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New Constitutional Amendments in the Field of Judiciary in Serbia – A Step Towards Europe?

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Abstract
This paper analyzes the adoption process of the constitutional amendments in Serbia in the context of the fulfillment of the European political criteria, namely – the Rule of Law. As an EU candidate country, the Republic of Serbia is officially committed to the European principles and values, however, it is still facing democratic backsliding in some aspects. Hence, the adopted constitutional changes aimed at strengthening the rule of law, by increasing legal certainty in the practices of judicial organs, and therefore in the entire legal order. Accordingly, in this paper the implications of the process of Europeanization which intensified the discourse on the constitutional transformation of the Republic of Serbia will be observed. Furthermore, the paper touches upon whether these introduced changes can equally reflect democratic strivings of the Republic of Serbia on its path towards the EU. In author's view, the institutional changes are very much needed, however, in the case of Serbia, „the devil is in the implementation". In addition, it is pointed out to the risks of "window dressing" in the reform process, showing that the formal fulfillment of the requirements without substantial understanding and proper legal and political execution is not equal to the real constitutional progress on the (long) road to EU membership.

Keywords: Judiciary, Serbia, constitutional amendments, rule of law, European Union

Introduction

The Republic of Serbia, as a candidate country for EU membership, is in the process of (re)building its political reality and is also undergoing the democratic transition of its political and legal systems. Accordingly, the discourse on the constitutional transformation of the Republic of Serbia was intensified after the latest amendments to the Constitution adopted in 2022. The Constitution, which came into force in 2006 confirmed the territorial integrity of the Republic of Serbia and firmly determined its "commitment to the European principles and

values"[1]. The Europeanization of Serbia's legal order, which encompasses the European integration process as well as membership of other European and regional organizations, such as the Council of Europe (CoE) and the Organization for Security and Co-operation in Europe (OSCE), has had a strong influence on the re-modeling of the constitutional and legal order. Therefore, this paper tries to analyze new constitutional challenges determined by the dynamics of the European integration process encompassing legal, political, and social changes. Henceforth, the dedication to European values as well as the fulfillment of the membership criteria in the European integration process shapes the existence and adapt the future of the core components of rule of law as a meta-principle,[2] such as an independent and properly functioning judiciary.

Firstly, the paper tries to grasp the process of Europeanization, as this is one of the key determinants of the Western Balkan countries' transition and transformation. Secondly, the author will discuss the European integration process and its transformative power over political processes that encompass transition and democratic changes that can be inspired by prospective EU membership. Finally, light will be shed on new constitutional amendments adopted and the involvement and influence of international (European) actors on their drafting and adoption. Ultimately, the paper intends to open the floor for discussion whether recently adopted constitutional changes genuinely identify and solve problems in the long run. Or is Serbia playing continuing to use these constitutional changes as "window dressing" to feign formal progress on their European path?

The process of Europeanization

'Europeanization' has been defined as a "way of doing things" which are first defined and consolidated in the making of EU decisions and then incorporated into "the logic of domestic discourse, identities, political structures, and public policies".[3] Moreover, this term is not limited solely to its political and legal aspects, but it encompasses a deeply rooted historical context. According to Anastasakis, Europeanization represents a method but also a means to achieve a goal and the end-game.[4] This transforms processes of harmonization and integration into different European legal and political systems such as the CoE, or the EU, but it is also a matter of cultural acceptance. In a narrower sense, Europeanization is often understood as a preparatory stage of pre-accession and accession processes and represents an externally driven, EU defined process of reformation. Additionally, it could be observed by looking at external political and economic incentives throughout the accession process and monitoring of the conditionality criteria implementation in the candidate countries. With the external incentives characterizing Europeanization along with democratic transformation and internal changes, there is a risk of, firstly, overestimating the EU conditionality and its influence and secondly, the risk of overcomplicating the separation of different processes that clearly influence legal and

[1] This dedication to European principles and values is explicitly mentioned for the first time in the constitutional definition of the state positioned at the very beginning of the Constitution. See, Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/2006, Art. 1.
[2] Vlajković, Marija and Jelisaveta Tasev. 2020. *The lack of uniform understanding of the rule of law in the EU and its implications on prospective member states* (accessed: 25 November 2022).
[3] Use of legal-political tools by the EU as well as evolution of the EU enlargement approaches.
[4] Anastasakis, Othon. 2005. The Europeanization of the Balkans. *Brown Journal of World Affairs* 12(1), 77-88.

political core of a (re)construction of a candidate state.[5]

Separating domestic and national choices and goals from "imported" norms and externally required political behavior, proved to be complicated.[6] Primarily, it is difficult to match the pattern of behavior given by the EU, having in mind differences in constitutional history, background, legal culture, trust in the legal system, level of political participation, etc., so the candidate countries sometimes draw selectively from European and international standards, as we have witnessed in not only the member states that were part of the Big Bang enlargement[7] but also in "older" member states such as the UK. However, when talking about external incentives in the context of the – Western Balkans, the transformative power of European integration is depicted in interdependent processes that precede each other. In a nutshell, the transition process and state building that precedes the European integration process is consequently closely followed by the Europeanization of the (constitutional) legal order as its legal consequence and as a final result.[8]

