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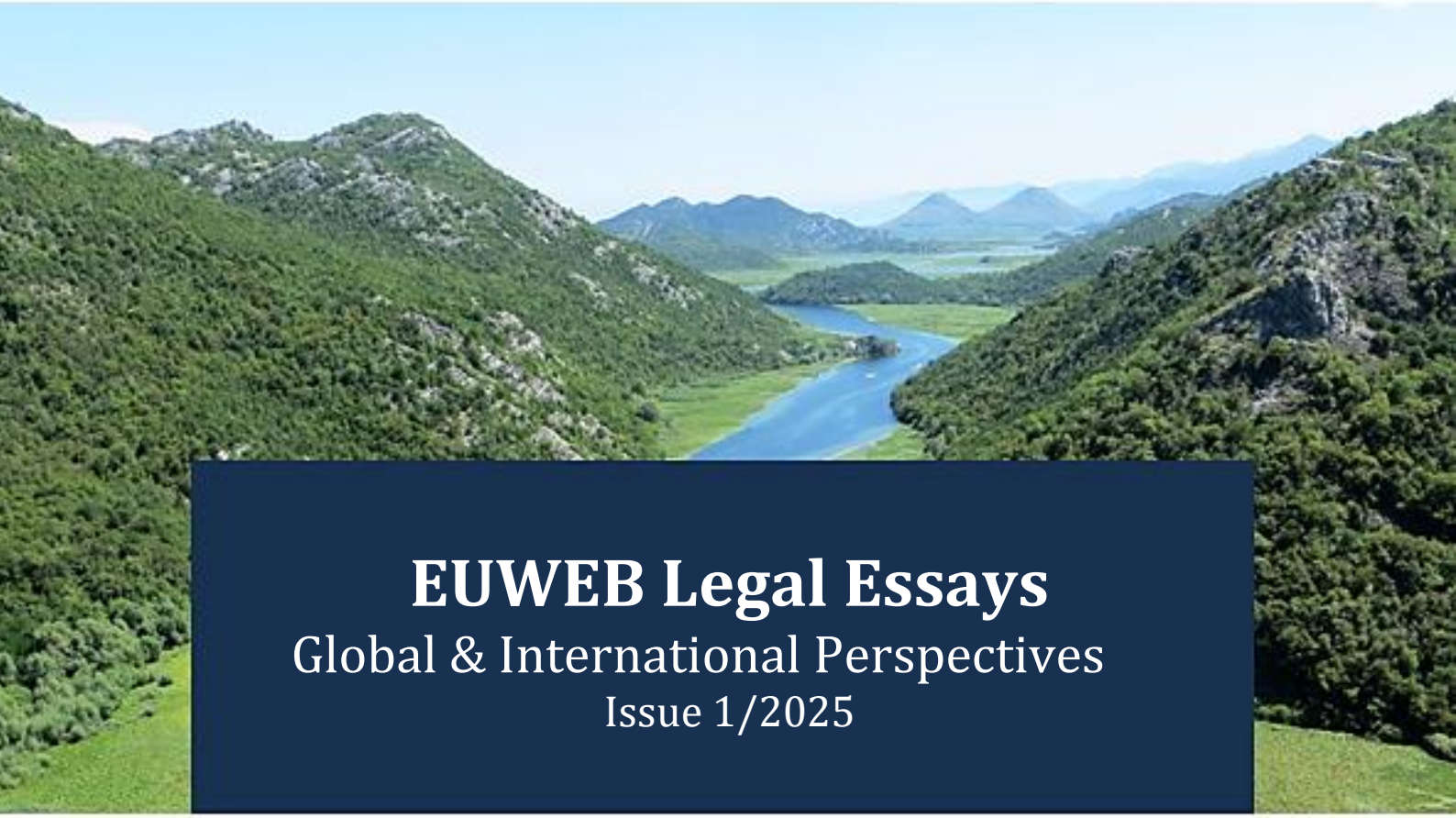

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Index
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COMMENTS

THE RIGHT TO AN INDEPENDENT AND IMPARTIAL COURT AS A PRESUMPTION OF THE RULE OF LAW IN LIGHT OF THE CONSTITUTIONAL CHANGES IN THE REPUBLIC OF SERBIA

By Darko Simović[*] and Radomir Zekavica[*]

1. Introduction

Achieving the rule of law is a long and complex process that has as its main goal the limitation of state power by its own law. At the same time, the right that the government should limit should be in the function of protecting the fundamental values of a democratic society, especially human rights and freedoms. Thus, the rule of law becomes the only possible framework for the protection of individual and collective rights, and as such, a necessary precondition for the establishment of a truly democratic order of government. In order for it to be realized, a several key principles are necessary. Among them is the principle of separation of powers, according to which the judicial power should be separate and independent from the legislative and executive powers. As such, she can be a guarantor of the objective application of law and someone who can enable effective control of the constitutionality of the work of the legislative and executive authorities. Therefore, it should not be surprising that the establishment of an independent judiciary is imperative for a modern democratic state that strives to establish and preserve the rule of law.

More than a decade ago, the process of constitutional revision in Serbia was started with this goal in mind, which was formally completed at the beginning of 2022. The trial, three-year mandate of judges was abolished, while the election of all judges and court presidents was transferred to the jurisdiction of the *High Council of the Judiciary*. The composition of the *High Council of the Judiciary* was depoliticized and the constitutional guarantees of the independence of judges were improved, among other things, by ensuring the permanence of the judicial function, constitutionalizing the reasons for dismissing judges and more precisely guaranteeing their immovability. Nevertheless, the majority of legal scholars remained critical or at least visibly restrained regarding the scope of the implemented constitutional changes. In addition to the deficient democratic legitimacy of the convening of the National Assembly that decided on constitutional changes, it is emphasized that the constitutional guarantees of the independence of the judiciary were only partially improved with the creation of new and hidden channels for political influence. Hence, the contextual analysis of the content of the constitutional

DOUBLE BLIND PEER REVIEWED ARTICLE

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amendments indicates that the implemented constitutional reform cannot have positive effects on improving the rule of law in Serbia.

