Judges' Association of Serbia

Testimony
Preparation for the Changes to the 2006 Constitution and the Legal Profession

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Content

CHAPTER I
PREFACE

Prompted by the significance of the issue at hand and the multitude of recent events, this introduction aims to not only highlight the value of the papers contained in this volume, but also to familiarise the reader with the broader context and so underscore the importance of the views presented.

Ever since its enactment in 2006, the present *Mitrovdan* Constitution of Serbia has been the subject of debate and a target for criticism, both at home and abroad. Many have seen it as contentious for a variety of reasons. Its adoption was not preceded by consultations across society, nor was it ever submitted to the Venice Commission for review in the form it was ultimately enacted in. Soon after the Constitution took effect, several events of fundamental importance for Serbia took place: let us elaborate on two of these. Firstly, about a year later, in February 2008, Kosovo formally seceded from Serbia. Then, towards the close of 2009, politicians whose declared aim it was to join the European Union (EU) used the cover of the most wide-ranging reform of the justice system in the past six decades to subject the judiciary to a comprehensive review that saw the dismissal of over a thousand judges and prosecutors overnight, without due procedure, reason, or explanation. The resulting chaos was only partially remedied in the three years that ensued. Now in mid-2018, Serbia is faced with a paradoxical situation in which we have to hope that the guarantees of judicial independence and prosecutorial autonomy enshrined in the 2006 Constitution are not diminished – and campaign for that aim.

Unusually, *ex officio* and *a posteriori*, in the spring of 2007 the Venice Commission issued an opinion on the Constitution of Serbia that included a number of critical observations on the provisions governing the judiciary. For its own part, Serbia identified the need to amend the portions of the Constitution regulating the judicial system as early as 2013 and committed to doing so in the National Judicial Reform Strategy, enacted by the Serbian Parliament on 1 July 2013, as well as in the Action Plan for Negotiating Chapter 23 in the EU accession process, adopted by the Serbian Government on 27 April 2016. It was explicitly stated that the reason why the Constitution was to be amended was to remove any undue political influence on the judiciary and strengthen judicial independence. Changes to any country's constitution essentially require a pressing need in society to alter the regulation of particular constitutional issues, primarily the functional and territorial arrangements of the country's government. Since the procedure for its amendment is cumbersome, and as the changes are set to be introduced at a time when doing so could destabilise the Serbian state, it is pertinent to ask whether altering the Constitution for the sake of greater judicial independence is necessary at this time, or whether this purpose would be better served by the (realistically feasible) enactment of appropriate legislation alone.

After Serbia had committed to amending the Constitution, by September 2014 a Working Party of the Judicial Reform Commission had produced its Legal Assessment of the Constitutional Framework Concerning the Judiciary. The Assessment recommended excluding Parliament from the process of appointing court presidents, judges, prosecutors and deputy prosecutors and barring officers of legislative and executive bodies from serving on the High Judicial Council (HJC) and State Prosecutorial Council (SPC). Another requirement was for the Constitution to require attendance of the Judicial Academy as a precondition for initial judicial appointment: in this regard the Working Party upheld the view of the Judicial Academy Reform and Development Working Group of 2 April 2014, which found that this strategic objective could be introduced into the Constitution only after the Academy was thoroughly overhauled. It seems, however, that the Legal Assessment found little favour with the executive, which shelved it away from public view. A meeting of all court presidents on 29 November 2016 made it clear that the conclusions of the Assessment were broadly accepted by the judiciary (apart from a number of exceptions, most notably as to whether the Minister of Justice should serve on any of the judicial councils). It was therefore only logical to refine the Assessment with a view to making it the official platform for public consultations about amendments to the Constitution. Yet, the Ministry of Justice (MoJ) continued to ignore the document.

Then, in May 2017, the Ministry invited professional associations and civil society organisations to put forward their own comments and suggestions for amending to constitutional provisions governing the judiciary. The government department itself, however, neither prepared nor voiced its starting positions. Sixteen entities, including the Judges' Association, responded by submitting written contributions by 30 June 2017, when it quickly became apparent that all of their shared views about the constitutional position of judges were essentially similar to those held by the Justice Reform Commission's Working Party. Only a newly-established network of four associations with ties to the Judicial Academy and the MoJ dissented, and its suggestions were subsequently incorporated into the Working Draft of Amendments to the Constitution of Serbia released on 22 January 2018, and were retained, with some modification, in the Draft Amendments published on 13 April 2018 and submitted on the same day to the Venice Commission for its consideration.

At first glance, it may seem that in proposing these provisions the Ministry has fulfilled its planned remit: the three-year 'probationary appointment' of judges is to be established; conditions for the dismissal of judges are to be incorporated into the Constitution; and the HJC is to be charged with the appointment and dismissal of all judges and court presidents, and its membership is (ostensibly) no longer to include the Minister of Justice and chair of the Parliamentary Judiciary Committee. The community of experts were immediately clear that January's Working Draft did not improve the position of the judiciary, but rather significantly reduced the current extent of guarantees of judicial independence. For one, it removed the prohibition of any influence on a judge in the exercise of their judicial office and the guarantee of the non-transferability of judges; it also diminished judicial independence

by introducing case law as a source of law and mandating its alignment in accordance with legislation. Moreover, provisions making judicial office incompatible with other positions were rendered less meaningful by an excessively broad and unclear definition, with the proposed amendments also allowing them to be easily altered by legislation. The security of judicial status was diminished and judges made even more dependent on political influence as the Minister of Justice was empowered to bring disciplinary proceedings against judges and seek their dismissal. The HJC was weakened: its judicial members were reduced to a minority and its powers to safeguard judicial independence removed; its ability to appoint judges was made merely ceremonial, since the Judicial Academy was, in essence, allowed to pre-select judges by choosing its attendees. Contrary to strategy papers, the National Assembly was to play a material role in selecting HJC members: one-half of the Council's membership were to be elected by Parliament, and the casting vote of the HJC's President (a non-judge) would give Parliamentary appointees control of the Council.

Although the MoJ initially claimed that experts' objections to the Working Draft were baseless, in the Draft Amendments of 13 April 2018 it reinstated the ban on exerting influence on a judge in the exercise of their judicial office and guarantees of non-transferability. The MoJ also defined judicial immunity and incompatibility office more clearly, gave back the power to safeguard judicial independence to the HJC, and removed the casting vote given to the HJC's President. Although these changes were beneficial in advancing the rule of law and judicial independence, they nonetheless constituted only a partial return to the starting point of the 2006 Constitution: they were neither sufficient to justify any changes to the Constitution nor served to strengthen the independence of the judiciary.

The MoJ never made any attempt to explain the foundations underpinning the April amendments, although some of the features with broad-based impact had not even been mentioned previously nor had ever been the subject of debate. These include the requirement for HJC members from the ranks of 'reputable jurists' to be appointed by the majority of votes of a five-member commission – meaning they had to receive a total of three votes – as well as the provision whereby the HJC would be dissolved whenever it did not issue a final ruling on issues from its remit within the statutory period of 30 days from its first consideration of any such issue. The same holds true for the Working Draft of the Constitutional Law to implement the amendments. The Draft Amendments published on 13 April 2018 also seek to diminish the current constitutional guarantees of judicial independence. Amongst other things, these would allow the Judicial Academy – an institution not accorded sufficient time to become properly established – to, in essence, pre-select judges; in addition, the changes would formally weaken the HJC and reduce its independence (in terms of its composition and the appointment and dismissal of its members, as well as its powers and operation); permit the abolition of judges' freedom in decision-making by requiring judges to apply law uniformly, which allows a non-judicial entity (a 'certifying commission' or similar body) impose decisions on judges in any particular case. The proposed amendments would also allow judges to be dispersed throughout the judiciary *en masse* by removing the current ban on transfer-

ring judges without their consent (in combination with abolishing the option for judges to appeal the HJC's decisions and mandating amendments to all judicial laws in the Working Draft of the Constitutional Law): these changes raise the spectre of penalties being imposed against disobedient judges and rewards distributed to co-operative ones. As the Working Draft of the Constitutional Law requires all legislation governing the judiciary to be aligned with constitutional amendments, its provision that guarantees security of tenure of only judges of the Supreme Court of Cassation in the future Supreme Court causes justified concern as to the likelihood of a new round of judicial re-appointments, in particular as the Constitutional Court left this option open in its ruling of 9 July 2009 following 'any significant future change to the organisation or exercise of judicial authority or arrangements for judicial appointment'.

Although the proposed amendments comprehensively alter constitutional arrangements concerning the judiciary, when viewed from the perspective of the ostensible reasons for amending the Constitution (removing political influence and promoting judicial independence) they still do not systematically or clearly govern the relationship between the three branches of government or otherwise define the powers of courts. Moreover, they do nothing to clarify the relationship between courts and the Constitutional Court or establish meaningful guarantees for the independence of either the judiciary in general or of individual judges. They also establish no safeguards for the freedom of speech or association of judges.

A reliable conclusion about the intentions behind these proposed amendments and their potential consequences can be inferred only when these are viewed through the lens of the stated motives for amending the Constitution, bearing in mind the provisions of the current Constitution and measures planned in the National Judicial Reform Strategy and Action Plan, Chapter 23 Action Plan, and the Constitutional Law to Implement the Constitution. One should also not ignore the detrimental nature of the proposed amendments to the position of prosecutors when compared to the current Constitution. Finally, one should also keep in mind reports and opinions of the Venice Commission (especially its positions assumed on multiple occasions with respect to Serbian legislation) and other bodies of the United Nations, the Council of Europe, and the European Union that contain standards applicable to the judiciary.

The approach to European standards allegedly adopted by the MoJ in its constitutional amendments on the judiciary is patently unacceptable. These provisions are based on a selective and out-of-context reading of a single report of the Venice Commission (Judicial Appointments, 2007) and the Commission's opinions on the legislation of Armenia, Georgia, and Montenegro, which do not present general principles but were, rather, made in connection with specific proposed pieces of legislation reflecting the particular social and historical situations of these countries, with their differing legal traditions and uneven degrees of readiness and ability to reform. Given the number and relevance of documents that comprehensively set out and elaborate upon standards that regulate various issues of the judiciary, it is clear why it is unacceptable to see the MoJ reference individual sentences taken out of context from disparate opinions of the Venice Commission. Moreover, this

approach begs the question of what motives underline the MoJ's actions. The assertion made by the Ministry in the course of the consultations – that its amendments complied with standards set by the Venice Commission – serves only to minimise the importance of international norms or, even, to misemploy them: it is also a methodologically inappropriate mode of justifying the proposed provisions. One gets the impression that only the suggested amendments conform to the standards, although the standards are, in actual fact, structured so as to allow individual countries to develop legislation that reflects their own legal traditions and social and historical circumstances and is feasible in accordance with their own capacity for reform. The Venice Commission's opinions do not provide justification for the proposed changes. On the contrary: the assertions made by the Commission in these documents only mean that the Commission has concluded that, all other requirements being met, a particular proposed feature of national law can conform to European standards. It goes without saying that this neither means that the feature in question is the only one that abides by these standards, nor that it would be acceptable or applicable in any other legal system in view of its overall make-up. Finally, a national provision considered by the Venice Commission as compliant with European standards is not automatically the best solution, nor does this view exclude the possibility of there being other provisions equally conforming to these standards (or, indeed, even more so). Differing arrangements for various issues (such as, say, initial training for judges) operate equally well in different European countries; as such, one should tread carefully when selecting any individual provision. It therefore remains unclear why any particular option was selected of a number of possible ones, and whether it is the best choice for the Serbian judiciary. It is particularly telling that the authors of the amendments did not engage with the suggestions that the Venice Commission made about Serbian legislation in 2007, 2008, 2013, and 2014 or its thematic reports, or indeed the comprehensive legal standards contained in documents enacted by other bodies of the Council of Europe, European Union, and the United Nations.

European (and international) legal standards are nothing other than the rules of logical and rational behaviour, arrived at through long-standing democratic practice, that are the common inheritance of all democratic nations. These rules are applicable in any country desiring to enhance its judiciary on condition that the country actually possesses the political will to improve its judicial system and promote the rule of law. However, European standards are not some magical spells that merely have to be copied for the desired results to be attained. Any country wishing to incorporate into its law the norms developed by advanced democracies – Serbia included – ought first to take its tradition and its abilities into account, use them as a starting point, and, bearing in mind their essence and purpose, create its own rules of good conduct. Only after it is so applied can an international standard be made a functional and meaningful part of any country's legal order.

It is also apparent that the proposed amendments are based upon the view that the executive and legislative branch will 'fix' the judiciary by subjecting it to supervision: this position is justified by reference to the legitimacy conferred to these two branches of government by citizens in political elections. This is further evidence of

the essential misunderstanding of the principle of the separation of powers: the legislative and executive are based on political legitimacy gained through political elections, whilst the judiciary derives its legitimacy from its professionalism, qualifications, and type of work – which by its very nature cannot be performed by either members of the public or their popular representatives (the Parliament as a body or its individual members, or the President). A system of government based exclusively upon legitimacy derived from the results of elections takes on an absolutist tinge, violates the principle of the separation of powers, diminishes judicial independence, and makes the judiciary subservient to the executive and the legislative, thus flying in the face of the rule of law. The proposed features ignore the fact that judicial independence is a cornerstone of the rule of law, and that the issue of judicial independence is not one of professional affiliation, but that judicial independence is a precondition for the safeguarding of human rights. There is no such thing as 'excessive' judicial independence; alleged threats of emerging cronyism or corporatism can only be discussed academically, as the Serbian judiciary is far from likely to escape the control of the two other branches of government.

