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CONSTITUTIONAL REFORM OF THE JUDICIARY IN SERBIA AND EU INTEGRATION

ABSTRACT

The National Assembly of the Republic of Serbia enacted the National Judicial Reform Strategy for the period from 2013 to 2018 in 2013 and the Government adopted an Action plan for implementation of the National Judicial Reform Strategy in which it envisages concrete measures and activities for implementation of strategic objectives, defines the deadlines and competent authorities for its implementation and financial sources. The Republic of Serbia accepted the EU Acquis with respect to Chapter 23 Judiciary and Fundamental Rights in 2016. On the path of EU integration, the constitutional reform of the judiciary is a very important and necessary step. Serbian constitutional law experts as well as the Venice Commission identified a number of weak points of the Constitution of Serbia of 2006 regarding the judicial system. Those weak points compromised the possibility of adhering to the principle of judicial independence as one of the basic principles of the rule of law. In this article, the author explains what should be regulated in the Constitution in order to have stronger guarantees of independence of the judiciary and the rule of law. Bearing in mind that there is no uniform European model of judiciary, the author concludes that successful constitutional reform requires a compromise between executive power and its tendency to dominate judiciary, on the one hand, and judicial power and its aspiration for absolute independence, on the other hand.

***Key words**: Constitutional reform, Judiciary, EU integration, Judicial independence, Rule of law, Constitutional culture*

1. INTRODUCTION

In the process of European integration, reform of the Constitution of Serbia specifically the section on the judiciary appeared on the agenda. The National Judicial Reform Strategy (for the period 2013-2018), that was adopted by the National Assembly, foresees three key phases of change: 1) exclusion of the National Assembly from the process of the election of Presidents of the Courts, judges, public prosecutors/deputy public prosecutors; as well as members of the High Judicial Council and State Prosecutorial Council; 2) changeover in the composition of the High Judicial Council and State Prosecutorial Council aimed at excluding the representatives of the legislative and executive branches from membership in

these bodies; 3) prescribing a degree be obtained from the Judicial Academy as an mandatory precondition for first election into the judiciary or as a prosecutor. [1]

The Commission for the Implementation of the Strategy formed a Working Group, which included four University Professors of Constitutional Law, with the task of preparing a legal analysis of the existing constitutional framework of the judiciary. At the end of June 2014, the requested legal analysis had already seen the light of day. It was not only based on the Strategy itself, but had equally encompassed the views of the Serbian Constitutional Sciences and the Venice Commission. It seemed that this text was a good platform for the preparation of the draft constitutional reform of the judiciary, because it was greeted with unanimous support by the legislative and verbally those of the executive power.[2]

Serbia had taken on the obligation, with the initialization of Chapter 23 on the judiciary, to amend the Constitution by the end of the year 2017. Everything pointed to a positive outcome. However a standstill ensued, although from time to time, the Serbian media talked about the reform of the Constitution in the context of EU integration. For the most part, the media touched upon questions regarding the judiciary and the integrative clauses in the Constitution, whilst other matters were only speculative (Kosovo, changes to the election process and competencies of the President of the Republic, reform of the constitutional judiciary, etc.).

At the end of July 2017, the Ministry of Justice officially starts the first round of public hearings with civil society (six round tables in multiple cities in Serbia). At that time there still was no text of the draft constitutional amendments. At the beginning of September, certain associations of experts and non-government agencies withdrew from discussions with the rationale that the public hearings were feigned and fallacious.[3] It was clear that Serbia will not amend the part of the Constitution regarding the judiciary by the end of the year 2017. The Ministry of Justice presented a working text of amendments of the Constitution (24 amendments to the Constitution) at the end of January 2018.[4] A new round of public hearings, for the most part with the same participants, was concluded at

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1 [http://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf] Accessed 20 March 2018

2 Conference "Towards Constitutional Amendments: the Constitutional Position of the Judiciary", Belgrade, 29 November 2016

3 [http://rs.n1info.com/a316091/Vesti/Vesti/NVO-o-promeni-Ustava.html] Accessed 20 March 2018