The goal of this paper is precisely the analysis of these issues, a critical review of constitutional reforms, but also an analysis of the judicial practice of the Constitutional Court (CC) of the RS, which in a large number of decisions dealt with the right to a fair trial and within that, the right to an independent and impartial court. Before that, we will first point out the general importance of independence and impartiality of the judiciary for the rule of law, as well as possible interpretations of the real scope of these principles.

2. On the Importance of an Independent and Impartial Judiciary for the Establishment and Preservation of the Rule of Law

The question of the position of the judiciary was one of the central ones in the historical effort to establish the rule of law. A typical example is the history of constitutionalism in England, which shows that the key struggle was waged precisely in the direction of establishing the independence of the judiciary, the supremacy of the common law system, and curbing the aspirations of the English rulers, especially James I, to subordinate the judges to their will and make them loyal servants of the king. Two different interpretations of the constitutional tradition and the position of the ruler marked the theoretical and political conflicts in the history of English constitutionalism, especially in the first half of the 17th century. One, which was based on the thesis of the supremacy of the ruler and the natural law foundation of absolutist power, whose representatives were James I and Francis Bacon, and the other, which was based on the idea of the supremacy of common law, which was consistently represented by judge Edward Coke. The outcome of these conflicts was the victory of ideas about the supremacy of common law and the establishment of a modern constitutional monarchy in England with the Glorious Revolution The idea of an independent judiciary was already fully affirmed and applied in practice, thus directing the history of English constitutionalism in the direction of the rule of law system. The Act of Succession to the Throne (Act of Settlement) from 1701 served for this purpose, which established that judges have a fixed salary and that they retain their position as long as they are well governed. In addition, the Act provided that the Crown could remove judges only on the proposal of both Houses of Parliament[1].

The further development of the English constitutional legal tradition additionally strengthened and determined the limitations of power by law, which resulted in the shaping of the concept of the rule of law and its peculiarities in the work of Albert Ven Dicey. One of the basic principles of the rule of law that he cites is the fact that all constitutional principles are the result of court decisions in which the rights of citizens are decided in specific cases brought before the court. Therefore, the English constitution is not a set of abstract norms and necessary protection of basic rights and freedoms, limitation and control of political power, but rather an expression of the practical realization of these goals through judicial activity in the system of precedent law[2].

With the latter authors, the role of the independent judiciary is even more prominent. Thus, Harold Lasky reduces the rule of law to the independence of the judiciary and the discretionary power of judicial decision-making. Laws, as Laski points out, do not mean what the ministers think they mean. The true meaning of the law and the intention of the Parliament should be determined by a body composed of independent persons,

[1] H.J. LASKI, *Parlamentary Government in England*, George Allen and Unwin, London, 1950, p. 360.
[2] A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, Macmillan&Co LTD, London, 1931, pp. 191-192.

disinterested in the content of the judgment they pronounce, and who, thanks to many years of experience, are familiar with the rules for judging and determining the legislator's intention in each individual case[3]. Laski is one of the first to recognize and emphasize the importance of other (not just legal one) factors that can influence the actual content of the role of the judiciary and the very idea of its independence. And one of the most significant such factors is the political beliefs of judges, which at the time Laski lived and wrote played a crucial role in the way judges, using their power of discretionary decision-making, created public policy directions in the direction that corresponded to their political beliefs. We are talking about the time when the concept of the welfare state and intensive social state policy modified the traditional common law doctrine, which viewed the role of the state in accordance with the principles of liberal individualism and laissez faire economics. In this sense, Laski carries out a kind of deconstruction not only of the concept of the rule of law (anti-rule of law doctrine), but also of the understanding of the role of the judiciary itself and its dependence, pointing to what is already widely recognized today in the phenomenon of judicial activism and the significantly greater role of judges in creation, not just the application of rights.

This interpretation of the role of judges was significantly influenced by legal theoretical thought, especially legal realism. His key idea rests on the conviction of the decisive role of the judiciary in the process of law creation, which was and remains a common practice in the conditions of the precedent character of the Anglo-Saxon legal system. Thus, in the works of Karl Llewellyn, Jerome Frank, Felix Cohen, the role of the court in the creation of law is strongly emphasized. What's more, the precedent character of the judicial decision-making of the European Court of Human Rights brings the European legal area closer to the peculiarities of the Anglo-Saxon legal system and turns the role of this court into the role of a true legislator who, through its interpretations, enables the application of the European Convention in practice.

All of this clearly indicates the general importance of the judiciary and judicial decision-making in the process of application and creation of law, so the issue of independence of the judiciary, all the more, arises as a question of crucial importance for the successful functioning of the rule of law. However, the key question is whether the independence of the judiciary in the sense that this principle is usually given is a sufficient guarantee that judicial decision-making will be in the function of the rule of law. In other words, is it enough to provide external mechanisms to protect the independence of the judiciary, that is, the organizational and functional independence of the judiciary, or is something more needed? It is precisely the principle of judicial impartiality that is a necessary supplement to the principle of independence, because all protection mechanisms will not be sufficient if the judge himself does not have built integrity, ability and willingness to resist all influences that may threaten the objectivity of his decision-making. Unlike the principle of judicial independence, which is primarily dedicated to preventing all possible harmful influences of the executive and legislative powers, the principle of impartiality is dedicated to the issue of the personal integrity of the judge himself and his ability to apply the law objectively and fairly from the position of an independent arbitrator. In the following text of this paper, we will present the constitutional solutions of these two principles and point to the relevant practice of the Constitutional Court of the RS in relation to these issues, and then give an overview of the result of constitutional changes in the field of Serbian judicial reform, guarantees of judicial independence and their real scope.