In the case of Western Balkans, it is quite difficult not only to separate these processes, but also it is hard to determine the beginning and the end of these interdependent processes. As Jano noted, this complex transformation could be traced through three main stages - 'last balkanization' as a period of nation and state building, 'delay transition' as a process of building and strengthening institutions, and 'pre-Europeanization' which could be described as a member state building, compliance with the EU policies and conditionality.[9] Analyzing only the Europeanization process itself, for the last two decades, the EU, and other European and regional organizations – OSCE, the CoE, with special emphasis on the Venice Commission, are evidently participants in the legal and constitutional evolution. Their role is very active in drafting and formulating constitutional amendments and changes, as well as in steering and directing the constitutional path towards the final goal. This is very important, as constitutional changes tackle not only the dynamics and changes of a legal order of a sovereign state, but they also deal with the identity of the constitution and its social perception - not only the text *per se*, but the context in which it exists and evolves.[10]

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[5] Kmezić, Marko. 2017. *EU rule of law promotion: Judiciary reform in the Western Balkans*. New York: Routledge.

[6] One of the examples could be the 'opt-out' clauses that the UK and Denmark defined when deciding not to take part in certain EU policies. Another example is the case of Central and Eastern European Countries that firstly had to go through a complex process of transition to move from strong communist and socialist legal heritage to ensure functioning of liberal democracy.

[7] It refers to the largest expansion of the EU that took place in 2004. In this fifth wave of enlargement ten countries became a member states: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

[8] As Ağir noticed, in the case of weak states, which most of the Western Balkan countries are, state building process is inseparable from the European Integration process. See, Ağir, Bülent Sarper. 2009. Rethinking security in the Balkans: The concept of weak state and its implications for regional security. *SDU Faculty of Arts and Sciences Journal of Social Sciences*, 1-13, 11.

[9] For more on characteristics and difficulties in every stage: Jano, Dorian. 2008. From 'Balkanization' to 'Europeanization': The stages of Western Balkans' complex transformations. *L'Europe en Formation* 3(349-350), 55-69, 57, 69.

[10] Vlajković, Marija. 2022. The importance of reshaping the European identity for the European integration process of Serbia, in *International organizations: Serbia and contemporary world,* Vol. 1, edited by Dimitrijevic, Duško and Toni Mileski. Belgrade: Institute for International Politics and Economy, 484-504.

The Republic of Serbia and the European integration

In an attempt to alter the integration approach donned in the previous EU enlargement rounds and to remedy the shortcomings that resulted in numerous crises burdening the Union,[11] the EU's approach to the Western Balkan's negotiations process has changed. This was firstly implemented in the case of the "integration front-runners" – Serbia and Montenegro.[12] It became more complex as it encompassed a thorough approach by the European Commission perceived in the demanding negotiation methodology. Besides the close monitoring of the harmonization with the EU *acquis* on all levels, the focus shifted to ensuring the respect of fundamentals under negotiating chapters 23 and 24.[13] The progress in the aforementioned chapters determines the continuation of the negotiations *in toto*,[14] and therefore, it is decisive for the success of the Europeanization process both formally and substantially.

Together with other regional and European actors and organizations, under Chapter 23, the EU monitors and encourages the process of judicial reforms in the Republic of Serbia.[15] These reforms firstly encompass constitutional amendments and then enactment of laws for the effective implementation of the amendments, while simultaneously nurturing democratic culture and respect of European common values. It also means that the European Commission leads the process of integration but when it comes to crucial legal reforms, it cooperates very closely with the CoE's body, the Venice Commission. The Venice Commission has been involved in the Serbian constitutional reform since the early 2000s thus providing "emergency constitutional aid" and afterwards legal aid to meet European standards in the field of democracy, human rights, and the rule of law.[16] The cross-cutting cooperation between two regional organizations is developed in a two-fold manner: on the one side, it provides the Republic of Serbia support from several European legal and institutional entities, and on the other, it also provides the EU with a strong back-up in the overall integration progress.[17]

Another side of the Europeanization coin, especially when it comes to the Republic of Serbia's constitutional transformation, is depicted in the fact that the mentioned organizations are involved in the constitutional reforms from the very beginning.[18] In practice this means, that firstly, the Venice Commission, and then the European Commission are engaged in the initial

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[11] Besides numerous examples of democratic backsliding in Hungary, especially politization of state institutions and judiciary, and disturbing similar situation in judiciary in contemporary Poland, our closest neighbors Bulgaria and Romania, both had been struggled (and still are in certain aspects) to achieve the EU expectations in the process of judiciary reform. Stanley, Ben. 2019. Backsliding away? The quality of democracy in Central and Eastern Europe. *Journal of Contemporary European Research* 15(4), 343-353.

[12] Böttger, Katrin and Dominic Maugeais. 2021. Countering the rule of law backsliding in the Western Balkans. *ÖGfE Policy Brief* 11, 1-6, 248.

[13] Council of Europe. *Chapter 23: Judiciary and fundamental rights and chapter 24. Justice, freedom and security* (accessed: 22 November 2022).

[14] Not counting Chapter 35. Other issues, that cover particularly difficult and complex area of negotiations of the Republic of Serbia with the EU, namely the Normalization of relations between Serbia and Kosovo.

[15] EU for Justice: Support for Chapter 23. *Negotiating chapter 23: Legal certainty, easier access to justice and protection of rights of all citizens* (accessed: 22 March 2023).

