УДК 340.131.4(497.11)
DOI: 10.5937/pr82-54798
Оригинални научни рад

Политичка ревија
4/2024.
Vol. 82
стр. 11-33

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THE STRUGGLE FOR INDEPENDENT JUDICIARY IN SERBIA**

Abstract

The citizens of the Republic of Serbia confirmed the constitutional amendments concerning the judiciary in a referendum held in January 2022. This constitutional change is part of a long-term struggle for an independent and professional judiciary in Serbia. The paper focuses on the procedure and conditions for the election of judges and the termination of judicial office. This research study incorporates several aspects of the de jure judicial independence initially developed by Melton and Ginsburg, later expanded upon in the Serbian context by Simović. The article employed a qualitative content analysis methodology of a wide array of credible data sources such as various constitutional and legal acts, academic publications, opinions from the Venice Commission, input from professional associations, and a historical approach to examining the development of judicial independence in Serbia. A chronological analysis of the most significant constitutional provisions addressing these issues, covering the period from the late 19th century to the present, is provided. Since 2002 it was first introduced, the High Judicial Council, as an independent body of judicial

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** The article was created within the strategic project of the University of Belgrade – Faculty of Law, for 2024, under the title "Problems of creation, interpretation and application of law" – subtopic: *Judiciary and challenges of today*. The article was presented at the Annual Meeting of the Research Committee on Sociology of Law: Law, Society and Digital Pasts, Presents and Futures, at the University of Lund (9/2023); the title of the presentation was: *The Battle for the Independent Judiciary in Serbia – the Recent History of Constitutional Change*.

self-government, has undergone significant changes in composition and competencies several times. Inasmuch as Serbia is a candidate for EU membership, the domestic and European public are interested in the judiciary becoming the veritable third branch of government, efficient and reliable. Hence, the expectations concerning the constitutional reform are high.

Keywords: judicial independence, permanent tenure of judicial office, selection and appointment procedure, removal of judges, Constitution of the Republic of Serbia, High Judicial Council

INTRODUCTION

Independence of the judicial branch of government from the political branches is essential for ensuring "the impartial administration of justice". The judiciary functions most effectively when it operates autonomously. In other words, "the judiciary is best off being left alone by the other branches", following the establishment of necessary conditions and budgetary provisions by the other branches of government (Sajó and Uitz 2017, 153–154). Some authors underline that it is vital that constitutions should, as precise as possible, prescribe the position of the judiciary in one country and its constitutional and political system: "Constitutional text raises the cost of interfering with judges, in part because it informs other actors, e.g., the public, governmental institutions, and other interested audiences about potential threats to the judiciary. This increases the likelihood that other actors will coordinate to defend the judiciary's independence when it is threatened" (Melton and Ginsburg 2014, 192). Therefore, it is essential to determine what kind of guarantees a constitution should contain to achieve the goal of independence and impartiality of the judiciary. Melton and Ginsburg defined six crucial components for de jure judicial independence: statement of judicial independence, judicial tenure, selection procedure, removal procedure, limited removal conditions, and salary insulation (195–196). Similar criteria in its interpretation of the guarantee of an "independent tribunal established by law", which is prescribed by the Article 6 of the European Convention of Human Rights, developed the European Court

of Human Rights: irremovability, the appointment of members, security of tenure and guarantees against outside pressures from the executive or legislator, e.g., direct instructions, pressures or even negative comments of politicians (Sanders 2023, 146-147).

The analysis will focus on the following four components: the selection procedures, the tenure of judges' office, removal conditions, and relevant procedures. The statement of judicial independence is also an important component, but it is usually a proclamation with more or less symbolic significance (Simović 2013, 96). The salary guarantee is an indisputably relevant component for judges' unobstructed work. However, this topic is not a part of the constitutional text in Serbia. Instead, different laws regulate it (see Law on Judges 2023, Art. 41 and Law on Court Organization 2023, Art. 87 and 88).

MacDonald and Kong ask the old question: "Do we get good judges because we have good judicial institutions, or do we get good judicial institutions because we have good judges?". As an answer, they offer the conclusion about the complex interconnectedness of the two entities while emphasizing the significance of the judges' selection procedure: "[…] the most important criterion for judicial independence and impartiality is the quality and character of the judges appointed." (MacDonald and Kong 2012, 857). For this reason, the main focus of this article will be on who and how elected and elected judges in Serbia.

