

DEMOCRACY AND HUMAN RIGHTS

# SERBIA'S PROGRESS IN EU INTEGRATION 2020-2022

Constitutional Changes the Only Step Forward?

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There was a stalemate in Serbia's EU accession process from December 2019 to December 2021, during which time no chapters or clusters were opened or provisionally closed



After a delay of four years and a failed attempt in 2017-2018, constitutional reform in area of judiciary was enacted in 2021 and confirmed on the 16 January 2022 referendum



Largely due to the constitutional reform, EU member states decided in December 2021 to open "green" Cluster 4 with Serbia, despite lack of progress regarding political criteria



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# 1

## INTRODUCTION

The pandemic year 2020 will be remembered as the worst year for Serbia's EU integration process since the opening of the first chapters in 2015. This was the first time that Serbia did not open or close any negotiating chapters in one year. Due to serious problems with electoral conditions, lack of political pluralism and rule of law, the question of whether Serbia is still a democracy was justifiably raised by both international organizations and groups in the European Parliament. European Commission Report on Serbia for 2020 also showed that Serbia has not made progress in judicial reform, media freedom and political environment, which was characterized by a lack of political pluralism and the absence of opposition from both the parliament and the media.

In October 2020 a new Serbian Progressive Party (SNS) led government was formed, with the same Prime Minister and the same Minister for European Integration, and with reform on the road to the EU included among its main priorities. Due to lack of opposition in the parliament and the questions about its legitimacy that this raised, the new government's mandate was immediately limited by President Vučić, who announced new parliamentary elections by Spring 2022.

Halfway through the mandate, the Serbian government formally began negotiations on a newly revised enlargement methodology, which should have made the process more credible, predictable, dynamic, and with stronger political steering. In December 2021, EU member states decided to make progress with Serbia by opening a new cluster of chapters, Cluster 4, devoted to the Green Agenda and Sustainable Connectivity. This decision was largely seen as a reward for the initiation of constitutional amendments in the area of the judiciary in the Serbian parliament in 2021 and the scheduling of a referendum for 16 January 2022.

Therefore, within this year-and-a-half, the 2020-2022 Serbian government managed to make formal progress in EU accession, opening a total of four chapters that comprise Cluster 4. This was lauded by both Serbian government and EU officials as a huge step forward and was seen as an impetus for further acceleration of progress. However, opening four chapters in 16 months is far from a stellar result for an EU accession frontrunner. There are important questions that need to be answered. Are there any signs that the Serbian government is indeed more devoted to EU reforms? What is the quality of the reforms that enabled this progress? Was the constitutional reform, that led the member states to reward Serbia with new clusters after two years of stalemate, an important step forward for the rule of law in the country?

## 2

# PROGRESS IN EU ACCESSION 2020-2022

## THE NEW GOVERNMENT AND POLITICAL ENVIRONMENT

Despite the very convincing victory of the ruling majority, the new Serbian government was formed almost four months after the June 2020 parliamentary elections, in October of the same year. Before it was formed, the President of Serbia Aleksandar Vučić de facto limited its mandate to less than two years and announced early parliamentary elections for April 2022 at the latest.<sup>1</sup> However, the formation of a government with a convincing parliamentary majority was a new opportunity to intensify reforms on Serbia's path to the EU, which remained the declarative goal in the manifesto of Prime Minister Ana Brnabić.

Following the European Commission's critical report on Serbia in October 2020, the Enlargement Commissioner Oliver Várhelyi said that it should serve as an incentive for further reforms, while PM Brnabić reinstated that reforms related to European integration will remain a top priority for her government.<sup>2</sup>

At the time of the formation of the new government, Serbia has not opened a new negotiating chapter with the EU for almost a year. Stalemate in this process was linked with the lack of progress and even regression in the areas of the rule of law and the state of democracy. The boycott of the elections by the most relevant opposition parties resulted in a parliament practically without opposition, presenting an even bleaker picture of democracy in Serbia.

