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# Judicial Self-governance and Judicial Culture in Serbia

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# JUDICIAL SELF-GOVERNANCE AND JUDICIAL CULTURE IN SERBIA*

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# 1. INTRODUCTION

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The 2021 – 2022 Constitutional Reform in Serbia was publicly advocated and justified with the argument of protecting the Serbian judiciary and Prosecutor's Office from excessive influence of the political branches of government. The primary focus was on the status and powers of the High Council of Judiciary and of its prosecutorial pendent, as well as the composition and functioning of the bodies of the magistrates' self-governance and the methods of their members' appointment. That public debate confirms the importance of these bodies and at the same time shows that the Serbian epistemic community has the correct perception of them as being quintessential for the establishment and preservation of judges' independence and prosecutors' autonomy.

In this paper, I examine the extent to which the High Council of Judiciary, part of the Serbian legal and political system since 2001, has profiled itself as a protector of judicial independence and professionalism, and what are the challenges to it. The paper is divided into following sections: Brief History of Judicial Self-Governance in Serbia (2); Legal and Political Nature of the High Judicial Council – the Barrier and the Bridge of the Judiciary to the other Branches of Government (3); Organization of the High Council of Judiciary (4); Powers of the High Council of Judiciary (5); Concluding Remarks (6); Policy Recommendations (7).

# 2. BRIEF HISTORY OF JUDICIAL SELF-GOVERNANCE IN SERBIA

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The antecedents of judicial self-governance in Serbia can be traced back to its 1888 Radical-Progressive Constitution. Judicial self-governance appeared in that Constitution in a form that was not common even in countries that had a more developed legal and political culture at the time. More specifically, the methods of judicial cooptation and monarchical appointment were combined in the selection of the second and third-instance judges.

The Progressive and indeed advanced character of the 1888 Constitution manifested not only in guaranteeing personal independence of judges – permanent tenure and immovability – but also in reducing the monarch to an almost symbolic figure in the process of appointing second and third-instance judges. Therefore, even though all judges were appointed by the King, the presidents and the members of the Court of Cassation and of Appeal were appointed on the basis of two lists: one proposed by the State Council (an institution based on the French public law tradition), and the other by the Court of Cassation (Article 155(1) and (3)). Thus, judges were protected from the moment of accession to their function in order to

perform it with as much impartiality as possible towards those who formally appointed them. These provisions would be repeated, *mutatis mutandis*, in the 1903 Constitution.[1]

The creation of Yugoslavia in 1918, first monarchical and then after 1945 republican-communist, put an end to experiments with judicial self-governance. The idea would only reappear in academic texts after the first democratic transition in the last decade of the twentieth century. At the forefront of those initiatives was one of the most renowned Serbian constitutionalists and comparatists – Miodrag Jovičić. In his article, "Principle of Separation of Powers and Judiciary," Jovičić pleaded for the introduction of the High Council of Magistrates of the type in the French Fifth Republic.[2] Jovičić's idea of a judico-political body that would be a guarantor of judicial independence received broad recognition, both from both from academics and law-makers.

Not too long after the idea was revived in academic circles, the High Council of Magistrature was introduced into the Serbian legal system on a legislative level in 2001, at the beginning of the second democratic transition. The High Council of Magistrature was a common body, serving as a guarantor of independence to both judges and prosecutors. More academic writing accompanied these legislative achievements.[3]

In 2006, the High Council of Magistrature was split into two bodies – High Council of Judiciary and High Council of Prosecutors – and both were constitutionalized. However, that was not the only reform related to the magistrates. In Serbia, the resetting of institutions while in the process of democratic transition and consolidation took the form of 'magistrature reform'. Advocated by the political branches of government, it consisted mainly of the general reappointment of the judges and prosecutors. The demise of the judiciary was achieved by the legislative termination of all judicial offices, in the aftermath of the adoption of the 2006 Constitution. More precisely, the reform was announced in the Constitutional Act on the Implementation of the Constitution, endorsed by the National Assembly in November 2006 (a few days after the popular ratification of the Constitution), and was put in place by the Law on Judges in December 2008.

The High Council of Judiciary, in its first composition, did not play a noble role in this process. It readily accepted the role of executor assigned to it by the political branches of government. In a single unreasoned decision, it appointed 1,531 judges to permanent tenure of judicial office in the courts of general and specialized jurisdiction. And in another single unreasoned decision, it terminated the office of those 837 judges not appointed in accordance

1 For more information on the 1888 and 1903 constitutions, see: Tanasije Marinković, Serbia (International Encyclopaedia of Constitutional Law), Wolters Kluwer, 2019, 31-39 and 42-44.

2 Miodrag Jovičić, *Kuda ideš Srbijo – Hronika srpsko-jugoslovenske ustavnosti (1990-1994) <Quo Vadis Serbia – Chronicles of Serbo-Yugoslave Constitutionality (1990-1994)>*, Draganić, Beograd 1995, 71-77.

