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Review Paper

PROMINENT LAWYERS IN THE HIGH JUDICIAL COUNCIL OF REPUBLIC OF SERBIA: NEW RULES, NEW DOUBTS

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Abstract. *In January 2022, Serbian Constitution was amended for first time after its adoption in 2006. The constitutional amendments were the basis for the new judicial reform. In 2023, a set of new laws on the judiciary was adopted, including the new Act on the High Judicial Council. This reform included changes in composition of the High Judicial Council of the Republic of Serbia. The subject matter of this paper is the new composition of the High Judicial Council. The author examines the new constitutional and legal norms on the composition of the High Judicial Council, particularly focusing on prominent lawyers as members of the High Judicial Council. The analysis of the constitutional amendments and relevant provisions of the new High Judicial Council Act focuses on the conditions that candidates for the High Judicial Council membership have to fulfill, as well as the election procedure. The author points to the dangerous impact that politics may exert through prominent lawyers on the work of the High Judicial Council. The purpose of this paper is to examine whether new legal framework may provide for a more independent High Judicial Council. The hypothesis is that new composition of the High Judicial Council will not make this body more independent.*

Key words: *High Judicial Council, prominent lawyers, judicial reform, judiciary, judicial independence, Serbian constitutional law.*

1. INTRODUCTION

The High Judicial Council of the Republic of Serbia is one of the two independent judicial councils in Serbian legal system, together with the High Prosecutorial Council. In theory, judicial councils are high bodies of judicial self-government, which guarantee judicial independence. Judicial councils should be independent and expert bodies and their

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role is important especially in the election of judges. Inspired by great comparative examples, the High Judicial Council was envisaged in the 2006 Constitution. Only a few years later, judicial practice clearly showed that judicial independence did not improve as it had been expected. After many years of planning and many proposals, the Serbian Constitution was amended in January 2022. The constitutional amendments were the basis for the new reform of judiciary. A new set of laws on the judiciary were adopted in 2023.

The composition of the High Judicial Council is one of the most important issues related to this body. The main question concerning its legal position is the membership in the Council: who can be a member, and how one can be elected to that function. This issue is directly related to the judicial independence. Namely, judicial councils can provide judicial independence only if they are independent as well, which especially refers to independence from political influence. Political influence can occur directly through politicians who participate in the Council work, or indirectly when politicians elect the Council members in parliament. While we may not exclude the possibility that some Council members are elected by political criteria, they should be a minority in the Council. If the Council members are not independent, how can they ensure the independence of a complex judicial system?

This paper examines the new constitutional and legal norms on the composition of the High Judicial Council of Republic of Serbia, with specific reference to prominent lawyers as members of the Council. The author analyzes the constitutional amendments (2022) on this matter and the new Act on High Judicial Council (2023), focusing on the conditions that candidates for the High Judicial Council membership have to fulfill, and the election procedure. The author points to a dangerous impact that politics may have on the work of the Council through prominent lawyers. The paper aims to examine whether the new legal framework can provide a (more) independent High Judicial Council. The hypothesis is that new composition of the High Judicial Council will not make this body more independent. To prove this hypothesis, the author uses the dogmatic, historical and normative methods.

2. THE COMPOSITION OF THE HIGH JUDICIAL COUNCIL IN THE CONSTITUTION 2006 AND THE CONSTITUTION 2022

The origin of the High Judicial Council of Republic of Serbia goes back to the democratic changes in Serbia in early 2000s, when a set of new laws on the judiciary was launched (legislative acts on judges, prosecution, organisation of courts and public prosecution offices, etc.). Within the judicial reform, the High Council of the Judiciary was established in 2001 as a body in charge of both the judiciary and the prosecution. Its main competence was to propose candidates for judges, public prosecutors, presidents of courts, and to elect jurors (Article 1 of the HCJ Act 2001).[1] However, this body did not meet the expectations because it only proposed candidates for judicial functions who were officially elected by the Serbian National Assembly. Thus, this body remained highly politicized.

Under the Constitution of Republic of Serbia adopted in 2006[2], the former High Council of Judiciary was divided into two bodies: the High Judicial Council (Articles 153-155) and the State Prosecutors' Council (Articles 156-165). Thus, both councils were raised from

[1] The Act on the High Council of the Judiciary (Zakon o Visokom savetu pravosuđa iz 2001);-http://www.podaci.net/_zakon/propis/Zakon_o_Visokom/Z-vsprav03v0163-0561.html

[2] The Constitution of Republic of Serbia, *Official Gazette RS*, 98/2006; available in English at: https://faolex.fao.org/docs/pdf/srb129685.pdf

the level of judicial legislation to the constitutional level. The legal position of the High Judicial Council was also defined by a set of laws adopted in 2008. The Council "was meant to be a body on the top of the judicial branch pyramid, with significantly extended jurisdiction" (Stanić, 2022: 115).

Articles 153-154 of the Constitution included provisions on the status, composition, election and jurisdiction of the High Judicial Council. The Council had 11 members. Three members were elected by virtue of their office: 1) President of the Supreme Court of Cassation; 2) Minister of Justice; and 3) President of the authorized parliamentary committee for the judiciary. Thus, Council members *ex officio* were members of all three branches of government, but all of them were elected to their functions by the National Assembly. The remaining eight members were electoral members, elected by the National Assembly. Six electoral members were judges holding permanent tenure[3] and two members were prominent lawyers with at least 15 years' professional experience, including one attorney and one law faculty professor (Article 153, §§ 2-4 of the Constitution 2006).

