AMENDMENTS TO THE CONSTITUTION IN THE AREA OF JUDICIARY IN THE CANDIDATE COUNTRIES FOR THE MEMBERSHIP IN THE EU – THE EXAMPLES OF MONTENEGRO, ALBANIA AND SERBIA

Aleksandar Andrija Pejović, PhD student,
Faculty of Law, University in Belgrade

Abstract

In accordance with the obligations undertaken in the process of the accession to the European Union, the three candidate countries in the Western Balkans have initiated or undergone the process of changing their constitutional acts in order to align them with the requirements stemming from Chapter 23 Judiciary and Fundamental Rights. The paper aims to analyse how Montenegro and Serbia approached this commitment as an integral and essential part of the Action Plans for Chapter 23, while Albania did it as a part of the preparation of the country to receive the candidate status and the opening of accession talks. Subsequently, the paper shows that during the drafting process, the three states were guided by the standards defined by the Venice Commission in its opinions and proposals as well as the EC views received within consultative processes they have undertaken. It also points out the differences in the approach to the content of the changes by the European Union and the Venice Commission in the three cases. While Serbia still has to implement these changes, this paper also presents the diverse experience in Montenegro since 2013 and Albania since 2016 in relation to the implementation of the Constitutional amendments in practice and the effects it has had. Furthermore, the paper discusses the effects of the Constitutional reform in the light of the Enlargement Policy considering the latest developments and the fact that the Rule of Law is an essential part of these processes and the EU requirements. Finally, the paper concludes that the Venice Commission, invited by the European Commission, has provided the three states with its opinion guided both by technical, but also political principles, which, as an effect, has produced a diverse approach to how certain elements of the constitution treat the independence and autonomy of the judiciary within the process of integration in the EU.

Key words: enlargement, accession talks, constitution, rule of law, judicial reform, Venice Commission, Western Balkan

Introduction

Constitutional reforms are characterised by a very complex and demanding process that calls for a lot of political and expert-level investment due to the reform's impact on the society and the legislation of any country. While, sometimes constitutional changes come as an expression of a changed political reality, in the case of the EU membership, amendments to the constitution in the candidate states originate from the need to adapt to the EU negotiation demands. These changes come usually late in the process of accession talks since the practice shows that most of the candidates postpone the changes to the most important legislation act for the last few years before joining the EU, mainly to adapt to the primacy of the EU law over the national one[1]. However, with the start of the New Approach in the negotiation of Rule of Law Chapters of the European Union in 2012, the EU, led by the experience from the previous accession talks (Pejović, 2018, p. 75), started with the policy of asking for substantial efforts to be invested in the area of rule of law very early in the process of integration into the EU. One of the key requirements has been to initiate or finalise the constitutional reform which would guarantee the independence of the judiciary in line with the European standards, e. g., already in the 2012 Enlargement Strategy of the EU, Montenegro was, e. g. explicitly advised „to complete the process of constitutional change in order to safeguard the independence of the judiciary" (COM(2012) 600 final) or Serbia was asked to „adopt new Constitutional provisions bearing in mind the Venice Commission recommendations, in line with European standards and based on a wide and inclusive consultation process" (10074/16 ELARG 78). So, the new generation of candidate countries, unlike the countries in the previous waves of enlargement, have been obliged to approach the changes to the Constitution quite early in the process in order to have enough time to implement them and to show progress in track record.

The European Commission relied on the *European Commission for Democracy through Law* (Venice Commission - VC) of the Council of Europe to assist the candidates in this process – especially in the context of the need to align with „the European standards". Some of the authors feel that the normative power of the European Commission in the field of judicial policy was less developed and deserves further research, therefore naturally turning to the Council of Europe (Coman, 2014, pp. 906, 918, 920). Obviously, the Venice Commission has been very well positioned to provide opinions to the judicial reform of the constitution due to its long tradition of providing advice on constitutional reform processes as the most distinctive part of its work, especially in central and eastern Europe

