


PROCEDURAL ASPECTS OF THE CONSTITUTIONAL REVISION IN THE FIELD OF JUDICIARY AND RESTRAINTS OF THE AUTHORITIES OF THE NATIONAL ASSEMBLY

ABSTRACT: The subject of this paper is an analysis of the procedure of the amendments to the “Mitrovdan” Constitution from the perspective of adherence to the procedure and protection of the constitutional continuity. Considering the multivalent effect of the constitutional revision on the strengthening of the constitutional order, constitutional culture, and rule of law in a unique legal-political moment immediately following the proclamation of the Act on Amendments to the Constitution, but prior to the enactment of the set of judicial laws, the study aims to analyse whether the procedure of the constitutional amendment contributed to the furtherance of the constitutional democracy. The scope of the study is limited to a procedure, the sequence of formal acts following a prescribed procedure for the constitutional amendment, while the subject of the amendments is reflected upon only as it is necessary for understanding both the essence and context of the matter. It is indisputable that by adopting 29 amendments to the “Mitrovdan” Constitution and guaranteeing the independence of the judiciary and prosecution there was made an important step in the process of overcoming tensions between both the form and substance of the constitutional political culture. But, at the same time, there were

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some additional restraints of the authorities of the National Assembly. The process of improving the constitutional democracy, preserving the constitutional continuity, and building the constitutional culture of Serbia is analysed from a historical perspective, with a special reference to the procedure for adopting the 2006 Constitution. The methodological, historical-comparative approach is completed by analyzing the comments and interpretations of certain constitutional acts, laws, and bylaws. The additional value of the analysis stems from the methodological facts being interpreted from the perspective of a fifteen-year experience as a Member of Parliament, and a direct participant in the constitutional review process as a member of the Committee on Constitutional Affairs and Legislation of the National Assembly.

Key words: *Constitutional Revision, the National Assembly, “Mitrovdan” Constitution, Constitutional Democracy, Constitutional Political Culture.*

1. Introduction

Fourteen years following the proclamation of the 2006 Constitution (hereafter: “Mitrovdan” Constitution¹), on its 10th session held on the 3rd of December 2020, the Government² confirmed and submitted to the National Assembly the Proposal for Amendment of the Constitution of the Republic of Serbia³: it is with that act that the process of partial constitutional revision was initiated, and the tradition of common constitutional changes continued. Namely, the modern constitutional and political history of Serbia was marked by the adoption of 16 constitutions, their duration was about 14 years, they were usually adopted for reasons of political necessity and not constitutional

¹ The National Assembly of the Republic of Serbia, on its Second Special Session held on the 8th of November 2006, adopted the Act of Proclamation of the Constitution of the Republic of Serbia, according to article 133 paragraph 3 of the Constitution of the Republic of Serbia and article 25 of the Law on Referendum and Citizens’ Initiative.

² In paragraph 1 of article 203 of the “Mitrovdan” Constitution it is prescribed that the proposal for amending the Constitution may be submitted by at least one third of the total number of parliament deputies, the president of the Republic, the Government, and at least 150.000 voters.

³ The proposed revisions regard article 4 of the Constitution of the Republic of Serbia and provisions of the Constitution regarding courts and public prosecutors, i.e. articles 142–165 of the Constitution, and consequently article 99 (powers of the National Assembly), article 105 (Decision-making in the National Assembly) and article 172 of the Constitution (election and appointment of Constitutional Court judges).

reason, and almost without exception, they were adopted with a lack of legitimacy, that is without adhering to the established revision procedure.

It shall be confirmed, that in the constitutional history spanning 187 years, the exemplary adherence to the procedure of revision for the “Mitrovdan” Constitution has guaranteed “the legality of the constitution, as an elementary perquisite of a constitutional state” (Pajvančić, 2005, p. 10) and has furthered the process of constitutionalisation in a sense that the exercise of state powers “assumes the existence of effective institutions for limitations, without which the rule and power of individuals, groups, states – has always shown a tendency to be abused” (Fridrih, 1996, pp. 52–53).

When mentioning the field of government restrictions, one of the reasons for changing the “Mitrovdan” Constitution is to improve the standard of respect for the rule of law, i.e., respect for consistently regulated and implemented division of power, guarantees of judicial and prosecutorial independence, and the judicial protection of constitutionally guaranteed human rights and freedoms.

