

# Struggle for Separation of Powers and Rule of Law

By: Milan Antonijević

The Constitution of the Republic in Serbia needs to be amended to eliminate:

- shortcomings regarding the status of institutions safeguarding judicial independence;
- inequality between the judiciary and other branches of government, and,
- imprecision and illogicality of provisions on the appointment of judges and prosecutors, court presidents and other judicial officers.

Serbia is under the obligation to make these amendments also in the EU accession process, within Chapter 23. The author proposes the disassociation of the High Judicial Council and the State Prosecutorial Council from the executive and changes in the status of judges, especially first-time judges appointed to three-year probation terms in office.

Strengthening of the rule of law in the process of accession to the European Union (EU) has for decades been a priority set by the countries in the Western Balkan region. Due to the dynamic of the negotiations with the European Union, the issue of the rule of law has reclaimed the position and attention it deserves in Serbia over the past few years, especially since talks on Chapter 23 were launched in mid-2016. Insistence on the implementation of the law, as well as on other elements of the rule of law, has increasingly been mentioned as a priority by Serbian politicians and, in particular, has been highlighted by all visiting EU officials.

The decision to attach major attention to the rule of law in the Chapter 23 Action Plan (AP) was a logical consequence of analyses of the situation in the judiciary<sup>1</sup>; the AP puts special emphasis on amending the Constitution, as one of the obstacles to the full realisation of judicial independence.

Namely, the system established under the 2006 Constitution of the Republic of Serbia does not provide sufficient guarantees for the independent work of the judicial and legislative authorities and insufficiently supports the work of independent institutions.

The shortcomings are primarily visible in the institutions established to guarantee judicial independence, as well as the judiciary's inequality vis-à-vis the other branches of government, and, finally, in the imprecision and illogicality of the provisions on the appointment of judges and prosecutors, court presidents and other judicial officers.

The fact that not all the constitutional rights and guarantees of separation of powers, especially the provisions guaranteeing conditions for the creation of an independent judiciary and autonomous prosecution service, have been consumed sufficiently has further motivated us to

investigate the causes of the situation. This would pre-empt the risk of constitutional amendments, including the ones proposed in this Paper, bypassing the independent judiciary, i.e. not contributing to the establishment of an independent judiciary at long last.

The timeliness of opening a public debate on the Constitution stems from the Chapter 23 Action Plan, which sets the deadlines for the debate and adoption of the Constitution in 2017. The urgency of constitutional change is also corroborated by the fact that the European Commission will re-examine and critique the efficiency of the realisation of the rule of law during the process of reviewing Serbia's compliance with the Copenhagen criteria.

The two above-mentioned reasons for the urgency of opening a public debate on constitutional amendments must immediately be supplemented by the third reason: the citizens' demands that rule of law be established and that the independence of the judiciary be simultaneously ensured.

### Inception of the Debate on Constitutional Change

The need to amend the Constitution has been discussed since the day it was adopted, when the legitimacy of the constitutional text was disputed because of the manner in which it was adopted, primarily due to the absence of a public debate, the two-day referendum at which the citizens voted on it, and the fact that the MPs, let alone the citizens, did not have the text in their hands they could peruse before voting on it<sup>2</sup>.

To recall, all the present MPs voted for the constitutional text in 2006 and the Constitution was adopted almost by consensus; the text itself puts in place broad human rights guarantees, as well as the basis for judicial independence and prosecutorial autonomy. We therefore strongly urge the parties - which later opposed

human rights guarantees, when they were to be enforced in practice, especially the proper implementation of the provisions on the judiciary creating the framework for its full independence - to conform their activities to the constitutional framework.

Now, when a session of the National Assembly and the forming of the political will to adopt the constitutional amendments by a two-thirds majority are clearly in the offing, we urge the MPs to clearly advocate the enforcement of the constitutional provisions they will adopt, particularly the ones on the separation of powers and the strengthening of the roles of independent institutions and the legislative and judicial branches of government vis-à-vis that of the strong executive.