4 [https://www.mpravde.gov.rs/files/Ministry%20of%20Justice%E2%80%99s%20Working%20Version%20of%20the%20Draft%20Amendments%20to%20the%20Constitution%201.pdf] Accessed 29 March 2018

the beginning of March in the same manner as the first round – a significant divide appeared with the Ministry of Justice on the one side and a large number of expert and non-government agencies on the other, supported also by a handful of professors of law.[5] The former affirming that the working text is good and balanced, written with consideration of the views and recommendations of the Venice Commission. The latter, that this text was in essence even worse than the valid Constitution[6] and that it only contained perfidious mechanisms for political control of the judicial powers, and that as such it should therefore be withdrawn in its entirety.[7]

Where did the error occur? What is the first cause of misunderstanding of the executive, on the one hand and the judicial powers on the other hand? How to escape the "dead-end" of the constitutional reform of the judiciary on the road to EU integration of Serbia? In this text, an attempt will be made to point out the key questions of constitutional reform of the judiciary in the context of EU integration and what are the seemingly correct guidelines for responding to those questions.

2. "SOURCES" OF INDEPENDENCE OF THE JUDICIARY

Theoretically, comparatively and from the viewpoint of the positive law of the Republic of Serbia, the fundamental constitutional principle is the principle of the Rule of law. The Constitution of the Republic of Serbia (in further text: CRS) first and foremost, defines this principle as a "fundamental prerequisite for the Constitution".[8] It is source of all other constitutional principles, but is also a fundamental constitutional value – legitimating basis of the constitution itself.[9] The Rule of law is effectuated within the political framework, and politics are moderated by the Rule of law. That latent tension between the law and politics, the supremacy of the constitution and the sovereignty of the people, has acquired its own expression in the syntagma "constitutional democracy".

In the constitutional democracy of political power, the legislative and executive have to have legitimacy and the judicial to be independent. Legitimacy is drawn

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5 [https://www.paragraf.rs/dnevne-vesti/080318/080318-vest3.html] Accessed 29 March 2018

6 The Constitution of the Republic of Serbia, Official Gazette No. 98/2006

7 See: The Opinion and Suggestions of the High Judicial Council to the Working Draft of the Ministry of Justice Amendment to the Constitution of the Republic of Serbia [https://vss.sud.rs/sites/default/files/attachments/ENG_Ustav.pdf] Accessed 25 March 2018

8 Art. 3 of the Constitution of the Republic of Serbia, Official Gazette No. 98/2006

9 See: Petrov, V., *Ustavna načela uopšte i u Republici Srbiji – teorijski pogled*, Pravni život, god. 29, tom IV, No. 12, 2016, pp. 497-508

from the consent of the people, acquired by way of free choice. The independence of the judiciary originates from other sources. The first is the Constitution, which defines the independence of the judiciary as a fundamental principle of a legal state and secures institutional guarantees of that independence. The other is constitutional culture, which is characterized by the "agreement on understanding" of political powers on the one hand, and the judicial powers on the other. That "agreement" arises when two naturally different powers renounce their "egoistical" aspirations – the executive power to put under "tutelage" the judicial and the judicial of make its independence absolute and isolate itself from other powers in the state.

It is not hard to understand why for decades in Serbia the reform of the judiciary has not been an evolutionary process, but instead a "vicious circle", in which only the players are changing, whilst the essence stays the same – declarative devotion for the judiciary to be established and implemented for the general wellbeing, i.e. in the interest of the people.[10]

3. FOUR CONSTITUTIONAL QUESTIONS AND AN INDEPENDENT JUDICIARY

This section will touch upon the first source of independence of the court, Constitution or "constitutional framework".[11] The CRS does not contain sufficient guarantees of the independence of the court.[12] In that critical approach toward the Constitution we should not go into extremes, because the judicial power is only one part a constitutional subject matter. The Constitution should only regulate that which is necessary, and nothing more. That constitutional "core" is made up of four questions. First, the principles on which the judicial powers are founded on which they are based – constitutional principles on the judiciary. Second, the manner in which the judges are elected. Thirdly, who is the highest court in the country? Fourth, grounds for termination of judges' tenure in office. The rest, regardless of how important it is for "practical life" of the judiciary, it should be regulated by the law and other legal acts.

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10 See: Orlović, S., *Stalnost sudijske funkcije vs. opšti reizbor sudija u Republici Srbiji*, Anali Pravnog fakulteta u Beogradu, god. 57, No. 2, 2010, pp. 163-186

11 In 2014, the Commission for the Implementation of the National Strategy for the Reform of the Judicial System formed a Working group for rendering the analysis of the amendment to the constitutional framework.