With the initiation of the constitutional revision process, citizens, as the bearers of sovereignty, were given the opportunity to participate in creating and reaching a basic consensus on the fundamental values of the community in which they live. In a way, it was a once-in-a-lifetime opportunity to ensure democratic legitimacy of the whole process through active participation in public debates⁴, of which eleven public hearings were held on the topic of “Amendment of the Constitution of the Republic of Serbia in the field of justice” from the 29th of April to the 17th of September 2021. Numerous civil and professional associations were involved in the public debates to formulate the best possible solutions and raise public awareness of the importance of constitutional changes and participation in the referendum.

In a partial constitutional revision (Pejić, 2018, p. 70)⁵ twenty nine articles of the “Mitrovdan” Constitution were amended in accordance with the procedure provided for in Article 203, and thus one segment of the

⁴ On April 16, 2021, the Committee on Constitutional Affairs and Legislation of the National Assembly decided to initiate activities in the process of amending the Constitution, which are within the competence of the Committee, primarily concerning conducting various forms of debates on constitutional changes, for different opinions and suggestions to be heard.

⁵ The concept of constitutional revision may be understood in two ways: as a revision in the formal sense and a revision in the material sense, with both processes present at the same time, but the former is most often defined as “constitutional revision” and the latter as “constitutional reform.”

sought-after changes that have been discussed practically since the entry into force of the Constitution were completed.

Namely, since the adoption of the “Mitrovdan” Constitution, it has been criticized by both domestic and international experts, and in the field of the judiciary, a key objection was expressed in the view that constitutional provisions leave too much room for legislative and executive power to influence judicial office, leading to the unwanted politicization of the judiciary.⁶ Serbia, which has reached the status of a European Union (EU) candidate country with entry into force of the Stabilisation and Association Agreement⁷ (SAA), has initiated constitutional amendments in accordance with Article 72 (3) and Article 80 of the SAA, which provides for special attention to be committed to strengthening the independence of the judiciary and improving its efficiency, as in line with article 14 of the Negotiating Framework,⁸ which emphasizes that judicial reform – in terms of improving its efficiency and independence – is a key precondition for the effective implementation of EU *acquis*. Along with the reports of the European Commission (EC) on Serbia’s progress in the process of European integrations, the opinions of the European Commission for Democracy through Law of the Council of Europe (Venice Commission) are of special importance, of which during the 2007⁹–2021 period a total of four opinions were drafted on necessary changes to the Constitution: in March 2007, concerns were already expressed about the “excessive role of parliament in appointing to the judiciary” (Opinion No. 405/2006) the following one in the year 2018 (Opinion No. 921/2018) and in 2021 the Venice Commission submitted two urgent opinions on two Draft Acts on amending the Constitution, one on the 18th of October (Opinion No. 1027/ 2021, No. 1047/2021) and one on the 19th of November (Opinion No. 1027/2021, No. 1067/2021).

The necessity of Constitutional revision in the part related to the judiciary was confirmed in the National Strategy for Judicial Reform for the period from

⁶ Article 99, paragraph 2, item 3 stipulated that the National Assembly, within its electoral rights, elect the President of the Supreme Court of Cassation, presidents of all courts, the Republic Public Prosecutor, all public prosecutors, judges and deputy public prosecutors.

⁷ 1st of September, 2013.

⁸ Adopted at the First Intergovernmental Conference on the 21st of January, 2014, when negotiations on Serbia’s accession to the EU were launched.

⁹ For the sake of precision, we must remind that before the adoption of the final text of the “Mitrovdan” Constitution, several drafts were the subject of public debate. In June 2005, the Venice Commission was asked to give an opinion on the draft’s chapter on Justice from the Draft approved by the Government of the Republic of Serbia. Some of the recommendations from the submitted Opinion of the Venice Commission have been incorporated into the final text of the Constitution, but a large number of criticisms have not been taken into account.