3 Vesna Rakić Vodinelić et ali, *Pravosudni saveti <Councils of Magistarture>*, Institut za uporedno pravo, Beograd 2003.

with the Law on Judges. In a series of rulings, the Constitutional Court partially remedied the devastating effects of the High Council of Judiciary decisions, and gradually almost all of the non-appointed judges were reinstated.[4] Nevertheless, the High Council of Judiciary's unreasoned and therefore arbitrary decisions irreparably discredited this institution of judicial self-governance in the eyes of many judges.[5]

The discontent with the constitutional provisions on the judiciary, and in particular with the composition and powers of the High Council of Judiciary (specifically, the concern that they do not insulate judiciary sufficiently from the political pressures), have led to a number of attempts to amend the Constitution. The principal advocates of the Constitution amendments were judges, scholars and NGOs, as well as the European Union Commission.[6] The first series of attempts in 2017-2018 was abortive. The second series in 2021-2022 was successful, and its results with respect to the organization and powers of the High Council of Judiciary are presented in sections 4 and 5 of this paper. Before that, however, the legal and political nature of the High Council of Judiciary will be briefly discussed.

# 3. THE LEGAL AND POLITICAL NATURE OF THE HIGH COUNCIL OF JUDICIARY – BARRIER AND THE BRIDGE OF THE JUDICIARY TO OTHER BRANCHES OF GOVERNMENT

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The 2022 Amendments to the Constitution of Serbia define the High Council of Judiciary as "an independent state body, which shall provide and guarantee independence of courts and judges, presidents of courts and lay judges." A closer look at its functions, scattered in various other constitutional provisions, points to its mission going beyond the guarantee of judicial independence. It also secures judicial independence by having the power to decide on the appointment of judges and cessation of their tenure in case of serious disciplinary offence, as well as decide on other decisions related to the status of judges. In addition to securing personal independence, it also secures judges' substantive independence – it protects judges from the improper influences, in particular

4 For more information on the "magistrature reform," see: Tanasije Marinković, Serbia (International Encyclopaedia of Constitutional Law), Wolters Kluwer, 2019, 141-143.

5 Interviews with the Supreme Court judges and with the Basic Court judge.

6 On the European Union Commission's role in reforming the Serbian judiciary, see: Tanasije Marinković, "Judicial Culture and Role of Judges in Developing the Law in Serbia", *IDSCS Research Chapter No.22/2021 - September 2021*, 12-13.

political. Yet, this also means that the High Council of Judiciary protects more generally the courts and the fair and efficient delivery of justice. And for that purpose too, it appoints the president of the Supreme Court and presidents of other courts and determines the necessary number of judges and lay judges. So, the High Council of Judiciary is also the guarantor of internal independence and ideally of the financial independence of judges and judiciary as a whole.

From the perspective of different theories state functions, the role of the High Council of Judiciary is extremely versatile. The Council is an administrative organ when it decides on the appointment, promotion and transfer of judges; it is judicial when it establishes the disciplinary responsibility of judges and imposes sanctions on them; and it is political when it protects judges in a strictly political arena from improper influences, as well as when it determines the necessary number of judges and lay judges; it is even more political in systems in which it is entitled to propose the budget items amounts, as well as other legislation related to the judiciary.

It follows that the role of the High Council of Judiciary, besides being the protector of judicial independence, is also to secure the good functioning of the judiciary, as well as protect citizens against errors and abuses of the judiciary.[7] In other words, it contributes to a better achievement of the principle of the separation of powers. The High Council of Judiciary protects the independence of the judiciary with respect to both executive and legislative powers.[8] At the same time, it is the bridge between the judiciary and the other two branches of government, which points more to the balance, rather than separation of powers.[9]

These two images of the Hugh Judicial Council – the barrier against other branches of government and at the same time the bridge towards them – are reflected in the organization and powers of the Council.

7 Cf. E. Bruti Liberati, "La nature des conseils supérieurs de la magistrature en Europe" in *Les Conseils supérieurs de la magistrature en Europe* (dir. Thierry S. Renoux), La documentation Française, Paris 1999, 65 ; L. Philip, "La nature des conseils supérieurs de la magistrature en Europe" in *Les Conseils supérieurs de la magistrature en Europe* (dir. Thierry S. Renoux), La documentation Française, Paris 1999, 61.

8 L. Philip, "La nature des conseils supérieurs de la magistrature en Europe" in *Les Conseils supérieurs de la magistrature en Europe* (dir. Thierry S. Renoux), La documentation Française, Paris 1999, 61.

9 Cf. L. Nunes de Almeida, "La nature des conseils supérieurs de la magistrature en Europe" in *Les Conseils supérieurs de la magistrature en Europe* (dir. Thierry S. Renoux), La documentation Française, Paris 1999, 62.