[1] For example, Croatia made changes to its Constitution in 2010, a year ago before finishing the accession talks. Among others, these changes were related to the accession of Croatia to the EU to regulate constitutional issues stemming from the individual chapters of the negotiations of the Republic of Croatia with the EU such as the independence of the Croatian National Bank and the State Audit Office, equal suffrage of EU citizens residing in the Republic of Croatia, but also the strengthening of the independence, impartiality and professionalism of the judicial branch of power, which is now implemented much earlier with current candidates.

where it has assisted the adoption of numerous constitutions (Volpe, 2017, p. 183). Furthermore, the geographic scope of the VC has been expanding lately making it an influencing actor in the reform processes in some African and Asian countries (De Visser, 2015, p. 35), which shows the appeal of the standards and the quality of the work of the Commission.

Already in its Recommendation 1791 from 2007 (Recommendation 1791 (2007)) on the state of human rights and democracy in Europe, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers drew up guidelines on the elimination of deficits in the functioning of democratic institutions. The Committee of Ministers were asked to especially focus on „whether the current constitutional arrangements are democratically appropriate". Thus, the Venice Commission was entrusted in 2009 to compile all relevant national constitutional provisions on amendments to constitution in the Council of Europe Member States and a number of other States in a Final Report on Constitutional Amendment Procedures (CDL (2009)168*). The VC very much relies upon the European Court for Human Rights (ECtHR) and its interpretation and application of the ECHR as 'hard law', the same way the ECtHR has often relied on the VC in its published decisions in what a former member of the ECtHR and the VC van Dijk calls a „two-way street" or „cross-fertilisation" (van Dijk, 2007, p. 183). Based on these observations and mechanisms as proposed in the said Report, the Venice Commission deals with a number of issues including the balance between flexibility and rigidity of the Constitutional provisions[2], procedures for amending the Constitution[3], the need for a coherent concept for the country's political system; and especially guarantees for the respect of the rule of law and fundamental rights and freedoms; and judicial reforms.

Ever since the New Approach to the Rule of Law chapters started in 2012, the three candidate countries in the Western Balkans approached the Venice Commission for its opinion on the proposals of changing their constitutional acts in order to align them with the requirements stemming from Chapter 23 Judiciary and Fundamental Rights. Montenegro and Serbia had this commitment as an integral and essential part of the Action Plans for Chapter 23 within the Sub-Chapter Judiciary, while Albania did it as a prerequisite for the country to receive the candidate status and the opening of accession talks. The opinions that the Venice Commission has provided to the three candidate countries has varied in its content and advice in several principal elements, though. The procedures of appointments of key judiciary functions as well as anti-deadlock mechanisms as proposed and supported by the Venice Commission e. g. have

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[2] „The point of balance between rigidity and flexibility may be different from one state to another, depending on the social and political context, constitutional culture, age, level of detail and the characteristics of the constitution, and number of other factors, especially as this balance is not static and can move over time according to social, economic and political transformations." (CDL-AD(2013)029), Opinion on three draft Constitutional Laws amending two constitutional Laws amending the Constitution of Georgia.

[3] Such as thresholds and required majorities for constitutional amendment, the inclusiveness of the constitutional process, the citizens' participation in the decision-making.

created a different qualified majority approach for the three cases in question. This paper further analyses certain distinctive elements of the three reform process and provides a conclusion on the role of the Venice Commission.

