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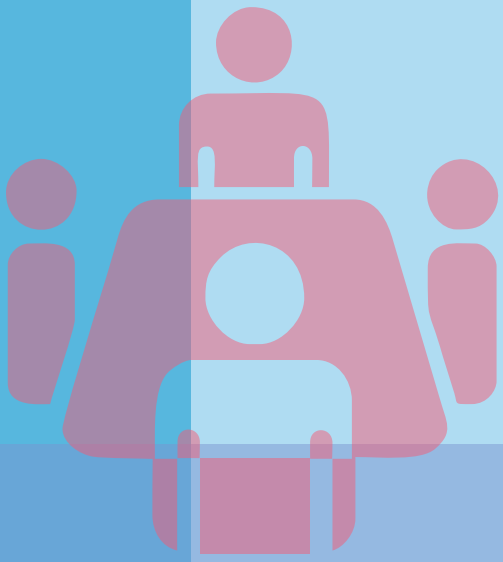
STANDING POINTS FOR ADOPTING THE LAW ON HIGH JUDICIAL COUNCIL



Kingdom of the Netherlands

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A PROJECT OF THE GERMAN MARSHALL FUND

Norway

STANDING POINTS FOR ADOPTING THE LAW ON HIGH JUDICIAL COUNCIL

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STANDING POINTS FOR ADOPTING THE LAW ON HIGH JUDICIAL COUNCIL

INTRODUCTION

Certain provisions of the Constitution of the Republic of Serbia of 2006 (hereinafter: the Constitution) and the Constitutional Law on Implementation of the Constitution have been criticized by experts and the public since the adoption. During the following years, the necessity to change the highest legal act was confirmed, both due to the inconsistency of certain provisions with the fundamental principles of constitutional democracies and the rule of law, as well as due to the requirements in the process of European integration. With the adoption of the Act on Constitutional Amendments of the Republic of Serbia in 2021, which was ratified in the referendum on January 16, 2022, the provisions of the Constitution pertaining to courts and the High Judicial Council (HJC or the Council), among others, were amended.

The lack of transparency and inclusiveness of that process was being indicated during the public debate and the implementation of the constitutional reform.[1] However, the adopted amendments have become our new constitutional and judicial reality. Along with all the positive or controversial from the point of view of the profession, those changes could be evaluated as a partially used opportunity to resolve the issues in the Constitution that contributed to the delays in the implementation of the previous reforms of the judicial branch of government.

The biggest achievement might be the decision on the appointment of judges, presidents of courts and members of the HJC from among judges, which was finally transferred from the Parliament to the Council. Among the positive

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1 There was also a lack of a wider expert public discussion, consideration and explanation of why certain proposals by the judiciary and the profession were not accepted and why the expert Working Group was dissolved immediately after the end of four public hearings on the draft act. For example, at the Working Group meetings and the Committee for Constitutional Affairs of the National Assembly sessions, the proposals and explanations from the "Model Amendments I to XXXVI to the Constitution of the RS" of the Judicial Research Centre (CEPRIS) were not considered, nor were the proposals of other proponents who expressed critical views in public. Experts and professions should sincerely and harmoniously engage so that their proposals and suggestions are maximally included in the proposals for new laws, within a democratic procedure and comprehensive discussion.

solutions are the improvement of guarantees of irremovability of judges and the abolition of the three-year probationary term for judges and public prosecutors. It is also significant that in the end, the Judicial Academy was not made a constitutional category, so its position and role will be regulated by law. However, a more emphatic definition of the judicial branch of government as independent in relation to the executive and legislative powers and the listing of all its prerogatives, such as the right to manage the court budget and other financial guarantees that protect the specific role of the court and judges, is missing. The general conditions and procedures for the first appointment to the judge's office are missing. The new judicial laws should also provide answers to some other judicial-organizational and professional issues (such as competences, methods of decision-making and removal of possible blockages in the work of the HJC, additional criteria for nominating prominent lawyers, etc.), which were criticized by the profession, and which were the subject of consideration in the opinions issued by the Venice Commission.[2]

The process which started by amending the Constitution in the part on the judiciary, continues with the activities of drafting and adopting new judicial laws.[3] Related to the changes that will include, among other things, the adoption of a new or significantly amended and supplemented Law on High Judicial Council, we believe that it would be useful to create a document on the vision, proposals and suggestions for improving the status and role of the HJC, which would contribute to a more successful performance of the work. In this document, we start from the new constitutional terms, competences and composition of the HJC, domestic documents, international and European standards, analysis and research, but also from the experiences gained, the results achieved, and the issues observed during fourteen years of work practice of that body, especially from the perspective of the judiciary, professional associations of judges and non-governmental organizations dealing with the issue.

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2 Venice Commission - European Commission for Democracy through Law (hereinafter the Venice Commission), CDL-AD(2021)032, Opinion on the Draft Constitutional Amendment on the Judiciary and the Draft Constitutional Law for the Implementation of the Constitutional Amendments of 18 October 2021 and CDL-PI(2021)019, Urgent Opinion on the Revised Draft Constitutional Amendments on the Judiciary of 24 November 2021

3 The laws must be harmonized with the amendments to the Constitution within one year from the date of their entry into force.