[3] H. LASKI, *op.cit*., p. 361.

3. The Right to an Independent and Impartial Court. Constitutional Solutions and Constitutional Judicial Practice in the Republic of Serbia

The right to an independent and impartial court is a key component of the right to a fair trial, and in order for it to be realized, the first and basic assumption is the legal foundation of the court. The court must not be established on a case-by-case basis by acts of the executive power, but must be based on general and abstract legal norms, in the form of a law. Therefore, the court is constituted by law, as a permanent state body, in order to prevent the influence of the executive power or the parties to the dispute. In accordance with this guarantee, the Constitution of Serbia (CS) expressly provides that the establishment, abolition, types, jurisdiction, areas and seats of courts, composition of courts and proceedings before courts are regulated by law (see art. 143, para. 1). Also, the Constitution prohibits the establishment of immediate, temporary or extraordinary courts (art. 143, para. 3).

A court established by law must be independent. The independence of the judiciary implies the prohibition of the influence of political authorities on the exercise of judicial function. Hence, the constitutional solutions should ensure the organizational and functional independence of the judicial power in relation to the executive power. The independence of the judiciary is realized in two ways, as independence of courts (real, ie functional independence) and as independence of judges (personal independence).

The independence of the judiciary is ensured through the principle of separation of powers (see art. 4, para. 4). The Constitution operationalized that principle with a series of constitutional guarantees. Judicial power belongs to courts that are independent (art. 142, para. 1), whereby the court's decision can be reviewed only by the competent court in a procedure prescribed by law, as well as by the Constitutional Court in a constitutional appeal procedure (art. 142, para. 3). Guarantees of the personal independence of judges have also been established. The judge is independent and judges on the basis of the Constitution, confirmed international treaties, laws, generally accepted rules of international law and other general acts, adopted in accordance with the law, whereby any undue influence on the judge in the exercise of the judicial function is prohibited (art. 144). The Constitution provides for other guarantees of an independent judiciary: permanence of the judicial function (art. 146), immovability of judges (art. 147), immunity and incompatibility of the judicial function (art. 148). A special body, the High Council of the Judiciary, was established, an independent state body that ensures and guarantees the independence of courts, judges, presidents of courts and lay judges (art. 150).

While the independence of the court refers to the provision of external mechanisms to protect its position in the system of government, the impartiality of the court implies the absence of prejudice, favor or personal interest. The state should provide effective mechanisms for assessing whether the principle of court impartiality has been violated. If the principle of impartiality of the court was violated in a specific case, the judge would have to be disqualified. According to the Constitutional Court (CC), "*the ratio legis of the institute of disqualification of a judge is to ensure that a judge, who is otherwise abstractly capable of performing the function of a judge in any criminal proceeding, does not participate in the proceedings regarding a certain criminal matter due to the existence of a certain reason that casts doubt on his impartiality. It can be a certain personal interest of the judge in the matter itself, the existence of a certain relationship with the*

parties and other participants in the criminal proceedings or the exercise of judicial or non-judicial functions in the same criminal proceedings".[4]

When deciding whether there was a violation of the right to an impartial trial, the Constitutional Court followed the standards of the European Court of Human Rights (ECHR) [5]. In this sense, the right to an impartial court implies the absence of prejudice or a predetermined attitude towards the parties, whereby the existence of impartiality is assessed by applying a subjective and objective test[6]. The test of subjective impartiality examines the behavior of a specific judge, i.e. the existence of personal prejudices of the judge who acted/decided in a certain case, while the test of objective impartiality determines whether the court, among other things and its composition, provided sufficient guarantees to exclude justified doubts about his impartiality[7]. The test of objective impartiality should determine whether, regardless of the behavior of a certain judge, there are facts that may cast doubt on the impartiality of the court, whereby the applicant's opinion is important, but not decisive. The key is whether the suspicion can be considered objectively justified. Also, according to the practice of the European Court of Human Rights, the fact that a certain judge had different procedural roles in certain stages of the procedure may in certain circumstances call into question the impartiality of the court, which is evaluated in each specific case.

In one of the cases, the Constitutional Court pointed to the previous practice of the European Court of Human Rights, according to which that court moved from a purely objective concept based on the strict separation of the function of prosecution, investigation and trial, to a concept that is more subjective, because it presupposes an analysis of the circumstances of the specific case in in which the judge did not respect the separation of said functions[8]. The main characteristic of the first period is the effort of that court to apply a strict definition of objective impartiality to remove any risk that, due to the previous performance of the function of prosecution or investigation, would call into question the judge's bias in the trial phase[9]. On the other hand, the current procedure of the European Court of Human Rights is characterized by the requirement that the objective violation of the principle of separation of functions of prosecution, investigation and trial must be accompanied by biased behavior of the judge. it is a decisive element in the assessment of impartiality[10]. In other words, the former abstract assessment was replaced by an assessment of the circumstances of the specific case, whereby the defendant's point of view is taken into account, but it has no decisive significance[11].

