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The Role and Importance of the High Judicial Council in the Republic of Serbia: Towards Democratisation in the Field of the Judiciary

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ABSTRACT

The author deals with constitutional changes in the judiciary in the Republic of Serbia. The Constitution of the Republic of Serbia was adopted in 2006, and for years there have been attempts of change towards democratisation. A special problem is the composition, and functioning of the High Judicial Council, as a body that should have exclusive competence in the election of judges. In the first part of the paper, the author explains the 2006 constitutional solutions, while in the second, he explains the first attempts to change the constitutional provisions to form new solutions aimed at depoliticising the judiciary, which never came into force. In the third part of the paper, the author points out the most important proposed constitutional changes from 2021, which the Venice Commission criticised, but which came into force. The author also points out the views of the Venice Commission and gives his suggestions.

KEYWORDS

Judicial independence, High Judicial Council, Constitution of Republic of Serbia, Amendments to the Constitution, Venice Commission

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INTRODUCTION

The Republic of Serbia adopted its Constitution in 2006.[1] The adoption of the new Constitution initiated a second stage of the democratisation process.[2] However, accession to the European Union [hereinafter E.U.] involves constitutional changes on many issues. One of the areas that must inevitably change is the part related to the organisation of the judicial system. The National Judicial Reform Strategy for the Period of 2013–2018 states that:

> [C]ertain solutions of the Strategy call for the amendment of the Constitution – we are talking about the solutions, such as the exclusion of the National Assembly from the process of election of presidents of courts, judges, public prosecutors/deputy public prosecutors as well as of members of the High Judicial Council and the State Prosecutorial Council; changes in the composition of the High Judicial Council and the State Prosecutorial Council aimed at exclusion of the representatives of the legislative and executive powers from the membership in these bodies...

One of the marked characteristics of constitution-making in the twenty-first century is the involvement of the international community.[3] The need for the amendment of the Constitution was concretised within the negotiating process in the Screening Report on Chapter 23, wherein the European Commission [hereinafter E.C.] noticed that the independence of the judiciary is, in principle, guaranteed by the Constitution. However, there are numerous issues in the constitutional solutions with regard to relevant E.U. standards related to the independence of the judiciary. Furthermore, as Adams points out, judicial independence has a strong sociological component: "[J]ustice, in the form of judicial independence, must not only be done, it must also very clearly and explicitly be *seen* to be done".[4]

Since this paper focuses on the constitutional position of judges and the High Judicial Council [hereinafter H.J.C.], it will not examine the provisions of laws that regulate the position of these entities and bodies in detail. The E.C. criticised the role of the National Assembly in the 2006 Constitution in the election and termination of the office of judges

[1] Устав Републике Србије [Constitution of the Republic of Serbia] (Serbia).
[2] *See* Violeta Beširević,*"Governing Without Judges": The Politics of the Constitutional Court in Serbia*, 12 Int'l J. Const. L. 954, 960 (2014) (U.K.).
[3] *See generally* Cheryl Saunders, *Constitution-Making in the 21st Century*, Int'l Rev. L., Apr. 2012, at 3 (2012) (Qatar).
[4] Maurice Adams, *Pride and Prejudice in the Judiciary - Judicial Independence and the Belgian High Council of Justice*, 2010 J. S. Afr. L., 236, 240 (2010) (S. Afr.).

as a significant problem that risks political influence on the judiciary. The National Assembly is also criticised for its relationship with the H.J.C., bearing in mind that the Assembly elected eight out of eleven members of the H.J.C.. The other three members, including the President of the Supreme Court of Cassation (appointed by the National Assembly), the Minister of Justice, and the Chairman of the Authorised Parliamentary Committee, were elected *ex officio*. Furthermore, the E.C. confirmed that the appointment of eight members and *ex officio* members was not in compliance with E.U. standards, stating that:

> "Serbia should ensure that when amending the Constitution...professionalism and integrity become the main drivers in the appointment process, while the nomination procedure should be transparent and merit based. Serbia should ensure that a new performance evaluation system is based on clear and transparent criteria, excludes any external and particularly political influence, is not perceived as a mechanism of subordination of lower court judges to superior court judges and is overseen by a competent body within the respective Councils".

The E.C. also contested the role of the Ministry of Justice in the judiciary in the Screening Report, stating that "the judicial reform process should lead to tasking both councils with providing leadership and managing the judicial system". [5]

The E.C. defined the Recommendations relating to the reform steps that need to be made in order to overcome the above-mentioned problems. The Recommendations call for a thorough analysis and amendment of the part of the Constitution relating to the judiciary, and particularly to the system of selection, proposal, election, transfer and termination of office of judges, presidents of courts and public prosecutors or deputy public prosecutors, which should be independent of political influence. It is requested that entry into the judicial system be based on objective evaluation criteria and equitable selection procedures, open to all candidates with relevant qualifications and transparent in the eyes of the general public. Furthermore, the H.J.C. and the State Prosecutorial Council [hereinafter S.P.C.] should be strengthened in such a way as to imply the taking over of a leading role in the management of the judiciary. Their composition should be mixed, without the participation of the National Assembly (except in an exclusively declaratory role), with a minimum of half of the members from the judiciary who represent different levels of jurisdiction. The elected members should be elected by their

[5] Ministry Eur. Integration, Screening Report Serbia: Chapter 23 - Judiciary and Fundamental Rights (May 15, 2014), https://www.mpravde.gov.rs/files/Screening-report-chapter-23- serbia%20Official%20(3)%201.pdf.

peers, and the legislative or executive power should not have the authority to control or oversee the work of the judiciary. The Recommendations also call for the re-examination of the three-year probationary period for candidates for judge and deputy prosecutor positions and for the precise stipulation of the reasons for terminating the office of judges, as well as of the rules relating to the termination of tenure of judges of the Constitutional Court. In addition, they call for the adoption and effective implementation of criteria for election to judicial positions. This would strike a balance between the H.J.C. and the S.P.C. in terms of their increasing powers and capacities, transparency and accountability which ought to be shown in their work.[6]