This composition of the High Judicial Council was criticized. Primarily, participation of the Minister of Justice and President of the parliamentary committee for justice gave a political note to the work of the Council because they were representatives of the executive and the legislative branch, respectively. Besides, all Council members were elected by the National Assembly, either directly or indirectly, which could not provide independence of this body. The National Assembly had the key role in elections of Council members and it could also decide not to choose any of proposed candidates. Many scholars considered that the composition of the Council was in collision with the principle of judicial independence (Pajvančić, 2017:177-178; Petrović-Škero, 2017:219-220; Pejić, 2014:169-170; Petrov, 2014:103-104; Orlović, 2010:183-184; Marković, 2006:23). As the judicial branch did not have the decisive role in election of the Council members, it seemed that the Council was not part of judicial branch (Pajvančić, 2017: 177). It was also unclear whether it was a judicial body or a body of state government, and the Council composition led to conclusion that it was a parliamentary body (Petrović-Škero, 2017: 217). Right after the adoption of the 2006 Constitution, the Venice Commission issued its Opinion No. 405/2006 on the Constitution of Serbia[4], stating that the composition of Council seems pluralistic at the first site, which was deceptive, and that the judicial appointment process was under the control of the National Assembly, which seemed like a recipe for politicization of the judiciary (Venice Commission, 2007:15).

In 2022, the Constitution of Serbia was amended[5] for the purpose of reforming the judicial branch and strengthening judicial independence. The normative framework of the reform was completed by adopting a set of new laws on the judiciary in 2023. One part of the changes was the reform of the High Judicial Council (Articles 150-154 of the Constitution 2022), including changes in its composition. Under the amended Constitution (2022), the High Judicial Council shall be an independent state body that ensures and guarantees independence of the courts, judges, court presidents, and jurors (lay judges). The Council is competent to: elect judges and jurors and decide on the termination of their

[3] Beside the judges holding permanent tenure, there were judges elected to their first judicial post for a three-year term of office. Since the constitutional revision in 2022, all judges have permanent tenure.

[4] Venice Commission /European Commission for Democracy through Law (2007). Opinion No. 405/2006 on the Constitution of Serbia, CDL-AD(2007)004, Venice, 17-18 March 2007);

[5] The Constitution of the Republic of Serbia, *Official Gazette RS*, 98/2006, 16/2022. https://www.paragraf.rs/propisi/constitution-of-the-republic-of-serbia.html

terms of office; elect the President of the Supreme Court and presidents of other courts and decide on the termination of their terms of office; decide on relocation and transfer of judges and jurors; decide on other issues related to the status of judges, court presidents and jurors; and perform other competences laid down by the Constitution and the law (Article 150 of the Constitution 2022).

According to the constitutional amendments, the High Judicial Council should have 11 members: six judges elected by judges, four prominent lawyers elected by the National Assembly, and the President of the Supreme Court (Article 151 §1 of the Constitution 2022). Therefore, the Council now has 10 electoral members (six judges and four prominent lawyers) and one *ex officio* member (President of the Supreme Court). It is significant that the Council has more members among the judges (six elected judges and the President of the Supreme Court). The prominent lawyers elected by the National Assembly are a minority, which is good because it is expected that these members could be under political influence. For this reason, members of the Council should be persons immune to such influence. "In order for the Council to have legitimacy, members of the Council have to be, if not better, than at least not worse than everyone they elect or deny election as a judge" (Vodinelić, 2010: 9-10). Surely, as Minister of Justice and President of the parliamentary committee are not members of the Council anymore, less political influence on this body should be expected.

The constitutional amendments also regulated the legal status of the Council members. A member of the Council shall be elected for a period of five years and the same person may not be re-elected. The Council shall have the President and the Vice-President. The President of the Council shall be elected by the Council among the members that are judges, and the Vice-President is elected among the members elected by the National Assembly, for a period of five years. The President of the Supreme Court may not be elected for the position of President of the Council (Article 152 §§ 1-3 of the Constitution 2022).

3. Prominent Lawyers in the High Judicial Council: Members Elected by the National Assembly

The National Assembly of Republic of Serbia shall elect members of the High Judicial Council from among the prominent lawyers with at least ten years' experience in the legal profession. The four prominent lawyers are elected from among eight candidates proposed by the competent committee of the National Assembly, following a public competition, by a two-thirds vote of all the deputies, in accordance with the law (Article 151 §4 of the Constitution 2022). The election procedure includes two stages. The first stage takes place in competent parliamentary committee, which proposes eight candidates after the public competition. The second stage takes place in the National Assembly plenary session, which chooses four members of the Council, from among the eight proposed candidates.

In case where the parliamentary majority of two-third votes of all deputies is not reached, there is a 'backup solution'. If the National Assembly fails to elect all four members within the time limit set by the law, the remaining members shall be elected (after the expiry of the legally determined time limit) from among the eligible candidates by the special constitutional commission comprising 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), by a majority vote (Article 151 §.5 of the Constitution 2022; Article 51 §1 of the High Judicial Council Act 2023).

3.1. Who is a prominent lawyer?

The term 'prominent lawyer' is envisaged as a legal standard, which should be interpreted as referring to "a legal expert who is dominantly or by consensus recognized by the professional public, which consists of other lawyers, as a person whose knowledge and skills in the field of law are greater than the knowledge and skills of laymen, other lawyers and legal experts to theoretically or practically solve existing and new legal problems" (Spaić, 2022). Yet, the vague term "prominent lawyer" raises a number of issues: who are the prominent ones, what makes them prominent (their expertise in law and/or public recognition as a legal expert), who shall evaluate their expertise and prominence, who shall propose/appoint/elect them, etc. The prior experience in using this unclear legal term raises further questions: "it is not clear whether they stand out from the rest according to some criteria, nor can it be concluded on the basis of their documented knowledge and skills why that particular person would be chosen for the position where he/she can decide on election and dismissal of judges" (Spaić, 2022).