We also wish to highlight the importance of the citizens' attitude towards constitutional change and the necessity of perceiving the forthcoming amendments as endowing the constitutional text with legitimacy, primarily through a long, thorough and meaningful debate on all issues, above all the judiciary.

The difficulty of writing a paper on the Constitution is compounded by the fact that a number of publications, academic and expert papers, as well as the Venice Commission's opinion on the directions of constitutional amendments, including the section on the judiciary, have already been published. This called for the perusal of all these papers and interviews with judicial officers, stakeholders holding legislative and executive offices, and those in independent institutions, who have been following the launched constitutional amendment process. The courage to offer specific solutions and suggest the deletion, amendment or abandonment of specific proposals made by experts stems from the wish to open a meaningful debate on the Constitution on time, before all the amendments are definitely submitted to the MPs for adoption.

Some of the issues we believe warrant greater attention are clearly reviewed in this

Paper, which describes the current state of play, the proposed solutions and the expected effects of changing the provisions of the Constitution. It outlines the problems regarding the fewer issues that remain open, but leaves it to a meaningful public debate to have the final say.

### Integrity – the Prerequisite for Judicial Reform

Integrity of judicial officers is the first issue to be reviewed before moving on to headway in the separation of powers and judicial independence. Integrity is, indeed, prerequisite for the success of any reform, be it imposed by constitutional amendments, a strategy or by going back to the implementation of the adopted laws. Integrity cannot be sufficiently defined in the text of the Constitution, but it must feature as the central point in assessments of the ability to conduct thorough judicial reforms during the public debate on the constitutional amendments.

Judges and prosecutors are best placed to assess whether their peers and superiors possess the required integrity and ability to fully assume their share of responsibility for the situation in the judiciary. In addition to disciplinary accountability proceedings, which can be initiated by the High Judicial Council (HJC) and the State Prosecutorial Council (SPC)<sup>3</sup>, judicial integrity can also be controlled by other mechanisms, already included in the Constitution. Other proposed solutions in this text additionally guarantee the establishment and positioning of integrity as the backbone of judicial independence

### About the Judiciary – Background

The constitutional provisions on the judiciary govern the appointment of judges, incompatibility of office, duration and termination of office, grounds for and decisions on their dismissal, their immunity rights and

financial security. The list of issues regulated by the Constitution, which directly or indirectly regard judicial independence and impartiality, does not end here. One must thoroughly understand these issues before one begins to suggest ways to improve the status of the judiciary in the text of the Constitution. The existing overviews of the relationship between the Constitution and the judiciary serve that purpose<sup>4</sup>. The separation of powers, as a clear principle and backbone of the Constitution, completes the set of provisions defining the judiciary, distinguishes the judiciary from other branches of government and creates mechanisms of mutual checks and balances between the branches of government. As far as the separation of powers is concerned, the Constitution comprises sufficient guarantees for their full separation. The details proposed in this text, the specific articles of the Constitution that must be amended, will further strengthen such a separation and the full enforcement of all the guarantees of this democratic legacy is expected to result in an entirely different perception of the government, through a well-ordered system, based on mutual checks and balances.

The chapter on the organization of state government regulates the status, organisation and jurisdiction of courts, their relationship vis-à-vis other branches of government and the status of judges. The fundamental constitutional provisions govern the principles of the constitutional state; such are the provisions on the judiciary, rule of law, restriction of state power, obligation to respect the Constitution and the law, equality before the law, et al.

The section on human rights lays down the judicial procedure principles and the presumptions of legal certainty (right to a fair trial and presumption of innocence; legality of acts and penalties; right to defence; right of appeal; public character of trials and delivery of judgments, et al).<sup>5</sup>

Under the Constitution<sup>6</sup>, the rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of

powers, independent judiciary and the authorities' observance of the Constitution and the law. The latter three items listed in the Constitution are clearly based on and define the framework conducive to the creation of an independent judiciary. Judicial independence has also become a universal generally-accepted value guaranteed by international regulations, wherefore the authors of the constitutional amendments also have to consult these high standards, especially those defined after the 2006 Constitution was adopted<sup>7</sup>.