Efforts to amend the Constitution in 2017 and 2018 saw the judiciary receive hitherto unseen levels of support from authentic civil society organisations, with the expert community reacting with similarly unanimous criticism to January's Working Draft of constitutional amendments. Judges' and prosecutors' professional associations, non-governmental organisations active for years in protecting human rights and promoting interests of the judiciary, many legal practitioners, and all courts that debated the proposed changes, including the highest institutions of the judiciary (Supreme Court of Cassation ad the HJC and SPC) and reputable professors of constitutional law – all these were united in seeing the proposed amendments as a vehicle for politicians to hold on to power and suborn the judiciary. No judge or professor saw the amendments in a positive light. They all recommended that the Working Draft be withdrawn and a wholly new set of amendments introduced in compliance with constitutional procedure and the principles of a modern, constitutional, democratic state.

This publication was originally intended as an account of a unique event organised on 20 February 2018 by the Judges' Association of Serbia and the Prosecutors' Association of Serbia, the Law Professors' Public Hearing, where the most acclaimed academics – previously denied a voice in the Government-sponsored 'consultations' – were invited to comment on the proposed constitutional amendments. On this occasion, crucial arguments were voiced in favour of efforts to promote the rule of law in Serbia by Professor Dr Ratko Marković, Professor Dr Irena Pejić, Professor Dr Darko Simović, Professor Dr Olivera Vučić, Professor Dr Dragan Stojanović, Professor Dr Marijana Pajvančić, Professor Dr Jasminka Hasanbegović, dr Bosa Nenadić, Professor Dr Tanasije Marinković, Professor Dr Vesna Rakić-Vodinelić, Professor Dr Radmila Vasić, Professor Dr Zoran Ivošević, Professor Dr Marko Stanković, Professor Dr Violeta Beširević, and Professor Dr Kosta Čavoški, Member of the Serbian Academy of Arts and Sciences. Although dissimilar in age, professional background, and political orientation, these renowned experts revealed they all shared the desire to advance the legal profession. Their conclusions

were all in agreement: the numerous deficiencies meant the proposed amendments had to be withdrawn and replaced by a wholly new text developed in conformity with the procedure mandated by the Constitution.

Nevertheless, unwilling to leave the fate of the judiciary to any unprincipled compromise between Serbian and foreign politicians and chance, the Judges' Association of Serbia initiated a number of other significant actions that deserve to be noted here.

As this volume was being prepared for publication, several important opinions were received from the European Association of Judges, Magistrats européens pour la démocratie et les libértes (MEDEL), and the Council of Europe's Consultative Council of European Judges, all in agreement with the views of the profession in Serbia. The opinion of the Consultative Council of European Judges is particularly worthy of mention: this was delivered in early May 2018 after the Judges' Association of Serbia applied for a formal appraisal of the conformity of the proposed constitutional amendments with European standards. The Consultative Council's principal duty is to determine standards for the judiciary, and it has done so by adopting some twenty thematic opinions to date. These documents are also used by the Venice Commission in assessing the conformity of national legislation with European standards. After the Venice Commission has released its opinion on the proposed amendments to the Constitution of Serbia, which is scheduled for 23 June 2018, it will be interesting to see to what extent the views of these two bodies of the Council of Europe are aligned.

This volume is motivated by the desire to bear testament to the efforts made by Serbia's intellectual elite to safeguard the rule of law and judicial independence on behalf and to the benefit of all the citizens of Serbia. At the same time, and without false modesty, I feel that the opinions presented herein constitute an outstanding and lasting scientific achievement to the development of legal science.

May 2018

Dragana Boljević
President, Judges' Association of Serbia

P.S. Circumstances prevented this book to be published in May 2018 as initially planned. However, at the same time it enabled for the Opinion of the Consultative Council of European Judges of 25 June 2018 as well as the Opinion of the Venice Commission of 25 June 2018 on the Draft Amendments to the Constitutional Provisions on the Judiciary to find their place in this book, alongside the Analysis of the High Judicial Council regarding changes of the Constitution pertaining to the judiciary of 20 July 2018. With this analysis the Council showed the purpose of its existence and the reason why it is necessary that the majority of its membership remains from the ranks of judges.

CHAPTER II

PREPARATIONS FOR THE CONSTITUTIONAL CHANGES

DRAFT

LEGAL ANALYSIS OF THE CONSTITUTIONAL FRAMEWORK FOR THE JUDICIARY OF THE REPUBLIC OF SERBIA

PART ONE

I INTRODUCTION

1. *Working Group for rendering the analysis of the amendment to the constitutional framework*[1] held its first meeting on 30 January 2014 on the premises of the Supreme Court of Cassation. At the said meeting it was agreed that the Working Group should execute its task in two stages. The first stage is the legal analysis of the current constitutional framework for the judiciary while the second entails writing a Draft of the Amendments to the Constitution, with revised articles. Legal analysis of the constitutional framework for the judiciary contains, in addition to a normative component, a certain theoretical component and analysis from the point of view of comparative law. Therefore, the Draft of this part of the analysis has been entrusted to the members of the Working Group who are part of the academic community: professor dr Irena Pejić, professor dr Vladan Petrov, professor dr Darko Simović and professor dr Slobodan Orlović.

2. *The Constitution of the Republic of Serbia* was passed at a special session of the National Assembly on 30 September, it was confirmed at a referendum held on 29th and 30th October and it was promulgated on the 8 November 2006. Local constitutional law experts as well as the Venice Commission identified a number of weak points of the Constitution regarding the judicial system. The said weak points compromised the possibility of adhering to the principle of judicial independence as one of the basic principles of the rule of law. It was only after the judicial reforms in 2008 and 2009 had failed that it became apparent that the said flaws had to be addressed.

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[1] Members of the Working Group were: Dragomir Milojević, Chief Justice of the Supreme Court of Cassation and President of the High Judicial Council; Danilo Nikolić, Ministry of Justice State Secretary at the time; Snežana Andrejević, Supreme Court of Cassation Justice at the time; Đorđe Ostojić, Deputy Republic Public Prosecutor; Branko Stamenković, Member of the State Prosecutorial Council at the time; Radovan Lazić, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia Management Board President; Dragana Boljević, Belgrade Court of Appeal Judges and President of the Judges' Association of Serbia; Zoran Jevrić, Attorney at law, Deputy President of the Serbian Bar Association at the time; as well as professors of the Constitutional Law, dr Vladan Petrov, Associate Professor and Vide-Dean at the Belgrade Law Faculty, dr Darko Simović, Belgrade Academy of Criminalistic and Police Studies Professor, dr Irena Pejić, Professor at Niš Law Faculty, dr Slobodan Orlović, Associate Professor at Novi Sad Law Faculty.

3. The National Strategy for the Reform of the Judicial System (for the period 2013-2018) which was adopted by the National Assembly on 1 July 2013 states: "Certain commitments laid down in this strategy require amendments to the Constitution. This refers to such provisions as: the exclusion of the National Assembly from the election process of the presidents of the courts, judges, public prosecutors/ deputy public prosecutors as well as from the election of the members of the High Judicial Council (HJC) and State Prosecutors' Council (SPC); the change in the composition of the HJC and the SPC towards the exclusion of the representatives of the legislative and executive powers as members of the said councils; stipulation that judicial academy is mandatory as a requirement for the first election to the judicial or prosecutorial office. In view of the fact that changing the Constitution is a time-consuming and complex process which may be influenced by those authorised to design and implement the Strategy for the Reform of the Judicial System to a limited extent, this strategy expresses strong and firm commitment to the aforementioned goals while the implementation process shall entail preparatory actions necessary for the change of the Constitution. With regard to this, the Commission for Strategy Implementation shall form a special sub-group for the purpose of drafting a proposal regarding the amendments to the provisions of the Constitution which regulate the aforementioned issues. The Strategy stipulates, as a provisional solution, a whole array of amendments to the normative framework, which are supposed to provide a more adequate support for the judiciary to function more efficiently in accordance with the existing constitutional framework during the period leading up to the constitutional changes."[2]

The Strategy is not legally binding. It constitutes a political plan which is supposed to be implemented through the use of legal instruments. The Strategy is not above the Constitution, it cannot be "the source" of constitutional changes nor can it serve as their justification. It contains certain guidelines on the direction the changes should take and what kind of provisions require amending the Constitution. The Working Group has analysed the said guidelines, including their weak points (e.g. the first election of the judges).

4. *The goal of this analysis is to define adequately constitutional guarantees which provide, under a system governed by the rule of law, a framework for judicial independence de iure*. Constitutional guarantees are not sufficient in themselves and their primary characteristics may have various effects on the social system in question depending on its political climate and cultural model. Therefore, the guarantees of judicial independence provided by the system should be considered simultaneously with the rules of accountability of political authorities when it comes to creating a social setting in which the judiciary is able to act independently. The said task lies outside the scope of this normative legal analysis.

4. *Legal analysis of the constitutional framework for the judiciary may only be a part of a broader analysis of the entire constitutional system established by the Serbian Constitution passed in 2006*. Consequently, its reach is rather limited. The provided

[2] http://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf.

analysis is not going to have greater impact if it is not incorporated into a serious state platform for the reform of the Constitution in the foreseeable future. The analysis consists of two parts, one is related to the judiciary and the other is related to the public prosecutor's office. Each part includes general comments and comments on particular provisions of the Constitution. A separate section deals with the issue of the relationship between the courts and the Constitutional Court. This issue requires further elaboration, which is not provided here as it would require in-depth examination of the issue of the reform of the constitutional judiciary, which is not a branch of the judicial system in the Republic of Serbia.

5. Regarding the stipulation that Judicial Academy is a mandatory requirement for the first election of the judges and the public prosecutors to the office, *this Working Group supports the position taken by the Working Group for Reforming and Developing the Judicial Academy according to which the Judicial Academy should not become a constitutional category (meeting held on 2 April 2014). Stipulating that the Judicial Academy is a mandatory requirement for the first election of the judges and public prosecutors to the office may be a strategic goal which could be achieved after thoroughly reforming the concept of the Judicial Academy*. With regard to this, in coordination with the Working Group for Reforming and Developing the Judicial Academy, we propose a team of experts to be put together which would provide a scientifically and professionally well-founded study on the Judicial Academy, which would supply realistic guidelines for its further development. In this part of the analysis, the Working Group did not dwell on the said issue as its task was to analyse constitutional regulations which are currently in force.

II SEPARATION OF POWERS PRINCIPLE IN THE CONSTITUTION
(ARTICLE 4 OF THE CONSTITUTION)

Article 4 of the Constitution proclaims that the constitutional order is uniform and it defines the separation of powers. According to paragraph 2 of the said Article "government system shall be based on the division of power into legislative, executive and judiciary". This is a conventional formulation of this principle and cannot be objected to. The point of contention may be found under paragraphs 3 and 4 which are incompatible with each other: "Relationship between the three branches of government shall be based on balance and mutual control" (para. 3) and "the judiciary shall be independent" (para. 4). There are three possible objections to these provisions. Firstly, the judiciary is by virtue of its nature different from the legislative and executive powers. Although it is impossible to absolutely eliminate the influence of political authorities on it and vice versa, the phrase "mutual control" may not be reconciled with the requirement referred to under paragraph 4 ("the judiciary is independent"). Secondly, the wording of paragraph 3, although used in other constitutions as well[3], is not appropriate for a constitution of the par-

[3] See Art. 4, para. 2 of Croatian Constitution (1990).

liamentary type. The principle of "balance and mutual control"(*checks and balances*) is a characteristic of presidential systems while the system of government according to the 2006 Constitution of the Republic of Serbia is, essentially, parliamentary. Thirdly, it is impossible to reconcile Article 4, para. 3 of the Constitution with Article 145, para. 3 which stipulates that "court decisions… may not be subject to extrajudicial review" and with paragraph 4 of the same Article which stipulates that "a court decision may only be re-examined by a competent court in the legal proceedings stipulated by the Law".

The wording of Article 4, par. 3 of the Constitution provides grounds for a provision which splits the decision on the election of the judges between the National Assembly and the High Judicial Council allowing this important guarantee of the independent position of the court to be exempted from the full jurisdiction of the judiciary. In order to rectify this, it is necessary to do one of two things: to expunge Article 4, para. 3 from the Constitution or to rephrase it so that it reads: "the relationship between the legislative and executive powers is based on balance and mutual control".

III THE JUDICIARY IN SERBIAN CONSTITUTION (2006)

1. GENERAL COMMENTS

Judging by the number of constitutional provisions and the extent of legal coverage devoted to the courts and the High Judicial Council one might infer that the legislators who had enacted this Constitution took a special interest in the independence of the courts. However, this section of the Constitution displays considerable weaknesses:

1) *Lack of a systematic approach* (e.g. "scattered" constitutional principles regarding courts).