Since there are no E.U. directives and regulations in this area, relevant standards are based on different acts adopted by the United Nations and relevant bodies of the Council of Europe—such as the Committee of Ministers and the Consultative Council of European Judges [hereinafter C.C.J.E.]—as well as on the positions of the Venice Commission of the Council of Europe [hereinafter V.C.], which emphasises that the rule of law, democracy, separation of powers and human rights are fundamental values.[7] However, standards in the judicial field must be flexible.[8] Furthermore, in the field of constitutional law, it has been highlighted that "the Venice Commission has acquired a reputation as an authoritative consultative body for matters of constitutionalism and democracy".[9] The V.C. has played and continues to play a major role in the adoption of constitutions in Central and Eastern Europe.[10] The V.C. has issued a number of opinions regarding Serbia over the years. What is particularly important is that the constitutional provisions of the judiciary and the prosecutorial office were the focus. Even the V.C. itself has concluded that the sources of standards in this area are particularly numerous. We can see that the V.C. makes a distinction between hard and soft law when producing its opinions and studies,[11] but standards are mostly rooted in soft law.[12] Bearing this in mind, the guarantees of the V.C. should be understood as the means of establishing a

[6] *See* Ministry Eur. Integration, Screening Report Serbia: Chapter 23 - Judiciary and Fundamental Rights (May 15, 2014), https://www.mei.gov.rs/upload/documents/skrining/screening-report-23.pdf (Serb.).

[7] *See generally* Agnieszka Bień-Kacała, *Dissolution of Political Parties by the Polish Constitutional Tribunal in Light of the Venice Commission's Standards and Decisions*, 154 Studia Iuridica Auctoritate Universitatis Pécs Publicata 32 (2017) (Hung.); *see also* Paul P. Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, UC Irvine J. Int'l Transnat'l Compar. L., Mar. 2017, at 57, 72.

[8] *See generally* Sergio Bartole, *Final Remarks: The Role of the Venice Commission*, 26 Rev. Cent. E. Eur. L. 351, 357 (2000) (Neth.).

[9] Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 Am. J. Compar. L. 963, 968 (2015). *See, e.g.*, Gianni Buquicchio, *Venice Commission to the Council of Europe and Ukraine: The Lines of Cooperation, Law of Ukraine*, Legal Journal 316, 318 (2012).

[10] Giorgio Malinverni, *The Venice Commission of the Council of Europe*, 96 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 390, 393 (2002).

[11] *See* Craig, *supra* note 6, at 77.

[12] *See* Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe – Standards and Impacts*, 25 Eur. J. Int'l L. 579, 582 (2014) (U.K.).

system that ensures balance is maintained among the different branches of power and which prevents misinterpretation and/or abuse of the concept of judicial independence. The provision of guarantees of judicial independence by regulations that are at the top of the hierarchy of sources of law is a standard that cannot be questioned. The rule of law cannot exist without an independent judiciary.[13]

This paper first discusses the position of the High Judicial Council in the legal order of the Republic of Serbia in the 2006 Constitution. Then, it explains the proposals of the first Amendments to the Constitution and the remarks of the Venice Commission from 2018. The third part examines the latest proposals for amendments in the field of justice from 2021, which came into force, but with which the V.C. did not (completely) agree, along with the proposals for future changes in the direction of democratisation of the Constitution.

1. THE HIGH JUDICIAL COUNCIL AND THE ROLE OF THE NATIONAL ASSEMBLY IN SERBIA: THE 2006 CONSTITUTION

The structure of judicial councils varies considerably from country to country. This is, of course, the situation in countries with judicial councils. Since the establishment of judicial councils or similar bodies has become commonplace, the issues of their composition and powers in relation to the selection and advancement of judges, as well as the management of the judiciary, have piqued the scientific, professional, and political public's interest. The Republic of Serbia has chosen a model with two completely different bodies: one for judges and one for prosecutors, which is one of the judicial council options available in Europe. In their attempt to create norms for the composition of judicial councils, relevant international entities appear to be cognizant of variances among national legal systems. The Committee of Ministers of the Council of Europe deems that the judicial councils should be

> [I]ndependent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.

[13] *See* Mario Reljanović & Ana Knežević Bojović, *Judicial Reform in Serbia and Negotiating Chapter 23 - A Critical Outlook*, 5 Pravni zapisi 241 (2014) (Serb.).

> ... Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions.
>
> In exercising their functions, councils for the judiciary should not interfere with the independence of individual judges.[14]

There are European standards on the issue of the composition of a judicial council, notably Recommendation CM/Rec(2010)12, which states in Paragraph 27 that: "Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary". No reference could be found on whether there should be an even or an odd number of members in such a council. In any case, where decisions are adopted by at least six members, whether there is an even or an odd number of members will not make a difference.

According to the V.C.,

> [T]here is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council falls within the aim to ensure the proper functioning of an independent judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power. However, where constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary should be authorized to make recommendations or express opinions which the relevant appointing authority follows in practice.[15]

[14] Recommendation CM/Rec(2010)12, supra note 20, at §§ 26, 28 and 29.

[15] Venice Commission, International Round Table: Shaping judicial councils to meet contemporary challenges, *Extracts from the opinions and reports of the Venice Commission on the organisation and mandate of the judicial councils*, § 47 (Mar. 21-22, 2022), https://www.venice.coe.int/files/judiciary_councils_compilation.pdf.

As defined by the European Charter on the Statute for Judges: "The decisions to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority...or on its proposal, or its recommendation or with its agreement or following its opinion".[16]

The H.J.C. was introduced into the legal order of the Republic of Serbia in 2001, and it was renamed by the 2006 Constitution. According to Article 153, the H.J.C. in Serbia was an independent and autonomous body which shall provide for and guarantee the independence and autonomy of courts and judges. The H.J.C. had eleven members. It was constituted by the President of the Supreme Court of Cassation, the Minister responsible for justice and the President of the Authorised Committee of the National Assembly as *ex officio* members, and the remaining eight were electoral members elected by the National Assembly. The President of the Supreme Court of Cassation was the President of the H.J.C., and according to certain positions in theory, this significantly limits the autonomy of this body because the President should be elected by a majority, by secret ballot, and not be imposed by law.[17] One solution for this situation could be the election of the President of the H.J.C. among the lay members, according to the V.C. The V.C. has stated that "the chair of the council could be elected by the council itself from among the non-judicial members of the council",[18] but this recommendation is primarily aimed at situations where judges elected by their peers have the majority in a council and is not applicable if it increases the risk of domination of the H.J.C. by the current majority in Parliament.

