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Judicial Reform in Serbia in Light of “the Venetian Concept” of the Rule of Law

- **ABSTRACT:** *This paper analyses the influence of the standards of the Venice Commission in the area of the rule of law in the course of Serbian judicial reforms. The author first “sketches” the constitutional “path” of the idea of judicial independence and the rule of law in Serbia. He derives an “extract” from the “jurisprudence” of the Venice Commission in the area of the rule of law, which refers to the standards of an independent judiciary summarised in a document called the Rule of Law Checklist. The normative framework, which has been set by the constitutional amendments from 2022 and judicial laws from 2023, is a positive step on the way to building a national rule of law that will be compatible with international standards. In the coming period, Serbia will face numerous external and internal challenges. The Commission points to the relatively weak material position of judges, the lack of interest of young lawyers in applying for judicial positions, the large gap between retiring judges and young people. The Commission particularly emphasises the importance of building a legal culture. The author considers that segment essential for the success of the process that has begun.*

The author underlines that the international standards of the rule of law must not have absolute supremacy vis-à-vis the real needs of their adaptation to the national political, legal and social environment of the country in question. It is necessary to strive for a dynamic balance that will, in the long term, provide the conditions for the rule of law of national content that confirms the generally accepted civilisational values and achievements of the international legal community. Every step in that process must be carefully thought out and undertaken.

- **KEYWORDS:** judicial independence, rule of law, Venice Commission, judicial council, prominent lawyers, legal culture

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1. Introduction: Traces of judicial independence in Serbian constitutional history and a recent failed attempt at judicial reforms

If we ignore the “traces” of the independence of the judiciary from Serbia’s medieval past that can be found in Dušan’s Code from 1349 and 1354, the principle is first clearly mentioned in the Sretenje Constitution from 1835, the first modern Serbian Constitution. It stated that the judge does not depend on anyone in Serbia in pronouncing his judgement, except the Serbian code of law, and that no major or minor authority has the right to dissuade him from doing so or to command him to judge differently than the laws prescribe. A classic determination of the independence of the judiciary in the constitutional monarchy contained the Constitution of the Kingdom of Serbia from 1888 (Article 147): ‘Courts are independent. In the administration of justice, they do not stand under any authority, but judge and decide only according to the law. No state power, neither legislative nor administrative, can exercise judicial functions; courts cannot exercise legislative or administrative power, either. Justice is pronounced in the name of the King.’ It is rightly said that

... with the Constitutions of 1888 and 1903, Serbia unexpectedly soared above the highest European models, adopting, in addition to the usual corpus of guarantees of functional and personal independence, solutions regarding the manner of acquiring and terminating judicial office, which in Western Europe they begin to spread after the Second World War, and are found in the East only after the fall of the Berlin Wall.¹

In truth, the gap between what was proclaimed and what was real was huge.

Nevertheless, when presenting such *grosso modo* high evaluations of the guarantees of judicial independence in the Constitutions of the Principality and the Kingdom of Serbia, one should not lose sight of the fact that judicial independence is measured not by the scope and content of formal guarantees, but by the degree its implementation in practice. Constitutional guarantees are a necessary step in that direction (at least when it comes to continental European experience), but certainly not sufficient. For its realisation, favourable political and social conditions are needed, and above all, a developed social awareness of judges about their duties towards the state and society, as well as their ever-vigilant conscience. In accordance with that, just

1 Marinković, 2009, p. 161.

as the Constitutions of nineteenth-century Serbia were houses made of sand that were blown down by the first strong political wind, so the judicial independence was relatively solid on paper, but extremely fragile in real life.²

The first Yugoslav Constitution, the Vidovdan Constitution of 1921, also contained strong formal guarantees of judicial independence. Although judges were appointed by the King, they held office until they reached the age of retirement. Before that, a judge could only be dismissed by written request or when he became physically or mentally so weak that he could not perform his duty, which was decided by the Court of Cassation. Unlike the principle of the independence of the judiciary, which had its formal foundation in the old Serbian Constitutions and in the first Constitution of the Kingdom of Yugoslavia, the concept of the rule of law in the modern sense is linked to the recent constitutional history of Serbia and the Constitution of Serbia from 1990. It was the first constitutional act of Serbia that unequivocally proclaimed the rule of law. In the same year, the Venice Commission was founded with a primary task to help former real socialist countries bring in new constitutions that were to rest on three “pillars” – the rule of law, democracy, and human rights.

The Constitution of Serbia of September 28, 1990 was adopted by the socialist, one-party Assembly, when the Socialist Federal Republic of Yugoslavia was already on the verge of disintegration. This Constitution defined Serbia in a modern way. According to Article 1, Serbia was

a (1) democratic, (2) civil state („of all citizens who live in it’) (3) based on the rule of law (4) and social justice. Article 9 of the Constitution proclaimed the division of power into legislative, executive and judicial powers. „Constitutional and legislative power belongs to the National Assembly’. – The Republic of Serbia is represented and its national unity is expressed by the President of the Republic. – Executive power belongs to the Government. – Judicial power belongs to the courts. – The protection of constitutionality, as well as the protection of legality in accordance with the Constitution, belongs to the Constitutional Court.

Therefore, according to the Constitution, Serbia became a parliamentary democracy. The Constitution opted for the concept of civil sovereignty. The catalogue of human rights included internationally recognised standard personal and political rights, and basic economic and social rights. The Constitution proclaimed a free economy. Article 95 proclaimed the independence and autonomy of the judiciary.

2 Marinković, 2009, pp. 161–162.

The Constitution defined the role of the courts in a material sense: ‘Courts protect the freedoms and rights of citizens, the rights and interests of legal entities established by law and ensure constitutionality and legality.’ It proclaimed the permanence of the judge’s office. Judges were elected by the National Assembly. The 1990 Constitution transferred the Constitutional Court from the system of unity of power, to which it did not naturally belong, to the system of separation of powers. Constitutional judges were elected to a permanent position.

