

**Irena Pejić\*, LL.D.**  
Full Professor,  
Faculty of Law, University of Niš

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## **CONSTITUTIONAL REFERENDUM AND JUDICIAL REFORM IN SERBIA\*\***

**Abstract:** *The process of constitutional revision can be observed from two standpoints: the first refers to the elements of the procedure for amending the constitution; the second calls for a review of the subject matter of constitutional revision contained in the Act amending the Constitution. This paper discusses the constitutional legitimacy of the Act amending the Constitution and the new constitutional solutions aimed at changing the provisions on the election of judges and public prosecutors, as well as the provisions on judicial councils in the Republic of Serbia.*

**Keywords:** *Constitution of the Republic of Serbia, constitutional revision, judicial reform.*

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\* irena@prafak.ni.ac.rs

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## 1. Introduction

The constitutionalization of judicial independence is the pillar of any system based on the values embodied in the rule of law. The judicial system operates in conditions of the separation of powers, which is the primary guarantee of the rule of law. Therefore, in order to create a social environment in which the judiciary could act independently, it is necessary to consider the normative guarantees of judicial independence alongside with the rules on the political responsibility of constitutional authorities.<sup>1</sup>

The constitutional revision in the Republic of Serbia is a manifestation of the necessity to strengthen the rule of law, which is a serious task in conditions of the disrupted tradition of constitutionality during the 20<sup>th</sup> century. The separation of powers should be a fundamental principle that fulfills the constitutional democracy standards and the rule of law values. Therefore, the constitutional reform should guarantee a model of checks and balances in which the political authorities will not be able to keep the judiciary on a “political leash”. In that sense, special emphasis is placed on the permanent tenure of the judicial function (i.e. continuity and stability of the term of office), which should enable judges to act in line with the rules of professional conduct as the strongest barrier against political influence.<sup>2</sup>

In the Republic of Serbia, the judicial reform took on a constitutional form in a referendum on 16 January 2022, when the Act amending the Constitution was adopted. In this context, the constitutional revision process could be observed from two standpoints: the first refers to the elements of the procedure for amending the constitution, and the second calls for a review of the subject matter of constitutional revision, as the substantive ground for judicial reform.

## 2. On the legitimacy of the constitutional revision

The constitutional revision procedure has a special significance not only in terms of ensuring the legality of constitutional change but also in terms of ensu-

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1 The French Constitution (1958) was the first constitution that used different terms to signify political power (legislative and executive) and judicial power. While the former was designated by the term “power” (*pouvoir*), the judiciary was designated by the term “authority” (*autorité judiciaire*). It means that the latter originated as a branch *per se* and that it does not depend on the power of political authorities (Triva, 1989: 226).

2 The permanence of the judicial function is based on the tradition of the English legal system, where the Act of Settlement of 1711 for the first time protected the judicial office from the monarch’s influence, allowing judges to act freely and independently of the king’s will (*durante bene placito nostro*), whereby the continuity of the judicial function was based on the good conduct of the judge (*quam diu bene gesserint*) (Dika, 1992: 518).

ring legitimacy. Since the adoption of the Constitution of the Republic of Serbia in 2006, there have been several calls for constitutional revision, including a popular (people's) initiative. Given that Serbia has embarked on the European integration process, the harmonization of national law with the *acquis communautaire* calls for a reform of the judiciary, *inter alia*. Hence, on 4<sup>th</sup> December 2020, the Government of the Republic of Serbia submitted a proposal for revising the Constitution which primarily referred to the provisions concerning the judiciary. The proposal for constitutional revision was presented to the National Assembly on 7<sup>th</sup> June 2021 and approved by a two-thirds majority of MPs. This was the first phase in the constitutional revision process, which was followed by drafting an act on changing the Constitution. The Committee on Constitutional and Legislative Issues, which is in charge of managing the constitutional revision process, formed a special Commission (working group) to draft a constitutional amendment act. The Special Commission stated that the act would be drafted on the basis of proposals and explanations of the Government, as well as the conclusions formulated in public hearings organized by the Committee. In the next phase, the National Assembly debated in the plenum and passed a decision to endorse the Act amending the Constitution by a two-thirds majority of MPs. Then, the Act was submitted to a constitutional referendum which was held on 16<sup>th</sup> January 2022.