2013 to 2018¹⁰ as well as the Strategy for the Development of the Judiciary for the period 2020–2025, which was adopted by the Government on the 10th of July 2020. The legal analysis of the constitutional framework on the judiciary in the Republic of Serbia¹¹ has been concluded with the aim to adequately define the constitutional guarantees which make up the *de iure* framework of the independence of the judiciary within the system of the rule of law. Both in the first¹² and in the revised¹³ action plan for Chapter 23, the first transitional criterion 1.1.1 is the adoption of new constitutional provisions concerning the independence of the judiciary, bearing in mind the “recommendations of the Venice Commission, in line with European standards and based on a extensive and comprehensive consultation process”.

2. The legitimization potential of the revision procedure for the “Mitrovdan” Constitution

The theoretical consideration of the causal influences of the value, constitutional and procedural field raises some important questions:¹⁴ did the revision procedure of the “Mitrovdan” Constitution contribute to the improvement of constitutional democracy (Podunavac, 2006, pp. 97–104)¹⁵ and did it represent a departure from undoubtedly problematic experiences that are not lacking in our constitutional history?

We are of the opinion that the very fact that the revision followed the constitutionally prescribed procedure ensured constitutional continuity as an important principle of democratic constitutionalism and preservation of political stability, democratic institutions and legitimacy (Dimitrijević, 2017, p. 227).¹⁶ Moreover, respect for the procedure of changing the constitution is not only a measure of the success of constitutional consolidation, but also a

¹⁰ The National Strategy, adopted by the National Assembly on 1 July 2013, envisages five basic principles of judicial reform: independence, impartiality, expertise, accountability and efficiency.

¹¹ The working group for the analysis of the changes to the constitutional framework held its first meeting on the 30th of January 2014 in the building of the Supreme Court of Cassation.

¹² Adopted by the Government on the 27th of April 2016.

¹³ Adopted by the Government on the 10th of July 2020.

¹⁴ Of course, the question is whether there are “inherent values of certain political and constitutional orders as well as whether there are political values and goals that can be achieved within a particular constitutional order?”

¹⁵ For Tocqueville, democracy is not only a form of government “but also a special form of political culture and social (democratic) learning.”

¹⁶ The text of the constitution is important “only if it is accompanied by a practice called constitutionalism.”

measure of the legitimacy of the entire constitutional order, the fulcrum of the constitutionalization process (Molnar, 2013, p. 21).¹⁷

The concise statement to which “constitutional regulations should have the force of the highest national laws” (Jovanović, 1924, p. 72), from which consistently follows that any revision of the constitution must be raised from the framework of the regular legislative procedure, because the supremacy of the constitution can be guaranteed only if it cannot be changed by “ordinary laws” (Györfi, 1998, p. 139) is, however, followed by a dilemma: how to balance the procedure in a way that allows the tension between democracy, order and constitutionalism to be overcome and the “necessary changes to be adopted so as not to disrupt constitutional stability and predictability” (Selected documents of the Venice Commission, 2020, p. 10).

The easier procedure of revision in relation to the 1990 Constitution has been held as one of the positive aspects of the “Mitrovdan” Constitution. The 1990 Constitution (alongside the 1888 Constitution of the Kingdom of Serbia), held as “normatively the highest range of our constitutionality” by a number of authors (Petrov, 2020, p. 13), belongs to the category of extremely firm constitutions (Ferrajoli, 2012, p. 43)¹⁸ as it stipulates that an act amending the constitution must be supported by a two-thirds majority of the total number of deputies as well as a majority of the total number of voters on referendum (articles 132–134).¹⁹ The reason for this, as emphasised by constitutional drafter Ratko Marković, that a firm procedure “preserves the dignity of the constitution as a legal act of supralegal legal force” (Simović, 2017, p. 620).

The process of adopting the “Mitrovdan” Constitution in 2006 did not meet the criteria of either procedural or substantive legitimacy, it was written in a hurry “at the end of summer and adopted even more hurried at the beginning of fall, under the pretext that in that way Kosovo and Metohija would be ‘saved’ within the borders of Serbia” (Molnar, 2010, p. 13), the general opinion being “that such a procedure did not correspond to the tradition created during the one-party system, nor to the general attitude of the Serbian public policy during its history” (Fira, 2007, p. 31). Institutions responsible

¹⁷ “In relation to constitutional consolidation, constitutionalization is a much broader concept and refers to the constitution in its full meaning, i.e., to the constitutional order or constitutional system.”

¹⁸ “Firmness, in other words, binds the hands of modern generations to prevent the amputation of the hands of future generations.”