The 2013 Amendments to the Constitution of Montenegro

The European Commission in its 2011 Progress Report for Montenegro that came out in October 2011 stated that „*with the current Constitution still in place, concerns persist over the appointment of the Supreme Court President and the Supreme State Prosecutor by parliament by simple majority. The appointment of the judges of the Constitutional Court is still not fully compliant with European standards. The limited mandates of the Supreme State Prosecutor and the Heads of Prosecutors Offices remain problematic.*" (SEC (2011)1204 final) This Report opened up the way for the December 2011 European Council to welcome the assessment on the good progress made by Montenegro and to task the Council to examine Montenegro's progress in the implementation of reforms, with particular focus on the area of rule of law in the first half of 2012 with a view of opening negotiations in June 2012 (D/11/8). The same June 2012 the Speaker of the Parliament of Montenegro requested the Venice Commission to prepare an opinion on the draft of amendments to the Constitution of Montenegro in the field of the judiciary. This request contained the draft amendments adopted by the Parliamentary Committee for Legal and Constitutional affairs of the Parliament of Montenegro as well as the alternative draft amendments to the Constitution proposed by the opposition Socialist People's Party of Montenegro. These constitutional amendments were a crucial step for the accomplishment of the necessary Screening Report for Chapter 23 Judiciary and Fundamental Rights recommendations (MD 281/12). At the same time, they were meant to become a stepping stone for a whole number of activities and measures in the area of the Judiciary Reform in the future Action Plan for Chapter 23.

Previously, the Venice Commission had already provided an opinion on the 2007 Constitution, where it also gave its view on the judicial system of Montenegro. In its Opinion on the Constitution in 2007 the VC reiterated that „*the Constitution must provide for the independence of the judiciary and recognise the imperative of avoiding any decisive role of political institutions in the procedure of appointment and dismissal of judges and prosecutors*" as well as that „*the provisions on the judiciary in the newly-adopted constitution reflect in several respects the previous suggestions of the Venice Commission. The appointment and dismissal of judges has been duly removed from the hands of the parliament. The Judicial Council has a balanced composition.*" However, the VC also found that „*the parliament has however retained some influence, notably through the appointment of the President of the Supreme Court and of the Public Prosecutors. These solutions are problematic in the light of the European standards*" and it expressed the hope that „*in the near future the effectiveness and impartiality of the judiciary will improve so as to enable Montenegro to complete the reform fully guaranteeing its independence*" (CDL-AD(2007)047).

In its 2012 Opinion on the amendments to the Constitution, the VC once again expressed the need for the independence of the judiciary to be improved. Mainly, the Venice Commission considered that the President of the Supreme Court should be elected by the Judicial Council alone; the composition of the Judicial Council should change in order to avoid both politicisation and self-perpetuating government of judges; the appointment and dismissal of the State prosecutors should be regulated at the constitutional level, and also the composition of the Constitutional Court should change as well (CDL(2012)051-e). One of the main proposals of the Venice Commission was the qualified majority approach in the election of the key Judiciary positions, primarily the judges of the Constitutional Court, the Supreme State Prosecutor and the members of the Judicial Council from amongst the renowned lawyers. The VC, and the European Commission that also supported this approach, recommended two third majority vote in the Assembly with a deblocking mechanism of three fifths in the second round. In spite of the fact that the insertion of this clause would create a possibility of blocking the system of appointment of these key positions, the insistence was based on the fact that a wider political compromise that needs to be reached with the opposition in order to reach two thirds or three fifths majority in a very polarised parliamentary system of Montenegro. The proposal was embraced rather rapidly since the country needed to pass the new Constitution with the changes in the judiciary as a prerequisite of opening of negotiations in Chapter 23. And indeed, Article 91(OJ of Montenegro 38/2013) of the Constitution of Montenegro specifies that the Assembly shall elect and dismiss the judges of the Constitutional Court, the Supreme State Prosecutor and four members of the Judicial Council from amongst the renowned lawyers with the two third majority vote in the first round of voting and the three fifths majority of all MPS in the second round of voting no earlier than one month following the first round. The VC also expressed their opinion that the basic conditions for the dismissal of judges should be kept at the constitutional level as well as to maintain the constitutional provision that judges should stay in their permanent posts until retirement, which the Constitution of Montenegro followed in its Article 121.