The Constitution 2022 established two conditions for the election of prominent lawyers for the High Judicial Council membership: they need to have at least ten years of experience in the legal profession (Article 151 § 4), and they must be worthy of that function (Article 151 § 7). In addition, a member of the Council elected by the National Assembly may not be a member of a political party (Article 151 § 8 of the Constitution). However, the last condition cannot prevent a candidate to be a member of a political party until the moment he/she is elected as a Council member.

For these reasons, the term 'prominent lawyers' had to be more precisely specified in the new Act on High Judicial Council (2023).[6] In addition to the two previously stated criteria, the High Judicial Council Act (hereinafter: the HJC Act) established ten other conditions (criteria) that must be fulfilled by a prominent lawyer to be elected as a member of the Council; an eligible person: 1) shall meet the general requirements for working in state authority; 2) shall have university education acquired through undergraduate academic studies with at least 240 ECTS, or university education obtained through undergraduate studies at the Faculty of Law for at least four years; 3) shall have experience and knowledge significant for the work of the judiciary; 4) be worthy of performing the function of a Council member; 5) shall not be over the age of 65 (i.e. eligible for retirement); 6) shall not hold/perform a judicial or prosecutorial office; 7) has not been elected to a public office directly by the citizens, does not perform a function for which he/she was elected by the National Assembly, or does not perform functions of the Constitutional Court judge or state secretary; 8) does not have a strong influence in political decision-making processes; 9) has not exerted undue influence on the work of a judge, a court, a public prosecution office or a holder of the public prosecutor's function; 10) has not publically advocated opinions that jeopardize the independence of the judiciary or the independence of the public prosecutor's office (Article 44 §1 of the HJC Act). However, has the HJC Act really managed to cast more light on the term 'prominent lawyer', or it has it generated further dilemmas on this vague term?

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[6] Act on the High Judicial Council (Zakon o visokom savetu sudstva), *Official Gazette RS*, 10/2023, https://www.paragraf.rs/propisi/zakon_o_visokom_savetu_sudstva.html, https://mpravde.gov.rs/files/Law%20on%20the%20High%20Judicial%20Council%2015112022.docx

First, we may criticize the condition referring to the established age limit, which is aimed at excluding persons who are eligible for retirement (pension). Yet, there are many retired lawyers, with great professional and life experience, who are perceived as prominent figures by professional public. This condition has a discriminatory character because it neglects competence but puts one's age in the foreground. Thus, it "discriminates a whole group of potential candidates (...) who reached full maturity and work experience and could devote themselves to this function" (Đurđić, 2023). This criteria may lead to some paradoxical situations where, for example, a retired university professor who significantly contributed to the theoretical study of judiciary cannot be the Council member.

The condition that a candidate does not perform a judicial or prosecutorial function and the condition that he/she has not been elected to a public function directly by the citizens, does not perform a function for which he was elected by the National Assembly, or does not perform functions of the Constitutional Court judge or state secretary are completely clear and justifiable. The aim of these conditions is to prevent cumulating public functions.

The condition on the experience and knowledge significant for the work of the judiciary is very arbitrary because the HJC Act does not define what kind of experience and knowledge significant for the work of the judiciary the candidates should demonstrate. Thus, although it is a professional rather than a political issue, the National Assembly may arbitrarily evaluate relevant experience and knowledge of candidates. In this context, the HJC Act also envisages that, during the election process, special consideration should be given to one's professional or scientific work of importance for the work of the judiciary, in-depth understanding of the judiciary, commitment to professional work, or public activity promoting the independence of the judiciary (Article 44 para.3 of the HJC Act). This provision looks like a guideline rather that an obligatory condition. In terms of legal education, we may note that a passed Bar Exam is not among the criteria for the election of prominent lawyers for the Council membership. As all judges elected to the High Judicial Council must be attorneys with a passed Bar exam. it would be reasonable to expect that the same criteria shall apply to the prominent lawyers.

The condition referring to one's worthiness to perform the function of the Council member is disputable and may be subject to arbitrary assessment. The HJC Act attempts to define the term "worthiness', which entails a set of moral qualities that the Council member should possess and the conduct in accordance with those qualities. Moral qualities include: honesty, conscience, fairness, dignity, perseverance and exemplary behaviour: safeguarding the reputation of the Council and the judiciary in exercising the function and beyond, awareness of social responsibility, maintaining independence and impartiality, reliability and dignity in performing the function and beyond, and assuming responsibility for a positive image and preserving confidence in the work and authority of the Council and the judiciary in public (Article 44 § 2 of the HJC Act). Yet, this specification raises two questions: first, how to determine whether the candidates have these moral qualities, and second, how to determine whether the candidates acted in line with these qualities in their previous professional work, and how can that indicate whether they will demonstrate such conduct in the future. As these issues seem to be impossible to determine in practice, the legal standard of worthiness could be relativized and transformed into a default element in the election procedure; it may be assumed that this condition will have only nominal but not essential importance in practice (Simović, 2022: 108-109).

The last three conditions are also imprecise, and they raise more questions instead of helping 'identify' a prominent lawyer. First of all, what is "a strong influence in making

political decisions", and how to determine whether it is strong or not? The condition that a Council member shall be a person who does not strongly influence the political decision-making is connected to the Constitutional condition that a Council member may not be a member of a political party. But, should this mean that "a member of political party who 'influences' the political decision-making, but does not do that 'strongly', may be a candidate for the Council member?" (Marković, 2023: 306). In that case, such a candidate should only disaffiliate from the party once elected as a Council member. Second, what is meant by "undue influence on the work of a judge, a court or a holder of the public prosecutor's function and the public prosecutor's office", and how to determine whether such influence was due or undue? Third, how to determine whether one's opinions expressed in public appearances jeopardize the independence of the judiciary or the public prosecutor's office? After all, who would be supposed to answer to all these questions in every specific situation?