2) *Inconsistency* (e.g. "Courts shall be autonomous and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts" – Article 142, para. 2; "In performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law." – Article 149, para. 1)

3) *Partially overlegislated issues* (e.g. provisions on the President of the Supreme Court of Cassation)

4) *Partially underlegislated issues* (e.g. deconstitutionalisation of the grounds for termination of a judge's tenure of office, as well as the reasons for the relief of duty)

5) In terms of content, *there are no pure principled provisions*, the mechanisms for establishing judicial independence and prosecutorial autonomy have been weakened; *the political factor (the National Assembly) is ubiquitous* and it is a deciding factor when it comes to defining and implementing all of the elements the status of a judge or a public prosecutor entails under constitutional law, etc.

6) *Poor editing of the normative text*.

2. COMMENTS ON PARTICULAR CONSTITUTIONAL PROVISIONS

Article 142 Judiciary Principles with reference to Articles 145, 146, 149-152

Although this Article is entitled "Judiciary Principles", it does not list all of the constitutional principles related to the judiciary. There are some principles which are stipulated under other articles: Article 145, para. 3: "Court decisions shall be obligatory for all and may not be a subject of extrajudicial review." – the principle of mandatory nature of a court decision; Article 146 ("Permanent Tenure of Office"), with reference to Article 150 as well ("Non-Transferability of a Judge"), Article 151 ("Immunity") and Article 152 ("Incompatibility of Judiciary Function"). Such an approach to regulating does not provide a clear picture of what concept of judicial independence has been opted for, considering that independent judiciary has been proclaimed under the basic provisions of the Constitution (Article 3) as a fundamental value of the rule of law.

Following the principle of uniform judiciary ("The Judiciary shall be uniform in the territory of the Republic of Serbia"), principle of autonomy and independence of the judiciary should be stipulated under a separate article, especially since it combines, in a sense, all of the other principles. The independence of the judiciary includes the independence of the courts (real independence of the judiciary) and the independence of a judge (personal independence of the judiciary). Therefore, these two components of the same principle should be stipulated under the same article and not, as it is done in the current text, under two different articles (Art. 142, para.2 and Art. 149). An objection of a more serious nature could be raised about the way this issue is regulated as real and personal independence of the judiciary, as stipulated by the Constitution, are incompatible with each other in terms of their content. Article 142, para. 2 states: "Courts shall be autonomous and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts", whereas Article 149, para. 1 stipulates: "In performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law". The question is raised whether this means that the judge is not responsible to the generally accepted rules of the international law and ratified international contracts even though the Constitution stipulates under Article 142, para. 2 that the courts shall perform their duties based on these sources of law as well. Article 145, para. 2 has added to the confusion by stating that "judicial decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law." It is unacceptable to offer three different formulations under three articles of the Constitution which are in terms of their content related to each other and they must be reconciled with each other. The greatest dilemma which needs to be resolved is whether to retain the stipulation of Article 142 that the courts shall perform their duties based on "generally accepted rules of international law" or, bearing in mind how vague those rules are, keep the wording of Article 145, para. 2.

Consistent interpretation of the guarantees provided by the system assumes that both institutional and personal guarantees are regulated at the same time. There-

fore, it is not possible to regard only the first ones (institutional guarantees) as principles while the latter are awarded the status of a constitutional rule regulating the performance of judicial office. The status of a principle of personal (individual) guarantees should meet the same objective as institutional guarantees: to set the framework for an independent judiciary as a fundamental value of the rule of law.

Constitutional guarantees of personal independence such as: permanent tenure of judicial office (Article 146), independence of a judge (Article 149) and non-transferability of a judge (Article 150) have been scattered across the entire section on the regulation of the judiciary in no discernable order. In view of the fact that the structure of a piece of legislation results from the order of regulating priorities and level of importance of particular institutes, it is inexplicable why the guarantee of individual "independence of a judge" while performing duties in judicial office follows the (redundantly detailed) provision on the President of the Supreme Court of Cassation, the provision on court decisions and on the termination of the judicial office. Quite the contrary, the independence of a judge in the performance of a judicial office constitutes the main prerequisite for autonomous decisions, which represents a fundamental value of the rule of law and that is why it deserves the status of a principle when this branch of government is being regulating.

This is not just a technical issue. Inconsistent structural organisation weakens the "spirit" of the constitutional guarantees, which in turn brings into question systematic establishment of the judiciary as an independent branch of government. Normative framework must not be represented as "the red carpet" rolled out for the ceremony of forming constitutional authorities, instead, it should raise awareness among the judges about the importance of their independence and autonomy in the decision-making process. *The judiciary principles should be defined by citing fundamental constitutional guarantees (institutional and personal) at the beginning of the relevant section (under several articles) regulating the position of the courts and judges*.

Article 143 Types of Courts

Point of contention under this Article is paragraph 4 which stipulates that "the Supreme Court of Cassation shall be the Supreme Court in the Republic of Serbia". It is unclear why the name of the supreme court in the country has been changed. This is also an objection expressed by the Venice Commission: "The only court specifically mentioned in this Article is the Supreme Court of Cassation. The reason for changing the name of the Supreme Court is not clear. Does this imply that the Court will be limited in the future to a pure cassation function?"[4]

The name of the court "the Supreme Court of Cassation" is a contradiction in terms.[5] Under comparative law, there are two basic organisational models of the highest court in the country – the model of a Supreme Court and the model of the Cassation Court. The first model means that the highest court with regard to the legal remedy decides on the merits of the case, i.e. its judgment is a final resolution

[4] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e.

[5] See: M. Stanković, *„Sudska vlast u Ustavu Srbije od 2006. – kritički pogled", Sudije u pravnom sistemu, E. Šarčević/V. Petrov, eds.),* Sarajevo, 2013, p. 80.

of the dispute. The second model, as a rule, does not include a decision on the disputed matter by the highest court but only on the legality of the judgment rendered by the court at a lower instance, with a right to vacate the illegal judgment and "return" the case (the contested issue) for a retrial. *By calling the highest instance court of the Republic of Serbia Supreme Court of Cassation, the framer of the Constitution has "blended" the two, seemingly incompatible, models putting the legislator in an awkward position either to provide for a court to have the right both to decide on the merits of the case and to return the cases for a retrial or to be the one to decide to opt for one of the two possible models.*[6] *Therefore, the former name of the highest instance court, the Supreme Court, should be restored.*

Article 144 President of the Supreme Court of Cassation

"President of the Supreme Court of Cassation shall be elected by the National Assembly, upon the proposal of the High Judicial Council and received opinion of the meeting of the Supreme Court of Cassation and competent committee of the National Assembly." (paragraph 1)

There are at least two serious objections to such a provision. Firstly, the Constitution does not only regulate the method of election of the President of the Supreme Court of Cassation in too much detail, which is redundant, but it fundamentally contradicts itself and causes suspicion that the intent is to make this election "important" in order to conceal the influence of the political authorities. There is no other election process regulated by the Constitution (the election of the judges of the Constitutional Court, the election of the members of the High Judicial Council and the members of the State Prosecutors' Council, the Republic Public Prosecutor, etc.) where so many active participants in the proceedings are stipulated and especially where the stipulated procedure does not allow the legal capacity of each of those participants to be determined with certainty. If the National Assembly, as a political authority, should elect the President of the Supreme Court of Cassation upon the proposal of the High Judicial Council, it is completely redundant to include a committee of the National Assembly at the stage of proposal preparation unless the intent was to completely cancel out the role of the Supreme Court of Cassation itself at the said stage.

Secondly, essentially the same method of election is stipulated both for the judges who are to be elected for the first time to a judicial office and the President of the Supreme Court of Cassation. "It is difficult to understand the logic followed here according to which the president of the court of the highest instance in the country, judicial high priest, and the novice judge, judicial deacon, are to be elected in practically the same procedure."[7] The same goes for the presidents of other courts who are elected by the National Assembly upon the proposal of the High Judicial Court. Therefore, the National Assembly in all three situations (the election of first-time judges, the election of the President of the Supreme Court of Cassation and the Presidents of other Courts) "has the authority regarding the election of judges in its

[6] *Ibidem.*

[7] R. Marković, „Predgovor: Ustav Republike Srbije od 2006 – kritički pogled" (Preface: the 2006 Constitution of the Republic of Serbia – Overview), the *Constitution of the Republic of Serbia,* Belgrade, 2006, p. 42.

full capacity whereas the type of authority the HJC has is only limited to the submission of the proposal for the election of the judges".[8]

Such provisions, which are extremely illogical, should be altered in the future revision of the Constitution. The presidents of the courts, as well as the president of the highest instance court, should be elected by the HJC. Perhaps it would be appropriate, when it comes to the election of the president of the highest instance court, that the decision rendered by the HJC should require a qualified majority of votes (e.g. two-thirds majority).[9] However, all of these organisational issues do not have to be regulated by the Constitution. This is the subject matter of the law which deals with the organisation of the judiciary. In view of the aforementioned, it would be perfectly acceptable to eliminate the whole Article on the President of the Supreme Court of Cassation and include the suggested provisions in the appropriate legislation.

Article 146 Permanent Tenure of Office

This Article proclaims the principle of permanent tenure of judicial office and an exception to the said permanence of office when a person is to be elected as a judge for the first time. The principle of permanent tenure of judicial office, which includes irremovability of judges (non-transferability), is proclaimed in most modern constitutions[10] and international documents on the legal status of the judges as well. *Basic Principles on the Independence of the Judiciary passed in 1985 (UNO)* state (Art. 12): "Judges, whether appointed or elected, shall have guaranteed tenure until mandatory retirement age or the expiry of their term of office, where such exists."[11]

"A person who is elected a judge for the first time shall be elected for the period of three years." (paragraph 2)

The election of a judge for a term of office limited to three years is questionable. First of all, such a solution has a serious downside. The "probationary period" for judges, which is stipulated by the Constitution, during which they are supposed to demonstrate their abilities and professional competence may present an expectation before them to show a certain degree of loyalty, readiness to cooperate and obedience. In any case, the very fact that a person must be concerned about being re-elected affects his/her feeling of security while at the same time it will reduce the number of newly recruited staff with good qualifications in courts. Consequently,

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[8] M. Pajvančić, „Ustavne kontroverze o sudskoj vlasti", in: *Spomenica akademiku Gaši Mijanoviću*, Banja Luka, 2011, p. 175.

[9] Such a provision is stipulated under the latest amendments to the Constitution of the Republic of Montenegro.

[10] There are some constitutions which do not proclaim permanent tenure of judicial office nor do they prescribe the grounds for the termination of judicial office and the relief of duties of a judge. Regulation of such issues by a law is an example of deconstitutionalisation of important issues and it is considered to be a serious omission of the framer of the Constitution.

[11] The same provision is included in the Recommendation No R (94) 12 of the Committee of Ministers of the Council of Europe *Europe to Member States on the independence, efficiency and role of judges*). The *Universal Charter of the Judges*, unanimously approved by the Central Committee of the International Association of Judges at its meeting in Taipei (Taiwan) on 17 November 1999, states: "Judges and public prosecutors should be appointed for life or for such other period and conditions that the judicial independence is not endangered. Any change to the judicial obligatory retirement age must not have retroactive effect."

such a mechanism of the election of judges enables the election of loyal persons who must demonstrate this quality during the probationary period in practice thus justifying their previous, as well as their subsequent, election. Insecurity in the position is thus introduced in the profession of judges since their election to a permanent tenure after the said probationary period is highly uncertain.

Secondly, permanent tenure of judicial office, which used to be absolute according to the Constitution passed in 1990, is no longer absolute, which has weakened an important institutional guarantee of judicial independence.

Thirdly, most international documents on the status of judges express great reservations about appointments for probationary periods. In the *Universal Declaration on the Independence of Justice* passed in *1983* it is stated that: "The appointment of temporary judges and appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased outgradually."[12] Venice Commission has more than once taken a clear position that "setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way." The Commission "strongly recommends that the ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence and systems of candidate judges without full judicial powers are preferable."[13]

Fourthly, in the jurisprudence of the European Court of Human Rights various positions have been taken with regard to the probationary periods for judges. In the case *Le Compte, Van Leuven, De Meyere* v. *Belgium* (1981) it was held that the exception to permanent tenure, which is implied by the first appointment of judges for a period of six years, is sufficient guarantee of independence. However, in the case *Incal v. Turkey* (1998), the European Court of Human Rights found that the election cycle of three or four years is quite short and problematic, since there are valid concerns that political influences would play a role.

Fifthly, modern constitutions recognise the principle of permanent tenure of judicial office as one of the prerequisites of judicial independence whether by explicitly proclaiming the said principle and defining it or by implying it while leaving the definition to be stipulated by a law. However, few constitutions stipulate an exception to the permanent tenure of judicial office in the form of election (appointment) of judges for a probationary period.[14] This provision, which is applied to judges who are elected for the first time, is justified by the need for such judges to acquire the necessary experience in order to perform such an important office and the need to confirm their abilities and whether they are worthy of judicial office through the implementation of objective criteria. Such a justification particularly

[12] *The Universal Declaration on the Independence of Justice of 1983* (Montreal, World Conference on the Independence of Justice).