For example, the Constitutional Court established a violation of the right to an impartial court, because a judge who is in the fourth degree of kinship with the

[4] CC, Už-12021/2017, 15.10.2020.
[5] CC, Už-452/2015, 8.11.2018.
[6] European Court of Human Rights, Judgement of 1 October 1982, Application no. 8692/79, *Piersack v. Belgium*, para. 30.
[7] European Court of Human Rights, Judgement of 24 February 1993, Application no. 14396/88, *Fey v. Austria*, para. 30; European Court of Human Rights, Judgement of 21 December 2000, Application no. 33958/96, *Wettstein v. Switzerland*, para. 42.
[8] CC, Už-12021/2017, 15. 10. 2020.
[9] European Court of Human Rights, Judgement of 26 October 1984, Application no. 9186/80, *De Cubber v. Belgium*, paras. 24-30.
[10] European Court of Human Rights, Judgement of 24 May 1989, Application no. 10486/83, *Hauschildt v. Denmark*, para. 50; European Court of Human Rights, Judgement of 7 August 1996, Application no. 19874/92, *Ferrantelli and Santangelo v. Italy*, para. 58.
[11] European Court of Human Rights, Judgement of 25 July 2002, Application no. 45238/99, *Perote Pellon v. Spain*, para. 44.

defendant's attorney participated in the adoption of the disputed decision as a member of the appeals panel, which was the reason for the exclusion of that judge from the trial by force of law[12]. The Constitutional Court also established a violation of the right to an impartial court in the case of the participation of the same judge in making appeal and review decisions[13]. On that occasion, the Constitutional Court pointed to the practice of the European Court of Human Rights, which referred to the fact that the same judge participated in the decision of the District Court, which annulled the first-instance verdict and sent the case back for retrial. Also, the fact that the same judge, in two separate but factually and legally connected proceedings, first participated in the rendering of the first-instance verdict, which was annulled, and then in the second procedure in the rendering of the second-instance verdict, was sufficient for the European Court of Human Rights to establish a violation the right to a fair trial. The fact that the judge did not take part in making the decision challenged by the appeal, since he had already formed an opinion on the merits of the request, is irrelevant[14].

An illustrative example of the violation of the right to an impartial court is related to the actions of a judge who simultaneously served as a member of the High Council of the Judiciary[15]. Namely, one of the judges voted at the session of the *High Council of the Judiciary* to make a decision to revoke the immunity of an elected member of the *High Council of the Judiciary* from the ranks of judges and approve the detention order. Therefore, participation in making a decision on immunity could have created a certain prejudice about the guilt of the applicant of the constitutional complaint. After that, that judge was a member of the panel of the Court of Appeals, which issued the challenged judgment of the Court of Appeals. The Constitutional Court therefore concluded that the multiple involvement of the judge in the specific case and the decision in which he participated, are circumstances that cause suspicion of bias[16]. Also, the Constitutional Court noted that in the proceedings before the High Council of the Judiciary, when deciding on the immunity of a member of the High Council of the Judiciary, the members of the Council are, among other things, familiar with the collected evidence from which the relevant degree of doubt for conducting the proceedings arises. From that fact comes the existence of reasons to doubt the impartiality of the judge who, thanks to his participation in the procedure for granting permission for the criminal prosecution of a person - a member of the Council, had the opportunity to thus acquire an appropriate prejudice for a specific case.

4. Constitutional Revision and Reform of the Judiciary in the Republic of Serbia. A Critical Review of the Constitutional Guarantees of the Independence of the Judiciary

Already during the adoption of the 2006 Constitution, it was clearly stated that it was not an act that would round off the process of constitutional consolidation of the Republic of Serbia[17]. The weaknesses of the Constitution in the section on the judiciary called into

[12] CC, Už-8132/2015, 5. 04. 2018.
[13] CC, Už-452/2015, 8. 11. 2018.
[14] European Court of Human Rights, Judgement of 27 November 2012, Application no. 43947/10, *Golubović v. Croatia*, para. 57.
[15] CC, Už-12021/2017, 15. 10. 2020.
[16] European Court of Human Rights, *Perote Pellon v. Spain*, cit., paras. 46-48.
[17] See R. MARKOVIĆ, *Ustav Republike Srbije iz 2006 – kritički pogled*, in *Anali Pravnog fakulteta u Beogradu*, n. 2, 2006; M. PAJVANČIĆ, *O sudskoj vlasti u ustavnom sistemu Srbije u kontekstu međunarodnih*

question the possibility of realizing the independence of the judiciary as one of the necessary assumptions of the rule of law. Regarding that part of the Constitution, the Venice Commission made a number of remarks, the key of which related to the possibility of politicization of the judiciary due to the broad competences of the National Assembly in the process of electing judges and members of the High Council of the Judiciary[18]. The beginning of the constitutional changes in the field of justice started in 2013 and after numerous stages, stormy discussions and changes, officially final in the beginning of 2022. The key changes were related to the reform of the Serbian judiciary, and in that context, the better realization of the independence of the judiciary. We will try to indicate whether this was achieved in the further text of this paper.

One of the key weaknesses of the original constitutional text was (and remains) the lack of a more precise definition of the content of judicial power. In such a way, the judicial power can be weakened and made dependent on the legislative power, which can change its content through the law. And just such a process of disempowerment of the judicial power occurred after the adoption of the constitution in 2006. Namely, certain functions have been transferred from the judicial authority to other subjects (the Agency for Economic Registers, the Republic Geodetic Institute, public notaries, public bailiffs, the public prosecutor's office), which do not have guarantees of independence[19]. Such a process should not be criticized a priori, because it is a way to relieve the already heavily congested work of the courts from atypical court cases, which enables citizens to exercise their rights more efficiently. However, when the content of the judicial authority is not defined, the legislative authority has no obstacles to transfer certain functions from the sphere of work of the courts to other entities. Not only is decision-making on individual human rights transferred to entities that are under the direct influence of the executive power, but the judicial branch of government itself is weakened. Therefore, in order for the judiciary to be as equal a partner as possible to the branches of government of a political nature, an important assumption is that its domain should also be fixed by the constitution. Hence, an opportunity was missed to determine, on the basis of already clearly established international standards, the content of judicial power and thus create a dam against its excessive expropriation and weakening rights.

