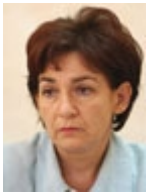
THE TOPIC OF THE ISSUE

OUR MANDATES ARE NOT POLITICAL MANDATES



Our mandates stem from professionalism and expertise

Vida Petrovic-Skero *President of the Supreme Court of Serbia*

Let me greet all colleagues, all guests, and let me say that it is nice to see that this hall can be filled with judges, and not only with students. This shows that we still do have the strength to speak out. Sometimes we are not listened to, but we do hear ourselves, and this is good.

I am always repeating at such gatherings: the Association consists of judges. It is we who have to say everything about the judiciary, other cannot speak for us. What is said hear will be heard, regardless of the fact that those who should be listening to us are not here. We must be heard, we are part of the administration which must take a stance in regard to our future status on time. We are a branch of power, we are that branch of power, the third one – or the first or the second one, it is irrelevant which one by order – which has a different character than the other two branches of power. The other two branches of power are subject to elections, one of them directly in democratic elections, the other branch of power gets its strength from the first one, democratically elected. I will never except that we must bear the same fate like the other two branches of power which by Constitution and law are subject to periodical controls in election. Both the old and the new Constitution envisage one of the basic guarantees of judicial independence, the permanence of the judge's function. Not even by a linguistic interpretation of the Constitution and the Constitutional Law can we conclude that all judges in Serbia must go through some new democratic selection, in the same manner as the representatives of the other two branches of power and thus confirm their mandates. Our mandates are not of a political nature. Our mandate stems from professionalism and expertise. Every elected judge had to and has to undergo evaluation of professionalism and expertise on a daily basis. In case that these criteria and these qualifications get lost, this state is obliged to elaborate mechanisms in its constitutional and legal system to have us discharged. If we are not conscientious or are unprofessional in our work, criteria have to be elaborated upon which this will be sanctioned. I shall try to be short. The only criterion for the election of judges, as envisaged by the Constitution, as said in laws, and I hope the future law will envisage this, too, and what is also established by generally applied standards, must be our professionalism, our expertise and our conscientiousness. It is my job, and therefore my duty, to read the laws. It is my duty and my job as judge to interpret them. Therefore I do not accept to think that anybody can think of reelection which is not envisaged either in the Constitution, or in law. The Constitution could have envisaged it, but it did not. Neither did the Constitutional Law envisage reelection. Linguistic interpretations of possible wishes regarding the unpredictable cannot be either contrary to European

standards, or against the established constitutional guarantee of the permanence of judgeship. I will always use the focused interpretation and like a "drunkard to the fence" I will stick to the envisaged constitutional guarantees of judge's independence.

I do not want ever again to read in the newspapers that somebody has annulled the judgment, being afraid of the consequences of the court's decision, because the judges are undergoing the process of reelection and therefore have developed an extorted fear of resentment in regard to political structures. Somebody will always use reelection for interpreting unwanted court decisions, if we do not have genuine guarantees envisaged by the Constitution. In my view, reelection is not envisaged, I do not want to speak of it any longer. It is clear that many see it as a solution for existing problems, which I cannot accept as a method without good methodology.

I would like to point out as a judge and as the President of the court, on behalf of myself and on behalf of many of my colleagues, to what is ahead of us, what we have to think about as people who have big responsibility, who actually are professionals who according to standards must judge independently, regardless of what somebody would like to have. The Constitutional Law has two crisis periods in regard to the judiciary. The first one is since January 1, 2007, and it will last until the second session of the parliament, which should pass laws which regulate all basic elements for the functioning of the judiciary. The second crisis period will run from the time when these laws will be passed, when the High Judicial Council will be constituted, and will last until this time next year, in which period we should realize the established mandate, to reach our punctuality, our quality, our independence. And the question is: How will this be done having in mind the dynamics envisaged by the Constitutional Law and the possible problems that can be the result of this dynamics? Unfortunately, it seems that only the judiciary is concerned in this regard. Of course, broad parts of the population which ask for court protection do not think too much on this issue at this moment. Unfortunately, those who were invited and who should have been here, and hear this, and exchange views with us, they are not present.

And what is our first problem? Obviously, the Parliament wanted to postpone the constituting of new courts. But it is obvious that the Constitutional Law oversaw that Art. 12 of the Constitutional Law envisaged that laws remain in force until they are harmonized with the Constitution, unless this Law does not say that they were no longer in force. It was further established that existing laws remain in force until the second session of the newly elected People's Assembly. Provisions of the Law on the Organization of Courts, those which do not speak only of courts which did not start to work, establish new competences. These are articles which are not in transitional provisions, which speak of competences of all courts, and according to the law which remained in force they apply as of January 1, 2007. So, until January 1 the courts which did not start to work will not start their work because of the provision of the Constitutional Law, however, according to applicable provisions related to the mandate of courts, there should be a change of mandate of the existing courts.