[13] Venice Commission, *Draft Report on the Independence of the Judicial System: Part I: The Independence of Judges,* CDL-JD(2009)001*, p. 3.

[14] Comparative overview of constitutions of the countries in the region shows that, apart from the Constitution of Serbia, none of them stipulate a probationary period for judges in office who are being elected for the first time.

comes into play in countries which have just established a system of separation of powers or have restored it after a longer period of time.

Sixthly, the first election of a judge for a limited period of time may be supported by reasons for and against this concept. Namely, the continental legal system is based on the election of judges which gives priority to the criterion of the knowledge of current law ("technical" knowledge) whereas the common law system primarily focuses on the experience of the judge, i.e. assesses his/her approach to the application of law. Judges start their professional career most often as a result of "years of practice and merit", while there are no special requirements for professional development and specialisation apart from what professional experience in such an office would be expected to entail. The establishment of specialised schools (Judicial Academies), first in France and later in other European countries, has prompted further professionalisation and specialisation of the judicial personnel. Therefore, it may be said that a limited first term in judicial office is quite well-founded and that it serves the purpose in terms of the confirmation of the candidate's ability to practice such a profession.

On the other hand, a limited period in office after the first appointment, which is passed by the Parliament, poses a serious threat to the constitutional concept of the separation of powers, which provides the judiciary a status of an independent branch of government. The election to the office secures and defines the institutional independence, it represents a legitimate basis on which to build and enhance the judge's confidence and moral awareness of his/her role in the legal system. It is most difficult to discuss the so-called moral aspect of the independence in a country which has not even developed institutional guarantees yet, causing the issue to be approached strictly from a positivist point of view: "As long as there is no violation of a legal rule, the conduct of a judge may be deemed to be moral."

Seventhly, the constitutional provision regarding the first election of the judges has not been successful in practice in the Republic of Serbia so far. Because the High Judicial Council did not establish the criteria and standards for evaluation of the work of judges and presidents of courts, it was not possible to evaluate the work of the judges who had been elected for the first time as judges in 2009. After their three-year term in office had expired, it was decided that all of such judges should be elected to a permanent judicial office.

With regard to the election of judges to a three-year term in office, there are two options for the future revision of the Constitution: institutionalisation of the first election in such a way that it ensures effective protection of the independence of the judicial office and prevents politicisation of discharging the said office or its abolishment. If the first option is taken, a stronger guarantee of the independence of the judicial office would entail an extension of the term in office for judges from three to five or six years. Furthermore, the judges would be allowed to automatically gain permanent tenure after the initial period they are elected for, while an independent body, the High Judicial Council, would have the possibility, in a relatively short time interval, to draw attention to the fact that there are pre-defined reasons which indicate that a person is not worthy of performing judicial office and relieve the person in question of their duties. The powers of "temporary" judges should be restricted so that they are not allowed

to pass final decisions. "Temporary judges" would be elected by the HJC, which would also decide other status issues, while filing an appeal with the Constitutional Court would be allowed against the decisions of the HJC. [15]

The second alternative, i.e. abolishing the first election of the judges, should be seriously considered, although this has not been stipulated by the National Strategy for the Reform of the Judiciary (2013-2018), especially in view of the position of the Venice Commission on the said issue.

Article 147 Election of judges

"At the proposal of the High Judicial Council, the National Assembly shall elect as a judge the person who is elected to the post of judge for the first time." (paragraph 1)

"Tenure of office of a judge who has been elected to the post of judge shall last three years." (paragraph 2)[16]

Since it has been opted that a probationary period for judges who are being elected for a judicial office for the first time should exist, it remains unclear why the jurisdiction over the said election is then entrusted to the National Assembly and not to the HJC. This represents an attempt to use a constitutional disguise in order to mask political influence exerted during the election of judges as the first election must go through the parliamentary instance, and only then is the HJC called to use its "wide" jurisdiction which remains within the perimeters of the selection the Assembly has already made. Basically, the election of "every" judge rests on the decision of the parliamentary majority, which, despite all the mechanisms during the process of selection of candidates, is always governed by political reasons. The experience of the countries around the world (e.g. Eastern European countries and Latin American countries) which are undergoing or have already undergone similar process of democratisation shows that the threat of political influence of the parliament is far greater than the threat of the influence of executive authorities (head of state or competent minister).

The objection that the "decision on the election is a discretionary act of the parliament, and that the process of passing it is dominated by political (partisan) reasons instead of objective and substantial ones"[17] is equally valid when it comes to the election of judges for a limited term in office. Such a provision just confirms the insecurity of the framers of the Constitution with regard to the legal nature of the HJC and just goes to prove that constitutionalisation of the HJC as an authority "which secures and guarantees the independence and autonomy of the courts and judges" has not been completed. In fact, the HJC is a secondary body in the procedure of electing the judges. The HJC is a body which gives "a seal of approval" for the transition of temporary judges into the category of judges with permanent tenure of office after these judges have already been subjected to a political triage by the

[15] Venice Commission, *Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia,* adopted by the Commission at its 64th plenary session (Venice, 21-22 October 2005), CDL-AD(2005)023, p. 4

[16] This is a rephrased reiteration of Article 146, para. 2 of the Constitution. In any case, it should be expunged, since the Constitution is a type of enactment that does not allow unnecessary repetition.

[17] R. Marković, *Ustavno pravo*, Belgrade, 2012, p. 523.

MPs. In order to assign the HJC an adequate role, the system of election of judges should be implemented through a special announcement of vacancies and the said Council would have to have jurisdiction over the initial selection of judges.

The constitutional provision on the election of judges who are being elected for the first time to perform judicial office should be amended when the Constitution undergoes next revision as has already been mentioned with regard to Article 146 of the Constitution.

The Constitution regulates the procedure for the election of judges but it does not contain the provisions on the protection of the rights of judges during the decision-making process of their election. Therefore, the status of the judges during the election proceedings is not protected,[18]

In any case, all judges, regardless of the fact whether they are being elected to the post for the first time, for a limited term of office, or they are being elected for permanent tenure, should be elected by the HJC.

Article 148 Termination of a judge's tenure of office

"A judge's tenure of office shall terminate at his/her own request, upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the Law, as well as if he/she is not elected to the position of a permanent judge." (paragraph 1)

This provision merits serious criticism. It stipulates that the conditions for the termination of a judge's tenure of office and the reasons for the relief of duty shall be legally prescribed by a law and not the Constitution as was the case under the 1990 Constitution of the Republic of Serbia. "Deconstitutionalisation of the grounds for the termination of a judge's tenure of office and the relief of duties weakens the position of the judiciary as an independent branch of government in the system of the government."[19] This is the opinion of the Venice Commission according to which "it is also a serious gap that apart from this provision on termination of office the Constitution does not contain any rules on the disciplinary responsibility of judges".[20] *Therefore, grounds for termination of a judge's tenure of office and reasons for the relief of duty should be constitutionalised once again*. It is particularly important to define the reasons for the relief of duty more restrictively so that the judges would not be left "defenceless". Using legal standards such as "unconscientious" actions with regard to issues as delicate as this certainly cannot guarantee judicial independence.

The 2006 Constitution does not stipulate the grounds for the termination of a judge's tenure of office nor the reasons for the relief of duties, instead, it states that the decision on the termination of a judge's tenure of office shall be rendered by the High Judicial Council and that a judge has the right to file an appeal against this decision with the Constitutional Court, which shall not include the right to file a

[18] M. Pajvančić, *op. cit*., pp. 176-177.

[19] R. Marković, „*Predgovor: Ustav Republike Srbije od 2006 – kritički pogled*" (Preface: the 2006 Constitution of the Republic of Serbia – overview) , *Constitution of the Republic of Serbia,* Belgrade, 2006, p. 42.

[20] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e.

constitutional appeal (Art. 148, para. 2). One of the opinions expressed by a local scholar (R. Marković) suggests that "such a provision is an indication of the lack of understanding of the "spirit" of the Constitutional Court. A dispute regarding the termination of a judge's tenure of office is not an administrative dispute, it does not revolve around a violation of the Constitution as is the case in a constitutional appeal and therefore its resolution should not be under the jurisdiction of the Constitutional Court. By placing the resolution of such a dispute under the jurisdiction of the Constitutional Court, the said Court is turned into a court of higher instance, which it certainly cannot be by its very nature."[21] Venice Commission disagrees with this. It holds that stipulating the possibility of filing an appeal with the Constitutional Court against the decision on the termination of a judge's tenure of office rendered by the HJC is a sound provision.[22]

Whether the Constitutional Court should have jurisdiction over the decision on the appeal against the decision on the termination of a judge's tenure of office is an issue which needs to be examined, however, it seems that, nevertheless, the current provision should not be changed.

Article 151 Immunity

The protection of judges is guaranteed through immunity of substantive and procedural nature. Substantive immunity protects the judge from liability for an expressed opinion or for voting in the process of passing a court decision, except in cases where the judge has committed a criminal offence by violating the Law. Procedural immunity protects the judge from an arrest during the proceedings initiated regarding the criminal offence which has been committed in the course of performing their judicial function. A constitutional concept of protection through the use of immunity which protects the judges in their professional capacity is in application in most European legal systems. The said immunity is more limited than the so-called political immunity enjoyed by the officials of political authorities (legislative and executive) and the immunity enjoyed by the justices of the Constitutional Court. However, substantive immunity of the judges should be regulated in greater detail, since current legal wording causes confusion and leaves room for a question whether the judges are protected from liability just for an expressed opinion during the process of deciding the case or if the said protection extends to the entire process of rendering a judgment.

In accordance with the purpose of the protection of judges through immunity, the provision on the substantive immunity should be clarified by inserting a phrase "for an opinion expressed during the court proceedings and for voting in the process of rendering a court decision".

Article 152 Incompatibility of the Judiciary Function

Incompatibility of judiciary function is an institute which is derived from the principle of separation of powers and it should be regulated by the Constitution in detail. A ban on political activities of judges is an important guarantee of both insti-

[21] R. Marković, *op. cit*., p. 43.

[22] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e.

tutional and personal independence of the judiciary but it requires content which is more detailed in order to be regulated by the Constitution. On this occasion as well, the Constitution leaves it to the legislator (as it did regarding the termination of a judge's tenure of office) to further regulate functions and activities which are incompatible with judicial office. *If conflict of interests in the realm of "private interest" may be regulated by an appropriate law, applicable to all state officials, as it requires precise and detailed citing of grounds for establishing such an interest, it is then expected that the Constitution should regulate the area of so-called political incompatibility by specifying all the public offices which are incompatible with the performance of judicial function.*

Article 153 The High Judicial Council – Status, Composition and Election

A question to be answered first: *Did the framers of the Constitution make a mistake by dividing the former High Judicial Council into two separate bodies, the one with jurisdiction over the status of the judges (High Judicial Council) and the one which has jurisdiction over the status of not so much the public prosecutors but more over the status of deputy public prosecutors (the State Prosecutors' Council)?* Some are of the opinion that the framers of the Constitution have made a mistake because "such a provision poses a risk of preventing the application of the same or initially the same professional and personal standards in both of these professions",[23] which are performed by judges and public prosecutors. In order to answer this question, one must start with the evident attempt of the framers of the Constitution to lay down different foundations for the status of judges and the status of public prosecutors. Suffice to say that the judges, after the election to their first term in office, are elected to a permanent tenure of office whereas the prosecutors are elected for a limited term in office (of six years, with an unrestricted possibility to be re-elected) as well as that the HJC elects the judges to a permanent judicial office, while the public prosecutors are elected by the National Assembly at the request of the Government. *The position of a public prosecutor has its special characteristics compared to the judicial office. Therefore, keeping the two independent state bodies, the HJC and the SPC, has a valid justification.*

There are some serious objections which concern the composition of the HJC and the procedure according to which its members are appointed. The HJC has eleven members. *The number of the members of the HJC may be rated as adequate.*

Members of the High Judicial Council are: the President of the Supreme Court of Cassation, the Minister responsible for the judiciary and the President of the competent Committee of the National Assembly, as members by virtue of the office they perform, and eight members elected by the National Assembly as stipulated by law. Elective members are six judges with permanent tenure of office, one of which must be from the territory of autonomous provinces and two respected and prominent jurists who have at least 15 years of professional experience, one of which shall be an attorney-at-law, and the other a professor at the Faculty of Law. The Presidents of Courts may not be elective members of the HJC. Tenure of office of the High Judicial Council's members shall last five years, except for the members

[23] V. Rakić – Vodinelić, „*Reforma pravosuđa u Srbiji*", Sveske za javno pravo, no. 9/2012, p. 8.

appointed *ex officio* who cease to be members once they no longer hold the position that has provided the grounds for their membership in the said authority.

