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THE RULE OF LAW AND CONSTITUTIONAL CHANGES IN SERBIA

Abstract. *"The rule of law, not rule of men", is the sentence frequently used to express one of the main principles that serve as a milestone of modern democracies. From ancient Greeks to modern legal theory, the rule of law principle increased its importance from basic guaranties established to protect citizens from unlimited power of sovereign to modern concept based on separation of power, whose synergy is framed by checks and balances mechanism. The basic pattern of the rule of law is nowadays consisted in constitutions of numerous countries all around the world, but also recognized as an accession and membership criteria by European Union. The author analyzes an issues of mutual balancing three branches of power in the context of constitutional changes in Serbia requested by the European Commission in the process of accession negotiations for the membership in EU. The author puts in the focus strengthening constitutional guaranties of judicial independence, accessing the draft Constitutional Amendments proposed by Serbian Ministry of Justice.*

Key words: *rule of law, constitution, separation of power, check and balances, judiciary*

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1. THE RULE OF LAW PRINCIPLE - MEANING AND DEVELOPMENT

Despite common connecting the rule of law principle with Montesquieu's thought, the real track of initial rule of law ideas could be found even in Ancient Greece in the late seventh and early sixth centuries B.C. That's the period when the Greeks laws got written form, became publicly accessible and were no longer so subject to arbitrary interpretation by a privileged class.[1] Step forward in this regard was Pericles's description of a late Athenian state. He stated that "as regards the law, all men are on equal footing so far as concerns their private disputes." However, the very first definition that clearly reflects the rule of law principle like we understand it nowadays, came from Aristotle who argued: "We do not permit a man to rule, but the law." [2] The similar trend existed in the Roman law,[3] where generality of laws was reflected in The Laws of the Twelve Tables (Table IX) which stipulated that "no privileges, or statutes shall be enacted in favour of private persons, to the injury of others contrary to the law common to all citizens, and which all individuals, no matter of what rank, have a right to make use of." According to Marcus Aurelius, the general nature of laws was described as "one substance, one law, and one reason common to all intelligent beings, and one truth; as there must be one sort of perfection to all beings, who are of the same nature, and partake of the same rational power.[4] This concept appeared in more sophisticated form in Cicero's thoughts. He concluded that "as bodies cannot, if deprived of the mind, so the state, if deprived of law, cannot use its separate parts, which are to it as its sinews, its blood, and its limbs. The ministers of the law are the magistrates; the interpreters of the law are the judges; lastly, we are all servants of the laws, for the very purpose of being able to be freemen."[5] So, in addition to generality and universal application of law, Cicero introduced the rudimental concept of the separation of power. Even in a Middle Age which was, on the first glance, incompatible with the rule of law, a significant progress was made in this regard in legal theory, but also the novelties introduced by *Magna Carta Libertatum*. The Thomas of Aquinas argued that because the power of kings originated with the people (rather than from God), the people retained the power to depose an unjust tyrant and concludes that even rulers should obey the laws' directives. He addressed the proper purpose of laws, arguing that laws failed to promote equity and common good were unjust,

[1] J. Kelly, *A Short History of Western Legal Theory,* Claderon Press: Oxford, 1992, 9.

[2] T. J. Angelis, J. H. Harrison, *History and Importance of the Rule of Law*, 2003, 9, https://worldjusticeproject.org/sites/default/files/documents/history_and_importance_of_the_rule_of_law.pdf, last accessed on March 3rd 2018.

[3] According to Kelly, validity of the rule of law in Roman law could be described as situation where law was little more than the will of the ruler, and where rulers were not bound by the written laws. (J. Kelly, *op. cit.*, 68-70)

[4] *The Meditations of the Emperor Marcus Aurelius Antonius*, Liberty fund Indianapolis, 2008, 84.

