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Vol. 12 No. 2 (9-25)
November 2025
e-publica.pt

DOI
https://doi.org/10.57846//Ulisboa/FD/002.epublica.2025v12n2.02

ISSN 2183-184x

Funded by:

FCT Fundação para a Ciência e a Tecnologia

Co-funded by the European Union

Advancing Cooperation on the Foundations of Law
Belgrade · Genova · Lisboa · Surrey

*e-Publica* **Vol. 12** No. 2, November 2025 (9-25)

# FACTORS UNDERMINING THE EFFICIENCY OF JUSTICE IN THE LEGAL SYSTEM OF SERBIA

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**Abstract:** The efficiency of justice in Serbia has been undermined by a combination of constitutional, institutional, procedural and social factors, including political influence, abuse of functions; inconsistency between laws and the constitution, lack of resources, overburdened courts and socio-political instability. The methodology used rests on the legal method, legal sources (e.g. Constitution, laws) and case studies. Socio-political methods are considered in sections dealing with student and civil protests. The analysis highlights the key factors determining the state of the judiciary. A brief theoretical discourse is given on the difference between the administrative and judicial function, which is followed by an overview of several recent judicial cases that illustrate the current state of judicial inefficiency. The institutional framework of the judiciary is represented by the contradictions regarding the integrity profile of so-called prominent lawyers as members of the High Council of the Judiciary. An overview of the student and civil protests serves as an introduction to the constitutional controversies regarding the office of the president of the Republic. The analysis is completed by details of the resent Constitutional Court "Jadar" (lithium) case as an illustration of the inefficiency of justice in this country.

**Keywords:** Judicial Function; European Commission; So-called Prominent Lawyers; President of the Republic; Constitutional Court "Jadar" Case 2024.

**Resumo:** A eficiência da justiça na Sérvia tem sido prejudicada por uma combinação de fatores constitucionais, institucionais, procedimentais e sociais, nomeadamente influência política, abuso de poder, incongruência entre as leis e a Constituição, carência de recursos, sobrecarga dos tribunais e instabilidade sociopolítica. A metodologia utilizada tem por base o método jurídico, as fontes do direito (por exemplo, a Constituição e as leis) e os estudos de caso. Os métodos sociopolíticos são abordados nas secções dedicadas aos protestos estudantis e civis. A análise evidencia os fatores-chave que determinam o estado do poder judicial. É apresentado um breve enquadramento teórico sobre a diferença entre a função administrativa e a função judicial, seguido de uma descrição geral de vários processos judiciais

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Submission: 05/05/2025
Accepted by peer reviewer: 19/07/2025
This paper is the result of research conducted within The Horizon Twinning project "Advancing Cooperation on the Foundations of Law – ALF" (Project No. 101079177)

recentes ilustrativos do atual estado de ineficiência judicial. A estrutura institucional do poder judicial é representada pelas contradições relativas ao perfil de integridade dos chamados advogados proeminentes como membros do Conselho Superior da Magistratura. Os protestos estudantis e civis são analisados a título de introdução às controvérsias constitucionais relativas ao cargo de Presidente da República. A análise é finalizada a partir de detalhes do recente caso «Jadar» (lítio) do Tribunal Constitucional, como exemplo da ineficiência da justiça neste país.

**Palavras-chave:** Função Judicial; Comissão Europeia; Os chamados Advogados Proeminentes; Presidente da República; Caso "Jadar" do Tribunal Constitucional de 2024.

## 1 . Introduction

Undermining the efficiency of justice in the legal system of Serbia is an issue which that has received considerable attention in the recent past, and has now become a leading topic on the rule of law agenda in Serbia. Efficiency of justice has been undermined by a combination of constitutional, institutional, procedural and social factors. Factors determining the present state of the judiciary in Serbia include political influence and abuse of functions and political instrumentalization of the judiciary. The inconsistency between laws and the constitution also contribute to judicial inefficiency Organizational factors such as a lack of resources and overburdened courts, also contribute to judicial inefficiency. Finally, the socio-political context is a significant factor adding to inefficiency of the Serbian judicial system.

The analysis is structured in a deductive format, beginning with defining the theoretical difference between the administrative and judicial function, supported with a background overview of notable cases of judicial inefficiency in the past decade and an overview of the social and political context, on one hand, and the examination of specific constitutional and judicial inconsistencies (distinguished lawyers and High Judicial Council; the delegitimization of the Constitution in the context of the authority of the president of the Republic, concluding with the assessment of the European Union on the issue of the present state of the judiciary in Serbia, on the other. The analysis then focuses on a concrete lithium mining "Jadar" case before the Constitutional Court supporting the initial hypothesis of factors undermining the efficiency of justice in the legal system. Finally, the Concluding Remarks include specific recommendations (e.g. defining objective criteria for 'prominent lawyers'; clarifying constitutional powers of the President of the Republic; enhancing independence and transparency of the Constitutional Court, etc.).