CONSTITUTIONAL HISTORY OF SERBIAN JUDICIARY

From the Medieval Ages to the First World War

The act with specific constitutional significance in the Serbian medieval state – Dušan's Code, adopted in 1349, had, for that period, a very progressive provision concerning the position of judges: "All judges should judge according to the code, right, as it is written in the code, and not judge according to the fear of my kingdom." (Dušan's Code Art. 172). After the fall of Smederevo in 1459, the Serbian medieval state disappeared and, with it, Serbian independent statehood. From the First Serbian Uprising (1804), Serbian people fought for independence and constitutionalism throughout the nineteenth century. Several constitutions were adopted during this period (1835 Constitution, 1869 Constitution, 1888 Constitution).

After the switch between the two ruling dynasties in Serbia (from Obrenović to the Karađorđević dynasty) in 1903, the new Constitution was adopted. In essence, that act was based on the 1888 Constitution combined with some modifications and improvements. According to this Constitution, all judges in the Kingdom of Serbia were appointed by the King, presidents of lower courts were nominated by the Court of Cassation and the Appellate Court, presidents of higher courts (Court of Cassation and Court of Appelation) were nominated by the Court of Cassation and the State Council, while judges of lower courts were nominated by the Minister of Justice and Presidents of the two highest courts (Mrđenović 1988, 181). The tenure was permanent, and the Court of Cassation was in charge of disciplinary issues and the termination of judicial tenure (126). The 1903 Constitution prescribed in a very detailed manner the conditions for the appointment of judges and for their removal from office (125). The constitutions of 1888 and 1903 are considered amongst the most progressive in Europe, not only in terms of their time. Some of their elements – the appointment and termination of judicial office, for example, have only been adopted in Western Europe at the end of the Second World War, while in Eastern Europe, these were only adopted after the fall of the Berlin Wall (Marinković, 2010, 161).

From 1918 to 1990 (the Yugoslav Era)

After the First World War, the first state of South Slavs was created – The Kingdom of Serbs, Croats, and Slovenes (renamed the Kingdom of Yugoslavia in 1929). In 1921, the first Constitution of the new state was adopted (the so-called Vidovdan Constitution – St. Vitus Day Constitution). Judges of appellate courts, the Court of Cassation, and presidents of lower courts were appointed by the King and nominated by the Minister of Justice (Mrđenović 1988, 224). All judges had permanent tenure, and the appellate courts or the Court of Cassation were in charge of office termination (225). In the 1931 Constitution of the Kingdom of Yugoslavia, almost all issues regarding judges were delegated to the legislator (262). The Constitution specifies only two institutions in this regard: the permanent tenure of judges and the jurisdiction of the Court of Cassation in disciplinary matters (263).

After the Second World War, a new South Slavic country was born – the so-called Second Yugoslavia. This was a major shift from Serbian

liberal-democratic constitutionalism towards socialist constitutionalism.[1] Permanent tenure disappeared from the constitutional texts. Although it was common for most judges to remain in office until retirement, their tenure had not been guaranteed. The Constitution of the Federal People's Republic of Yugoslavia (1946) and the Constitution of the Socialist Federal Republic of Yugoslavia [hereinafter: SFRY] (1963) regulated only the appointment process and the judicial function's termination (in this regard). In both cases, the federal, republic, or local assemblies, according to the specific type of Yugoslav socialism, had the jurisdiction in the selection process (Marković i Srdić 1987, 51 and 118). In the last Constitution of SFRY (1974), all of the issues regarding the judges' status and terms of office were delegated to the legislator (252).

From the 1990 Constitution to its Successor

In 1990, Serbia adopted a new Constitution. Throughout the duration of the application of its provisions, Serbia had been a republic within the federal structure of the SFRY and later, from 1992 to 2006, one of the two units of the Federal Republic of Yugoslavia (from 2003, the country was called the State Union of Serbia and Montenegro). The 1990 Constitution of Serbia was a breaking point that ended the era of socialist constitutionalism. Following this, Serbia returned to its previous liberal democratic legal heritage. However, this wasn't a complete return to the old, well-established traditions (see: Petrov and Đorđević 2023, 109). Judicial tenure was reinstated as permanent, and the authority to terminate judges' office was restored to the highest court, the Supreme Court of Serbia (Milosavljević and Kutlešić 1995, 105). Despite this, all other issues were left to the legislature to regulate (106). In practice, the National Assembly elected all the judges by a simple majority of votes (97).