[16] The European Commission for Democracy through Law, so called the Venice Commission, is the advisory entity on constitutional matters of the CoE. See, Venice Commission. *Through democracy through law* (accessed: 22 March 2023).

[17] For example, Venice Commission. *The rule of law checklist adopted by the Venice Commission at its 106th plenary session* (accessed: 22 November 2022).

[18] For Venice Commission's documents and relevant opinions since 2001, Venice Commission. *Venice Commission's documents and relevant opinions since 2001* (accessed: 18 November 2022).

travaux préparatoires i.e. drafting of the amendments, followed by the experts' opinions and public discussion, all the way through the finalization of the amendments and ultimately their implementation through constitutional laws. If we are to analyze the difference in engagement between these two European entities involved, we could state that the Venice Commission guides the Serbian institutions and normative bodies through the formal requirements but also through substantial changes in the constitutional amending process in order to meet CoE's best standards and practices, while the European Commission monitors the formal fulfillment through the lens of the criteria set out in the benchmarks of negotiating Chapter 23 in order to guide Serbia through accession process.

For these reasons and confronted with the democratic and rule of law backsliding in some member states, in the previous years,[19] the EU sought to deepen its approach to the negotiation process in legal reforms, and thus offered a *New or Revised Methodology* for the Western Balkans in 2020.[20] One of the "most pressing issues" that the European Commission wanted to tackle in a more substantial way was the respect of the rule of law in the candidate and prospective candidate states with the rule of law backsliding.[21] This being said, it is no wonder that in the 2020 Revised Methodology, accepted by the Republic of Serbia,[22] EU asked for a more visible commitment to legal reforms, joining former Chapter 23 and 24 together in a Cluster, symbolically called "Fundamentals". It means that the Cluster cannot be successfully closed until all "Fundamentals" are ensured and respected. This thorough approach oriented towards the substantial understanding and proper implementation of legal reforms, strives to avoid solely formal fulfillment of the enlargement criteria and reforms that exist on paper for the sake of accelerated Europeanization i.e., the European integration process.[23] One of the major tests to this approach are the legal as well as constitutional reforms introduced in the Republic of Serbia.

The connection between the rule of law and the efficient judiciary in the EU

The protection of the rule of law according to the European Commissioner Reding is "in many ways a prerequisite for the protection of all other fundamental rights listed in Article 2 of the Treaty on the EU and for upholding all rights and obligations deriving from the Treaties."[24] Therefore, Europe of values, with the rule of law as a central meta-value, must be preserved at all costs. That is the rationale of every "tool" that was envisaged or implemented in practice,

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[19] Kochenov, Dimitry and Laurent Pech. 2016. Better late than never? On the European Commission's rule of law framework and its first activation. *Journal of Common Market Studies* 54(5), 1062-1074.

[20] Revision of the enlargement process methodology came as a logic response to the "fundamentals first" principle enounced in the European Commission's document from 2015. See, European Commission. Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions, a credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM(2018) 6 (accessed: 27 October 2022).

[21] See Vlajković, *The importance of reshaping*.

[22] The Council announced the application of the revised enlargement methodology to the accession negotiations with Montenegro and Serbia, after both candidate countries expressed their acceptance of the new methodology. See, Council of Europe. *Enlargement: New enlargement methodology will be applied to Montenegro and Serbia* (accessed: 27 October 2022).

[23] See, Peirone, Franco. 2019. The rule of law in the EU: Between union and unity. *Croatian Yearbook of European Law and Policy* 15, 57-98. Dale Mineshima stresses the "the discrepancy between the identification of the rule of law as important within the Community, and at the same time, the lack of a uniform conception for this fundamental principle." See, Mineshima, Dale. 2002. The rule of law and EU expansion. *Liverpool Law Review* 24(1-2), 73-87.

[24] Reding, Viviane. *The EU and the rule of law: What next?* (accessed: 18 April 2023).

starting from the activation of article 7 para. 1 TEU against Poland, infringement procedures before the Court of Justice of the EU (CJEU) against Hungary and Poland and numerous Commission's Communications.[25] One of the core elements of the rule of law is the judicial independence that acts as a fundamental pre-condition for principle of constitutionalism and principle of legality in general that should be ensured in every member state.[26]

To underline its importance for further protection of the rule of law, the CJEU developed its own standards – starting from the 2018 the Associação Sindical dos Juízes Portugueses (ASJP) case.[27] In that particular case the Court underlined the core elements of the concept of judicial independence. For example the independent judiciary entails a "body concerned (that) exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".[28] The CJEU quoted the Venice Commission opinion regarding judicial independence as a key element of the rule of law[29] in its 2019 decisions Commission v Poland regarding the lowering of the retirement age of Polish Supreme Court judges from 70 to 65 and the retirement age applicable to judges of the ordinary Polish courts to 65 years for men and 60 years for women.[30] The same narrative insisting on ensuring judicial independence continued in the following CJEU rulings.