Opinion No. 10 of the C.C.J.E. on "the Council for the Judiciary at the service of society" stipulates that: "The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non-judges. In both cases, the perception of self-interest, self-protection and cronyism must be avoided." It followed by stating that:

> In the [C.C.J.E.]'s view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self-protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no

[16] Council of Europe, European Charter on the Statute for Judges, § 3.1, DAJ/DOC (98) 23 (July 8-10, 1998), https://rm.coe.int/16807473ef.

[17] *See* Vladan Petrov & Darko Simović, Ustavno pravo [Constitutional Law] (2020).

[18] Venice Commission, Judicial Appointments Report adopted by the Venice Commission at its 70th Plenary Session, § 35, CDL-AD(2007)028 (Mar. 16-17, 2007), https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad(2007)028&lang=EN.

> concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.[19]

The Committee of Ministers of the Council of Europe recommends that not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and while respecting pluralism inside the judiciary.[20] A similar recommendation is also contained in the Opinion of the V.C., which also identifies the essential element of the role of the council stating that "at least half of the members of the authority should be judges chosen by their peers".[21] However, in compliance with the formerly mentioned endeavour to establish elementary democratic principles, the Venice Commission recognises the need for other members of the council, who are not a part of the judiciary and that represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management".[22] In a mixed composition of the Council's performance of this control, the Commission perceives the mechanism for strengthening the confidence of citizens in the judiciary.

When participation of the executive power, or its representatives (e.g., the minister of justice) is in question, the V.C., taking into consideration the practice of numerous European states, in principle, allows for the possibility that a minister is a member of the Council but proposes that he/she should not be involved in decisions concerning the transfer of judges or disciplinary measures against judges as this could lead to inappropriate interference by the Government.[23] The V.C. emphasised the need to ensure effective disciplinary procedures, including ensuring that disciplinary procedures against judges are carried out effectively and without excessive peer restraint.[24] In the opinion of the Council of Europe, the composition of judicial councils should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request.

In Serbia, electoral members included six judges holding the post of Permanent Judges, of which one was from the territory of Serbian autonomous provinces, and two

[19] Opinion No. 10 of the C.C.J.E. on "the Council for the Judiciary at the service of society".
[20] Recommendation CM/Rec(2010)12, supra note 20, at § 27
[21] Venice Commission, *supra* note 17, § 46.
[22] Venice Commission, supra note 17, § 30.
[23] *Id.* § 34.
[24] *Id.* §§ 50-51.

were respected and prominent lawyers with at least fifteen years of professional experience, of which one was a solicitor, and the other was a professor at the law faculty. Presidents of any court in Serbia could not be electoral members of the H.J.C. Tenure of office of the H.J.C's members lasted five years, except for the members appointed *ex officio*. A member of the H.J.C. enjoyed immunity as a judge.[25] In theory, the legal nature of this body was considered controversial. First, the H.J.C. was not a judicial body because it did not exercise judicial power, nor was it a body of judicial self-government because it was not composed exclusively of judges or elected. Based on that, it is considered that the H.J.C. is an autonomous state body *sui generis*.[26]

The V.C. is of the opinion that judicial councils should have a decisive influence on the appointment and advancement of judges (as well as on disciplinary accountability) while the court should be competent for the appeals against decisions of disciplinary bodies. However, as opposed to the decisions related to a judicial career, there is no need to take over the complete judicial administration which may be left to the Ministry of Justice. "An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges".[27] "Judicial councils, where they exist, or other independent bodies in charge of the management of courts, actual courts and/or professional organisations of judges may be consulted when drafting the budget of the judiciary."[28]

The H.J.C. appointed and relieved judges, in accordance with the Constitution and the law; proposed to the National Assembly the election of judges in the first election to the post of Judge; proposed to the National Assembly the election of the President of the Supreme Court of Cassation as well as presidents of courts; participated in the proceedings of terminating the tenure of office of the President of the Supreme Court of Cassation and presidents of courts and performed other duties specified by the law.[29] An appeal could be lodged with the Constitutional Court against a decision of the H.J.C.[30]

On the proposal of the H.J.C., the National Assembly elected a judge for a trial period of three years, for the first time in his career. Tenure of office of a judge who was elected to the post of Judge lasted three years. The H.J.C. elected judges to the posts of Permanent Judges, in that or another court. In addition, this body decided on the election

[25] Устав Републике Србије [Constitution of the Republic of Serbia], art. 153 (Serb.).
[26] Petrov & Simović, *supra* note 16, at 213.
[27] Venice Commission, *supra* note 17, §§ 25-26.
[28] *Id.* § 40.
[29] Устав Републике Србије [Constitution of the Republic of Serbia], art. 154 (Serb.).
[30] *Id.* at art. 155 (Serb.).

of judges who hold the post of Permanent Judges to other or higher courts.[31] A judge's tenure of office terminated at his/her own request, upon legally prescribed conditions coming into force or upon relief of duty for reasons stipulated by the law, as well as if he/she is not elected to the position of a Permanent Judge. The H.J.C. passed a decision on the termination of a judge's tenure of office. A judge had the right to appeal to the Constitutional Court against this decision. The lodged appeal shall not include the right to lodge a constitutional appeal. The proceedings, grounds and reasons for termination of a judge's tenure of office, as well as the reasons for the relief of duty of the President of the Court, are stipulated by the special law.[32]

2. THE HIGH JUDICIAL COUNCIL AND THE ROLE OF THE NATIONAL ASSEMBLY IN CONSTITUTIONAL AMENDMENTS IN 2018

In the second half of 2017, intensive discussions began on amendments to the Constitution of the Republic of Serbia in the field of justice. Civil society was also involved in this process.[33] It was in accordance with the V.C.'s view that "a broad and substantive debate involving the various political forces, [N.G.O.s] and citizens associations, academia and the media is an important condition for the adoption of a sustainable text acceptable for the entire society and in accordance with democratic standards".[34] The Ministry of Justice announced a competition for the submission of proposals by all interested parties in the direction of amending constitutional solutions, to which several professional organisations have responded.[35] After receiving all the proposals for constitutional amendments, several public debates were held at round tables in Belgrade, Novi Sad, Niš and Kragujevac.[36] Without entering into the solutions that were offered, the Ministry of Justice submitted the draft Constitutional Amendments in 2018, which will be analysed briefly in the text that follows. It is especially important that during 2018, two draft Amendments to the Constitution were created, the second of which was accepted by the V.C. It was necessary to use several