The first general criticism of the Constitution regards the consistency of the provisions defining and governing the judiciary. The principles guaranteeing judicial independence can be found in various sections of the Constitution. This issue should thus be regulated better nomothetically, with a view to systematising the constitutional principles and presenting them more clearly.

Provisions on the judiciary can be found in Section One entitled "Constitution Principles", notably in Articles 3 and 4 on the separation of powers, the checks and balances between the three branches of government and the independence of the judiciary<sup>8</sup>, as well as in Part Five, which regulates the judiciary in greater detail; such provisions cannot, however, be found in the part governing the bounds of the executive and legislative branches. The provision on the independence of the judiciary in Article 4 of the Constitution is thus not clearly reflected in the principles binding on the judicial, legislative and executive branches.

It is imperative to group the Articles of the Constitution, specifically in Section One, Principles, whilst avoiding the contradictoriness of the checks and balances between the three branches of government and judicial independence. The principles regarding the executive and legislative branches ought to be singled out, like the judiciary principles have been in the part on the courts<sup>9</sup>. This would facilitate perusal of and familiarisation with the parts of the Constitution guaranteeing judicial independence and reflect the authors' clear view that the types of checks and balances

between the three branches of government cannot be equated, and would, thus, guarantee the independence of the judiciary.

### Protection and Improvement of Judicial Independence vis-à-vis the Executive and Legislative Branches of Government

The next issue to be addressed after the principles of the Constitution, as well as the principles governing the three branches of government, is the influence of the National Assembly of the Republic of Serbia (NARS) on the judiciary, accompanied by justified concerns that the judicial offices are and will be divided among the political parties, with no account being taken of objective judicial appointment criteria.

The question of NARS' role in the appointment of judges, especially of lower courts, duly arises, because it is inevitably linked to politicization. There have been instances of NARS refusing to appoint the judges nominated by the HJC, thus both delaying or precluding the filling of prosecutorial and judicial vacancies and amounting to disrespect of the HJC and SPC, which have to be the bulwarks and guarantors of judicial independence and prosecutorial autonomy. It may be concluded that the MPs have been provided with excessive discretionary powers and, given the absence of a meaningful debate on the specific candidates<sup>10</sup>, either in the relevant parliamentary committee or at the plenary session, the impression is that the NARS has rendered its (non-)appointment decisions largely on the basis of political criteria, i.e. that these decisions were taken outside the NARS. Experts have also been mentioning the quotas individual political parties were given during the judicial appointment process, which further fogs the picture and corroborates the necessity of reviewing the NARS' role in the appointment of judges.

The articles on the jurisdiction of the High Judicial Council<sup>11</sup> and the State Prosecutorial Council<sup>12</sup> must be amended

to ensure the clear regulation of the system of nominating candidates and to impose upon the NARS the obligation to appoint the judges on the list of nominees and to strengthen i.e. introduce the SPC's role in the appointment of the Republican Public Prosecutor<sup>13</sup>. Limiting the number of candidates running for one judicial or prosecutorial office to two, from among whom the NARS is to appoint one, will facilitate the depoliticization of the judicial appointment process; this is a matter that can be clearly prescribed by the Constitution.

The same applies to appointment to other judicial offices, including, notably, to the appointment of the court presidents, and, in particular, the President of the Supreme Court of Cassation (SCC).

Amendments have to be made to Article 144, authorising the NARS to appoint the SCC President, especially the provisions on the termination of his/her office. The term in office of the SCC President must be extended from five to at least seven years, to ensure s/he holds the office over a period spanning a number of parliamentary elections, while the provision prohibiting the reappointment of the SCC President needs to be preserved. These observations are all the more topical given that the NARS amended the Law on Judges at the time this Paper was written, shortening the SCC President's term in office from five to four years, but allowing for his/her reappointment.