Three years later the CJEU developed its own standards on judicial appointments and composition of judiciary bodies which presuppose "rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."[31] The obligation of member states to ensure that "... any regression of their laws on the organization of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary" was stressed in the now famous 'Repubblika case' before the Luxembourg court.[32] Therefore, the operationalization of the rule of law as a European common value was enforced through the dynamic development of EU case-

[25] One of them being Communication from the Commission (COM) 2014/0158 to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law, 2014 and later on Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union, a blueprint for Action, COM/2019/343 final.
[26] Reding, *The EU and the rule of law.*
[27] Court of Justice of the European Union. Judgement of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117.
[28] Court of Justice, *Associação Sindical,* § 44.
[29] Venice Commission. *Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on act on the organisation of ordinary courts, Opinion no. 904/2017* (accessed: 27 October 2022).
[30] Court of Justice of the European Union. Judgement of 24 June 2019, *European Commission v Republic of Poland*, C-619/18, ECLI:EU:C:2019:531; Court of Justice of the European Union. Judgement of 5 November 2019, European Commission v Republic of Poland, C-192/18, ECLI:EU:C:2019:924.
[31] Court of Justice of the European Union. Judgement of 2 March 2021, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, C-64/16, ECLI:EU:C:2021:153.
[32] Court of Justice of the European Union. Judgement of 20 April 2021, *Repubblika v Il-Prim Ministru*, C-896/19, ECLI:EU:C:2021:311. "In Repubblika, the ECJ introduced a dynamic approach to judicial independence, ruling that Article 19(1) TEU precludes reforms that would reduce such independence". European Parliament. *European Court of Justice case law on judicial independence* (accessed: 23 May 2023).

law responding to the challenges of safeguarding independent, impartial, and efficient judiciaries in the member states. This is even more obvious when considering that another regional court (ECtHR) received 37 appeals concerning judicial independence in Poland in 2020 and 2021. Thus, more stringent standards in order to ensure European values, had to have a proper "spill-over" to the enlargement policies and integration processes of candidate countries.

Constitutional amendments, judiciary, and the new constitutional reality in Serbia

In order to support the argumentation and orientation towards European values, the Republic of Serbia, added a part to the basic principles stated in Article 1 of the 2006 Constitution, as a part of the state definition, and introduced the enhanced and enlarged catalog of Human and Minority Rights in Section II. Moreover, in practice, the Constitutional Court changed the attitude towards the ECHR and the ECtHR decisions, now looking up to when deciding on the merits, but also regarding the methods use.[33] However, even though claiming European values and showing positive development when it comes to the human and minority rights protection, it was clear from the very start that the regulation of the judiciary and judicial power was not completely in accordance with the European standards, as underlined by the Venice Commission in its opinion given in 2007.[34] This meant that the Republic of Serbia had to introduce significant changes to the constitutional judicial organization that covered strengthening the independence of the courts and the independence of public prosecutors.[35]

The road to constitutional changes

Immediately after the adoption of the Constitution in 2006, the Venice Commission expressed concerns regarding potential politicization of the judiciary in its statement in 2007: "the influence of parliament on the judiciary is clearly excessive".[36] This opinion garnered support among academia and legal experts stating that the Constitution allowed the Assembly to wield a disproportionate influence over the process of electing and dismissing judges and public prosecutors.[37]

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[33] Cozzi, Alessia / Sykiotou, Athanassia / Rajska, Dagmara / Krstić, Ivana / Filatova, Maria / Katić, Nikolina / Bard, Petr and Stephanie Bourgeois. 2016. *Uporedni prikaz primene Evropske konvencije o ljudskim pravima na nacionalnom nivou*. Beograd: Savet Evrope, 89-105.

[34] "The main concerns with respect to the Constitution relate, on the one hand, to the fact that individual members of parliament are made subservient by Art. 102.2 to party leaderships and, on the other, to the excessive role of parliament in judicial appointments. Judicial independence is a fundamental prerequisite of a democratic constitutionalism and is also wholly necessary to ensure that the constitution is not merely a paper exercise but will be enforced in practice. Yet the National Assembly elects, directly or indirectly, all members of the High Judicial Council proposing judges for appointment and in addition elects the judges. Combined with the general reappointment of all judges following the entry into force of the Constitution provided for in the Constitutional Law on Implementation of the Constitution, this creates a real threat of a control of the judicial system by political parties. The respective provisions of the Constitution will have to be amended." Venice Commission. *Opinion on the constitution of Serbia adopted by the Commission at its 70th plenary session, Opinion no. No. 405/2006* (accessed: 25 November 2022).

[35] In this paper we focus solely on the judiciary reforms, more on the reforms on public prosecutors see, Nikolic, Aleksa and Ivana Radisavljevic. 2022. You shall not pass: About the constitutional amendments in Serbia. The position of the Public Prosecutor's Office. *SEE: EU Cluster of Excellence in European and International Law* 8, 89-98.

[36] "Involving the Parliament in judicial appointments risks politicizing appointments … elections in the Parliament are discretionary procedures in which political reasons will always play a role". Venice Commission. *Opinion on the provisions of the judiciary in the draft constitution of the Republic of Serbia, Opinion no. 349/2005*.

[37] Mitrovic, Sava. 2022. *Serbia's constitutional amendments: Towards depoliticisation of the judicial branch of government or preservation of the current state?* (accessed: 28 October 2022).

