



Reasons for filing a complaint - conduct of judges and attorneys in criminal proceedings against S.Č.

Non-governmental organizations, civil society associations, Human Rights Action, Women's Safe House and Women's Rights Centre filed complaints on 17 December 2014 with the Judicial Council and Bar Association about the conduct of judges and attorneys in the case against Moldovan citizen Svetlana Čabotarenko (S.Č.), in which a final verdict was reached last year convicting her *in absentia* to one year in prison for perjury. The procedure was initiated by an indictment filed by private prosecutors Zoran Piperović and Ekrem Jasavić, who were accused along with three other defendants in a testimony given by S.Č. in 2002 for abuse, mediation in prostitution and trafficking in humans. The criminal investigation ended in 2003 without charges against the defendants, which was criticized by the Council of Europe and OSCE in a special report¹. As part of her testimony, S.Č. also mentioned a private party in Sveti Stefan, allegedly attended, amongst others, by Montenegrin Prime Minister Milo Đukanović, who still holds the same post.

Analysis of the first instance judgment, sentencing S.Č. conditionally *in absentia*, and the second instance one, confirming the first instance judgment and modifying her sentence to one-year jail term, indicates that judges in this case acted with bias, contrary to the human right to a fair trial and the Code of Ethics of Judges of Montenegro.² In the context of ethics, as a brief illustration, one should recall the conclusions that judge Đuković based the final judgment on, which in themselves speak enough about his lack of objectivity:

"It is crucially illogical that (Piperović), who held public office of Deputy Supreme State Prosecutor, could have committed such a serious criminal offence to the detriment of the then damaged, especially since the said function, in addition to professional references, implies good reputation in both professional and personal life..." (judgment K.br. 199/14³, page 40);

"(The testimony of the accused) appears to be false and above all illogical, especially that any Montenegrin statesman lives this kind of lifestyle, as unfoundedly portrayed by the then damaged party..." (judgment K.br. 199/14⁴, page 41).

Among other things, judge Đuković's ruling contains insulting and disparaging statements at the expense of his colleague Ana Vuković, judge of the Higher Court in Podgorica, who led the criminal investigation in 2002-2003, which is a precedent in the case law of Montenegro, as well as at the expense of Ljiljana

¹ Joint Council of Europe / OSCE assistance to Montenegro in the fight against trafficking in human beings: Independent Experts' Report on their visit to Podgorica (22-24 July 2003) and Responses of the Government of Montenegro, SG/Inf(2003) 42, 11 December 2003, p. 61-65, available online.

² Analysis available at: <http://www.hracion.org/wp-content/uploads/17-12-2014-ANALIZA-PRAVOSNAZNE-PRESUDE.pdf>. Judgments available at: <http://www.hracion.org/?p=7877>

³ <http://www.hracion.org/wp-content/uploads/presuda-S.C-OSNOVNI-SUD.docx>

⁴ <http://www.hracion.org/wp-content/uploads/presuda-S.C-OSNOVNI-SUD.docx>

Raičević, Director of Women's Safe House, who provided S.Č. a shelter, and S.Č.'s attorney Dragan Prelević, although Đuković had no legal or moral obligation to do so, while also failing to hear the mentioned persons during the proceedings, even though he was supposed to.

In doing so, the judge damaged the reputation of the judicial office, which, according to law, is a specific offense, i.e. reason for establishing his disciplinary responsibility. Art. 50, para 1 of the previously valid Law on Judicial Council (*Sl. list CG*, 13/2008, 39/2011, 31/2012, 46/2013 and 51/2013), whose provisions remain in force until 1 January 2016, provides that a judge shall be disciplinary responsible in case of negligent performance of judicial duties or damage to the reputation of the judicial office in cases prescribed by law. As the previously valid Law on Courts (*Sl. list CG*, 5/2002, 49/2004 and *Sl. list CG*, 22/2008, 39/2011, 46/2013 and 48/2013) in Art. 33b, para 1, item 2 prescribes that a judge harms the reputation of the judicial office if he/she treats participants in the court proceedings and court staff improperly, it is clear that at the time of filing a complaint against judge Đuković there were reasons for establishing his disciplinary responsibility, i.e. for acting on the complaint.