Although the principle of publicity was reformulated and expressed more precisely, the constitutional amendment did not expand its reach. Namely, the public hearing before the court is guaranteed, while the public can be excluded in accordance with the Constitution (Amendment IV art. 142 para. 6). Ensuring the publicity of court proceedings is one of the mechanisms for preserving and encouraging public trust in the judiciary, and at the same time it enables control over the work of the judiciary and ensures protection against arbitrariness. However, the revision of the Constitution did not provide for the obligation of public pronouncement of verdict, which is one of the essential elements of the fairness of court proceedings. Namely, the public pronouncement of the verdict and its explanation provide additional protection against

standarda, in *Zbornik radova Pravnog fakulteta u Novom Sadu*, n. 3, 2011; I. PEJIĆ, *Konstitucionalizacija sudske nezavisnosti: uporedno i iskustvo Srbije*, in *Zbornik radova Pravnog fakulteta u Nišu*, Vol. 68, 2014.

[18] Venice Commission, *Opinion on the Constitution of Serbia*, 19 March 2007, CDL-AD(2007) 004, paras. 60-74.

[19] D. BOLJEVIĆ, *Zapažanja o Radnom tekstu amandmana na Ustav Republike Srbije sa obrazloženjima (referencama Venecijanske komisije) u delu koji se odnosi na sudstvo*, in *Sveske za javno pravo*, Vol. 31, 2018.

arbitrariness, and it is also a factor that contributes to ensuring the transparency of the work of the courts.

Unlike the original constitutional text ("*The Court shall try in a panel, and the law may provide that in certain matters a single judge shall try*" (para. 142, 6)) the constitutional amendments do not provide for the principle of quorum[20]. The basic meaning of the trial assembly is to ensure a higher degree of objectivity and impartiality of the court when acting in a specific case, and at the same time a stronger guarantee for exercising the right to a fair trial. On the other hand, the principle of quorum is closely related to the principle of citizen participation in the trial, since the quorum of the trial provides more opportunities for citizen participation in the capacity of lay judges. It is absurd that the constitutional amendments, extremely unusual, pay a lot of attention to lay judges who were mentioned as many as seven times, and the newly adopted constitutional solutions will significantly narrow the possibility of their participation in the trial, because the quorum of the trial is no longer determined as a principle. Namely, it is guaranteed that the law can stipulate that in addition to judges, jury judges also judge (Amendment IV art. 142 para. 7), but this possibility is foreseen as an exception.

The constitutional amendment provides that judges judge on the basis of the Constitution, confirmed international treaties, laws, generally accepted rules of international law and other general acts, adopted in accordance with the law (Amendment VI art. 144). However, it is unclear why there is a departure from the hierarchy of legal acts provided by the Constitution, since in that provision they are listed in a different order. That omission cannot affect the hierarchy of legal acts defined by the Constitution, according to which the generally accepted rules of international law are above the law, however, it is an inconsistency that can cause certain dilemmas. Second, although the Constitution foresees that the provisions on human and minority rights are interpreted in favor of improving the values of a democratic society, in accordance with valid international standards of human and minority rights, as well as the practice of international institutions that supervise their implementation (art. 18 para. 3), it was not corrected by the amendments the omission of the original constitution maker who omitted those sources of law from the list of those on the basis of which the function of judging is exercised.

Although the original constitutional solution provided for only the basic organizational scheme of judicial power, which belongs to courts of general and special jurisdiction (art. 143 para. 1), the constitutional amendments omitted that solution. The organization of the courts is undoubtedly a legal matter, however, in order to ensure the stability of the judicial system, the constitution should contain at least the basic organization of the courts, especially in those countries where the independence of the judiciary should be strengthened. Hence, the omission of the provision that foresees the basic organization of the courts for at least two reasons weakens the constitutional guarantees of the independence of the judiciary. First, determining the organization of courts in principle narrows the scope for the legislative authority to jeopardize the principle of immovability of judges by frequent reorganization of the court network. Second, frequent changes in the organization of the courts can thwart the creation of a stable electoral basis for the formation of the High Council of the Judiciary, as a result of which the influence of politics in the process of electing members of that body from among judges is facilitated.

In relation to the original constitutional decision, which stipulated that any influence on a judge in the exercise of judicial function is prohibited (art. 149 para. 2), the

[20] D. SIMOVIĆ, R. ZEKAVICA, *Људска права*, Криминалистичко-полицијски универезитет, Београд, 2020, pp. 330-331.

amendment prohibits any inappropriate influence on a judge in the exercise of judicial function (Amendment VI art. 144 para. 2). That change was made based on the suggestion of the Venice Commission, according to whose point of view the words inappropriate or impermissible before the word influence clearly indicate that the material scope of the provisions does not extend to situations such as, for example, journalistic contributions to a trial or hearing[21]. In a country where the independence of the judiciary needs to be strengthened and where there are many examples of threats and violations of the prohibition of influence on the performance of the judicial function by the executive power[22] such a change can only cause negative consequences in practice. It is also a good illustration of the fact that the Venice Commission does not have a realistic idea of the socio-political context in which constitutional amendments are made. Bearing in mind that the prohibition of any influence on a judge in the exercise of judicial function is formulated in the article of the Constitution dedicated to the independence of judges, it cannot be interpreted in a way that includes some indirect influences that would be expressed in professional or journalistic texts. The meaning of that norm is to prohibit influences that would lead the judge to deviate from the principle of legality and to base his decision on the expectations of political power holders or private interests. By constitutionalizing the prohibition of undue influence on a judge, a standard has been created that can be interpreted extremely flexibly. Hence, even in a symbolic sense, the prohibition of any influence on the judge in the performance of the judicial function should have been maintained, since the standard "improper" somewhat relativizes that prohibition and opens the question of interpretation of its meaning. In addition to all that, the aforementioned constitutional ban does not provide for a sanction in the event of its violation, nor is it foreseen to be regulated more closely by law, which is why it acquires primarily a symbolic and declarative significance.