The requirement that the HJC should be an authority with a balanced composition has been, seemingly, met. "This appearance of pluralism, however, is deceptive." [24] *The intent of the framer of the Constitution to provide the complete constitutional guarantee of independence may be suspect as the election and appointment of the members of the Council, directly and indirectly, starts with the legislative power or the political will of the parliamentary majority*. Eight elective members of the Council are elected by the National Assembly at the proposal of the authorised proponents while the influence of the legislative authority is strongly felt through the presence of three members appointed *ex officio*: the Minister, who has been elected by the parliament according to the system of separation of power, the President of the parliamentary Committee, who is at the same time an MP and the President of the Supreme Court of Cassation, who is also elected by the National Assembly. The Assembly, therefore, completely governs this body so there is no mention of independent or autonomous judicial body. Its legal position could be defined as the competence of a specialised parliamentary committee regulated by the Constitution, which is responsible for the judiciary issues and which assists the legislature in the implementation of the guarantees of the independence of the judiciary. Although its powers with regard to election of judges and termination of the judicial office are of constitutional nature and have the implication of a state body, it does not have functional capacity to accomplish more than what a specialised parliamentary committee has the competence to do.

Out of 11 members of the HJC, seven are the judges and two are "respected and prominent" jurists. The Minister responsible for the judiciary and the President of the competent parliamentary Committee represent the political authorities, the executive and the legislature.[25] *Although, upon comparative analysis, judicial councils may be found elsewhere which do not include the Minister of Justice as a member, this solution, which includes the Minister of Justice in the composition of the HJC, may be kept.* The Minister of Justice may not be denied that it is within his/ her competence under the Constitution to secure the guarantees of judicial independence (primarily with regard to the judicial administration and allocation of the budget) but the Minister's active participation in this body cannot be supported, since political influence of a minister is quite clear. *His/ her participation in the work of the HJC should be modified so that the Minister is a member in "limited capacity". He/ she would not have the power to decide on matters which concern the transfer of judges and imposing disciplinary measures.*[26] The Minister could be involved when budgetary issues are being discussed, i.e. income and expenditure of the judiciary. In such a way a balance could be found with regard to financial needs of the judiciary and total finances the Government proposes to the parliament.

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[24] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e.

[25] The words "respected" and "prominent" are synonymous with each other. Therefore, it was sufficient to use only one of them in the Constitution.

[26] Venice Commission, *Judicial Appointments,* CDL-JD(2007)001rev.

As far as the President of the competent parliamentary Committee is concerned, his membership in the HJC is redundant. Former MPs due to their legal qualifications may be elected as members of the Judicial Council but this should not be the case when it comes to active MPs. First of all, a Member of Parliament in the capacity of the President of a competent parliamentary Committee is, to say the least, an improper political involvement in the structure of the Council. The position of the said person is such that (s)he participates by virtue of his/her office in the securing of guarantees of judicial independence as a Member of Parliament and in accordance with the functional capacity of the legislature. According to Article 51, paragraph 2 of the Rules of Procedure of the National Assembly, the parliamentary Committee responsible for judiciary issues "shall deliver its Opinion on the proposed decision on the election of the President of the Supreme Court of Cassation and the Republic Public Prosecutor". This means that the function of the President of the competent Committee combines several powers which should remain separate and which call into question other constitutional rules on the separation of powers (for instance, incompatibility and conflict of interest). The same person first participates in the process of formulating the proposal for the President of the Supreme Court of Cassation as a member of the High Judicial Council; then, as the President of the Committee, (s)he organises the work of the Committee and secures the majority for the said proposal and at the end, in the capacity of the Member of Parliament, votes for the same proposal at the session of the National Assembly. The President of the parliamentary Committee as the member of the Council is in exact same situation when the Committee responsible for judicial issues "considers the proposed decision on the election of the members of the High Judicial Council, members of the State Prosecutors' Council, court presidents, public prosecutors, and judges and deputy public prosecutors appointed for the first time" (Article 51, paragraph 3 of the Rules of Procedure). It is clear that the National Assembly manages to coordinate and secure political control over the work of the Council through this, at first glance, loose personal connection.

Secondly, an additional argument in favour of removing the representative of the legislature from the High Judicial Council's composition may be found in the provision of Article 102 of the Constitution which created a legal path for the introduction of the party-owned seats in the parliament ("blank resignation letters") which resulted from a wide-spread practice according to which the political parties "dispose of" the parliament seats freely. Normative framework and past parliamentary experience do not offer any guarantee that the representative of the legislature would take the position which would reflect the general or majority position of the parliament. Quite the contrary, there is always going to be an underlying danger that the seats would be "reassigned" among the parties during the selection and election of the judges.

Therefore, when redefining the composition of the HJC by the Constitution, the President of the competent parliamentary Committee should be left out from the membership.

As far as the third member appointed *ex officio,* the President of Supreme Court of Cassation, is concerned, (s)he could remain a member. However, the current legal provision which stipulates that the President of the Supreme Court of Cassation

should be the President of the High Judicial Council *ex officio* is not sound. The HJC is not a judicial body, so it is not required that the president of the highest court should head the said Council. The President of the HJC should be elected by the members of the HJC. Venice Commission recommends that "the chairman of the Council should be elected by the Council itself from among the non-judicial members of the Council", which would "strike a balance between the necessary independence of the Chairman and and the need to avoid potential aspirations towards corporatism within the Council".[27]

When it comes to the elective members of the HJC, there are two things that need to be rectified. First of all, the Constitution should stipulate that the composition of the HJC should include different types of judges and at different levels (from the lowest to the highest court, the judges of general and special jurisdictions). *Moreover, a slight increase in the number of respected jurists elected by the Assembly should be considered*. It may be justly noted that practicing lawyers are favoured.[28] The new constitutional wording should not limit the choice of respected jurists just to two legal professions, that of professors and lawyers.

Furthermore, *the provision according to which out of six elected judges – the judges with permanent tenure of office, one must be from the territory of an autonomous province is questionable*. The HJC should be a highly professional body which is based on clear principles: 1) professional credibility of members; 2) their high moral reputation in the professional community and in the society; 3) the ability of strategic thinking and of decision-making.[29] None of the aforementioned principles have anything to do with members being from a particular territorial constituency. Even if Serbia were a federation and not a unitarian state, the nature of the HJC would not require the representation of federal (territorial) constituencies in this body. In any case, the judicial system in the Republic of Serbia is uniform and there is no justifiable reason to grant a special seat in the body in charge of guaranteeing the independence and autonomy of the state's courts to the constituencies with territorial autonomy, which do not have their own courts. It seems more like another "hypocritical" provision of the Constitution which is supposed to create an illusion of the participation of the Autonomous Province of Vojvodina in the judiciary (there is a similar one regarding the composition of the Constitutional Court). Therefore, such a provision should be removed.

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[27] Venice Commission, *Judicial Appointments,* CDL-JD(2007)001rev.

[28] "In this way, the Constitution expressly stipulates that the persons involved in a lucrative activity, lawyers, who provide legal assistance for a reward, in addition to occupying political posts in the Ministry of Justice, the parliamentary committee for the judiciary and other political bodies, which is a political choice and as such it is not disputed now, should hold an office in a body which "guarantees the independence and autonomy of the courts and judges", the High Judicial Council. If, on the other hand, the intent was to strengthen the Council legally, then we do not see the reason why other "respected and prominent jurists", who have passed the Bar Examination, should be discriminated against and not allowed to become members of this body if they are not lawyers. As we do not belong to a legal tradition of the countries which appoint lawyers as judges (the UK appoints barristers as judges), it remains unanswered why the Constitution has singled out the profession of a lawyer. S. Orlović, „*Stalnost sudijske funkcije vs. opšti reizbor sudija u Republici Srbiji*", *Annals of the Faculty of Law in Belgrade*, 2/2010, p. 183.

[29] B. Perić, „Tenzije *između pravosuđa i politike: da li najavljene izmjene Zakona o VSTV rješavaju probleme?*", available at: *http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Branko_Peric4.pdf.*

Therefore, the structure of the member judges of the Council should be based on the criterion of function, fully reflecting the existing organisation of courts in the Republic of Serbia. It is allowed not to adhere to the said principle to an extent which allows reinforcement of a legitimate goal of equal representation of all courts. Therefore, territorial representation, which under existing law is introduced as a political remedy based on the respect of decentralisation and of the fact that the autonomous provinces exist, should be replaced with, for instance, representation of all four state appellate instances in the composition of the Council.

Finally, *even if the composition of the HJC were to remain the same, the procedure for electing its members would have to change in order to eliminate the pervasive influence of the National Assembly (and through the parliamentary majority, of the Government as well) in this area.* "The members of the High Judicial Council are elected, directly or indirectly, by the National Assembly, which merits criticism, since in such a way the body which is supposed to be completely autonomous and highly professional in its entirety is dependent on the National Assembly where the members of parliament pass most of the decisions under the orders of the political party or political coalition that has put them on their list of candidates for MPs in the first place".[30] Such a solution shows that the framer of the Constitution has not completely abandoned the election model for judges used in the 1990 Constitution. It is, without a doubt, a confirmation that the constitutional definition of the High Judicial Council as an "independent and autonomous body" is a mere proclamation without any real content. In any case, criticism of such a provision for the election of the members of the HJC should not lead to opting for another extreme solution which would exclude the Assembly completely from the said process. *Balanced composition of the HJC implies a balanced procedure for the election of its members whereby the judges would select judicial members, whereas non-judicial members would be elected by the Assembly from a list of respected jurists proposed by professional and expert organisations. The Assembly should not elect the members of the HJC by a simple majority, when the quorum is reached, but a qualified majority, which would require a compromise between the majority and the opposition in order to agree on a candidate.*

Article 154 Jurisdiction of the High Judicial Council

Bearing in mind the definition of the HJC stipulated under Article 153, paragraph 1 of the Constitution, it may be said that the jurisdiction of this body has not been adequately set forth. It should be redefined, in view of the comments of the provisions opted for in the preceding articles, so that the HJC is responsible for electing judges and relieving them of duty always (whether it be permanent tenure of office or the first appointment if this provision regarding the first appointment is kept), for electing the presidents of the courts and the president of the highest instance court and rendering of the decision on the termination of their office.

The issue of accountability of the HJC within the constitutional organisation of the government should be somehow resolved. At the moment, the control mechanism used by the political authorities is regulated by the Constitution and it is built

[30] R. Marković, *Ustavno pravo*, Belgrade, 2012, p. 526.

into the initial act, i.e. the procedure for electing and appointing the members of the Council. However, if the independence of the HJC is secured through the rules on the election and its structure, which would prevent political influence on the HJC, the issue is raised regarding the Council's accountability for the use of the powers vested in it. Considering that this is a body which links the third branch of government with the political authorities, it "answers", in the broadest sense, solely to the citizens and the profession. Consequently, it is necessary to introduce precise rules on public access to the work of the Council, which would represent a powerful tool for quality control of the Council's work. On the other hand, the mechanism of the right to file an appeal against the decision of the High Judicial Council with the Constitutional Court offers additional guarantees, not just legal ones, but also guarantees of professional accountability of the Council. In the broadest sense, it is possible to apply here the rule on the right to a legal judge as the guarantee provided to all those who are subject to the jurisprudence of the said specialised state body: a guarantee to request a court decision and a guarantee against unauthorised interference with the work of the judiciary. Finally, the accountability of the HJC may be secured even if the term of office of its members is limited, in which case the said term should exceed the term of office of the representatives of political authorities, which means at least six years. A limited term of office strengthens its accountability in the broadest possible sense: by being held accountable by the citizens and legal profession after the term of office stipulated by the Constitution expires.

IV PUBLIC PROCECUTOR'S OFFICE IN SERBIAN CONSTITUTION (2006)

1. GENERAL COMMENTS

Unlike the courts, the public prosecutor's offices are not always the subject matter of the Constitution. There are constitutions which regulate the public prosecutor's office in detail, those that just stipulate that the organisation of the public prosecutor's office would be regulated by a specific law and there are those which do not contain a single provision on the public prosecutor's office. The 2006 Constitution of the Republic of Serbia belongs to the first category as it contains pretty detailed provisions on the public prosecutor's office.

For the main part, in terms of the content and nomotechnics, the objections directed to the regulation of the judiciary apply to the public prosecutor's office as well. There are three general comments that need to be underlined.

First of all, the position of the public prosecutor is no longer permanent as it used to be according to the 1990 Constitution of the Republic of Serbia. On the other hand, the deputy public prosecutors, who are not autonomous holders of powers performing the duties of the public prosecutor's office, are elected to serve first three years and then to a permanent office. Such provisions should be re-examined.

Secondly, State Prosecutors' Council (SPC), a state body whose relationship with the public prosecutor's office mirrors the relationship between the HJC and the ju-

diciary, is established. *The fundamental objection regarding this body is that its constitutional definition is not in accordance with its jurisdiction at all.* According to the constitutional definition, it is an autonomous body which secures and guarantees the independence of public prosecutors and deputy public prosecutors in accordance with the Constitution. The jurisdiction of the SPC refers solely to the deputy public prosecutors so the question is raised how this body can secure and guarantee the independence of the public prosecutors.

Thirdly, *the election procedure for the public prosecutors which is split between the National Assembly and the Government (they are elected by the National Assembly at the proposal of the Government) does not offer any guarantees of the independence of the public prosecutor's office from political factors*.

2. COMMENTS ON PARTICULAR CONSTITUTIONAL PROVISIONS

Article 156 Public Prosecutor's Office: Status and Jurisdiction

"Public Prosecutor's Office shall perform its function on the grounds of the Constitution, Law, ratified international treaty and regulation passed on the grounds of the Law."