The complaint indicates that the extreme bias demonstrated by judge Đuković in this case has damaged the reputation of the court, integrity of the judicial office and public confidence in the integrity of judicial institutions, all of which also constitute a violation of Art. 2,3,5,7 and 10 of the Code of Ethics of Judges⁵. The complaint also points out that, in deciding on the appeal of prosecutors to the first instance verdict, such conduct of a judge of the first instance court was fully supported by three judges of the Higher Court, who failed to react to the fact that the defendant's attorney had failed to take any action in the first instance proceedings, that he had not even appealed against the conviction, or filed what could have been considered a response to the appeal. In doing so, judges of the Higher Court allowed for completion of the proceedings which not only lacked the minimum standard of a fair trial, but also resulted in a violation of judicial ethics, although under Art. 11 of the Code of Ethics of Judges they were also required to call attention of the competent authorities to the conduct of the judge in direct contrast to what has been prescribed in the Code.

Boško Laličić, attorney who represented S.Č. *ex officio* in her absence, failed to do anything for the defence of S.Č., acting thus in an unprofessional and unethical manner, i.e. contrary to the Attorneys' Code of Professional Ethics⁶, charging the state budget for such services. The Code requires an attorney to act "in a considerate, conscientious, decisive and timely manner, with honesty to the client, with full commitment to the case entrusted to him/her and using all his/her knowledge and skills and all legally permissible and reasonable means". During the court proceedings, attorney Laličić failed to suggest presentation of any evidence or question any evidence against his client, while in the closing arguments he only stated "that he leaves it to the Court to assess the adoption of a lawful decision". He also failed to appeal the first instance decision finding his client guilty and sentencing her to a suspended prison sentence of two years, while in response to the appeal of prosecutors, who insisted on a more stringent punishment, he laconically stated that he sought "justice and legality". The Higher Court quoted these words in its ruling and stated that based on them "the court concluded" that the attorney suggested rejection of the appeal as unfounded, which means that the defence counsel representing S.Č. *ex officio* did not even propose that the appeal be rejected.

⁵ <http://sudovi.me/podaci/sscg/dokumenta/1274.pdf>

⁶ <http://www.advokatskakomora.me/kodeks1.html>

To whom and when the complaints about the conduct of judges and attorneys were submitted

In accordance with regulations on the competence of the Judicial Council and Bar Association, we have addressed these institutions on 17 December 2014, expecting them to act on complaints and initiate the procedure to establish responsibility of judges and attorneys for breach of professional ethics, i.e. disciplinary responsibility. On 23 December 2014 the complaints were also submitted to the presidents of the Basic Court in Podgorica and Higher Court in Podgorica, as they are competent to initiate disciplinary proceedings against judges of the court in which the preside - in the case of the Higher Court President and in relation to judges of a directly lower court.

Since we have not received official responses from the mentioned institutions or any feedback even after 70 days from the filing of complaints, on 26 February 2015 follow-up requests were submitted.⁷

Conduct of the Judicial Council on the whole

On 27 February 2015 we received a short letter⁸ from the Judicial Council, informing us that the competence of the Judicial Council has been stipulated under Art. 128 of the Constitution of Montenegro and Art. 23 of the Law on the Judicial Council (*Sl. list CG*, 13/2008, 39 / 2011, 31/2012, 46/2013 and 51/2013), and that these provisions do not provide the Judicial Council the possibility to comment on final decisions or evidence presented during the proceedings. HRA asked the Council to once more provide their opinion on the complaint, hoping that it was some kind of mistake, noting that the Constitution⁹ in Art. 126 stipulates that the Judicial Council ensures "the independence and autonomy of courts and judges", while Art. 128, para 1, item 5 prescribes that the Judicial Council is competent to review reports on the work of courts, *petitions and complaints against judges and take position on them*. Also, Art. 23, para 1 of the Law on the Judicial Council (*Sl. list CG*, 13/2008, 39/2011, 31/2012, 46/2013 and 51/2013) provides that the Judicial Council "considers complaints against judges", while para 2 of the same Article provides that the Council "decides on the disciplinary responsibility of judges." The right to submit a complaint to the Judicial Council has also been prescribed by the Rules of Procedure of the Judicial Council¹⁰ (*Sl. list CG*, 57/11, 17/13, 04/14), which in Art. 50, para 1 states that

⁷ On 17 December 2014, HRA submitted to the Judicial Council via e-mail: Analysis of the first instance verdict in the case of S.Č. (K.br. 199/14), first and second instance verdicts and a complaint against the work of judges of the Basic and Higher Court in Podgorica. Since there was no answer to the complaint for a long period of time, on 24 March 2015 in oral communication with the President of the Judicial Council, HRA Executive Director was told that the Judicial Council President did receive the e-mail of 17 December 2014, with all attachments – except for the complaint, and that therefore he could not have replied to it. After reviewing the content of the e-mail in question, it was established that all the specified documents were in the attachment, including the complaint about the work of judges, so it is obvious that the President of the Judicial Council, reading and reviewing the e-mail, failed to look at the last attached document (the complaint). On the same day, 24 March 2015, the same e-mail has been forwarded to the Judicial Council President with the same attachments of 17 December 2014, after which the Judicial Council acted in a manner described in detail in the main text.