Although it does not differ from the original constitutional text, the amendment stipulates that the conditions for the election of judges are regulated by law (Amendment VII art. 145). In principle, nothing can be objected to that constitutional solution, because the conditions for the selection of judges are not, as a rule, part of the constitutional matter. However, one should keep in mind the draft constitutional amendments from 2018 prepared by the Ministry of Justice. They provided for the constitutionalization of a special institution for training in the judiciary (Judicial Academy), whose additional training would be a prerequisite for election to the post of judge. If we do not ignore that overture, we can conclude that there is a real possibility that a similar solution will be provided by law. In this sense, if training in that institution is set as a prerequisite for election to the position of judge, it would mean that it carries out a preliminary selection and that the *High Council of the Judiciary* receives a list of already filtered candidates. By controlling the number of candidates who enroll, as well as their selection, the electoral function of the *High Council of the Judiciary* would become meaningless. Precisely because of this, because there was a clear determination that the Judicial Academy would be the only track for acquiring the position of judge, such a possibility should have been prevented by providing objective, transparent and non-discriminatory criteria for the selection of judges, in accordance with relatively clear international standards in that field. After all, the Venice Commission suggested that the criteria for

[21] Venice Commission, *Opinion on the Draft Constitutional Amendments on the Judiciary and Draft Constitutional Law for the Implementation of the Constitutional Amendments*, 18 October 2021, CDL-AD(2021)032, para. 31.

[22] See T. MARINKOVIĆ, *Одговорност председника Републике за повреду Устава – забрана утицаја на вршење судијске функције*, Београд, 2021.

the selection of judges should perhaps be raised to the constitutional level[23]. According to the existing constitutional solution, the parliamentary majority has the possibility to control the selection of candidates for judges through the Judicial Academy.

One of the more serious shortcomings of the original constitutional solutions was related to the lack of constitutionalization of the reasons for the dismissal of judges. The amendments correct this, but it has gone to the other extreme, which can have extremely negative consequences for the development of judicial power. Namely, a judge can only be dismissed for two reasons: first, if he is convicted of a criminal offense and sentenced to a prison term of at least six months, and second, if in the disciplinary procedure it is established that he has committed a serious disciplinary offense that seriously damages the reputation of the judicial function or trust public to the courts (Amendment VIII art. 146 para. 4). No matter how important it is that the reasons for dismissal are set as precisely and narrowly as possible, the text of the constitutional amendment sets those reasons extremely restrictively. Unconscionability or incompetence cannot be grounds for dismissing judges. Therefore, regardless of the degree of unconscionability or incompetence of the judicial function, a judge cannot be dismissed for those reasons. The principle of permanence was not established to protect such judges, and since the *High Council of the Judiciary* is competent to dismiss judges, the provision of reasons of this nature would not threaten the independence of judges. The independence of the judiciary should not be equated with the absolute irresponsibility of judges in relation to the manner in which they perform their judicial function, unless they commit a specific criminal offense and a serious disciplinary offense. Modern democratic constitutional systems are characterized by the consistent implementation of the principle of responsibility of state bodies and holders of public authority, and judges should be responsible not only in the form of criminal and disciplinary responsibility, but also for the proper performance of judicial functions[24]. After all, the Venice Commission apostrophizes that, in the field of judicial discipline, it is necessary to reach a balance between the independence of the judiciary, on the one hand, and the necessary responsibility of the judiciary, on the other hand, in order to avoid the negative effects of corporatization in the judiciary[25].

The constitutional revision, at least at first glance, established stronger guarantees of the immovability of judges. Namely, a judge has the right to exercise his judicial function in the court to which he was elected and only with his consent can he be permanently

[23] Venice Commission, *Opinion on the Draft Constitutional Amendments on the Judiciary*, cit., para. 35.

[24] According to Goran Marković, "*not even judges can avoid responsibility for the decisions they make, referring to their independence and the need to develop their careers. They are the ones who resolve legal disputes in the courts, i.e. pronounce verdicts and make other court decisions. They do it in the name of the people, who, at least according to the letter of the Constitution, are the holders of supreme power, by applying laws to specific cases. Since judges are not private individuals, but are in the service of the state, as part of a single state body, they must bear responsibility for their actions, and not only criminal or disciplinary responsibility, because other public office holders do not only bear criminal or disciplinary responsibility. but also for the validity of exercising the judicial function*". Goran Marković, *Zašto na referendumu u Srbiji zaokružiti "ne"?*, in *Novi Plamen*, 10 May 2022, available at https://www.noviplamen.net/glavna/zasto-na-referendumu-u-srbiji-zaokruziti-ne/.

[25] Venice Commission, *Opinion on the Draft Constitutional Amendments on the Judiciary*, cit., para. 38; "*The purpose of the principle of the permanency of the judicial function is not to protect all judges forever and a priori, including those who prove to be bad, insufficiently capable, dishonest, that is, ``unprofessional and unworthy.* (...) *The principle of the permanency of the judicial office aims to improve the work of the judiciary, enable the professional training and advancement of judges, contribute to an objective trial, and this cannot happen if unprofessional and unworthy judges cannot be dismissed, in accordance with the constitution and the law. Allowing such judges to judge and apply the law would ultimately threaten the rule of law, whose last guarantor is the judiciary*". See S. ORLOVIĆ, *Stalnost sudijske funkcije VS. Opšti reizbor sudija u Republici Srbiji*, in *Anali Pravnog fakulteta u Beogradu*, n. 2, 2010, pp. 167-168.