# 4. ORGANIZATION OF THE HIGH COUNCIL OF JUDICIARY

## 4.1 Composition of the High Council of Judiciary and the Method of Selection of its Members

The High Council of Judiciary consists of 11 members: six judges elected by the judges, four prominent lawyers appointed by the National Assembly, and the President of the Supreme Court (Constitution, Article 151 (1), Amendment XIII). This composition of the High Council of Judiciary that was introduced in the 2022 Amendments does not depart significantly from to the original provisions of the 2006 Constitution, either in terms of structure or method of selection of Council members. More specifically, the 2006 Constitution also provided for 11 members of the High Council of Judiciary, but included the Minister of Justice and the chairman of the National Assembly's committee on the magistrates, in addition to two prominent lawyers (an attorney at law and professor of law), six judges and the President of the Supreme Court of Cassation (Constitution, Article 153 (2), (3) and (4)). The elimination of the Minister of Justice and chairman of the National Assembly's Committee on the Magistrates, seen as factors of the politicization of the High Council of Judiciary's work, was one of the reasons for the reform. The method of selection of Council judicial members was also amended, in that they are no longer appointed by the National Assembly, but elected by the judges themselves. Although this is an important aspect of the representation of judges, the practice was already in place, under the 2006 Constitution, in particular the Law on the High Council of Judiciary. More specifically, only the judges nominated in the electoral process, by the judges themselves, would be appointed by the National Assembly as judicial members of the Council.

The Constitution stipulates that the election of the members of the High Council of Judiciary from among the judges shall be stipulated by the law, further saying that "the principle of broadest representation of judges shall be taken into account in the process of election of judges as members of the High Council of Judiciary" and that "presidents of courts shall not be elected for members of the High Council of Judiciary" (Article 151 (1), (2) and (6), Amendment XIII). Constitutional Law on the Implementation of the Constitution imposes a time limit of one year for the adoption of the necessary legislation (article 1).

That legislation should address some of the problems of the electoral process identified so far. More specifically, judges-candidates for membership on the Council have no obligation to have a program and present it in the electoral campaign. Further, some of the ballot places are so

small that it violates the principle of secrecy of vote and consequently that of freedom of suffrage.[10] The same problems, *mutatis mutandis*, have been identified with respect to the State Council of Prosecutors.[11] Some judges and prosecutors have criticized the curial type of vote (judges vote only for the candidates coming from their ranks or types of the courts).[12] An additional problem, more difficult to regulate by law, is the pressure coming from presidents of courts in the electoral process.[13] However, it appears that so far there has been no pressure from the Ministry of Justice in the electoral process for members of the High Council of Judiciary. The same cannot be said for the corresponding process of selection of candidates for the State Council of Prosecutors.[14]

When it comes to the category of prominent lawyers as members of the High Council of Judiciary, the Constitution establishes that "the National Assembly shall elect members of the High Council of Judiciary among prominent lawyers with at least 10 years of experience in the legal practice, among 8 candidates proposed by the competent committee of the National Assembly, after having conducted a public competition, by a two-thirds majority vote of all deputies, pursuant to the law" (Article 151 (4), Amendment XIII). The two-thirds majority vote was clearly introduced under the influence of the Venice Commission standards and possibly also under the direct influence of the rapporteurs of the Venice Commission who held talks with the members of the National Assembly's Constitutional Amendments Drafting Committee.[15] The idea behind it being that the decision on the prominent lawyers should be based on the respect of political pluralism.[16] However, since that majority is not always easy to achieve in a society as divided as Serbia, the anti-deadlock mechanism was also envisaged: "If the National Assembly has not elected all the four members within deadline stipulated by the law, the remaining members upon the expiry of the deadline stipulated by the law shall be elected from among the candidates who meet the criteria for election, by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Protector of Citizens, by majority vote" (Constitution, Article 151 (5), Amendment XIII).

The composition of this commission has also raised serious concerns, even among the members of the Constitutional Amendments Drafting Committee, who openly expressed them in the

10 Interviews with the Appellate Court judge and with the Higher Court judge.

11 Interview with a deputy public prosecutor of the Appellate Prosecutor's Office.

12 Interview with a deputy public prosecutor of the Appellate Prosecutor's Office; interviews with the Supreme Court judge and with the Basic Court judge.

13 Interviews with the Supreme Court judge, Appellate Court judge, Higher Court judge and Basic Court judge.

14 Interviews with a deputy public prosecutor of the Appellate and Basic Prosecutor's Office.

15 Cf. *Serbia - Opinion on the Draft Constitutional Amendments on the Judiciary*, European Commission for Democracy through Law, Venice and online, 15-16 October 2021, para. 4.

16 *Ibid*., para 68.

public hearings. The principal argument being that the composition of the anti-deadlock mechanism does not have a dissuasive effect and poses a risk of turning into the rule rather than exception. In other words, the anti-deadlock mechanism does not stimulate the parliamentary majority to pursue a compromise with the parliamentary minority, as there is obviously distrust in the integrity of the persons who would comprise that commission.[17] In addition to this argument, there is also a consideration that the composition of that commission is corruptive in itself.[18]

A possible response to these concerns is to stipulate in the Law on the High Council of Judiciary more stringent preconditions that candidates for lay-members of the High Council of Judiciary must satisfy in order to be eligible.[19] The Venice Commission has also suggested that these should be specified in the law.[20] The Constitution stipulates only that "a member of the High Council of Judiciary elected by the National Assembly shall be worthy of the function" and that a "member of the High Council of Judiciary elected by the National Assembly may not be a member of political party," as well as that "other conditions for election and incompatibility with the function of the member of the High Council of Judiciary elected by the National Assembly shall be defined by the law" (Article 151 (7), (8) and (9), Amendment XIII).