The 1990 Constitution, for all 16 years of its validity, was condemned as a “chimera.” There were no conditions for political pluralism that would eventually create a stable political system. The standard of living was low because of internal (unsuccessful property transformation and the absence of a real free market for goods, labour, and capital) and external factors (economic and political international sanctions, and NATO aggression on FRY in 1999). The judiciary and constitutional judiciary were burdened by the real socialist legacy. Consequently, rudimentary democratic forms (multi-party system and elections) without substance were developed. There were certainly no socioeconomic and political conditions for the establishment of the independent judiciary. Therefore, the rule of law remained an abstract concept without any real basis. The expression ‘the rule of law’ was used very often in public discourse, but its true meaning had not penetrated the consciousness of politicians, judges, and other legal practitioners.

The Constitution of Serbia from 2006 was adopted under duress,³ without any serious public discussion and without consulting the Venice Commission (although cooperation with this body formally began in 2001).⁴ The Constitution from 2006 can be roughly described as a “corrected” one from 1990 – partly for the better, and much more for the worse. This particularly applies to the provisions on the judiciary. Although a formally independent body – the High Judicial Council (the HJC) – was established, the National Assembly continued to elect judges; these judges were being elected to office for the first time. The permanence of the judge’s function was curtailed by “the probationary mandate” of judges who were elected for the first time for a period of three years, but also by the deconstitutionalisation of the grounds and reasons for the termination of judicial office – instead of being in the Constitution, they were found in the law on judges. Therefore, the constitutional guarantees of judicial independence was significantly weakened compared to the previous Constitution. Judicial reforms that took place in 2008-2010 was a logical consequence of bad constitutional solutions. Until then, Serbia had not known such a “reform” of the judiciary, with such disastrous consequences, although some sporadic “reforms” that had often included the removal

3 Montenegro had previously decided to withdraw from the state union in a referendum in May 2006.

4 On the beginning of the cooperation of Serbia with the Venice Commission, see Petrov and Prelić, 2020, pp. 548–553.

of politically unsuitable judges had also occurred during the period of validity of the Constitution from 1990.

In the process, all the highest state organs – the Ministry of Justice and Government, HJC, National Assembly, President of the Republic, and Constitutional Court participated. The process, called the general re-election of judges, was *de facto* the lustration of judges, that is, the unconstitutional political ‘cleansing’ of the judiciary.⁵ The result was a “disoriented” judiciary with most judges being convinced that the permanence of the judicial function as a constitutional principle in Serbia meant nothing. In the Serbia Progress Report for 2010, the European Commission stated:

Serbia made little progress towards further bringing its judicial system into line with European standards, which is a key priority of the European Partnership... The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary. The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which neglected adequate representation of the profession and created a high risk of political influence ... There are serious concerns over the way recent reforms were implemented, in particular the reappointment of judges and prosecutors.⁶

An urgent reaction of the Serbian authorities followed in the form of a change in the law on judges. The main change was the conversion of appeals submitted by unappointed judges to the Constitutional Court (837 in all) into objections that were to be decided upon by the HJC, a body that had, at the first instance, decided on the re(appointment) of judges. In May 2012, the HJC concluded the review of objections and 837 constitutional appeals to the Constitutional Court were filed against its decision. At the time, presidential and parliamentary elections were held, which led to the removal of political stakeholders who were responsible for the unprecedented unconstitutional reform of the judiciary. The Serbian Progressive Party, SNS, came to power in a coalition with the Socialists. Until October 2012, the Constitutional Court approved all appeals of the judges who were not re-appointed. Based on the decisions of the Constitutional Court (CC) that found procedural shortcomings vis-à-vis the HJC decision, all judges whose appointments had ceased were returned to function.⁷ The “benefit” of the disastrous judicial reform was reflected in the fact that Serbia’s European path was most strictly

5 Petrov, 2015, p. 5.

6 European Commission, 2010, pp. 10–11.

7 On the general reappointment procedure of the judges and its consequences, see Petrov, 2015, pp. 5–10.

linked to the complete depoliticisation of the judiciary. On the way to achieving that goal, the first step was the implementation of constitutional reforms in the judiciary. Active cooperation with the Venice Commission (VC) became a *conditio sine qua non* for the success of the judicial reforms.

2. The independence of the judiciary in the VC Rule of Law Checklist

Rule of Law Checklist⁸ can be freely called an “identity card” and constitutional document of the VC in the sphere of the rule of law. This document represents a synthesis of the multi-decade contribution of the Commission to the definition and implementation of the modern concept of the rule of law.⁹ According to the VC, “the benchmarks” of the rule of law are: Legality; Legal certainty; The prevention of abuse (misuse) of powers; Equality before law and non-discrimination; and Access to justice. In this paper, access to justice, especially its first component – independence and impartiality of the judiciary, will be analysed in detail. Access to justice comprises three core elements: independence and impartiality (of judiciary and judges); fair trial; and constitutional justice (if applicable).¹⁰

All terms in the Checklist are defined through a set of questions. After the questions, the key elements of the defined principle are explained in brief. The Commission defines the independence of the judiciary in a classic manner as “free from external pressure,” and ‘not subject to political influence or manipulation, in particular by the executive branch.’¹¹ One of “the pillars” of the independence of judiciary is definitely the permanence of judicial tenure, because ‘limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.’¹² The second “pillar” is the disciplinary responsibility of judges, which means that ‘offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s).’ The third “pillar” is an appropriate method of selecting judges. The VC recommends “an independent judicial council” with

8 VC, 2016.

9 In the Introductory part of the document, the Commission explains the purpose and scope of the report. After that, it develops the interrelations between the rule of law, on the one side, and democracy and human rights, on the other side. The second part concerns the “benchmark” of the rule of law, that is, various aspects of the rule of law. The third part of the Checklist disuses the standards, i.e. the most important instruments of hard and soft law addressing the concept of the rule of law.

10 Fair trials need a separate discussion. Constitutional justice is not analyzed in this paper because it is not a part of the judiciary in the Republic of Serbia even though the VC in its 2021 Opinion on Draft Constitutional Amendments gave some recommendations about the election of constitutional judges in the National Assembly.