[5] M. T. Cicero, *Pro Cluentio*, Harvard University Press-London, 1967, par. 146.

and thus had "the quality not law, but violence."[6] In addition to these theoretical developments one of the biggest steps toward modern understanding of the rule of law was made by proclamation of guaranties contained in *Magna Carta*, despite the fact that is sometimes criticized as a document that did more to secure baronial privileges than more universal equality.[7]

However, period from the 17th to 20th century has had the decisive influence on the rule of law principle as we know it today. From the English Bill of Rights (1689) where is argued the King James the Second was replaced because, he by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom.[8] The same act stipulates "that the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal." [9] The idea that a government's legitimacy depend upon popular consent was also the milestone of the Lock's theoretical understanding of the rule of law.[10] He

[6] Thomas of Aquinas, *Moral Philosophy*, 311.

[7] T. J. Angelis, J. H. Harrison, *op. cit*.,12.

[8] English Bill of Rights from 1689, available on: https://www.law.gmu.edu/assets/files/academics/founders/English_BillofRights.pdf, last accessed on February 16th 2018. The Bill of Rights provides for an extensive list of acts committed by King James the Second, that shows in depth understanding of the necessity also for the King to act in compliance with law. In the Bill is listed that incompliance with the law could be committed: By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament; By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the said assumed power; By issuing and causing to be executed a commission under the great seal for erecting a court called the Court of Commissioners for Ecclesiastical Causes; By levying money for and to the use of the Crown by pretense of prerogative for other time and in other manner than the same was granted by Parliament; By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament, and quartering soldiers contrary to law; By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law; By violating the freedom of election of members to serve in Parliament; By prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses; And whereas of late years partial corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason which were not freeholders; And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects; And excessive fines have been imposed; And illegal and cruel punishments inflicted; And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied; All which are utterly and directly contrary to the known laws and statutes and freedom of this realm.

[9] J. Locke, *Two Treatises of Government, Book Two*, Chapter IX, par. 131, http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf, last accessed on February 16th 2018.

[10] He argued that whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress

promoted several core rule of law elements such a written and general laws, but also separation of power. That concept got its more or less final shape in theoretical views of Montesquieu. According to Montesquieu, "when the legislative and executive power are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[11] It is important to notice that Montesquieu well recognized the third core element of the rule of law in addition to written law (constitution) and the separation of power- he emphasized importance of the independent judicial review.

During the 20th century brought new issues related to understanding and developments of the rule of law concept. The modern authors included substantive elements in formal rule of law definition That's also visible from the Dicey understanding of the rule of law as: the supremacy of law over arbitrary power; the universal application of law by the courts; and derivation of the rights from the ordinary law of the land, rather than from a written constitution. [12] Probably the best explanation of the qualitative requirements of the written laws was given by Radbruch in form well-known as the Radbruch Formula (*Radbruchsche Formel*).[13] He concluded that positive law cannot be defined otherwise as a rule that is precisely intended to serve justice. Based on Radbruch Formula, numerous modern authors attempted to find a balance between equality before law and justice.[14, 15]

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foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.

[11] C. Montesquieu, *The Spirit of Laws*, Batoche Books, Kitchener, 2001, book XI, Chapter 6, 174.

[12] T. J. Angelis, J. H. Harrison, *op. cit*., 18.

[13] Analysing the role and competences of the judge in case he deciding in certain case where there is a conflict between a statute and what he perceives as just, Radbruch argued that "the conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law". He admitted that is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content, but clearly stated that "where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all." G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, Süddeutsche Juristenzeitung, 1946, 107.

[14] See: F. Hayek, *The road to Serfdom*, Routledge Classics, 2001.

[15] In interpretation of Fuller, there are eight requirements of the rule of law. Laws must be general (specifying rules prohibiting or permitting behaviour of certain kinds); Laws must also be widely promulgated or publicly accessible, that ensures citizens know what the law requires; Laws should be prospective (specifying how individuals ought to behave in the future rather than prohibiting behaviour that occurred in the past); Laws must be clear in order to enable citizens to identify what

2. THE SEPARATION OF POWER AS A CONSTITUTIONAL GUARANTIE IN SERBIA

As earlier mentioned, the separation of power constitutes the backbone of modern constitutions. Considering this, one of the main challenges for legislators all around a world, is how to enable that three separate branches of power function in manner that ensures: (1) unity of legal order; (2) proper checks and balances mechanism; (3) adequate connection and accountability to citizens as owners of sovereignty.