The methodology used in this analysis is primarily the legal (normative) method, resting on legal sources (e.g. Constitution, laws) and case studies (e.g. the Jadar case). Socio-political methods are considered in the segments regarding student and civil protests.

The structure of the analysis pursues the following pattern: a general introduction on the topic, followed by a conceptual and analytical framework on the topic of the judicial and administrative functions, and the institutional framework of the judiciary (High Judicial Council and High

Prosecutorial Council). The Socio-political Context examines the Student and Public Protests (2024–2025), describing the causes, development, and consequences of the protests (focusing on the harsh treatment of demonstrators vs. passivity toward crimes committed against them, and in particular interim measures issued by the ECHR related to LRAD use). Analysis is dedicated to the *ultra vires* competencies of the President of Republic. The initial premise on the inefficiency of the judiciary in Serbia is presented in a case study of the constitutionally controversial "Jadar" case, including the analysis of procedural omissions and the constitutional implications of the dissenting opinions on this matter.

In the conclusion and recommendations section, the initial hypothesis is reaffirmed in light of the conducted analysis and specific recommendations are offered.

## 2 . Factors determining the state of the judiciary

The efficiency of justice in Serbia has been undermined by a combination of constitutional, institutional, procedural, and social factors. This premise rests on the research hypothesis, which includes constitutional ambiguities and contradictions, such as undefined criteria for "distinguished lawyers" (the Constitution does not specify clear and objective criteria for their selection), as well as a lack of precise procedures for selecting members of judicial bodies (creating opportunities for abuse, non-transparency and reducing public trust). As emphasized previously (cf. Rabrenović, 2010: 25-44), and in particular in recent analytical papers regarding the state of the judiciary in Serbia: "This constantly changing landscape of judicial regulation in Serbia is generally seen as a campaign for asserting more judicial independence and judicial self-governance, particularly through extending the competencies of the High Judiciary Council over a number of issues that had previously not been within its purview" (Knežević Bojović, Ćorić, 2024: 357).

Factors determining the present state of the judiciary in Serbia include political influence and abuse of functions such as confusion over the competencies of state bodies (e.g. vaguely defined competencies, especially regarding the President of the Republic, allow for political influence over the judiciary and weaken the separation of powers, leading to institutional inefficiency) and the political instrumentalization of the judiciary as judicial bodies are often subject to political pressure, compromising the independence of courts and resulting in slower and less fair decisions (cf. European Commission for the Efficiency of Justice, 2024). The inconsistency between laws and the constitution also contributes to judicial inefficiency (e.g. spatial planning: The Law on Planning and Construction allows the Government to adopt special-purpose spatial plans, although the Constitution assigns this competence to representative bodies. The Constitutional Court has not effectively addressed this unconstitutionality, contributing to legal uncertainty and inefficiency).

Organizational factors such as lack of resources and overburdened courts, also contribute to judicial inefficiency: courts are often overloaded with cases, and the number of judges and support staff is inadequate for efficient case resolution and outdated IT systems with limited digitalization and poor

technical equipment further slow court operations and prolong proceedings (Serbia Judicial Functional Review, 2014).

Last, but not least, the socio-political context is a significant factor adding to the inefficiency of the Serbian judicial system, including, *inter alia*, declining public trust as mass public protests and student blockades against deep and persistent institutional crisis reflect the inefficiency in resolving major social issues and establishing accountability. Due to these factors, public trust in the judiciary is low, making the implementation of justice more difficult and increasing the sense of legal insecurity.[3]

### 2.1. Administrative and judicial functions

Apart from distinguishing legislative and executive functions, a clear distinction should theoretically, be made between the judicial and the administrative function. The problem here is that the direct application of the law in individual cases is a function of both the courts and the administration, since the direct application of the law can take the form of a court decision (sentence), but also the form of an administrative decision. However, although both functions make individual decisions, they are not identical (cf. van Caenegem, 1987). They differ not only the nature of the decision-making body (i.e. court or administrative body) and the appropriate procedure (i.e. adversarial court procedure or administrative procedure), but judicial and administrative functions differ significantly in terms of the content of the decisions that are made. This difference stems from the fact that the goal ("end product") of administrative proceedings is to specify dispositions (i.e. what should be done), while the goal of judicial proceedings is to specify sanctions (i.e. something is or is not done against the law) (cf. Kelsen, 1951). Thus, the judicial function is performed by the courts that decide on the "dispute" that has arisen (cf. Shapiro, 1981), i.e. whether a legal rule has been violated (e.g. whether there is a criminal offense or whether damage to goods has occurred), while the administrative function is performed by the administrative bodies that decide on the future situation of the party (e.g. granting citizenship or determining tax liability). While courts "reconstruct" events from the past and pass judgments based on that, administrative decisions refer to the future behaviour of the party (e.g. construction license).