After the October Revolution in 2000, two significant laws were adopted: Law on Judges (Law on Judges 2001) and Law on the High Council of Judicature (Law on the HCJ 2001). The first law regulated the jurisdiction of the newly independent body – the High Council of Judicature, and the second regulated its composition. It is an interesting fact that some European countries introduced similar independent bodies in the same period: Belgium in 2000, Slovakia in 2001, and

[1] The first Yugoslavia's constitutionalism was rather more closely related to the historical phase of authoritarian constitutionalism, especially after the suspension of 1921 Constitution in 1929 and adoption of its successor in 1931.

the Netherlands in 2002 (Stanić 2022a, 61 and 64). Seen as a crucial institutional innovation in liberal democracies, judicial councils are "expected to play an important role in guaranteeing the separation of powers, taking the competencies over the management of judicial careers away from the hands of politicians" (Castillo-Ortiz 2019, 516).

The High Council of Judicature consisted of two groups of members: five permanent and eight invited members (Law on the HCJ 2001, Art. 3). The president of the Supreme Court of Serbia, the Republic's Public Prosecutor, and the minister of justice were the ex officio members who composed the first group. The two remaining members in this group were a lawyer elected by the Bar Association of Serbia and a "distinguished jurist" elected by the National Assembly from among three candidates proposed by the Supreme Court of Serbia. The second group consisted of six judges, whom the Supreme Court of Serbia chose from among the judges, and two prosecutors, elected by the deputies of the Republic Public Prosecutor and the district public prosecutors (Art. 4). The composition of this body (judges and prosecutors together) was the reflection of its mixed role – it was responsible for status issues of both judges and prosecutors. The tenure of the High Council's members was five years with the possibility of re-election (Art. 6). This body made its decisions by the majority votes of all the members in sessions closed to the public (Art. 16). The High Council of the Judicature had a significant role in the judges' selection and appointment process. One of its most important tasks was to propose to the National Assembly the presidents of courts, judges, public prosecutors, and deputy public prosecutors (Art. 1).

From the point of view of the method of judges' appointment, the epoch of the 1990 Constitution application could be divided into two periods. The first one was from 1990 to 2001, in which the selection of judges was divided between the legislature and the executive. From a formal perspective, the National Assembly elected judges based on the proposal of its committee. Still, the Minister of Justice had a decisive role in this process, as his opinion was crucial for that proposal. The second was from 2001 to 2006, in which the National Assembly and the High Council of Judicature had a central role in the selection process (Petrov 2013, 58).

THE 2006 CONSTITUTION AND ITS IMPLEMENTATION

After the referendum in 2006, Montenegro became independent, and the last Yugoslav state disappeared from the political map of Europe. Serbia was a sovereign state again, like it was at the beginning of the 20th century, this time in the republican form of government. On the 8th of November 2006, the new so-called Mitrovdan Constitution was adopted. In many aspects, this Constitution is an upgraded version of its predecessor – the 1990 Constitution. When it comes to the judiciary, a half-step forward has been taken.

Limited Advancement of Judicial Independence

The High Council of Judicature disappeared, but two new bodies replaced it: the High Judicial Council and the State Prosecutors' Council. The High Judicial Council consisted of eleven members: six judges, two distinguished and prominent lawyers (a professor from a law faculty and a practicing lawyer with a minimum of 15 years of experience), and three ex officio members – the President of the Supreme Court of Cassation, the Minister of Justice, the President of the relevant committee of the National Assembly. Judges and prominent lawyers (as well as the president of the Supreme Court of Cassation) were elected by the National Assembly (Constitution 2006, Art. 153). The Venice Commission marked this procedure as "flawed" and "a recipe for the politicization of the judiciary" and recommended substantial amendments. (Venice Commission [VC] 2007, Para. 70). This provision was also criticized in Serbia's academic circles, as the process seemed to have deteriorated compared to the previous legal situation from 2001–2006 (Simović 2013, 101). The tenure of the High Judicial Council [hereinafter: HJC] members was the same as in the previous period – five years without the possibility of re-election (Art. 153 Para. 6), while the termination of office had not been regulated.