[31] *Id.* at art. 147 (Serb.).
[32] *Id.* at art. 148 (Serb.).
[33] *See* Čedomir Backović, *Current State of Affairs in the Republic of Serbia in the Context of European Integration*, *in* European integration and criminal legislation 34, 35 (Stanko Bejatović ed., 2016).
[34] Mihai C. Apostolache, *The Review of Constitutional Norms Concerning Local Public Administration in the View of the European Commission for Democracy Through Law (Venice Commission)*, J. L. Admin. Sci., 2015, at 105, 108 (Rom.).
[35] It is interesting to note that some authors believe that constitutional amendments are frequently the product of abuse. *See* Wiliam Partlett, *Courts and Constitution-Making*, 50 Wake Forest L. Rev. 921, 926 (2015).
[36] *See* Čedomir Backović, *Constitution as a Guaranty of Independence of Functioning of Justice*, *in* European integration and criminal legislation (Stanko Bejatović ed., 2018).

dozens of international documents as the source of E.U. standards in the subject area. Many of which are adopted by the relevant bodies of the United Nations, the Council of Europe, and the European Commission.

The V.C. at its 116th Plenary Session, held in Venice, October 2018, adopted Opinion No. 921/2018 on the compatibility of the draft Amendments to the Constitutional Provisions on the Judiciary as submitted by the Ministry of Justice of Serbia a week prior (CDL-REF(2018)053) along with the Venice Commission's Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary (CDL-AD(2018)011). Namely, following a request on 13 April 2018 by the Minister of Justice of Serbia, an Opinion (CDL-AD(2018)011) on the draft Amendments to the Constitutional Provisions on the Judiciary (CDL-REF(2018)015) was adopted by the V.C. at its 115th Plenary Session held in Venice, June 2018. There were two sets of draft Amendments prepared by the Ministry of Justice of Serbia and the first set of draft Amendments were adopted by the Government of Serbia prior to their submission to the V.C. for an Opinion (CDL-AD(2018)011). The V.C. was concerned to learn that the important process of amending the Constitution of Serbia of 2006, in its sections pertaining to the judiciary bringing it in line with European standards, began with a public consultation process which was marred by an acrimonious environment. The V.C., in its Opinion No. 921/2018, encouraged the Serbian authorities to spare no efforts in creating a constructive and positive environment around the public consultations concerning this important process of amending the Constitution. After that, a second set of draft Amendments was prepared by the Ministry of Justice of Serbia after the adoption of the Venice Commission's Opinion, and was submitted for public consultation on 18 September 2018. These draft Amendments were also sent to the Venice Commission for assessment and the Venice Commission took note that the recommendations formulated by the Venice Commission in its Opinion No. 921/2018 were followed.

As we said, the first draft Amendments were prepared by the Ministry of Justice, following the adoption of the National Action Plan for Chapter 23 of the accession negotiations by Serbia with the E.C., opened in July 2016, with the aim of depoliticising the judiciary and to strengthen its independence. The draft Amendments were adopted by the Government of Serbia prior to being submitted to the Venice Commission for the present opinion. The V.C. was informed that the formal amendment process will be initiated by the National Assembly of Serbia after the adoption of the present Opinion by the Venice Commission. This Opinion was adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018) after having been discussed at the Sub-Commission on the Judiciary (21 June 2018).

According to the proposed solution, the H.J.C. should be an autonomous and independent state body that guarantees the independence and autonomy of the courts by deciding on issues of the position of judges, court presidents and lay judges determined by the Constitution and the law. This was a broader definition than the one in the current Constitution. Furthermore, the H.J.C. elects and dismisses the President of the Supreme Court of Serbia and presidents of other courts; elects judges and lay judges and decides on the termination of their functions; collects statistical data relevant to the work of judges; evaluates the work of judges and court presidents; decides on transfer and temporary assignment of judges; appoints and dismisses members of disciplinary bodies; determines the number of judges and lay judges; proposes to the Government funds for the work of courts in matters within its competence; and decides on other issues of the position of judges, court presidents and lay judges determined by special law. The disciplinary procedure and the procedure of dismissal of judges and presidents of courts may also be initiated by the Minister of Justice in charge.

Certain positions regarding the composition of this body were discussed earlier. However, one of the main issues were the election of non-judicial members of the H.J.C. In the first set of draft Amendments from June 2018, the Amendment dealing with the election of non-judicial members of the H.J.C. by the National Assembly provided for two rounds of elections: a first round of elections (three-fifths majority) and a second round (five-ninths majority). In the event that not all the candidates were elected, a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia, and the Ombudsman, would elect the remaining members by majority vote. However, the V.C criticised this solution. Essentially, the V.C. considers that there is a high degree of danger that the five-member body will become the rule and not the exception when selecting prominent lawyers. Accordingly, the V.C. therefore recommended that this be changed and provided for four options: (1) one would be to provide for a proportional electoral system that ensures the minority in the Assembly will also be able to elect members; (2) another option would be to give to outside bodies, not under the Government's control, such as the Bar or the law faculties the possibility to appoint members; (3) a third option would be to increase the number of judicial members to be elected by their peers, and (4) a fourth option would be to increase the majority requirement and to enable the five-member commission to choose from among the candidates who originally applied with the National Assembly for the membership in the H.J.C. The Opinion left it up to the Serbian authorities, based on the conditions in and experience of the country, to choose the most suitable option. The next, October

Amendments submitted to the Venice Commission, has followed the fourth option by increasing the majority from three-fifths to two-thirds in the first round. The second round has been taken out, but the text kept the commission as an anti-deadlock mechanism and is in line with the recommendations made by the V.C.

The second problem lied in the term *prominent lawyers*. The V.C. pointed out that this criterion raised the question as to why only those who have passed the Bar exam fall within the category of "prominent lawyers". This would exclude law professors, for instance. The third problem in this text was the condition that the prominent lawyer must have at least ten years of working experience in the field of law falling within the competence of the High Judicial Council, which was very vague and unclear as to its purpose. The October text submitted to the Venice Commission addressed this issue and no longer referred to the Bar exam and took out the vague reference to working experience in the field of law falling within the competence of the High Judicial Council and stated "...relevant working experience as defined by law...". This was in line with the V.C.'s recommendation.