Soon after the Constitution was adopted on 31 July 2013, Montenegro faced the problem of the appointment of the four members of the Judicial Council from amongst the renowned lawyers ever since in July 2018 their four-year term in office expired especially considering the fact that most of the opposition was boycotting the parliament (SS/2019). Thus, the Government initiated a procedure for the amendment to the Law on the Judicial Council and Judges envisaging that the President and the members of the Judicial Council continue to perform the duty until the new composition of that body was declared, and asked the Venice Commission for an opinion. The Venice Commission in principle supported the prolongation of the term in office as a tool to preserve the functioning of the democratic institutions of the state, but reminded that this should not create opportunities for the majority by impossible proposals to lead to the necessity for the application of such mechanisms, and advised that they be limited in time (CDL-AD(2018)015-e). Subsequently, on 26 June 2018, the

Parliament of Montenegro adopted the Law on Amendments to the Law on Judicial Council and Judges that allowed for the Council to continue working (OJ of Montenegro, 42/2018), which is still the case. The initially appointed four lawyer members still sit in the Judicial Council although their four-year term-in-office expired in 2018 since the Parliament has not been able to elect the new ones.

Another problem came in October 2019, when the mandate of the Supreme State Prosecutor expired, and having no possibility to muster two thirds or three fifths majority in the Assembly, there is no sign of appointment of the new Supreme State Prosecutor. The European Commission in its November 2019 Non-paper on the state of play regarding chapters 23 and 24 for Montenegro, stated that the Parliament has yet to appoint four non-judicial members of the Judicial Council, while the first call for candidates failed due to absence of any applications, the Prosecutorial Council appointed the outgoing Supreme State Prosecutor as acting until the election of a new one is ensured.

As it can be seen, the provisions that the 2013 Constitution of Montenegro brought in order to strengthen the independence and autonomy of the judiciary are experiencing a range of challenges in their implementation. The link between the parliamentary role and the professional side of the work of the judiciary, which has been promoted as essential to keep out the political influence from the judiciary branch, has brought about the standstill in the appointment of the second generation of the holders of key functions in the Montenegrin judiciary, thus jeopardising the overall reform and the progress within Chapter 23 negotiations.

The 2016 Amendments to the Constitution of the Republic of Albania

In 2015 Progress Report for Albania, the European Commission stated that the Albanian judiciary „*is jeopardised by the highly politicised way in which High Court and Constitutional Court judges are appointed, and the wide margin of discretion enjoyed by the HCJ in appointing, promoting and transferring jud*ges" (SWD(2015) 213 final). The Albanian Parliament appointed a special Ad hoc Committee on Justice System Reform with a mandate to prepare proposals for reform of the justice sector to be assisted by a panel of high-level experts. In October 2015 the Chairman of this Committee requested an opinion of the Venice Commission on the Draft Amendments to the Constitution of Albania. Already in December 2015 the Venice Commission adopted an *Interim Opinion on the Draft Amendments* which mainly concerned the functioning of the Constitutional Court, organisation of the judiciary and of the prosecution service, with the aim to guarantee the integrity of the Albanian judiciary. Following this Opinion, the Ad hoc Committee revised the Draft Amendments and on 15 January 2016 submitted to VC the revised Draft Amendments to the Constitution[4]. The *Final*

[4] The opposition parties: the Democratic Party, the Socialist Movement for Integration, and the Justice, Integration and Unity Party submitted their comments on the revised Draft.

Opinion was adopted by the Venice Commission in March 2016 (CDL-AD(2016) 009). It recommended that if the parties to the political process do not agree on the qualified majority required to elect lay members of the HJC, HPC, IQC and SQC, they may opt for a proportionate system guaranteeing the opposition a representation within those collective bodies, or any other appropriate model which would secure the opposition a certain influence in the election process. It also recommended to specify the method of appointment of the Chief Special Prosecutor and accountability mechanisms.