One should add that administrative and judicial functions also differ in terms of whether the goal is the "protection" of public interests or the "realization" of public interests (although often, especially in legal texts, this difference is not specified). While the "protection" of the public interest is the function of the courts and the prosecution as an activity that is initiated when the law is violated, the "realization" of the public interest is the function of the administration as an activity that is initiated when the law needs to be applied to future situations. From a theoretical point of view, the "protection" of public interest implies the imposition of a legal sanction (due to violation of the law), while the "realization" of public interest implies the determination of a disposition for the purpose of applying the law (Lilić,

3. For detailed issues regarding judicial reform in the Region, see: Preshova, Damjanovski, Nechev; 2014.

2024: 24). The decision of the tax administration is not made for the "protection" of legality, because taxing it is not a sanction (or a "punishment") against the party, but for the "implementation" of the tax law. When the phrase reads: "the rule of law exists when the administration is brought under the law", this means that legality exists when "citizens are protected from the administration", not that "the administration protects legality". Legality is protected by the courts (*inter alia,* in administrative disputes when they decide on illegal administrative decisions), and in particular by the Constitutional Court also vested with protecting legality, but above all, protecting constitutionality.

### 2.2. General background of judicial inefficiency

A comprehensive research (commissioned by the Open Society European Policy Institute – OSEPI and Open Society Foundations Serbia, and conducted by Transparency Serbia and the Center for Investigative Journalism Serbia), identified specific conducts (supported by concrete case studies) by which political control is exerted over judges, courts and other independent institutions in Serbia in which systemic abuse of the rule of law is exposed, and which enable corruption and/or political pressure over the judiciary, the prosecutors and police, which, *inter alia*, includes (cf. Cvijic, 2018).

a) Limited accountability (e.g. the system for holding judges and public prosecutors accountable is ineffective and inconsistent with lack of proactive disciplinary bodies and insufficient transparency (e.g. the case of judge Vučinić**,** who left the judiciary as a result of pressure to influence his decisions in the trial of businessman Miroslav Mišković as the "face" of the ruling party's anti-corruption campaign, 2012);

b) Political appointments (e.g. the trial of Mirjana Marković, wife of former president Slobodan Milošević, which has been going on through several retrials. An indictment was raised in 2010, but the investigation against Marković and her son has been suspended since they are not in Serbia);

c) Extensive discretion (e.g. Mlađan Dinkić, frequently criticized by politicians and charged with "destroying the Serbian economy", Dinkić, a former Governor of the National Bank and Minister of Finance and Economy, managed to join every government from 2000 to 2013. In 2006, the current President of Serbia, Aleksandar Vučić, then an MP of the Serbian Radical Party, promised that Dinkić would be sent to jail and brought a prison uniform bearing Dinkić's name to Parliament. The Prosecutor's Office for Organized Crime launched an investigation against Mlađan Dinkić at the end of 2014, but two years later suspended it. However, none of this prevented Vučić and Dinkić from forming a ruling coalition in 2012 and Vučić appointed him as his deputy in the Governmental Committee for Cooperation with the United Arab Emirates);

d) Media manipulation (e.g. leaking and misrepresenting information in the murder case of Jelena Marjanović (e.g. in April 2016 this story was led the tabloids for 18 months and represents the creation of news for political purposes, in particular live arrests which suggest that the political regime

got together with a TV station close to the government in order to boost the ratings of a political leader and party);

e) Statute of limitations (e.g. the case of businessman and politician Bogoljub Karić illustrates political influence on the work of judicial authorities and in particular the (ab)use of the procedural instrument of statute of limitations. Ten years after criminal proceedings against Karić began, the statute of limitations ended them. Karić and 15 others were indicted in 2010. His trial never took place and in January 2016 the Higher Court ended proceedings against him on the grounds of statute of limitations. According to the Supreme Court of Cassation during 2015 and 2016, a total of 930 criminal cases were subject to the statute of limitation, including the Karić case. Of these, 898 lapsed in the basic courts, and 32 cases in higher courts. Because higher courts deal with more serious offences, the public are often under the impression that this figure is higher) (Cvijic, 2018: 5-7).

f) Abuse of political powers (e.g. Kosmajac case - at a press conference in June 2014 Vučić described Dragoslav Kosmajac as "the biggest drug dealer in Serbia". Consequently, he was arrested in November, but not because of drug trafficking, but for illegally obtaining a small piece of land. However, a second indictment charged him with tax evasion (ca. 4,000 Euros), but this was rejected because the First Belgrade Court found that it was not a criminal offence, but a misdemeanour. In this case the political interest was paramount and the court proceedings of secondary importance.).

## 3. Institutional framework of the judiciary

### 3.1. High council of the judiciary

In no other place are the details as crucial as they are in the endless labyrinth of legal norms, legal formulations, as well as in the texts of banking contracts (so-called small print). Legal regulations abound in complicated and often contradictory formulations, such as: "in terms of this law"; "the provision of Article X shall apply in conjunction with the provision of Article Y"; *lex specialis derogat lex generalis*, etc. Some legal documents, however, also contain very skilfully formulated solutions and procedures that camouflage and cover up various demons that lurk in the details with the aim of achieving the exact opposite effect from the one that is presented in the justification for their adoption.