A fluid character of the Rule of Law principle, combined with its growing importance as during the accession to the EU as for the member states remains one of the key challenges for Serbia but also for other Western Balkan and Eastern Europe countries. Their legal tradition and resistance of the society caused by double standards of the EC, frequently associated with political factors, does not make the process easy. Clear benchmarks and accession negotiation schedule could significantly contribute the process and demotivate EU sceptics, giving the strong arguments in hand of justice reform advocates. Contrary, "a moving target" scenario with obvious political background could only stop or significantly slow down the process. Additionally, a proper understanding and interpretation of the EU standards relevant for judicial reform, mostly created by the Council of Europe bodies should be driven by EC bureaucrats who are not always in depth familiar with them. This lack of knowledge encourages local interest groups and individuals who make a strong pressure on public authorities in charge of justice reform, using various non-governmental but also openly political structures. Instead of this, clear interpretation, uniform application and evaluation of the EU standards but also reform ownership in hands of institutions, should be seen as the only right way in strengthening the Rule of Law and justice reform.

Analyzed in light of current constitutional provisions, Serbian authorities recognized the rule of law and separation of power as milestone principles that follows provision of the Article 2, of the Serbian Constitution.[16] This article stipulates that "sovereignty is vested in citizens

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the laws prohibit, permit, or require; Laws must be non-contradictory among themselves; Laws must not ask the impossible; Nor should laws change frequently; Finally, there should be congruence between what written statute declare and how officials enforce those statutes. [15] According to Fuller, law is "the enterprise of subjecting human conduct to the governance of rules". When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how to act. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke.He also considers a moral component of the rule of law, arguing that the rule of law provides some normative grounds for thinking that citizens have a moral, but conditional obligation to obey the law. "Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted"(242-243)

[16] Constitution of the Republic of Serbia, Official Gazette of the RS, no. 98/2006.

who exercise it through referendums, people's initiative and freely elected representatives. No state body, political organization, group or individual may usurp the sovereignty from the citizens, nor establish government against freely expressed will of the citizens." The article 3 provides for rule of law definition and stipulates that "Rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights. The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities." In this provision, legislator made connection between citizens as owners of sovereignty and their right to be equal before law, and authorities from three separate branches of power, bound by Constitution and laws. The more definition of the separation of power is given in the Article 4 that stipulates: "The legal system is unique. Government system shall be based on the division of power into legislative, executive and judiciary. Relation between three branches of power shall be based on balance and mutual control. Judiciary power shall be independent." The last sentence reflects importance of the judicial independence as a rule of law element. In parallel, further elaboration of this principle in Chapter V of the Constitution - Organization of Government, became the main issue within rule of law reform scope in last decade.

a. Judicial independence as the rule of law element and constitutional guaranty

Without any doubt, "independence" became the buzzword of justice reform in transitional countries that is promoted and frequently used beyond the scope that includes impartiality, competence, quality, accountability and efficiency. However, the independence of judiciary has been frequently wrongly understood and misinterpreted as the right on some kind of self-perpetuation and corporatization of judiciary. Contrary, efforts of executive or legislative power to have a strong influence or total control over the judiciary are sometimes so intensive that they don't even try to hide them. Producing a so called "parrot judges" is usually defended by arguments related to necessity of compliance of a "judge's basic outlook on life, his attitude to life and his politics" with the policy of government.[17] Additional problem could be found in some kind of "forced widening" of standards dealing with judicial independence, on position of public prosecution service that is, in its nature, different from judicial. This difference is significant to the extent that shall be subject of a separate analysis.[18]

Commonly, the right solution should be found in a balanced approach that assumes application of basic principles of democracy, where no branch of government should be potentially self-perpetuating. "A mature democracy requires those who exercise significant public power to hold

[17] See more in: F. Musthafa, *Does the Government want parrot judges,* http://www.livelaw.in/government-want-parrot-judges/, last visited on October 14th 2016.