1. FORMS, CONSEQUENCES AND ARGUMENTS OF JUDICIAL SELF-GOVERNANCE IN EUROPE AND SERBIA

Judicial self-governance has a long tradition in several European countries and has significantly increased during 1990s and in the beginning of the 21st century, especially due to the development of judicial councils, broadly understood, in Central and Eastern Europe and their expansion to Western European countries. Contrary to the standard image, in most European countries the self-governance is non-linear and represents a response to political and social changes. The judicial self-governing body must protect its actions from political actors, but also from judges and other self-governing bodies. If it fails to do so, it may be captured by political forces or become an irrelevant factor.[4] If successful, it can improve the efficiency and transparency of the judiciary, and in the long run perhaps increase public trust in the courts, judicial independence and judicial accountability.[5]

Therefore, the judicial self-governance, apart from judicial councils, is seen as a much more complex network of actors and bodies with different levels of participation by judges. Judicial panels, promotion committees, spokespersons and management, presidents of courts and disciplinary bodies are significant. The development of judicial councils is not necessarily an absolute benefit because it can cause political conflict and new channels for the politicization of the judiciary.[6] According to the Opinion of the Consultative Council of European Judges (CCJE) No. 10, the judicial council aims to protect both the independence of the judicial system and the independence of the judge. It should affirm the efficiency and quality of justice, ensure the full implementation of Article 6 of the European Convention on Human Rights and strengthen public trust in the judicial system, establish the necessary mechanisms for evaluating the judicial system, report on the status of services and request that the competent authorities take necessary steps to improve the work of the judiciary. It is not acceptable for other bodies to limit the autonomy of the judicial council to decide on its own

4 Office for Democratic Institutions and Human Rights at OSCE (OSCE/ODIHR) (2022). Report "Towards Culture of Accountability or Councils for the Judiciary", p. 6.

5 David Kosar (2019), Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe, *German Law Journal* 19 (7).

6 Ibidem, pp. 1611–1612. See also Maria Dicosola (2012), Judicial Independence and Impartiality in Serbia: between Law and Culture, *Diritti comparati*, 17. 12. 2012; Bianca Selejan Gutan (2019), Romania: Perils of a "Perfect Euro Model" of Judicial Council, *German Law Journal* 19 (7); David Kosar (2017), Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court President and Ministry of Justice, *European Constitutional Law Review* 13 (1).

manner of work and the issues it considers. The relationship between the HJC and the Minister of Justice, the President of the State and the Parliament should be clearly established. In addition, considering that *the judicial council is not part of the hierarchy of the judicial system* and as such cannot decide on cases, one should very carefully approach the arrangement of its relationship with the courts and especially with the judges. "Among Councils for the Judiciary, a distinction can also be made between Councils performing traditional functions (e.g. in the so-called "Southern European model" with competences for appointment of judges and evaluation of the judiciary) and Councils performing new functions (e.g. in the so-called "Northern European model" with competences for management and budget matters)". CCJE encourages giving both traditional and new powers to the council.[7]

In 2010, the CCJE passed the Magna Carta of Judges, which states, among other things, that each state is obliged to form a council for the judiciary or another special body, independent of the legislative and executive powers, with broad powers for all matters concerning their position, as well as the organization, functioning and image of judicial institutions. The Council is composed either exclusively of judges or of a substantial majority of judges elected by their peers and is responsible for its activities and decisions.[8] However, the conclusions of available research indicate a mixed impact of the European Union (EU) in promoting judicial reforms in candidate countries.[9] The main reason for the insufficient success of that model, along with the general deficiencies of the work of judicial councils in other countries, was that they were established too soon, without considering the judicial culture and the context in which the judiciary functions in practice, in terms of increased pressure from internal and external factors on the independence of the judiciary. The accountability of the judiciary's has also worsened.[10] Second, the establishment of councils and their functioning reduced the transparency of the judicial self-governance. Third, the individual

7 Opinion no. 10 (2007) on the Council of the Judiciary in the Service of Society, Chapter V paragraph 46

8 *Opinions of CCJE and Magna Carta of Judges*

9 For a more comprehensive overview, see Michal Bobek and David Kosar (2014). Global Solutions, local damages: A critical study in judicial councils in Central and Eastern Europe. *German Law Journal*, 15.