### Protection of the Judges' Independence and Securing Their Impartiality

The permanence of judicial tenure, coupled with the rule on the three-year term in office of first-time judges under Article 147 of the Constitution, provide sufficient guarantees of independence. Judges have frequently called for the abolition of the three-year probation period, which is followed by reappointment, i.e. confirmation of judicial tenure and appointment to permanent judicial tenure. Amendment of

Article 147, which would involve the abolition of appointment to probation judicial tenure, would result in the abolition of the mechanism for appraising judicial performance in light of the guaranteed permanence of judicial tenure. In a system in which rigorous disciplinary and other measures are rarely resorted to in cases of judges whose performance is appraised as unsatisfactory, the mechanism of confirmation, i.e. appointment three years after the first appointment to a judicial office, along with a probation period that is not excessively long<sup>14</sup>, is an adequate solution. Given that the HJC, rather than the NARS, is charged with appointing first-time judges to permanent tenure, the judges, HJC members, themselves have the possibility of exerting greater influence on the appointment of judges, awarded permanent tenure and all the guarantees of independence accompanying it.

The concept of appointing first-time judges to a "probation period" should not be abolished, but it must be limited in individual cases, i.e. abolished with regard to appointments of judges to the SCC for the first time.

Furthermore, with a view to emphasising the importance and delicacy of the judicial dismissal issue, the grounds for dismissing judges must be clearly specified in the Constitution, rather than leaving the enumeration of the grounds for dismissal to the law.

In addition, the judicial appointment and dismissal procedures are closely linked to judicial independence, and, given that the Constitution allows dismissed judges to complain to the Constitutional Court, there is no reason to preclude the Constitutional Court from reviewing appointment issues, i.e. not to expand this constitutional framework. This is why the provision on the protection accorded judges during the appointment process must be expanded to cover dismissals as well.

The same arguments apply with respect to introducing in the Constitution the provisions on judicial disciplinary accountability,

which would comprise elements now elaborated by laws on the judiciary, again with a view to emphasising their importance. Enough room needs to be left to subsume the reality in the courts under the above-mentioned constitutional norm, as well as under the adopted laws.

In addition, the public character of trials, although guaranteed by the Constitution, has to be expressly formulated to cover delivery of judgments as well.

#### Composition of the High Judicial Council and the State Prosecutorial Council

The fewest disagreements have arisen with respect to the composition of the High Judicial Council. Namely, most of the existing documents, from the Venice Commission's report to the analysis conducted by the Center for Judicial Research, which was commissioned by the Organization for Security and Co-operation in Europe (OSCE), the composition of the HJC, more specifically, the member coming from the ranks of the executive, is considered an indicator of the executive government's influence on the judiciary. The Justice Minister's participation in HJC sessions, especially his/her right to vote on HJC motions during disciplinary proceedings, has been qualified as an indicator of such influence<sup>15</sup>. The same applies to the State Prosecutorial Council and its composition, as the Minister also sits on the SPC.

The mechanisms the executive has been applying to influence these two bodies defining the judiciary are numerous, i.e. the possibility of the executive fully affecting their work thanks to the presence of merely one of its members is indisputable.

Another issue that must be raised regards the way in which decisions on the appointment and "termination of office" of a large number of HJC members are taken<sup>16</sup>. The NARS' influence has to be reduced, i.e. the HJC members should be elected in direct elections organised by the HJC and providing judicial officers with a broad right to

vote; their election can subsequently merely be upheld by the NARS.

The theses in this Paper on the Constitution were anticipated in one of the last sentences of the Venice Commission's Opinion, that "[W]ith respect to other parts of the Constitution, a lot will depend on implementation." Now, more than a decade since the Constitution was adopted, we can clearly say that the Constitution did not yield the desired results later in practice, especially with respect to the part governing the judiciary.