It can be concluded that only five out of ten conditions (conditions no. 1, 2, 5, 6 and 7) are precisely defined, and facilitate a clear evaluation of whether a candidate fulfills them. If a candidate does not fulfill any of these five conditions, his/her application shall be rejected; thus, these five conditions are formal and the other five conditions are substantive (Marković, 2023: 305). The remaining five conditions (substantive conditions) are all legal standards and they may be subject to discretionary assessment of those who elect the Council members. Instead of electing professionally eligible candidates, this could easily pave the way for politically eligible candidates.

3.2. Prominent lawyers' election procedure

In addition to the dilemmas about the conditions that have to be fulfilled by a prominent lawyer, another issue is the election procedure. The election procedure includes two major stages: the first one takes place in the competent parliamentary committee, and the second one takes place in the National Assembly.

In the first stage of the election procedure, the first step is a public competition, where candidates file an application for a Council member in the capacity of a prominent lawyer. Thus, in order to apply, a candidate should consider himself/herself a prominent lawyer. However, a candidate cannot assess whether he/she is a prominent lawyer. The only relevant assessment can be preformed by the professional public. Therefore, it would be much more appropriate if the professional public would suggest eligible candidates and the National Assembly would elect the Council members among them. For example, the candidates could be proposed by professional judges', prosecutors' and lawyers' associations, the Bar Association of Serbia or its regional units, law schools (faculties), NGOs involved in democracy and the rule of law, etc. The essence of this issue is that prominent lawyers should not apply for a public competition themselves; as they have drawn attention to themselves through their professional engagement, they should be proposed by other professionals who have recognized the quality of their work. The concept of public competition means that the application will be submitted by the ones who have received a political signal to do so, or the ones who are so confident in their work they consider themselves prominent lawyers.

As the first step in the election procedure, the public competition shall be announced by President of the National Assembly. Although the President of the National Assembly is the one who announces it, the public competition is conducted by Committee on the Judiciary, Public Administration and Local Self-Government. The applications for a public competition shall be submitted to the Committee within 15 days from the announcement

(publication) date in "the Official Gazette of the Republic of Serbia". The application must contain information about the candidate and relevant evidence proving that he/she fulfils the conditions for election (at least for conditions that could be proven with evidence (Article 47 of the HJC Act).

After the expiry of the application deadline, the Committee examines the applications and the enclosed evidence. Inadmissible, incomplete and untimely application shall be rejected by the Committee. The application is inadmissible if it is submitted by a person who does not meet formal eligibility criteria (the conditions above). The Committee has a discretionary power to obtain data about the candidate from the authorities, organisations and legal entities where the candidate has worked, and other relevant data. The Committee will probably use this power when there is some doubt about the accuracy of data provided in the application and enclosed evidence. After this preliminary examination of the applications, the Committee should prepare a shortlist of candidates who fulfil the conditions for election. The Committee is also obliged to publish the biographies of candidates from the shortlist and schedule interviews with them. Then, in a public session including the participation of the professional and general public, the Committee considers applications and submitted evidence, and conducts interviews with the shortlisted candidates. The conversation with the candidates is broadcast directly through the media (Article 48 of the HJC Act).

After this public session, the Committee holds a special session, where the Committee proposes to the National Assembly twice the number of candidates than the number of Council members who are to be elected (Article 45 § 2 of the HJC Act). For example, if the National Assembly shall elect all four prominent lawyers as Council members, the Committee has to propose eight candidates. Every Committee member can propose candidates for the Council, from among the candidates who fulfilled the stipulated criteria (conditions), and the Committee has to decide on all proposals. The proposal of candidates shall be adopted by a two-thirds vote of the total number of Committee members. This supermajority should provide a wider political consent about the candidates. If the Committee does not adopt a proposal by a two-thirds majority, a new session should be held. At a new session, the Committee decides again but this time it needs three-fifths majority to adopt a proposal of candidates. Thus, if the Committee members could not reach the two-thirds majority at a first Committee session, the required majority gets reduced to the three-fifths majority at the second session. Eventually, if the Committee cannot reach the proper majority at the second session, the Council members will be elected by the special Commission (Article 49 of the HJC Act). It is good that the 'interview' session has to be a public one, but it is unclear why the special session is not public. It may happen that the Committee majority decides to close this session for public, which is bad because the debate about the candidates between Committee members should be publicly available. After all, biographies of candidates are publically published and the interviews with them are held at a public session.

This first stage in the election procedure implies that the Committee should receive applications for the public competition, determine fulfillment of (some) formal conditions and then filter the applications by proposing candidates for the Council members. However, in practice, parliamentary committees in Serbia mostly do not decide in line with professional criteria but on the basis of political interests. It raises concerns whether this stage can really bring the best candidates to the second stage of the election process. "Having in mind that parliamentary majority, as a rule, dominates in the most important parliamentary committees, it is clear that it will be a channel of strong political influence",

where the Committee "could eliminate all candidates who are not to the liking of the parliamentary majority and it could prejudice their final decision" (Simović, 2022: 110).