The Supreme Court has already discussed this issue, it considered the possible problems. It asked the Assembly to give the interpretation regarding the mandate of courts. Depending on what the Assembly is going to do until a given date, the Supreme Court convened the General Session, at which standpoints will be adopted which oblige the Supreme Court. The High Judicial Council reacted in regard to possible problems. It reacted the whole time also in regard to the passing of laws which established mandates for the courts which have not been established. The Supreme Court reacted, and has been reacting the whole time in matters of mandate and law. But the crisis was generated, it was deepened because of the provisions of the Constitutional Law. This period with uncertain criteria regarding the constituting of the judiciary is too long and will generate problems in its functioning, and later also in a longer period of time in which elections for different levels of the judiciary are envisaged.

The Constitution envisaged the existence of the Supreme Court of Cassation as the highest ranking court. Of course, lawyers will ask what this is? A legally unsustainable construction. Our colleague, whom I esteem very much, called this court the "so-called' court. We still do not know what it is going to do. The Constitution avoided deciding on the mandate of the highest level of judicial power. The mandates of the government, of the parliament, of the constitutional court – they were all defined, but the mandate of the new, highest, Supreme Court of Cassation was not.

I do not know how the legislator is going to solve this problem, and I believe that it will be very difficult for the members of the working group for the elaboration of the law which will regulate the issue of organization and mandate of the highest Supreme Court of Cassation to reconcile and unite two different legal concepts in one institution.

In any case, the Supreme Court of Cassation will be established, as envisaged in the Constitutional Law, within 90 days since the constituting of the High Council. It should not have the mandate to decide on appeals like the appellate court has. Who will decide on appeals in most severe cases, within the nine-moths period in which the appellate court will not yet be constituted? Will this be the new Supreme Court of Cassation with a reduced number of judges in regard to the now existing Supreme Court? If it will be

doing this, which number of judges will it need? If the judges are elected in a number sufficient for the new mandate of the Supreme Court of Cassation, they will not be able to perform promptly in the period until the appellate court will be constituted. It is well known that already now the Supreme Court in view of its jurisdiction does not have a sufficient number of judges. What will the entire mandate of the Supreme Court of Cassation and the appellate court be like in a relatively longer time span in which an even smaller number of judges will be working? It is obvious that we shall be facing a problem related to the element which gives quality to the judiciary, and this is expeditious conduct of trials. Such a legal solution can lead to the situation that during nine months the citizens will not be able to even dream of some realistic quick solution to their case. This question, too, will have to be solved by the new law which will regulate the organization and mandate of courts in accordance with the Constitution. The law will have to find answers to all raised questions, which is very difficult. I suppose that this time the legal theoreticians will be asked to assist, because in practice the problem is going to be a big one.

I think that we must opt for some solutions in regard to everything that was said here, that we have to give some kind of message. We are judges, we have our legal stance and we must say where we stand now. In my view, we must say that reelection is not envisaged, we must say that the election must be done by an organ which must give some guarantees as to independence. In case that the members of the High Council shall be proposed and elected exclusively by the Assembly, such an organ cannot produce such guarantees. The legislator must have this in mind, when giving such constitutional solutions. The report of the Commission of the Council of Europe after monitoring speaks of insufficient guarantees for the independence of courts. The Venice Commission is working on its own opinion. But we ourselves must also solve this problem, we must give our answer in order to arrive at a solution which will enable us to have quality. Can we answer that there are guarantees for the independence of courts, as I was asked a few days ago within a monitoring, that they will be sufficient when the time comes to decide on possible election disputes in the Supreme

Court? The question was raised because in a few months the members of parliament in regard to whose disputes the judges were ruling, will maybe discuss the election of these judges in the Assembly. Can we function normally in such circumstances? Is this pressure on the functioning of these judicial organs? I will say, and I firmly believe so, that my colleagues will do their job by the rules. However, will this be commented in this way also by those who will not be satisfied with the court decisions? I am certain they will not. Every citizen who is addressing the court seeks protection for something which he holds to be right. If he does not succeed in his dispute, he thinks that his rights are jeopardized and he uses all possible means to prove that he was deprived of his right. To bring the judiciary into such a situation is unacceptable. Someone will say that it even represents some kind of misuse. I think that it is necessary to once again point at the necessity to coordinate the work of all three branches of power. If this coordination is missing, the judiciary loses its attributes – independence and expertise – which will make it impossible for it to represent a genuine branch of power. We do believe that we are a branch of power. However, in view of the number of those invited and the presence of only two representatives of other branches of power I would not say so that they, too, believe that we are those who are genuinely equal with them, because if they would believe so, I presume they would have come and talk with us on an equal footing about all common problems.

Constitutional solutions for the judiciary – without judges

If we look back at the history, we shall find the fact that at the beginning of the last century there was a big discussion, which had lasted for three years, on whether or not we should have had in the future the Supreme Court or the Court of Cassation. Theoreticians and those from the practice in all main towns, after many years of discussion, decided that the country will have the Supreme Court as the highest court. Now the decision was made without broader legal discussion. I must stress that the judges did not take part in defining constitutional solutions for the judiciary. We shall have the Supreme Court of Cassation, whose mandate will be difficult to define due to the conceptual difference in the mandate of the Supreme Court on the one hand and the Court of Cassation on the other.