[18] M. Kolaković-Bojović, Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, No. 3, 2016, 192-198.

themselves open to account. Judicial power ought not to be excluded from accountability requirements. The challenge is to develop mechanisms of accountability that do not undermine judicial independence.[19] " Without such a balanced approach, one branch of government is in danger of effectively becoming a "self-perpetuating oligarchy".[20] The imperative of every state has to be identification of an ideally balanced normative and institutional scope that stays in line with the Venice Commission request to avoid both - the risk of politicization and the risk of self-perpetuating government of judges (CDL-AD(2012)024, par. 36 & 52).

A situation is bit different when it comes to external relations of prosecution service with legislative and/or executive power. Comparative legislation provides form various models, but it is important to notice that only small number of European countries have a prosecutor's office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Venice Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. In par. 26 and 27 of the CDL(2010)040 notes that there is a tendency of leaving the model of subordination to executive power. Anyway, position of the public prosecution service/prosecutor's offices are often referred to as 'autonomous' and individual prosecutors would be referred to as 'independent'. However, 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). That's not the case if we are talking about general instructions that do not refer to individual cases, having in mind that they could be seen as a measures of a state criminal policy adopted by parliament or government (CDL(2010)040, par. 29-30).[21]

However, the ways to include guaranties of judicial independences as constitutional provisions are limited by Venice Commission views on issue of "young democracies". The Venice Commission stated that at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state power in the appointment of judges. What that means in practice? When the detailed constitutional guaranties of judicial independence are in place, the chance for political interference through legislative amendments is limited (CDL-AD(2007)028, par. 46). Without denying that there is a positive logical pattern in such approach of the Venice Commission, it stays unclear who, when and based on which

[19] A. Paterson, C. Paterson, *Guarding the guardians? Towards an independent, accountable and diverse senior judiciary.* London: Centre Forum, 2012, 11.

[20] See more in: R. Stevens, Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World, *Legal Studies*,1-2/2003, 1-34.

[21] See more in: Kolaković-Bojović, M. & Turanjanin, V., Autonomy of Publıc Prosecutıon Servıce- The Impact of the "Checks and Balances" Prıncıple and International Standards, *Journal of Eastern European Criminal Law*, 2/2017

criteria made the decision on division of European countries in two "qualitative groups" (young and old democracies)? [22]

b. Weaknesses of constitutional guaranties of judicial independence in Serbia

Even before of adoption of the Constitution in 2006 there were plenty of criticism addressing the organization of judiciary and guaranties of judicial independence. However, the activities aimed at its serious assessment and changes became in 2013, associated with accession negotiation with EU-Chapter 23.

The Screening of Serbian normative and institutional framework with relevant acquis within Chapter 23 started in September 2013 with Explanatory Screening (presentation of the relevant acquis and EU standards to the Serbian institutions). This stage served as starting point for assessment of an alignment level of the Serbian legislative and institutional framework with the acquis and EU standards, during the bilateral screening in December 2013. The screening process resulted in publishing of the Screening Report which tackled various issues of the substantial importance for the justice reform and rule of law in Serbia. The European Commission (hereinafter: EC) criticized the role of the National Assembly in the election and termination of office of judges as a significant deficiency that creates risks of a political influence on the judiciary. The same is also stated for the relationship with the High Judicial Council (hereinafter: HJC) and the State Prosecutorial Council (hereinafter: SPC), bearing in mind that the National Assembly also elects eight out of eleven members of the HJC and SPC, while the other three members are elected *ex officio*, including the president of the Supreme Court of Cassation and the Republic Public Prosecutor (appointed by the National Assembly), the Minister of Justice, and the chairman of the authorized parliamentary committee. The EC confirmed that the described appointment is not in compliance with the EU standards through the comment that "Serbia should ensure that when amending the Constitution … professionalism and integrity become the main drivers in the appointment process, while the nomination procedure should be transparent and merit based. Serbia should ensure that a new performance evaluation system is based on clear and transparent criteria, excludes any external and particularly political influence, is not perceived as a mechanism of subordination of lower court judges to superior court judges and is overseen by a competent body within the respective Councils." The EC also contests the role of the Ministry of Justice (hereinafter: MoJ) related to its role in the judiciary, as well as in the part of the Report in which the EC says that „The judicial reform process should lead to tasking both Councils with providing leadership and managing the judicial system." Also, the probationary three-year period for candidate judges is contested and described as „very long". [23]