The Council members are elected in the second stage, which may include two scenarios: the first one is that the Council members are elected by the National Assembly, and the second one is that they are elected by the special constitutional Commission. In the first case, the President of the National Assembly convenes a session for the election of a Council member. The session of National Assembly shall be scheduled no sooner than 15 days from the receipt of the proposal for the election of the Council member, and the session must be held and completed within 30 days from the date of receipt of the proposal. Before holding the plenary session, the Committee organises a public hearing for the purpose of presenting the candidates. At the plenary session, the National Assembly elects the Council members by votes of two-thirds of all deputies. The National Assembly must vote for each candidate separately, and four candidates who receive the highest count of votes are elected. If several candidates received the same and concurrently the lowest number of votes sufficient for election, the National Assembly votes again between those candidates (Article 50 of the HJC Act). The required two-thirds majority should provide that Council members are not elected only by the parliamentary majority; in effect, it could be result of a compromise between the government and the opposition (Mitrović, 2022).

The special constitutional Commission shall elect the Council members in two cases: 1) if the Committee cannot determine the proposal of candidates after its second session; or 2) if the National Assembly does not elect the Council members within the given time limit. In case the National Assembly does not elect all Council members within the given time limit, the remaining Council members may be elected by the special constitutional Commission, which is composed of: 1) the President of the National Assembly, 2) the President of the Constitutional Court, 3) the President of the Supreme Court, 4) the Supreme Public Prosecutor, and 5) the Ombudsman. The President of the National Assembly convenes and presides over the session of this Commission. Before the election of a Council member, the Commission considers the applications of all the candidates who meet the election criteria. Then, the Commission conducts an interview with candidates. The decision on the election of a Council member is made at a public session by a majority of votes, within 30 days from the date of expiry of the deadline for the election the Council Member by the National Assembly (Art. 51 §§ 1-5 of the HJC Act). However, since the majority of votes is at least three out of five votes, "this means that a strong parliamentary 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" (Pejić, 2022: 85). The Commission members can vote only for the remaining number of candidates that are to be elected for Council members. If several candidates received the same and concurrently the lowest number of votes sufficient for election, the Commission votes again between those candidates. If the Commission fails to reach a decision within the time limit, a new public competition is announced for the election of a Council member for whom the decision was not reached (Art. 51 §§ 6-8 of the HJC Act).

The main problem with the special Commission is legitimacy of its composition. At first sight, the composition of the Commission seems very respectable, although the Commission is an *ad hoc* body (Kolaković-Bojović, Petković, 2020: 101). The President of the National Assembly is the only Commission member who is a politician and the remaining members are prominent state officials. However, in political reality, the remaining officials are elected under political influence and there is a significant political influence in resolving politically sensitive

cases by these institutions. Thus, it can be expected that the Commission will elect the Council members that are to the liking of the ruling majority.

In practice, it may also be assumed that Council members will always be elected by the special Commission. As two-thirds votes of all deputies are required for the decision of the National Assembly, it means that a vast majority of deputies should agree on all four candidates who deserve to be elected. But, in political practice, the National Assembly performs its function in such a way that the ruling majority elects candidates who they can (tacitly) count on and through whom they may influence the body to which they were elected. In the circumstances where there is a weak parliamentary majority and a huge division of the government and the opposition deputies, it would be quite impossible to reach the two-thirds majority. In such a case, the required majority cannot be reached and the special Commission will have a chance to elect the Council members. The same situation may occur before the Committee so that the parliamentary plenum will not even have a chance to debate on the candidates; thus, the election process will be transferred directly to the special Commission. The opposition deputies have two options: to choose between already selected candidates or not to accept any of the candidates from the list, which will lead to transferring the elections from the National Assembly to the special Commission (Simović, 2022: 110). Anyway, there is a clear concern that most Council members or all four prominent lawyers will be chosen by the special Commission and not by the National Assembly; thus, the exception could became the rule. Additionally, the task may be transferred to the special Commission if the National Assembly exceeds the time limit for adopting its decision (Art. 51 § 1 of the HJC Act); hence, the ruling majority may deliberately prolong the discussion until the expiry of the time limit. Such a scenario is good for the ruling majority because they can (partially) avoid the parliamentary debate, which citizens follow much more than other activities of deputies.

4. THE FIRST ELECTION OF THE REFORMED HIGH JUDICIAL COUNCIL

Soon after the High Judicial Council Act entered into force, the first opportunity to apply the new rules was the first elections for the new (reformed) High Judicial Council. The procedure was launched by the President of the National Assembly who issued the Decision on call for a public competition for the election of the High Judicial Council members elected by the National Assembly (2023).[7] The Committee on the Judiciary, Public Administration and Local Self-Government examined all applications and made a list of 18 candidates who fulfilled the conditions (National Assembly RS, 2023a).[8] Candidates were interviewed at the next Committee session (National Assembly RS, 2023b).[9] The Committee managed to propose six candidates by the two-thirds majority (at

[7] Народна скупштина РС (2023). Одлука о расписивању првог јавног конкурса за избор чланова Високог савета судства које бира Народна скупштина (Decision on call for the First public competition for the election of the High Judicial Council members elected by the National Assembly), 01 No. 02-282/23 on 10.02.2023, *Службени гласник РС*, 11/2023.