This provision, unlike similar provisions on the courts, does not mention generally accepted rules of the international law. If the generally accepted rules of the international law remain with regard to the courts, then they should be added with regard to the public prosecutor's offices as well.

Article 158 The Republic Public Prosecutor

"The Republic Public Prosecutor shall be elected by the National Assembly, on the Government proposal and upon obtaining the opinion of the competent committee of the National Assembly." (paragraph 2)

The point of contention is, first of all, whether the provision according to which public prosecutors and, consequently, the Republic Public Prosecutor are elected by the National Assembly should be kept. It should be considered to put this under the jurisdiction of the State Prosecutors' Council (SPC) to correspond with the HJC's role. It is particularly problematic to carry out the election at the proposal of the Government, i.e. the executive power. Such a provision, without a doubt, needs to be removed.

"The Republic Public Prosecutor shall be elected for the period of six years and may be re-elected." (paragraph 3)

Venice Commission has expressed an objection only in part which refers to the possibility of re-election, citing that such a possibility does not exist with regard to the President of the Supreme Court of Cassation. *It seems that the election of the Republic Public Prosecutor for a limited term in office (of six years) is debatable. It is unclear why the position of the public prosecutor is not permanent, the way the judge's tenure is.*

"Tenure of office of the Republic Public Prosecutor shall terminate if he/she is not re-elected, at his/her own request, upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the Law." (paragraph 4)

The same criticism may be applied to this provision as to the provision regarding the judges and the president of the courts since the grounds for the termination of office and reasons for the relief of duty are deconstitutionalised. Therefore, *the grounds for the termination of office and for the relief of duty of a public prosecutor should be specified under the Constitution*.

"The decision on termination of tenure of office of the Republic Public Prosecutor shall be adopted by the National Assembly, in accordance with the Law, bearing in mind that it shall pass a decision on relief of duty at the Government proposal". (paragraph 5)

Here, too, it should be considered whether the decision on the termination of tenure of office of the Republic Public Prosecutor should be passed by the National Assembly whereas the role of the Government should definitely be eliminated.

Article 159 Public Prosecutors and Deputy Public Prosecutors

There are several provisions under this Article which are not sound or logical. *The election of all public prosecutors by the National Assembly, at the Government's proposal, is a provision which should be replaced with an election carried out by the SPC.* As has already been mentioned above, restoring permanent tenure of office for the public prosecutors should be taken into consideration.

As has already been mentioned under general comments, the provision which deals with deputy public prosecutors is illogical. They are first elected by the National Assembly for a period of three years and subsequently, they are elected by the SPC for a permanent tenure of office. It is neither clear why the SPC should elect only the deputy public prosecutors for a permanent tenure of office, nor why the deputies are guaranteed permanent tenure after their first election whereas this is not the case with the public prosecutors.

Article 161 Termination of Public Prosecutor's and Deputy Public Prosecutor's Tenure of Office

Just as it was done with regard to judges, the conditions under which tenure of public prosecutor's office is terminated (except in cases when the tenure of office is terminated due to a resignation – upon his/ her request) and the reasons for the relief of duty have been deconstitutionalised. *Grounds (conditions) for the termination of public prosecutor's tenure of office and the reasons for his/her relief of duty must be stipulated by the Constitution*.

This Article is just another example of poor nomotechnics typically found in the Constitution. Under paragraph 5 of this Article there is no need to repeat what has been in part said under paragraph 1 ("… grounds and reasons for the termination of the tenure of office of the Public Prosecutor and the Deputy Public Prosecutor shall be regulated by the Law").

Article 164 Status, Composition and Election of the State Prosecutors' Council

The same objections and comments which have been expressed regarding the corresponding Article which deals with the HJC may apply here. Therefore, there is no need to reiterate them.

Article 165 Jurisdiction of the State Prosecutors' Council

As has been stressed in the aforementioned general comments, the jurisdiction of the SPC refers solely to the electoral powers regarding the deputy public prosecutors and the procedure of rendering a decision on the termination of the tenure of office of the deputy public prosecutors. This body performs other duties stipulated by the Law but it is obvious that they may not be related to the public prosecutors, since the Constitution does not mention such duties at all. Therefore, unlike the HJC for which it may be said that it has a partially adequate scope of constitutional jurisdiction, in view of its position and role as defined by the Constitution, *the SPC is a state body whose constitutional jurisdiction is not in accordance with its constitutional definition for the most part. Therefore, its jurisdiction should be completely redefined in accordance with the aforementioned comments on particular Articles.*

V THE RELATIONSHIP BETWEEN THE COURTS AND THE CONSTITUTIONAL COURT

From the point of view of constitutional organisation of the judiciary, and especially through the lens of guarantees of the independent judiciary, the issue of the relationship between the courts and the Constitutional Court is raised. The provision on the institutional protection of human and minority rights and freedoms guaranteed by the Constitution (Article 170) is key. Constitutional appeal is regulated as a special legal institute under the sixth section of the Constitution which deals with the Constitutional Court. Constitutional appeal contains basic elements of the textbook definition (what is being protected, the contested issue, the nature of the violation and subsidiarity) but regulation of a number of important issues has been omitted, which was justly criticised in the professional circles.

The fundamental flaw of such an approach to legislation of the issue lies in the fact that the writers of the Constitution have left it to the legislators to regulate this sensitive area of constitutional protection of human rights and rights of the minorities, which have been proclaimed as the fundamental principle of the rule of law (Article 3). This has affected the jurisdiction of the Constitutional Court (it has not been explicitly defined by a list of competences of the Constitutional Court, Article 167) as well as the relationship of the Constitutional Court with other courts under the system of separation of powers.

We are going to underline first some general views on the constitutional appeal which can be encountered in theoretical writings regarding constitutional law. Bearing in mind the objective of this analysis, authors and their works, which served as the basis of this theoretical overview, shall not be cited but, for the purpose of copyright protection, the works of professor dr Irena Pejić may be consulted, one of the undersigned authors of this analysis who has researched this issue more extensivelyand whose works cite the views of other authors as well.[31]

[31] I. Pejić, „*Ustavnosudska zaštita osnovnih prava: ustavna žalba u Srbiji*", *Pravni život,* Journal for

In the broadest sense, the Constitutional Courts provide the protection of human rights through the use of their competences to assess whether the normative acts comply with the Constitution thus interpreting the constitutional provisions as a part of abstract review of constitutionality. The system of Constitutional Court's review should provide basic guarantees in a state governed by the rule of law. The Constitutional Court is allowed to interpret the constitutional norms in accordance with the theory of "an open constitutional norm" and to assess what actions of the government are necessary, appropriate and not extreme according to the principle of proportionality. In order to strike the right balance when assessing constitutionality, the Court is expected to decide which value should prevail, or to put it more simply, to ensure that the greatest "benefit" is achieved "at the lowest cost".

In order to establish effective legal protection of human rights, a constitutional appeal is guaranteed in many so-called new constitutional democracies (in the Czech Republic, Slovakia, Hungary, Russia, Poland, and among former Yugoslavian Republics in Slovenia, Croatia, Macedonia and Montenegro). Establishing the protection of the rights through a constitutional appeal before the Constitutional Court fits in with the European system of protection in accordance with the European Convention on human rights. European Court of Human Rights deals with the requests for protection only after all of the available instruments of legal protection have been exhausted in the national system in question. According to the European Convention, the European Court "may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken." (Article 35, paragraph 1). Under a national legal system, constitutional appeal represents a special instrument of legal protection with characteristics of an extraordinary legal remedy, which ensures a well-rounded protection of human rights under the constitutional order.

The Constitutional Court comes into direct contact with courts by taking under consideration constitutional appeals. Consequently, this leaves room for the emergence of a special kind of conflict or some type of rivalry between them. The Constitutional Court, however, does not treat the courts as "a high" or "the highest" court instance. Although it re-examines the court decisions in a way when deciding the constitutional appeals, the Constitutional Court should limit its examination to just the so-called constitutional issue, i.e. the issue of protection of the right guaranteed by the Constitution. The fact that the Constitutional Court does not decide the case which has been decided on by the court and that it cannot replace the court decision with its own decision shows that there is no subordination in their relationship. The review by a Constitutional Court as "the review of the appreciation and understanding" of the constitutional law means that, when acting on constitu-

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Legal Theory and Practice (Monothematic issue: Law and Freedom (Pravo i sloboda)), Belgrade, No. 14, Vol. VI, 2007; I. Pejić, „Garancije ljudskih prava u nacionalnom poretku: ustavnosudska zaštita", *Proceedings of the International Scientific Conference – Constitutional and International Legal Guarantees of Human Rights (Ustavne i međunarodnopravne garancije ljudskih prava)*, (ed. Zoran Radivojević), Niš; Publications Centre of the Faculty of Law, 2008.

tional appeals, the Constitutional Court does not examine the procedure and how the courts have rendered their decisions, instead it is its task to examine what was the understanding of the constitutional law by the court in question. Therefore, it is assumed that the applicable law is the so-called constitutional law and the province of other branches of law are not taken into consideration (for instance, criminal or civil law). The Constitutional court reviews "constitutional legitimacy", so even when the constitutional appeal is the result of a civil or criminal dispute, the Constitutional Court is limited just to those issues regarding court's actions which are related to a potential violation of the constitutional law. The third relevant characteristic in the relationship between the Constitutional Court and other courts refers to the fact that the Constitutional Court does not replace a court's decision which was challenged by a constitutional appeal with its own decision. The Constitutional Court's decision may lead to a new rendering of the decision of the court on the same issue if it is found that constitutional law has been violated.

Based on these generally outlined theoretical views, it could be said that the legislator's task was difficult as it was necessary to reconcile both aspects of the constitutional appeal: effective legal protection of the human rights in a national legal order and preservation of the separation of powers according to which the judiciary is independent, while the Constitutional Court occupies a special area in terms of organisation and its function.

Firstly, effective legal protection of human rights and the rights of minorities implies that the Constitutional Court may re-examine individual acts and actions of the state authorities, including the court judgments, when there is a violation of a particular right guaranteed by the Constitution. To be specific, the protection would be practically devoid of content if such a mechanism would fail to include court decisions and if its application would be limited just to enactments by administrative authorities (considering that there is a possibility of initiating an administrative dispute, the scope of the protection afforded by the Constitutional Court would be considerably limited). If the court decisions were to be excluded, the following issue would arise: Would the European Court of Human Rights be able in such a case to respond to all of the complaints of our citizens and what would be the position on the "effective" system of national protection in Serbia? *There is no room for any dilemmas with regard to constitutional wording that a constitutional appeal may be filed "against individual acts or actions of the state authorities" and that it may refer to all of those who participate in the application and implementation of general acts, which means administrative authorities and the judiciary.*[32] *This does not exclude a*

[32] This is also the position taken by the Constitutional Court which declared as unconstitutional the provision of the Law on Amendments and Supplements to the Law on the Constitutional Court (Article 89, para. 2) at the beginning of 2013, which excluded court decisions from being challenged by a constitutional appeal ("When the Constitutional Court finds that the challenged individual act or action violates or denies a human or minority right or freedom guaranteed by the Constitution, it may annul the individual act *unless it is a court decision* etc.") After the decision of the Constitutional Court was passed (Official Gazette of the Republic of Serbia", No. 18/ 2013), Article 89, paragraph 2 reads: "When the Constitutional Court finds that the challenged individual act or action violates or denies a human or minority right or freedom guaranteed by the Constitution, it may annul the individual act, prohibit the continuation of such actions or order taking other measures or actions that eliminate the

possibility of finding a more precise definition of what is subject to a constitutional appeal, when the Constitution undergoes its next revision. The same goes for the provisions under Article 145, paragraphs 3 and 4 ("Court decisions shall be obligatory for all and may not be subjected to extrajudicial review." – "A court decision may only be re-examined by a competent court in the proceedings stipulated by the Law."). Although it is clear that the phrase "extrajudicial review" aims to prevent political re-examination of court decisions and not the re-examination by the Constitutional Court in part which is related to potential violations of the human rights guaranteed under the Constitution, it should be explicitly stated under the constitutional norm. Therefore, just as it was done with regard to the exception entitled "amnesty and pardon", it should be explicitly stated that there is a possibility of re-examination of the court decision by the Constitutional Court based on the constitutional appeal filed due to a violation of the right guaranteed by the Constitution.

Secondly, the constitutional guarantees of the rule of law, among which the separation of powers and the independence of the judiciary occupy the most prominent place, require a rational provision regarding the effect the decision of the Constitutional Court on a constitutional appeal should take. The task of the Constitutional Court is to resolve a particular "constitutional issue" whether the right guaranteed by the Constitution has been violated, after which it is left to the competent court to resolve the dispute in question, i.e. the legal issue which was being decided on in the court's judgment, in accordance with the decision rendered by the Constitutional Court.[33] It is the court that has the power and the obligation to re-examine the contested issue and render its judgment in compliance with the position of the Constitutional Court on the protection of constitutional rights. This means that the Constitutional Court could uphold the constitutional appeal, when it finds that an individual act has violated human rights or rights of the minorities, and annul the said act in its entirety or in part and return it for a new decision to the competent authority. The competent authority should immediately (and not later than within 60 days) deal with the matter while taking into account the legal reasons the Constitutional Court has cited in its decision. Due to a possibility of violating the right to a trial within reasonable time, the law should prescribe other deadlines for actions by the competent authority pursuant to the Constitutional Court's decision.

