Judicial culture and the role of judges in developing the law in Serbia*

Judicial culture - in the sense of the customary ways judges think and behave when interpreting and applying the law - is very much determined by the constitutional history of the given polity and specific socio-political conditions under which it evolved. Serbian experience confirms this standing.

Serbian constitutional history consists of three major periods. In the nineteenth century, Serbia gradually gained independence from the Ottoman Empire and started introducing modern public law institutions. In the "Short Twentieth Century", Serbia became a member of a bigger state, Yugoslavia, which became a Socialist republic after the Second World War. In the twenty-first century, after the dissolution of Yugoslavia, Serbia re-embraced the values of liberal-democratic constitutionalism.

No matter how distant and different these historic periods are, they have all contributed to the definition of the current Serbian judicial culture. Firstly, they point to the fact that the importance of formal guarantees of judicial independence is overestimated, while the weight of the authoritarian political and legal culture in influencing the application of these norms is generally underestimated. Secondly, the Serbian constitutional history reveals that political branches of government tend to disrespect judicial independence, especially in politically sensitive matters. Finally, a common historic tread is that the permanent tenure of a judge's office is not secured even when it is constitutionally mandated, which affects judicial behavior towards executive and legislative branches of government.

It was not only the historic circumstances that preconditioned today's Serbian judicial culture and the understanding of the judicial independence. The international factors such as the European Union (EU) and the Council of Europe have been playing their role, as well. As Serbia became a candidate country in 2012, the European Commission reports on the country's progress towards the EU and its recommendations, including those favoring judicial independence, became increasingly important in the power politics in Serbia. And even prior to this, in 2004, Serbia became a party to the European Convention on Human Rights. This implied the supra legislative status of the European Court's case-law and, accordingly, the evolution of the understanding of the importance of the "judge-made law".

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As a result of all these endogenous and exogenous factors, Serbian judicial culture can be summarized as predominantly dogmatic and formalist, with a long-term perspective to evolve towards a more robust role of judiciary in developing the law. Serbian judges generally prefer to adjudicate not on the basis of constitutional or legislative sources, but on the basis of by-laws which attempt to regulate social relations in very details. And, since such regulation is not always available, on many occasions, there is no proper reasoning in the rulings. However, the problem of poorly reasoned judgments is not just the consequence of the tradition of textual exegesis and "one right answer approach". It is also explained by the big case backlog and pressure for the respect of the right to trial within a reasonable time. Due to these challenges, many judges unwillingly adhere to a particular policy of "solving the cases and not the problems", whereas when it comes to politically sensitive matters, it appears that the policy of "delaying the cases and not solving them" is mostly dominant.

The other side of the coin of the predominantly dogmatic and formalist approach to adjudication is that judiciary in Serbia has not established itself as a third branch of government. Serbian judiciary generally does not perceive itself as a separate branch of power and it does not always act like one, as manifested by the practice of poorly reasoned judgments and incoherent case-law. It is under open pressure from the executive and legislative branches of government, especially in politically sensitive cases. Furthermore, their prominent members have engaged, for the past couple of years, in the veritable populist attacks on the judiciary, with the intention to intimidate judges who do behave as an independent third branch of government, as well as all the others who could potentially follow suit. Finally, the legal education does not equip future judges with values and heuristic tools necessary for the establishment of the judiciary as an effective third branch. It does not boost the image of a judge – lawmaker, but of a judge – simple mouth speaker of the law: the syllabi and teaching methods being more supportive of the authoritarian discourse rather than of the discursive authority.

Despite all the burdens of the past and present times, rulings in the Serbian judicial system are generally impartially rendered and correct on the merits. And the quality of their reasoning is also being improved in the direction of being more discursive, more attentive to the overall coherence of the case-law and more open to the international sources of law. These developments are mostly the product of the Serbian membership in the European system of human rights protection. This "learning-by-doing" has helped a number of judges to question and even abandon the excessive formalism of post-Socialist law and the authoritarian legal discourse.

These conclusions have lead to the following policy recommendations:

- **Bar exam should be reformed so as to include European human rights law (EHRL). This reform would allow future judges, prosecutors and attorneys to have the basic knowledge of the law which is judge-made and to grasp what the concept of the discursive authority means in practice. In addition, the reform would prompt the inclusion of EHRL course in law faculties' curricula.**

- **Law faculties' curricula should be reformed so as to include EHRL as a mandatory course. Thereby the students of law – to be judges, prosecutors and attorneys, but also lawmakers and administrators – would embrace, from an early stage of their professional education, the liberal-democratic values, indispensable for an effective profiling of the judiciary as the third branch of government.**

- **Legal ethics course, promoting, inter alia, the values of the independent and professional judiciary, should be introduced as a mandatory course in the law faculties' curricula. Also, the best comparative and domestic examples of judge made-law should be included in the law faculties' courses' syllabi.**

- **Law faculties' curricula should be amended to provide for more interactive and discursive teaching methods.**

- **Ordinary courts' rulings should be easily reached on the courts' websites. This way, their rulings would be visible and open to professional critique, which in return would gradually contribute to their better quality.**

- **Constitutional Courts' rulings should be more easily reached on the Courts' websites. This way, its rulings would be more visible and open to professional critique, which in return would gradually contribute to their better quality. Also, already present, good practices of the Court in the constitutional appeal proceedings would thereby be more accessible to ordinary courts' judges, prosecutors and attorneys enabling them to give effect to it in their practice.**

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