[8] Narodna skupstina RS/National Assembly RS (2023 a). Deseta sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 6 mart 2023 (Proceedings of the 10th session of the Committee on Judiciary, Public Administration and Local Self Government); accessed on 07 August 2024; http://www.parlament.gov.rs/Deseta_sednica_Odbora__za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu.46680.941.html

[9] Narodna skupstina RS/National Assembly RS (2023 b). 11. sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 11 mart 2023 (Proceedings of the 11th session of the Committee on Judiciary, Public

least 12 out of 17 votes of the Committee members) (National Assembly RS,2023c).[10] Subsequently, the Committee held another session where two more candidates were proposed by the three-fifths majority (at least 11 out of 17 votes of the Committee members) (National Assembly RS, 2023d).[11] However, the candidates proposed at this session were strongly challenged by the opposition (Nikolić, 2023). Then, the Committee organized a public hearing where candidates presented themselves. It was noted that the candidates were mostly presenting their theoretical knowledge and listing competences of the Council, while they failed to respond to the questions of the opposition deputies on practical cases demonstrating that the judiciary in Serbia is not independent (Čodanović, 2023). At the plenary session of the National Assembly, only one of the eight proposed candidates received the requisite two-thirds majority vote. Three more candidates received a high number of votes but the two-thirds majority was not reached (Decision of the National Assembly, 2023).[12]

Since the National Assembly elected only one Council member, conditions were met for the special Commission meeting. The Commission had to elect three Council members out of seven proposed candidates. The Commission considered the candidates' applications and interviewed them, watched the videos of candidates' presentations before the Committee and at the public hearing, and elected three Council members by majority votes. The Commission elected those three candidates who had received most votes before the National Assembly but who had not reached the two-thirds majority.

In the Decision on the election of three Council members[13], the Commission explanation was pretty tight. The explanation mainly included the description of all procedural actions taken before the Committee, the National Assembly, and the Commission. Only in the last paragraph did the Commission refer to the requisite election criteria, stating that "the Commission has determined that the elected candidates have university education obtained at the Faculty of Law, that they have long term experience and knowledge for work in the judiciary, that they are worthy of performing the function of a Council member, and that they have fulfilled the other legal conditions." At the end, the Commission stated that "the elected candidates have persuasively presented arguments in their presentations before the National Assembly, the Committee and the Commission, provided answers to the questions asked, and thus have shown relevant work experience and knowledge of significance for the work in the Council" (Decision of the Commission, 2023).

Administration and Local Self Government, accessed on 07 August 2024; http://www.parlament.gov.rs/11._sednica_Odbora_za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu.46706.941.html;

[10] Narodna skupstina RS/National Assembly RS (2023 c). 12. sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 11 mart 2023 (Proceedings of the 12th session of the Committee on Judiciary, Public Administration and Local Self Government), accessed on 07 August 2024; http://www.parlament.gov.rs/12._sednica_Odbora_za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu.46746.941.html;

[11] Narodna skupstina RS/National Assembly RS (2023 d). 12. sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 26. mart 2023 (Proceedings of the 13th session of the Committee on Judiciary, Public Administration and Local Self Government); accessed on 07 August 2024; http://www.parlament.gov.rs/13._sednica_Odbora_za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu_.46818.941.html

[12] Одлука о првом избору члана Високог савета судства кога бира Народна скупштина , Народна скупштина РС, 20. априла 2023 **(**Decision on the election of a member of the High Judicial Council elected by the National Assembly on 20.04.2023**)**, *Службени гласник РС, бр.* 31/2023;

[13] Одлука о првом избору три члана Високог савета судства које бира Народна скупштина **(**Decision on the first election of three members of the High Judicial Council elected by the National Assembly**)**, Комисија за избор члана Високог савета судства и Високог савета тужилаштва 01 No. 02-896/23 од 08.05.2023, *Службени гласник РС,* бр. 38/2023 од 10. маја 2023.

The explanation does not clearly specify how the elected candidates have stood out from among the other candidates, in line with the requisite criteria (conditions) stipulated in the High Judicial Council Act. It seems that the main condition for the Commission was 'persuasiveness in presenting arguments', but it is still unclear whether the Commission gave more weight to the arguments or persuasiveness in their presentation. As the Commission concluded that the elected candidates have relevant work experience and knowledge to work in the Council, this legal condition seems to have been decisive. As a matter of fact, the Commission justification of such a decision should contain a comparison on fulfillment of the requisite criteria for all candidates. Legal conditions should be the first premise and the biographies of candidates should be the second one. In order to draw relevant conclusions and make a final decision, it is necessary to consider and compare the fulfillment of each condition separately, and all the conditions together, for every single candidate. It should result in preparing a thoroughly justified decision which will clearly show why some candidates were elected and the others were not. The lack of proper justification of the decision casts doubt on the quality of the elected Council members, particularly given the fact that the Commission decision was the same as the opinion of the parliamentary majority.

5. CONCLUSION

The recent judicial reform in the Republic of Serbia included the reform of the High Judicial Council, the body of judicial self-government. The new High Judicial Council Act was adopted in 2023, introducing *inter alia* new rules on the composition and election of Council members. For the time being, it can be said that the scope of the reform is quite limited. The reform included changes in the structure (composition) of the High Judicial Council. In terms of the Council independence, the main problem is hidden political influence through four members who are prominent lawyers elected by the National Assembly. The election procedure for these Council members entails a few disputable issues.

First, the term 'prominent lawyer' is a fairly vague legal standard, which may lead to arbitrary interpretation. Second, the new High Judicial Council Act (2023) establishes conditions for the election of these Council members but half of the conditions are legal standards themselves, which further complicates the issue. Thus, candidates for prominent lawyers in the Council membership may fulfill these conditions by default, which may reduce the election process to a political decision. Third, the political judgment is supposed to be the result of political agreement between the government and the opposition deputies in the National Assembly, which would enable them to reach the two-thirds majority to elect all four prominent lawyers; otherwise, these Council members will be elected by the special Commission of the National Assembly. However, the political relations in the National Assembly may lead to situations that prominent lawyers are almost always elected by the Commission instead the National Assembly. Since the Commission is composed of officials who are politically appointed to their functions, it can be expected that the Commission will elect candidates who are close to the ruling structures. The first elections for prominent lawyers in the reformed High Judicial Council confirmed these concerns. Three out of four prominent lawyers were elected by the Commission, which elected the candidates who received the votes of government deputies but not the votes of opposition deputies. Fourth, the Commission decision did not clearly justify, in line with the stipulated legal conditions, how the elected candidates have stood out from among the other candidates.

