of the existence of expert resources for deciding in these cases. A constitutional appeal may be lodged against individual general acts or actions performed by state bodies or organizations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified (Article 170 of the Constitution). Therefore, in the Council's view, judicial experience is required to decide on cases of constitutional complaints.

With regard to the length of the proceedings before the Constitutional Court, the Council has very poor experience, since it took about 4 years for the decision on the requirements of the Council to review the constitutionality.

The overriding importance of addressing the Constitutional Court is to provide at national level the protection of citizens' guaranteed rights and freedoms. However, there is a trend that citizens are increasingly seeking this protection or announcing that they will seek it before the Strasbourg court, raising doubts in advance about the correctness of the Constitutional Court's decisions.

The Council analyzed the number of disputed cases before the Strasbourg court, preceded by decisions of the Constitutional Court, and found that, over a period of 2 years (from 2016 to 2018), in disputes which were resolved on a merits basis (disputes in which the claims were not dismissed as inadmissible) out of 58 disputes, 56 were lost and only 2 were won.[6]

[6]Data were taken from Constitutional Court's Performance Review, which is scanned and attached in the annex.

These data indicate the quality of work of the Constitutional Court, but also of the entire judiciary, which is why it is necessary to thoroughly investigate and determine the reasons for failure - whether the reason is poor regulations or the reason for their misapplication, which could be due to incompetence or lack of actual independence of the judiciary.

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да на националном нивоу пружи заштиту зајемченим правима и слободама грађана, има значај и за Републику Србију као чланицу Савета Европе и потписницу Европске конвенције, али и за сам Европски суд који је оптерећен великим бројем покренутих спорова против држава потписница Конвенције. Подаци из годишњег сумирања рада Европског суда за људска права у 2016. години неспорно показују да је Суд у Стразбуру далеко мање отперећен представкама поднетим против Србије него што је то било у ранијем периоду. Наиме, за разлику, примера ради, од 2014. године када је пред Европским судом за људска права у раду било готово 14.200 предмета против Републике Србије, пред тим Судом је на крају 2016. године у раду било свега 1.190 поступака по представкама поднетим против Србије, док је, примера ради, у односу на Републику Словенију пред истим Судом у току 1.587 поступака. Наведени податак био би само илустрација ефикасног рада Суда у Стразбуру да није праћен податком да током 2015. године донето свега 17, а током 2016. године 19 пресуда у односу на Републику Србију, којима је утврђена повреда неког од права гарантованих Европском конвенцијом за заштиту људских права и основних слобода.[4] Истовремено, у 2016. години 1.220 представки поднетих против Републике Србије проглашено је недопуштеним.

IV

ПРАВНИ СТАВОВИ УСТАВНОГ СУДА И НОРМАТИВНА ДЕЛАТНОСТ

а) Правни ставови

Уставни суд је на седници одржаној 26. маја 2016. године, поводом постављених питања у вези са обликом и садржином специјалног пуномоћја за изјављивање уставне жалбе, допунио раније заузети правни став од 2. јула 2009. године, на начин који гласи:

„Специјално пуномоћје за изјављивање уставне жалбе доставља се Уставном суду у оригиналу или овереном препису. У супротном, Уставни суд ће затражити од подносиоца или потписника уставне жалбе да такво пуномоћје достави, у остављеном року, уз упозорење на последице пропуштања да поступи по налогу Суда.

Уколико Суд посумња у истинитост специјалног пуномоћја за подношње уставне жалбе, затражиће од подносиоца или потписника уставне жалбе да поднесе оверено пуномоћје."

На седници одржаној 24. новембра 2016. године, а поводом постављених питања у вези са поступком разматрања нерешених предмета у којима је након вођене расправе на седници Уставног суда одложено одлучивање или предлог одлуке није усвојен, Уставни суд је утврдио став о поступању и одлучивању Суда у предметима у којима је отворена расправа на седници Суда, а која није окончана доношењем одлуке, који гласи:

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[4] Поређења ради у 2016. години је у односу на Републику Хрватску донето 25 пресуда којима је утврђена повреда неког од права гарантованих Конвенцијом.

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достављен појединачни акт који се оспорава или није достављено специјално пуномоћје за подношење уставне жалбе и др.), а што за правну последицу има одбацивање уставне жалбе. На поменуту појаву Уставни суд указује већ дужи низ година, али је реаговање професионалног удружења адвоката изостало.