The mandate for members and of the President of the H.J.C. was five years without the possibility of re-election. According to the Venice Commission, this was a relatively short mandate, although a change in the position of the President every five years is to be welcomed. The problem was raised in a situation where all the members were to change at the same time every five years, including the President. The V.C. therefore suggested that a system of gradation in the turnover of the membership of the H.J.C. be introduced, which would be welcome.

Furthermore, there were two models of election of the president of the H.J.C. According to the first proposed solution the President of the H.J.C. was to be elected among the lay members. Later, the new Amendments stipulated that the President should be elected among the judges. This was welcomed by the Forum of Judges in Serbia,[37] and the solution did not contradict the opinions of the V.C. As we stated before, the Venice Commission has stated that "the chair of the council could be elected by the Council itself from among the non-judicial members of the council".[38] However, this recommendation by the Commission is primarily aimed at situations where judges elected by their peers have the majority in a council and is not applicable if it increases the risk of domination of the H.J.C. by the current majority in Parliament.

[37] *See* F. J. Serb., Komentar Foruma sudija Srbije na radni tekst amandmana na Ustav Republike Srbije (Sept. 12, 2018), http://dopuna.ingpro.rs/Forum%20sudija%20Srbije.pdf (Serb.).
[38] *See* Venice Commission, *supra* note 17, § 35.

It was proposed that the H.J.C. makes decisions by the votes of at least six Council members or by the votes of at least five Council members, including the vote of the President of the H.J.C., at a session attended by at least seven Council members. Furthermore, it was prescribed the obligation for the H.J.C. to explain and make public its decisions, and to make decisions on the election of judges, presidents of courts, lay judges and on the termination of their functions, on the transfer and temporary assignment of judges and on the appointment and dismissal of members of disciplinary bodies, which are determined in accordance with the law and in the procedure regulated by law.

The cessation of an H.J.C. member's office term was "for reasons prescribed by the Constitution and law and in the procedure prescribed by law". This provision appeared to apply to all members of the H.J.C., but the draft Amendments, however, contained no criteria for dismissal and so appeared to leave this entirely to secondary legislation, which was a problem.

The members of the H.J.C. elected by the National Assembly could be dismissed by the Assembly by a five-ninths majority regardless of the majority with which they were elected. This solution had to be revised because the majority required for dismissal should be higher or at least equal to, the majority required for election. It was important that criteria for dismissal (and procedures) be laid down in the Constitution and not just left to legislation.

The special problem was the dissolution of the H.J.C. According to the proposed solution, if the H.J.C. does not make a decision within thirty days, the term of office of all the members of the H.J.C. shall cease. The V.C. raised the question of what is to be considered a decision? This may sound obvious, but what happens in a situation in which none of the applicants for a position as a judge is found to be qualified – does this qualify as a decision to reject all candidates, or is it a decision not made? It had to be clearer. Furthermore, in case of a tied vote, there was no decision and a very concrete danger that the term of office of all members would cease. This could lead to hastened decision making or frequent dissolutions of the H.J.C. By definition, the H.J.C. is an independent body, which also means that its individual members should be regarded as independent and should not be dismissed *en masse* on the grounds that one member has not acted responsibly in the decision-making process.

With respect to the dissolution of the H.J.C., if it does not render a decision within thirty days, the V.C. recommended that this be either deleted or at least the conditions for dissolution tightened. The threat of dissolution could lead to the hastening of the decision-making process or to frequent dissolutions of the H.J.C. Taking into account the

composition of the H.J.C. of five-five, the deadlock in the decision-making process could potentially be provoked by the members of the H.J.C. elected by the National Assembly part of the H.J.C. against the judges or vice versa. This had the potential of rendering the H.J.C. inoperative. Although not the preferred solution, the October text submitted to the V.C. was in line with the recommendation, as it listed the issues on which decisions need to be rendered and increased the period of time for the dissolution of the H.J.C. from thirty to sixty days if a decision on an issue falling into the list is not made, thereby tightening the condition.

Finally, members of the H.J.C. might not be held accountable for a given opinion and vote in decision-making in the Council unless they commit a criminal offence and they might not be deprived of their liberty in proceedings instituted for a criminal offence committed as members of the H.J.C. without the approval of the H.J.C.

However, the constitutional Amendments from 2018 did not enter into force despite receiving support from the V.C. The reason lay primarily in the strong work of various professional organisations, which fought for different interests, and primarily in the direction of strengthening the role of judges in the H.J.C. Remarks were also sent by the Bar Association of Vojvodina, who assessed that the Amendments does not meet depoliticization, that the transfer of election of judges from the National Assembly to the H.J.C. does not provide protection from political influences, that representatives of the Bar should not be left out of H.J.C., and that the election of judges to basic courts has not been resolved in a way that would protect the interests of judicial and prosecutorial assistants and that the Bar should have been designated as part of the judicial system.[39]

3. THE HIGH JUDICIAL COUNCIL AND THE ROLE OF THE NATIONAL ASSEMBLY IN CONSTITUTIONAL AMENDMENTS IN 2021 AND THE CURRENT SOLUTIONS

According to the Amendments from June 2021, the High Judicial Council should be an autonomous and independent body that shall provide for and guarantee the autonomy and independence of courts and judges, presidents of courts and lay judges. The H.J.C. shall elect judges and lay judges and decide on the cessation of their tenure, elect the President of the Supreme Court and presidents of other courts and decide on the

[39] *See* Slobodan Beljanski, *Patronage over Justice: In Relation to the Working Draft of the Amendment to the Constitution of the Republic of Serbia*, 90 Glasnik Advokatske komore Vojvodine [J. legal theory Prac. Bar Ass'n Vojvodina] 70, 76 (2018).

cessation of their tenure, decide on the transfer and temporary relocation of judges, determine the necessary number of judges and lay judges, decide on other issues related to the status of judges, presidents of courts and lay judges, and perform other functions provided for by the Constitution and law. This Amendment is a new attempt to separate the judiciary from the executive and the legislature according to the concept of the bipolar model – the constitution maker distinguishes between the judiciary on the one hand and the legislative and executive branches on the other, as one of the most prominent characteristics of modern constitutionalism.[40]