During the debate on the recent set of judicial laws (2021) whose goal was the operational implementation of the "judicial reform measures" (which have in the meantime become Constitutional Amendments that were consequently incorporated into the text of the Constitution), the most professional and public controversies were caused by the introduction of so-called "prominent" lawyers", as members of the highest judicial instances.

The goal of the judicial reform through constitutional amendments was to eliminate political influence on judges (and prosecutors) that was widely present. The argument that when judges (prosecutors) are elected by the parliament as *a par excellence* political institution, each elected judge (prosecutor) automatically transfers into the structure of the independent judiciary (and prosecution) the corresponding political DNA of the

parliamentary majority that had appointed them. This goal has been achieved, as judges (prosecutors) are now elected by the relevant judicial bodies (High Council of the Judiciary and High Council of Prosecutors). These *ex constititio* respectively include not only judges and prosecutors, but also "prominent lawyers" as a mechanism of "external" control of these institutions.

### 3.2. Comprehensive definitions of "prominent lawyer"

However, in the very wording "prominent lawyer", there is a detail in which a potential demon is hiding. The Constitution only stipulates that a "prominent lawyer" is a lawyer by profession (with at least ten years of professional experience), and does not prescribe other, clear and reliable criteria or objective standards on the basis of which the "control of professional quality and personal integrity" of these "prominent lawyers as members of judicial (prosecutor) councils could be carried out. In this specific context, the property of "prominent" is determined by subjective criteria and general impression, instead of an objective criteria. Instead of appointing "prominent lawyers", a more appropriate wording would be "respected lawyers", as the attribute "respected" is determined by objective criteria and concrete results of work in the legal profession. For example, any lawyer can be "prominent" on any basis (e.g. by making statements in tabloids to raise their personal rating), while a "respected" lawyer can only a person whom the professional legal community (e.g. bar, university, economy, civil sector) recognizes as a person of professional integrity and ethical virtues based on the results of his/her work: "The potential vagueness of the term will lead to doubts about who can be brought under that category, and thus to well-founded and unfounded, personally, scientifically and professionally motivated challenges from the legal, political and lay public." (Spaić, 2015).

Conceptually, a "prominent lawyer" is an individual distinguished by a high level of legal expertise, professional integrity, public reputation, and significant contributions to the development of legal theory, legal practice and, in particular, the rule of law. The key elements of defining a "prominent lawyer" are: a) expertise (e.g. law degree and substantial professional experience, as a judge, attorney, prosecutor, legal scholar, legal advisor and demonstrates advanced knowledge of both legal theory and practice; b) contribution to law and the judiciary (e.g. has authored legal or scholarly publications; has participated in legal reforms, legislative processes, or legal education; has contributed through work in judicial bodies, professional associations, NGOs, or international legal forums); c) personal integrity (e.g. is known for ethical conduct, impartiality, and strong moral character; is recognized by the wider legal community for excellence; is free from professional or legal blemishes with no disciplinary sanctions or politically compromised conduct); d) influence (e.g. their views and work influence legal professionals, institutions, or the broader public; is frequently engaged in public debate on legal issues and consulted as an expert). Consequently, a "prominent lawyer" is a legal professional who possesses exceptional legal knowledge and experience, proven integrity and public trust, a demonstrated contribution to the development of justice, and professional

recognition for legal work by legal institutions and experts, as well as the general public.

Another judicial demon is hidden in the details of the selection procedure of "prominent lawyers" for members of the highest judicial (prosecutor) instances. According to the Constitution, the procedure for selecting "prominent lawyers" is significantly different from the procedure for selecting other members of the judicial and prosecutorial councils: out of 11 members of the High Council of the Judiciary, 7 members are elected judges from among judges (Article 151). Similarly, in the election of members of the High Council of the Prosecution (Article 163). However, unlike the election of judges and prosecutors as members of judicial councils, for which the Constitution stipulates that the selection procedure must be regulated by law (and is), the election of "prominent lawyers" as members of judicial (prosecution) councils, the Constitution does not prescribe that the procedure for their selection be regulated by law.

The procedure for selecting "prominent lawyers" is not particularly complicated at first glance. However, with a closer look at the details of this procedure, on the one hand, it points to the highest level of democracy when "prominent lawyers" are elected by the National Parliament in a public session with a 2/3 majority, but on the other hand, it reveals room for procedural manoeuvres if the selection of "prominent lawyers" by the parliamentary majority is not successful. This then activates a "reserve procedure" which is then conducted behind closed doors by a special five-member committee (with a very possible "desired outcome").