Having in mind the composition of the High Judicial Council, it is quite questionable whether politics will be excluded from the work of Council. There are too many dangers from hidden political influence on the Council through prominent lawyers. For a successful reform of the judiciary, there must be a political will and political culture to exclude political influence from the judiciary. Without these, every reform is just a cover for political influences which change its form but still affect the judiciary. The huge problem are legal norms that seem excellent *de iure* but, in reality, they can lead to political influence *de facto*.

REFERENCES

Kolaković-Bojović, M., Petković, B. (2020), *Položaj pravosuđa u Srbiji – između vladavine prava i samovlašća* (Position of the Judiciary in Serbia – between the rule of law and autocracy), Belgrade, Institut za kriminološka i sociološka istraživanja;

Marković, Đ. (2023). Visoki savet sudstva u novom normativnom ruhu (The High Judicial Council in the New Normative Setting/ In: Mirjanić, Ž., Milinković, I., Vlaški, B., Miškić, M. (ed.), *Zbornik radova Međunarodni naučni skup "Izazovi i perspektive razvoja pravnih sistema u XXI vijeku"*, 2023, Vol. 3, No. 3 (1), pp. 297-316;

Marković, R. (2006). The 2006 Constitution of the Republic of Serbia – A critical appraisal, *Anali Pravnog fakulteta u Beogradu*, Vol. 54, No. 2, 2006, pp. 5-46;

Orlović, S., (2010). Stalnost sudijske funkcije vs. opšti reizbor sudija u Republici Srbiji (General Reappointment of Judges vs Permanent Tenure of Judicial Office in Serbia), *Anali Pravnog fakulteta u Beogradu*, Vol. LVIII, No. 2, 2010, pp. 163-186;

Pajvančić, M. (2017). Ustavni položaj sudija u okviru organizacije vlasti: Normativni okvir – problemi normativnog i faktičkog karaktera (Constitutional Status of Courts in the Government Organization: Normative framework – problems of normative and factual character), *Glasnik Advokatske komore Vojvodine*, Vol. LXXVII, No. 3-4, 2017, pp. 173-189;

Pejić, I. (2022). Constitutional Referendum and Judicial Reform in Serbia, *Zbornik radova Pravnog fakulteta u Nišu,*, Vol. LXI, No. 94, 2022, pp. 75-92;

Pejić, I. (2014). Konstitucionalizacija sudske nezavisnosti: uporedno i iskustvo Srbije (Constitutionalization of Judicial Independence: in comparative law and in Serbian legislation), *Zbornik radova Pravnog fakulteta u Nišu*, Vol. LIII, No. 68, 2014, pp. 157-174;

Petrov, V. (2014). Predlozi za reformu Ustava u delu koji se odnosi na pravosuđe - preispitivanje Nacionalne strategije (Proposals for Constitutional Reform in the part relating to the Judiciary - the Review of the National Strategy), *Zbornik radova Pravnog fakulteta u Nišu*, Vol. LIII, No. 68, 2014, pp. 97-108;

Petrović-Škero, V. (2017). Visoki savet sudstva – Sastav, izbor, razrešenje, mandat, članstvo, nadležnost (The High Judicial Council – Status, election, dismissal, mandate, participation, jurisdiction), *Glasnik Advokatske komore Vojvodine*, Vol. LXXVII, No. 3-4, 2017, pp. 215-255;

Simović, D. (2022). Ustavni amandmani iz nužde - kritički osvrt na reformu sudske vlasti (Constitutional Amendments Resulting from Necessity: A Critical Overview of the Constitutional Reform of the Judiciary), *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. LVI, No. 1, 2022, pp. 85-119;

Stanić, M. (2022). *Sudski saveti: sastav i nadležnosti širom Evrope* (Judicial Councils – Composition and Competences Across the Europe), Beograd, Institut za uporedno pravo, ISBN 978-86-80186-87-0

Vodinelić, V. (2010). Reizbor sudija 2009: uspeo početak reforme ili reforma neuspelog početka? (Re-election of Judges in 2009: Successful Beginning of the Reform or Reform of Unsuccessful Beginning?), *Hereticus*, Vol. VIII, No. 1, 2010, pp. 7-13;

Legal Documents

Constitution of Republic of Serbia, *Official Gazette RS*, 98/2006; https://www.refworld.org/legal/legislation/natlegbod/2006/en/71120

Constitution of Republic of Serbia (amended), *Official Gazette RS*, No. 98/2006, 16/2022; https://www.paragraf.rs/propisi/constitution-of-the-republic-of-serbia.html

Zakon o Visokom savetu pravosuđa iz 2001 (Act on the High Council of the Judiciary);–http://www.podaci.net/_zakon/propis/Zakon_o_Visokom/Z-vsprav03v0163-0561.html

Закон о Високом савету судства (Act on the High Judicial Council), *Службени гласник РС*, 10/2023; https://www.paragraf.rs/propisi/zakon_o_visokom_savetu_sudstva.html; https://mpravde.gov.rs/files/Law%20on%20the%20High%20Judicial%20Council%2015112022.docx

Одлука о расписивању првог јавног конкурса за избор чланова Високог савета судства које бира Народна скупштина (Decision on call for the First public competition for the election of the High Judicial Council members elected by the National Assembly), Народне скупштина Републике Србије, 01 No. 02-282/23 on 10.02.2023, *Службени гласник РС*, 11/2023

Одлука о првом избору члана Високог савета судства кога бира Народна скупштина , Народна скупштина РС, 20. априла 2023 **(**Decision on the election of a member of the High Judicial Council elected by the National Assembly on 20.04.2023), *Службени гласник РС, бр.* 31/2023;

Одлука о првом избору три члана Високог савета судства које бира Народна скупштина **(**Decision on the first election of three members of the High Judicial Council elected by the National Assembly), Комисија за избор члана Високог савета судства и Високог савета тужилаштва 01 No. 02-896/23 од 08.05.2023, *Службени гласник РС,* бр. 38 од 10. маја 2023.