There were two alternative solutions regarding the composition of the H.J.C. The first proposal entails that the H.J.C. consist of eleven members: six judges elected by their peers and five "prominent lawyers elected by the National Assembly". This proposal should be welcomed. It met the parameters set out in Recommendation CM/Rec(2010)12, which states that "not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary".[41] The second proposal, which the V.C. does not recommend, also entails an H.J.C. consisting of eleven members but with only five judges elected by their peers, the President of the Supreme Court and five prominent lawyers elected by the National Assembly. This proposal does not follow the V.C. recommendations and puts great power into the hands of the president of the Supreme Court. Furthermore, the current President has been elected by the National Assembly, which means the National Assembly would appoint six out of eleven H.J.C. members (i.e., a majority of members). The Group of States against Corruption (GR.E.CO.) goes even further in this respect; in its fourth evaluation round (corruption prevention with respect to members of parliament, judges and prosecutors) adopted on 29 October 2020, Recommendation IV calls for "(i) changing the composition of the H.J.C., in particular by excluding the National Assembly from the election of its members, providing that at least half its members are judges elected by their peers and abolishing the *ex officio* membership of representatives of the executive and legislative powers."[42]

Election of the H.J.C. members from among the judges shall be stipulated by the law. The principle of broadest representation of judges shall be considered in electing judges as H.J.C. members. The National Assembly shall elect H.J.C. members from among ten candidates (prominent lawyers with at least ten years of experience in legal practice) proposed by the competent committee of the National Assembly, after having conducted

[40] *See* Adams, *supra* note 4, at 236.

[41] Recommendation cm/rec(2010)12, supra note 20, at § 27

[42] *See* GRECO, *Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors*, 86th Session, Doc. No. 12, § 25 (Nov. 28, 2020), https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a07e4d.

public competition, by a two-thirds majority vote of all deputies, pursuant to the law. The V.C. did not object to a two-thirds qualified majority vote, but it is aware of the factual backdrop against which these theoretical proposals will operate in practice:

> As the current National Assembly is dominated by one political party, obtaining a qualified majority vote is not a problem. To reinforce depoliticisation, while the two-thirds majority requirement should be kept, the [V.C.] recommends adding (in)eligibility requirements. These could create a certain distance between the members elected by the National Assembly (the 'prominent lawyers') and party politics, which could make the [H.J.C.] more politically neutral and avoid conflict of interest, even if it may be difficult to completely insulate these members from any political influence. The [V.C.] has shown its appreciation of such criteria in its Urgent Opinion for Montenegro on the revised draft Amendments to the Law on the State Prosecution Service.[43]

Furthermore, the provision stipulates that a candidate must be a prominent lawyer with at least ten years of experience in legal practice. These criteria are welcomed, but they are insufficient to alleviate the identified problem. Accordingly, the V.C. recommended that either the wording "other specifications shall be defined by the law" be added to the draft amendment or that several basic criteria be elaborated in the draft Amendment.[44]

If the National Assembly has not elected all five members within the deadline stipulated by the law, the remaining members shall be elected from among the candidates who meet the criteria for election by a commission comprised of the Speaker of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman, by majority vote. Presidents of courts shall not be elected as H.J.C. members. An H.J.C. member elected by the National Assembly shall be creditable of the function and may not be a member of a political party. Other conditions for election and incompatibility with the function of the H.J.C. members elected by the National Assembly shall be defined by the law.

[43] Venice Commission, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, adopted by the Venice Commission at its 128th Plenary Session, § 68, CDL-AD(2021)032 (Oct. 18, 2021), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)032-e.

[44] *See* Venice Commission, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, adopted by the Venice Commission at its 128th Plenary Session, § 69, CDL-AD(2021)032 (Oct. 18, 2021), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)032-e.

The V.C. noted that where the high quorums are not reached, a five-member commission might become the rule rather than the exception. Foreseeing an anti-deadlock mechanism to avoid stalemates is a positive step. However, the danger is that in the end, it will be up to a small five-person commission to decide the composition of the H.J.C., and as a consequence, the composition of the judiciary. The V.C. believes this issue might be partially resolved by altering the commission's composition – and thereby making the pursuit of a consensus more appealing.[45]

An H.J.C. member shall be elected to a five-year term of office. The same person may not be re-elected to the H.J.C.. The H.J.C. has a president and a Vice-President. The President is elected by the H.J.C. from among the members who are judges and the Vice-President from among the non-judicial members for five years. This term is shorter than provided in the criticised Hungarian Constitution.[46] An H.J.C. member's term of office shall cease upon their personal request or conviction of a criminal offence resulting in at least six months of imprisonment. Before the expiry of the period to which he or she is elected, the term of office of a member of the H.J.C. shall cease upon personal request, or if he or she is convicted of a criminal offence to at least six months of imprisonment. The term of office of a member who is a judge shall cease in case of the termination of a judge and the term of office of a member who is not a judge shall also cease in case of permanent loss of ability to exercise the function of a member of the H.J.C. The decision on the termination of the term of office of a member of the H.J.C. shall be made by the H.J.C. An appeal against the decision shall be allowed to the Constitutional Court, which excludes the right to a constitutional appeal.

Draft Amendment XV describes the working methods and decision-making process of the H.J.C. The H.J.C. shall make decisions by the votes of at least eight members. In the Venice Commission's view, that is a rather high threshold that could easily lead to a situation where a decision is not adopted. Such a result might be welcome for decisions on a judge's dismissal but perhaps less so with decisions such as the appointment of new judges.

Furthermore, the H.J.C. shall announce the reasoning of its decisions and publish them in accordance with the law. European standards call for certain due process safeguards because the decisions of the H.J.C. impact judicial careers, but the V.C. believes this should be regulated in the law on the H.J.C. This is all the more

[45] *Id.* § 70.

[46] In Hungary, the V.C. criticised the term of office (nine years) as too long and the rule that provided for the automatic renewal of his/her appointment if there is no two-thirds majority for a new President in the Parliament. *See* Katalin Kelemen, *The New Hungarian Constitution: Legal Critiques from Europe*, 42 Rev. Cent. E. Eur. L. 1, 20 (2017) (Neth.).

recommended because the eight-vote majority could block the work of the H.J.C. and could be more easily regulated in a law where different majorities are called for different types of decisions taken by the H.J.C. Additionally, the European Charter on the Statute for Judges requires that the proceedings be adversarial and involve the full participation of the judge concerned. These draft amendments do not regulate the adversarial nature of the proceedings, the possibilities of adequate preparation by the judge or even a timeframe within which the H.J.C. needs to adopt a decision. The V.C. emphasises that the national authorities do not need to regulate these issues at the constitutional level. However, if the constitutional legislature decides to regulate a particular issue, all essential features need to be regulated in the constitutional provision – but it is not recommended. The better way is to regulate this in an ordinary law.[47]

An appeal of an H.J.C. decision may be lodged with the Constitutional Court in cases stipulated by the Constitution and the law. The lodged appeal shall exclude the right to lodge a constitutional appeal. The H.J.C. members cannot be held accountable for an opinion expressed about performing their duties and voting during decision-making within the H.J.C. The members shall not be deprived of liberty in the proceedings initiated against them for a criminal offence they have committed as members of the H.J.C. without the approval of the H.J.C. In the end, the H.J.C. will no longer be dissolved if it does not render a decision within 30 days, which is to be welcomed.