## 4. Socio-political context

### 4.1. Student and civil protests

The situation in Serbia at the end of 2024 and the beginning of 2025 is marked by a deep political, structural, social, moral, institutional and constitutional crisis and socio-political instability. After the November 1 tragedy in Novi Sad (when sixteen innocent people lost their lives after a railway station canopy collapsed on them), since the competent authorities did not immediately initiate appropriate procedures to establish criminal and other responsibility, protests began in Novi Sad, Belgrade and later in all other cities of Serbia. These protests were followed by student protests by blocking universities. The student demand was investigation and full insight into the construction documentation, as all circumstances indicated that this was a serious case of "corruption that kills people".

As the government did not provide the necessary answers regarding the issues of responsibility, even the highest state officials and institutions openly, publicly and systematically misled the public that there were no works on the part of the station that collapsed. Suspicion was fuelled by the fact that the statements made by different state entities (President of the Republic, Minister of Construction, Railway Infrastructure Management) were identical denials in terms of timing, content and wording. On the other hand, day by day the unrevealed facts were increasingly pointing in the opposite direction, revealing what in legal terms in known as "premeditated deception" (*animus fraudis)*.

This, in turn, caused massive daily demonstrations, blockades and protests by dozens, even hundreds of thousands of students and citizens, with the aim of "un-blocking" competent institutions, so that they can be "reset" to do their functions and tasks prescribed by the legal order. The first institution on the list to be addressed was the public prosecutor's office, which is headed by a person who has not appeared publicly for years. At the same time, the students sent a clear message to the President of the Republic, who was addressing the media day in and day out on this matter, that as someone who in not competent on this issue, "nobody is asking him anything". Along with the demand to un-block the institutions, these protests regained the lost sense of interpersonal spiritual solidarity (daily 16 minutes of "thunderous" silence for the 16 victims), and most significantly, the general value narrative expressed in the resolute demand of *iustitia hic et nunc* (justice here and now) was expanded and consolidated.

Month-long student blockades and citizen protests are a direct response to the structural crisis and the current social, social and political situation in Serbia. Student protests have become a key factor in changes in society, especially due to the growing support of citizens. According to public opinion surveys by the non-governmental organization CRTA, about 80 percent of citizens support students.[4] The growth of optimism about the country's future, as the survey data shows, clearly stems from the energy brought by the student protests, not from confidence in government policies and the state of the economy. In the context of an increasingly certain constitutional reform, the so-called Student Edict (March 1) that they adopted in the city Niš, which, as a kind of "declaration and constitutional convention for the restoration of freedom", contains, among other things, provisions about freedom, state, justice, youth, dignity, knowledge, solidarity and the future. The turning point in this situation occurred on March 15, 2025, in Belgrade. The authorities responded to the protest of several hundred (approx. 500) thousand citizens with excessive force, including use of the controversial and legally prohibited "sonic cannon" (LRAD). This action could be put into contrast with the (in)efficiency of the Serbian judicial institutions and the police in processing the criminal charges filed by citizens relating to the same event. On the other hand, the reaction to this "non-existing" sonic weapon assault on silent and peaceful protesters, the European Court for Human Rights imposed an Interim measure (i.e. urgent measures that apply only where there is an imminent risk of irreparable harm to a Convention right) concerning Serbia.[5]

4. CRTA. Ubedljiva podrška građana Srbije studentskim zahtevima i protestima. 2025. Available at: https://crta.rs/ubedljiva-podrska-gradjana-srbije-studentskim-zahtevima-i-protestima/.

5. The Court has decided to issue an interim measure in the case *Đorović and Others v. Serbia*. The case concerns the alleged use of a sonic weapon for crowd control by the authorities at demonstrations and concern that it could be used at future demonstrations. The applicants had requested that the Court issue an interim measure that the Serbian authorities would (i) prevent use of sonic weapons in such circumstances; (ii) prevent criminal prosecution of those who take part in public debate on the use of a sonic weapon on 15 March 2025; and (iii) conduct an effective investigation into the allegations that a sonic weapon had been used. (https://www.echr.coe.int/w/interim-measure-granted-concerning-serbia, 07.07.2025).

## 5. Constitutional contradictions

### 5.1. *Ultra vires* and the office of the President of the Republic

Apart from the issue of revising the current Constitution due to a number of "open issues (e.g. status of autonomous provinces and local self-government, the constitutionality of the Constitutional Law, electoral procedure, media freedoms, public security, corruption) (cf. Vučić, n.d.; Beširević, 2025), there are two (incorrect) theses regarding the status of the President of the Republic (Jerinić, 2017: 4; Međak, 2016: 7).