11 VC, 2016, p. 20.

12 VC, 2016, p. 21.

‘decisive influence on decisions on the appointment and career of judges.’ The standard in terms of the composition of this body is. ‘...a pluralistic composition with a substantial part, if not the majority, of members being judges.’ The goal is to find “an appropriate balance” between judges and lay members, because ‘both politicisation and corporatism must be avoided.’ The fourth “pillar” is the integrity and the efficiency of judiciary, which can not be realised without sufficient resources, that is financial autonomy (relative autonomy of the judiciary’s budget, fair and sufficient salaries...).¹³ Citing the relevant practice of the ECHR, the VC points to another important aspect, which is the impression on the public that the judiciary is independent and impartial.¹⁴ That may be the crucial element of the legal culture facilitated by the rule of law. Without it, the independence of the judiciary and the rule of law exist only on paper and are not binding.

The independence of individual judges represents ‘the other side of the same coin.’ The most important element is appealing against a judgement before a higher court as ‘the only mode of review by judges while applying the law.’ There must not be any supervision by their colleague-judges, court presidents, or the executive. In order to ensure that it is important to answer adequately to related questions as following: constitutionally guaranteed the right to a competent judge; the competence of court clearly defined by the law; the objective and transparent allocation of cases.¹⁵

Although impartiality can hardly be separated from independence, the VC talks about objective (judiciary) and subjective (judges) impartiality by relating it to the public perception of impartiality (see above) and corruption, as well as other specific measures against it in the judiciary.¹⁶ The VC emphasises the autonomy of public prosecution as one of the “cornerstones” of the access to justice. There are two important qualitative differences between the judiciary and public prosecution: The first refers to independence, which does not feature for the prosecution. The VC demands “sufficient autonomy” to ‘shield prosecutorial authorities from undue political influence.’ The prosecutorial office must act based on and in accordance with the law. However, it does not mean independence. The second difference is that ‘there is no common standard on the organisation of the prosecution service.’ This is especially true for the mode of appointment of public prosecutors and the internal organisation of public prosecution. The public prosecution office is organised on the principle of hierarchy, which, however, is not strict. It means that ‘prosecutors must not be submitted to strict hierarchical instructions without any discretion and should be in a position not to apply instructions contradicting the law.’¹⁷

13 VC, 2016, pp. 21–22.

14 VC, 2016, p. 23.

15 VC, 2016, p. 22.

16 VC, 2016, pp. 22–23.

17 VC, 2016, pp. 23–24.

In conclusion, the Rule of Law Checklist provides a comprehensive definition of the rule of law today. However, it lacks a pure and prevailing academic and doctrinal character. It is not the way the Commission thinks and functions. The Checklist, available to all stakeholders – international organisations, national authorities, and civil society, is constantly evolving.¹⁸ Therefore, monitoring defined standards in the practice of national states is the primary task of the Commission, as demonstrated by the example of Serbian constitutional reforms in the judiciary.

3. Judicial reforms in Serbia in the VC “mirror”

■ 3.1. Serbia “on the Rialto Bridge”

From St. Mark’s Square (Piazza San Marco), the most popular tourist location in Venice, to the Scuola Grande San Giovanni Evangelista, where the sessions of the VC take place, you have to cross the famous Rialto Bridge (Ponte di Rialto). Serbia somehow got lost in the “Venetian labyrinths.” It took her almost two decades – from establishing formal cooperation with VC in 2003 – to “find” and finally “cross” the Rialto bridge. Until 2021, when it became certain that the change of the Constitution in the part on the judiciary would be carried out to the end (with the potentially always uncertain outcome of the constitutional referendum), the influence of the VC was very limited. The VC first addressed provisions concerning judiciary in its Opinion on a draft of the Constitution of Serbia in 2005. The Commission expressed concerns regarding the initial election of judges for five years (probationary mandate of judges), and the controversial election of judges and court presidents by the National Assembly.¹⁹

The main objection in the Opinion on the Constitution of Serbia from 2006²⁰ concerned the potential politicisation of the judiciary owing to the significant competences of the Parliament. The VC expressed dissatisfaction with the fact that the Assembly plays a dual role in electing judges – it elects members of the HJC and judges for permanent office. The next important document for the Commission was the Analysis of the Constitutional Framework for the Judiciary in the Republic of Serbia, which it adopted as part of the National Strategy of Judicial Reform in 2014.²¹ The document corresponded to the VC standards, codified in its reports on the judiciary and public prosecution adopted a few years earlier.²² Although the

18 See Suchocka, 2020, pp. 641–652.

19 See Petrov and Prelić, 2020, pp. 550–553.

20 VC, 2007.

21 Petrov et al., 2014.

22 VC CDL-JD(2007)001rev, VC CDL-AD(2010)004 etc.

VC never made an official statement on this document, it was highly rated in the Commission.²³

The work on changing the Constitution in the judiciary continued during 2018, when the Ministry of Justice prepared the Draft Act on the Amendment of the Constitution in the part on the judiciary and sent it to the VC. The Opinion was adopted in June 2018.²⁴ The Commission made numerous recommendations to improve the proposed solutions. The Ministry of Justice acted on some of them. However, the new version of the text did not satisfy leading non-governmental organisations (for example, the Association of Judges of Serbia). The draft was sent to the Commission for evaluation. On 22 October 2018, the Commission published the Memorandum of the Secretariat on the Compatibility of the Draft Amendments to the Constitutional Provisions on the Judiciary.²⁵ The changes in the final draft followed recommendations formulated by the Commission in its opinion. The Government of Serbia submitted a proposal to amend the Constitution to the Parliament. However, until the end of the mandate of that parliamentary convocation, the proposal was not considered. Thus, the attempt to change the Constitution failed.

The Government submitted the same proposal again in December 2020. In April 2021, the Parliamentary Committee for Constitutional Issues and Legislation (Committee) adopted a decision on the initiation of activities to amend the Constitution. Seven public hearings were organised on the proposal to amend the Constitution, to which the Committee invited representatives of the profession, scientists, professors, civil society, and other interested subjects. At the beginning of June 2023, the Assembly adopted a proposal to amend the Constitution. The Committee formed a Working Group to draft the act on amending the Constitution. It predominantly comprised representatives of the profession (main professional associations) and academia (professors of law, research associates), in which there were only two professional politicians (the President of the Committee and Deputy Secretary of the National Assembly). The Working Group adopted the Draft Act on the Amendment of the Constitution at the beginning of September 2021. A second round of public hearings was also held in September. The public discussion was organised so that everyone’s voice could be heard and taken into account.²⁶ Even before the draft of the constitutional amendments was sent to the VC for its opinion, it was certain that the standards of this body regarding the revision procedure were met to the greatest extent. The procedure was transparent and inclusive, and ‘the

23 The author of this text was convinced of this when he was in the VC for the first time as a member of the Commission for Serbia in July 2021.