¹⁹ A complex procedure for its amendment was envisaged: 1) two votes in the Assembly and a two-thirds majority of the total number of deputies for the amendment of each constitutional provision; 2) obligatory constitutional referendum in which it was necessary for most of the total number of voters registered in the voter list to vote “yes” for the change of the Constitution.

for its preparation were excluded from the constitutional process, deputies received the constitutional text on the day of its adoption and were denied opportunity to participate in the debate. The new constitution was adopted “during an emergency session of the National Assembly, which was renamed the day before the adoption of the constitution into a “special session” – a type of session unknown to the Serbian constitution” (Pajvančić, 2007, p. 26). The Constitution was adopted unanimously, with 242 deputies present and sent to a referendum (Petrin, 2007, p. 75).²⁰ The referendum was held for two days: 28th and 29th Of October 2006 (Analysis of irregularities during the referendum, 2006, p. 5) 21 with 54,91% of voters participating on the referendum and 53,04% of the citizens of Serbia voting in support of Constitution according to the Republic Electoral Commission (REC) (Stojiljković, 2007, p. 19).

Pursuant to the provisions of Article 203 of the “Mitrovdan” Constitution, the National Assembly decides on the proposal to change the Constitution by a two-thirds majority of the total number of deputies, and by adopting the proposal, the drafting or consideration of the proposal for an act amending the constitution is commenced. Article 15, paragraph 1, item 1 of the Law on the National Assembly (entered into force 2010) also stipulates that the National Assembly, as the holder of the constitutional and legislative power, adopts and amends the Constitution. The amendment of the Constitution, according to Article 53 paragraph 1 of the aforementioned law, shall be regulated by the Rules of Procedure of the National Assembly (entered into force 2012) which in its Article 48 paragraph 1 stipulates that the Committee on Constitutional Affairs and Legislation considers the proposal for amending the Constitution and the proposed Act on Amendments to the Constitution, and in paragraph 2 stipulates that the Committee prepares the proposed Act on Amendments to the Constitution and a proposal for a constitutional law for the implementation of the Constitution.²²

²⁰ The referendum was called based on the Decision on calling a national referendum to confirm the new Constitution of the Republic of Serbia, and the wording of the referendum question was: “Are you in favor of confirming the new Constitution of the Republic of Serbia?”

²¹ At the end of the first day of voting, 17.5% of registered voters turned out on the referendum, while on the second day, in the late afternoon, the percentage was around 26%, followed by a sharp leap in turnout upto 41.9% at 5 pm.

²² The Committee on Constitutional Affairs and Legislation considered the Proposal for Amendments to the Constitution of the Republic of Serbia at its session on the 6th of May 2021 and determined that the Proposal was submitted by the constitutionally authorized proposer in the prescribed form and sent a report to the National Assembly. At the Fourth Special Session on June 7, 2021, the National Assembly adopted the Proposal for revision of the Constitution of Serbia in its part concerning justice.

The extent to which the process of revising the “Mitrovdan” Constitution marked the political life of Serbia is confirmed by the fact that the previous, Eleventh Convocation of the National Assembly (2016–2020), almost completely implemented the constitutional revision procedure but did not complete it. Namely, in November 2017, the Ministry of Justice, approaching the realization of the first task from the Action Plan for Chapter 23, asked the Venice Commission for help in drafting constitutional amendments related to the judiciary. At the end of January 2018, the draft amendments to the Constitution of Serbia in the field of justice were published on the website of the Ministry of Justice for the purposes of public debate, and four round tables were organized for this purpose.²³ Following the opinion of the Venice Commission on Draft Amendments I-XXIX (the Commission voiced 44 criticisms and recommendations for the substantial change of 29 constitutional amendments), in September 2018, the Ministry determined the third version of the Draft Amendments I-XXXII, and in mid-October 2018, the fourth version of the Draft Amendments I-XXXII were set. In November 2018, the Government submitted an initiative to the National Assembly to amend the Constitution, and the Committee on Constitutional Affairs and Legislation approved this initiative in June 2019.

The proposal made by the Ministry of Justice in 2018, which considered the recommendations of the Venice Commission, was used by the Working Group of the Committee on Constitutional Affairs and Legislation, which worked on drafting constitutional amendments in June and July 2021.