The comparative law practice demonstrates that a constitutional revision can be undertaken in several forms: by enacting Amendments, by enacting a new Constitutional Act, or by enacting a special act amending the constitution. The form underlying the constitutional revision process is not just a technical issue; quite the reverse, the manner in which the constitutional revision will be undertaken largely reflects the "ideological" approach towards the constituent power and its supremacy to preserve the original "revolutionary" work or to leave it to the revision power to intervene in its masterwork.

The constitutional technique of enacting Amendments has been applied in the United States. It fits into the constitutional "idolatry" and the "cult" of the Constitution, which is protected by adding amendments to the original constitutional act without intruding into its original content. As a technique for instituting constitutional change, the Amendments technique is primarily aimed at supplementing, improving and developing the constitution. On the other hand, "extra-constitutional" participants (such as courts) have been vested with the authority to introduce specific changes in the process of constitutional review of individual cases, by means of constitutional precedent, thus harmonizing the "normative" and the "real". The enacted Amendments have the same legal force as the Constitution; they operate on the principle of *lex posterior derogat legi priori*, which safeguards the work of the original framers of the constitution but

concurrently recognizes the functional power of the revision power. The amendments which are added to the original text of the constitution do not necessarily have to refer directly to the articles that will be amended (which was the case with the Serbian amendments). Basically, this technique of constitutional change stems from the need to preserve the original constitutional document, as well as the intention of the revision authority to retain all functional properties of the constituent power.

As an instrument for supplementing and developing the constitution which originated in the American legal space, Amendments are not a common feature of the European-continental legal tradition. The term “amendment” (Lat. *amandere*) denotes change, modification, addition; but, as a constitutional technique, it gained a new meaning developed in a legal system featuring a rigid and long-lasting constitution, such as the US Constitution. The European constitutional history (from the adoption of the first constitutions on the European continent) shows that this technique has never been used by European countries; the contemporary practices show that it was seldom used in the European countries which adopted their new constitutions at the end of the 20<sup>th</sup> century.<sup>3</sup>

Serbia adopted the Act amending the Constitution in the referendum held on 16<sup>th</sup> January 2022. The Act which contains 29 amendments but, nomotechnically speaking, they are amendments only by designation. In effect, these amendments are articles that change the existing constitutional provisions.<sup>4</sup> Thus, the Serbian legislator has retained the hybrid form of constitutional nomotechnic, which originates from the Socialist Republic of Yugoslavia and which has been preserved only in Serbia, Montenegro and Northern Macedonia.<sup>5</sup>

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3 For example, in Austria, any change related to *materia constitutionis* and adopted by Parliament in a special procedure is made in the form of a Constitutional Act. In the Czech Republic and Slovakia, it is designated as “the Constitutional Act on Amendments to the Constitution”. In Bulgaria, it is designated as “the Act on Amendments to the Constitution”.

4 For example, Amendment 1 reads: “This amendment replaces Article 4 of the Constitution of the Republic of Serbia.” (Act Amending the Constitution of the RS, adopted by the National Assembly, 30. 11. 2021).

5 Other former Yugoslav republics have adopted the technique inherent to the European civil law system. For example, Croatia enacted two acts: “the Constitutional Act revising the Constitution” and “the Revision the Constitution”, whereby the appropriacy of the term “revision” in the latter act was subsequently assessed by the Constitutional Court, which considered that the term “revision” cannot be used in the name of an act as it refers to the content of the act amending the Constitution. The last (consolidated) version of the Constitution of the Republic of Croatia was published in 2010 (<https://www.usud.hr/hr/ustav-rh>). Similarly, the Constitution of Slovenia does not explicitly state the type of act on constitutional change, but the model of enacting a constitutional act has been applied in practice.

On the other hand, the constitutional referendum conditions have been completely relaxed by the reason that can be found in the previous Serbian Constitution (1990),<sup>6</sup> which envisaged that the Constitution could be changed only if more than half of all registered voters voted for it in a referendum. In order to meet this rigid requirement and secure the necessary referendum majority, the referendum on the adoption of the new 2006 Constitution took two days. It opened the first cracks in the legitimacy of constitutional grounds for adopting the highest general legal act of the first independent Republic of Serbia. It is quite unusual for a referendum to last more than one day, especially in a country with a small number of voters and a territory that does not require special technical conditions for a long-time voting.