The existing legal formulation which refers to "annulling" individual acts does not comply with the basic function of the Constitutional Court as the "guardian of the Constitution". In addition to ensuring the protection of constitutionality and legality, the Constitutional Court must take into account the legal security of the citizens. In that sense, the decision of the Constitutional Court should have the effect of cassation which consists of annulling individual acts by state authorities.

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harmful consequences of the violation or denial of guaranteed rights and freedoms and determine the manner of just satisfaction of the appellant."

[33] The Constitutional Court has been criticised for acting as the highest instance court in its past practice, as the court of the fourth instance, since it did not provide only the analysis of the constitutional provisions, but also embarked on interpreting the regulations related to substantive law which govern the court proceedings. See: P. Trifunović, „*Sudska odluka i ustavna žalba*", taken from the Supreme Court of Serbia's Bulletin of Court Practice, No. 3/2009, Intermex, Belgrade

VI CONCLUSIONS

1) The wording of Article 4, paragraph 3 of the Constitution ("Relationship between the three branches of government shall be based on balance and mutual control") provides the grounds for a solution which splits the decision on the election of judges between the National Assembly and the High Judicial Council, in doing so, this important guarantee of independent status of the courts is exempted from the full jurisdiction of the judiciary. In order to rectify this, it is necessary to do one of the two things: expunge Article 4, paragraph 3 from the Constitution or rephrase it so that it reads "relationship between the legislative and the executive powers shall be based on the balance and mutual control";
2) The principles of the judiciary should be defined more precisely and in a more systematic way. They should be defined in such a way that the beginning of the section cites (under several articles) fundamental constitutional guarantees (institutional and personal) which regulate the status of courts and judges instead of spreading them out across the whole section.
3) The name of the Supreme Court of Cassation is a contradiction in terms. The former name of the court should be restored – the Supreme Court;
4) The Presidents of the Courts, as well as the President of the highest instance court should be elected by the High Judicial Council. It might be appropriate, when it comes to electing the president of the highest instance court that the HJC should decide based on a qualified majority of the vote (e.g. two-thirds majority). These organisational issues do not have to be regulated by the Constitution. They are the subject matter of an organisational judicial law. In view of the aforementioned, it would be perfectly acceptable to expunge the whole article on the President of the Supreme Court of Cassation and proposed provisions could be moved to an appropriate piece of legislation;
5) With regard to the election of a judge for a period of three years, there are two options for the future revision of the Constitution: institutionalisation of the first appointment in a way that protects the independence of a judicial office more effectively and prevents the politicisation of the said office or elimination of such a provision. If it is opted for the first alternative, a stronger guarantee of the independence of judicial office requires an extension of the first tenure of office from three to five or six years. Moreover, the judges might automatically be given a permanent tenure of office after the said initial period in office expires, while an independent body, High Judicial Council, would be allowed to draw attention, within a relatively short time interval, to the fact that there are legally stipulated reasons which indicate that a certain individual is not worthy to perform a judicial office and relieve the said person of duty. The powers of the "temporary judges" should be restricted so that they are not allowed to render final decisions on their own. "Temporary" judges would be elected by the HJC, which would also decide other status issues whereas such decisions could be subject to an appeal filed with the Constitutional Court. The second alternative, i.e. the elimination of the first appointment of judges, although it has not been stipulated under the National Strategy for the Reform of the Judiciary (2013-2018), should be seriously considered, especially in view of the position of the Venice Commission on this issue;

6) All of the judges, regardless of the fact whether they are being elected to the office for the first time, for a limited period or they are being given permanent tenure of office, should be elected by the High Judicial Council;
7) The grounds for the termination of a judge's tenure of office and the reasons for the relief of duty should be reconstitutionalised. The reasons for a relief of judicial duty in particular should be defined more restrictively, so that the judges would not be left "defenceless". The use of legal standards, such as "unconscientious" actions, regarding such sensitive issues certainly do not offer a guarantee of judicial independence;
8) In accordance with the goals of the protection of judges through the use of immunity, the provision on substantive immunity should be clarified by introducing a phrase "for an opinion expressed during the court proceedings and for voting in the process of rendering a court decision";
9) If conflict of interests in the realm of "private interest" may be regulated by an appropriate law applicable to all state officials as it requires precise and detailed citing of grounds for establishing such an interest, it is then expected that the Constitution should regulate the area of so-called political incompatibility by specifying all the public offices which are incompatible with the performance of judicial function.
10) Although, upon comparative analysis, judicial councils may be found elsewhere which do not include the Minister of Justice as a member, this solution, which includes the Minister of Justice in the composition of the HJC, may be kept. His/ her participation in the work of the HJC should be modified so that the Minister is a member in "limited capacity". He/ she would not have the power to decide on matters which concern the transfer of judges and imposing disciplinary measures. The Minister could be involved when budgetary issues are being discussed, i.e. income and expenditure of the judiciary.
11) As far as the President of the competent parliamentary Committee is concerned, his membership in the HJC is redundant. Upon redefining the composition of the HJC by the Constitution, the President of the competent parliamentary Committee should be left out from its membership;
12) The President of the Supreme Court of Cassation should be included in the composition of the HJC but without automatically assigning him/her the position of the president of this body. The President of the HJC should be elected by the members of the HJC.
13) The structure of member judges of the Council, should be based on the criterion of function, fully reflecting the existing organisation of courts in the Republic of Serbia. It is allowed not to adhere to the said principle to an extent which allows reinforcement of a legitimate goal of equal representation of all courts. Therefore, territorial representation, which under existing law is introduced as a political remedy based on the respect of decentralisation and the fact that the autonomous provinces exist, should be replaced with, for instance, representation of all four state appellate instances in the composition of the Council.
14) Balanced composition of the HJC implies a balanced procedure for the election of its members whereby the judges would select judicial members, whereas non-judicial members would be elected by the Assembly from a list of respect-

ed jurists proposed by professional and expert organisations. The Assembly should not elect the members of the HJC by a simple majority, when the quorum is reached, but a qualified majority, which would require a compromise between the majority and the opposition in order to agree on a candidate.

15) Bearing in mind the definition of the HJC stipulated under Article 153, para. 1 of the Constitution, it may be said that the jurisdiction of this body has not been adequately set forth. It should be redefined so that the HJC is responsible for electing judges and relieving them of duty always (whether it be permanent tenure of office or the first appointment if this provision regarding the first appointment is kept), for electing the presidents of the courts and the president of the highest instance court and rendering of the decision on the termination of their office.
16) It is debatable whether the provision according to which public prosecutors and, consequently, the Republic Public Prosecutor, are elected by the National Assembly should be kept. It should be considered to put this under the jurisdiction of the State Prosecutors' Council (SPC) to correspond with the HJC's role. It is particularly problematic to carry out the election at the proposal of the Government, i.e. the executive power. Such a provision, without a doubt, needs to be removed.
17) Restoring permanent tenure of office for the public prosecutors should be considered.
18) Grounds for the termination of office and for the relief of duty of a public prosecutor should be stipulated by the Constitution;
19) Deputy Public Prosecutors should be elected by the SPC regardless of the fact if they are being elected for the first time, for a limited period of time, or for a permanent tenure of office;
20) The SPC is a state body whose constitutional jurisdiction is not in accordance with its constitutional definition for the most part. Therefore, its jurisdiction should be completely redefined in accordance with the aforementioned comments on particular Articles.
21) The SPC must be restructured bearing in mind the suggestions given in this analysis regarding the HJC.
22) There is no room for any dilemmas with regard to constitutional wording that a constitutional appeal may be filed "against individual acts or actions of the state authorities" and that it may refer to all of those who participate in the application and implementation of general acts, which means administrative authorities and the judiciary. This does not exclude a possibility of finding a more precise definition of what is subject to a constitutional appeal, when the Constitution undergoes its next revision.

In Belgrade, 2014

Professor dr Irena Pejić
Professor dr Vladan Petrov
Professor dr Darko Simović
Professor dr Slobodan Orlović

25 August 2017

THE JUDGES' ASSOCIATION OF SERBIA COMMENTS ON THE PROPOSED CONCEPTS AND CONCEPT PROPOSALS FOR AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

1. Introductory remarks

Remaining consistent with its proposals for amending the Constitution of the Republic of Serbia (hereinafter: "the Constitution") in the part concerning the judicial branch, which were proposed to the Ministry of Justice on 30/06/2017, adding to the conclusions of the first round table organized on 21/07/2017 by the Ministry, in cooperation with the Office for Cooperation with Civil Society, regarding the proposals tabled by civil society organizations, the Judges' Association of Serbia (hereinafter: "the Judges' Association") hereby makes the following remarks:

With regard to the proposal of possible amendments to the Constitution, the proposals of all professional associations (Judges' Association, Prosecutors' Association, YUCOM, Belgrade Center for Human Rights, CEPRIS), as well as other non-governmental associations, are essentially identical or in mutual agreement.

Of the presented proposals for amending constitutional provisions concerning the judicial authority, including those of the Judges' Association, the only fundamentally different proposals were tabled by the so-called Rule of Law Academic Network ROLAN (hereinafter: "the Network")[1].

It is true that certain proposals of the Network, supported by the Judges' Association and other professional and non-governmental associations and probably embraced by other players, such as the suggestions to revoke the so-called trial term for judges, for the High Judicial Council (hereinafter: "HJC") to elect and dismiss judges, to abandon the election of HJC members from autonomous provinces, the proposal to ban representatives from the judicial and executive branch or attorneys at law from membership in the HJC, to forbid members of the HJC from being members of political parties, as well as to restore the old name of the highest court – Supreme Court of Serbia. However, the Network presented a series of other proposals, which the Judges' Association finds unacceptable.

Given that the potential concepts proposed by the Network, were already been put forward by the representatives of the executive branch in previous years, on different occasions and in written materials, the Judges' Association paid particular

[1] According to information available on the website of the Ministry of Justice, the members of the ROLAN network are the Institute for Criminological and Sociological Research, the Serbian Association for Criminal Law Theory and Practice, the Europius Citizens' Association and the Alumni Club of the Judicial Academy.

attention to them, especially since it finds that they might threaten the independence of judges and the judiciary. Therefore, the Judges' Association will, in this paper, present the reasons why it believes that these proposals should not be accepted. In developing this paper, the Judges' Association used, without specific reference, its publications[2], as well as parts of already published analyses and scientific papers of its members, with their consent.

2. The main problems in the judicial system – misconceptions

2.1. Absence of checks and balances of the three powers

In the text[3] accompanying the proposals of the Network, the authors recognize that the principles of separation of powers and independence of the judiciary, enshrined in Article 4 of the Constitution, represent, in the Republic of Serbia, *"the greatest challenge for establishing a mutual equilibrium"*[4] between the three branches of power. Starting from such a statement, all matters have been analyzed, in the rest of the text, not from the aspect of an independent judiciary in a system of separation of powers, but from the angle of checks and balances between the three powers.

Although it is common knowledge that judicial independence in Serbia is threatened by other branches of power, although it does not, in any way whatsoever, restrict the functioning of the legislative or executive branch, the paper considers the guarantees of judicial independence as *"a means of establishing a system that guarantees a balance between the branches of power and averts a wrongful interpretation and/or misapplication of the concept of judicial independence"*[5].

2.2. Absence of the Acquis and the power of the government to choose the concepts

The said paper also recognizes the *"absence of the Acquis in Chapter 23, which, among other things, deals with the reforms of the justice system"*[6], as well as that candidate states have been vested with the freedom to choose, among several acceptable solutions, the ones that fit them best, although that freedom of choice is often illusory and *"undermined by selective application, namely the interpretation of the relevant standards by the European Commission itself"*[7].

While it is said that *"several dozen international documents, adopted by the relevant bodies of the United Nations (hereinafter: "UN"), the Council of Europe (hereinafter: "CoE") and European Commission (hereinafter: "EC") were used as a source of*

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[2] The publications of the Judges' Association are posted at http://sudije.rs/index.php/o-nama/164-publikacije/95-publikacije.html.

[3] The organization of the Justice System in the Republic of Serbia in the context of constitutional changes – An analysis of EU standards and proposal of possible amendments to the Constitution, accessed on 04/08/2017.

[4] *Ibid*, page 6.

[5] *Ibid*, page 7.

[6] *Ibid*, page 6.

[7] *Ibid*, page 6.

EU standards"[8], the text mainly invokes documents of the CoE Venice Commission (hereinafter: "VC") as a source, as well as the VC itself, as the most relevant interpreter of European standards.

We often had the opportunity, in the last couple of years, to hear from representatives of the executive and other politicians similar ideas – about the need to restrict the judicial power in order to establish a system of checks and balances; as well as about the possibility (right) of the candidate state, in the absence of European acquis for the judiciary, to choose a specific concept among those applied in European countries.

