



Kingdom of the Netherlands

# CONCLUDING REMARKS AND POLICY RECOMMENDATIONS

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## CONCLUDING REMARKS

The institutions of judicial self-governance were introduced in contemporary Serbia in the first decade of the twenty-first century. They were created at first on a legislative level in the form of the High Council of Magistrature (2001), which served as a guarantor of independence to both judges and prosecutors. In the next step, the Council was split into two bodies: High Council of Judiciary and High Council of Prosecutors, which were both constitutionalized (2006).

From the beginning hopes were high for the role of the High Council of Judiciary in promoting the values of judicial independence among judges and protecting them against political branches of government and undue societal pressures. However, the High Council of Judiciary, in its first composition, was not up to its expectations. It readily accepted to serve the political branches of government in vetting of the judiciary (2008-2012), directly violating the constitutional guarantees of judicial independence, under pretext of Serbia's democratic transition and consolidation.

This episode shed light on the importance of the judicial culture, and more generally of the legal and political culture, in understanding how judges and other institutional actors think and behave when interpreting and applying the law. In particular, it showed that judges – members of the High Council – who were supposed to be the *crème de la crème* of the Serbian judiciary, did not perceive themselves and act as a governmental power in their own right.

The disillusionment with the first and subsequent compositions of the High Council of Judiciary created a movement within Serbia (among judges, scholars and NGOs) and outside of it (EU Commission), advocating amendments to the 2006 Constitution. The goal was to further insulate the judiciary from political pressure by making the High Council of Judiciary more autonomous from the executive and legislative branches of government, both in terms of its organisation and of its powers. After many abortive attempts, the Constitution was amended on 16 January 2022, with mixed results.

The composition of the High Council of Judiciary, introduced by the 2022 Amendments, does not depart significantly from the original provisions of the 2006 Constitution either in terms of the structure, or member selection method. On a more positive note, the president of the Supreme Court was removed from the position of Head of the High Council of Judiciary, and the position will now be assigned to a judge-member elected by his/her peers, the other members of the High Council.

The shrinking of the functions of the president of the Supreme Court is an important institutional change since it has been observed, more generally, that the presidents of courts pose a particular danger to internal independence of judges by the very nature of their administering role in the courts. Furthermore, when they are appointed by political branches of government, they also become direct channels of political pressure. In that light, it is important that 2022 Constitutional reform in Serbia secured that the appointment of presidents of courts, including the Supreme Court, are no longer made by the National Assembly, but by the High Council of Judiciary.

On the other hand the 2022 constitutional amendment that stipulated that only “improper influence on a judge in the performance of his/her judicial function shall be prohibited” is quite dissatisfying given the Serbian political context, in which the judicial authority is regularly humiliated and annihilated by public statements and comments of the President of the Republic, ministers and MPs. The reason for concern comes from the fact that in the past the High Council of Judiciary has rarely reacted to these attacks on the authority and impartiality of the judiciary, even though the 2006 Constitution unconditionally prohibited “any influence on a judge in the performance of his/her judicial function”.

Also disappointing was the fact that 2022 constitutional reform did not address a pressing need for budgetary autonomy of the High Council of Judiciary, since such autonomy is closely connected to the efficient functioning of the judiciary, above all the proportionate distribution of the courts’ workload. Finally, despite the relatively solid legal framework, the publicity and transparency of the work of the High Council of Judiciary remains an on-going unresolved issue.

## **POLICY RECOMMENDATIONS**

- ▶ The Law on the High Council of Judiciary should be reformed so that the system of election of judicial members of the Council is improved. More specifically, the judges – candidates for the judicial members of the Council – should be obligated to have a program and present it during electoral campaigns. Also, there should be no small ballot places whose size might violate the principle of secret voting or freedom of suffrage. Finally, the curial type of vote for the judicial members of the Council should be reconsidered as it leads to inequality among judges.
- ▶ The Law on the High Council of Judiciary should stipulate stringent preconditions for lay-member candidates to the High Council of Judiciary to meet, in order to be eligible for the post. This may avoid some challenges of the politicisation of their appointment in the National Assembly.
- ▶ The transparency of the work of the High Council of Judiciary should be improved by creating a more functional internet-site and by allowing non-governmental organizations that wish to monitor its work to attend its sittings.

- ▶ Media visibility of the High Council of Judiciary could be overcome either by engaging a spokesperson of the Council or by designating one of the members of the Council as a spokesperson.
- ▶ The administrative Office of the High Council of Judiciary is severely understaffed. The Council should recruit staff particularly qualified for analytical research.
- ▶ The procedure for establishing improper influence on a judge in the performance of his/her judicial function should be improved by introducing the power of the Council to initiate cases on its own motion. The reason for this is that the judges feel afraid to stand up to the political branches of the government, especially after the 2008-2012 reform of the judiciary. Therefore, it is highly unlikely that they would themselves bring cases of political influence on a judge in the performance of his/her judicial function.
- ▶ The Law on the High Council of Judiciary should establish the powers of the High Council of Judiciary to propose budget item amounts related to the judiciary, and to dispose of the funds. The reason for this is that budgetary autonomy of the Council is closely connected to efficient functioning of the judiciary, above all, proportionate distribution of the courts' workload.
- ▶ The eventual establishment of the budgetary autonomy of the High Council of Judiciary should be accompanied by the further professional strengthening of the Council's Administrative Office.