THE PUBLIC HEARING OF PROFESSORS

KEY POSITIONS

ON THE WORKING VERSION OF THE DRAFT AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

As a contribution to the debate on the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia (hereinafter referred to as: the Working Version), on 20 February 2018 the Judges Association of Serbia and the Prosecutors Association of Serbia have organised a *Public Hearing of Professors* that was attended by fifteen eminent experts from the fields of constitutional law, theory of state and law, and judicial-organisational law. The event was attended by Prof. Ratko Markovic, Ph.D, Prof. Irena Pejić, Ph.D, Prof. Darko Simović, Ph.D, Prof. Olivera Vučić, Ph.D, Prof. Dragan Stojanović, Ph.D, Prof. Marijana Pajvančić, Ph.D, Prof. Jasminka Hasanbegović, Ph.D, Prof. Bosa Nenadić, Ph.D, Prof. Tanasije Marinković, Ph.D, Prof. Vesna Rakić-Vodinelić, Ph.D, Prof. Radmila Vasić, Ph.D, Prof. Zoran Ivošević, Ph.D, Prof. Marko Stanković, Ph.D, Prof. Violeta Beširević, Ph.D, and Academician Prof. Kosta Čavoški, Ph.D. These persons are of different age, educational background and political orientation, and their only common denominator is the legal profession. In terms of expert conclusions, they all agree that the proposed Working Version should be withdrawn due to numerous shortcomings, and that an entirely new version of the text should be drafted, with due respect paid to the constitutional procedure.

This text outlines the key critical positions that essentially represent the common denominator of the opinions voiced at the above gathering. To facilitate reading, they were classified into the following thematic units (with the understanding that these units, of course, interweave to form a wider whole): 1) procedural issues, 2) issues concerning the division of power, 3) issues that represent constitutional matter and those that have no place in the Constitution, 4) nomotechnical issues, 5) tendent and erroneous interpretation of the views of the Venice Commission, and 6) room for political influence.

1. Procedural issues:

1. The public hearing of the professors represented the first opportunity for the above experts to publicly express their views of the Working Version, as they were in no way involved in the drafting or debate concerning said document.

2. The Ministry of Justice (hereinafter referred to as: the Ministry) is not competent to propose amendments to the Constitution. The Government, on the other hand, is competent to submit such a proposal, which is to be followed by the procedure conducted by the competent committee of the National Assembly (hereinafter referred to as: the Assembly). For the above reason, the proposed version of the text cannot serve as grounds for any public debate on the amendments to the Constitution, and can instead only have the character of a working version discussed among the expert public prior to the initiation of the official procedure, and prior to the opening of a public debate on said topic. It follows from the above that the proposed text of the Ministry also cannot be legally submitted to the Venice Commission.

3. The Working Version is in contravention of the objectives set forth in the National Strategy and Action Plans for Judicial Reform and Chapter 23.

4. The Working Version is based on the views of a non-governmental organisation. In the earlier, so-called consultative phase, professional associations provided their detailed written contributions regarding said views, and submitted them to the Ministry in September 2017 precisely because they realised that they will be represented solely by the Ministry.

5. Ever since 2014, the Working Version had not taken into account the views of the working group of the Commission for the Implementation of the National Judicial Reform or the views that were submitted at the request of the Ministry by professional associations of judges and prosecutors, as well as other associations dealing with the judiciary and human rights.

6. The debate underrates legal science and does not allow for a proper dialogue, whereas the media are diminishing the importance of amending the Constitution, almost as if the aim is to introduce the changes without attracting public attention.

7. The proposed Working Version reflects a low level of constitutional culture and morality; if it were to be adopted, Serbia would have a highly deficient, “clerical” Constitution.

2. Division of power:

1. The [creators of the] Working Version proceed from the view that the executive and legislative powers will improve the judiciary by controlling the judicial power, and that this is justified by legitimacy afforded to them by the citizens in political elections. Beyond that lies the intention to have the executive and legislative powers rule over the judicial power. In other words, a situation where two wolves and a sheep are voting on what is to be served for lunch also represents democracy; independent judiciary is therefore necessary precisely to protect citizens from such an outcome of voting.

2. The principle of the division of power is misunderstood, since the legislative and executive powers are founded on political legitimacy based on the electoral will of the citizens, while the judicial power derives its legitimacy from the profession, professional education and the type of work, whose nature is such that the population cannot perform it, and neither can therefore its representatives (Assembly, deputies, President).

3. Regulation of state power based exclusively on legitimacy deriving from the electoral will of the citizens leads to unification of power, violates the principle of the division of power, prevents independence of the judiciary and establishes political accountability of the judiciary to the executive and legislative branches of power, thus undermining the concept of the rule of law.

4. The “balance and control” rule applies among the legislative and executive powers; it does not apply to the judicial power as this would undermine its independence, which would, consequently, leave the human rights of citizens without essential protection.

5. The fact that all the branches of power are formally based on the Constitution, i.e. that they are based on it in an equal way, is ignored.