10 For a critical review of this model in "young democracies", see David Kosar (2016). *Perils of Judicial Self-Government in Transitional Societies*. Cambridge University Press; Samuel Spáč, Katarina Šipulová & Marina Urbániková (2018). Capturing the Judiciary from inside: The story of judicial self-governance in Slovakia. *German Law Journal*, 19; Maria Popova (2012). *Politicized justice in emerging democracies: A study of courts in Russia and Ukraine*. Cambridge University Press. The case of Poland in the past ten years, also showed how the council of the judiciary can become an extended arm of the government. See: Wojciech Sadurski (2019). *Poland's Constitutional Breakdown*. Oxford University Press.

independence of judges - is further challenged by the exercise of powers related to the evaluation of individual performance, disciplinary proceedings and dismissals.[11]

A similar issue of the lack of broader and deeper internal effort (culture) and integrity, as well as the unequivocal political will to implement judicial reforms in accordance with the proposals of local experts and professionals, and with the support of the EU and the Council of Europe, was also shown during the implementation of that reform in Serbia. Pursuant to the Constitution of Serbia of 2006, after the High Judicial Council, which was established by law in 2002, the High Judicial Council and the State Prosecutorial Council (SPC) were introduced into the constitutional system for the first time. The HJC was established in 2009 and it led the unsuccessful implementation of judicial reform with the re-election of judicial office holders in 2009–2012.[12] The Republic of Serbia, then, adopted the National Judicial Reform Strategy 2013-2018, by which, among other things, it committed to changing the Constitution. During 2014, a legal analysis of the constitutional framework on the judiciary in the Republic of Serbia was produced.[13] In the process of the EU accession, in 2016, the Action Plan for Chapter 23 was adopted, which recognizes "the absence of independence of judges and excessive political influence", provides directions and deadlines for the implementation of that reform. The National Judicial Reform Strategy 2013-2018[14] establishes that the reform of the judicial system of the Republic of Serbia is based on five key principles: independence, impartiality and quality of justice, competence, liability and efficiency. In the Strategy, it is emphasized that the HJC and SPC *are one of the key conditions for the successful functioning of the judiciary, which is why, on the one hand, mechanisms must be provided to guarantee the independence of these bodies from illicit and illegal influences, and on the other hand, considering the deficiencies recognized so far in the work of the HJC and SPC, legally shape the conditions and mechanisms of accountability, both of their members individually and of those bodies as a whole.*

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11 Denis Prešova and Others (2017). Effectiveness of the "European Model" of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern of Judicial Reforms. *CLEER PAPERS*, Asse Institute in the Hague, 5 and 24.

12 By the decisions of the Constitutional Court of 2012, the HJC and the SPC were obliged to reinstate judges, prosecutors and their deputies who were not re-elected in 2009. These bodies complied by passing a decision on their reinstatement in 2012.

13 Legal Analysis of the Constitutional Framework on the Judiciary in the Republic of Serbia, taken from the publication "Svedočanstvo priprema za promenu Ustava od 2006. godine i struka", Društvo sudija Srbije, Beograd 2018, 17–42.

14 Adopted by the National Assembly of the Republic of Serbia on July 1, 2013 (*The Official Gazette of RS* 57/2013). http://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za -period-2013-2018.-godine.pdf.

2. SERBIAN JUDICIARY ON THE STATUS AND DEVELOPMENT ON THE HIGH JUDICIAL COUNCIL

In the Legal Analysis of the Constitutional Framework on the Judiciary, it is stated that in relation to Article 153, para 1 of the Constitution, the competence of that body is not adequately determined. The issue is opened on the liability of the HJC for the exercise of entrusted powers in the constitutional organization of government, in which the HJC would be exempt from political influence. Given that it is a body that connects the third branch of government with the political authorities, it "accounts" in the broadest sense only to citizens and the profession. Therefore, precise rules on the transparency of the HJC's work should be introduced, which would represent a powerful instrument for assessing the quality of work. On the other hand, the mechanism of the right to appeal the decisions of the HJC before the Constitutional Court provides additional guarantees not only of the legal but also of the professional liability of the HJC.[15]

In the Opinion and Suggestions of the HJC on the Draft Text of the Amendment of the Ministry of Justice to the Constitution of the RS [16] the HJC says: "The current Constitution has not specified the nature of the power that the HJC has, because it cannot be said whether it is a judicial body or a state body. The HJC, as the highest body of judicial power, should not be labelled as a 'state body', it must be distinguished from other bodies of public administration or from the Constitutional Court, as a specific state body that is not part of the judiciary..."

In the document entitled The HJC on Constitution Amendments in the Field of Justice after the Opinion of the Venice Commission[17] of July 19 and 20, 2018, among other things, it is recommended to retain the definition of the HJC under Article 153 of the current Constitution that the HJC is an independent and autonomous state body that safeguards and guarantees the independence and autonomy of courts and judges. Next, that the appropriate criteria are prescribed for the election to the HJC and the method of electing those members who are not chosen by the judges, so that the members are not a connected group of like-minded people under the influence of the ruling majority.

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15 Legal analysis in "Svedočanstvo priprema za promenu Ustava od 2006. godine i struka", 2018, 33.

16 Adopted at the HJC sessions of January 25 and February 13, 2018. See: "Svedočanstvo o promenama Ustava od 2006. godine i struka", 2018, 116–126.

17 The HJC on Constitutional Amendments in the Field of Justice after the Opinion of the Venice Commission, in "Svedočanstvo pripreme za promenu Ustava od 2006. godine i struka", Društvo sudija Srbije, 2018, 488. The current HJC accepted that document.