It is indisputable that in relation to the revision procedure prescribed by the 1990 Constitution, the procedure for amending the “Mitrovdan” Constitution is less demanding: the obligation to vote in the constitutional referendum is not prescribed in case of change of each of the 206 articles, and in the case when the obligation of referendum is prescribed, it is not accompanied by the requirement of minimum turnout and positive vote of at least 50% of the electorate, and pursuant to Article 203 paragraph 8, the amendments to the Constitution are adopted if a majority of the voters voted in favor of the amendments in a referendum. However, we must not forget that “out of the total 206 articles of the Constitution, a referendum is necessary to change 153 articles, but a referendum may also be requested to modify the remaining 53 articles” (Molnar, 2010, p. 13).

The adoption of the new Law on Referendum and Citizens’ Initiative (Law, 2021), albeit with a 13-year delay in relation to the obligation established

²³ 5th of February in Belgrade, 19th of February in Kragujevac, 26th of February in Niš and 5th of March in Novi Sad.

by the Constitutional Law for the Implementation of the Constitution of the Republic of Serbia, was an important intermediate step in organizing the constitutional referendum. Since the “Mitrovdan” Constitution deleted the 50% turnout quorum, the Referendum Law, which was in force from 1994 to 2021, provided that a referendum was valid if a majority of eligible voters entered into the voter list voted in favor, while the new law stipulates, in accordance with the “Mitrovdan” Constitution, that a decision in a referendum is made if the majority of citizens who voted in a specific the territory for which the referendum was called voted for it. The constitutional referendum was called by the Decision of the National Assembly for calling a republic level referendum to confirm the Act on Amendments to the Constitution of the Republic of Serbia, based on Article 203, paragraph 7 of the Constitution and Art. 13 and 18 of the Law. Without the adoption of the new Law, the constitutional referendum would be practically unenforceable, since the new solutions not only abolished the exit clause, but also specified the provisions which, in accordance with the Constitution and international standards, regulated: circle of authorized proposers of a referendum, electronic collection of signatures, court jurisdiction, financing, reporting and implementation of the referendum campaign and citizens’ initiative, obligations of the bodies in these proceedings...

Contrary to criticism, we believe that the harmonization of the Law with the “Mitrovdan” Constitution was an important segment of respecting the procedure of changing the constitution and preserving constitutional continuity, because the law as an act of less legal force than the Constitution could not determine the quorum in a constitutional referendum, when that quorum was abolished by the “Mitrovdan” Constitution.

3. Limiting the competences of the National Assembly

The process of constitutional revision also opened the topic of constitutional and legislative supremacy of the National Assembly. Namely, although it is prescribed that the National Assembly, as the bearer of constitutional and legislative power, adopts and amends the Constitution, in the process of European integration the sovereignty of states is relativized (Kuljić, 2018, p. 24)²⁴ and in the process of taking over and implementing primary and secondary

²⁴ “Already at the end of the 20th century, the new EU discourse, not with a simple guidance, but with a decreed binding force, prescribes the basic framework of analysis, the value criteria of the new vision of progress and its indicators.”

sources of the *acquis communautaire*, a significant part of national legislation is harmonized, not only substantively but also procedurally, in accordance with the standards and recommendations of the European institutions (Slavnić & Majhenšek, 2011, p. 2).²⁵ The process of constitutional revision of the “Mitrovdan” Constitution only confirmed the view that national parliaments are the “institutional losers of membership in the Union” (Horváth, 2010, p. 128), and that the whole spectrum of classical and new limitations of the constitutional and legislative function of the National Assembly leads not only to the limitation of competencies, but also in the case of changes in the field of justice and self-disempowerment. After the constitutional revision, the election of all judges, presidents of courts and the president of the Supreme Court is transferred from the National Assembly to the High Court Council, and the election of chief public prosecutors and public prosecutors to the High Prosecutorial Council, furthermore the High Court Council does not include the President of the competent committee of the National Assembly, nor the Minister of justice. By deleting paragraph 2 of Article 146 of the Constitution, the National Assembly was stripped of another of its competencies, namely, judges and prosecutors are no longer elected in the first term for three years because, in accordance with the principle of permanence, the judicial function lasts from election until the end of each judge’s working life.²⁶

Seeing as the corpus of EU legal provisions, regulations, and directives represent “the limits of legislative independence and the bulwark of the activities of the National Assembly” (Pastor, 2018, p. 236), and considering the fact that the Venice Commission was actively involved in the process of constitutional changes practically from the preparations for the adoption of the “Mitrovdan” Constitution in 2005 to the amendment of 29 provisions in the field of justice in 2022, confirms the eternal actuality of the question of

²⁵ “The European Union suggests to candidate countries such a model of harmonization of law according to which EU law can be transposed into national legislation by the method of reformulation, as the primary and basic method of harmonization.”