12 See: Venice Commission, *Opinion on the Constitution of Serbia*, CDL-AD(2007)04, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e] Accessed 27 March 2018

With respect to the constitutional principles regarding he judicial powers, the Serbian framers of the constitution listed mainly all of them. However, this was not due to a poor systematization and stylization of norms; but in fact inconsistency and partialness in content. In one section it states that the "Courts shall be separated and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts;"[13] in another: "in performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law"[14]; and yet in the third: "Court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law."[15] Three differing formulations of the same concept – judicial (institutional and personal) independence - in three articles of the Constitution which are related in content are inadmissible. Statements on the principles of the Constitution, and the judicial power, must be polished and precise, words carefully chosen and none of them excessive.

Essentially, the election of judges is regulated, better than in the Constitution from 1990. That Constitution prescribed that the judges be elected by the National Assembly. The Constitution of the Republic of Serbia prescribes that the permanent judges shall be elected by the High Judicial Council (in further text: HJC); made up of eight electoral members (six judges with permanent judicial function and two prominent and respected lawyers - a professor from the Faculty of law and a solicitor) and three members *ex officio* (the President of the Supreme Court of Cassation, the Minister of Justice and the President of the authorized committee of the National Assembly). Theoretically, election by the High Judicial Council contributes greatly to the achievement of judicial independence.[16]

From there, three essential reproaches can be made regarding the Serbian constitutional solution. First, the High Judicial Council appoints only the judges that will hold a permanent tenure in office. Individuals who are being elected for the first time into the judicial role, for a period of three years, are appointed by the National Assembly at the proposal of the High Judicial Council. Therefore, the constitutionalization of the model of the judicial council stopped at the half-way point; this body does not appoint all judges. Secondly, the High Judicial Council

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13 Article 142 (2) of the Constitution of Serbia, Official Gazette No. 98/2006

14 Article 149 (1) of the Constitution of Serbia from 2006, Official Gazette No. 98/2006

15 Article 145 (2) of the Constitution of Serbia from 2006, Official Gazette No. 98/2006

16 Venice Commission, *Report on the Independence of the Judicial System Part I: Independence of the Judges*, CDL-AD (2010) 0004 Or., [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e] Accessed 27 March 2018

is not solely made up of judges exclusively, which it does not have to, however it is not favorable for all of its members to be appointed by the National Assembly. Third, "the probatory mandate" of those judges who have been elected for the first time is contrary to the nature of the judicial function. According to the Venice Commission, "foreseeing a probatory period can jeopardize the independence of the judges, because they may feel pressured to make decisions in a certain manner". Therefore, the Commission proposes that "judges of the ordinary courts be elected permanently until retirement".[17]

Judges should be elected by the High Judicial Council. A singular method of electing judges should be defined, which includes the elimination of "temporary judges". Furthermore, a balanced composition of the High Judicial Council should be determined. There does not have to be an equal number of judges and politically appointed members in the Council, however there must not be explicit dominance of one or the other. Member judges must elect judges, and not the Assembly. A number of politically appointed members should remain, however their political capacity, should not be the only factor that serves as a recommendation for their membership. The Venice Commission recommends that "the majority of the members of the Judicial Council should be elected by the judiciary itself", but "for democratic legitimacy of the judicial council to be secured, the other members should be elected from amongst the individuals with adequate legal qualifications taking into consideration possible conflict of interest." That means that in the Council there is no room for Members of Parliament and membership of the Minister of Justice. The President of the highest court should not be automatically designated the President of the Council. The President, by way of a majority vote, should be elected by the Members of the Council, which does not have to be regulated by the Constitution.

With respect to the highest court, it is unclear as to why the framers of the constitution opted in for the name "Supreme Court of Cassation". In comparative law, there exist two models of organization of the highest court – the Cassation Court model and the Supreme Court model. The Supreme Court passes valid decisions resolving a dispute. The Court of Cassation decides upon the legality of decisions made by lower instance courts. Decisions made without properly adhering to the law are returned to a lower instance court to be heard again. By calling the highest instance court The Supreme Court of Cassation, the framers of the constitution have "mixed-up" these two models. The former title of the highest court – Supreme Court should be reinstated, and its competencies, as well as the competen-

[17] *Ibid.*

cies of the lower instance courts, should be regulated clearly and precisely by way of laws, not the Constitution.