24 VC, 2018.

25 VC Secretariat, 2018.

26 At the last public hearing on 17 September in the National Assembly of the Republic of Serbia, representatives of CEPRIS participated and presented their “alternative” model of constitutional amendments.

widest consensus possible within society' was reached around the text of the constitutional amendments.²⁷ The text determined by the Committee was submitted to the Commission for its opinion, so that it could be adopted at the plenary session in October.²⁸ The Commission was an active consultant in the process of changing the Constitution, while drafting constitutional amendments and preparing the opinion for the plenary session,²⁹ and after the adoption of the opinion, when the Committee followed a number of key recommendations from the opinion.³⁰

In the course of amending the Constitution in 2021, two standards were reached, and it was established that no deviation from them would be permitted in future revisions of the Constitution. The first is a public hearing that included a wide range of interested subjects and the formation of a representative working group for the drafting of constitutional amendments. The second is a qualitative shift in cooperation with the VC. In 2021, Serbia definitely "crossed the Rialto Bridge". The constitutional change in the judiciary, in the part that is of the greatest importance for the rule of law, almost unthinkable a few years earlier, was carried out procedurally in such a way that, from the point of view of the standards of the VC, no serious objection could be found to it.³¹

Complaints, predominantly politically coloured, came, as is usually the case, from within – specifically, from the non-parliamentary opposition, which had previously refused to participate in the process on several occasions,³² and from certain non-governmental organisations (CEPRIS), which from the beginning had objections to the procedure and content of most new constitutional solutions.³³ Nevertheless, the key political figures, President of the Republic Aleksandar Vučić and President of the Assembly Ivica Dačić, supported the constitutional

27 See on standards of the VC concerning constitutional provisions for amending the constitution, VC, 2023.

28 VC CDL-AD(2021)032.

29 On 28 and 29 September 2021, online meetings of the rapporteurs of the VC were held with all relevant stakeholders in the process of changing the Constitution.

30 See VC CDL-AD(2021)048.

31 'The Commission considered the process of public consultations for the draft amendments as being sufficiently inclusive and transparent; it stressed nonetheless that in the context of the current Serbian political landscape it is important for the Serbian authorities to actively seek the participation and involvement of the opposition. In this context it should be noted that the Venice Commission is pleased to learn from Mr Dačić, Speaker of the National Assembly, that a meeting with numerous representatives of the non-parliamentary opposition took place on 22 October 2021.' VC CDL-AD(2021)048, p. 4.

32 The VC stated that the institutional framework for changing the Constitution was provided by a politically monolithic assembly and that until the end of the process, it is necessary to actively seek the participation and inclusion of the opposition to achieve the widest possible legitimacy for constitutional reforms. Critics of the change in the Constitution took these words out of context, mostly, not stating that the Commission demands the opposition's responsibility and participation in the process. See VC, CDL-AD(2021)032, p. 5.

33 The representatives of various opposition currents generally agreed on two things – that this is not the moment to change the Constitution and that the referendum is only a 'testing ground' for measuring forces before the general elections in April 2022.

amendments and contributed to their approval by the citizens in a referendum dated 16 January 2022 after their adoption by the National Assembly on 30 November 2021. The revision of the Constitution, the first since its entry into force and in general in the modern constitutional history of Serbia (as the Constitution had never been revised since 1990), was proclaimed on February 9, 2022.

■ 3.2. *Serbian judicial reforms: “Year zero”*

After the adoption of the constitutional amendments, judicial laws were adopted a year later (February 2023). In the main contours, the normative framework was established. The normative framework is a necessary but not sufficient condition for the success of judicial reforms. Its operationalisation is another condition and will take place in two directions. The first is the adoption of by-laws and general acts.³⁴ The second is the constitution of new bodies, namely the HJC and High Prosecutorial Council (HPC), which happened at the beginning of May 2023.

The constitutional amendments from 2022 completely replaced the part of the Constitution from 2006 concerning the judiciary. They seek to find a balance between political and judicial authorities. It concerns the old aspiration to find a balance between partocracy and sudocracy, without damaging the system of constitutional democracy. Politics is withdrawn from the election of judges. However, the withdrawal is not absolute as judges judge operate in the name of the people, and every power, including the judiciary, has its source in the people. Every power is also political. The judiciary is, however, special, because it is or should be least political. It, however, does not mean that its performance does not entail responsibility, even if indirect, before society and citizens. This is the reason why the formulation of the relationship between the three branches of power remained: ‘The relationship between the three branches of power is based on mutual checks and balances’ (marked by *V.P.*).³⁵ Therefore, the judiciary, which is independent,³⁶ cannot entirely spring from or respond to itself. Absolute independence, without mechanisms of mutual influence negates responsibility. A constitutional democracy is unthinkable without a clearly established and constitutionally achievable principle of responsibility. These were the reasons presented by the VC when it positively assessed a similar constitutional solution back in 2018.³⁷

The constitutional amendments determined that judicial power belongs to independent courts.³⁸ The establishment, abolition, types, jurisdiction, areas of functioning, headquarters, and composition of and proceedings before courts are regulated by law. The establishment of immediate, temporary, and extraordinary

34 For example, court rules of procedure, rules of procedure for the work of the HJC and the HPC, etc.

35 Amendment I to the Constitution of Serbia (‘Official Gazette of the RS’, No. 16/2022).

36 Amendment I to the Constitution of Serbia.

37 See VC, 2018, pp. 4–5.

38 Amendment IV to the Constitution of Serbia.

courts is prohibited. The highest court in the Republic of Serbia is the Supreme Court (SC).³⁹ Therefore, the constitutional amendments respect the rule according to which judicial organisational law is a legal and not constitutional matter. An exception to this rule refers to the constitutional provisions on the election and mandate of the presidents of the SC and courts. The conditions for the selection of judges and the selection and mandate of lay judges are regulated by law.⁴⁰ By leaving the legislature to fully regulate judicial organisational law, two purposes were achieved: relief for the Constitution from a matter that is not *materia constitutionis*,⁴¹ and the constitutional identification of issues that must be regulated by the Constitution, which raised the dignity of the judiciary to the appropriate level. The independence of the judiciary is an explicitly proclaimed constitutional principle. 'Judicial power belongs to courts that are independent.'⁴² The previous wording, according to which the courts are autonomous and independent, has been abandoned.⁴³ Independence is a higher quality than autonomy. A state body can be autonomous, but not independent, which, in a certain sense, is still the case with the public prosecutor's office. The reverse, however, is not possible.