⁸ On 26 February 2015 HRA submitted to the Judicial Council a request for access to information on actions taken on the complaint dated 17 December 2014 regarding the work of judges, since from December 2014 until the end of February 2015 the Judicial Council had failed to provide us with any information on actions taken. One day after submitting the request in February 2015, namely on 27 February, HRA received a letter stating that the Judicial Council had considered the complaint in its XV session, held on 25 December 2014, and that the response to the complaint was forwarded to HRA on 26 December 2014. However, HRA did not receive this response since the courier, i.e. Postal Service officer, noted on the envelope that HRA was no longer at the address given and that we have "moved". However, even assuming that HRA has indeed moved from a given address, there are other means of communication for delivering the response to the complaint, such as e-mail or fax, which are well known and which the employees or officials in the Judicial Council could have used to deliver the response. Instead, only on 27 February 2015 HRA received the response to the filed complaint, with the said letter and scanned envelope as proof of a submitted response and failed delivery.

⁹ The Constitution of Montenegro (*Sl. list CG*, 1/2007).

¹⁰ <http://sudovi.me/podaci/sscg/dokumenta/1483.pdf>

"any natural or legal person is entitled to file a complaint to the work and conduct of a judge and that the complaint is submitted to the Judicial Council."

In the same request HRA has particularly emphasized the fact that in its response the Judicial Council treated an accurately labelled complaint as a "petition", reducing thus the legal and procedural weight of a written document and trying to classify it as a document in respect of which there is no specific obligation of consideration and possible processing by the Judicial Council. However, a complaint, in contrast to a petition, represents the written address - processed and decided upon in line with the aforementioned specifically prescribed provisions of the Law on the Judicial Council and Rules of Procedure of the Judicial Council - that the Judicial Council is obliged to review and act on.

In addition to being obliged to consider the complaint on judge's conduct and to act on it as per the provision cited above, pursuant to Art. 51 of the Rules of Procedure, the Judicial Council was also obliged to submit the complaint to a president of the court employing the judge against whom the complaint was lodged - in this case the presidents of the Basic and Higher Courts in Podgorica¹¹, to verify the allegations in order to decide whether there are grounds for disciplinary action. Para 3 and 4 of Art. 52 of the Rules of Procedure stipulate that the court president, if he/she finds that there are no grounds for initiating disciplinary proceedings, will submit the entire case file to the Judicial Council with an explanation of why there are no grounds for disciplinary action, and that the Judicial Council will take a stand on such complaint and notify the complainant and the judge against whom the complaint was lodged about it.

On 12 May 2015 HRA received a letter from the Judicial Council in the form of Position on the request of 4 March 2015, noting once again that the provisions referenced by HRA (Art. 126 and 128 of the Constitution of Montenegro, Art. 23 and 54 of the Law on the Judicial Council (*Sl. list CG*, 13/2008, 39/2011, 31/2012, 46/2013 and 51/2013) and Art. 50 and 51 of the Rules of Procedure of the Judicial Council (*Sl. list CG*, 57/11, 17/13, 04/14) "do not leave the possibility to the Judicial Council to comment on the final court procedures or evidence presented during the procedures, but only assess the work of judges in the proceedings that are not completed, in order to decide whether there are grounds for disciplinary action against the judge for a committed disciplinary offense envisaged in the provisions of the Law on Courts, taking into account that ultimately the protection is provided by regular and extraordinary legal remedies."

In support of its allegations, the Judicial Council referred to the Venice Commission's opinion on Draft Law on the Rights and Duties of Judges and the Judicial Council of Montenegro, dated 28 November 2014, in which the Venice Commission stated that the competence of the Judicial Council to consider complaints about the work of judges leaves open the question of who has the right to lodge complaints and on what basis, and that in light of the functioning of judicial independence and taking into account the appeal proceedings against the decisions of judges, the Judicial Council should not be competent "to review complaints against judges." However, the Constitution of Montenegro expressly provides for this competence of the Judicial Council, as well as the Law on the Judicial Council and Rules of Procedure of the Judicial Council.