In order to preclude the complications arising from the rigid revision procedure, the new Constitution (2006) not only relaxed the referendum majority (formerly half of all citizens eligible to vote) but also excluded the so-called referendum quorum (a minimum citizen participation requirement). Under the 2006 Constitution, the decision on changing the constitution is made by a simple majority of citizens who vote for the Act amending the Constitution, regardless of how many voters actually take part in the referendum. Consequently, the constitutional referendum is legally valid irrespective of the citizens' turnout, which raises the question of legitimacy of the highest general legal act in the event of a low voter turnout. Formally speaking, it is enough to get a larger number of votes supporting the constitutional amendment act as compared to those against it. Thus, given that the Constitution does not envisage specific mandatory turnout thresholds (e.g. a half or a quarter of registered voters), the referendum decision is valid notwithstanding the actual size of the majority or turnout percentage in relation to the total number of eligible voters.

In 2022, a total of 1,995,215 voters (out of 6,510,323 registered voters in Serbia) voted in the constitutional referendum held on 16 January 2022, which amounts to 30.64% of voters. A total of 1,189,460 citizens voted for constitutional changes, which amounts to 59.62% of voters who turned out and 18.27% of the total number of registered voters in Serbia; on the other hand, 785,163 citizens (39.35%) voted against the constitutional changes, which is 12% of the total number of registered voters (Electoral Commission, 2022).<sup>7</sup> The low turnout in the constitutional referendum undoubtedly raises the issue of legitimacy of the Act amending the Constitution, and perpetuates the infamous tradition

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6 For more on the referendum in the context of constitutional legitimacy, see Pejić, 2018: 75-77.

7 The Electoral Commission of the Republic of Serbia (<https://www.rik.parlament.gov.rs/tekst/11511/republicki-referendum-radi-potvrdivanja-akta-o-promeni-ustava-republike-srbije-16-januar-2022-godine.php>).

of constitutional acts lacking legitimacy. Namely, legitimacy has been a highly disputed issue in almost all constitutional acts enacted since the introduction of the multi-party system in Serbia. Such was the case with the 1990 Constitution of Serbia, which was adopted by the Assembly of the Socialist Republic of Serbia immediately before the first multi-party elections. The 1992 Constitution of the Federal Republic of Yugoslavia (FRY) was adopted by the Federal Assembly without a quorum because the former socialist republics which declared independence from the federal state had previously withdrawn their delegations. The current 2006 Constitution was adopted in a two-day referendum, without a prior public debate.

### **3. The constitutional reform of the judicial system**

The constitutionalization of judicial independence should not be understood as a “red carpet” that facilitates a “ceremony” for the formation of constitutional authorities. On the contrary, the goal is to create and develop self-awareness among judges about their inherent independence and autonomy in decision-making processes. In recent years, many Eastern European countries have experienced similar problems. In their efforts to reform the judiciary, they have often encountered similar institutional mimicry aimed at covering up what is really going on in the functioning of the judiciary.<sup>8</sup>

Under the 2006 Constitution, judges were first elected for a (probationary) three-year term by deputies in the National Assembly, and then for a permanent term by the High Judicial Council. In 2022, the method of electing judges in the Serbian law has been changed by the Act amending the Constitution. According to the constitutional amendments, the first election of judges for a three-year period has been abolished. The High Judicial Council has the authority to nominate and elect judges to permanent judicial offices. The process of electing judges should ensure institutional independence, which is the foundation for developing self-confidence and moral awareness of the judiciary about their professional role in the legal system.<sup>9</sup> The former entails personal/professional integrity, inner safeguards which should ensure the impartiality of the judge

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8 For more on the Serbian judicial reform 2008-2012, see Rakić-Vodinelić, Knežević Bojović, Reljanović, 2012.