The personal independence of judges is defined thus: 'A judge is independent and judges on the basis of the Constitution, confirmed international treaties, laws, generally accepted rules of international law and other general acts adopted in accordance with the law.' Any undue influence on a judge in the performance of his judicial function is prohibited.⁴⁴ Somewhat new formulations of this principle achieved a double benefit. First, all sources of law that a judge is obliged to interpret and apply while performing judicial functions are consistently listed. Judges in Serbia are no longer unfamiliar with the ECHR and refer to it more frequently in their court decisions. However, the direct application of the Constitution remains an abstract category that is considered the *domaine réservé* of the CC. Second, it is important that the term 'improper influence on the judge' remained, because not every influence is inappropriate and thus prohibited. There are influences on the judge that are not only permissible, but also legitimate. For example, the influence of a university professor's lecture or a judge's presentation at an expert meeting, and a scientific article or an opinion expressed in a professional journal on an issue of importance for making a specific court decision, among others, is allowed, and even desirable.

39 Amendment V to the Constitution of Serbia.

40 Amendment VII to the Constitution of Serbia.

41 Although not completely successful, the situation is better than it was in the original text of the 2006 Constitution.

42 Amendment IV to the Constitution of Serbia.

43 This wording is also credited to the informal communication conducted during the preparation of the draft of the Act amending the Constitution with the director of the Venice Commission Simona Granatha Menghini and the rapporteurs who wrote the opinion on the constitutional amendments.

44 Amendment VI to the Constitution of Serbia ('Official Gazette of the RS', No. 16/2022).

The amendments define the binding nature of court decisions so that ‘a court decision can only be reviewed by a competent court in a procedure prescribed by law, and by the CC in a procedure based on a constitutional appeal.’⁴⁵ Therefore, no body other than the competent court can review the legality of the court decision. The CC does not examine the legality of the court decision in the procedure of the constitutional appeal, but whether or not the disputed decision violated the human right guaranteed by the constitution. Therefore, this supervision of the CC over the court’s decision cannot be considered a deviation from the principle of the obligation of court decisions. This new wording, where the CC is expressly authorised to review court decisions, will not be approved by the judges of ordinary courts who believe that the CC is not a court and that any intervention by it in a court decision can be considered an attack on the independence of the judiciary. This is a constitutional solution that was welcomed by the VC in its opinion from 2018.

Another constitutional principle on the judiciary has been corrected so that it can no longer be questioned. It concerns the permanence of the judicial tenure: ‘The judicial office shall be permanent.’⁴⁶ It shall last from the election of a judge until the judge reaches the retirement age. The probationary mandate of those elected to the position of judge for the first time is excluded, which is also in line with the long-expressed views of the VC.⁴⁷ The grounds for the termination of a judicial office before the end of the working life are determined in the Constitution, as mentioned in the 1990 Constitution. The permanent tenure of a judge will be terminated only in case of (a) retirement, (b) a personal request by the judge, (c) permanent loss of ability to exercise the judicial function, (d) loss of Serbian citizenship, and (e) dismissal in case of a criminal conviction to at least six months imprisonment or a disciplinary sanction, if the HJC considers the disciplinary offence seriously damaging to the reputation of judicial office or public confidence in the judiciary. The return of the permanence of the judicial office as an absolute constitutional principle and the constitutionalisation of the grounds for termination of the judicial office is the first systemic change in the judiciary made by the amendments in 2022.

A component of the permanency of the judicial function is the immovability of the judge, which implies that the judge performs the judicial function in the court to which he was elected. Only with his consent can he/she be permanently transferred or temporarily referred to another court. The Constitution foresees cases where transfer or referral is allowed without the consent of the judge, which is in line with the position of the VC.⁴⁸ First, in case of the dissolution of a court,

45 Amendment IV to the Constitution of Serbia (‘Official Gazette of the RS’, No. 16/2022).

46 Amendment VIII to the Constitution of Serbia (‘Official Gazette of RS’, No. 16/2022).

47 See on probationary mandate of judges, VC CDL(2010)006 *, p. 9.

48 ‘Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it can also be used as a kind of a politically motivated tool under the disguise of a sanction. Such transfer is justified in principle in cases of legitimate institutional reorganisation.’ VC, 2016, p. 35.

the judge is transferred to the court that takes over the jurisdiction of the dissolved court. Second, in the event of the abolition of the majority of the court's jurisdiction, the judge may exceptionally, without his consent, be permanently transferred or temporarily sent to another court of the same level that has taken over the majority of the jurisdiction. A judge can appeal to the CC against a decision on permanent transfer or temporary assignment, made by the HJC, and it excludes the right to a constitutional appeal.⁴⁹ The second systemic change in the constitutional amendments is the method of electing judges. According to the original text of the Constitution, those who were first elected to the position of judge for a period of three years were elected by the National Assembly on the proposal of the HJC. Judges for permanent positions were elected by the HJC. According to the 2022 Constitution, judges are elected to a permanent position by the HJC.⁵⁰ Not only were the representatives of the executive and legislative authorities excluded from the composition, but the HJC, at least on paper, has become a constitutionally potent body. This is the third systemic change, without which the second one, on the method of selecting judges, would have been merely cosmetic.