These draft Amendments bring some positive steps toward democratisation. First, and as the V.C. also states, it is a welcome change to introduce the principle of non-transferability of judges, functional immunity for judges and prosecutors, removal of the probationary period for judges and prosecutors, ending of the H.J.C.'s dissolution if it does not render a decision within thirty days and, most importantly, removal of the National Assembly's competence to elect court presidents. The relevant Amendments align with European standards and address previous recommendations, including the V.C. The V.C. made the following key recommendations:

> [T]he election by high quorums needed in the National Assembly for the election of prominent lawyers to the [H.J.C.] (five members)...may lead to deadlocks in the future. There is a danger that the anti-deadlock mechanism, which is meant to be an exception, will become the rule and allow politicised appointments. In order to encourage consensus and move away from the anti-deadlock mechanism of a five-member commission, the composition of the latter should be reconsidered;

[47] *See* Venice Commission, *supra* note 39, § 76.

> regarding the two alternative suggestions for the composition of the [H.J.C.] (both have [eleven] members, which is to be welcomed): the first alternative is clearly preferable with a majority of members being judges appointed by their peers; the second alternative would reduce the number of judges to five and include the President of the Supreme Court. This would mean that fewer than half of the members would be judges elected by their peers, which is not recommended;
>
> while the two-thirds majority requirement in the parliamentary vote is welcome and should be kept, eligibility criteria designed to reduce the risk of politicisation should be added, due in particular to the current political situation;
>
> ...
>
> consideration should be given to include the budgetary autonomy of the [H.J.C.] at the constitutional level;
>
> the working methods of both the [H.J.C.] should appear in an ordinary law and not at the constitutional level.[48]

I agree with the V.C. that the threshold of a two-thirds majority of all deputies is dangerous. In Serbia, a commission comprised of the Speaker of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman could easily become a rule and not an exception. Second, we talk about the Judicial Council. Therefore, judges should have a majority in this Council, but I believe that the demands for democratisation are quite satisfied if there are six judges in the Council, with five prominent lawyers. Furthermore, it is important to introduce an eligibility criterion and budgetary autonomy at the constitutional level.

We can solve additional problems at the legislation level, such as judicial incompatibilities and H.J.C. working methods. The Law on High Judicial Council regulates the working methods of the H.J.C., but there is no necessary law on judicial incompatibilities. Furthermore, there are no provisions on budgetary issues, except one that provides operational funds for the H.J.C. in the budget of the Republic of Serbia.[49]

Almost immediately after the arrival of the comments of the V.C. in October 2021, the Republic of Serbia started a quick revision of the Amendments. Due to the planned referendum on constitutional issues in January 2022, the Government quickly tried to push

[48] *See* Venice Commission, *supra* note 39, §§ 110-111.

[49] *See* Zakon O Visokom Savetu Sudstva [Law on the High Council of the Judiciary] Sl. glasnik RS br. 116/2008 [Official Gazette of the Republic of Serbia No. 116/2008], art. 3 (Serb.).

through constitutional solutions that were not completely in accordance with the V.C.'s Opinion.

According to the December 2021 Amendments, the H.J.C. is no longer autonomous, and it was proposed that the H.J.C. be only an independent state body.[50] Then, in relation to the previous decision, the composition of the H.J.C. and the manner of electing prominent lawyers were partially modified: the H.J.C. consists of eleven members with six judges elected by judges, four prominent lawyers elected by the National Assembly and the President of the Supreme Court. This proposal also meets the standards set out in Recommendation CM/Rec(2010)12).

The National Assembly elects H.J.C. members from among eight candidates (prominent lawyers with at least ten years of experience in the legal profession) proposed by the competent committee of the National Assembly after a public competition, by two-thirds of all deputies, in accordance with the law. This solution meets the V.C's parameters, but the special issue is that the anti-deadlock mechanism remained the same. The authorities believe that because this anti-deadlock panel is supposed to operate as a substitute for the National Assembly's competence, it should be made up of the highest-ranking Government officials with constitutional legitimacy. The panel also includes famous lawyers and the speaker of the National Assembly, who serves as an institutional figure and represents Parliament.[51]

Because there are no prescriptive or specific criteria for the composition of such an anti-deadlock mechanism, the V.C.did not determine that the proposed mechanism does not meet international standards and must be altered.[52] The V.C. recognises the members' explicit demands for high legal competence and finds it beneficial that the H.J.C.'s "prominent lawyers" be appointed by key figures in the Serbian judiciary. It also has no objections to the participation of the Ombudsman; given that the anti-deadlock mechanism supersedes a power of the National Assembly, the participation of the Speaker of the National Assembly is similarly logical.[53] However, because four of the five members of this commission are currently elected by the National Assembly (and not all with a qualified majority), it is possible that the proposed anti-deadlock mechanism will "lead to politicised appointments" for the Commission, at least until these constitutional

[50] *See* Устав Републике Србије [Constitution of the Republic of Serbia], art. 150 (Serb.).
[51] *See* Venice Commission, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 24 November 2021, endorsed by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §15, CDL-AD(2021)048-e (Dec. 13, 2021), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)048-e.
[52] *Id.* § 18.
[53] *Id.* § 16.

Amendments take effect and the composition of Parliament becomes more pluralistic.[54] Nonetheless, the V.C. encouraged the Serbian police to make the possibilities for an alternative anti-deadlock mechanism that would address the risk that it might not be politically neutral or that it might be viewed as such.[55]

The recommendation on budgetary autonomy has not been implemented. The V.C. believes that even if constitutional inclusion appears to be the preferred option for enhancing the impression of independence, a legislative regulation would also be appropriate.[56] Finally, the recommendation regarding the working methods of H.J.C. has been followed by changing the titles and content of some draft Amendments.