transferred or temporarily referred to another court, except in the case provided by the Constitution (Amendment IX, art. 147). Therefore, in contrast to the initial constitutional solution, which left the regulation of that issue to the law, the Constitution defines the cases of permanent transfer or temporary assignment of a judge to another court. First, in case of dissolution of the court, the judge is transferred to the court that takes over the jurisdiction of the dissolved court; and secondly, in the event of the abolition of the majority of the jurisdiction of the court, the judge may exceptionally without his consent be permanently transferred or temporarily sent to another court of the same level that took over the majority of the jurisdiction. Observing only those two constitutional provisions, it could be concluded that strong guarantees of immovability of judges were established. However, the problem arises due to the way in which it is formulated what is meant by the abolition of the majority of the jurisdiction of the court, as a reason for permanent or temporary transfer to another court. Namely, the majority of the court's jurisdiction is abolished if the necessary number of judges in the court is reduced as a result of a change in the actual jurisdiction of the court, the establishment of a new court or another case provided for by law. That constitutional norm is illogical because, on the one hand, it speaks of the abolition of the "predominant part" of jurisdiction, which can be understood as the abolition of a more significant, larger and even dominant part of jurisdiction, while, on the other hand, it is understood that this condition is fulfilled if reduced required number of judges, which can be understood as any reduction in the number of judges in the court, even if it is one less judge. Bearing in mind that the organization of courts falls under the domain of the legislative power, the parliamentary majority can, even with minor changes in the organization of the court network, result in a reduction of the required number of judges in a court. The good side of the constitutional solutions is that the *High Council of the Judiciary* determines the required number of judges and decides on the transfer and assignment of judges (Amendment XII, art. 150), but with clumsy wording, the parliamentary majority is left with the possibility to exert covert pressure on the High Council by changing legal solutions. judiciary. Hence, the stability of the judicial system, in terms of the type and organization of courts, should be one of the principles of the judiciary provided by the constitution, because it could prevent frequent changes in the legal framework that could threaten the principle of the immovability of judges, as well as the independence of courts in general.

Although the provisions on the immunity of judges have been reformulated and somewhat specified, they are still incomplete. Namely, a judge cannot be held accountable for an opinion given in connection with the performance of a judicial function and for voting when making a court decision, unless he commits a criminal offense of violating the law by a judge or public prosecutor (Amendment X art. 148 para. 1). That constitutional norm is incomplete due to the fact that the immunity refers to the opinion given in connection with the exercise of the judicial function and to voting during the adoption of the court decision, but not to the opinion expressed in the court decision. At the same time, the position of the judge would be strengthened by the constitutionalization of civil immunity, which implies that the judge is not responsible for the damage caused by his illegal and improper work in the exercise of his function.

In addition to the fact that, in the part dedicated to human and minority rights, judges are prohibited from being members of political parties (art. 55 para. 5), as well as according to the original constitutional solution, the political activity of judges is prohibited (Amendment X art. 148 para. 4). That wording is extremely extensive since "political action" does not have a clear and precise meaning. It is a stretchable standard

that can contribute to suppressing the public expression of judges' opinions, and in a broader context, it can affect the independence of judges.

It should be pointed out that in the constitutional amendments, lay judges are mentioned more than is usual, however, only the political activities of judges, but not lay judges, are expressly prohibited. Therefore, since it was not explicitly mentioned, it can be concluded that lay judges are not prohibited from political activity, nor are they prohibited from being members of political parties. Such reasoning also contributes to the decision that stipulates that the law regulates which functions, jobs or private interests are incompatible with function of judge and lay judge (Amendment X art. 148 para. 3). Therefore, in the context of the prohibition of conflicts of interest, lay judges are explicitly mentioned, while this is not the case when it comes to the prohibition of political activity that applies exclusively to judges.

A clumsy wording stipulates that "*a member of the High Council of the Judiciary elected by the National Assembly cannot be a member of a political party*" (Amendment XIII, art. 151, Paragraph 8). According to the literal meaning of that constitutional norm, membership in a political party is not a legal obstacle for a person to be nominated and then elected as a member of the High Council of the Judiciary. It is only after his election that membership in the *High Council of the Judiciary* and a political party are incompatible. It is an obvious editorial error that renders the aspiration for a depoliticized selection of prominent lawyers meaningless.

Regardless of the pronounced re-normation of the text of the constitutional amendments dedicated to the courts, some important guarantees of the independence of the judiciary were missing. There is a lack of material guarantees of the independence of judges and courts, which ensure the consistent implementation of the principle of separation of powers. Namely, without appropriate financial independence, the judicial power cannot be effective, and therefore not independent. International standards on material guarantees include, on the one hand, the existence of a judicial budget, which implies the obligation of the state to provide adequate funds and enable the judiciary to properly perform its function, and on the other, the appropriate compensation for the work of judges, which is guaranteed by law and corresponds to the dignity of their profession and the burden responsibilities, as well as the right to a pension, the amount of which must be as close as possible to the amount of their last judicial salary[26].

5. Conclusion

The constitutional changes in Serbia have gone a relatively long way in reaching agreement between the professional and scientific community on the one hand and the drafters of those changes themselves. They were primarily aimed at reforming the judiciary and solutions that should bring a higher degree of independence of the judiciary in order to ensure the rule of law in Serbia. The proposed solutions, or constitutional amendments that were finally adopted, are still the subject of criticism, especially from the professional and scientific community, who indicate that the task of ensuring the independence of the judiciary has been partially achieved and that the influence of politics on the work of the judiciary, as well as the public prosecutor's office, has not been completely avoided in this field. This criticism should be objective and well-intentioned. Some progress has been made, especially if we consider the first versions of the constitutional amendments, which made the independence of the judiciary even more

[26] European Charter on the Statute for Judges, paras. 6.1-6.4; Consultative Council of European Judges, *Magna Carta of* Judges, 17 November 2010, CCJE (2010)3 Final, p. 7.

vulnerable. In this paper, we have attempted to highlight the key arguments of this criticism in order to shed light on the scope of possible political influence on the independence of the judiciary. The adopted amendments should also stand the test of time, so that in practice their implementation can be seen not only the potential weaknesses we have pointed out, but also their potential positive effect on strengthening the independence and impartiality of the judiciary. It should be borne in mind that strengthening the rule of law is a complex process in which all relevant factors should participate. However, whether it will be successful or not primarily depends on whether the judiciary in a given system is independent and impartial. Serbia has made some progress with the constitutional revision, but the real achievements of these efforts will only be visible over time. Until then, the professional and scientific community has a responsibility to point out all potential weaknesses and contribute to the extent possible to building and preserving sound foundations of the rule of law.