Recommendations given in the Screening report obliged Serbian

[22] M. Kolaković-Bojović, *op. cit*., 194.

[23] See more in: The Screening Report for the Negotiation Chapter 23, available at: http://seio.gov.rs/upload/documents/eu_dokumenta/Skrining/Screening%20Report%2023_SR.pdf, 25 May 2016.

authorities to draft, (in inclusive and transparent process that assumes inclusion of all relevant stakeholders and civil society organizations) adopt and implement the detailed action plan that should serve as a "reform road map." This roadmap includes adoption and implementation of dedicated strategic documents and laws in various fields, but also tracking its implementation. That should be unambiguous indication of Serbian dedication to effectively deal with numerous shortcomings that currently exist.

c. The main recommendations aimed at strengthening judicial independence

Without any further doubt, one of the most important, but also the most challenging reform steps arising from the EC recommendations is obligation to amend the Constitution of Serbia in order to strengthen independence of judiciary. In this regard, EC recommended that the HJC and the SPC should be strengthened in a way that would imply taking over of the leading role in the management of the judiciary. Their composition should be mixed, without participation of the National Assembly (except exclusively in the declaratory role) with minimum half of the members from the judiciary who represent different levels of jurisdiction. The elected members should be elected by their peers, and the legislative or the executive power should not have the authority to control or oversee the work of the judiciary. Additionally, the recommendation calls for the re-examination of the probationary period lasting three years for candidates for judges and deputy prosecutors, precise stipulation of the reasons for termination of office of judges, as well as of the rules related to the termination of tenure of judges of the Constitutional Court. At the same time, the EC insisted on the adoption and effective implementation of criteria for election to judicial functions, as well as on striking a balance between the growing power of the HJC and the SPC, their capacities, as well as on the transparency and accountability in their work.

d. Constitutional amendments - recent developments

Despite some delays, the Ministry of Justice has initiate public debate on constitutional amendments in May 2017. Debate was organized as two-stage dialogue. The first phase in 2017 was dedicated to consultations with all relevant stakeholders and CSOs. Based on proposals submitted in written upon public call, but also presented on six round tables, the MoJ published Draft Amendments on its website and organized four additional round tables followed by public call for all interested parties in order to discuss proposed solutions. The Draft Proposal brings several novelties following the topics emphasized by EC. In accordance with the APCH23 provisions, the legislator followed the guidelines given by Venice Commission. The general impression is that tendency of the legislator was to ensure a proper balance between judicial independence and a need to keep connection with citizens as owners of the sovereignty.

The first of all, composition of the High Judicial Council is changed. Now the High Judicial Council shall have ten members: five judges elected

by their peers and five prominent lawyers elected by the National Assembly by a three-fifths majority. This kind of composition of the HJC shall guarantee a balance between the members. The judges as members of the HJC shall be elected by other judges and not any more by the National Assembly. On the other hand, five prominent lawyers elected by the National Assembly by qualified majority in the composition of the HJC shall ensure the high quality of work of the HJC and shall prevent formation (nascence) of the corporatism, self-perpetuation, self-interest and cronyism in the judiciary. [24] According to Draft Proposal, the President of the HJC shall be elected by the High Judicial Council from among its members who do not perform judicial functions by two-third majority vote of the members of the High Judicial Council.[25]