In the Conclusions and Recommendations of the HJC on the Draft Act on Constitutional Amendments and the Draft Constitutional Law for the Implementation of Constitutional Amendments of September 30, 2021, it is stated that the largest number of recommendations of the HJC (11) of 2018 were fully adopted, but also that some were not. That is an issue of the relationship between the three branches of government, an issue of the financial guarantee of the independence of courts and judges and the freedom of association of judges, "while the freedom of expression is somewhat expanded by the provision on immunity."

3. STATUS AND COMEPETENCES OF THE HIGH JUDICIAL COUNCIL

According to the Constitution of 2006, the High Judicial Council is *an independent and autonomous body which shall provide for and guarantee independence and autonomy of courts and judges*. According to the adopted Act on the Constitutional Amendments, the HJC is *an independent state body which shall safeguard and guarantee the independence of courts, judges, presidents of courts and lay judges*.

In the public debates on amendments to the Constitution in the part on the judiciary, the previous constitutional definition of the HJC was not disputed. The significance and importance of that body as the highest body not only of the judicial-administrative power but also of judicial self-governance and protection of the independence of courts and judges were emphasized.[18] Therefore, in order to understand the matter of those amendments, it is important to refer to paragraph 26 of the Opinion of the Venice Commission dated October 18, 2021: “In order for the judicial reform to succeed in bringing the Serbian judiciary in line with European and international standards, organic laws will need to be reformed that regulate very essential details such as eligibility criteria for judicial office and

[18] Whether the definition of the HJC, by introducing new terms such as the attribute *state* in addition to the term organ (which is not used in the Constitution when defining the highest bodies of other branches of government), excluding the term *autonomous*, and that the HJC safeguards and guarantees independence not only of courts and judges but also of *court presidents and lay judges* (as if they were not covered by the terms court and judges), will improve the work of that body and the judicial branch of government, or it will support the retention of the current dualism in the competences of the Ministry of Justice and the HJC, will soon be seen in new draft laws. It is not only about the competences of the judicial administration, the Court Rules of Procedure, the financing of the judiciary and the status of employees in the judiciary who are not judges, but also about the status, competences, quality and manner of work and decision-making in the HJC. Time, practice and results of the work of courts and judges, as well as public trust in the courts and in the rule of law, will show whether we are on the right track.

invest in practice", as well as to paragraph 60, which states that the word 'independent' should be favoured over 'autonomous' in regard to the judiciary and public prosecutor's office. We believe that this recommendation refers to the distinction of closer definitions of the functions of the two judicial professions, and not to the character of the judicial council as a prominent body in the judicial branch of government.

Keeping in mind that the HJC is the body that safeguards and guarantees that independence, the constitutional changes, but also new judicial laws, should provide conditions to eliminate weaknesses in the realization of its status and competence, both in a narrow and in a wide context. However, even though the constitutional reform was a necessary and important first (formal) step in that process, it should be constantly reminded that the reform of the judiciary cannot be successfully completed until the real conditions for the legal, independent and impartial work of the courts and the judge are met. The HJC, as an independent body of the judicial branch of government, should have a strength and ability to ensure the independence of courts and judges, including, according to the current definition of that body, both presidents of courts and lay judges. This means that it insists on optimal conditions for the work, progress and status of individuals in positions commensurate with their contribution, responsibility and performance, with adequate financial security and reward for the work of all judicial staff. Therefore, the judiciary as a whole should fulfil its constitutional role.

The competences of the HJC are defined, first of all, by the amended Article 150, paragraph 2 of the Constitution (Amendment XII), which established that the HJC „shall elect judges and lay judges and decide on the termination of their office, elect the Supreme Court president and presidents of other courts, decide on the transfer and assignment of judges, determine the required number of judges and lay judges, decide on other issues of the status of judges, court presidents and lay judges and carry out other competences determined by the Constitution and the Law ".

Apart from the competences defined by the Constitution, the HJC based on the current wording from Article 154 of the Constitution "performs other duties specified by the Law", which are significantly elaborated and improved in Article 13 of the current Law on HJC. However, in the implementation of those competences, regulated by laws, since 2013, and especially since 2016, when new members of the HJC and the SPC were elected and the Action Plan for Chapter 23 specified deadlines for the implementation of constitutional changes on the judiciary, various types of obstruction of the implementation of agreed obligations have appeared, as well as the monopoly of the executive and legislative authorities over the management and direction of those processes. The

HJC also exercises the competences established by the Law on Organization of Courts and the Law on Judges. The HJC "shares" certain competences, out of about 80, with other bodies, such as the budget and human resources, which complicates the organization of work in the HJC, the Ministry of Justice and the courts.

All this shows that efforts should be made to preserve, and then improve the existing HJC's competences and introduce new ones, which will be discussed later, given the current wording of the Constitution that the HJC "performs other duties specified by the Constitution and the Law". Any possibly more restrictive interpretation of the competence of the HJC would not be in accordance with the basic constitutional principles of the separation of powers and independence of judiciary, with a note that judicial self-governance is not only represented by the judicial council, but also by other judicial organs and bodies, presidents of courts, lay judges, but, firstly, the judges and the role of adjudicating. Dualism also exists in the competences of the HJC in the system of division of powers pertaining to training and professional development of judicial staff and the Judicial Academy, because that institution does not have all the qualities and guarantees of independence of the judicial branch of government and is not a constitutional category.