Venice Commission, Opinion No. 405/2006 on the Constitution of Serbia, CDL-AD(2007)004, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e;

Internet Sources

Čodanović, N., (2023). *Predstavljanje istaknutih pravnika pred Odborom – bez stavova, uz Đukanovićeve savete i razgovor o togama* (Presentation of Prominent Lawyers before the Committee - without opinions, including Đukanović's advice and discussion about judicial gowns), Istinomer, 3.4.2023, https://www.istinomer.rs/analize/predstavljanje-istaknutih-pravnika-pred-odborom-bez-stavova-uz-djukanoviceve-savete-i-razgovor-o-togama/; (accessed 14 August 2024)

Đurđić, S. (2023). *Primedbe na Nacrt Zakona o Visokom savetu sudstva i predlozi za njegovu izmenu i/ili dopunu* (Remarks on the Draft Act on the High Judicial Council and proposals for its amendment), Centar za paravosudna istraživanja, Beograd, (accessed 12 August 2024), https://www.cepris.org/istrazivanja-i-analize/primedbe-na-nacrte-zakona-o-sudijama-uredenju-sudova-i-visokom-savetu-sudstva/;

Mitrović, S., (2022). *Ustavne promene - depolitizacija pravosudne grane vlasti ili konzerviranje postojećeg stanja?* (Constitutional Changes: Depolarization of the Judicial Branch or Conservation of the Present Condition), Centar za evropske politike, Beograd, (accessed 13 Aug.2024) https://cep.org.rs/blog/ustavne-promene-depolitizacija-pravosudne-grane-vlasti-ili-konzerviranje-postojeceg-stanja/;

Nikolić, M. (2023). *Ugledni pravnici, besprekorni i nepoznati* (Prominent lawyers, impeccable and indeterminate), Istinomer, 18.3.2023; https://www.istinomer.rs/analize/ugledni-pravnici-besprekorni-i-nepoznati/ (accessed 14 August 2024);

Spaić, B. (2022). *'Istaknuti pravnik': uputstvo za upotrebu* (Prominent Lawyer: Instruction Manual), accessed on 12.08.2024. https://www.otvorenavratapravosudja.rs/teme/ustavno-pravo/istaknuti-pravnik-uputstvo-za-upotrebu;

Narodna skupstina RS (2023a). Deseta sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 6 mart 2023 (Proceedings of the 10th session of the Committee on Judiciary, Public Administration and Local Self Government) accessed on 7 August 2024, http://www.parlament.gov.rs/Deseta_sednica_Odbora__za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu.46680.941.html;

Narodna skupstina RS (2023b). 11. sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 11 mart 2023 (Proceedings of the 11th session of the Committee on Judiciary, Public Administration and Local Self Government, accessed on 7 August 2024, http://www.parlament.gov.rs/11._sednica_Odbora_za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu.46706.941.html;

Narodna skupstina RS (2023c). 12. sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 18.mart 2023 (Proceedings of the 12th session of the Committee on Judiciary, Public Administration and Local Self Government), accessed on 7 August 2024, http://www.parlament.gov.rs/12._sednica_Odbora_za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu.46746.941.html;

Narodna skupstina RS (2023d). 12. sednica Odbora za pravosuđe, državnu upravu i lokalnu samoupravu, 26. mart 2023 (Proceedings of the 13th session of the Committee on Judiciary, Public Administration and Local Self Government, accessed on 7 August 2024, http://www.parlament.gov.rs/13._sednica_Odbora_za_pravosu%C4%91e,_dr%C5%BEavnu_upravu_i_lokalnu_samoupravu_.46818.941.html;

ISTAKNUTI PRAVNICI U VISOKOM SAVETU SUDSTVA REPUBLIKE SRBIJE: NOVA PRAVILA, NOVE NEDOUMICE

U januaru 2022 godine su usvojeni ustavni amandmani i Ustav Republike Srbije je izmenjen po prvi put od njegovog donošenja 2006. godine. Ustavni amandmani su bili osnova za novu reformu pravosuđa, a 2023. godine su usvojeni novi pravosudni zakoni. Reforma je podrazumevala i promene u vezi sa Visokim savetom sudstva. Predmet ovog rada je reformisani sastav Visokog saveta sudstva. Rad se bavi novim ustavnim i zakonskim normama o sastavu Visokog saveta sudstva, a posebno istaknutim pravnicima kao članovima Saveta. U radu su analizirani ustavni amandmani o ovom pitanju i novi Zakon o Visokom savetu sudstva. Rad se posebno bavi uslovima koje kandidati za članove Saveta treba da ispune, kao i procedurom za njihov izbor. Rad razmatra potencijalnu opasnost da poltitika utiče na rad Visokog saveta sudstva preko istaknutih pravnika. Cilj rada je da ispita da li novi pravni okvit može da obezbedi (veću) nezavisnost Visokog saveta sudstva. Početna hipoteza je da novi sastav Visokog saveta sudstva neće obezbediti veću nezavisnost ovog tela.

Ključne reči: *Visoki savet sudstva, istaknuti pravnici, pravosudna reforma, pravosuđe, nezavisnost sudstva, srpsko ustavno pravo.*