In another EU document – EU Common Position, prior to opening this Chapter in July 2016, the EU Commission underlined the obligation of the Republic of Serbia to amend laws and properly implement legislation, supporting Constitutional amendments application and implementation. The EU clearly set the role of European organizations as an active participants and main monitoring actors by stating, at the beginning of the process, that Serbia needs to consult "the Venice Commission and by involving all relevant stakeholders with the aim to achieve consensus and increase ownership".[38] Therefore, the Republic of Serbia, on behalf of all the relevant stakeholders and institutions involved, offered a first set of constitutional amendments with the aim of depoliticizing the judiciary and strengthening its independence.

The draft amendments were adopted by the Government of Serbia prior to being submitted to the Venice Commission for the present opinion. Even though the draft amendments were heavily criticized by the relevant professional organizations as well as by academia,[39] the Venice Commission welcomed the efforts. Some improvements were acknowledged, namely the abolition of the judges' appointment for probationary period and the exclusion of the representatives of Serbian political entities in the appointment or dismissal of judges. However, the Venice Commission did stress numerous shortcomings or weak points in the draft amendments starting from the composition of the High Judiciary Council (HJC) and High Prosecutorial Council and the role of the National Assembly,[40] the dissolution for incompetence, disciplinary responsibility for judges and prosecutors etc.[41] Criticism was also expressed by The Court of Cassation of the Republic of Serbia[42] and the European Commission in the Report regarding progress of the Republic of Serbia in 2018 and 2019, therefore another round of constitutional amendment re-drafting continued.

Constitutional amendments and the independence of the judiciary in Serbia

After relaunching the initiative to amend the current Constitution, the Committee on Constitutional Affairs and Legislation of the National Assembly of the Republic of Serbia formed a new working group in 2020. Notwithstanding the fact that the work of the previous working group on the 2018 constitutional amendments was quite controversial (some would even say just a cover),[43] a new working group based its work on the final version of this amendments as well

[38] Council of Europe. *European Union common position. Chapter 23: Judiciary and fundamental rights* (accessed: 25 November 2022).

[39] Association of Judges of Serbia. *Announcement on the draft amendments to the constitution of Serbia: It is necessary to involve eminent professors of constitutional law in the process of amending the constitution* (accessed: 26 November 2022); Association of Judges of Serbia. Conference on the role of Prominent Lawyers in Judicial Councils (accessed: 26 November 2022); Violeta Beširević described the 2018 draft amendments as "A Tool for the Final Demise of Judicial Independence". See more: Beširević, Violeta. 2018. The draft amendments to the Serbian constitution: Populism before judicial independence. *VerfBlog*, 24 April 2018.

[40] As with the HJC, it is important that the HPC not be dominated by the current majority in the National Assembly. See more: Prelić, Maja. 2022. Ustavne promene u Republici Srbiji sa osvrtom na radni tekst amandmana Ministarstva pravde na ustav Republike Srbije u delu koji se odnosi na pravosuđe. *Sveske za Javno Pravo* 31, 27-34.

[41] Venice Commission. *The opinion on the draft amendments to the constitutional provisions on the judiciary adopted by the Venice Commission at its 115th plenary session, Opinion No. 921/2018* (accessed: 15 November 2022).

[42] Analysis of the Working Draft of Amendments to the Constitution of Serbia as released by the Serbian Ministry of Justice, Republic of Serbia Supreme Court of Cassation Su I-7 9/2018-1 on 12 February 2018. The Court accentuated that "the proposed amendments would also diminish constitutional guarantees of judicial independence" having in mind that it was envisaged that the provision that contained the prohibition of influencing a judge in the exercise of their judicial office was deleted by the draft amendments.

[43] Petrović Škero, Vida and Ana Zdravković. *Radni izveštaj: Procedura predlaganja ustavnih amandmana* (accessed: 25 November 2023).

as on opinions and reports received from the relevant European bodies. In mid-2021 public consultations were held with relevant stakeholders.[44] Despite the dynamics of the consultation period,[45] by the end of September 2021, the second tour of the draft Constitutional amendments was sent to the Venice Commission for its opinion.

When it comes to the new set of constitutional amendments, from a substantive point of view, they indeed brought about some key changes and improvements in the judiciary.[46] This is especially the case when it comes to the election of judges, which is one of the most controversial issues in the field of the judiciary in Serbia.[47] With the aim to depoliticize the process of appointing new judges, the composition of the High Judicial Council was changed. Now, the National Assembly appoints four members by a 2/3 majority compared to the previous eight members. In addition, the Minister of Justice is no longer an *ex officio* member of the HJC.[48] By these means, the possibility of politicization of judicial appointments was reduced, especially in the process of selecting judges in courts of lower jurisdiction.[49] Secondly, the jurisdiction of the HJC was expanded, being now the only judicial body authorized to appoint judges, court presidents and the president of the Supreme Court. The exclusive right of this judicial entity to appoint judges guarantees to a much greater extent selection based on objective and substantive criteria, instead of political criteria and motivations. Finally, the three-year trial period for appointments was abolished, and now judges are considered appointed until they reach the end of their working life.[50] On the other hand, what remains unresolved regarding the Constitution

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[44] Seven consultations were held with the representatives of judges, public prosecutors, professional associations, law professors, as well as members of civil society, the EU delegation in Serbia, of the CoE, the OSCE etc. Venice Commission. *Opinion on the draft constitutional amendments on the judiciary and the draft constitutional law for the implementation of the constitutional amendments adopted by the Venice Commission at its 128th plenary session, Opinion no. 1027/2021, no. 1047/2021* (accessed: 15 November 2022).