A changed composition of the High Prosecutorial Council[26] is proposed, too. The High Prosecutorial Council (hereinafter: HPC) shall have eleven members: four public prosecutors elected by their peers, five prominent lawyers elected by the National Assembly, Public Prosecutor General[27] and the Minister responsible for justice. A particular nature and jurisdiction of the prosecution service allows a mix and balanced composition of the members of the HPC.[28] The Public Prosecutor General shall be ex-officio a president of the High Prosecutorial Council. This solution is considered to be the most appropriate for Serbian system having in mind the function and the organization of the prosecution service as a system of

[24] In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised." 13 Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management". (CDL-JD(2007)001, par. 29 and CDL-AD (2007)028, par. 29-30) The Venice Commission considers that a composition in which there is a parity of members coming from the judiciary and from the rest of society and in which the President of the Judicial Council will be elected from among the lay members would ensure a better balance between the autonomy and independence and the accountability of the judicial power. (CDL-AD(2011)010 , para.14.) In the Venice Commission's view, this composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicization and autocratic government. CDL-AD(2011)010 , para.20)

[25] Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council. (CDL-JD(2007)001, par. 34 and CDL-AD (2007)028, par. 35)

[26] A new tittle of the State Prosecutorial Council

[27] A new tittle of the Republic Public Prosecutor

[28] On the same position is the Venice Commission, that stated Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority (CDL-AD(2010)040, par. 66).

hierarchic subordination.[29]

Proposed majority for election of non-judicial members might ensure a broad agreement in parliament and a compromise between the majority and the minority. As an anti-deadlock mechanism is prescribed a decreasing majority of a five-ninths of all deputies in the second round of voting.

The significant step forward in strengthening judicial independence is the removal of the trial (probationary) period for judges, that is in line with relevant EU standards,[30] as well as the solution that HJC and HPC are in charge of election of judges, court presidents and prosecutors.[31] The aim of this solution is to eliminate any interference of legislative and executive powers in the process of appointment and dismissal of judges and court presidents.

An interesting novelty is broader definition of Public Prosecutor's Office. Namely, the Draft stipulates that Public Prosecutor's Office shall be an autonomous state body which shall prosecute the perpetrators of criminal offences and other punishable actions, take measures in order to protect constitutionality and legality, human rights and freedoms. In spite of some tendencies to establish the same guaranties for judges and public prosecutors, the legislator has kept different approach, following EU standards in this regard and specific nature and role of prosecution service.[32] A special

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[29] (In the opinion of the Venice Commission, the Supreme State Prosecutor should chair ex officio the Prosecutorial Council, except in disciplinary proceedings. CDL-AD(2012)024, Montenegro, para 50) "[…] [T]he hierarchical nature of the prosecution service and the obligation on the Supreme State Prosecutor to manage the prosecution service makes it appropriate that that person should also chair the Prosecutorial Council. […]" CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §38)

[30] The Venice Commission took the stand that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. Bearing this in mind, the Commission took the standpoint that this should not be understood as exclusion of a possibility to have temporary judges. This particularly in the states having relatively new judicial systems, where there may be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment or appraisal that the election should not take place. At any rate, if probationary periods are considered indispensable, „refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office. (CDL-AD (2007)028, par. 41-42)

[31] The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. (Judıcıal Appoıntments CDL-AD (2007)028 , para.25)

[32] There is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent

attention should be paid on differences between role and function of court/judges and public prosecution service in every society. Having this in mind, prescribing guaranties of judicial independence in the constitution is pretty common practice[33] but situation is quite different when it comes to guaranties of prosecutorial independence/autonomy. Reasons for that could be found in long tradition of organizational connections between prosecution service and executive power and consequently, in tradition of political interference. The Committee of Ministers noted that legal Europe is divided on this key issue between the systems under which the public prosecutor enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. The Committee also concluded that inasmuch as this is an institutional question - concerned with the fundamental distribution of power in the state - and currently, in many countries, a key factor in internal reforms occasioned either by changes in the historic context or by the existence of problems in the relationship between justice and politics, the very notion of European harmonisation around a single concept seemed premature. Therefore, the committee sought, by analysing the two types of system currently in operation, to identify the elements for achieving the balance that is necessary if excesses in either direction are to be avoided (Rec(2000)19, pp. 22).