Article 146 of the 2006 Constitution states that a judge is appointed on a permanent basis until her/his retirement. Despite this general rule, the Constitution relativized the principle of stability of judges. It introduced the probationary period – a three-year term for the judges elected for the function for the first time. The National Assembly had elected persons who were becoming judges for the first time at the

proposal of the HJC (Constitution 2006, Art. 147 Para. 1). After a three-year term, they could be confirmed by the HJC (Art. 147 Para. 3). The President of the Supreme Court and presidents of other courts in the country were elected by the National Assembly after the proposal of the HJC. Their term is 5 years, without the possibility of reelection (Art. 144 and Art. 154). The Venice Commission expressed concerns about the independence of judges during a probationary period: "The involvement of parliament in judicial appointments risks leading to a politicization of the appointments and, especially for judges at the lower level courts, it is difficult to see the added value of a parliamentary procedure." (VC 2007, Para. 65). Despite the HJC being responsible for terminating a judge's office term (Art. 148 and Art. 154), the Constitution contains no provisions on the disciplinary responsibility of judges; this was heavily criticized by some authors (see Stanković 2013, 77-78).

The Harmful Judicial Reform

Two days after the adoption of the 2006 Constitution, the National Assembly adopted the Constitutional Law on Implementation of the Constitution of the Republic of Serbia (Constitutional Law 2006). According to the Art. 7 of this act, it was prescribed that "the election of judges and presidents of other courts will be carried out no later than one year from the date of constitution of the High Council of the Judiciary". This provision and its later (mis)interpretation[2] introduced the process, which had damaging effects on the third branch of power in Serbia. This process, known as the "judiciary reform", lasted from 2008 to 2012. In its 2007 opinion, the Venice Commission warned that "a comprehensive and quick reappointment process is bound to be extremely difficult, and there is no guarantee that in the end better judges and prosecutors will be appointed. One may, therefore, have doubts whether the decision to undertake such a process was wise." (VC 2007, Para. 72).

Despite this timely warning, in 2008, the Law on Judges (Law on Judges 2008) was adopted. It operationalized the abovementioned Constitutional Law provision proclaiming that judges not elected by this Law will have their office terminated *ex-lege* on the day that judges elected under that law have taken office, which took place on January

[2] In Serbian constitutional jurisprudence, the dominant perspective was that constitutional law serves merely as an executive law and cannot override the principle of permanence of judicial tenure (see: Marković 2014, 139).

1, 2010. The consequences were colossal. More than 800 judges (out of circa 2400) had lost their jobs. Similar practices existed from 1990 to 2006, but their effects were significantly smaller (Simović 2013, 108). In its 2010 Progress Report for Serbia, the European Commission pointed out unequivocally: "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. […] Objective criteria for reappointment, which had been developed in close cooperation with the Council of Europe's Venice Commission, were not applied." (European Commission 2010, 10).

The whole process was carried out under the lead of the Ministry of Justice, but the High Judicial Council and the Constitutional Court failed in their duties as well. Firstly, the Constitutional Court procrastinated on controlling the constitutionality of the Constitutional Law before it finally declared itself unauthorized to handle that situation. Secondly, the High Judicial Council didn't conduct the hearing of judges, and the decisions concerning the termination of judges' office weren't adequately explained. Instead, a short explanation was applied to a single decision, encompassing all the judges who lost their jobs (see: Marković 2014, 144).

Several international remarks were published concerning the internal and external dissatisfaction with the reform. The Parliamentary Assembly of the Council of Europe adopted the Resolution on Serbia, which had called on the HJC to "complete the procedure for the re-election of judges and prosecutors according to objective, indisputable, transparent criteria, in accordance with European standards" (Council of Europe 2012, 4). The European Parliament, in its 2011 Resolution, expressed great concern on the subject, especially regarding the implemented reform of the judicial system and the fight against corruption (European Parliament, 2011, Para. 17). Finally, at the end of 2012, the Constitutional Court of Serbia accepted several judges' appeals concerning the HJC decision and struck down some of the provisions of the Law on Judges (Marković 2014, 155–156). The reform was brought back to the beginning.