The first incorrect thesis refers to the so-called the two-headed (*bi-cephalic*) executive power according to which in this country the executive power is simultaneously exercised (shared) by the Government of Serbia and the President of the Republic. This, of course cannot be true, as it has no basis in the Constitution. This thesis, as a clever political "spin", was previously promoted by a professor of Constitutional Law (R. Marković), who knew very well that the executive power is not divided between the Government and the President, for the simple reason that he personally wrote the 1990 Constitution (which did not contain such a constitutional provision). As an alleged argument, it is stated that the Government and the President of the Republic share executive power, since, for example, the Government proposes, and the President appoints ambassadors, and entrusts the mandate for the composition of the Government. As a counter argument, according to this logic, the President also has "double-headed legislative power" (as he promulgates laws adopted in Parliament by a presidential decree, and also has the right of suspensive veto), and even has "double-headed judicial power" (since he can pardon persons who have been sentenced by the court). The thesis on two-headed power is a failed legal syllogism, as according to that logic, the President does not actually have one, but three "two-headed" powers, which is nonsense.

The second incorrect thesis refers to the claim that the President of the Republic is the head of state who exercises "supreme state power". This concept is derived from the first thesis, i.e. that the executive power is two-headed and divided between the President and the Prime Minister. However, as in the previous case, this is also not true and has no basis in the Constitution, due to the fact that there is no such constitutional provision. The populist motive behind this spin was to present to the public that the President was some kind of "supra state power" (much like a king) as promoted through the pro-regime media.

According to the Constitution, Serbia as a state rests on two basic principles: the Rule of Law (Article 3) and the Separation of Powers (Article 4) (cf. Lilić, 1996: 357-368; Milosavljević, 2012: 5-21). The Constitution foresees only three special forms of state power (but also a number of so-called constitutional functions). State power is exclusively exercised by three constitutionally authorized structures of state bodies: a) legislative power is vested in the National Parliament (Article 98), b) executive power is exercised by the Government (Article 122) and c) judicial power is incorporated in the judicial system of lower and higher courts and the Constitutional Court (Article 142). This means that the Constitution does not authorize any other body or

institution to exercise "state power" (as this would mean that, contrary to Article 4, there are more than three identified institutions of state power). It follows that the person who performs the "constitutional function" of the President of the Republic does not exercise any state power, especially not the "highest state power". Statements that the President of the Republic is the "head of the state" (and "supreme commander") are just tabloid platitudes and political spins of the current regime. In this country, the President of the Republic is not the head of the state administration (i.e. like in the US), nor the commander-in-chief, but a person entrusted with a special, relatively limited constitutional function with exactly 8, mostly ceremonial, responsibilities (Article 112). In this context, the present constitutional provision (Article 111) declaring that the President "embodies state unity" is a relic of the former (Milošević) Constitution which was inserted into the text of the new Constitution "by the back door". This provision is of a declarative nature and does not contain the authority to exercise executive power, as "embodiment" in itself does not imply "exercising" any power (this provision was disputed by the professional public as "inappropriate and imprecise" and especially "Caesarist" because it implies that the President of the Republic is "above" other government structures).

However, the most significant characteristic (*differentis specifica)* of the constitutional function of the President is that the Constitution (Article 115) expressly does not allow the President to engage in active politics: "the President of the Republic cannot perform any other public function or professional activity." This is also included in the Law on the President of the Republic (Article 9) and the Law on Prevention of Corruption (Article 1). During the term of office, the Constitution prohibits the President from carrying out political activities, nor does it allow him to have the "highest political positions". During the active mandate, the President is not allowed to act as the president of a political party, to found new political movements, to lead promotional political campaigns, to organize, actively participate in and lead political gatherings, rallies and counter-rallies, to participate in television "political-entertainment" talk shows, to participate in political promotional videos, nor to be the bearer of any electoral lists in elections in which he/she does not participate (e.g. in local elections). Also, the President is not responsible for conducting foreign policy, nor for the promotion of stadiums and similar sports facilities, nor for economic-propaganda exhibitions. *Last but not least,* the President is not competent to preside over meetings of the Government, nor to issue orders to ministers or ask for clarifications. In order to maintain as much as possible the principles of rule of law and separation of powers, the function of the President must be contained within the constitutional framework from which it has gone "out of line" (*ultra vires*).

## 6. Constitutional court ruling in the "Jadar" case

### 6.1 Initiative for constitutional review of the 2020 government Jadar decree

In the most recent Report on Serbia (2024), in the section on the rule of law and the functioning of the judiciary, the European Commission, *inter alia*,

emphasized that the efficiency and transparency of the Constitutional Court's work should be further improved and access to court case law of both the European Court of Human Rights and the domestic courts be simplified with access made easier (European Commission, 2024: 28-31). The Report also indicates that the private sector is hampered by weaknesses in the rule of law, in particular in tackling corruption and judicial inefficiency, as last year's recommendations were implemented to some extent but are still mostly valid (European Commission, 2024: 8).