9 Safeguarding Article 6 of the European Convention, the European Court of Human Rights rendered a number of decisions expressing the Court’s view on independent judiciary and impartial tribunals, and specifying the main criteria for determining the degree of independence: election of judges, length of their term of office, constitutional guarantees against external pressures, and whether the tribunal can act independently in relation to the executive branch as well as the parties to the proceedings (See case *Ringeisen v. Austria*, 16.07.1971, A 13).

to decide in a legal matter in accordance with the old maxim *sine spe ac metu* (without expectation of benefits or fear of reprisals). Arbitrariness and subjectiveness should be barred; a judge should adjudicate without prejudice and bias. The latter entails a level of external protection, which excludes any form of political or other influence and pressure from other branches of government on the exercise of a judicial office (Leach, 2007: 267; Smith, 2003: 255). Yet, it is difficult to talk about the moral aspect of independence in a state that has not developed institutional guarantees; hence, this issue is strictly formalized: “as long as there is no violation of a legal rule, the judge’s behavior can be considered moral” (Bobek, 2008: 109).

The Act amending the Constitution establishes the guarantees for the judiciary in a modern way, which excludes the traditional approach prevalent in the national legal system (Pejić, 2014: 157-175).<sup>10</sup> According to the original text of the 2006 Constitution, the judiciary was “independent and autonomous”; the new Act proclaims judicial independence, while autonomy is guaranteed to the public prosecutor’s office. In addition to institutional guarantees, there are personal guarantees; thus, the Act guarantees the independence of each judge who acts on the basis of the Constitution, ratified international treaties, laws, generally accepted rules of international law and other general acts adopted in accordance with the law.<sup>11</sup> These personal guarantees have the same goal as the institutional ones: to create an independent judiciary as the foundation of the rule of law, and they include the permanence of the judicial function, independence of the judge, and non-transferability of judges.<sup>12</sup>

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10 For more on constitutional guarantees, see the original text of the 2006 Constitution of the Republic of Serbia.

11 In the constitutional law literature, there are various attempts to define judicial independence: independence in decision-making, administrative independence, and personal or individual independence (Bobek, 2008: 101); personal versus structural independence (Russel, 2001: 6); collective versus personal independence, decision-making independence, internal independence (Shetreet, 2001: 234), etc. Independence is most frequently expressed in two forms: 1) institutional independence, which includes substantive and personal independence; 2) behavioral independence of judges (Russel, 2001: 7) in terms of professional conduct, bearing and stance. Institutional independence is *de iure* independence provided by formal guarantees; behavioral independence is *de facto* independence which can be achieved beyond the formal normative framework and can be measured by various parameters (social system, historical heritage, cultural pattern, etc.). The *de iure* independence is sometimes referred to as “negative independence” of the judiciary while *de facto* independence is designated as “positive independence” which reflects the actual behavior of judges as holders of this function.

12 Since the separation of power has been instituted, the imperative of an independent judiciary has been to make the election of judges as “politically neutral” as possible. This request was difficult to fully implement because the election process and termination of

The adjustment of specific requirements for the election of a judge is left to the legislator. Currently, these requirements include: Serbian citizenship, general conditions for employment in state bodies, a diploma obtained upon graduation from a faculty of law, the bar exam and expertise (competence), professional qualification, and dignity of judicial office. A special condition refers to work experience after passing the bar exam. The Act also elaborates on other conditions pertaining to expertise, qualifications and dignity. Expertise should show that the candidate for a judge has the theoretical and practical knowledge necessary to perform the judicial function. A judge is qualified if he/she has the skills that enable the application of specific legal knowledge in resolving cases. A special condition of dignity includes the moral qualities that a judge should possess, as well as his behavior in accordance with those virtues. The law specifies the virtues that can be considered moral qualities: honesty, conscientiousness, fairness, dignity, perseverance, and exemplary conduct. In accordance with these characteristics, behavior includes maintaining the reputation of the judge and the court both in and out of office, awareness of social responsibility, preserving independence and impartiality, reliability and dignity both in and out of office, as well as taking responsibility for the organization and positive image of the judiciary in public.