From the same reasons, competence for election of the Public Prosecutor General is given to the Parliament. The Draft proposal provides that by means of a three-fifths majority vote of all deputies, the National Assembly shall elect the Public Prosecutor General, for the period of five years, upon the proposal of the High Prosecutorial Council after the public announcement process has ended. If a three-fifths majority is not achieved within next 10 days another election shall be held requiring a five-ninths majority vote of all deputies. If a five-ninths majority vote of all deputies is not achieved also, after 15 days the complete election process shall be repeated but without the possibility that previous candidate participate in it.[34] The same person may be elected the Public Prosecutor General only once.[35]

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there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.“ Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service CDL-AD(2010)040, par.28)

[33] Article 149, paragraph 1 of Serbian Constitution stipulates that a judge in performance of the judicial function shall be independent and responsible only to the Constitution and the law. Further on, in paragraph 2, the same Article prescribes that any influence on a judge while performing his/her judicial function shall be prohibited. Such a formulation seems to be too wide. Namely, although the intention of the legislator to sanction only unpermitted and/or undue influences is clear, the impression is that this should have to be visible from the actual constitutional norm, as well as that, at this place, it is appropriate to refer to the law which would more precisely stipulate what type of influence is prohibited.

[34] The appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority… It is instead not acceptable to have entrusted the Parliament with the power to appoint all the other state prosecutors. (CDL-AD(2007)047 para.108,109)

[35] It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential

CONCLUSIONS

Ensuring proper constitutional guaranties of judicial independence remains one of the greatest challenges in post socialist societies[36]. Serbia failed to do that in its first attempt in 2006. Judged according to Draft Proposal, it seems that this attempt is going to be more successful. However, there is a still a reasonable dose of mistrust and misunderstanding between representatives of executive and judicial branch of power that reflect of whole atmosphere of constitutional changes. Attempts to strength positions of both branches of power is understandable from their individual perspectives. Anyway, only balanced solution, that reflects citizens' interest to have independence, professional, accountable and efficient judiciary, capable to ensure the rule of law, not men from any branches of power, should find its place in amended text of the Constitution.

risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change." CDL-AD(2010)040, European Standards as regards the independence of the judicial system: Part II - the Prosecution Service)

[36] See more in> A. Di Gregorio, *Rule of Law crisis in the new EU Member States*, https://www.academia.edu/32646202/Rule_of_law_crisis_in_the_new_EU_Member_States, last accessed on January 6th 2018.

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ВЛАДАВИНА ПРАВА И УСТАВНЕ ПРОМЕНЕ У РЕПУБЛИЦИ СРБИЈИ

Владавина права- не човека, фраза је која се неретко користи да би се изразила суштина једног од принципа који представљају камен темељац модерних демократских друштава. Од древне Грчке па до модерне теорија права, принцип владавине права добијао је на значају, и из од базичне гаранције успостављене са циљем заштите грађана од самовоље суверена, израстао у у концепт који у својој основи има поделу власти, чија синергија је оличена у механизму checks and balances. Основни принципи владавине права садржани су бројним уставима широм света, али и препознати као критеријум за приступање и чланство у Европској унији. Аутор анализира питање међусобног баланса три гране власти у контексту уставних промена у Републици Србији, захтеваних од стране Европске комисије у процесу приступних преговора са ЕУ. Аутор у фокус ставља јачање уставних гаранција независности правосуђа, анализирајући Нацрт уставних амандмана предложен од стране Министарства правде.

Кључне речи: владавина права, правна држава, устав, подела власти, правосуђе

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