Имајући у виду место које уставна жалба заузима у систему заштите људских права зајемчених Уставом и Европском конвенцијом за заштиту људских права и основних слобода, као и чињеницу да се супсидијарна заштита обезбеђује ван граница Републике Србије, путем представки Европском суду за људска права, значајно је напоменути да је у 2017. години Европски суд за људска права од 1.631 предмета који су се односили на Републику Србију, 1.594 представке прогласио недопуштеним или их одбацио, донео 26 пресуда (које су се односиле на 37 подносилаца) и у 25 предмета нашао повреду права. Такође, треба указати да је, према подацима Европског суда за људска права, значајно смањен број представки изјављених против Републике Србије.[6]

IV

ПРАВНИ СТАВ УСТАВНОГ СУДА И НОРМАТИВНА ДЕЛАТНОСТ

а) Правни став

Уставни суд је на седници одржаној 6. априла 2017. године разматрао предлог става у вези начина коришћења личног имена судија Уставног суда - припадника националне мањине, у актима Уставног суда. Питање дуалног начина навођења имена судије Уставног суда по први пут се појавило пред Уставним судом, за судију чије је име у матичну књигу рођених уписано двојезично, односно и на језику и писму националне мањине.

Имајући у виду непостојање претходне праксе у поступању Уставног суда поводом овог питања, Уставни суд је усвојио став који гласи:

„Лично име судије Уставног суда који је припадник националне мањине се, на захтев упућен председнику Суда, у актима Уставног суда наводи на начин на који је његово или њено лично име уписано у матичну књигу рођених, што значи да ако је лично име судије Уставног суда у матичну књигу рођених уписано и на језику националне мањине, у актима Уставног суда ће се наводити најпре на српском језику, ћириличким писмом, а након тога, у загради, и на језику и писму националне мањине којој судија припада. Уколико судија Уставног суда такав захтев не постави, његово или њено лично име се у актима Уставног суда наводи на српском језику, ћириличким писмом".

[6] На дан 1. јануара 2018. године пред Европским судом за људска права се налази укупно 1.577 представки изјављених против Републике Србије.

у којима су подносиоци уставних жалби покушали да, као запослени или бивши запослени у предузећима са искључивим или већинским друштвеним, односно државним капиталом, намире своја потраживања из радног односа.

Одлукама којима су усвојене уставне жалбе најчешће је утврђена повреда права на правично суђење из члана 32. став 1. Устава – у 135 одлука, повреда права на суђење у разумном року у поступку који је окончан и у неокончаним управним поступцима – у 225 одлука и повреда права на имовину – у 197 одлука. Због неједнаког поступања судова у истим чињеничним и правним ситуацијама Суд је у 37 одлука утврдио повреду права на правну сигурност, као елемента права на правично суђење, а у 31 одлуци повреду права на једнаку заштиту права из члана 36. став 1. Устава. Повреда права на правно средство из члана 36. став 2. Устава утврђена је у 10 одлука. У кривичноправној области донете су 2 одлуке којима је утврђена повреда права на слободу и безбедност из члана 27. став 1. Устава, а у 10 одлука је утврђена повреда права на ограничено трајање притвора из члана 31. ст. 1. и 2. Устава. У 3 одлуке утврђена је повреда права на правну сигурност у казненом праву из члана 34. став 2. Устава. У 1 предмету утврђена је повреда слободе изражавања из члана 46. Устава, у 2 предмета повреда права на правну заштиту за случај престанка радног односа из члана 60. став 4. Устава. У 1 предмету утврђена је повреда права и дужности родитеља из члана 65. став 1. Устава.

Уставни суд је поводом утврђених повреда права на суђење у разумном року у 179 предмета утврдио и право подносилаца уставних жалби на накнаду нематеријалне штете, док је у 192 предмета утврдио право на накнаду материјалне штете на терет средстава буџета Републике, као начин отклањања последице утврђене повреде права на имовину. Укупна висина утврђене накнаде нематеријалне штете износи 603.740 евра, у динарској противвредности на дан исплате по средњем курсу Народне банке Србије, док се висина накнаде материјалне штете утврђује у износу утврђеног, а ненаплаћеног потраживања. Уставни суд је, у складу са одредбом члана 89. став 2. Закона о Уставном суду у 149 предмета поништио појединачни акт којим је учињена повреда уставног права и одредио да доносилац тог акта поново одлучи о спорном питању.