In July 2024, the Constitutional Court adopted a very controversial ruling (the "Jadar" case) which has become an indication of serious (in)efficiency of the judicial system in Serbia. The case refers to the annulment of a 2022 (*anti*-Jadar) Government Decree: "The Court Rules that the Decree on the Termination of the Validity of the Decree on Defining the Spatial Plan of the Area of Special Purpose for the Realization of the Project of Exploitation and Processing of Jadarite Mineral "Jadar", of January 20, 2022 is not in accordance with the Constitution and the Law."[6]

The Constitutional Court, however, missed (accidentally?) to state in the *Dictum* of the Ruling what it stated in the Narative (of the Ruling), that by annulling the 2020 (*anti*-Jadar) Decree, the previous annulled (*pro*-Jadar) Decree of March 13, 2020, cannot be subsequently legally "revived". In addition, the Constitutional Court also omitted other, otherwise routine procedural actions in the proceedings regarding the submitted Initiative for Constitutional Review of the (*anti*-Jadar) Decree of 2020. As an unusually procedural step, the Constitutional Court in its Ruling did not state who submitted the Initiative for constitutional review, nor who is the reporting judge in this case.[7]

### 6.2. Descending opinion

The 2024 Constitutional Court Ruling determining that the (*anti*- Jadar) Decree of January 20, 2022, was not in accordance with the Constitution and the Law, was adopted by the 11 (remaining) judges with 10 votes for and 1 vote against. There were two "descending opinions" which were published on the website of the Constitutional Court. However, one of the two descending judges later voted for the final version of the Ruling.

On the other hand, in a logically very consistent and well-argued descending opinion, the judge who voted against this Ruling, *inter alia*, gave several legally relevant reasons:

– *Failure to hold a public hearing*. According to Article 37, paragraph 1 of the Law on the Constitutional Court, holding a public hearing is the rule, and the possibility of not holding a public hearing is a very conspicuous

6. Ruling of the Constitutional Court of Serbia (Jadar Case), IUo-39/2022, July 11, 2024.

7. The Constitutional Court currently has 11 (out of a total of 15) judges. Amendments to the Law on the Constitutional Court of 2023, introduced a clause (Article 20-a) which states that: "In the event that all judicial positions in the Constitutional Court are not filled, until they are filled, the salary of the President and Judge of the Constitutional Court is increased by 10%, for each unfilled judicial position." Consequently, each judge adds an additional 40% per month to their salary.

exception (adding that this generation of judges who have been in the Constitutional Court for nearly eight years, "have not experienced a single public hearing in this Constitutional Court").

- *Failure to issue a Procedural Decision on the Initiation of Proceedings*. The Constitutional Court did not ask for an answer or an opinion from the creator of this Decree, as it would have been much better had the Constitutional Court initiated the proceedings with a separate "procedural decision" (instead of making a confirmatory ruling in "summary proceedings").

- *Failure to deliver the Initiative to the creator of the disputed act*. The Constitutional Court unnecessarily failed to submit the Initiative for response or opinion to the creator of the contested act. By this failure the Government of Serbia, as the creator of the contested Decree, was not only unjustifiably deprived of this procedural possibility, but also of its important right to reply and give an opinion regarding the Initiative.

- "Unnecessary rapidity in adopting the Ruling". There was no reason given by the Constitutional Court for not giving the Government of the Republic of Serbia the opportunity to withdraw its own Decree or pass a new one).

### 6.3 Adoption of the *anti*-Jadar decree (2022)

The so-called "Jadar" case started with environmental protests by citizens dissatisfied with the way the Government solves environmental problems, especially regarding mining lithium by the Rio Tinto company, which culminated in the massive citizens "blockade of the Sava Center in Belgrade" (December 4, 2021). Demonstrators also gathered in Novi Sad, Niš and other cities of Serbia. The key demands of the demonstrators, led by environmental organizations, refer to the withdrawal of the recently adopted laws and decrees that would, if not revoked, pave the way for Rio Tinto's environmentally dangerous investment in a lithium mine in Western Serbia. Consequently, under public pressure, on January 20, 2022, the Government adopted a (*anti*-Jadar) Decree that annulled the previous (*pro*-Jadar) Decree of March 13, 2020. The Prime Minister at that time (A. Brnbić) publicly proclaimed that this new Government Decree finally "put an end" to the Rio Tinto mining project.

However, there was something "very wrong" with the July 11, 2024, Ruling of the Constitutional Court in the Jadar (name of a river) case. In this case, the "devil in the detail" sat in the formulation that the Constitutional Court Ruling of July 11, 2024, which annulled the (*anti*-Jadar) Decree of January 20, 2020, does not automatically "revive" the March 13, 2020 (*pro*-Jadar) Decree. However, as pointed out in the descending opinion, the wording "does not revive" regarding the (*pro*-Jadar) Decree of March 13, 2020, must have been contained in the legally binding *Dictum* section of the Ruling and not in the legally non-binding) Narrative section of the Ruling.