ABSTRACT

The right to an independent and impartial court is one of the components of the right to a fair trial. As such, it is a key prerequisite for realizing the right to a fair trial and at the same time a barrier against arbitrariness and bias in the realization and protection of human rights. And it is precisely here that one can see the key importance that this right has for the rule of law. Namely, as a concept that implies the absence of arbitrariness in the exercise of power, the rule of law could not be achieved without the independence and impartiality of the judiciary. In legal theory, there is a general consensus about the primary importance of an independent judiciary for the existence and preservation of the rule of law. What is and should be the subject of constant analysis and criticism is the way it is realized in a given society. When it comes to Serbia, the constitutional changes, from the beginning of 2022, were aimed at the reform of the Serbian judiciary, within which the issue of judicial independence was one of the most important. The trial, three-year mandate of judges was abolished, while the election of all judges and court presidents was transferred to the jurisdiction of the High Council of the Judiciary. The composition of the *High Council of the Judiciary* was depoliticized and the constitutional guarantees of the independence of judges were improved, among other things, by ensuring the permanence of the judicial office, constitutionalizing the reasons for the dismissal of judges and more precisely guaranteeing their immovability. Nevertheless, the majority of legal scholars remained critical or at least visibly restrained regarding the scope of the implemented constitutional changes. In addition to the deficient democratic legitimacy of the convening of the National Assembly that decided on constitutional changes, it is emphasized that the constitutional guarantees of the independence of the judiciary were only partially improved with the creation of new and hidden channels for political influence. Hence, the contextual analysis of the content of the constitutional amendments indicate that the implemented constitutional reform cannot have positive effects on improving the rule of law in Serbia. The goal of this paper is precisely the analysis of these issues, a critical review of constitutional reforms, but also an analysis of the jurisprudence of the Constitutional Court of the RS, which in a large number of decisions dealt with the right to a fair trial and, within that, the right to an independent and impartial court.

KEYWORDS
Constitution of RS, Constitutional Reform, Impartial Court, Judicial Independence, Rule of Law.

Il DIRITTO A UN TRIBUNALE INDIPENDENTE E IMPARZIALE COME PRESUNZIONE DELLO STATO DI DIRITTO ALLA LUCE DELLE RIFORME COSTITUZIONALI NELLA REPUBBLICA DI SERBIA

ABSTRACT
Il diritto a un tribunale indipendente e imparziale è una delle componenti del diritto a un giusto processo. In quanto tale, è un prerequisito fondamentale per realizzare il diritto a un giusto processo e allo stesso tempo una barriera contro l'arbitrarietà e la parzialità nella realizzazione e nella protezione dei diritti umani. Ed è proprio qui che si può vedere l'importanza fondamentale che questo diritto ha per lo stato di diritto. Vale a dire, come concetto che implica l'assenza di arbitrarietà nell'esercizio del potere, lo stato di diritto non potrebbe essere raggiunto senza l'indipendenza e l'imparzialità della magistratura. Nella teoria giuridica, esiste un consenso generale sull'importanza primaria di una magistratura indipendente per l'esistenza e la preservazione dello stato di diritto. Ciò che è e dovrebbe essere oggetto di analisi e critica costanti è il modo in cui viene realizzato in una data società. Per quanto riguarda la Serbia, le modifiche costituzionali, dall'inizio del 2022, erano mirate alla riforma della magistratura serba, all'interno della quale la questione dell'indipendenza giudiziaria era una delle più importanti. Il mandato triennale dei giudici è stato abolito, mentre l'elezione di tutti i giudici e dei presidenti di tribunale è stata trasferita alla giurisdizione dell'Alto Consiglio della magistratura. La composizione dell'Alto Consiglio della magistratura è stata depoliticizzata e le garanzie costituzionali dell'indipendenza dei giudici sono state migliorate, tra le altre cose, assicurando la permanenza dell'ufficio giudiziario, costituzionalizzando le ragioni del licenziamento dei giudici e più precisamente garantendo la loro inamovibilità. Tuttavia, la maggior parte degli studiosi del diritto è rimasta critica o almeno visibilmente frenata riguardo alla portata delle modifiche costituzionali implementate. Oltre alla scarsa legittimità democratica della convocazione dell'Assemblea nazionale che ha deciso le modifiche costituzionali, si sottolinea che le garanzie costituzionali dell'indipendenza della magistratura sono state migliorate solo parzialmente con la creazione di nuovi e nascosti canali di influenza politica. Quindi, l'analisi contestuale del contenuto degli emendamenti costituzionali indica che la riforma costituzionale attuata non può avere effetti positivi sul miglioramento dello stato di diritto in Serbia. L'obiettivo di questo articolo è proprio l'analisi di queste questioni, una revisione critica delle riforme costituzionali, ma anche un'analisi della giurisprudenza della Corte costituzionale della RS, che in un gran numero di decisioni ha affrontato il diritto a un giusto processo e, al suo interno, il diritto a una corte indipendente e imparziale.

KEYWORDS
Corte Imparziale, Costituzione Della RS, Indipendenza Giudiziaria, Riforma Costituzionale, Stato di Diritto.