By 2022, the legal grounds for the termination of the judicial office were in the competence of the legislator. After the adoption of the Act amending the Constitution, they were constitutionalized.<sup>13</sup> Constitutional guarantees regarding the termination and dismissal of a judge provide guarantees pertaining to the independence of judges as well as guarantees regarding their election. Considering the bipolarity of institutional independence, it can be said that safeguards against arbitrariness in terms of termination of the judicial office prevail, even more than those pertaining to the initial judicial election. The goal of the Constitution is to protect the judicial branch from the potential “arbitrariness” of the legislator, particularly considering that the competences of these branches extend in the same horizontal line of the separation of powers.

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judicial office were the responsibility of parliament. This enabled the legislature to exert influence on the judiciary, although it cannot be said that the institutional guarantees of an independent judiciary were completely denied. The need to make judges fully independent, not only from the influence of political power but also from any form of pressure or corruption, was described by Benjamin Constant in his depiction of the conditions of political instability in France in the early 19th century: “Courage in defying death in battle is easier than publicly preaching independent opinion amid threats from tyrants and party troublemakers.” He also noted: “Buying your own furniture is less corrupt than constantly fearing that it will get lost” (Konstan, 2000: 149)

13 For more on the Constitution 2006, see Pajvančić, 2009.



The Act amending the Constitution stipulates that a judicial function is permanent and that a judge's office ends when a judge meets the conditions for retirement. A judge's office may be terminated before the retirement age at his/her explicit request, if he/she permanently loses the ability to perform the judicial function, if he/she loses the citizenship of the Republic of Serbia, or if he/she is dismissed (Article 146, para.2). In addition to meeting the requirements for retirement, when the office is terminated by force of law, a judge may submit a written request to the High Judicial Council asking for the termination of his/her judicial office. The loss of ability to perform the judicial function is based on the opinion of the competent body, and the decision on referral to medical examination is made by the High Judicial Council, upon the proposal of the president of the court or the judge himself/herself.

A special cause for termination of a judicial office is discharge. A judge may be discharged (removed from office) if he/she is convicted of committing a criminal offence punishable by at least six months of imprisonment, or if it is determined in disciplinary proceedings that he/she has committed a serious disciplinary offense which, according to the assessment of the High Judicial Council, seriously damages the reputation of the judicial office or public confidence in the courts (Article 146, para. 3). In such a case, the High Judicial Council decides on the termination of a judicial office and the judge has the right to file an appeal against its decision to the Constitutional Court; however, it excludes the right to lodge a constitutional complaint (Article 146, para. 3 and 4).

The Act amending the Constitution (2022) also established a new way of electing the Supreme Public Prosecutor and public prosecutors in the Republic of Serbia. Under the original 2006 Constitution, the Republic Public Prosecutor and other public prosecutors were elected by the National Assembly, upon the proposal of the Government, Under the Act amending the Constitution, the National Assembly elects only the Supreme Public Prosecutor, acting upon the proposal of the High Council of Prosecutors, with a three-fifths of votes of all deputies. Given the goal of reducing political influence in the process of electing the Supreme Public Prosecutor, the legislator envisaged a stronger majority than the one required for the election of the Government, which is a good solution. In case the National Assembly does not elect the Supreme Public Prosecutor "within the prescribed time limit", the Act amending the Constitution provides an alternative solution. In such a case, the Supreme Public Prosecutor will be elected by a special Commission composed of the following high-ranking officials: the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor, and the Protector of Citizens (Ombudsman). The Commission decides on the election of the Supreme Public

Prosecutor by a majority vote, which means that three out of five high-ranking public officials are enough to vote.<sup>14</sup>

Yet, the time limit within which the Assembly is obliged to elect the Supreme Public Prosecutor is unclear. It may be assumed that this provision makes reference to the deadlines pertaining to the public competition, but it does not eliminate the problems that may arise in the process of electing the Supreme Public Prosecutor. It should be noted that the same provision establishes another deadline, formulated as “after the expiry of the next ten-day period”, which can be interpreted as a time frame for initiating the election procedure in the special Constitutional Commission, but it can also be interpreted as a deadline for its completion. Considering the specific nature of the special Commission, it may be concluded that the initial intention to reduce political influence can turn into a serious problem which may give rise to exerting not only political but also other influences in the process of electing the Supreme Public Prosecutor. The Supreme Public Prosecutor is elected for a six-year term of office and may not be re-elected for a second term (Article 158), which is a significant change in comparison to the original provision in the 2006 Constitution which did not envisage any restriction on re-election. Chief public prosecutors are elected by the High Council of Prosecutors for a period of six years, without any restrictions on their re-election (Article 158). Public prosecutors are elected by the High Council of Prosecutors and their prosecutorial office is permanent (Article 160).