### 6.4. Boomerang effect of the 2024 constitutional court ruling

The descending judge was right all along. By stating in the Narrative (and not in the *Dictum*) of its 2024 Ruling this decision of the Constitutional Court "does not revive" the March 13, 2020 (*pro*-Jadar) Decree, the Court endorsed a "boomerang" effect which gave "green light" to "someone else" (in this case the Government) to "revive" the 2020 (*pro*-Jadar) Decree, previously annulled by the (*anti*-Jadar) Decree in 2022.

Only five days later, with the (*anti*-Jadar) Decree of 2022 out of the way by action of the Constitutional Court, the Government openly "revived" the previous (*pro*-Jadar) Decree of 2020 by adopting a new (*pro*-Jadar) Decree on July 16, 2024. The wording of Article 1 of the new (*pro*-Jadar) Decree reads: "On the day this Decree enters into force, the Decree on Establishing the Spatial Plan of a Special Purpose Area for the Realization of the Project of Exploitation and Processing of Jadarite Mineral "Jadar" of March 13, 2020, SHALL RE-ENTER INTO LEGAL FORCE" (emphasis added).

With this kind of Constitutional Court judicial ruling, the key issue is the need to harmonize judicial procedure standards with EU law. In the most recent Report on Serbia (2024), in the section on the rule of law and the functioning of the judiciary, the European Commission, *inter alia*, emphasized that the accountability of the judiciary needs to be improved, in line with the newly adopted constitutional legal framework (2021); that there is need for the Supreme Court to more effectively steer the jurisprudence by providing guidance on contentious legal issues (particularly on repetitive cases), as the country still lacks a comprehensive court case and document management system that interlinks cases across courts and prosecutors' offices. The Commission also indicted that the efficiency of justice needs to be improved, and in particular that the efficiency and transparency of the Constitutional Court's work (four vacant positions still need to be filled) should be further improved and access to the court practice database of both domestic and European Court of Human Rights judgments simplified (European Commission, 2024: 28-31).

## 7. Concluding remarks

The efficiency of justice in Serbia is undermined by a combination of constitutional contradictions, political influence, procedural weaknesses, lack of resources, and a general decline in trust in institutions. These weaknesses enable abuses, slow down judicial proceedings, and reduce legal certainty, posing a serious challenge to the rule of law and the functioning of Serbia's legal system.

In the context of the efficiency of justice in the legal system of Serbia, the status of the "prominent" lawyers as members of the high judicial and prosecutor councils, the socio-political factors, the constitutional contradictions of the presidential function, the European Commission indicators, as well as the "hidden agenda" regarding the Constitutional Court Rio Tinto (*pro*-Jadar) Ruling, it seems that the Constitutional Court has not fulfilled its fundamental task as the guardian of the Constitution.

Not only did the Constitutional Court with its 2024 Ruling in the Jadar case, "boomerang" the issue back to the Government which in a matter of several days "revived" the annulled 2020 (*anti*-Jadar), but, in the immediate context

of this case, failed to perform its primary responsibility in safeguarding and upholding the principle of "constitutionality of laws." What the Constitutional Court should have, but had not done, was to initiate a procedure on its own initiative and remove a serious breach of the Constitution in regard to the Law on Planning and Construction. This Law has a provision regarding "spatial plans of special purpose areas" (Article 35, Paragraph 2): "The spatial plan of special purpose areas is adopted by the Government". Although, the Constitutional Court mentions this provision in its Ruling on several occasions, it fails to efficiently react (as the guardian of the Constitution). According to the "letter" of the Constitution, spatial plans are adopted by representative bodies, i.e. the Serbian Parliament (Article 99), assemblies of the autonomies provinces (Article 183) and local government assemblies (Article 191). In the Constitution there is no mention of the executive having competence in regard to spatial plans.

As the Law on Planning and Construction contains a provision according to which the Government (as executive branch) may adopt "spatial plans for special purposes" in spite of the Constitutional provisions which designate the adoption of spatial plans exclusively to legislative and representative bodies, this respective provision in the Law is clearly unconstitutional. This "devil in the detail" leads to a very disturbing conclusion that, in view of the Jadar Case, the "constitutional protection" of the Constitutional Court is realized according to a "reverse" formula in which law is above the constitution and in which the Constitutional Court is more a protector of "legality" (in conjunction with executive competence overriding representative and legislative competence in spatial planning), than a true (judicial) protector of substantive constitutionality. On the efficiency of justice, in particular constitution-wise, one must always bear in mind the words of Hans Kelzen (who "invented" the constitutional court): "A law whose content is not in accordance with the provisions directly prescribed by the constitution could not be considered valid." (Kelsen, 1951: 159).

Reaffirming the initial hypothesis of the factors which undermine the efficiency of the judiciary in Serbia, in light of the presented analysis, we find it necessary to point out several specific recommendations, including the need to: precisely define objective criteria for "prominent lawyers"; clarify constitutional powers of the president of the Republic in order to curtail the present *ultra vires* activities of this office; enhance transparency in the nomination procedure of judges of the Constitutional Court, and last but not least, harmonize judicial procedure standards with EU law.

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