TWO UNSUCCESSFUL CONSTITUTIONAL REFORM ATTEMPTS

In 2012, the new Government of the Republic of Serbia [hereinafter: Government] took office, which created a shift towards a more thoughtful reform of the legal framework concerning the judiciary. Several documents

regarding the judiciary reform were published in subsequent years. National Assembly adopted the National Judicial Reform Strategy and the Action Plan for the Implementation of the National Judicial Reform Strategy in 2013. The Judicial Reform Commission Working Group enacted the Legal Analysis of Constitutional Framework on Justice in the Republic of Serbia in 2014. In 2016, the National Assembly passed the Action Plan for Negotiating Chapter 23 (Judges' Association of Serbia 2018, 10). All of these documents and conducted actions resulted in two drafts of constitutional amendments in January and April 2018.

Working Text of the Draft Constitutional Amendments – January 2018

After the consultation process conducted between July and November of 2017 by the Ministry of Justice and the Office for Cooperation with the Civil Society of the Republic of Serbia, the Ministry of Justice published the working version of the amendments to the 2006 Constitution in January 2018. The text was discussed monthly at four round tables (Judges' Association of Serbia 2018, 91).

The Working text of the draft constitutional Amendments prescribed that the HJC should consist of ten members. Five among them should be selected within the pool of judges elected by their colleagues, while the remaining five members would be selected from among prominent lawyers, elected by the National Assembly by a three-fifths majority on the proposal of the competent committee of the National Assembly after the procedure of the public call. If not selected this way, they should be elected within ten days by fifth-ninths of the total number of members of the National Assembly, or, if the process fails again, the whole procedure would be repeated after 15 days. The tenure of the HJC members should have been five years, with no possibility of a reelection. The mandate of a member of the HCJ should be terminated for specific reasons and within the procedure determined and prescribed by law. The decision-making quorum was set at seven members. The President of the HJC should have been elected from among prominent lawyers, and she or he would have a golden vote[3] (Judges' Association of Serbia 2018, 93). Procedures for appointment and termination of the office of judges and presidents of courts should have been conducted by the HJC. The President of the

[3] In the case of a tied vote, the president's vote should have been decisive.

Supreme Court had a tenure of five years without the possibility of re-election. In this Working text, conditions for terminating judges' office were relatively detailed and prescribed (92–97).

Working Text of the Draft Constitutional Amendments – April 2018

In April 2018, the Ministry of Justice published a revised version of the January Working text of the draft constitutional Amendments and sent it to the Venice Commission for expertise on the same day without any public discussion (Judges' Association of Serbia 2018, 385). The provision on the composition of the HJC remained unchanged in comparison with the previous version of the Working Text of the Draft Constitutional Amendments: the HJC consisted of five judges and five prominent lawyers who passed a bar exam and had a minimum of ten years of work experience in the legal field under the jurisdiction of the HJC. The new selection procedure for the HJC members differed in one segment. If the National Assembly failed to elect all members in two attempts (by three-fifths, or five-ninths majority of all MPs), the special commission (consisted of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Prosecutor General and the Ombudsman) should finish the process. The Commission's decisions are to be adopted by a majority vote. The status of the HJC members remained similar – five years tenure, no possibility of a re-election. Thus, the decision-making process within this body has changed. The president's golden vote was abolished, and any decision now required the approval of six out of ten HJC members. If the HJC failed to decide on some issues within 30 days, the mandate of all members of the HJC would be terminated. Provisions concerning the appointment and status of judges and presidents of courts remained the same as in the previous version of the Working text. Some of these provisions were not mentioned in the January Working text and haven't been publicly discussed. The Judges' Association of Serbia was one of the loudest opponents of this version of the Working text of the Draft, highlighting the "draft amendment contains provisions that are not acceptable in modern constitutional democracies" (386–389).