#### **4. The High Judicial Council and the High Council of Prosecutors**

The institutionalization of the judicial councils in the Republic of Serbia began in 2001 when the National Assembly adopted the High Judicial Council Act, but the constitutional guarantees were secured in 2006. Under the 2006 Constitution, the High Judicial Council was established as an autonomous and independent state authority that should guarantee the autonomy and independence of the judiciary and judges (Article 153). The High Judicial Council has the authority to elect judges and lay justices of peace (sitting on the judicial panel as “jurors”; *Srb. sudije porotnici*) and decide on the termination of their term of office; to elect the President of the Supreme Court and the Presidents of other courts,

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14 The Act amending the Constitution of the Republic of Serbia, Amendment XX, Article 158.3: “If the National Assembly does not elect the Supreme Public Prosecutor within the prescribed time limit, after the expiry of the next ten-day period, the Supreme Public Prosecutor shall be elected by the Commission comprising the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor, and the Protector of Citizens. The new candidate shall be selected from the list of candidates who meet the election requirements, and elected by a majority vote.”

and decide on the termination of their term of office; to make decisions on the required number of judges and lay justices/jurors; to decide on other issues concerning the position of judges, presidents of courts, and lay justices of peace; and to exercise other competencies determined by the Constitution and the law.

Under the 2006 Constitution, the members of the High Judicial Council were elected by the National Assembly.<sup>15</sup> Under the Act amending the Constitution (2022), the High Judicial Council is still composed of 11 members but its structure has significantly changed. The High Judicial Council now includes: six judges elected by the judiciary (other judges), four prominent lawyers elected by the National Assembly, and the President of the Supreme Court. The election of members from the judiciary is regulated in more detail by law, including the general condition that the widest representation of judges should be taken into account during the election. Under the Constitution, presidents of courts may not be elected members of the High Judicial Council (Article 153, para. 5).

The National Assembly elects four members of the High Judicial Council from the rank of prominent lawyers, having at least ten years of experience in the legal profession, from the list of eight candidates proposed by the parliamentary Committee following the process of public competition. The decision on the election of members is made by a majority of two thirds of all deputies (Article 151, para. 4). Unlike the vague constitutional wording on the “deadline” for the election of the Supreme Public Prosecutor, the Act amending the Constitution envisages that, if the National Assembly does not elect all four members within the legally prescribed time limit, the remaining members will be elected by the special constitutional Commission. In terms of composition, the Commission for the election of the High Judicial Council members is identical to the Commission for the election of the Supreme Public Prosecutor, comprising the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor, and the Protector of Citizens (Article 151, para. 5). Although the concern for the functioning of the High Council is understandable in case the National Assembly cannot reach a strong two-thirds majority, the impression remains that the intention was to nullify any influence on the High Judicial Council. An alternative solution is a special constitutional commission that decides by a majority of its members. This means that a strong two-thirds parliamentary majority has been reduced to the votes of three out of five high-ranking state officials who make up the special Constitutional Commission.

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<sup>15</sup> Under the 2006 Constitution, the High Judicial Council was composed of the President of the Supreme Court of Cassation, the Minister of Justice and the President of the Committee of the National Assembly as 3 *ex officio* members, as well as 8 members elected by the National Assembly (Art. 153, para 3).

An additional condition for the election of a member of the High Judicial Council elected by the National Assembly is that he/she be worthy of that office, as well as that he/she cannot be a member of a political party. Other conditions for the election and incompatibility of the functions of the members elected by the National Assembly shall be regulated by law (Article 151, para. 6-8). Members of the High Judicial Council enjoy the same immunity as judges. Members of the High Judicial Council are elected for a term of five years and cannot be re-elected. The mandate of a member of the Council may be terminated before the expiry of the prescribed five-year term if he/she has requested to be discharged or if he/she is convicted of committing a criminal offence and sentenced to a term of imprisonment of at least 6 months. In case a member of the High Judicial Council is a judge, his/her mandate shall end alongside with the termination of their judicial office; the term of office of a member elected by the National Assembly shall be terminated before the expiry of the term of office if he/she permanently loses his ability to perform this function.