When defining the competence of the HJC in the amendments to the legal act, in addition to the aforementioned, into account should be taken and maximally implemented the position of the CCJE that the judiciary council should generally have a wide range of powers that are interconnected, so that the HJC can better protect and improve judicial independence and judicial efficiency. It is recommended that the judicial council, autonomously or in cooperation with other bodies, but independently, performs the following responsibilities: appointment of judges, promotion of judges, professional evaluation of judges, disciplinary and ethical matters, training of judges, control and management of separate judicial budget, administration and management of courts, protection of the image of judges, provision of opinions to other powers of the State, cooperation with other relevant bodies on national, European and international level, responsibility towards public: transparency, accountability, reporting.[19] This is reasonable for the Ethics Committee and the rulebook on the committee's work, which could adopt abstract views on the ethically correct conduct of judges, only if this does not turn into the opposite in practice.

[19] CCJE Opinion No. 10, paragraphs 41 and 42

4. SIGNIFICANT ISSUES FOR IMPROVING THE STATUS AND WORK OH THE HIGH JUDICIAL COUNCIL

a. Budget autonomy

It is immediately noticeable that the constitutional amendments have not established that the HJC proposes and disposes of budget funds for the courts' and for its own work. Previous practice has shown that in all discussions on constitutional amendments, and especially in the spring of 2018, all judicial bodies, as well as the profession, unanimously advocated for those guarantees of the independence of courts and judges. In that part, the reform of the judiciary should have been implemented through the amended Law on Organization of Courts, and it was stopped in 2016 by the will of the executive power, which referred to the decision of the Constitutional Court on the temporary measure of invalidating the provisions of Article 42, paras 4 and 5 of the Law on Judges, by which the HJC determined the right to compensation for a separate life for judges of the national level. In its Opinion of October 18, 2021, the Venice Commission stated that „... the issue of the budgetary autonomy of the HJC was raised and including this principle in the Constitution, which is supported by GRECO and should be considered". In the Urgent Opinion of the Commission of November 24, 2021, it is stated that this recommendation had not been followed and it is recommended that "consideration should be given to include the budgetary autonomy of the HJC and the HPC at the constitutional level". Once again, it was revealed that there was no real political will to implement this authority. Despite this, we believe that the judiciary should persevere in a decade-long effort, which is also supported by the Venice Commission.[20] It is necessary to include in the judicial laws under the competence of the HJC the proposing, allocating and supervising of financial resources for the work of the courts and the HJC, as one of the guarantees of the institutional independence of the courts, at least at the level of the Constitutional Court.

[20] European Commission on Democracy through Law (hereafter the Venice Commission), CDL-AD(2021)032, Opinion on the Draft Constitutional Amendments on the Judiciary and the Draft Constitutional Law for the Implementation of the Constitutional Amendments of October 18, 2021. and CDL-PI(2021)019, Urgent Opinion on the Revised Draft Constitutional Amendments on the Judiciary of November 24, 2021. "Even if inclusion at the constitutional level seems the preferrable option with a view to strengthen the appearance of independence, a regulation at the legislative level would also be acceptable." (CDL-PI(2021)019, para 36).

b. Court rules of procedure and opinions on draft laws

The constitutional amendments also missed the opportunity to include adopting rules of procedure of the courts based on previously obtained opinion of the Ministry of Justice under the HJC competences, and to confirm the HJC's right to give an opinion when laws on courts and judges are amended and adopted. It should also be considered that the competences of the HJC could be expanded by enabling that body to initiate amendments to laws within its scope of work, following the example of the National Bank of Serbia, the Protector of Citizens and the Constitutional Court. In order for the judicial branch of government to have all its constitutional prerogatives, if we stand for the principles of the rule of law and the separation of powers and the integral European model of the judicial council, the HJC should be competent to adopt the rules of procedure of the courts, upon the opinion of the President of the Supreme Court and the Minister responsible for justice, then, to approve the rulebook on the internal organization and systematization of jobs in the court and to draft strategic and development acts, all of which should be included in the competences of the HJC and at the same time amend the provision of Article 70 of the Law on Organization of Courts.

c. HJC members from among judges - structure and selection of the members

A new "key" and method of selecting members of the HJC from among judges should be thoroughly considered and proposed. After a comprehensive consultation with judges and their representatives, it should be decided whether the “electorate" will consist of all judges (voting "all for all") or whether the electorate will be defined by levels and types of courts, as is the case now. The Act on the Constitutional Amendments contains a norm according to which the widest representation of judges is considered when electing members of the HJC, but there is also a request from certain courts for their fairer and more equal representation in the HJC. The analysis of the previous campaigns of judges who applied for membership in the HJC indicated the need to regulate and achieve more equal conditions for the presentation of candidates. It would include a group presentation and debates of the candidates for the HJC on certain issues of importance for the development of the judiciary, as well as an equal video or online presentation of the candidates and their programs.