## 4.2 Status of the Members of the High Council of Judiciary

For the High Council of Judiciary to perform its functions in an independent manner, its members need to enjoy the necessary guarantees of independence. These guarantees serve the purpose of protecting them from undue influence of both political branches of government and the judiciary itself.

In the first place, these guarantees concern the length of mandate and prohibition of reelection. Members of the High Council of Judiciary are elected to a five-year term of office and the same person may not be reelected to the High Council of Judiciary (Article 152 (1) and (2), Amendment XIV). A term of office longer than that of the National Assembly (four years) or the Government is intended to secure the independence of the members of the High Council of Judiciary, in particular its lay members (appointed by the National Assembly). The rule of non-reelection stimulates the members of the High Council of Judiciary to profit fully from their mandate to further the independence and professionalism of the judiciary, without regard to a second mandate.

17 Dragana Boljević, Supreme Court judge, and Goran Ilić, deputy public prosecutor of the Republic Prosecutor's Office, both members of the National Assembly's Constitutional Amendments Drafting Committee.

18 T. Marinkovic, "Ustavni amandmani udaljavaju Srbiju od EU" <Constitutional Amendments Distance Serbia from the EU>, *Danas*, 29.12.2021.

19 Interview with the with the Higher Court judge.

20 *Serbia - Opinion on the Draft Constitutional Amendments on the Judiciary*, European Commission for Democracy through Law, Venice and online, 15-16 October 2021, para. 69.

The possibility of a reappointment for the justices of the Constitutional Court served as a bad example in that sense. The legal scholars have denounced that constitutional provision as potentially corruptive, since it can be expected that individual justices will have the reappointment in mind, showing leniency towards powers that decide on the composition of the Constitutional Court.[21]

The other guarantees of independence of the members of the High Council of Judiciary concern the conditions under which the early termination of their mandate is possible. These conditions are stipulated in the Constitution and are objective in their nature: "Before the expiry of the period to which he or she is elected, the term of office of a member of the High Council of Judiciary shall cease upon personal request, or if he or she is convicted of a criminal offense carrying a penalty of 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 their judicial function 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 High Council of Judiciary" (Article 152 (4), Amendment XIV).

Not only does the Constitution stipulate grounds for the early termination of office of the members of the High Council of Judiciary, but it also provides for the procedural mechanism of their protection in that respect: "The decision on the termination of the term of office of a member of the High Council of Judiciary shall be made by the High Council of Judiciary. An appeal against the decision shall be allowed to the Constitutional Court, which excludes the right to a constitutional complaint" (Article 152 (5), Amendment XIV).

In addition to the personal guaranties of independence of the members of the High Council of Judiciary, the Constitution provides substantive guaranties by granting them the immunity for the opinion and vote expressed in the performance of their function: "Members of the High Council of Judiciary cannot be held accountable for an opinion expressed in regard to performing the duties of a member of the High Council of Judiciary and for voting during decision-making within the High Council of Judiciary" (Article 154 (1), Amendment XVI).

Finally, the Constitution provides for the procedural safeguards of the personal freedom of the members of the High Council of Judiciary, when it can be restricted in relation to the performance of their public function. More specifically, "members of the High Council of Judiciary shall not be deprived of liberty in the proceedings initiated against them for a criminal offense they have committed as members of the High Council of Judiciary without the approval of the High Council of Judiciary" (Article 154 (2), Amendment XVI).

21 Momčilo Grubač, *Constitutional Judiciary in Serbia*, in *Public Law in Serbia: Twenty Years After* 77 (Violeta Beširević ed., Esperia Publications Ltd. 2012), 94.

## 4.3 President and Vice-President of the Council

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One of the most important changes in the organization of the High Council of Judiciary, accomplished in the 2022 reform of the Constitution, was the removal of the president of the Supreme Court from the position of the head of the High Council of Judiciary. The accumulation of these two functions was not provided for in the 2006 Constitution but in the Law on the High Council of Judiciary. Consequently, the amended Constitution expressly states their incompatibility: "The President of the Supreme Court shall not be elected for the President of the High Council of Judiciary" (Article 152 (3), *in fine*, Amendment XIV).

Another important change of the 2022 constitutional reform was the introduction of the institution of vice president of the High Council of Judiciary. The presidency of the Council is conferred to a judge-member, while the vice-presidency is conferred to the lay-member: "The High Council of Judiciary shall have a president and a vice president. The president of the High Council of Judiciary shall be elected from among members of the High Council of Judiciary who are judges and the vice president from among members who are elected by the National Assembly for the period of five years" (Article 152 (3), Amendment XIV).