²⁶ Constitutional changes limit the competencies of the National Assembly to the election of four members of the High Court Council and the High Prosecutorial Council, as well as the election of the Supreme Public Prosecutor (Article 99 paragraph 2 item 3). Pursuant to Article 151, paragraph 1, the HCC has eleven members, and the number of those directly elected by the National Assembly has been reduced from eight to four, while the remaining six members will be elected by judges; the eleventh member of the HCC is the President of the Supreme Court. If the National Assembly does not elect all four members of the HCC (Article 151, paragraph 5) and the HPC (Article 163, paragraph 6), or the Supreme Public Prosecutor (Article 158, paragraph 3) within the deadline set by law, they will be elected by a commission consisting 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.

Abbé Sieyès: whether the constitutional power is really constituent and not limited by anything?

The topic of limiting the competencies of the constitutional and legislative body not only raises the issue of limiting the power and influence of parliament and the distribution of competencies among branches of government, but also calls into question the foundations of the functioning of modern representative democracies. Namely, with the persistence of the provision from Article 145 of the Constitution, according to which court decisions are made on behalf of the people (which we consider correct), one should be aware that the self-disempowerment of the National Assembly jeopardizes the realization of two fundamental principles – the principle of citizens’ sovereignty and legitimacy. Namely, according to Article 2, paragraph 1 of the Constitution, sovereignty originates from citizens who exercise it directly through referendums and citizens’ initiatives and indirectly, through their freely elected representatives. By excluding the National Assembly from the process of electing judges, the connection between the citizens who are the bearers of sovereignty, the deputies who are the legitimate representatives of the citizens and the judges who make decisions on behalf of the people is lost. For the past sixteen years, within its competences, the National Assembly, in its capacity as a collective state body consisting of freely elected representatives of sovereignty holders, has elected judicial office holders who have proclaimed judgments on behalf of the people. How can we talk about the legitimacy of court judgments made on behalf of the people, when the decision-makers are not elected by freely elected representatives of the people, but by a narrow circle of colleagues? And if the judiciary is one of the three branches of government, what is the source of legitimacy of judges if not the people through their freely elected representatives?

And last but not least, we remind you that in addition to the normative and control function and the right of the parliament to regulate its own organization, its electoral function is of special importance. The electoral rights of the National Assembly prescribed by Article 99 paragraph 2 of the Constitution²⁷

²⁷ After the constitutional revision, Article 99, paragraph 2 of the Constitution narrowed the electoral competence of the National Assembly as follows: 1. it elects the Government, supervises its work and decides on the termination of the mandate of the Government and ministers, 2. it elects and dismisses judges of the Constitutional Court, 3. it elects four members of the High Court Council, four members of the High Prosecutorial Council and elects the Supreme Public Prosecutor and decides on his termination from office, 4. elects and dismisses the Governor of the National Bank of Serbia and supervises his work, 5. elects and dismisses the Protector of Citizens and supervises his work, 6. elects and dismisses other officials determined by law.

represent an important mechanism of liberal-democratic institutional design. By limiting the electoral function of the National Assembly, the provision of Article 4 paragraph 3, that the relationship between the three branches of government is based on mutual verification and balance, is also called into question (Stanovčić, 2015, p. 132).²⁸

In general, we witness that the process of limiting the competences of the National Assembly takes place under the auspices of Eurobureaucratic new discourse and the ubiquitous mantra (Kuljić, 2018, p. 22)²⁹ of the rule of law, without precisely defined criteria (Logarušić, 2021, p. 47)³⁰ according to which EU institutions determine “whether certain member states take sufficient account of the principles of the rule of law and respect for human rights when adopting their constitutions or adopting individual laws” (Pastor, 2018, p. 237). At the same time, there are no generally accepted standards and models within the EU itself for proposing, electing, or appointing judicial office holders, so the revision of the “Mitrovdan” Constitution took place on a fluid horizon of value expectations and harmonization of new constitutional solutions with vaguely defined EU standards (Venice Commission Selected documents, 2020, pp. 163–165).³¹