At the plenary session held in June 2018, the Venice Commission released a conditional positive opinion regarding this Working text (VC, CDL-AD(2018)011). The draft Amendments were revised by the Ministry

of Justice according to this Opinion and sent again for assessment to the Venice Commission, which, in October 2018, published a Secretariat Memorandum on the compatibility of the Draft Amendments to the Constitution of Serbia with its previous Opinion (VC, CDL-AD(2018)023). At the end of 2018, the Government initiated the official constitutional revision procedure by sending the proposal to the National Assembly. The National Assembly Committee on Constitutional and Legislative Issues confirmed at its sitting in June 2019 the compliance of the Proposal with the Constitution. This was the last action in this direction before the whole process was reshaped: "Due to the boycotting of the Assembly's sessions by the opposition and the parliamentary election that was supposed to be held in April 2020 but has now been delayed due to the COVID-19 pandemic, the whole process of the constitutional revision is put on hold" (Petrov and Prelić 2020, 565–566).

THE CONSTITUTIONAL CHANGE AND ITS IMPLEMENTATION

At the end of 2020, the Government again initiated the official constitutional revision procedure (Government of Serbia 2020). In June 2021, the National Assembly formed the Working group to draft the Act on the amendment of the Constitution of the Republic of Serbia (National Assembly 2021). This Working group consisted of legal experts from various areas (National Assembly, Ministry of Justice, academia, courts, prosecutors' offices, etc). During 2021, several public hearings concerning the new text of amendments took place in a generally positive atmosphere (Stanić 2022b, 115), although some criticisms appeared as well (Simović 2022, 89). In October and December 2021, the Venice Commission issued two urgent and positive opinions on the revised draft of the constitutional amendments (VC CDL-AD(2021)033 and VC CDL-AD(2021)048).

In January 2022, the proposal for revising the Constitution was adopted at a referendum, and it was confirmed on February 9th, 2022, by the National Assembly. The current text of the Constitution differs significantly regarding the composition of the HJC compared to the previous drafts of amendments and the old version of constitutional provisions. The HJC henceforth consists of the President of the Supreme Court (ex officio member), six judges, and four prominent lawyers. Prominent lawyers should have at least ten years of work experience,

be worthy of the office, and not hold a political party membership (Constitution 2006 with the 2022 Amendments, Art. 151 Para. 1 and Para. 4). Members of the HJC are subsequently elected by the National Assembly by its two-thirds majority, on the proposal of the relevant parliamentary committee, and after the public call. If the National Assembly fails to do so, after 15 days, a special commission (composed of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Prosecutor General, and the Ombudsman) elects the missing members by a majority vote (Art. 151 Para. 4 and 5). Tenure of office of the HJC members remains for five years, with no re-election possibility, accompanied by precise conditions for termination of their function and authorization of the HJC to decide about the status of its members (Art. 151 Para. 1, 2, and 4). In contrast to the 2018 Drafts, the president of the HJC is now elected by its members from among the judges serving on the Council. The Vice-President is elected from among members elected by the National Assembly. Both have a five-year term. The President of the Supreme Court is ineligible for the position of the President of the HJC (Art. 151 Para. 3).

Regarding judges and court presidents, current constitutional provisions are aligned with the 2018 Drafts. Judges, lay judges, and court presidents are elected by the HJC. One of the most important novelties of the 2022 Amendments is the removal of the earlier three-year probation period for judges elected for the first time. Art. 146 of the Constitution unambiguously prescribed the stability of the judge's office by claiming that "the judge's office is permanent". The same provision filled the legal gap in the 2006 Constitution concerning the termination of judges' office terms. A judge's post can terminate before retirement under the following reasons: on his request, in case of permanent loss of ability to work as a judge, if citizenship of the Republic of Serbia ceases, or in the case of dismissal from the function (Constitution 2006 with the 2022 Amendments, Art. 146 Para. 3). The decision on the termination of a judge's office (or his/her dismissal) is adopted by the HJC if he/she is convicted of a criminal offence to a prison sentence of at least six months, or if it is established in a disciplinary procedure that he/she has committed a serious disciplinary offence which, according to the HCJ, seriously damages the reputation of the judicial function or the public's trust in the courts (Art. 146 Para. 4).