На крају овог дела Прегледа рада Уставни суд налази да је потребно да укаже и на податке о раду Европског суда за људска права у 2018. години у односу на представке поднете против Републике Србије. Имајући у виду да је уставна жалба истовремено и последње правно средство у Републици Србији које се изјављује пре обраћања Европском суду за људска права, њена делотворност, поред примарног значаја да на националном нивоу пружи заштиту зајемченим правима и слободама грађана, има значај и за Републику Србију као чланицу Савета Европе и потписницу Европске конвенције за заштиту људских права и основних слобода (у даљем тексту: Конвенције), али и за сам Европски суд који је оптерећен великим бројем покренутих спорова против држава потписница Конвенције. Према подацима из годишњег сумирања рада Европског суда за људска права у 2018. години, током 2018. године разматрано је 1.269 представки које су поднете против Републике Србије, од којих су 1.224 представке проглашене недопуштеним или су брисане са листе предмета. У истом периоду су потписане две једностране декларације и закључена 33 пријатељска поравнања. Европски суд за људска права је донео 13 пресуда (поводом 45 представки), од којих је у 12 пресуда утврђена повреда неког од права гарантованих Конвенцијом. Потребно је истаћи да је ово најмањи број пресуда донетих против Републике Србије још од 2012. године. На крају 2018. године, Европски суд за људска права је у раду имао још 1.800 представки против Републике Србије (од укупно 56.350 нерешених предмета против свих држава чланица Савета Европе).

7. JUDICIARY AS AN INSTITUTION IN THE FIGHT AGAINST POWER AND CORRUPTION

When we analyze all the elements that determine the judiciary's independence, which are, according to the standards of the European Court of Human Rights: the manner of selecting judges, the duration of their term of office, the existence of guarantees that remove the ability to exert pressure on judges, we conclude that none of these elements is satisfactory. The attitude and actions of the authorities make it impossible for the judiciary to limit their power. It is clear that judges have no guarantee that they will be protected if they go against the expectations of the authorities (examples given in this Report). It follows that the judiciary is not allowed to act independently.

We covered all elements of the independence of the courts in our earlier reports on the judiciary.

A GRECO (Group of States Against Corruption) report published in 2018 concluded that Serbia did not fully comply with any of the Council of Europe's 13 recommendations for preventing corruption among MPs, judges and prosecutors. As stated, 10 recommendations were partially fulfilled, while three were not at all. Serbia has been given a new deadline. That deadline, meanwhile, had expired. Unlike previous GRECO reports, this one states that the overall assessment by the Serbian authorities of the implementation of the recommendations is no longer "overall unsatisfactory". This confusing assessment is justified by the failure to pass constitutional amendments.

The Council thinks that all 13 GRECO recommendations had to be adopted and implemented in order for the judiciary to become independent, that this did not require a change in the Constitution, that is, that there were legal mechanisms to do so.

All of the above mentioned produce the following:

8. CONCLUSIONS

- the adoption of laws under emergency procedure has become the rule rather than an exception;
- such conduct avoids substantial public debate regarding the enactment of the law;
- due to the urgency of the law-making process, there is no broad and competent public debate;
- the consequence of the laws thus enacted is their difficult applicability and susceptibility to frequent amendments;

- the implementation of the law is hindered by the unconstitutional interference of the representatives of the executive power in court proceedings, by making statements by state officials about one's guilt or innocence;
- it leads to the violation of the constitutionally guaranteed rights of citizens, in particular the rights of defendants in criminal proceedings;
- some laws are of poor quality, because they do not correspond to the existing social conditions and peculiarities of society;
- constitutional provisions on the organization of power are not strictly observed;
- a more efficient and professional conduct of the Constitutional Court is required;
- public property is not sufficiently protected in practice.

9. RECOMMENDATION

In this report, the Council pointed out problems that were primarily of a factual nature. This means that these problems, summarized in the conclusions of the report, can be remedied by the future strict adherence to already existing constitutional and legal solutions and generally accepted legal standards of the European Union, which would be the shortest route to the essential establishment and maintenance of the rule of law.

VICE-PRESIDENT

Prof. dr. Miroslav Milicevic