## REFORMS OF THE 2020-2022 GOVERNMENT

From 2020 to 2022, the new government took certain steps in reforms related to the rule of law and the state of democracy, which were at the time key areas for progress in the accession process. However, most of them were formal and procedural in nature. According to the Monitoring report of the Coalition "PrEUgovor", the new government has not re-

ally changed the old approach of "ticking boxes" in the negotiation process. "The ultimate goal was to show and not to achieve reforms. Therefore, despite the messages from government officials that reforms in the area of the rule of law are key to further progress, serious problems continued to arise, which significantly slowed down the improvement of the situation in the political areas in Serbia", states the report.<sup>3</sup>

Due to the political crisis, electoral conditions become one of the most important political criteria for progress in EU accession. There are still no official data on the implementation of the ODIHR recommendations, but it is clear that all the problems noted by this body were not resolved before the 3 April elections. For example, during the summer of 2021, the government secretly worked on amendments to the Law on Financing Political Activities.<sup>4</sup> Civil society organizations warned that the main problem in this area will not be solved.<sup>5</sup> In addition to the process of implementation of ODIHR recommendations, during 2021 there were two parallel processes of inter-party dialogue aimed at improving electoral conditions. The first was the dialogue mediated by the European Parliament, which produced a table of 16 measures, but which have not significantly improved the quality of the electoral process.<sup>6</sup> The other dialogue was the dialogue "without foreigners" which included mostly anti-EU parties which rejected EP mediation. This dialogue also produced several measures whose effects were rather limited.<sup>7</sup>

When it comes to the fight against corruption, during this period the government started to work on legal changes, strategic documents, and reforms of institutions in charge of fighting corruption. However, few of these activities have

1 RFE: Vučić: Opet izbori 2022, Vlada ograničenog trajanja, Dačić na čelu skupštine <https://bit.ly/3w7t6EI>, Accessed on 10 March 2022

2 N1 : Varhelyi sa Nacionalnim konventom: Izveštaj EK da bude shvaćen kao podstrek <https://bit.ly/3w8HMmS>, Accessed on 10 March 2022

3 Coalition „PrEUgovor“, Alarm Report on Progress of Serbia in Cluster 1 – November 2021, <https://bit.ly/3tc1Ycf>, Accessed on 8 March 2022

4 CINS: Tajni nacrt: Šta sve donose izmene pravila o finansiranju političke kampanje, <https://bit.ly/3q2O5UP>, Accessed on 8 March 2022

5 Beta: Transparentnost Srbija: Izmene pravila o finansiranju izborne kampanje bez javne rasprave, <https://bit.ly/37qIC4V>, Accessed on 12 March 2022

6 EWB: Srbija i EU u 2021 godini: Međupartijski dijalog, Klaster 4 i rezolucije Evropskog parlamenta, <https://bit.ly/3JQ2T1a>, Accessed on 10 March 2022

7 CCP: State of democracy in Serbia 2021, <https://bit.ly/36UpEIU>, Accessed on 13 March 2022

been completed. On the other hand, the most widespread corruption scandals in the public, which include the highest state officials (mostly members of the Government), have not yet received a legal epilogue. As the report of the Coalition "prEUgovor" showed, a significant number of reforms envisaged by the Action Plan for Chapter 23 are still pending. "There is no visible progress in the implementation of existing anti-corruption regulations, and negative trends have continued, especially in the field of public procurement, and in state-owned and public administration companies", states the report.<sup>8</sup>

When it comes to freedom of expression and media freedom, the government has implemented several reforms with limited effects. In December 2020, the government adopted the Action Plan for the Media Strategy, which was adopted at the beginning of the year. This led to the establishment of the Working Group for the Safety of Journalists, as well as other measures aimed at improving the security of journalists. However, actions of the ruling majority undermined formal improvements. In this period, journalists in Serbia faced unprecedented verbal attacks by MPs from the ruling party and pro-government media, which led to five journalists' associations leaving the Workgroup for the Safety of Journalist and forming a coalition for media freedom.<sup>9</sup>

In the first half of 2021 the implementation of activities from the Action Plan was delayed - out of six activities planned for the fourth quarter of 2020 and the first quarter of 2021, only one was implemented.<sup>10</sup> However, the biggest problem in Serbia when it comes to media freedom was media capture, as the ruling parties strengthened their grip on mainstream media, using co-financing schemes, public procurement as well as state-owned Telekom Srbija to finance, purchase or found pro-government media.<sup>11</sup> Nevertheless, the beginning of the implementation of some measures within the Action plan was a good enough reason for the European Commission to assess that there has been "limited progress" in freedom of expression in 2021.<sup>12</sup>

## PREPARATION FOR OPENING CLUSTERS 3 AND 4

Although the government has intensified reforms in fundamental areas, their impact on the overall state of the rule of law has been limited. At the same time, the government has been working for two years on technical reforms related to the process of opening new clusters of negotiating chapters.