After the adoption of the constitutional amendments, the Government and the Ministry of Justice drafted the so-called "set of judicial laws",

including the Law on the High Judicial Council (Law on the HJC 2023). During the autumn of 2022, the Venice Commission expressed its views on these drafts twice. The first opinion was issued in October (VC CDL-AD(2022)030), and the second one was published in December 2022 (VC CDL-AD(2022)043). The Government's Proposal of the Law on the High Judicial Council mainly followed the recommendations of the Venice Commission. However, in February 2023, the National Assembly adopted a text different from the original Proposal, as numerous amendments (primarily from members of parliament belonging to the government majority) were incorporated during the parliamentary debate (Marković 2023, 298).

Regarding the conditions for the appointment and dismissal procedure of prominent lawyers, the Law on the HJC 2023 includes several vague provisions. Furthermore, the selection procedure of prominent lawyers is highly problematic and potentially unconstitutional (Marković 2023, 303, 306, and 308). At the end of 2024, the Draft Law on the Judicial Academy and the accompanying Draft Law on Judges were published. According to these laws, the HJC has to appoint a judge only from among candidates who have completed initial training at the Judicial Academy. This raised concerns about lawyers who have passed the bar exam and possess extensive professional experience, particularly regarding their eligibility to apply for judicial positions. The Judges' Association of Serbia considers that the HJC is the only institution entrusted (by the Constitution) with the power to elect judges, and nobody else can do this assignment, not even the Judicial Academy (Judges' Association of Serbia 2024, 17).

CONCLUDING REMARKS: THE PARAMETERS' FULFILMENT OR THE CONTINUATION OF THE STRUGGLE?

After the long-lasting battle, the tenure of Serbian judges has finally become permanent. The current constitutional provision is unambiguous: it is now the responsibility of all political actors to fully adhere to it. A similar situation exists when it comes to the removal procedure and the removal conditions. Notable progress has been made with the constitutionalization of the judges' removal conditions. Given that the HJC is the primary and sole institution responsible for determining

judges' professional destiny, the key issue lies in the composition and operational procedures of this body.

A German judge, K. Rennert (Rennert 2023), expressed an interesting view concerning the judges' selection procedure: "(…) at the moment of their appointment or promotion, judges are, of course, dependent. They depend on those who appoint or promote them, which is absolutely unavoidable. However, it is essential to ensure the independence of judges during the time before and after their appointment." (182). Given that the act of appointment is the focal point of the judges' future (in) dependence, the institution in charge of this action is the crucial player in the whole process. Like many other countries worldwide (see Garoupa and Ginsburg 2009, 108), Serbia chooses an independent body for this purpose – the HJC. Since 2001, Serbia has undergone three changes in the composition of its judicial council and has presented two unsuccessful drafts concerning this body. Garoupa and Ginsburg (Garoupa and Ginsburg 2009, 128) explain the councils are widely adopted because they "allow a wide number of stakeholders to participate in discussions of judicial governance", and for this reason, they, at the same time, very often "become the targets of institutional reform".

The 2022 Constitutional Amendments have significantly improved the setting for the judges' selection. The composition and selection process of the HJC is upgraded as well. However, the 2023 Law on the HJC introduced some potentially unconstitutional variant of the appointment procedure of the prominent lawyers: the direct path from the parliamentary committee towards the special electoral commission (Law on the HJC 2023, Art. 49 Para. 5). In this manner, the National Assembly (in its plenary session) can be entirely bypassed, contrary to the unequivocal constitutional provision on its jurisdiction over this matter. Furthermore, the legislative implementation of the constitutional provision regarding the definition of the term prominent lawyer is vague (Marković 2023, 305–306). Still, the application of this provision will depend not only on the legal wording but also on the future political culture and willingness to promote the real prominent lawyers in this body because "unfortunately, the practice has shown that the quality of 'prominence' was acquired through selection by the competent authority more often than the candidate came before the selecting authority with a previously formed quality of 'prominence' in the legal and broader community" (Petrov 2022, 41). Others have criticized the method of selecting prominent lawyers in a similar manner (Radojević 2022, 639).

According to the 2022 Constitutional Amendments, the HJC should have the last word regarding the judges' selection and appointment. In both 2018 drafts of constitutional amendments, there was a precondition for all candidates for judges: they should have to attend a particular educational institution named Judicial Academy. The Academy has not become part of the constitutional text, but the draft law concerning this institution was published in the previous months. If the text of the draft law were to remain as it is now, it could seriously jeopardize the freedom of the HJC. Although the 2022 Constitutional Amendments created a solid basis for improving judicial independence, there is a risk that the accompanying laws could change the sovereign (constitution-maker) will of who and how should elect judges.