'The High Council of the Judiciary is an independent state body that ensures and guarantees the independence of courts, judges, presidents of courts, and lay judges.'⁵¹ The HJC does not have judicial power. It does not handle judicial self-government either, because it neither exclusively comprises judges, nor are all its members elected by judges. The affairs of the judicial administration are divided between that body and the Ministry of Justice. The HJC belongs to a category of independent state bodies. This fulfils another standard of the VC – the independence of the body responsible for the status of judges and related issues. The powers of the HJC are not exclusively constitutional in nature. In principle, the competences related to deciding on the positions of judges, presidents of courts, and lay judges are specified in the Constitution.⁵² Other competences of the HJC are prescribed by the law.⁵³

49 Amendment IX to the Constitution of Serbia.

50 Amendments VIII, XII to the Constitution of Serbia.

51 Amendment XII to the Constitution of Serbia.

52 Amendment XII to the Constitution of Serbia. 'The High Council of the Judiciary elects judges and lay judges and decides on the termination of judicial office, elects the president of the Supreme Court and the presidents of other courts and decides on upon the termination of their office, decides on the transfer and assignment of judges, determines the required number of judges and lay judges, decides on other issues of the position of judges, presidents of courts and lay judges and exercises other competences determined by the Constitution and the law.'

53 The Law on HJC from 2023 lists 29 competences of the Council, including those prescribed by the Constitution, and leaves room for the law to determine other competencies and tasks of this body (Art. 17 of the Law on HJC).

The HJC has 11 members: 6 judges elected by judges, 4 prominent lawyers elected by the National Assembly, and the President of the SC.⁵⁴ The Constitution leaves to the law the regulation of the method of selection of HJC members from the ranks of judges, but mandates that during their election to the HJC, the broadest representation of judges is taken into account. Any judge can be a candidate for a member of the HJC from among the existing judges. The President and acting President of the court cannot be candidates for members of the HJC.

Members of the HJC from among prominent lawyers are elected by the National Assembly from among eight candidates proposed by a competent committee, after a public competition, with the votes of two-thirds of all deputies, in accordance with the law. The goal of such a solution is to at least partially maintain a connection with the Assembly, which embodies popular sovereignty, but to prevent the politicisation of the election of these members and ensure their maximum independence and impartiality. The term prominent lawyer is a legal standard, which means that its content is determined in each case. The Constitution adds that a prominent lawyer must have at least 10 years of experience in the legal profession, must be worthy of that position, and cannot be a member of a political party. The Constitution provides that ‘other conditions for election and incompatibility with the function of a member of the High Council of the Judiciary elected by the National Assembly shall be regulated by law.’⁵⁵

The standard of the VC on the balanced composition of the judicial council, which will not comprise judges alone, but in which ‘judges and lawyers and the public will be adequately represented,’⁵⁶ is completely fulfilled. In theory, it is difficult to seriously object to a judicial council constituted this way. In practice, as we will show below, this concept has not been fully understood and, in the short term, does not remove all dangers from judicialisation and politicisation.

If the National Assembly does not elect all four members within the deadline specified by law, after the expiry of the deadline specified by law, the “anti-deadlock mechanism” of the election will be applied, where the remaining members will be selected by the Commission from among all other candidates who meet the conditions for election. That Commission comprises the Presidents of the National Assembly, CC, and SC, the Supreme Public Prosecutor, and the Protector of Citizens (Ombudsman), by majority vote. The anti-deadlock mechanism does not represent the defined standard of the VC, because there is no mention of it in the earlier reference documents and in the Checklist of the Rule of Law. Nevertheless, the Commission insisted on this mechanism, bearing in mind a qualified majority for the election of prominent lawyers in the Assembly, which, on regular occasions, in a pluralist Parliament, is extremely difficult to achieve without making a

54 Amendment XIII to the Constitution of Serbia.

55 Amendment XIII to the Constitution of Serbia and the Art. 44 of the Law on the HJC.

56 VC, 2016, pp. 34, 36.

compromise. If that compromise, which would imply that the elected prominent lawyers have almost unanimous support in the Parliament, cannot be achieved, the principle of efficiency and expediency gains primacy, according to which it is important that a body is constituted in its full composition, and not that its constitution be prevented by the impossibility of electing prominent lawyers in the Assembly.⁵⁷ Bearing in mind that this Commission comprises only five members and decides by simple majority (three “yes” votes are enough for election), and its democratic legitimacy is not even similar to that of the Parliament, the application of the anti-deadlock mechanism should be exceptional. The National Assembly should not relinquish its constitutional competence to elect prominent lawyers as members of the HJC.⁵⁸ Members are elected to the HJC for five years, and re-elections are not allowed. The HJC issues a decision on the termination of the office of an elected member, against which a member of the Council can lodge an appeal with the CC, which excludes the right to submit a constitutional complaint. This appeal can be submitted within 15 days from the date of delivery of the decision. The CC makes a decision on the appeal within 30 days from the date of receipt of the appeal in the Court, and this appeal postpones the execution of the decision on the termination of the position of a member of the Council. The HJC has a President and Vice President. The President is elected by the HJC from among members who are judges, and the Vice President from among members elected by the National Assembly, for five years. The Constitution expressly prohibits the President of the SC from being elected as the President of the HJC.⁵⁹

The HJC makes decisions by majority vote, provided that at least eight members of the Council are present. This means that no decision can be made without the participation of at least one member of the Council elected by the Assembly.⁶⁰ Exceptionally, the decisions on the election of the President and Vice

57 The VC, in its Opinion on Constitutional Amendments of Serbia in 2021, was not particularly “happy” with the solution proposed by the makers of the Serbian constitution vis-à-vis the five-member Commission. However, it did not recommend a concrete and adequate solution, either.

58 The establishment of an ‘anti-deadlock’ mechanism for the selection of prominent lawyers in the HJC was criticised by many in the domestic professional public, but it was one of the areas of “consensus” in the VC, which insists on the existence of such a mechanism. The Commission was not overly satisfied with the composition of the five-member Commission, but it did not propose a different solution. VC CDL-PI(2021)019 rev.

59 The VC recommended that the President of the SC be omitted from the composition of the HJC as an official, so that there would be six judges and five prominent lawyers. The solution adopted by the Serbian constitution makers was not acceptable for the Commission. The argument of the Serbian authorities was that the President of the SC traditionally personifies the judicial power in Serbia and that it is difficult to imagine the HJC without him composition. A concession was made in that the President of the Supreme Court will not be the President of the HJC, which is the standard of the VC.

60 This means that, as a rule, no prominent lawyer’s consent is necessary for making a decision, which is a strong argument in favour of supporters of the thesis of judicialisation, that is, sudocracy, to which such a legal solution paves the way.