According to the Constitution of the Republic of Serbia, the proceedings, basis and reasons for terminating judges tenure of office, as well as the reasons for dismissing the President of the Court, are defined by the law. The Constitution of the Republic of Serbia from 1990 regulated the grounds for terminating the judicial role as well as the dismissal of judges.[18] It should have stayed that way. "By deconstitutionalizing the grounds for termination and the reasons for dismissal from office the position of the judiciary as an independent branch of government in the systems of power is weakened."[19] Therefore, grounds for termination from the judicial role must be constitutionalized once again and in that way strengthen the guarantee of the permanency of the judicial role.

4. CONSTITUTIONAL CULTURE AND THE INDEPENDENCE OF THE JUDICIARY

If the four questions regarding the judicial branch are regulated in the proposed way, a solid normative precedent will be created for an independent judiciary; nothing more than that. Constitutional culture is necessary to be paired with good constitutional guarantees. Constitutional culture is the highest form of legal and political awareness which gathers the bearers of state powers and citizens around the fundamental values of society. Constitutional culture involves the surrender of "institutional egoism", constitutional factors and their unity in effectuating the aims of a legal state. The executive branch must not use the reform of the judiciary and the constitution as a "screen" for seeking out new methods of control of the judicial power. The judicial power must not treat its "independence" as an intangibility and irresponsibility. The people should demand an independent judiciary, but also work on building their own legal awareness, which will aid them in responsibly utilizing legal instruments available for judicial protection of law.

Good constitutional stipulations are easily written as opposed to developing constitutional culture which is adequate for a legal state. Different is the process and it should not be rushed due to "the Brussels" or other similar standards, but instead it should develop in harmonization with proven European and national constitutional values. Those values are founded on the principle of "unity of diversity", and not on generally accepted and uniform solutions. If such solutions were to exist, judges, for example, would be elected in the same way in Great Britain, Germany

[18] Article 101 of the Constitution of Serbia from 1990, Official Gazette, No. 1/90

[19] Marković, R., *Ustavno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2017, p. 527

and France. In these stable democracies, they are elected in differing ways, with controlled and accountable participation of political factors.[20]

5. CONCLUSION

Amendments to the Constitution in the section pertaining to the judiciary will not be sufficient to secure an independent judiciary. There is no best solution, but one of the worst possible ones would be if under the slogan of fighting for European values to enable further Americanization of Serbian law. The system of 'checks and balances' and the judicial practice as a source of law and the Anglo-American concept of independence of the courts are not welcomed within the European legal framework. That would be a fatal disorienting blow to the judiciary in Serbia, which is slowly recovering from the detrimental consequences of earlier serial "reforms of the judiciary" (particularly the last in 2009). "If Serbia would like to change its legal system and introduce the Anglo-Saxon model ...we would need one-two hundred years for our jurists to learn and apply it. So as to avoid a legal shipwreck our jurists are decisive in their fight for the survival of our legal tradition (Milan Škulić)".[21]

In any case, quality changes to the Constitution can be implemented if political powers consult two sources: domestic constitutional sciences and the most recent, synthesized opinions of the Venice Commission regarding the judiciary. There is no discord between these sources, as is sometimes presented to the public. The viewpoints regarding this subject matter are identical. However, there is no magic formula. The independence of the judiciary in the Constitution is only the legal frame; however the brushstrokes creating the picture must be ongoing, as it remains imperfect and incomplete. In that respect, stable constitutional democracies have long ago "graduated" on that subject-matter, but Serbia has not.[22]

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20 See: Petrov, V., *Izbor sudija uporedno i u Republici Srbiji*, Šarčević, E., Petrov, V. (ur.), Sudije u pravnom sistemu, Sarajevo, 2013, pp. 39-69

21 Petrović, A., *Evropa ne prihvata amerikanizaciju našeg pravosuđa*, Politika from 6 August 2017

22 The ideas exhibited in this article was developed in the Draft of the Legal Analysis of the Constitutional Framework for the Judiciary of the Republic of Serbia [https://www.mpravde.gov.rs/files/April%20report_judicial%20power_doc.doc]. Accessed 30. March 2018

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