It can be assessed that the government took the reform momentum and carried out numerous technical activities that were delayed for years, with the aim of receiving the green light to open new clusters. Over the past two years, Serbia has technically met the criteria for opening two clusters, 3 (Competitiveness and Growth) and 4 (Green Agenda and Sustainable Connectivity). At the intergovernmental conference in December, however, only cluster 4 was opened.<sup>13</sup>

During the two-year period, the Government completed the work of adopting negotiating positions for Chapters 15 (Energy) and 28 (Consumer Protection). The European Commission's 2021 report assessed that most progress had indeed been achieved in these two chapters.<sup>14</sup> The good assessments are the result of the intensification of the Government's reforms in this area. When it comes to taxation, last year the Government fulfilled the measure from 2016, which equalized the excise duties on alcoholic beverages, which for years discriminated foreign producers.

In the field of energy, formal progress in this area took place in May 2021, when Serbia adopted reform plans to separate "Srbijagas" and "Jugorosgas". In addition, a set of laws in this area was adopted in April - on the use of renewable energy sources and energy efficiency, and rational use of energy.

8 *Ibid*

9 KRIK: Zbog napada na KRIK novinarska i medijska udruženja napustila radnu grupu za bezbednost novinara, <https://bit.ly/3INlj05>, Accessed on 12 March 2022

10 CCP: Small steps and unresolved problems: The Report on Reforms in the Area of the Rule of Law in October 2020 – June 2021, <https://bit.ly/3tezRm5>, Accessed on 8 March 2022

11 *Ibid*.

12 European Commission, Serbia Report 2021, <https://bit.ly/3w71Gyo>, Accessed on 13 March 2022

13 MEI: J.Joksimović: Srbija intenzivno radi na pripremi klastera 3 i 4, <https://bit.ly/35SpnQt>, Accessed on 13 March, 2022

14 European Commission, Serbia Report 2021, <https://bit.ly/3w71Gyo>, Accessed on 13 March 2022

# 3 CONSTITUTIONAL AMENDMENTS RELATED TO JUDICIARY

## FAILURE AT THE FIRST ATTEMPT IN 2017-2018

According to the interim benchmark related to the functioning of the judiciary within the Action Plan for Chapter 23, Serbia was supposed to amend the Constitution bearing in mind the Venice Commission recommendations and European standards in order to ensure independence and accountability of the judiciary.<sup>15</sup> The adoption of the amended Constitution related to judiciary and Constitutional law was planned for the 4th quartal of 2017, and the adoption of related judicial laws for the end of 2018.

The consultation process first started in June 2017, but professional associations and civil society organizations left these consultations due to the lack of meaningful debate between the state bodies and civil society.<sup>16</sup> In January 2018 Ministry of Justice published the Draft Amendment to the Constitution of the Republic of Serbia in relation to the judiciary and opened a public debate. The initiated process was in a collision with the constitutional amendment procedure since it should have started by submitting a proposal to amend the Constitution to the National Assembly, which then needed to be adopted by a two-thirds majority of the total number of deputies, and only after that decision of the Assembly is brought, new constitutional solutions may be created.<sup>17</sup>

Despite the objections from the expert public, the government decided to continue the process, chasing the timeframe of AP23 which was already breached. The entire judicial profession was against the solutions offered in the draft, including the judicial councils, High Cassation Court, and judicial associations. The draft was sent to the Venice Commission for opinion, which provided substance-related recommendations.<sup>18</sup> In October 2018, after receiving the amended draft,

the VC Secretariat memorandum issued the Memorandum on Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia.<sup>19</sup> In November 2018 the Government submitted the initiative to change the constitution.

Although the pressure to continue with the amendments was present in EU reporting, the Government paused the process. Facing opposition by the judiciary, it realized that it needs to find a consensus and have a proper procedure of amending the Constitution in this area, since the entire process of accession negotiations started to focus on the independence of the judiciary.

## REVISED ACTION PLAN AND RESTART OF THE REFORM IN 2020

The process of amending the Constitution became an important part of the revision of the Action plan for Chapter 23. At the point the revision started, these activities were delayed for over a year. Nevertheless, local civil society used the opportunity of the mechanism of revising the AP23 to bring the process back on track and ensure that all procedural stages are respected. The interim benchmark repeated: "Serbia adopts new Constitutional provisions bearing in mind the Venice Commission recommendations, in line with European standards and based on a wide and inclusive consultation process. Serbia subsequently amends and implements the Laws on the Organization of Courts, on Seats and Territorial Jurisdiction of Courts and Public Prosecutors' Offices, on Judges, on Public Prosecutor's Office, on the High Judicial Council and the State Prosecutorial Council as well as the Law on Judicial Academy".<sup>20</sup>

Despite the adoption of the revised AP23 in July, the process of amending the Constitution was not continued until the end of 2020. The new timeframe for delivering these activities was the end of 2021, but since it was set in 2019, this meant that at least one year was lost again. In December

15 Action Plan for Chapter 23 2016, 29.

16 Danas, "Sudije i tužioci napustili konsultacije o izmenama Ustava", 30 October 2017, <https://www.danas.rs/vesti/drustvo/sudije-i-tuzioci-napustili-konsultacije-o-izmenama-ustava/>, 23 February 2022.