President of the Council and SC and President of other courts, the dismissal of the President of the SC and of other courts, and the dismissal of a judge are made by a majority of eight votes. The Constitution offers protection against the decisions of the HJC. An appeal to the CC is allowed against the decision of the HJC in cases prescribed by the Constitution and the law. A declared appeal excludes the right to file a constitutional appeal. The VC Checklist allows judges to appeal against the decisions of the judicial council to protect their independence, which is ensured, in principle, by this decision. In practice, however, the question concerns the urgency of such an appellate procedure and the suitability of the CC, in the short term,⁶¹ to decide on the appeal. The fourth systemic change brought about by the constitutional amendments refers to the public prosecution: The provision of stronger guarantees of independence and internal independence of the public prosecution, abolition of the category of deputy public prosecutors (‘assistant public prosecutors’ who in practice handled cases, but was not responsible for them), and a certain relaxation of the hierarchical principle as the basic principle of the organisation and functioning of the public prosecutor’s office. However, the presentation of the public prosecutor’s office requires special attention and is not the focus of this paper.

■ 3.3. *The life of new judicial laws – “If a day is known by its morning...”*

In its opinion on the draft judicial laws from October 2022, the VC underlined the importance of an adequate normative framework for the judiciary:

As stressed in the November 2021 opinion on the constitutional reform in Serbia, the recent constitutional amendments have the potential to bring about significant positive change in the Serbian judiciary. The VC observes that the Serbian authorities invested considerable effort in preparing the legislative package: the draft laws are generally well-structured, clearly written, and cover all essential points which need to be covered. However, the VC wishes to underline that a successful judicial reform does not only depend on these legislative amendments: in order to secure an independent and future-oriented judiciary of good reputation, it is crucial that a solid legal framework should be accompanied by the non-legislative measures....⁶²

The Commission identified four key problems that must be addressed systematically if visible and lasting effects of the judicial reforms are really desired. The

61 The deadline is determined by the Law on HCJ, and the procedure for the action of the CC is regulated by the Law on the Constitutional Court, and to be respected, the deadline of 30 days must be exceeded, which is a consequence of the inconsistency of two related laws.

62 VC CDL-AD(2022)030, pp. 4–5.

first problem is related to the ‘generation gap’ between judges. Serbia has many vacant judicial positions, and in the next short period, there will be a significant outflow of judges owing to retirement. Law graduates are not motivated to apply for the position of a judge. The Commission noted that ‘this generation gap may be difficult to fill, and may become the endemic problem of the Serbian judiciary for years to come.’⁶³ Another problem concerns the material conditions for performing the function of a judge:

Attracting young judges to the system may require allocating sufficient budgetary means to the judiciary to solve the problem of relatively modest judicial salaries, as well as regulating judicial salaries and pensions in the law itself in order to ensure their appropriate level and regular indexation.⁶⁴

The third problem, ‘which cannot be solved by the legislative amendments alone, is the strictly hierarchical organisation of the judiciary, with a strong notion of supervision, hierarchy between higher courts and lower courts, and multiple forms of evaluations and controls.’⁶⁵

The fourth problem, which we can call a challenge of substantial importance for the rule of law in Serbia, is the change created, namely the building of a legal culture.⁶⁶ Creating a legal culture as a necessary condition for the rule of law is complex and requires a stable political framework that does not depend exclusively or even predominantly on internal political conditions in a small country like Serbia, but on relevant European and global political and legal factors. Legal principles and the content of law have become a relative category at the global level. Value landmarks of the international legal order founded immediately after World War II are disappearing. There are no new ones in sight. In such circumstances, building the rule of law from within seems almost impossible. One important, formal step was taken by complying with the legal deadlines for the constitution of new judicial bodies – the HJC and HPC. The very way in which prominent lawyers were elected,⁶⁷ the dubious “prominence” of many candidates who applied for competition, the discussions that took place in the competent parliamentary committee, and discussions in the National Assembly, which were not about specific candidates, but about general or current political issues, confirmed that normative solutions without an appropriate democratic legal and political culture are of little value and can be completely meaningless. We will refer only to two questions.

63 VC CDL-AD(2022)030, p. 5.

64 VC CDL-AD(2022)030, p. 5.

65 VC CDL-AD(2022)030, p. 5.

66 VC CDL-AD(2022)030, p. 5.

67 This is because judges, in accordance with constitutional law, remain in the Council until the end of their mandate.

First, the identity of the prominent lawyers remains an open question. In constitutional law, there are two views on the identity of a prominent lawyer. According to one, a prominent lawyer is a top legal expert who is distinguished by professional achievements from other lawyers. He is not an ordinary legal “technician” or “paragaphist,” but a lawyer with the highest abilities to interpret and apply the law. It is neither only years of life, seniority, and experience, nor formally high qualifications (e.g. full professor, scientific adviser), but also material evidence of the highest expertise of the candidate – scientifically and professionally recognised papers and reports, public appearances in accordance with the highest standards of the profession, international contacts and cooperation in the field of the rule of law, and proven engagement in the protection of human rights, among other things. According to another understanding, a prominent lawyer is a top legal expert who must also possess qualities such as moral integrity, autonomy of thought, intellectual courage, tolerance, creativity, and awareness of responsibility. He must enjoy a good reputation in society. This reputation is constitutionally confirmed by election in the National Assembly, with a strengthened two-thirds majority of all deputies. The goal of this solution is to maintain the connection with the Parliament, which embodies national sovereignty – for a candidate to receive the support of both the ruling majority and a relevant number of opposition MPs. Therefore, the chosen candidate should be a prominent lawyer with a certain democratic legitimacy. He does not represent himself in the judicial council, but the citizens, just as the judges in this council represent the judiciary.⁶⁸ None of that could be heard in the parliamentary debate. The above-mentioned mechanisms for the election of prominent lawyers have been tested in Parliament and before Commission and implemented for the first time in April and May 2023. Whereas the opposition MPs generally qualified as candidates for HJC membership as people close to the government, the MPs of the ruling majority did not deal with the personal and professional qualities of the candidates at all. The concept of a prominent lawyer in the judicial council as one of the key segments of the newly established legal framework of the judicial system was thus devalued from the very start.