Finally, in July 2016 Albania's Assembly unanimously adopted the new Constitution where no less than 46 articles of the 1998's constitution were changed. The reform was seen as the stepping stone for the opening of accession talks with the European Union. The Constitution allowed for the establishment of a decentralised Prosecutor's Office with the power to independently investigate organised crime and corruption. The autonomy of local prosecutors was to be enhanced, and the current dominant role of the prosecutor general would be reduced in favour of a self-governing body with a majority elected by the country's prosecutors. The Supreme Court was to be transformed into a career court deciding only matters of law with appointment and dismissal powers taken away from the political branches. A new disciplinary system was to be established for all judges and prosecutors, as well as special anticorruption structures, with dedicated courts, prosecutors, and investigators, and strengthened powers of investigation. Finally, the reform instituted the mechanism of the *vetting process* of all judges and prosecutors and their legal advisers which has shown to create the most impact on the state of the Albanian judiciary.

The new Constitution (OJ of Albania, 76/2016) prescribed thoroughly the way of election of the High Judicial Council (HJC), the Constitutional Court judges and the Prosecutor General. A subcommittee, that is composed of five members of the Assembly (three members nominated by the parliamentary majority and two by the opposition) selects the candidates for the HJC supported by 4 members. In case the majority cannot be reached the candidate shall be selected by lot. The Assembly may then reject the entire list of candidates as a block by a majority of two-thirds, in which case the procedure is repeated by the subcommittee, but no more than two times. If the Assembly after the competition of the procedure for the third time, has not approved the presented list, the candidates of this list shall be deemed elected. The constitution also prescribed that the Assembly shall appoint the Constitutional Court judges by three-fifth majority of its members. If the Assembly fails to appoint the judges, within 30 days of the submission of the list of candidates by the Justice Appointment Council, the first ranked candidate shall be deemed appointed. Finally, the Prosecutor General will be appointed by three-fifths of the members of Assembly among three candidates proposed by the High Prosecutorial Council, for a seven-year, non-renewable mandate. If the Assembly cannot elect the Prosecutor General within 30 days of receiving the proposals from the High Prosecutorial Council, the highest-ranking candidate will be automatically appointed.

Based on the joint initiative of the parliamentary groups of the Democratic Party and the Socialist Movement for Integration in October 2018 the Speaker of the Parliament of Albania requested the opinion of the Venice Commission on the constitutional amendments on vetting process, including the assessment of relations of the senior public officials with organised crime. The VC recommended that it would be for the „*Albanian Parliament to decide on forthcoming steps concerning the proposed constitutional amendments, through constructive dialogue between all political forces and the society at large*" (CDL-AD(2018)034-e).

As it can be seen in the case of Albania, the approach of the VC did differ than that of Montenegro, where a different deadlock mechanism for the election of the judges of the Constitutional Court, the Supreme Prosecutor and the lay members of the Judicial Council was adopted. Furthermore, the Albanian approach installed the vetting process which has managed to change the judicial landscape of Albania, where 60 percent of the vetted magistrates were either dismissed or they resigned by March 2020 (SWD(2020) 46 final). Since the reform has just recently started, it remains to be seen how the new mechanism will be functioning in practice, especially once the vetting process gets finalised.

Proposal for the Amendment to the Constitution in the Republic of Serbia

Already in the 2014 Screening Report on Chapter 23, the European Commission recommended Serbia to make with the support of external experts „a *thorough analysis of the existing solutions/possible amendments to the Constitution bearing in mind the Venice Commission recommendations and European standards, ensuring independence and accountability of the judiciary.*" (MD45/14) Following a request of the Serbian Minister of Justice in April 2018, an *Opinion on the draft Amendments to the constitutional provisions on the judiciary* was adopted by the Venice Commission in June 2018 (CDL-AD(2018)011-e). The VC welcomed the draft Amendments and acknowledges the efforts of the Serbian Government in pursuit of its aspirations to develop and evolve as a modern democracy. It examined the constitutional revision of the judiciary of Serbia and made recommendations especially regarding the composition of the High Prosecutorial Council and the High Judicial Council, the dissolution of the latter, the selection of public prosecutors, the grounds for the dismissal of judges and of deputy public prosecutors as well as the method to ensure uniform application of laws, and the constitutional provision regarding the Judicial Academy and its status as an autonomous institution. These recommendations were followed by the new draft amendments prepared by the Ministry of Justice of Serbia after a public consultation was organised in September 2018. In its *Secretariat Memorandum on the Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia* from October 2018 (CDL-AD(2018)023-e), the VC examined if, and to what extent, the text submitted followed the recommendations contained in its June Opinion. It was especially focused on the question of the election of non-judicial members of the HJC by the National Assembly. It noted that that the fourth option it offered in its Opinion (to increase the majority requirement and