[45] According to some professors "the highest possible consensus between representatives of the profession… executive power… professorships... and science… was achieved" while others, such as one of our judges of the Court of Appeal, asks "is the (consultation) process inclusive and transparent or is the working group an alibi?". See, Petrov, Vladan. 2022. Na korak od promene ustava o delu o pravosuđu. *Arhiv za Pravne i Društvene Nauke* 1, 75-79, 79; Djurdjić, Savo. 2022. *Da li će i kada sudstvo u Srbiji biti zaista nezavisno?*, in *Pravno-političke rasprave o pravosuđu*, edited by Jovanović, Miodrag and Teodora Miljojković. Beograd: CEPRIS, 17-33, 29-31.

[46] Some would say that "modest reforms" were "formal progress regarding constitutional amendments" describing the period between October 2020 – June 2011 as "small steps and unsolved problems". See, Popović, Sofija and Aleksandar Ivković. 2021. *Small steps and unsolved problems: The report on reforms in the area of the rule of law in Serbia*. Belgrade: Centre for Contemporary Politics.

[47] In 2010, the European Commission referred critically to the reappointment procedure of the judges and prosecutors that was carried out in the second half of 2009 and beginning of 2010, led by the Serbian Ministry of justice, stating that "the reappointment procedure for judges and prosecutors was carried out in a non-transparent way... The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which … created a high risk of political influence." European Commission. *Serbia 2010 progress report accompanying the communication from the Commission to the European Parliament and the Council, enlargement strategy and main challenges 2010-2011*, SEC (2010) 1330 (accessed: 25 November 2022). The same opinion is shared by the members of academia, judiciary, legal professionals as well as public in Serbia. See, Rakić-Vodinelić, Vesna / Knežević Bojović, Ana and Mario Reljanović. 2012. *Reforma pravosuđa u Srbiji 2008–2012*. Beograd: Pravni Fakultet Univerziteta Union u Beogradu / Službeni Glasnik; Dabetić, Valerija. 2020. *Uticaj političke elite na očuvanje (ne)stalnosti sudijske funkcije u Srbiji*, in *Sudstvo kao vlast*, edited by Jovanović, Miodrag and Ana Zdravković. Beograd: Dosije Studio, 55-72; Marinković, Tanasije. 2009. O ustavnosti opšteg reizbora. *Anali Pravnog Fakulteta u Beogradu* 56(1), 283-291.

[48] On the importance of the content of HJC and other possible solution of the election of judges see, Marković, Djordje. 2017. Nezavisnost sudstva u Republici Srbiji: Predlozi za promenu ustavnog okvira za izbor sudija i prestanak sudijske funkcije. *Serbian Political Thought*, 201-227.

[49] As the Venice Commission noted: "elections by a parliament are discretionary acts and political considerations will always play a role". Venice Commission. *Opinion on the constitution of Serbia.*

[50] Mitrović, Sava and Anesa Omeragić. 2022. Breaking down Serbia's 2022 constitutional amendments. *European Policy Centre Blog*, 16 December 2021.

itself relates to: a) the question of the conditions for the selection of judges, which will not be prescribed by the constitution, b) the question of the budgetary independence of the Supreme Court, c) the absence of the Constitutional Court's reform and g) the potential abuse of the Commission which, only in exceptional cases, should be the last instance for the selection of members of the HJC.[51]

Summing up the pressing challenges that might represent the risk for the proper constitutional reform in the area of judiciary, the Venice Commission advised the following: in order to avoid for the anti-deadlock mechanism to become the rule for politicized appointments, the composition of the Commission should be reconsidered; the reduction of judges in the composition of the HJC should be questioned; eligibility criteria should be added when it comes to two-thirds majority requirement in the parliamentary vote.[52] The Commission went on to underline the importance of further legislative development of the amendments stressing that "current constitutional reform is a necessary and important first step in the process, but does not constitute the completion of this process".[53]

The National Assembly of the Republic of Serbia adopted the Act on the Changes to the Constitution of the Republic of Serbia on November 30th 2021 with a 2/3 majority, and in accordance with Article 203 of the Serbian Constitution, the National Assembly scheduled an affirming referendum, that took place on the January 16, 2022, where Serbian citizens voted for constitutional changes.[54] Despite strong criticism that described the drafting of amendments as "an unsuccessful, lacking expertise even sinister and harmful in many ways, adventure of the Ministry of Justice", the work of government representatives as "patronage over the judiciary",[55] and the motivation of the constitutional amendments' drafters as "inauthentic",[56] the referendum was successful. This means that now the focus should be on what many authors warned about: the procedural aftermath,[57] that is, the success of the legislative implementation of the adopted solutions. This further means that for these changes to truly reconcile the decades-long discontinuity between the *de jure* and *de facto* state of judicial independence in Serbia, their adoption must not be reduced to fulfilling European conditions only on paper (i.e., "ticking the boxes").