¹¹ A complaint was lodged on the work of Goran Đuković, judge of the Basic Court in Podgorica, as well as on the work of Milijana Pavićević, Hasnija Simonović and Evica Durutović, judges of the Higher Court in Podgorica.

Such position of the Judicial Council on its competence is the least contradictory, because in the preceding paragraph cited above from the letter of 12 May 2015 the Judicial Council states that it is competent "*only to assess the work of judges in the proceedings that have not been completed*, in order to decide whether there are grounds for disciplinary action against a judge for a committed disciplinary offense envisaged in the provisions of the Law on Courts, taking into account that ultimately the protection is provided by regular and extraordinary legal remedies". It is not clear what is the essential difference between the competence of the Judicial Council to "assess the work of judges (...) in order to decide whether there are grounds for disciplinary action" and its competence to "examine complaints on the work of judges", since both include the obligation of acting on complaints, initiatives or other form of pointing to improper or irregular work of judges.

The Council's reference to cited opinion of the Venice Commission raises a logical question - what is binding on the Judicial Council - the legal system of Montenegro or Venice Commission's opinion? It is clear that the current Constitution and state laws take precedence over the Venice Commission's opinion, particularly because the cited provisions of the Constitution, Law on the Judicial Council (*Sl. list CG*, 13/2008, 39/2011, 31 / 2012, 46/2013 and 51/2013) and Rules of Procedure of the Judicial Council¹² (*Sl. list CG*, 57/11, 17/13, 04/14), governing the procedure for handling complaints against judges, are still in force. Accepting such position of the Judicial Council would imply suspension of the application of the laws in force because of the Venice Commission's opinion, which, in the end, was not taken into account when adopting the new Law on the Judicial Council and Judges from March 2015 (*Sl. list CG*, 11/2015), which in Art. 27, para 1, item 5, regulating the competence of the Judicial Council, stipulates *that the Judicial Council, in addition to the responsibilities established by the Constitution (...) considers complaints relating to the work of judges and court presidents.*

The position of the Judicial Council that it can assess the work of judges only in procedures which have not been completed yet is not based in any of the applicable laws in Montenegro. In fact, *there is no regulation prohibiting the Judicial Council to consider complaints against judges in resolved cases.*

Failure to act of the President of the Commission of Judicial Ethics Code, Dobrica Šljivančanin

Although the complaint on the work of judges has been submitted to all the members of the Judicial Council, including the member of the Council who is also the President of the Committee for Judicial Ethics Code, Dobrica Šljivančanin, he did not see fit to take measures in line with the law and rules of procedure, and in accordance with his responsibilities, in response to a complaint pointing to multiple violations of the Code of Ethics of Judges.

Law on the Judicial Council in Art. 54, para 3 (*Sl. list CG*, 13/2008, 39/2011, 31/2012, 46/2013 and 51/2013) (regulations applicable until 1 January 2016) authorizes the Commission for Judicial Ethics Code to submit a proposal for establishing disciplinary responsibility of a judge for contempt of judicial function in cases stipulated by law. Art. 4 of the Rules on the Method of Work and Decision-making of the Commission of Judicial Ethics Code¹³ stipulates that the Commission *shall monitor the application of the Code of Ethics of Judges, act upon initiatives to institute proceedings to determine possible violations*

¹² <http://sudovi.me/podaci/sscg/dokumenta/1483.pdf>

¹³ <http://sudovi.me/podaci/sscg/dokumenta/1571.pdf>

of the Code of Ethics of Judges, decide whether certain conduct of a judge constitutes a breach of the Code of Ethics of Judges, submit a proposal to establish disciplinary responsibility to the Disciplinary Committee in accordance with the law.

Failure to act of the President of the Higher Court in Podgorica and President of the Basic Court in Podgorica

On 23 December 2014 a complaint was submitted to Presidents of the Higher Court in Podgorica and Basic Court in Podgorica, on the work of a judge of the Basic Court in Podgorica Goran Đuković, and work of judges of the Higher Court in Podgorica, Milijana Popović, Hasnija Simonović and Evica Durutović, with notification that the same complaint had been submitted to the Judicial Council. More than two months after filing the complaint and notice of complaints submitted to the Presidents of the Basic and Higher Court in Podgorica, on 3 March 2015 HRA once again addressed the Presidents of the Basic and Higher Court in Podgorica, requesting information on actions taken on complaints. Contrary to the Basic Court President, who did not provide any feedback to date, President of the Higher Court in Podgorica advised HRA in a letter dated 6 March 2015 to address the Judicial Council with regard to the outcome of handling the complaint, since the complaint had first been filed with this body, while he was only notified about it, and that the matter in question concerns a final decision, which may be challenged in proceedings under extraordinary legal remedies.