to enable the five-member commission to choose from among the candidates who originally applied with the National Assembly for the membership in the HJC) was adopted by the Serbian side by increasing the majority from 3/5 to 2/3 in the first round. The second round has been taken out, but the text kept the commission (comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman) which would elect the remaining members by majority vote, as an anti-deadlock mechanism.

The Serbian Government subsequently forwarded the Proposal for Amendments of the Constitution of Serbia to the Serbian Assembly in November 2018. The Proposal also included a detailed explanation of the reasons underpinning the proposed amendments. In June 2019 the Parliamentary Committee for Constitutional and Legislative Issues considered the constitutional amendments and ascertained the Proposal to Amend the Constitution of the Republic of Serbia duly submitted by the party authorised by the Constitution, but did not take any further action. Given the political situation in the country and the general election of 26 April 2020, it is certain that the preparation of the changes to the Constitution will be left to the next convocation of the parliament. In practice, this would mean that the constitutional changes will have to undergo a new cycle once the new Government takes oath: a new initiative of the Government to the Parliament, the preparation of the constitutional amendments and the vote on them, and finally a referendum which is obligatory in the Serbian case by the Constituion[5] for any changes to the highest national legal act. In any case, if the constitutional changes in Serbia happen on the basis of the 2018 proposal of the Government, the Serbian judiciary would be changed in a different way than the Montenegrin or Albanian both in the way of selection of the highest judicial functions i. e. the role of the Parliament and a completely new deadlock mechanism.

Judicial independence and accountability through the appointment of key judicial functions

Dissimilar legal solutions for the three most common issues that present the subject of constitutional changes in the case of the three Balkan states, mainly the appointment of the judges of the Constitutional Court, of the HJC and the Supreme/General Prosecutor can present us with the question of whether the EU Membership Candidates are passing through the uniform procedures of adopting common European standards within the judiciary. The selection

[5] Article 203 of the Constitution specifies: „*The National Assembly shall adopt an act on amending the Constitution by a two-third majority of the total number of deputies and may decide to have it endorsed in the republic referendum by the citizens. The National Assembly shall be obliged to put forward the act on amending the Constitution in the republic referendum to have it endorsed, in cases when the amendment of the Constitution pertains to the preamble of the Constitution, principles of the Constitution, human and minority rights and freedoms, the system of authority, proclamation the state of war and emergency, derogation from human and minority rights in the state of emergency or war or the proceedings of amending the Constitution.*" - the 2006 Constitution of the Republic of Serbia (OJ of Serbia, 98/2006)

mechanisms throughout the world, though, have always lacked consensus on the best manner to guarantee the independence of the judiciary (Ginsburg, Garoupa, 2008, p. 54). As it can be seen, these issues, and especially the mechanism of appointment with its deblocking (anti-deadlock) clause has been implemented and proposed in various manners and different approach both at a) the level of functions, where in certain cases the VC has not proposed the qualified majority voting for the constitutional judges (like in Serbia), while in some others it has insisted on it (as in the case of Albania and Montenegro); as well as b) the anti-deadlock mechanism, which in the Montenegrin case is three-fifths majority in the Assembly for the election of all the three groups of judicial functions presented here, the lot system for the candidates to the HJC in Albania, or a special commission by majority vote on the lay members of the HJC and the Supreme Prosecutor in Serbia. From these examples we can deduct that the various approaches to dealing with the judicial reform in these three countries have been supported by the VC, and consequently by the European Commission. Also, there are other variants, that for the sake of the limited space of this paper, could not be further expanded, but the Serbian approach differs in the composition of the HJC, where the minister of justice is not a part of it, while the Prosecutorial Council, unlike Montenegro where it is elected by simple majority, in Serbia calls for two-thirds qualified approach.