17 Article 203, Constitution of the Republic of Serbia, *Official Gazette of the RS No. 98/2006*.

18 Venice Commission, Serbia - Opinion on the draft amendments to the constitutional provisions on the judiciary, adopted by the Venice Commission at its 115th Plenary Session, 22-23 June 2018, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)011-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)011-e), 23 February 2022.

19 Venice Commission, Serbia - Secretariat memorandum - Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia, taken note of by the Venice Commission at its 116th Plenary Session, 19-20 October 2018, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)023-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)023-e), 23 February 2022.

20 Measure 1.1.1. Revised Action Plan for Chapter 23.

2020 the Government once again submitted the Proposal on Amending the Constitution of the Republic of Serbia. In May 2021 the National Assembly organized a series of public hearings before it finally decided on the Government Proposal on 7 June 2021.

## IMPLEMENTATION OF CONSTITUTIONAL CHANGES

This time the Government and National Assembly put an effort to respect every step of the procedure since they needed to provide visible progress before the next EC report. The competent committee of the National Assembly on Constitutional Affairs and Legislation formed the working group, involving, amongst others, the representatives of the professional judicial associations. The Working Group prepared the draft, and then organized another series of public hearings. No drastic changes were made in the document upon these discussions and the draft was sent to the Venice Commission for an opinion at the end of September 2021.

VC provided in its opinion of 18 October 2021 a series of recommendations for clarification and improvement of the document in order to fit the aim of the amendments. At the same time, VC requested a holistic approach and the need for a inclusive reform process in Serbia and encouraged it to involve the parliamentary and extra-parliamentary opposition not only in the constitutional amendment process but also in future larger constitutional reform processes. The opinion was in general favourable, with insisting on changes related to the composition of the High Judicial and High Prosecutorial Council, and those related to the anti-deadlock mechanism in case the specific proposed members of these bodies cannot be elected by a qualified majority in the National Assembly. The 2021 EC Report confirmed that the Venice Commission issued a favourable opinion of the draft text on 15 October 2021 and that the key recommendations need to be addressed.<sup>21</sup>

Although only partly referring to the VC recommendations, disregarding the recommendations related to a low number of elected prosecutors in the HPC, and leaving the anti-deadlock mechanism unchanged, Serbia sent the new draft to the Venice Commission. It gave its second opinion on 24 November 2021, generally marking the amendments in line with the standards of the Council of Europe, repeating the non-addressed recommendation from the previous opinion.<sup>22</sup> There was no further referring to these recommendations, which influenced the quality of the proposed changes. The draft ensured some of the foundations for the potential removal of political influence on the judiciary, but partly missed implementing the request from the screening in Chapter 23, precisely to provide over 50% of prosecutors in the prosecutorial council.

21 Serbia 2021 Report, 21.

22 Venice Commission, Serbia Urgent Opinion No. 1067/2021 on the Revised Draft Constitutional Amendments on the Judiciary, 24 November 21, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2021\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2021)019-e), 23 February 2022.

The National Assembly adopted the *Proposal of the Act on Amendments to the Constitution of the Republic of Serbia, the Draft Constitutional Law for Implementation of the Act on Amendments to the Constitution of the Republic of Serbia*, as well as *Proposal of the decision on announcing the republic referendum to confirm the Act on the change of the Constitution of the Republic of Serbia* by a qualified majority on 29 November 2021.<sup>23</sup> The referendum was held on 16 January and the amendments were adopted on 8 February 2022.<sup>24</sup>

## NEXT STEPS IN CONSTITUTIONAL REFORM

The adoption of Constitutional amendments was perceived by the European Commission as the first visible progress within Chapter 23 and can be directly linked to the opening of Cluster 4, regardless of the preparation of positions in these related chapters. There is a high possibility that the process would not have been held in this manner if the focus of the Member State was not highly put on this matter.

When compared to other legislative changes, which were not this transparent and opened to the public and we could see that they were implemented to show quantitative progress in implementing activities, the changes to Constitution were of more procedural quality. Although the new methodology gives the candidate country incentives to focus on implementing certain activities, the problem is that it remains little oriented to the substance, which may cause problems at the point of assessing the level of interim benchmarks achievement.