Given different views and alternatives that are being discussed in public, especially the option that one candidate would be elected by: the Supreme Court and the Administrative Court, appellate courts, higher courts, basic courts,

commercial courts and misdemeanour courts, it should be considered whether there are much more judges of the basic courts than the ones of the other courts of general jurisdiction, and possibly determine two positions for them in that structure. In that case, one electorate would become the Supreme Court and the courts of appeal, and the Administrative Court, as a court of specific jurisdiction, would be attached to the group of commercial courts. However, we should certainly consider the proposals that have been put forward in public that all judges in Serbia vote on candidates for members of the HJC, but also that not only judges from Belgrade and the largest cities in Serbia are represented in that body. The latter could be ensured if the candidates from the courts of general jurisdiction were chosen according to the areas of the appellate courts, and one place was provided for the courts of specific jurisdiction and the courts of national level. In this regard also, the recommendations of CCJE and the OSCE's analysis on monitoring of those processes should be carefully considered. All judges could be proposed a member of the HJC from among judges, and a possible restriction would apply only to judges who have just been elected to the position of a judge. It is important to draw attention that CCJE Opinion No. 10 points out that all members of the HJC, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence.

d. Prominent lawyers

According to the adopted Act on Constitutional Amendments (Amendment XIII, Article 151, Paragraph 4), the National Assembly selects members of the HJC from among *prominent lawyers* with at least ten years of experience in the legal profession from among eight candidates proposed by a competent committee, after a public competition, by a two-thirds vote of all deputies. The prominent lawyer cannot be a member of a political party and must be worthy of that office. Given the concern of applying the criteria of political expediency in the selection of these individuals, which was emphasized during the public debate, we believe that the criteria for their selection in the Law and in the by-laws should be specified as concretely as possible. In this sense, in addition to the existing ones, several more criteria should be added, such as: notable (exceptional) results in the previous career; distinction based on theoretical or practical contribution to the development of the profession; demonstrated courage and determination in representing positions in defence of basic democratic principles and the principles of legal order and legal recognition. We believe that, to reduce the space for political influence, the Law should *exempli causa* state, apart from the criteria established by the Constitution, the criteria for

the selection of a prominent lawyer to the HJC. These should be lawyers who are recognized by the professional public as persons of high professional integrity who, compared to other colleagues, stand out for their expertise, which is confirmed in practice. Also, these could be lawyers with published work and lectures in the country and abroad, whose determination and courage are notable in supporting the rule of law, and who are characterized by tolerance and willingness to dialogue.

From a procedural point of view, it should be provided that, after the competition, along with the proposal of the competent board or commission, a reasoned opinion about the candidate must be obtained. We believe that a procedure in which confirmed (or denied) statements from the candidate's application by institutions and organizations where the candidate works or previously worked would be visible, along with a possible opinion of other judicial institutions valued by the profession, would raise the quality of the selection of future members of the HJC as prominent lawyers. On the other hand, in our opinion, the candidate's conditioning by the legal career (for example, an active or retired public prosecutor, member of the bar association, full professor of law at the university, etc.) should not be accepted, given that it must be based on the valid amended provision of the Constitution on the composition of the HJC, which does not provide for any structure or profession as a criterion for proposing and selecting from among prominent lawyers. The proposal to include in the Law a provision that the prominent lawyer cannot be the one who has reached or will reach, during the term of office, the retirement age or that the candidate was not a member of a political party or held positions in executive authorities for at least three years prior to the candidacy discriminates against the entire group of potential candidates for the prominent lawyer. These are all those who are over 60 years of age at the time of the competition, who have reached full professional maturity and experience and could dedicate themselves to this position. We believe that the same rules should apply to them as to the election of the deputies who select them to that position. The provision of the Code of Ethics of the members of the HJC (Article 7, para 2) that a member of the HJC may not perform other tasks that, due to their nature, could call into question his/her independence or impartiality, which in the current practice of the HJC is not applied by individual non-judicial members, should be reviewed, as well as the compliance of the Code with other norms, and after that the provision should potentially be included in the Law.

e. Manner of working and decision-making

In the first text of the Draft Act on Constitutional Amendments, and during the discussion and campaign before the referendum on the ratification of the Act on Constitutional Amendments, there was a proposal to stipulate in the Constitution that the HJC always decides by a majority of eight votes. In the end, the proposal of the HJC was accepted to regulate the issue of decision-making in the HJC by the Law. Such a manner of decision-making could refute and block the work of the HJC and render meaningless the international and domestic standards of the judicial majority and judicial self-governance in the HJC and enable political influence on the work of the HJC if prominent lawyers, as well as individual judges, were selected by *a connected group of like-minded people under the influence of the ruling majority.* Therefore, we advocate that decisions are made, as before, by a majority of the total number of votes of all members and that voting is always public.