There is a lot of discussion about the concept of separation of powers and the concept of checks and balances of the democratically elected powers of government over judiciary (Parau, 2012, p. 7), and whether it is really easy to distinguish what judicial independence is in practice. For some scholars the judicial councils have been a panacea for virtually all problems (Kosař 2018) and thus also the safeguard of the judiciary independence, while for some this lack of form and diverse normative and descriptive employment of the judicial independence makes it into an amoeba, a theoretical construct and an end in itself (Geyh, 2014, p. 2). Therefore, this has also made the whole process even more complicated when embedded into the need to accommodate the three legal approaches to the judicial independence based on differing legal and constitutional systems against the diverse political, democratic and historic background.

Table 1. Three constitutional approaches to appointment of key judicial functions

	MONTENEGRO	**ALBANIA**	**SERBIA**
Appointment of the Judges of the Constitutional Court	The 7 judges of the Constitutional Court shall be elected and released from duty by the Parliament, by **two-third majority** vote in the first voting and by **three-fifth majority** in the second voting of all the Members of the Parliament no sooner	The 9 Constitutional Court judges will be appointed by **three-fifth majority** of the members of the Assembly. If the Assembly fails to appoint the judges, within 30 days of the submission of the list of candidates by the Justice Appointment Council,	**CURRENT CONSTUTIONAL FRAMEWORK:** The Constitutional Court shall have 15 justices: five justices of the Constitutional Court shall be appointed by the National Assembly, another five by the President of the Republic, and another five at the general session of the Supreme Court of Cassation.

	MONTENEGRO	ALBANIA	SERBIA
	than a month, as follows: two judges at proposal of the President of Montenegro and five judges at proposal of the competent working body of the Parliament upon the announced public invitation carried out by the proposing parties.	the first ranked candidate shall be deemed appointed.	The National Assembly shall appoint five justices of the Constitutional Court form among ten candidates proposed by the President of the Republic, the President of the Republic shall appoint five justices of the Constitutional Court from among ten candidates proposed by the National Assembly, and the general session of the Supreme Court of Cassation shall appoint five justices from among ten candidates proposed at a general session by the High Judicial Court and the State Prosecutor Council **2nd PROPOSAL AFTER THE VC**: The National Assembly shall appoint and dismiss judges of the Constitutional Court by **simple majority.**
Appointment of a part of (High) Judicial Council members through parliamentary procedure	The 10 members of the Judicial Council shall be: president of the Supreme Court; four judges to be elected and released from duty by the Conference of Judges, considering equal representation of courts and judges and minister in charge of judicial affairs. Finally, four reputable lawyers are elected and released from duty by the Parliament, by **two-third majority** vote in the first voting and by **three-fifth majority** in the second voting of all the Members of the Parliament no sooner than a month, at proposal of the competent working body of the Parliament upon announced public invitation;	The High Judicial Council shall be composed of 11 members, six of which are elected by the judges of all levels of the judicial power and five members are elected by the Assembly among jurists who are non-judges. A subcommittee composed of five members of the Assembly (three members nominated by the parliamentary majority and two by the opposition) selects the candidates supported by 4 members. In case the **majority** cannot be reached the candidate shall be selected by lot. The Assembly may then reject the entire list of candidates as a **block by a majority of two-thirds**, in which case the	**CURRENT CONSTUTIONAL FRAMEWORK:** The High Judicial Council (11 members) shall be constituted of the President of the Supreme Court of Cassation, the Minister responsible for justice and the President of the authorised committee of the National Assembly as members ex officio and eight electoral members elected by the National Assembly, in accordance with the Law (i. e. **simple majority**). **2nd PROPOSAL AFTER THE VC**: The High Judicial Council shall be composed of ten members: five judges elected by the judges and five prominent lawyers elected by the Assembly upon the proposal of the competent committee of the Assembly after having conducted a public competition, by a **two-thirds** majority vote of all deputies, within 20 days of receipt of the proposal. If the