The next step is to amend the Law on Organization of Courts, Law on Judges, Law on Public Prosecutor's Office, Law on High Judicial Council, Law on State Prosecutorial and later also Law on Seats and territorial Jurisdiction of Courts and Public Prosecutors' Offices and Law on Judicial Academy according to the changes in Constitution. The biggest focus must be put on the functional independence of prosecutors, the general and budgetary competencies and decision-making procedures of the judicial councils and election of their members in the National Assembly. Only when these laws are brought or changed the effect of the Constitutional changes will be visible. Until then all the efforts must be put in monitoring the upcoming legislative changes.

23 Paragraf, "Narodna skupština RS: Usvojen Predlog Akta o promeni Ustava RS", 30 November 2021, <https://www.paragraf.rs/dnevne-vesti/011221/011221-vest4.html>, 23 February 2022.

24 Radio Televizija Srbije, "Skupština Srbije proglasila promene Ustava", 9 February 2022, <https://www.rts.rs/page/stories/sr/story/9/politika/4696153/skupstina-glasanje-potvrda-promene-ustav-.html>, 23 February 2022.



# 4

## CONCLUSION

The adoption of constitutional changes in the area of judiciary certainly represented an important step in the EU accession process. This is especially true if compared with the first attempt of constitutional changes in 2017-2018 and when put into the context of a stalemate in the accession negotiations in previous years. Other reforms pursued by the government from 2020 to 2022 also represented a step in the right direction, which enabled Serbia to open Cluster 4 and to be ready to open Cluster 3.

This image, however, becomes much less clear when these reforms are put in the appropriate political context. In this period, the government faced no opposition in the parliament and had the luxury of adopting legal and constitutional changes without any obstacles or efforts to establish a wide political and societal consensus that constitutional changes require if they are to have a desired effect. The decision to push through constitutional changes through a parliament whose legitimacy was brought into question by the ruling majority itself clearly shows that the government's goal was to tick boxes and achieve formal progress in EU accession at the time when the process was seen as being halted.

The apparent lack of progress in improving electoral conditions and the state of democracy also brings into question the government's dedication to EU accession. Moreover, the EU's own willingness to reward and welcome formal progress even without any improvements in key political criteria demonstrates that the government's logic was sound, and that the EU was more interested in seeing formal steps forward, making the EU enlargement process seem alive, than pressuring the Serbian government to deliver on political criteria.

Conditionally, constitutional reform is indeed the substantial step forward that the EU was waiting for and it represents a genuine improvement in the rule of law. This means that, if properly implemented, the constitutional reform could bring major positive steps in practice.

The problem, however, is that the effects of this reform, as well as other reforms enacted by the government in this period, will largely depend on the political will of the government and not the text of the adopted documents. This is, however, an area where there was rather a backsliding than progress in recent years.

Democracy and electoral conditions continued to deteriorate despite the EP's involvement in the inter-party dialogue and government's declarative dedication to the process. Media freedom continued to deteriorate, as attacks on journalists by the ruling party and pro-government media annulled all formal progress on the safety of journalists, which is practically recognized in the same sentence in which the EC Report in 2021 described "limited progress" in this area. Prosecution of high-level corruption cases continued to drop, while perception of corruption continued to rise. At around the same time when constitutional amendments were enacted and a new cluster was opened, brute force, police and media propaganda were misused against peaceful environmental protestors throughout Serbia.

Therefore, it could be argued that the Serbian government did some of its homework and that the constitutional changes, despite some of their flaws, have the potential to improve the rule of law in Serbia. On the other hand, the government on whose political will the successes of these reforms depend on, has hardly shown signs of readiness to improve democracy, rule of law and media freedom in the country.

Although quantitatively in 2021 Serbia made an effort to implement activities within the rule of law chapters, no effect of the implemented legislative changes, or substantive change in institution behavior, was perceived. Over the time, the EU needs to address its tools to monitor qualitative progress in the area and prioritize the reforms in order to incite the Government of Serbia to substantively and meaningfully approach the rule of law reforms in the future.



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## SERBIA'S PROGRESS IN EU INTEGRATION 2020-2022

### Constitutional Changes the Only Step Forward?



Serbia opened cluster 4 largely due to constitutional changes in the area of judiciary. Even though it presented one of the very few relatively inclusive and transparent processes related to the improvement of the rule of law, there was a lack of qualitative progress in other rule of law areas and political criteria



The adoption of constitutional changes in the area of judiciary represented an important step in the EU accession process, but its effect may be measured only after the adoption and implementation of judicial laws



Although the new EU enlargement methodology gave Serbia the incentives to focus on implementing certain activities, it remains little oriented to the substance, which may cause problems at the point of assessing the level of interim benchmarks achievement

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