The separation of offices of the presidencies of the Supreme Court and of the High Council of Judiciary has been generally welcomed by judges. They consider it a step forward for a more efficient High Council of Judiciary, since the president of the High Council of Judiciary has been so far overwhelmed by their work as the head of the Supreme Court and had little time to spare for heading the High Council of Judiciary. This has had the detrimental effect on the work of the High Council of Judiciary, as the post requires a full-time commitment, leading to many of its functions being neglected.[22] Also, there were instances when the president refused to convene the High Council of Judiciary (Council's third term, 2016-2021), which will be less likely once the presidencies of the Supreme Court and of the High Council of Judiciary are separated.[23] The separation of the two presidencies has also been supported by the deputy public prosecutors, former members of State Council of Prosecutors, on the basis of their experience regarding the workings of that body.[24] However, there are also considerations that the separation of the two presidencies may lead to the internal strife between the two presidents and competition for the position of the "first person" in the judiciary. This would, naturally, weaken the position of the judiciary regarding the other two branches of government.[25]

22 Interview with the Basic Court judge.
23 Interview with the Higher Court judge.
24 Interview with a deputy public prosecutor of the Appellate and Basic Prosecutor's Office.
25 Interview with the Supreme Court judge.

## 4.4 Work of the High Council of Judiciary

The High Council of Judiciary works in the plenary sessions and in committees, and takes decisions at the plenary sittings (Article 10(1), Standing Orders of the High Council of Judiciary). The sittings of the High Council of Judiciary are held publicly, but the press and public may be excluded in total or in part, if in the interest of public order or prevention of disclosure of confidential information, or the protection of privacy of a judge or another person whose status, rights and obligations are being determined (Article 10(2) and Article 11(1) and (2), Standing Orders of the High Council of Judiciary). In addition to these provisions, a whole section of the Standing Orders of the High Council of Judiciary deals with the publicity of its work: press conferences, internet presentation, publication of the minutes of the Council's meetings, etc. (Article 38). Despite the relatively solid legal framework, the public nature and transparency of the work of the High Council of Judiciary in practice is not fully satisfying. The internet-site of the High Council of Judiciary is very resourceful, but not always user-friendly or easy to research. Also, the High Council of Judiciary and its members are not sufficiently visible in the media, which could be overcome either by engaging a spokesperson of the Council[26] or designating one of the members of the Council as a spokesperson.[27] Particularly worrying is the fact that on 21 October 2021, the High Council of Judiciary declined, under pretext of Covid-19 measures, a request of the Center for Judicial Research (*CEPRIS*) to monitor its work by assisting sessions open to the public.

The committees of the High Council of Judiciary are: Committee on the Evaluation of the Work of Judges and Presidents of the Courts, Electoral Committee, Disciplinary Committee, the Judicial Assistants Complaints Committee and Ethical Committee (Article 16(1) and Article 17a, Standing Orders of the High Council of Judiciary).

The President of the High Council of Judiciary represents the High Council of Judiciary, convokes its sittings, presides over them and performs other activities stipulated by the law and Standing orders of the High Council of Judiciary (Article 7, Standing Orders of the High Council of Judiciary). The High Council of Judiciary sits at the session at which at least six members of the Council are present and takes decisions by a majority vote of the total number of members of the Council (Article 21(1) and Article 26(7), Standing Orders of the High Council of Judiciary).

26 Interviews with the Appellate Court judge and the Basic Court judge.
27 Interview with the Higher Court judge.

The High Council of Judiciary is assisted by an Administrative Office that provides technical and professional help. The Office is headed by the secretary of the Council who is responsible to the Council (Article 15(1) and (2) and Article 18(1), Standing Orders of the High Council of Judiciary). The Council has 42 employees (as of 31 December 2019), but is still severely understaffed taking into account the total envisioned number of employees is 60.[28] It appears that the Council particularly lacks staff qualified for analytical research.[29]

# 5. POWERS OF THE HIGH JUDICIAL COUNCIL

## 5.1 Overview of the High Council of Judiciary's Powers

The Constitution defines the High Council of Judiciary as "an independent state body which shall provide and guarantee independence of courts and judges, presidents of courts and lay judges" (Article 150(1), Amendment XII). In line with this definition, the Constitution enumerates also the powers of the High Council of Judiciary: to appoint judges and lay judges and decide on the cessation of their tenure; to appoint the president of the Supreme Court and presidents of other courts and decide on the cessation of their tenure; to decide on the transfer and temporary relocation of judges; to determine the necessary number of judges and lay judges; to 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 (Article 150(2), Amendment XII).

28 High Council of Judiciary Information booklet, p. 11. Available at: https://vss.sud.rs/sites/default/files/attachments/Informator%20o%20radu%2028.%20%20april%202021%20za%20sajt.pdf

29 Interviews with the Appellate Court judge, the Higher Court judge and the Basic Court judge.

In addition to these powers, the Constitution stipulates that "a judge shall not be deprived of liberty in the legal proceedings initiated against him/her for a criminal offense committed while performing judicial function without the approval of the High Council of Judiciary" (Article 148(2), Amendment X).