The 2006 Constitution envisaged that the function of the President of the Council would be performed *ex officio* by the President of the Supreme Court of Cassation. By contrast, the Act amending the Constitution stipulates that the President of the High Judicial Council shall be elected by the Council from the ranks of judges elected by the judiciary, while the Vice President shall be elected from the non-judicial members elected by the National Assembly (Article 152, para. 3).

The second judicial council is the High Council of Prosecutors, which was established by the Act amending the Constitution instead of the former State Council of Prosecutors. It is an independent state authority whose task is to ensure and guarantee the autonomy of the public prosecutor's office. The Council has the authority to propose the election of the Supreme Public Prosecutor and termination of his/her term of office to the National Assembly, to appoint the acting Supreme Public Prosecutor, to select chief public prosecutors and public prosecutors and decide on termination of their public prosecutor's office, and to decide on other issues concerning the position of public prosecutors (Article 162).

Under the Act amending the Constitution (2022), there are considerable constitutional changes regarding the composition and election of members of the High Council of Prosecutors. It is significantly different not only from its predecessor but also from the High Judicial Council. The High Council of Prosecutors is composed of 11 members: five public prosecutors elected by all public prosecutors, four prominent lawyers elected by the National Assembly, the Supreme Public Prosecutor, and the Minister of Justice. It is interesting that the proponents of constitutional change decided that the composition of the two councils be identical only in terms of the so-called "prominent" lawyers. The four promi-

nent lawyers elected by the National Assembly are a common element in both councils, while the number of so-called representatives of the profession (public prosecutors) has been reduced in favor of the Minister of Justice who is a member of the High Council of Prosecutors.

By analogy with the election of judges to the High Judicial Council, the election of members from the ranks of public prosecutors into the High Prosecutorial Council is subject to the same rules, and the widest representation of public prosecutors is taken into account in the election. Following a public competition, the parliamentary Committee proposes a total of eight candidates from the rank of prominent lawyers (having at least ten years of experience in the legal profession) for membership in the High Prosecutorial Council. Then, the National Assembly elects four members of the High Prosecutorial Council from the rank of prominent lawyers. The Council members are elected by a two-thirds majority vote of all MPs. In case the National Assembly does not elect all four members within the legally prescribed time limit, the members will be elected by a special constitutional Commission, just like the High Judicial Council. In this procedure, the same relaxing rule is applied; a two-thirds parliamentary majority may be replaced by a majority of the members of the special constitutional Commission (three out of five members of the commission) (Article 163).

The members of the High Council of Prosecutors are elected for a five-year term of office, without the possibility of re-election. The President of the High Council of Prosecutors is elected from among the members who are public prosecutors, and the Vice-President is elected from among the members elected by the National Assembly, and their term of office is five years. The term of office of a member of the Council may end before the time for which he was elected if he/she so requests or if he/she is convicted of committing a criminal offense and sentenced to a term of imprisonment of at least 6 months. The mandate of a member who is a public prosecutor shall end with the termination of the public prosecutor's office, and the mandate of a member who is not a public prosecutor shall end if he/she permanently loses the capacity to perform this function (Article 164). Members of the High Council of Prosecutors enjoy immunity just as public prosecutors (Article 165a).