The comparative data shows that the fact of adoption of a judicial council in one country is "not enough to achieve a judiciary that is perceived as independent and trustworthy" and that "many of the difficulties judicial councils struggle with are beyond their control" (Sanders 2023, 162). The success of similar independent organs of judicial governance in different political systems heavily relies on the "institutional set-up in which they are inserted". In other words, a "wider legal and political setting" can modify the way the judiciary operates in the system, and even in the case of similar organs for judicial governance, "certain aspects of institutional design and the institutional context might make an important difference" (Castillo-Ortiz, 2023, 7). These statements remind us that the normative setting is of vast importance. Still, the critical role in every constitutional and political issue is our willingness to respect the norms we adopted to maintain and improve our institutions.

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БОРБА ЗА НЕЗАВИСНО ПРАВОСУЂЕ У СРБИЈИ**

Резиме

Кључна одлика српске историје је дисконтинуитет. Превише је догађаја који су ништили претходни и установљали (потпуно) нови поредак. Када је реч о развоју политичких и уставних институција, такав амбијент за њих никако није подстицајан. То се посебно односи на оне крхке, попут судства. Већ је општепознато место да се судска власт описује као најслабија од све три државне власти – јер не располаже ни силом ни властитим новцем. У турбулентним временима и нестабилним политичким приликама, судству није лако да обавља свој нимало лак задатак. Због тога је изузетно важно да право, односно нормативна основа за његов рад буде што прецизнија и усмерена ка оснаживању ове гране власти. У раду смо, колико нам је обим то дозвољавао, приказали неке најзначајније моменте за развој независног српског правосуђа. Указали смо на светле традиције које су на тренутак засијале крајем 19. и почетком 20. века на нашем правном и политичком небу, али и на бројне успоне и падове који су присутни од поновног увођења вишестраначја. После 2000. године, чинило се да ће развој српског правосуђа ићи само узлазном линијом. Ипак решења која је садржао

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** Чланак је настао у оквиру стратешког пројекта Универзитета у Београду – Правног факултета, за 2024. годину, под насловом „Проблеми стварања, тумачења и примене права" – подтема: Правосуђе и изазови данашњице. Чланак је представљен на годишњем састанку Истраживачког комитета за социологију права: Право, друштво и дигитална прошлост: садашњост и будућност, на Универзитету у Лунду (9/2023); назив излагања је био: Битка за независно правосуђе у Србији – новија историја уставних промена.

Митровдански устав у овој области нису била адекватна за наше тадашње прилике, што се најбоље видело током правосудне реформе од 2008. до 2012. године. Уследио је потом дуги период трагања за бољим решењима. Недавна промена нашег Устава, представља плод синергије акумулираног знања и друштвене енергије које су се тих година стекле у једној тачки. Гарантована је сталност судијске функције, разлози за престанак судијске фунције су поново конституционализовани, а Високи савет судства је реконфигурисан и оснажен у односу на пређашња решења. С друге стране, неке од норми које садрже пратећи правосудни закони, пре свега Закон о Високом савету судства, садрже решења која су у најмању руку проблематична. Стиче се утисак да законодавац није доследно пратио јасну интенцију уставотворца, а која је усмерена ка независном и компетентном правосуђу. У току је израда Закона о Правосудној академији. Овај акт ће, такође, у многоме додатно трасирати пут за развој судства у Србији. Ипак, без обзира на законска решења која су и која ће тек да буду усвојена, најснажнији импулс независном и непристрасном судству у нашој земљи даћемо ми сами и наше институције. Онолико колико га будемо поштовали, толико ће и оно имати снаге да се издигне из некада туробне свакодневнице и усмери свој поглед као оном жељеном, али (још увек) недостижном идеалу – правди.

Кључне речи: судијска независност, сталност судијске функције, избор судија, престанак судијске функције, Устав Република Србије, Високи савет судства

* Овај рад је примљен 1. новембра 2024. године, а прихваћен за штампу на састанку Редакције 29. новембра 2024. године.