## 5.2 High Judicial Council's Role in Securing Substantive Independence of Judges – Protecting Judges' from the Improper Influence

The Constitution enshrines that "any improper influence on a judge in the performance of their judicial function shall be prohibited" (Article 144(2), Amendment VI). This provision of the Constitution is within the Article entitled "Independence of Judges" and comes right after the provision that stipulates the system of sources of law on the basis of which the judges adjudicate: "A judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws, generally accepted principles of international law and bylaws, adopted in line with law" (Article 144(1), Amendment VI). It follows that the prohibition of any improper influence on a judge in the performance of their judicial function secures the substantive independence of judges.[30]

A study of public statements and comments of the President of the Republic, Aleksandar Vučić shows that he violated this prohibition no less than 25 times in a period of three and half years, from when he took office as the President of the Republic in 2017 to mid-2020. He directly infringed upon the authority and impartiality of the judiciary by attacking a specific named judge, specific unnamed judges and the entire judiciary or the prosecutor's office. The President of the Republic also indirectly infringed upon the authority and impartiality of the judiciary by expressing expectations regarding the outcome of court proceedings, investigations and preliminary investigations and/or expressing views on essential elements of these proceedings, as well as inculpating or exculpating persons against whom no proceedings were conducted.[31] In these trials by media and media trials against judges, the President of the Republic has had a leading role, which was then followed by prominent ministers and national deputies of the ruling Serbian Progressive Party (*SNS*) and its coalition partners.

Taking into account this political atmosphere in

30 On the substantive independence of judges, see: Tanasije Marinković, *Contemporary Challenges of Judicial Independence in Serbia*, in *Public Law in Serbia: Twenty Years After* 77 (Violeta Beširević ed., Esperia Publications Ltd. 2012), 126-127.

31 Tanasije Marinković, *Responsibility of the President of the Republic for the Violation of the Constitution – Prohibition of Influence on the Exercise of the Judicial Function*, Cepris, Beograd, 2022 (forthcoming).

which the judicial function is publicly humiliated and annihilated, it is difficult to understand how it was possible that the Venice Commission advised that an unconditional prohibition in the 2006 Constitution ("any influence on a judge in the performance of their judicial function shall be prohibited" (Article 149(2)) be replaced by a conditional one – "any improper influence […] shall be prohibited" – as if there was anything proper in the aforementioned statements. This advice was readily taken up by the National Assembly's Committee on Constitutional and Legislative Matters in the 2022 amendment drafting process and, as a result, the Constitution now stipulates that "any improper influence on a judge in the performance of their judicial function shall be prohibited" (Article 144(2), Amendment VI). The concern of the Venice Commission that without this tempering "it might be wrongly argued that, for instance, news coverages during a trial potentially influence a judge," and that "adding the word 'improper' or 'undue' before the word 'influence' would clarify that the material scope of the provision does not extend to such situations" is completely misplaced since the concerns, addressed by the Venice Commission, have never been an issue in Serbia.

Neither the Constitution nor any piece of legislation stipulate how the improper influence on a judge in the performance of their judicial function is established; nor do they stipulate how this general prohibition, addressed to everyone, is supposed to be sanctioned. This legal lacuna was filled by the High Council of Judiciary which introduced a procedure in its Standing Orders for establishing the improper influence on a judge in the performance of their judicial function and informing of public on it (Articles 27(a) – (f)). More recently, a member of the Council was designated as a rapporteur for this type of cases. Although these initiatives of the High Council of Judiciary should be welcomed, the practice of the Council in this field is not satisfying. The Council rarely reacts to public statements and comments of the representatives of the executive and legislative branches of government which directly or indirectly infringe the authority and impartiality of the judiciary.[32] The Council contents itself to reacting when the integrity of the Council or its members, especially of the president of the Council, are publicly questioned. Finally, the procedure for establishing the improper influence on a judge in the performance of their judicial function could also be improved by introducing the power of the Council to initiate a case on its own motion. Since judges feel intimidated to stand up against political branches of government, especially after the 2008-2012 reform of the judiciary, it is highly unlikely that they would themselves bring forward cases for political influence in the performance of their judicial function.

32 See the website of the Council, the statements section: https://vss.sud.rs/sr-lat/saop%C5%A1tenja

## 5.3 High Council of Judiciary's Role in Securing Financial Independence of Judges

Financial independence of judges is one of the most important guarantees of their impartial and professional work. Its relevance is recognized in the major European and international documents on judicial independence: Consultative Council of European Judges Magna Charta of Judges (Judicial Independence (3) and (4)), IAJ Universal Charter of the Judge (Article 13) and Montreal Declaration on the Independence of Justice (2.19). Guarantees of financial independence go beyond the question of the judge's right to sufficient remuneration to secure true economic independence and to retirement with an annuity or pension in accordance with their professional category (IAJ Universal Charter of the Judge, Article 13). It includes also the financing of the judiciary as a whole (Magna Charta of Judges (Judicial Independence (4)). "In that sense, Magna Charta of Judges favours the introduction of the Council for the Judiciary, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning […] the organization, the functioning and the image of judicial institutions" (Body in Charge of Guaranteeing Independence (13)).

For all these reasons, it is important that the High Council of Judiciary have budgetary autonomy, as noted in the 2021 Venice Commission's Opinion on Serbia.[33] However, this opinion of the Venice Commission was not endorsed by the Constitutional Amendments Drafting Committee. As a result, the Constitution stipulates the power of the High Council of Judiciary to determine the necessary number of judges and lay judges, which is very important for the proper functioning of the judiciary as a whole, but not the budgetary autonomy of the Council.