6. It is also ignored that the judicial power, precisely because of the guarantees of its independence, is the power that is legally limited and defined the most:

- In the sense of content, because it applies the norms that are prescribed by the other two branches of power;
- In the procedural sense, because it is precisely defined when and how a judge is to act;
- In the sense of status, both in terms of legal expertise requirements that a judge must meet as a minimum requirement for becoming a judge (whereas any adult legal person can be Prime Minister or President), and in terms of the constraints concerning the type of work a judge can perform, communication with the public, promotion, etc.

7. It is ignored that the independence of the judiciary is the foundation of the rule of law, and that independence of the judiciary is not a question of ordinance, but a prerequisite for the protection of human rights.

8. The Working Version is allegedly fighting corporatism within the judiciary, but it is instead destroying the legacy of the rule of law. The idea, contained in the Working Version, of a law that would harmonise the jurisprudence is an obvious example of demolition of the division of power and the rule of law according to which, in a contemporary legal state, a judge is the person who decides based on the Constitution, laws and other applicable regulations, including those on the assessment of evidence based on a judge's free conviction.

9. Regardless of whether it was caused by ignorance or intent, the result of the Working Version is a denial of independence of the judiciary and the equalisation of judicial free conviction with judicial arbitrariness.

10. If one proceeds from the unquestioned view that an independent judiciary is the foundation of the rule of law, then the Working Version destabilises this foundation.

3. Issues that have no place in the Constitution and those that should be regulated by the Constitution

1. The following issues do not constitute constitutional matter, and therefore have no place in the working version of the eventual Draft Constitution:

- The system of education and professional development in any field, including the development of lawyers for the purpose of acquiring knowledge necessary for the profession of judge, and even less the constitutional definition of the institution in charge of judicial training, that is, the Judicial Academy as the only such institution for the time being, whose work to date has not been positively assessed and no criteria and control system of its independence and quality of work have been established by scientific institutions; in addition, such an institutions does not exist in every country;
- Details that would turn the Constitution into a "book of all things", such as "applying for a public competition" for the selection of prominent lawyers, judicial committees' procedures or their detailed competencies ("dealing with statistics"), etc.;

2. The Working Version of the possible Draft Constitution has omitted the following issues that must be regulated:

- A clearly defined relationship between the three branches of power (present in the current Article 4 of the Constitution), so that it is unquestionable that the system of balance and mutual control refers to the legislative and executive powers, while the judicial power remains independent,
- Certain types of courts (only the Supreme Court is mentioned, while the provisions concerning all other courts have been deleted),
- Prescribed material guarantees of the independence of judges and autonomy of prosecutors,
- Prescribed right of judges and prosecutors to professional association,
- Prescribed reasons for dismissal of members of judicial councils from the ranks of "prominent lawyers",
- Prescribed public nature of the work of the judiciary,
- Retained current constitutional position of the High Judicial Council within the rank of the highest state authorities.

4. Nomotechnics:

1. The Working Version, which contains an unusually large number of amendments (24), was created at an extremely low nomotechnical level and should never have been published.

2. Only in the first two amendments is it possible to understand what, in the existing articles of the Constitution, is to be changed by which amendment.

3. There are practically no explanations concerning the amendments (there are none for 10 amendments). Apart from the exceptions, there is no explanation as to why some of the existing solutions are being changed or completely abandoned, and what it is to be achieved by this, which is extremely important for the proper interpretation of the Constitution when applied in the future.

4. References to the views of the Venetian Commission are excessive, erroneous, inappropriate or unnecessary – without respecting legal science and the profession in Serbia, as if the Constitution was being changed to benefit others and not us, while the explanations provided for some dozen amendments quote the views of the Venice Commission that do not even refer to the content of said amendments.

5. Important principles of the judiciary are poorly formulated: permanence tenure of office, non-transferability, incompatibility, immunity.

6. Unlike the other authorities (the Government, the President, the Protector of Citizens, the Constitutional Court), is it unnecessarily added only in the case of the Supreme Court that it is an authority “of Serbia”.

7. The provisions relating to independence and prohibition of political activity have been deleted, although they should have been emphasised.

8. There is a deviation from the fundamental nomotechnical rule that the terms used must be clear, precise and determinable (unclear terms “prominent lawyer”, “reorganisation” of the judicial system, “private function”, “first instance jurisdiction” are used completely unnecessarily and nesciently).

9. Competencies of the High Judicial Council are increased, while the number of its members is reduced.

10. Bearing in mind the terrible experience involving the re-election of all the judges and prosecutors of 2009, contrary to all the principles of legal civilisation, a significant deficiency of the Working Version is that it does not contain the draft version of the corresponding accompanying Constitutional Law on the Implementation of the Constitution, as the real scope of the proposed solutions can be understood only when all these norms are considered together. Especially since, formally and legally, the Constitutional Law can only be proposed in the final phase of amending and supplementing the Constitution, i.e. in the phase of adoption of the new Constitution, which would completely prevent transparent examination of the intended constitutional solutions since, until that time, neither the general nor the expert public would have been able to get acquainted with all the solutions.