#### Chapter 23 Action Plan

Before concluding the review of the directions which the amendments of the Constitution in the field of judicial independence need to take, we must outline the priorities set in the Chapter 23 Action Plan. The Chapter 23 AP sections on constitutional amendments in light of putting in place stronger guarantees for protecting the judiciary from the excessive influence of other branches of government, especially the executive, as well as the legislative authorities, largely coincide with the proposals set out in this Paper.

The Chapter 23 AP, for instance, sets out that "[T]he system for the recruitment, selection, appointment, transfer and termination of judge's office, presidents of courts, and prosecutors should be independent of political influence". It further states that "[E]ntry in the judiciary shall be based on merit-based objective criteria, fair in selection procedures, open to all suitably qualified candidates and transparent in terms of public scrutiny."

The Chapter 23 AP then goes on to say that the "[T]he High Judicial Council and the State Prosecutorial Council should be empowered with leadership and the power to manage the judicial system, including when it comes to immunities. They should have a pluralistic composition, without involvement of the National Assembly (unless solely declaratory), with at least 50%

of members stemming from the judiciary, representing different levels of jurisdiction. Their elected members should be selected by their peers.”

The AP also raises the following three issues:

- Legal or executive authorities should not have the power to supervise or monitor operations of the judiciary;
- Reconsider the probation period of three years for candidate judges and deputy prosecutor;
- Clarify the grounds for the dismissal of judges.

Although this Paper does not deal with the Constitutional Court, its status, powers and relationship with courts in greater detail, apart from the possibility of it reviewing judicial appointment and dismissal complaints, it needs to be specified that the Chapter 23 AP also calls for clarifying “[...] the rules for terminating the mandate of judges of the Constitutional Court.”

Furthermore, once the Constitution is amended, the AP sets end 2018 as the deadline for “[A]lignment of judicial laws with new constitutional provisions (Law on Organization of Courts, Law on Seats and Territorial Jurisdiction of Courts and Public Prosecutors’ Offices, Law on Judges, Law on Public Prosecutor’s Office, Law on High Judicial Council, Law on State Prosecutorial Council, Law on Judicial Academy)”.

The implementation of this part of the AP is particularly surprising. Namely, in May 2017, the NARS adopted amendments to the provisions of the Law on Judges on the appointment of court presidents, cutting their terms in office from five to four years and allowing them one reappointment, which this Law had not originally permitted. This move is not in compliance with the Chapter 23 AP. It has greatly extended room for politicization of this judicial office as well. Furthermore, the practice of amending a systemic law defining the judiciary’s bloodstream in mid-2017, under an emergency procedure and in the absence of a meaningful debate, although its amendment envisaged by the AP is to take

place very soon, gives rise to doubts about the legislator’s intention of adopting such amendments at this very time.

The AP envisages the “[A]lignment of by-laws with amended judicial laws” in 2019 and this is where the text of this document referring to the Constitution and judiciary in light of EU integration ends. There remains the part of the AP prescribing the alignment of the valid Constitution with the observations of the Venice Commission, wherefore the constitutional reform must be viewed much more broadly than as merely the amendment of several articles on the judiciary and it must also cover other constitutional provisions, both those in the field of human rights protection and others.

## Conclusion and Recommendations

This Paper suggests the directions in which the Constitution is to be amended, the specific Articles that have to be re-examined and changed, at the moment when the public debate on constitutional change is opening.

We started out by proposing nomothetical amendments, suggesting the grouping of norms and principles on the judiciary. We then clearly called for the protection and improvement of judicial independence from the executive and legislative authorities, through the redefinition of the Government’s and NARS’ roles in the appointment of judges and prosecutors. The provisions on the protection of independence and ensuring the impartiality of the judges, primarily via amending the probation period and its limitation, will further contribute to judicial independence. So will a change in the HJC’s and SPC’s composition and elimination of the executive government’s influence on these two bodies.

The fact that a number of articles on the judiciary need to be amended clearly testifies to the necessity of changing the current practice, which is the main thesis

advocated in this Paper. We perceive constitutional amendments as a new chance to build guarantees of judicial independence, as well as to implement the existing standards.