The (possible) aftermath of constitutional amendments

What changes did the constitutional amendments breath into the Serbian constitution? We could start this part by asking ourselves what the pros and cons of the adopted amendments are. As

[51] Simović, Darko. 2022. Ustavni amandmani iz nužde: Kritički osvrt na ustavnu reformu sudske vlasti. *Zbornik Radova Pravnog Fakulteta u Novom Sadu* LVI(1), 85-119; Djurdjić, *Da li će i kada*.
[52] Venice Commission. *Opinion on the draft constitutional amendments.*
[53] Venice Commission, *Opinion on the draft constitutional amendments.*
[54] Unofficial results say 61.84% voted 'yes' in the referendum on changes in the election of judges and prosecutors, which Serbia says should boost the independence of courts and the country's EU bid. However, turnout was estimated at a little over 30%. See, Trkanjec, Zeljko. 2022. Serbs approved constitutional changes in referendum. *Euractiv*, 18 January 2022.
[55] Beljanski, Slobodan. 2018. Patronat na pravosuđem: Povodom radnog teksta amandmana na ustav Republike Srbije. *Glasnik Advokatske Komore Vojvodine. Časopis Za Pravnu Teoriju i Praksu* 78(1-2), 70-89.
[56] Hasanbegović, Jasminka. 2022. *Može li promena ustava da promeni srpsko pravosuđe nabolje?*, in *Pravno-političke rasprave o pravosuđu*, edited by Jovanović, Miodrag and Teodora Miljojković. Beograd: CEPRIS, 7-16, 8.
[57] Miljojkovic, Teodora. 2022. The constitutional referendum in Serbia, judicial independence and the EU accession process. *VerfBlog*, 17 Januar 2022.

D. Simović noticed, and we can agree, formal comparison of old and new constitutional solutions indeed gives the impression that the judicial independence guarantees have been improved.[58] This particularly concerns the election of judges, the abolishment of a three-year mandate of judges, and the transfer of the jurisdiction for the appointment of all judges and court presidents to the HJC. In addition, the composition of the HJC has been depoliticized and the constitutional guarantees for the independence of judges have been strengthened. Moreover, the permanence of the judicial function has been ensured, the reasons for dismissal of judges are clearly stated while their position is guaranteed in a more firm and precise manner.[59]

On the other hand, constitutional revisions cannot be analyzed without observing the whole picture of the reform process. This entails an overview of the shortcomings that, without a doubt, exist. Firstly, a constitution can be revised in different ways – by adopting the amendments, enacting a special constitutional law, or by enacting a new constitution. For some reason, in this case, these techniques were combined. Beside the fact that the applied "hybrid" technique is not so common when it comes to the continental legal tradition, it also resulted in weaker legislative solutions and editorial weaknesses.[60] We will name a few blatant examples. Most of them concern the possibility for continuation of implicit political influence on the HJC. According to the Center for European Politics analysis, the provisions on budgetary autonomy of the HJC are missing and there is a danger that the anti-deadlock mechanism envisaged in the introduction of the Commission[61] will become the rule and allow the politicized appointment of members to the HJC.[62] Other NGOs, such as YUCOM (Lawyer´s Committee for Human Rights), Belgrade Centre for Human Rights as well as CEPRIS (Center for Judicial Research) especially point out the "problematic" role of a 'prominent lawyer' that was newly introduced as one of the members of the HJC (as well as HJP). 'Prominent lawyer' is a legal standard, that is not clear nor concise enough and therefore, again, susceptible to political influence and political pressure.[63]

Furthermore, on February 9, 2023, a set of laws regulating the judiciary, in accordance with the amendments introduced, was adopted by the National Assembly of the Republic of Serbia. As the Venice Commission rapporteurs stated, these reforms, "have the potential to bring about significant positive change in the Serbian judiciary".[64] However, the extent of change depends on the will and efficiency of stakeholders involved. Aleksa Nikolić draws attention to the fact that the method of appointing judges, that is in the focus of the novel legislation related to judiciary, can lead to the covert influence of legislative and executive power on judicial organs. This may violate the independence of the judiciary and lead to the alienation of judicial power from

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[58] Simović. *Ustavni amandmani*, 114.
[59] Simović. *Ustavni amandmani*, 114.
[60] Pejić, Irena. 2022. Constitutional referendum and judicial reform in Serbia. *Zbornik Radova Pravnog Fakulteta u Nišu* 94(LXI), 77.
[61] The Commission is envisioned as a 'back-up' solution if the members of the HJC are not elected in the National Assembly with the said majority. Members of the Commission will be composed of President of the Constitutional Court, President of the Supreme Court, Speaker at the National Assembly, Ombudsman and Supreme Public Prosecutor.
[62] Mitrović, *Serbia's constitutional amendments.*
[63] Nikolić, Aleksa. 2022. *Teze i antiteze ustavnih amandmana u oblasti pravosuđa*, in *Sudski postupak, pravda i pravičnost*, *zbornik radova 35. susreta Kopaoničke škole prava*, edited by Perović Vujačić, Jelena, Beograd: Kopaonička škola prava, Slobodan Perović, 681-696, 693.
[64] Sremčević, Katarina. 2022. Judicial reforms after the change of the Serbian constitution: Potential for both reduction and institutionalization of political influence on the judiciary. *European Western Balkans*, 31 December 2022.

citizens.[65] The rapporteurs of the Venice Commission, Regina Keener, and Martin Kuijer underline the importance of several factors pointing out to "the behavior of the various stakeholders and the legal culture in which they operate", as well as avoidance of "corporatism in judiciary" through accountability.[66]