5. Tendent and erroneous interpretation of the views of the Venice Commission

1. It is a mistake to believe that the Venice Commission is the source of *standards* in the field of judiciary and the independence of the judiciary, as it is an *advisory* body that only provides *concrete opinions* on concrete constitutional and legal solutions of individual states and their compliance with *standards*. Numerous bodies create the standards, such as the Court of Human Rights in Strasbourg, the Consultative Council of European Judges, the Consultative Council of European Prosecutors, and others.

2. It is disregarded that the Venice Commission:

- Calls for a stronger and constitutional guarantee of independence in “new democracies”;

- Takes different views on the same issues under different circumstances (for example, the first appointment for a limited period of time);
- Expects representatives of the executive and legislative powers to refrain from issuing any statements that undermine the confidence in the judiciary, which was negated by the appearances of representatives of the political power, as well as by the Working Version, which suggests that the other two branches of power should be superior to the judicial branch, thus additionally undermining the confidence [of the public] in judicial power;
- Is not of the opinion that the Minister should have the right to institute disciplinary proceedings, which is contrary to the earlier decisions of our Constitutional Court, as well as the decisions of the Court in Strasbourg in three cases against Macedonia,
- Proceeds from the standpoint that the purpose of a judicial council is to strengthen the independence of the judiciary when it comes to issues concerning the election (career advancement) of judges and their accountability (dismissal and disciplinary liability), due to which "the majority of members of the judicial council must be elected by the judiciary itself, while other members must be from among the rank of prominent lawyers and free of conflict of interest ", while the proposed solutions are contrary to this view.

3. In the Working Version, a selective approach was applied when referring to certain views of the Venice Commission, in that only a part, or even part of a sentence, from the opinion is quoted, while the other part – the one that makes it a meaningful and functional whole – is ignored. Thus, referring to the alleged position of the Venice Commission (the opinion concerning Armenia) on judicial practice as the source of law and the possibility of harmonising jurisprudence by law, is inappropriate, especially since, in said opinion, the Venice Commission reiterates that decisions of judges of lower instance courts should not be forced by the higher courts, and that neither the higher nor the highest courts should be allowed to act as "legislators".

6. Room for political influence

1. The election of judges is removed from the previous competence of the Parliament into the institution in charge of judicial training, i.e. the Judicial Academy, which, by selecting its own attendees, preliminarily decides who will become a judge (as only a graduate of such an institution can be elected judge in certain courts); the Academy itself, or any institution with such powers, will fall very quickly, if it hasn't already, prey to political parties.

2. The election of judges (to courts with exclusively first instance jurisdiction) is essentially removed from the hands of the High Judicial Council, whose role in the election of judges is to become only protocolary (since judges are elected from among the candidates selected by the Academy).

3. The ruling political majority (based on the votes of five members of the High Judicial Council elected by said majority, and the "golden" decisive vote of the President) is allowed, in the event of "reorganisation" of the judicial system, to transfer a judge against his or her will to another court, of any type and territory. This annuls non-transferability as one of the guarantees of judicial independence.

4. By imposing a ban on the discharge of a "private function" by a judge/prosecutor, the right to professional association is jeopardised and the persecution of politically "disobedient" persons permitted.

5. The judiciary is to be "disciplined" by the authority of the Minister of Justice to initiate disciplinary proceedings against judges, as well as proceedings for the dismissal of judges, which enables an administrative official to decide on the termination of judicial office.

6. The objective of the existence of the High Judicial Council and its role have been frustrated, as the ruling political majority is authorised to elect *any lawyer* as member of the High Judicial Council, due to the fact that the Assembly Committee, which is not obliged to include a single lawyer, is authorised to propose – between candidates who have nominated themselves – members of the High Judicial Council to the Assembly. They, in turn, become "prominent lawyers" by the very act of election.

7. A new method of political influence on the judiciary has been incorporated, while the institutional impact of the legislative power has been shifted from the Assembly to the ruling political majority, in the following manner:

- It is stipulated that five members of the High Judicial Council are to be elected by the Assembly, by means of a two-thirds majority vote, and if a two-thirds majority vote cannot be achieved, by a five-ninths majority vote of all deputies (139 MPs, i.e. the current ruling majority),
- The President of the High Judicial Council may not be a judge,
- It is stipulated that the President of the High Judicial Council shall have the decisive ("golden") vote in the event of an equal number of votes,
- The number of members of the High Judicial Council has been reduced from 11 to 10,
- The number of members of the High Judicial Council from the rank of judges has been reduced from 7 to 5,
- Judges are a minority in the High Judicial Council because they have five out of 11 votes, while prosecutors are a minority in the State Prosecutorial Council because they elect four of the 11 members of the Council,
- The High Judicial Council can take decisions without a single "judicial vote", because it is sufficient for only one judge to attend a Council session to have a quorum, and his or her vote is not necessary for taking a decision in such a situation – the single present judge may vote against the decision, yet the decision will still be validly taken.

8. The Working Version represents a struggle of politicians to preserve their power and a wish to subjugate the judiciary, which is unacceptable in a modern constitutional democracy.

Based on all of the above, there is a unanimous opinion that it is necessary to withdraw the proposed Working Version and start drafting a completely new version of the text, respecting the constitutional procedure and the principles of a modern constitutional democratic state.