Second, it was shown that the two-thirds majority for the election of prominent lawyers in the Assembly, which was insisted on by the VC, and is required in the Constitution of Serbia only in two other cases⁶⁹ represents the “threshold” which, in the conditions of Serbian parliamentarianism, cannot be “jumped over.”⁷⁰ The Assembly lightly relinquished its competence to elect prominent

68 See on prominent lawyers in judicial councils and on judicial councils in general, VC CDL-PI(2022)005. See also in Serbian Petrov, 2022, pp. 37–53.

69 While dismissing the President of the Republic owing to a violation of the Constitution, and while deciding to revise the Constitution.

70 The selection of one of eight candidates for both judicial councils represents a symbolic excess, which does not call into question our conclusion, but rather strengthens it.

lawyers. As far as the anti-deadlock mechanism is concerned, the five-member Commission did its job in an instant.⁷¹ The exception according to the Constitution, has become the rule. The good side of this mechanism is that it achieved its primary purpose – it prevented a “deadlock” in the selection of prominent lawyers. The potential problem that this mode of selecting prominent lawyers will produce in practice is reflected in the fact that these lawyers were chosen in the procedure “by the rest,” that they will not have the necessary democratic legitimacy, and that their presumed professional legitimacy will not be sufficient to achieve adequate balance in decision-making in these bodies, among other things. At the same time, officials who are influential members of the new judicial councils – the President of the SC and Supreme Public Prosecutor – took part in the election of prominent lawyers. Distortions in practice are sometimes such that even the most careful lawmaker, and even a body such as the VC, can neither foresee nor avoid them. The Commission is aware of the practical imperfections of anti-deadlock mechanisms, but did not give up on them at the time of writing.⁷² It recommended the exclusion of *ex officio* members (President of the SC from the HJC, Minister of Justice, and Supreme Public Prosecutor from the HPC), but for the Serbian authorities, this was an unacceptable “liberation” of the judiciary from any potential (President of the SC) or both formal and real links with politics (Minister of Justice and SPP).

The HJC is neither a judicial body, nor should it become a “miniature court.” It is a body in which, in the exchange of views, attitudes, and ideas, two different qualities, namely judicial and “non-judicial” ones, should achieve unity that will ensure the conditions for the independent, efficient, and responsible work of the judiciary. That, *mutatis mutandis*, applies to the HPC. Nevertheless, “if the day is known by the morning” (an old Serbian traditional proverb), it will take time to develop judicial councils that will be ready to create a legal and environment for a more independent, efficient and responsible judiciary.

4. Conclusion

After over three decades since the formal introduction of parliamentary democracy and political pluralism in the course of judicial reforms, Serbia managed to “cross the Rialto Bridge” and “find a way” to the Scuola Grande San Giovanni Evangelista. Apart from “critics by profession” and the diffusely oriented political

71 The seven other candidates, four for the HCJ, and three for the HPC, were elected after a meeting of the Commission, in front of the cameras, which lasted 49 minutes with an invitation to view the complete material submitted to the Commission from the previous election procedure.

72 The author had the opportunity, formally and informally, to verify the persistence of this position of the VC and its readiness to deal with the improvement of anti-deadlock mechanisms.

opposition, no one in Serbia can dispute that the normative framework of the modern judiciary is well set in the “mirror” of the VC. A far more demanding part of the road follows. Now we should think about the experience of European countries that entered the EU significantly before Serbia. All of them, just in different ways, constantly face the challenges emanating from the independence, efficiency, and responsibility of the judiciary and the rule of law as a fundamental principle and value standard of the functioning of a constitutional democracy. The rule of law poses challenges to the VC, which must change and adapt to justify its existence and preserve respect in the international world at the crossroads of law and politics. This applies to all supranational bodies and organisations, including the OUN.

In an era that many perhaps lightly call a somewhat pathetic ‘crisis of democracy and the rule of law’ in the world, Serbia, a country with an especially rich constitutional and political history, has achieved positive developments through the legal organisation of its state and society. Certain politicians, whose contribution to the constitutional and legal reforms of the judiciary should not be disputed, declare that the first effects of the reform will be felt in a year or two at the most. Two normative steps were taken almost perfectly in the “Venetian mirror.” However, we should be aware that “Venetian magic” creates miracles that can be an illusion and disappear in an instant. These “miracles” will only survive if they are based on true and timeless values. When it comes to judicial reforms, it means a sincere commitment to building a society in which current politics will be at a sufficient distance from the judiciary, where law students will want to become judges to protect the rights of their fellow citizens; where judges, prominent lawyers, and politicians will strive for institutional dialogue and not a media cauldron; where the citizens themselves will be interested in a more independent judiciary; and where the public perception of judicial independence and impartiality will be at an enviable cultural level. For any of that to happen, based on the current normative framework, at least a third of the total period (counting only from 1990) that has passed in the “barren transition” is needed – that is, at least 10 years (two mandates of judicial councils). Time is, however, an important, but not sufficient factor.

The second is dedicated work in which all stakeholders will be involved. The judiciary and the rule of law do not and will never exist because of international standards and organisations, but because of citizens, society, and the state. The third factor is the responsibility of everyone, but first of all the highest state authorities, and among them the judicial councils. They have the responsibility to solve problems, and not “photoshop” them.

Finally, international standards of the rule of law, in whose definition the VC undoubtedly has a special place, must not have absolute supremacy vis-à-vis the real needs of their adaptation to the national political, legal, and social environment of the country in question. It is necessary to strive for a dynamic

balance, that, in the long term will ensure the conditions for the rule of law of national content, which naturally incorporates generally accepted civilisational values and achievements of international law. Every step in the process, especially in light of the extremely delicate conditions at present, must be carefully thought out and undertaken with a clear and just vision that respects the international realm for the preservation and development of real (national) identity law. It is neither about state and national egoism, nor about a policy of self-isolation. It is about building state and national self-respect, which is a prerequisite for rational respect, not irrational fear of other states and international institutions. No matter how important, the reform of the judiciary in the “Venetian mirror” will remain like the “vain queen” from the fairytale *Snow White and the Seven Dwarfs* if its bearers “do not take a good look” at the “Serbian political and legal mirror,” at its reality, and even more in the vision of universal justice, which is nothing but the only and true rule of law.

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