There were attempts to introduce budgetary autonomy of the High Council of Judiciary through the Law on the Organization of the Courts. The transitory provisions of this law provided, *inter alia*, that the powers to propose budget item amounts related to the judiciary and dispose of the funds should be transferred from the Ministry of Justice to the High Council of Judiciary. However, the periodical amendments to this piece of legislation systematically put off the deadline for the implementation of these provisions: in June 2016 to 1 January 2017, in December 2016 to 1 January 2018, and in December 2017 to 1 January 2019.[34] Finally, in 2018, the Constitutional Court struck down these provisions arguing that they are of such a nature that they could not be regulated by the transitory provisions on the transfer of powers from one state organ to another. In addition to this argument, the Court considered

33 *Serbia - Opinion on the Draft Constitutional Amendments on the Judiciary*, European Commission for Democracy through Law, Venice and online, 15-16 October 2021, para. 71.

34 Vida Petrović-Škero, *Visoki savet sudstva – Zaštitnik nezavisnosti sudova i sudija u Srbiji? <High Council of Judiciary – Protector of Independence of Courts and Judges in Serbia>*, available at: https://www.cepris.org/najnovije-vesti/visoki-savet-sudstva-zastitnik-nezavisnosti-sudova-i-sudija-u-srbiji/

that the aforementioned legislative reforms were not sufficiently clear and foreseeable, and that they were therefore contrary to the constitutional principle of rule of law and to the autonomous meaning of law as defined in the case law of the European Court of Human Rights.[35]

There is a pressing need for budgetary autonomy of the High Council of Judiciary since the powers to propose the budget item amounts related to the judiciary and to dispose of the funds is closely connected to the efficient functioning of the judiciary, above all for a proportionate distribution of the courts' workload.[36] Nevertheless, a transfer of these powers to the High Council of Judiciary should be accompanied by the further strengthening of the Council's Administrative Office, since the Council does not have the human resources to perform that function adequately.[37]

## 5.4 High Council of Judiciary's Role in Securing Internal Independence of Judges

Judicial independence presupposes that "judges individually shall be free [...] to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason" (Montreal Declaration on the Independence of Justice, 2.02). Judicial independence is essential to the separation of powers, but it would be wrong to assume that it manifests only with regards to the executive and legislative branches of government: it also has an internal dimension. As stipulated by the Montreal Declaration on the Independence of Justice, "in the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely" (2.03).

The presidents of the courts may pose a particular danger to internal independence of judges by

35 Ruling of the Constitutional Court, IUz-34/2016, 25 October 2018, s. IV.

36 Interviews with the Supreme Court judges and the Basic Court judge.

37 Interview with the Higher Court judge.

the very nature of their role in administering the courts. In addition to hierarchical pressure that they may exert on judges, when they are appointed by political branches of government, they may also become direct channels of the political pressure on them. This is why it was important that the 2022 constitutional reform in Serbia secured that the presidents of the courts, including the president of the Supreme Court, are no longer appointed by the National Assembly, but by the High Council of Judiciary (Constitution, Article 150(2), Amendment XII).

In addition to these constitutionally entrenched powers in the field of the internal independence of judges, the High Council of Judiciary performs also other functions in this field. The Law on the High Council of Judiciary stipulates that the Council adopts the Code of Ethics (Article 13). The Code, which the Council adopted in December 2010, stipulates, *inter alia*, the internal independence of judges vis-à-vis other judges and presidents of courts (Point 1(3) and 1.2). The violation of the Code may lead to disciplinary action against a judge (Code of Ethics, Point 7.3). The High Council of Judiciary established the Ethical Committee to oversee the following of the Code (Regulation on the Work of the Ethical Committee, Article 10). The Ethical Committee also appoints confidential councillor(s) (Regulation on the Work of the Ethical Committee, Article 10). The High Council of Judiciary also protects the internal independence of judges through the procedure for establishing what is improper influence on a judge in the performance of their judicial function and informing the public (Standing Orders, Articles 27(a) – (f)). So far, the Council has issued a couple of statements protecting the internal independence of judges.[38]

# 6. CONCLUDING REMARKS

The institutions of judicial self-governance were introduced in contemporary Serbia in the first decade of the twenty-first century. They were created at first on a legislative level in the form of the High Council of Magistrature (2001), which served as a guarantor of independence to both judges and prosecutors. In the next step, the Council was split into two bodies: High Council of Judiciary and High Council of Prosecutors, which were both constitutionalized (2006).

From the beginning hopes were high for the role of the High Council of Judiciary in promoting the values of judicial independence among judges and protecting them against political branches of government and undue societal pressures. However, the High Council of Judiciary, in its first

38 See the web-site of the Council, the statements section: https://vss.sud.rs/sr-lat/saop%C5%A1tenja

composition, was not up to its expectations. It readily accepted to serve the political branches of government in vetting of the judiciary (2008-2012), directly violating the constitutional guarantees of judicial independence, under pretext of Serbia's democratic transition and consolidation.

This episode shed light on the importance of the judicial culture, and more generally of the legal and political culture, in understanding how judges and other institutional actors think and behave when interpreting and applying the law. In particular, it showed that judges – members of the High Council – who were supposed to be the *crème de la crème* of the Serbian judiciary, did not perceive themselves and act as a governmental power in their own right.