	MONTENEGRO	ALBANIA	SERBIA
		procedure is repeated by the subcommittee, but no more than two times. If the Assembly after the competition of the procedure for the third time, has not approved the presented list, the candidates of this list shall be deemed elected.	Assembly does not elect all the five members within the stipulated deadline, the remaining members, upon the expiry of the next ten days, shall be elected from among the candidates who meet the criteria for election, by a **commission** comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, by majority vote.
Appointment of the Supreme/ General Prosecutor	The Parliament shall elect and release from duty the Supreme State Prosecutor, by **two-third majority** vote in the first voting and by **three-fifth majority** in the second voting of all the Members of the Parliament no sooner than a month, after the hearing with the competent working body of the Parliament, at proposal of the Prosecution Council, upon the announced public invitation.	The Prosecutor General will be appointed by **three-fifths** of the members of Assembly among three candidates proposed by the High Prosecutorial Council, for a seven-year, non-renewable mandate. If the Assembly cannot elect the Prosecutor General within 30 days of receiving the proposals from the High Prosecutorial Council, the highest-ranking candidate will be automatically appointed.	**CURRENT CONSTUTIONAL FRAMEWORK:** The Republic Public Prosecutor shall be elected by the National Assembly, on the Government proposal and upon obtaining the opinion of the authorised committee of the National Assembly. **2nd PROPOSAL AFTER THE VC**: The Supreme Public Prosecutor of Serbia shall be elected by the National Assembly upon the proposal of the High rosecutorial Council, after having conducted a public competition, by majority vote of **three fifths** of deputies, within 20 days from the receipt of the proposal. If the National Assembly does not elect the Supreme Public Prosecutor of Serbia within the stipulated deadline, upon the expiry of the next ten days, the commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, shall perform the election by majority vote, from among the candidates who meet the criteria for election.

Source: the author

Conclusions

The distribution of competences and the division of powers in the area of the judiciary falls very close to the heart of state sovereignty, therefore making the judicial constitutional reform politically very sensitive. Suggesting constitutional or legislative solutions in a certain legal system provides room both for technical and political expertise. This especially holds true for the enlargement countries where the process of the judicial reform is very much influenced by the need to fulfil the obligations within the political/democratic institutions part of the Copenhagen Criteria. Although the newly created or empowered institutions (such as the newcomer in the region - the judicial council and the prosecutorial council, along with special prosecutors for organised crime and corruption) in the Western Balkans have been seen as a general panacea to improve the rule of law (Mendelski, 2018), the process showed that it is not an easy task to sever all influence from executive and legislative branches of authority within the judiciary and to create a sustainable and efficient mechanism of the new and the revamped bodies, which is shown by different models both proposed and adopted in the countries in question.

The Venice Commission, in line with its growing track record and worldwide involvement in the judicial reforms, has managed to provide very expert and fit to the purpose opinions to the enlargement countries. In this regard, no matter how technical and expert level the support of the VC is, it has not managed to escape the political choices and therefore various political interest, as it could be seen in the proposed ways of decision-making mechanisms within the appointment of the most important judicial functions. On the other hand, the European Commission itself, which has outsourced the primary role in the process to the Council of Europe (i. e. the VC), would need to build up its own capacities to deal with the judicial reform if it wants to keep up the quality, consistency and institutional memory of its approach to the rule of law within the negotiation processes.

The paper has tried to conduct a scientific research on the role of the Venice Commission in the process of the constitutional changes in Montenegro, Albania and Serbia initiated by their European integration aspirations. The processes of the judicial reform underpinned by the VC and the pressure exercised by the EU will take quite more years to come. Recent developments and the presented dissimilarities among the three states summarised in the last part of the paper, therefore, open a new research agenda for scholars of judicial reform, the quality of the European integration and the role of the VC.

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