f. Publicity and transparency of work

The principle of publicity and a high degree of transparency, along with the obligation to respect the adopted standards, criteria and prescribed procedures, are of key importance for the realization of the constitutional role and competence of the HJC. In addition, the widest possible degree of publicity of the work of the HJC reduces the possibility of politicization and abuses and contributes to strengthening the legitimacy of the HJC's decisions, which in the past practice, in some cases, have been called into question. In this sense, we believe that, in addition to retaining and redefining the existing norms, additional guarantees of that principle should be provided, such as audio-recording of all sessions and timely publication of the minutes and decisions, with highlights from the discussions, but also norming of new situations based on analysis of the previous HJC work. In this regard, it is necessary to insist on respecting the procedures and responsibilities in the work of the HJC and its bodies and members, including the obligation to submit and review work reports, timely announce calls for the election of new officials, so as not to repeat the fundamentally bad practice of acting appointments. It is necessary to provide normative conditions for audio-video recording of the sessions and mandatory content of the minutes. It should be regulated as obligatory to publish on the HJC website, in a timely manner, not only all the minutes, but also the materials for the sessions. Data related to the decision-making must be available to the public, except in cases where the public is excluded for legally justified reasons. All interested persons and representatives of the media should be allowed to attend the sessions of the HJC

and its organs and bodies. The HJC should have a quality and effective communication strategy and a spokesperson.

g. Mandatory explanation of decisions, communication and information

Public trust in the work of the HJC has become particularly significant after the adoption of the Act on Constitutional Amendments, which gave the HJC new competencies. So far, the legitimate question was why the work of the HJC was not more transparent and available to observers. Some authors even describe it as the work in the media darkness and institutional shadow of the executive and legislative powers.[21] Decisions on the selection of candidates for judicial positions were not explained as to be concluded why a certain candidate was given priority. Of particular concern is the fact that unelected candidates do not have an effective legal remedy to challenge the HJC's decision. The possibility of providing the right to object or appeal the decisions of the HJC should be considered in those cases, without the HJC acting as a second-instance body. The Council should be completely open to all professional bodies and projects that monitor its work. In addition, it should enable authorized persons to join the work of the Council and its bodies and have insight into the complete documentation of the Council, including lists, data and decisions on the evaluation of the work of judges and other documentation available to the working bodies and members of the HJC, which has not been done so far.

h. Reactions of the High Judicial Council to undue pressure on the court and judges

We believe that, while maintaining the existing norms pertaining to the Rules of Procedure of HJC and the framework for extraordinary action in certain situations of political pressure on the court and judges, an effort should be made to improve that area. It would be good if the new Law on HJC provides a basis and more closely defines the right and obligation of the HJC to act in this regard and to give suggestions and propose certain activities and measures not only towards the judicial authorities but also towards the authorities of other branches of government. A normative solution should be found to enable the HJC to carry out an on-site investigation in certain cases not only pertaining to work of the

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21 Izveštaj o javnosti rada Visokog saveta sudstva i Državnog veća tužilaca april 2021 – februar 2022 [Report on the Publicity of the Work of the HJC and the SPC April 2021 - February 2022] (author Sofija Mandić, editor Miodrag Jovanović), CEPRIS, Beograd 2022, available at CEPRIS website.

Disciplinary Commission, the Commissioner for undue influence on the work of judges and the Ethics Committee, and not only through the authorization of individuals, but also through expert and team analysis, before the Council takes a position and makes a decision, especially in complex cases.

i. Professional Office and expert assistance

The name of the Administrative Office of the HJC must be adapted to its basic competence, the professional support to the Council. In this sense, we support the name Professional Office of the HJC, which would more adequately reflect the nature and tasks of that body. This can be regulated through a special by-law, through improved organization and systematization of all jobs[22], but also by undertaking other activities, such as hiring experts and providing adequate spatial and technical conditions for the work of HJC members and employees of the Office.[23] The Council for the Judiciary may request the expertise of other professionals on specific issues.[24] Full attention should be paid to the work of the Expert Working Group, which should prepare a new text of the Rules of Procedure of the HJC and other by-laws. In certain areas of the Council's work, those acts are equally important as legal provisions.

5. NEW LAW: STRENGTHENING DEMOCRACY TO PROTECT THE INDEPENDENCE OF THE JUDICIARY OR A NEW REASON FOR CONCERN OVER THE REFORM?

The separation of powers was established to make the government efficient and controlled. The judiciary was supposed to become a legal, political and historical construct, the centre of the rule of law and a point of the general culture of the community. According to professional standards, the judiciary should constitute itself, be accountable to itself and be immune to changes in the balance of power on the political scene. The guarantee of judicial power is the stability of

22 The number of vacant positions at the HJC stagnated from 2012 to 2016, and decreased in 2019 and 2020, amounting to 26% and 43%, respectively.

23 Analiza organizacije, funkcionisanja i potreba VSS i njegove Administrativne kancelarije – radni tekst [Analysis of the organization, functioning and needs of the HJC and its Administrative Office - draft text], GIZ, 2020.

24 CCJE Opinion No. 10(2007), paragraph 40

the office.[25] In a country where the realization of modern constitutional and democratic principles is in its beginnings, the judicial branch of government cannot be developed and protected without an independent, professional, responsible, transparent and efficient judicial council.