The disillusionment with the first and subsequent compositions of the High Council of Judiciary created a movement within Serbia (among judges, scholars and NGOs) and outside of it (EU Commission), advocating amendments to the 2006 Constitution. The goal was to further insulate the judiciary from political pressure by making the High Council of Judiciary more autonomous from the executive and legislative branches of government, both in terms of its organisation and of its powers. After many abortive attempts, the Constitution was amended on 16 January 2022, with mixed results.

The composition of the High Council of Judiciary, introduced by the 2022 Amendments, does not depart significantly from to the original provisions of the 2006 Constitution either in terms of the structure, or member selection method. On a more positive note, the president of the Supreme Court was removed from the position of Head of the High Council of Judiciary, and the position will now be assigned to a judge-member elected by his/her peers, the other members of the High Council.

The shrinking of the functions of the president of the Supreme Court is an important institutional change since it has been observed, more generally, that the presidents of courts pose a particular danger to internal independence of judges by the very nature of their administering role in the courts. Furthermore, when they are appointed by political branches of government, they also become direct channels of political pressure. In that light, it is important that 2022 Constitutional reform in Serbia secured that the appointment of presidents of courts, including the Supreme Court, are no longer made by the National Assembly, but by the High Council of Judiciary.

On the other hand the 2022 constitutional amendment that stipulated that only "*improper* influence on a judge in the performance of their judicial function shall be prohibited" is quite dissatisfying given the Serbian political context, in which the judicial authority is regularly humiliated and annihilated by public statements and comments of the President of the Republic, ministers and MPs. The reason for concern comes from the fact that in the past the High Council of

Judiciary has rarely reacted to these attacks on the authority and impartiality of the judiciary, even though the 2006 Constitution unconditionally prohibited "*any* influence on a judge in the performance of their judicial function".
Also disappointing was the fact that 2022 constitutional reform did not address a pressing need for budgetary autonomy of the High Council of Judiciary, since such autonomy is closely connected to the efficient functioning of the judiciary, above all the proportionate distribution of the courts' workload.

Finally, despite the relatively solid legal framework, the publicity and transparency of the work of the High Council of Judiciary remains an on-going unresolved issue.

# 7. POLICY RECOMMENDATIONS

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- The Law on the High Council of Judiciary should be reformed so that the system of election of judicial members of the Council is improved. More specifically, the judges – candidates for the judicial members of the Council – should be obligated to have a program and present it during electoral campaigns. Also, there should be no small ballot places whose size might violate the principle of secret voting or freedom of suffrage. Finally, the curial type of vote for the judicial members of the Council should be reconsidered as it leads to inequality among judges.

- The Law on the High Council of Judiciary should stipulate stringent preconditions for lay-member candidates to the High Council of Judiciary to meet, in order to be eligible for the post. This may avoid some challenges of the politicisation of their appointment in the National Assembly.

- The transparency of the work of the High Council of Judiciary should be improved by creating a more functional internet-site and by allowing non-governmental organizations that wish to monitor its work to attend its sittings.

- Media visibility of the High Council of Judiciary could be overcome either by engaging a spokesperson of the Council or by designating one of the members of the Council as a spokesperson.

- The administrative Office of the High Council of Judiciary is severely understaffed. The Council should recruit staff particularly qualified for analytical research.

- The procedure for establishing improper influence on a judge in the performance of their judicial function should be improved by introducing the power of the Council to initiate cases on its own motion. The reason for this is that the judges feel afraid to stand up to the political branches of the government, especially after the 2008-2012 reform of the judiciary. Therefore, it is highly unlikely that they would themselves bring cases of political influence on a judge in the performance of their judicial function.

- The Law on the High Council of Judiciary should establish the powers of the High Council of Judiciary to propose budget item amounts related to the judiciary, and to dispose of the funds. The reason for this is that budgetary autonomy of the Council is closely connected to efficient functioning of the judiciary, above all, proportionate distribution of the courts' workload.

- The eventual establishment of the budgetary autonomy of the High Council of Judiciary should be accompanied by the further professional strengthening of the Council's Administrative Office.

# Information about the project

The underlying objective of this project is to *complement the European Commission's process of vertical judicial Europeanization with an internal, horizontal, initiative that would combine an academic and practical approach in detecting and noting the main shortcomings of our judicial culture*, and through consultations with international and regional experts, outline recommendations for future steps in the Europeanization of judicial culture.

The project is coordinated by the **Institute for Democracy "Societas Civilis" Skopje (IDSCS)** from North Macedonia, in cooperation with **T.M.C. Asser Instituut** from the Netherlands, the **Judicial Research Center (CEPRIS)** from Serbia, and the **Albanian Legal and Territorial Research Initiative (ALTRI)**, and supported by the **Dutch Fund for Regional Partnership (NFRP)/Matra**. The project will be carried out and have impact in **Skopje (North Macedonia)**, **Belgrade (Serbia)** and **Tirana (Albania)**.

# Information about IDSCS

IDSCS is a think-tank organisation researching the development of good governance, rule of law and North Macedonia's European integration. IDSCS has the mission to support citizens' involvement in the decision-making process and strengthen the participatory political culture. By strengthening liberal values, IDSCS contributes towards coexistence of diversities.

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