Even though the new solutions did not fully satisfy the Venice Commission, the Republic of Serbia entered a referendum. Through the media, the public was informed that the Venice Commission welcomes all constitutional amendments and gives its consent. In January 2022, in a referendum, the people's consent was obtained for constitutional changes even though the V.C. did not give a positive opinion on all Amendments. The key provisions on the H.J.C. are Articles 150-154 of the Constitution. In the end, the Amendments to the Constitution entered into force and the first new position of the H.J.C. was formed.

CONCLUSION

It is not disputed that there is no perfect constitution, but one may be considered optimal if it "meets the requirements of the era, corresponds to the level of social development and the normativisation of the common values of the political community that are acceptable for all of the members in accordance with the interest and value structure of the pluralist society".[57] The constitution-maker in the Republic of Serbia must establish, at least, optimal solutions when it comes to the position of judges and the H.J.C. However, the question is when and whether this will be possible in the near future. The last ten years have clearly shown us how many conflicting opinions and interests there are in Serbia regarding these issues. In this set of conflicting interests, it is necessary to find a balance and a middle line by which we will avoid both the influence of the executive power on the selection of judges and the creation of judicial corporatism.

[54] *Id.* § 17.
[55] *Id.* §19.
[56] *Id.* § 36.
[57] Nóra Chronowski et al., *What Questions of Interpretation May Be Raised by the New Hungarian Constitution?*, 6 Vienna J. on Int'l Const. L. 41 (2012) (Austria).

Generally speaking, Serbia followed a large number of recommendations and positions from the relevant bodies. Most of the V.C.'s important recommendations from the October Opinion have been implemented, most notably regarding the composition of the H.J.C. In the first place, the Constitution was harmonised with the recommendation that the H.J.C. consist of eleven members: six judges elected by their peers and five "prominent lawyers elected by the National Assembly", and it met the parameters set out in Recommendation CM/Rec(2010)12, which states that "not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism within the judiciary".[58] This also builds on the C.C.J.E.'s view - such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. In a mixed composition of the H.J.C., the V.C. perceives the mechanism for strengthening the confidence of citizens in the judiciary.

The President of the Supreme Court of Cassation was the President of the H.J.C., and according to certain positions in theory, this significantly limits the autonomy of this body, because the President should be elected by a majority, by secret ballot, and not be imposed by law. According to the current solution, the H.J.C. has a President of the Council, who is elected by the H.J.C. for five years from among the elected members of the H.J.C. among judges. The President represents the H.J.C., convenes and presides over sessions, coordinates the work, takes care of the implementation of the Council's acts and performs other tasks in accordance with the law and acts. The H.J.C. has a Vice-President, who is elected for five years by the H.J.C. from among the elective members chosen by the National Assembly. The Vice-President performs the duties of the President in case of his absence or incapacity. In this way, all standards regarding the election of the president of the H.J.C. have been met.

When participation of the executive power, or its representatives (e.g., the Minister of Justice) is in question, the V.C., taking into consideration the practice of numerous European states, in principle allows for the possibility that a minister is a member of the Council but proposes that he/she should not be involved in decisions concerning the transfer of judges or disciplinary measures against judges, as this could lead to inappropriate interference by the Government. However, Serbia took the position that the Minister of Justice should not be a member of the H.J.C. at all.

The drafter of the Constitution followed the recommendation regarding the category of "prominent lawyers". Namely, it was a very problematic solution according

[58] Recommendation CM/Rec(2010)12, supra note 20, at § 27.

to which the category of ”prominent lawyers“ would exclude law professors, for instance. The new rule, which was confirmed in practice during the election of H.J.C. members, is much broader.

The V.C. is of the opinion that judicial councils should have decisive influence on appointment and advancement of judges (as well as on disciplinary accountability) while the Court should be competent for the appeals against decisions of disciplinary bodies. Such a solution is represented in the new Constitution, and an appeal to the Constitutional Court is allowed against the decision of the H.J.C.

However, Serbia did not follow all the recommendations. There are a number of recommendations that Serbia has not followed, so some problems appear in the sphere of the topic of this paper. In the first place, the mandate for members and of the President of the H.J.C. was of five years without the possibility for re-election. According to the V.C., this was a relatively short mandate, although a change in the position of the President every five years was to be welcomed. The problem was raised in a situation that all the members were to change at the same time every five years, including the President. The Venice Commission, therefore, suggested that a system of gradation in the turnover of the membership of the H.J.C. be introduced, which would be welcome. However, the mandate of a member of the H.J.C. lasts for five years, except for the *ex officio* member. An elective member of the H.J.C. cannot be re-elected to that position. Therefore, the same person cannot be re-elected to the H.J.C. Therefore, the entire composition of this body will be changed in this way.

A special question is whether Serbia has separated the judiciary from the executive and the legislature. The anti-deadlock procedure for the election of lay members of the H.J.C. has not been implemented. Namely, if the National Assembly has not elected all five members within the deadline stipulated by the law, the remaining members shall be elected from among the candidates who meet the criteria for election by a commission comprised of the Speaker of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman, by majority vote. The danger is that in the end, it will be up to a small five-person commission to decide the composition of the H.J.C., and as a consequence, the composition of the judiciary. I have to repeat that I agree with the V.C. that the threshold of a two-thirds majority of all deputies is dangerous. In Serbia, a commission comprised of the Speaker of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman could easily become a rule and not an exception. Because four of the five members of this commission are currently elected by the National Assembly

(and not all with a qualified majority), it is possible that the proposed anti-deadlock mechanism will "lead to politicised appointments" for the commission, at least until these constitutional amendments take effect and the composition of the Parliament becomes more pluralistic.[59] Despite the fact that the solutions offered in the updated draft Amendments in relation to these two proposals do not violate any international norms, the V.C. continuously emphasises the importance of reducing the risks of politicisation of the H.J.C. I am afraid that this may indeed be the case. However, in any case, I believe that the current Constitution is a step forward towards democratisation.

[59] *See also* Darko Simović, *Constitutionalization of the Judicial Council in North Macedonia and Serbia – Can we Learn from Each Other?,* 67 Strani pravni život 623, 639 (2023) (Serbia). *See also* 37 (2024). *See* also David Kosař et al., *The Case for Judicial Councils as Fourth-Branch Institutions*, 20 Eur. Const. L. Rev. 82 (2024) (Neth.).