Following the prescribed procedure, the Committee on Constitutional Affairs and Legislation of the National Assembly held a total of 15 sessions (in the period from the 16th of April to the 29th of November 2021) at which

²⁸ “Constitutionalization must be viewed in the broader context of the rule of law, which in essence includes other principles, such as separation of powers, an independent judiciary without whose action and independence essential goals such as constitutionality and legality and the rule itself rights cannot be achieved.”

²⁹ “The hegemony of certain concepts should be understood not only as an internal scientific reaction but also because of a new social context, i.e., the relationship of forces that impose them.”

³⁰ “Precisely established criteria require respect for research principles: objectivity, reliability, systematicity and precision.” Without precisely defined criteria, the rule of law is transformed into a means of discrediting and disciplining, e.g., Poland, Hungary.

³¹ There is a wide range of different models for nominating, electing and appointing judges in the EU: 1. by direct election (a very rare case that exists in Switzerland, at the cantonal level), 2. elections in the assembly (judges are elected like this in Switzerland at the federal level, in Slovenia, and in Spain, the House of Representatives nominates future judges by a three-fifths majority, while the appointment of judges is the king’s authority), 3. direct appointment by the head of state on the recommendation of the Judicial Council (Czech Republic, Greece, Ireland, Lithuania, in the Netherlands on the recommendation of a court whose judges are elected through the Judicial Council, and in Italy the President is also President of the Judicial Council), 4. appointments by the Government (Sweden) and in Malta, on the recommendation of the Head of Government; 5. combined appointments made by the head of state and government, e. g., the Dutch Minister of Justice is politically responsible for appointments by royal decree and also signs appointments, 6. directly by a judicial council (Italy, Portugal, Croatia).

it was decided to form a Working Group to draft a proposal to amend the Constitution and the Constitutional law for the implementation of the Constitution; determined the text of the act which the National Assembly submitted to the Venice Commission for opinion;³² Committee members spoke with representatives of the Venice Commission; the proposed changes were discussed with representatives of the non-parliamentary opposition; determined the question³³ on which the citizens will vote in a referendum and sent a request to the REC for an opinion; the Proposal of the Act on Amendments to the Constitution with Explanation, the Proposal of the Constitutional Law for the Implementation of the Act on Amendments to the Constitution as well as the Proposal of the Decision on Calling a Referendum to confirm the Proposal of the Act on Amendments to the Constitution were determined.

On the 30th of November 2021, at the Eighth Special Session of the National Assembly in the Twelfth Convocation, the Draft Act on Amendments to the Constitution, the Draft Constitutional Law on the Implementation of the Act on Amendments to the Constitution and the Draft Decision on Calling a Referendum to confirm the Draft Act on Amendments to the Constitution were adopted by 193 deputies. A referendum for the 16th of January 2022 was also called at the Eighth Special Session. The REC declared the overall results of the referendum on the 4th of February 2022: according to the Report on the Overall Results of the Referendum conducted to Confirm the Act on Amendments to the Constitution of the Republic of Serbia the number of voters who voted for the answer “yes” was 59.62% and those who voted “no” was 39.35%, and on the 9th of February 2022, on the Tenth Special Session of the National Assembly in the Twelfth Convocation, the Act on Amendments to the Constitution and the Constitutional Law on the Implementation of the Act on Amendments to the Constitution were promulgated.

Assessing the constitutional review process, the EC Report for 2021 states that limited progress has been made and a certain level of preparedness reached in the Serbian judicial system, and that after the adoption of the constitutional amendments “a thorough overhaul of the system for appointing judges and

³² The Committee on Constitutional Affairs and Legislation sent to the Venice Commission for opinion Draft Amendments I–XXIX to the Constitution of the Republic of Serbia on the 23rd of September 2021, and the Speaker of the National Assembly wrote a letter to the Venice Commission on the 26th of October 2021 asking for another urgent opinion on Draft Constitutional Amendments I–XXIX.