If we observe this other stage in the constitutional evolution process as another opportunity to fix the flaws and shortcomings as well as to cover the legal *lacunae* or constitutional articles leaving space partially and adequately for political manipulation, we must not forget the importance of inclusive consultations with all relevant stakeholders (including the political opposition and civil society, as well as experts and academia). As it turned out in the case of other Western Balkan countries, institutional and legal changes driven by the EU (the so called *top-down approach*) providing extended support for the rule of law reform, have had limited influence.[67] One of the reason behind this is that these changes, in the case of non-consolidated democracies, need to be conducted together with the *bottom-up approach soft socialization mechanisms* such as the process of building trust and confidence in political system and institutions, the encouragement for greater social and political participation of the citizens, development of stronger legal and political culture, cooperation with the civil society etc.[68] So the crucial role would be on Serbian political community and its willingness, preparedness, and readiness to enforce the introduced amendments in accordance with the judicial and constitutional culture i.e. in the spirit of the constitution, its identity together with its (European) values, with special emphasis on the rule of law.[69]

Conclusion

From an outside perspective, Serbia did take a step forward towards the changes supported by the EU and the requirements of the accession negotiations under Chapter 23 (or Cluster 1 under the so-called new methodology). The adoption of the constitutional amendments was commended by the EU stating that it "welcomes the completion of this important step in the Constitutional reform with a view to strengthening the independence of the judiciary". Europeanization had numerous positive economic, political, and most importantly, ideological impacts on this democratic transformation. European organizations and actors – the OSCE, the CoE, the Venice Commission evidently participated in the legal and constitutional evolution by guiding and monitoring the fulfillment of both formal and substantive criteria. The EU will continue to follow the process and be involved in the following steps, strengthening the Europeanization factor every step of the way. However, together with the Venice Commission, it brought attention to the most important issue, the effective implementation of laws to make sure the amendments really "breathe new life" into Serbia's legal order.[70]

Furthermore, analyzing the adoption process of constitutional amendments in Serbia in the context of the fulfillment of the European political criteria, namely – the Rule of Law, we have

[65] Sremčević, *Judicial reforms.*
[66] Sremčević, *Judicial reforms*.
[67] Kmezić. *EU rule of law promotion*, 160-161.
[68] Kmezić. *EU rule of law promotion*, 160-161; Ağir, *Rethinking security in the Balkans*, 11.
[69] Marković, Djordje. 2022. Zašto i šta menjamo u ustavu. *Arhiv za Pravne i Društvene Nauke* 1, 81–82, 82.
[70] European Union External Action. *Serbia: Statement by the spokesperson on the referendum about constitutional amendments* (accessed: 16 November 2022).

to bear in mind the criticism received from the public as well as from experts regarding the fact that independent and non-governmental bodies were not included in the process.[71] Likewise, the public, especially the citizens, were not adequately informed by means of a public debate, which also raises the issue of whether the substance of the changes was understood properly by those voting in their favor?[72] This additionally raises the issue of transparency of said procedures in general, as well as the future effectiveness and implementation of the new norms. Additionally, the strong tendency of the government to control this process through many attempts of the politicization of the constitutional amendments hindered the democratic improvements. Finally, we point out the underdeveloped legal and political culture and a questionable quality of democracy in which the uncritical adoption of European solutions, which have proven to be effective in countries with a strong democratic tradition, can be extremely destructive, and often abused in different ways.[73]

All of this brings us back to our initial question, whether Serbia adopted the constitutional amendments just to "check another box" on its way to the formal fulfillment of the criteria necessary for further progress in the European integration process, having in mind that both the EU and the Venice Commission supported the adoption of the amendments prior to the referendum, or was there an actual intention to change the flawed judicial culture and institutional environment present for decades?[74] It seemed that the adoption of the constitutional amendments was the easy part. Therefore, as one of our colleagues rightfully states, "the devil is", indeed, "in the implementation".[75] Consequently, the current constitutional reform is just the first step in the constitutional revision process. It only opened the Pandora's box of unresolved issues of the decades-long judicial culture and discrepancies in the *de jure* and *de facto* position of judges as well as in the proper "checks and balances" principle according to the European rule of law criteria. Rightfully so, the Venice Commission concludes that "*… the current constitutional reform … does not constitute the completion of this process. The legislative changes through a holistic reform of the relevant organic laws*" are crucial for the positive outcome of this process.[76]

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[71] See for example the proposals made by non-governmental organization, CEPRIS. *CEPRIS-ov model amandmana za promenu ustava* (accessed: 16 November 2022).
[72] Miljojkovic, *The constitutional referendum*.
[73] Simović, *Ustavni amandmani*.
[74] One of the problematic parts that remained is "the election by high quorums needed in the National Assembly for the election of prominent lawyers to the HJC (five members) and to the HPC (four members) may lead to deadlocks in the future. There is a danger that the anti-deadlock mechanism that is meant to be an exception will become the rule and allow politicized appointments…", Venice Commission. *Urgent opinion on the revised draft constitutional amendments on the judiciary issued pursuant to Article 14a of the Venice Commission's rules of procedure* (accessed: 24 November 2021); Prelić. *Ustavne promene*, 29.
[75] Venice Commission, *Urgent opinion*.
[76] Council of Europe. *Serbia: Revised constitutional amendments on the judiciary meet most of the key recommendations, their full and prompt implementation is now crucial, says Venice Commission* (accessed: 25 November 2022).

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