Significant support for the creation of such a body of the judicial branch of government would be a new, improved legal framework for the work of the HJC. The goal and intention of these activities must not be the formal implementation of the Act on Constitutional Amendments, but the strengthening of democracy and the protection of the independence of the judiciary and judges. That is why it is extremely important to preserve and improve all the results and qualities achieved so far, but also to accept new, more advanced solutions from the aspect of the rule of law and the division of powers.

We believe that the judiciary should unequivocally and actively advocate for the interpretation and implementation of the legal nature of the HJC in accordance with the constitutional principle of the separation of powers and the independence of the judicial branch of government, therefore, away from the principle of the unity of power and the traditional system of state administration, although these issues have not been sufficiently advanced in the recent amendments to the Constitution. Along these lines is the recommendation that "the competences of the HJC are regulated in such a way that the legislator can expand them both in terms of the type and number of responsibilities/ authorizations, as allowed by the current Constitution and regulated by the Law on High Judicial Council".[26]

Due to the importance and scope of the work and the short deadlines for adopting the new Law on High Judicial Council, it is important that, from the perspective of the judicial profession and the legal profession, that work is as transparent and inclusive as possible. All judges and court staff should be given the opportunity to be informed and express their opinions in a timely manner in all phases of work on new legal projects. Also, it is important that the working versions and drafts of the new court laws are thoroughly reviewed by the profession before they are sent to the Venice Commission for opinion. In the judiciary, as well as in society, there is a lack of a positive democratic atmosphere for essential understanding and implementation of new laws.

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25 Tatjana R. Kandić, *Sudska vlast u Republici Srbiji*, Institut za uporedno pravo i Dosije, Beograd 2015, 13 and 52.

26 HJC on amendments to the Constitution in the field of justice after the Opinion of the Venice Commission, in: "Svedočanstvo pripreme za promenu Ustava od 2006. godine i struka", Društvo sudija Srbije, 2018, 488.

SUMMARY OF RECOMMENDATIONS

OBSERVED PROBLEMS	**PROPOSED SOLUTIONS**
Apart from the right to the first election of judges and court presidents, the status and competences of the High Judicial Council (HJC) have not been sufficiently improved by the constitutional amendments.	Improve the status and work of the HJC by new laws on the judiciary, more precisely determine the legal competences and improve the work organization of that body.
The issue of the HJC competences is unresolved in the Constitution. Lack of regulation of competences pertaining to the court budget and the budget of the HJC.	Keep all existing competences under Article 13 of the Law and introduce new ones. Introduce the competence to propose and allocate financial resources for the HJC and the courts.
The Budget Committee and the Ethics Committee were not defined as permanent bodies of the HJC.	The Budget Committee and the Ethics Committee are legally envisaged as permanent working bodies of the HJC.
Competences of the HJC related to a mandatory opinion on laws on courts and judges are legally imprecisely regulated.	Along with the competence to issue a mandatory opinion on laws on courts and judges, provide the possibility for the HJC to propose the laws.
The HJC "shares" about 80 competences with the Ministry of Justice and other bodies, for example, the budget and human resources of the courts, so due to this dualism, the organization of works in the HJC, the Ministry and the courts is complicated.	Adoption of the Court Rules of Procedure and the decision-making on status issues of court staff should be a competence of the HJC, while the competences on court administration and IT should be reviewed.
Inadequate definition of the term prominent lawyer and the procedure for proposing and selecting these four members of the HJC in the National Assembly by a two-thirds majority.	Define the concept of prominent lawyer more closely, determine the procedure for selecting these members more precisely, and additionally prescribe the conditions for the selection of prominent lawyers. For example, the criterion that s/he is recognized by the professional public as an individual of high professional integrity, whose expertise has been confirmed in practical work.
Irrational restrictions proposed in setting criteria for the selection of prominent lawyers.	Remove the requirement that a prominent lawyer cannot be retired or must be a university professor, etc.

Restrictive provisions regarding the candidacy of judges and the judges' right to vote in judicial elections for members of the HJC.	Prescribe that any judge can be a voter and a candidate, to achieve the goal of proportional representation of all types and instances of courts, in accordance with international standards that regulate the position of the judicial council as a body responsible for the protection of judicial independence.
Deficient regulation of electorates for selecting judges to HJC.	Consider all options and consult with judges before legislating the issue. Consider the organization of electorates on different principles (for example, one electorate where all judges vote for all candidates regardless of the rank of the court they belong to).
Insufficiently regulated manner of working and decision-making in the HJC. Prediction of the qualified majority when voting in the Council.	Keep decision-making by a simple majority vote of all members. Other solutions (such as a qualified majority or raising the number for a quorum) inherently contain the danger of depersonalizing the judicial majority in the HJC and the possibility of blocking the work of that body, when, for example, a decision cannot be made if prominent lawyers do not want to vote.
Insufficient publicity and transparency of the work of the HJC.	Improve the publicity and transparency of the HJC work, with possible recording and live streaming the sessions or broadcasting; detailed management and up-to-date publication of the HJC minutes on the website and regular public information in accordance with the Communication Strategy, which includes a spokesperson, media conferences and other instruments.