This is why the constitutional amendments must also be perceived as a new opportunity to review the issues of the success of the judicial reform, as well as the adopted documents, which still can change the image of the courts and prosecutorial services.

Time needed to properly conduct the constitutional amendment process is another factor that must be added to the recommendations in this Paper to ensure enough room and elements for debate. The Chapter 23 AP deadlines, which have been set ambitiously<sup>17</sup>, cannot be interpreted as denying, limiting or undermining a meaningful

public debate and presentation of its results to the public.

The EU integration process, from which the political will to amend the Constitution stems as well, must be presented also as a social process, acquiring the elements of a social contract; it was mislaid in 2006 and is now being rediscovered and extended to the citizens. Public debate is the basis of such a process wherefore, to reiterate, the involvement of all the relevant institutions, organizations and experts is prerequisite for presenting the full breadth and diversity of views on constitutional amendments. That is the only way to ensure that the citizens will really understand the question they will be asked at the referendum: Do you endorse the proposed amendments to the Constitution?

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## BIBLIOGRAPHICAL NOTES

- 1 "Serbia Judicial Functional Review" (Belgrade, World Bank. 2015) et al.
- 2 The National Assembly session at which the Constitution was adopted lasted slightly over an hour: fifteen MPs discussed the text and all 242 MPs present at the session voted for the Constitution, which was approved at a referendum.
- 3 The SPC reviews the complaints about the work of the prosecutors in the second instance.
- 4 See: 'Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality' (Strasbourg: Council of Europe, 2017), available at: <https://rm.coe.int/1680700125>
- 5 See the paper and detailed overview of the constitutional provisions on judicial independence in "The Constitutional Position of the Judiciary – Analysis and Recommendations for Modification" (Belgrade, Center for Judicial Research, 2016), available in Serbian at: [http://mojustav.rs/wp-content/uploads/2013/03/CEPRIS.Ustavni-poloz%CC%8Caj-sudske-vlasti.PROJEKAT.OEBS\\_.decembar-2016.pdf](http://mojustav.rs/wp-content/uploads/2013/03/CEPRIS.Ustavni-poloz%CC%8Caj-sudske-vlasti.PROJEKAT.OEBS_.decembar-2016.pdf)
- 6 Article 3, "Constitution of the Republic of Serbia," *Službeni glasnik Republike Srbije* No. 98/2006.
- 7 See: 'Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality', (Strasbourg: Council of Europe, 2017), available at: <https://rm.coe.int/1680700125>
- 8 The expression "judiciary power" prevails in the Constitution, while the term "judiciary" appears later in the text.
- 9 Article 142, Constitution of the Republic of Serbia.
- 10 See the transcripts of the NARS sessions on judicial candidates, available in Serbian at: [www.otvoreniparlament.rs](http://www.otvoreniparlament.rs)
- 11 Article 154, Constitution of the Republic of Serbia.
- 12 Article 165, Constitution of the Republic of Serbia.
- 13 In the event the public debate results in the necessity of introducing the role of the State Prosecutorial Council in the appointment of the Republican Public Prosecutor, the autonomy of the prosecution services needs to be redefined and approximated to independence.
- 14 To recall, under the preliminary drafts of the Constitution preceding the text adopted in 2006, the first-time judges' probation period initially lasted five years, and was subsequently shortened to three years. novi ugovor sa a da to je važnosvoju punu nezavisnost.ndumusvihiji pratio izbore za članove VSS i DVT koji su se odvijali širo
- 15 Out of 11 members: the President of the Supreme Court of Cassation, the Justice Minister and the Chairperson of the relevant NARS Committee are *ex officio* members, while the rest - six judges (one of whom from the autonomous province), one lawyer and one law school professor - are elected members.
- 16 With the support of the OSCE Mission to Serbia, the Lawyers' Committee for Human Rights monitored the elections of HJC and SPC members in the prosecution services and courts across Serbia in December 2015.
- 17 Under the Chapter 23 AP, the constitutional amendments are to be adopted by the fourth quarter of 2017.

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