³³ “Are you in favour of confirming the Act on Amendments to the Constitution of the Republic of Serbia?”

prosecutors and evaluating their work is needed to enable employment and skills-based advancement, as the current legal framework is not a sufficient guarantee against potential political influence on the judiciary” (EC, 2021, p. 5).

4. Conclusion

The multi-year process of preparation of constitutional changes, only in the period from 2018 to 2021 seven draft constitutional amendments were considered and 15 public hearings were held, even considering all the shortcomings and objections that accompanied the constitutional review process, represented a procedurally correct and transparent legal-political effort to bring the basic values, institutions and principles of Serbia as a state and political community into a balanced relationship.

We must constantly keep in mind to analyze the real legal-political context of Serbia, that there is no ideal constitutional paradigm, that constitutional guarantees can alleviate the gap between formal and essential independence and autonomy in the judiciary, but not eliminate it. Only time will show whether the provision of Article 2 of the Constitutional Law on the Implementation of the Act on Amendments to the Constitution of the Republic of Serbia, which stipulates that the Law on Judges, the Law on the Organization of Courts, the Law on the Public Prosecutor, the Law on the High Court Council and The Law on the State Council of Prosecutors shall be harmonized with the Amendments within one year from the day of its entry into force, and all other laws within two years.

It is indisputable that on the one hand, the adoption of 29 amendments to the “Mitrovdan” Constitution in the field of justice was an important step in the process of overcoming tensions between the form and content of constitutional political culture, but on the other hand, limiting the competences of the National Assembly in the field of representative democracy was a step backwards.

The analysis of complex, multi-year, multi-stage and multidimensional processes that resulted in the adoption of Amendments I-XXIX to the “Mitrovdan” Constitution showed that the process of partial constitutional revision has the potential for democratic legitimacy, but only time will confirm the extent to which respecting constitutional continuity helped overcome tensions between democracy and constitutionalism, whether it strengthened the stability, legality and legitimacy of the political system, and the extent to which respect for constitutional continuity has led to the strengthening of constitutional democracy.

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PROCEDURALNI ASPEKTI USTAVNE REVIZIJE U OBLASTI PRAVOSUĐA I OGRANIČENJE NADLEŽNOSTI NARODNE SKUPŠTINE

REZIME: Predmet rada je analiza procedure promene Mitrovdanskog ustava iz perspektive poštovanja propisanog postupka i očuvanja ustavnog kontinuiteta. Budući da razmatramo viševalentni uticaj ustavne revizije na jačanje ustavnog poretka, ustavne kulture i vladavinu prava u jedinstvenom pravno-političkom trenutku, neposredno po proglašenju Akta o promeni Ustava a pre donošenja seta pravosudnih zakona, rad ima za cilj da istraži da li je procedura ustavne revizije doprinela unapređenju ustavne demokratije. Delokrug analize ograničavamo na proceduru, sled formalnih odluka koje prate propisani postupak za promenu Ustava, a sadržinom promena se bavimo samo u meri koliko je potrebno da bi se razumela suština i kontekst. Nesporno je da je usvajanjem 29 amandmana na Mitrovdanski ustav i garancijom nezavisnosti sudstva i samostalnosti tužilaštva, učinjen važan korak u procesu prevladavanja napetosti između forme i sadržine ustavne političke kulture ali su istovremeno i dodatno ograničene nadležnosti Narodne skupštine. Proces unapređenja ustavne demokratije, očuvanje ustavnog kontinuiteta i izgradnju ustavne kulture Srbije analiziramo u istorijskoj perspektivi, sa posebnim osvrtom na proceduru donošenja Ustava iz 2006. godine. Metodološki, istorijsko-komparativni pristup zaokružujemo analizom komentara i tumačenja određenih ustavnih, zakonskih i podzakonskih akata. Dodatna vrednost analize proizilazi i iz činjenice da metodološka saznanja tumačimo iz rakursa 15-godišnjeg iskustva narodnog poslanika i neposrednog učesnika u procesu ustavne revizije u svojstvu člana Odbora za ustavna pitanja i zakonodavstvo Narodne skupštine.

Ključne reči: ustavna revizija, Narodna skupština, Mitrovdanski ustav, ustavna demokratija, ustavna politička kultura.

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