## **5. Conclusion**

The revision of the Serbian Constitution in the constitutional referendum of 16<sup>th</sup> January 2022 has laid the foundation for the reform of the judiciary in the Republic of Serbia. The Constitution has been changed in the part pertaining to the judicial system but a complete judicial reform may be expected only when

relevant laws are passed on this matter.<sup>16</sup> It can be said that a shift has been made because the Act amending the Constitution (2022) has introduced more stability in the performance of the judicial function by eliminating the probationary period (the first election of a judge for a three-year term). In addition, the grounds for termination of a judicial office have been established, but the conditions for the election of judges have been left to the legislature. The role of the High Judicial Council has been strengthened, especially through its structure that guarantees members' independence from political authorities. The election of the Supreme Public Prosecutor by a majority of three-fifths of MPs in the National Assembly is also a good guarantee against political influence during the nomination. On the other hand, the Act amending the Constitution has established a "safety valve" in the form of a special constitutional Commission, which takes over the powers of parliament if the agreement of the government majority and the parliamentary opposition cannot be reached. The Commission consists of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor, and the Protector of Citizens (Ombudsman). In all cases, instead of a strong qualified majority (three-fifths for the election of the Supreme Public Prosecutor and two-thirds for the election of members of the high judicial or prosecutorial council), the Act amending the Constitution envisages in a five-member Commission composed of top public officials who decide by a simple majority (three out of five members of the Commission).

An important aspect for success of the judicial reform is public opinion and trust in the judicial system. Hence, we should not ignore the fact that only a third of the citizens registered to vote actually participated in the constitutional referendum. While the formal prerequisites ensure the legality of constitutional revision, legitimacy is the "armature" that is built into the foundation of constitutional change and that provides stability and strength to the Constitutional Act. Although the majority of voters voted for the constitutional change, it is basically only about 18% of all registered voters, while about 13% of voters were against. In the end, instead of a conclusion, we may pose the following

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16 It was also underscored in the opinion of the Venice Commission on the Draft Amendments to the RS Constitution: "For this reason, the present opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the functioning of democratic institutions in Serbia. This could be the object of a second opinion, should PACE consider it necessary and useful. This opinion also does not deal with judicial reform as such, but only with these draft Amendments". (Venice Commission CDL-AD(2021)032-e. Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, adopted by the Venice Commission at its 128th Plenary Session, Venice and online, 15-16 October 2021).

question: does it mean that the citizens were satisfied with the previous justice system, or that they were still dissatisfied but thought that normative changes would not bring significant improvement? The problem of legitimacy of national constitutions has persisted since the adoption of the first Constitution in 1990 but the holders of constituent power did not consider this issue important. Although the power of the people no longer has the same meaning as at the outset of a constitutional state, its strength and its messages to the formal legislators should not be neglected.

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**Др Ирена Пејић,**  
Редовни професор,  
Правни факултет, Универзитет у Нишу

## **УСТАВНИ РЕФЕРЕНДУМ И РЕФОРМА ПРАВОСУЂА У СРБИЈИ**

### **Резиме**

Ревизија Устава Републике Србије спроведена на уставном референдуму 16. јануара 2022. поставила је основу за реформу правосуђа. Устав је промењен у делу који се односи на правосудни систем, али се комплетна правосудна реформа може очекивати тек када буду донети одговарајући закони којима је препуштена разрада ове материје. Може се рећи да је учињен помак, јер је унета већа извесност у обављању судијске функције укидањем пробног периода, тј. првог избора судија на трогодишњи мандат. Ојачана је улога Високог савета судства, нарочито преко његове структуре која гарантује независност чланова према политичкој власти. Такође, избор Врховног јавног тужиоца у Народној скупштини већином од три петине представља добру гаранцију од политичког уписа приликом номинације. Са друге стране, успостављен је један “сигурносни вентил” у форми специјалне комисије, која преузима надлежности парламента уколико се не постигне сагласност владине већине и парламентарне опозиције. У свим случајевима снажне квалификоване већине (три петине за избор Врховног јавног тужиоца и две трећине за избор чланова Правосудних савета) излаз је пронађен у петочланој комисији састављеној од највиших државних функционера која најважније одлуке доноси већином, довољно је три од пет чланова уставне комисије.

За успех правосудне реформе важно је поверење грађана у правосудни систем и зато не треба занемарити да је на уставни референдум изашла тек трећина грађана уписаних у бирачки списак. За разлику од формалних претпоставки којима је остварена легалност уставне промене, легитимитет је “арматура” која се уграђује у темељ уставних промена и која пружа стабилност и чврстину уставном акту.

**Кључне речи:** реформа правосуђа, уставна ревизија, Устав Републике Србије.