However, both the President of the Higher Court in Podgorica and President of the Basic Court in Podgorica should have considered our complaint, and, in case of establishing reasons for disciplinary action, initiate disciplinary proceedings by submitting a proposal to establish disciplinary responsibility of a judge in accordance with Art. 54, para 2 of the Law on the Judicial Council (*Sl. list CG*, 13/2008, 39/2011, 31/2012, 46/2013 and 51/2013 - provision applies until 2016). There is no provision that would oblige a court president to wait to be addressed by the Judicial Council with a request to act on a complaint.

Failure to act on complaints or to institute proceedings for establishing disciplinary responsibility of a judge when the court president knows or should know that there are conditions to do so is a breach subject to disciplinary liability (required by the provisions of Art. 50, para 2 of the Law on the Judicial Council (*Sl. list CG*, 13/2008, 39/2011, 31/2012, 46/2013 and 51/2013), which apply until 1 January 2016 and Art. 33v, para 1, item 2 and 3 of the Law on Courts (*Sl. list RCG*, 5/2002, 49/2004 and *Sl. list CG*, 22/2008, 39/2011, 46/2013 and 48/2013).

Failure to act of the Disciplinary Counsel of the Bar Association Živko Savović and President of the Bar Association Zdravko Begović

A complaint of unprofessional conduct of attorney Boško Laličić, who represented defendant S.Č. *ex officio* contrary to the Attorneys' Code of Professional Ethics¹⁴, was submitted by HRA on 16 December 2014 to the President of the Bar Association Zdravko Begović, and Disciplinary Counsel of the Bar Association Živko Savović. We have not been informed to this day whether any action has been taken by the Bar Association of Montenegro and its Disciplinary Counsel on the complaint.

¹⁴ This Code was adopted by the Founding Assembly of the Bar Association of the FRY, at the session held on 16 January 1999.

After 70 days had passed from filing of this complaint too, on 26 February 2015 HRA addressed the Bar Association with a follow-up request seeking information about actions taken on the complaint, and on the same day received confirmation from the Bar Association that the request was received and that it would be immediately forwarded to the Disciplinary Counsel and Bar President. Since no person contacted us on behalf of the Bar Association with regard to the said request, seven days later, on 5 March 2015 HRA filed yet another follow-up request, reminding the Bar about the complaint filed in December 2014 and the first follow-up request from February 2015, however, up to the present days no feedback has been received from this body.

Pursuant to Art. 94 of the Statute of the Bar Association of Montenegro¹⁵, Disciplinary Counsel acts upon the report of a natural or legal person, body of the Bar Association or upon own initiative. Art. 95 of the Statute provides that, if considering that the report contains elements of a breach of duties of an attorney and grounds for suspicion that there has been a violation of official duties, Disciplinary Counsel shall inform the reported person and submit to him/her a copy of the report and the accompanying evidence, with a call to provide a statement within 8 days of receipt of the report. Disciplinary Counsel may request additional explanations and evidence from the complainant or other state bodies, natural or legal persons (Art. 96). Ultimately, upon receiving the statement or upon the expiration of an 8-day deadline, and after carrying out the necessary preliminary inquest, Disciplinary Counsel decides whether to initiate proceedings and file an indictment or to reject the report.

After filing the complaint in December 2014, two more follow-up requests were submitted to the Bar Association of Montenegro and its Disciplinary Counsel, which, as stated, did not yield results. Disciplinary Counsel was obliged to comply with the cited provisions of the Statute and take concrete actions in order to verify the allegations and facts described in the complaint and decide whether to issue an indictment or dismiss the application.

Failure to act of the Bar Association and its Disciplinary Counsel, which protects the highly unprofessional conduct of an attorney in *ex officio* defence process, does not bring honour to this institution.

Tea Gorjanc-Prelević, Executive Director of NGO Human Rights Action

Ljiljana Raičević, Executive Director of NGO Women's Safe House

Maja Raičević, NGO Women's Rights Centre Executive Director

¹⁵ <http://www.advokatskakomora.me/STATUT/NOVI%20STATUT%202014%20PDF.pdf>