In view of such assumptions, frequently "promoted" by the politicians, we may conclude that the latter think that too much attention is paid to the need for the judiciary to be independent. On the other hand, they seem to believe that these same judges are insufficiently accountable and efficient, that they are unpredictable (due to inconsistent case-law) and illegitimate (since they are not elected by the citizens and "isolated" within their own guild). Meanwhile and in opposition to the above statements, it may be inferred that the political powers, (legislative and executive) while not being in the position to really intervene and "repair" such "overly independent" and "alienated" judicial branch, intend to introduce "reforms" and perhaps even constitutional changes in order to finally remedy the problems they are convinced to exist in the judiciary.

3. The principal problems in the judiciary

As opposed to the problems with the judiciary, as formulated above, the Judges' Association is of the opinion that there are three principal problems with the functioning of the judicial branch: insufficient (institutional and actual) independence of the judiciary, deficient training of judges (especially permanent training) uneven caseload at the level of different courts, but also between judges.

All the remaining problems in the Serbian judiciary, including slowness, backlog of old cases and inconsistent case-law stem from the aforementioned three. Therefore it is necessary to deal with these three main issues. After the conditions for greater independence, better training and a more equitable caseload allocation are created, the effectiveness, predictability and access to the court system will be improved, which, in turn, will increase the citizens' trust in the judiciary.

The essentially identical position stems from Opinion 17(2017) of the Consultative Council of European Judges of the CoE (hereinafter: "CCJE") on the evaluation of judge's work, the quality of justice and respect for judicial independence: *"The Consultative Council of European Judges (CCJE) has paid constant attention to two fundamental matters. First, the protection of judicial independence*[9] *and secondly, ways of maintaining and improving the quality and efficiency of judicial systems.*[10]" (Paragraph 1.). This Opinion sublimates all the relevant documents pertaining to the evaluation of judges' work: *This Opinion has been prepared on the basis of previ-*

[8] *Ibid*, page 2.

[9] See the CCJE Opinion number 1(2001).

[10] See CCJE Opinions number 3(2002), number 4(2003), number 6(2004), number 11(2008), number 14(2011).

ous CCJE Opinions and the Magna Carta of Judges (2010) and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation (CM/Rec(2010)12) of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter Recommendation (CM/Rec(2010)12). It also takes account of the United Nations Basic Principles on the Independence of the Judiciary (1985), the Bangalore Principles of Judicial Conduct (2002), the General Report[11] *of the International Association of Judges (IAJ) (2006) (hereafter IAJ General Report), the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability (hereafter Kyiv Recommendations), and the Report of 2012-2013 of the European Network of Councils for the Judiciary (ENCJ) on minimum standards regarding evaluation of professional performance and irremovability of members of the judiciary (hereafter ENCJ Report). The Opinion takes account of the member states' replies to the questionnaire on the individual evaluation and assessment of functioning judges and of a preparatory report drawn up by the expert appointed by the CCJE, Ms. Anne SANDERS (Germany)"*[12].

3.1. Insufficient independence

The insufficient independence of judges and courts is evident in the daily workings of the courts and judges, which are defenseless against the mostly unfounded populist and demagogic attacks by politicians and insufficiently independent and professional media, manipulated by these same politicians. However, the insufficient independence of the courts and judges also exists at the normative level.

The concepts enshrined in the Constitution have cemented the influence of both the legislative and executive branch on the judiciary. Undue political influence on the courts is made possible, inter alia, by the constitutional provisions concerning the powers of the National Assembly to elect first-term judges, as well as to elect the presidents of the courts and all members of the HJC, which, in turn, elect judges for a permanent term. It's also enabled by the fact that the members of the HJC are "ex officio" the current politicians – representatives of the legislative and executive branch (the Chairman of the Judiciary Committee of the National Assembly and the Minister of Justice)[13].

Furthermore, the insufficient independence of the courts at the constitutional level has also been made possible by the existence of the so-called "trial" term of three years for first-term judges, in the absence of constitutional reasons for the termination of the judge's office and for the dismissal of judges, as well as in the lack of material guarantees for judges and courts, which are the foundation and guarantee of judicial independence[14].

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[11] The title of that report "How can the appointment and assessment (qualitative and quantitative) of judges be made consistent with the principle of judicial independence?" See at http://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/I-SC-2006-conclusions-E.pdf .

[12] Opinion number 17(2014) CCJE, paragraph 7 (paragraph 3).

[13] Opinion number 405/2006 on the Constitution of the Republic of Serbia CDL-AD(2007)004 from 19/03/2007 paragraphs 65 and 70.

[14] *Ibid*, paragraphs 64 and 66.

Amendments to the Constitution are, in this regard, necessary, provided that the right conditions are met. In the Report on Judicial Independence CDL-AD (2010) 004 dated 16/03/2010, the Venice Commission said in paragraph 82 that standards should be respected by states in order to ensure internal and external judicial independence, with the following standard topping the list: "The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability."

However, independence may not be gained by merely a constitutional proclamation, as evidenced by the fact that, while the Constitution guarantees them the permanence of judicial office, only 52% of judges in Serbia believe they are truly independent. The judges are convinced that their independence could be better ensured in the existing legal framework if only the requisite political will existed. The legal concepts governing the status of judges and the functioning of courts are intruding deeply in the independence of courts and judges. Court presidents are vested with too much power, even the conditions for their retirement are different (if they fulfil the criteria for old-age retirement, they remain in office until the end of their term), the Justice Minister is empowered with adopting the Rules of Court Procedure, as well as to set out the framework criteria for the necessary number of staff and decide about the procedure of recruiting court trainees. The involvement of the executive branch in the Managing Board of the Judicial Academy (JA) is especially problematic, as well as its direct institutional and practical influence on the JA. In order to remedy such a situation in terms of boosting judicial independence, it is not necessary to wait for amendments. The Rules of Court Procedure, a very important document for the workings of the judiciary, could be adopted by the Supreme Court of Cassation (i.e. the President of that Court) subject to prior opinion of all judges of that court, instead of having it adopted by the Justice Minister (as it is currently the case). Furthermore, the current tasks of the President of the Court could be carried out by a collective body, which would include the President, as well as the judges elected by their peers in the court, etc. *"Experience nonetheless shows that in many countries, the best institutional concepts cannot work without the good will of those accountable for their implementation and enforcement. The fulfilment of the existing standards is therefore at least as important as setting new ones."*[15]

3.2. Insufficient competence

Competence is the necessary requirement for judicial office and, in addition to integrity of judges, it is one of the main criteria for someone to become a judge. The Judges' Association shares to the position of CCJE that: "*The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality.*"[16] Judges perform a

[15] Venice Commission Report on the Independence of Judicial Systems, Part I: Independence of Judges, CDL-AD(2010)004, Study number 494/2008 from 16/03/2010, paragraph 10.

[16] Opinion number 17. CCJE on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, paragraph 1.

very important function, which needs them to be competent and to have integrity. The Judges' Association shares the position of CCJE from Opinion number 17(2014), paragraph 4, that: *Judges perform indispensable duties in each democratic society that respects the rule of law[17]. Judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution[18] and decide cases in a timely manner and independently and must be bound only by the law. They must give cogent reasons for their decisions[19] and must write in a clear and comprehensible manner[20]. Moreover, all binding decisions of judges must also be enforced effectively[21]. Judicial independence does not mean that judges are not accountable for their work. The CCJE has laid emphasis on maintaining and improving the quality and efficiency of judicial systems in the interest of all citizens[22]. Where it exists, the individual evaluation of judges should aim at improving the judiciary while ensuring the highest quality possible. That exercise must be done in the interest of the public as a whole.[23]).*

Hence, it does no harm to reiterate that competence is one of the main preconditions for the proper discharge of judicial office. Only those judges whose competence is accompanied by integrity may command the two-fold trust necessary in societies ruled by law: the trust of judges in themselves, in the meaningfulness of their work, on one hand, and the trust of citizens in the impartiality of judges and the equity of court decisions, on the other hand.

Competence will be further elaborated on below, in the part concerning the reasons against addressing the issue of competence by failing to differentiate between competence and the training received on the Judicial Academy and through "raising" the latter to the level of constitutional category and prescribing the aforementioned training at the JA as a prerequisite for judge's election.

3.3. Uneven caseload for judges and between courts

The problem of uneven caseload between judges, as well as between different courts, reflects unevenly on the citizens' access to justice, meaning that, depending on the work burden of a particular court or judge, the dispute will be finished in a different time period. Timely access to justice requires the trial, including the enforcement of the court decision, to be finished in a reasonable and predictable time period. For that to happen, however, the state needs to ensure the proper conditions, as emphasized by the European Court for Human Rights (hereinafter: "ECHR") in the decision in Zimmermann v. Switzerland[24] and other related deci-

[17] See Recommendations CM/Rec(2010)12, paragraphs 59- 65.

[18] See CCJE Magna Carta of Judges (2010), paragraph 15.

[19] See CCJE Opinion number 11 (2008), paragraph 36.

[20] See CCJE Opinion number 11 (2008), paragraph 32.

[21] See CCJE Opinion number 13(2010), Conclusion A; CCJE Magna Carta of Judges (2010), paragraph 17.

[22] See CCJE Opinions number 1(2001), number 3(2002), number 4(2003), number 6(2004) and number 11(2008).

[23] Opinion number 17(2014) CCJE, paragraph 7.

[24] Zimmermann and Steiner v. Switzerland, judgment in application 8737/79 from 13/07/1983.

sions, as well as a series of international recommendations and opinions. The excessive burden on judges with too many cases results in plummeting quality of trials, since the judges are required to be efficient in the sense of adjudicating as many cases as possible in the shortest possible term. Requests to adjudicate cases, instead of solving problems are justified by the fact that the ECHR, in the judgments against Serbia, primarily establishes violations of the right to trial in a reasonable time.

Of the 153 cases in which it ruled on the substance, the ECHR found in 136 of them that rights were violated, whereas it established in the same number of cases the existence of a violation of the right to trial in reasonable time and of the right to fair trial – in 28 cases each – which constitutes 18% of all the decisions passed. The fact that in 50 cases (1/3), a problem was found to exist with the enforcement of court decisions, especially in so-called repetitive cases, is the responsibility of the state, since the courts had already passed a final verdict in these cases. Therefore, the claim that inefficiency is one of the main problems of the Serbian judiciary is simply inaccurate and deliberately overblown. The problem clearly lies in something else – in the quality of legal protection, namely the professionalism of judges and the conditions they work on. So, the described structure of the identified violations clearly demonstrates that the quality of justice, rather than speed, is the main thing that needs to be improved in the Serbian justice system.

The problem of an uneven caseload became increasingly evident as of 2010, with the beginning of the application of the Law on the Seats and Regions of Courts and Public Prosecutors Offices[25] that drastically reduced (from 138 to 34) the number of basic (hitherto municipal) courts. On 01/01/2014 started the implementation of the new Law on the Seats and Regions of Courts and Public Prosecutors Offices[26], which increased the number of basic courts to 66, along with another 29 court units, as well as of the amended Law on the Organization of Courts[27] that "divided" the second-instance competence in criminal matters between appellate courts and higher courts. On 01/10/2013, the Code of Criminal Procedure[28] started to be implemented, which has seen the transfer of almost 40.000 investigative cases to the public prosecutor's office. In spite of the aforementioned amendments, which have reduced the uneven case load to a certain extent, especially in criminal matters, the problem remains. The uneven caseload is still much greater than before 2010.

Of the 26 higher courts in Serbia, at the end of 2016, the following number of cases remained, per one judge:

- First-instance civil cases 187 cases, but that number in Belgrade is 244, in Novi Sad 340, in Zaječar 430, Nis 462, Vranje 1076, Kruševac 1218, while in 17 courts that number is below 50;

[25] The Law on Seats and Regions of Courts and Public Prosecutors' Offices, *Official Gazette of the RS*, number 116/08.

[26] The Law on Seats and Regions of Courts and Public Prosecutors' Offices, *Official Gazette of the RS*, number 101/13.

[27] Law on Amendments to the Law on the Organization of Courts, *Official Gazette of RS* number 101/13.

[28] Criminal Procedure Code, *Official Gazette of the RS,* number 72/11, 101/11, 121/12, 32/13, 45/13, 55/14.

- First-instance criminal matters 24 cases, but that number in in Niš is 38, Novi Sad 41 and in Belgrade 68;
- In appellate civil matters 276 cases, but that number in in Novi Sad is 658, Niš 799, Belgrade 976, Kragujevac 976; while in 15 courts that is a double-digit number.

Of the 66 basic courts, at the end of 2016, the following number of cases remained per one judge:

- In civil cases 289, but that number in Belgrade, in the First Basic Court is 560, while in the Third Basic Court it is 531, in Sjenica 409, Niš 437, Lebane 444, Kuršumlija 588, Kragujevac 862, while in 15 courts the number is between 100 and 200 cases per judge, and in 13 courts that is a double-digit number;
- In criminal matters 97 cases, but that number in Pirot is 200, Prijepolje 210, Obrenovac and Despotovac 227 each and in Lazarevac 317.

An uneven caseload also exists in the 16 commercial courts. At the end of 2016, there remained 379 cases in average per judge, with that number in Belgrade being 637, Kragujevac 503 and Novi Sad 457.

This uneven burden is the consequence of the inadequate court network, inadequate jurisdiction of the courts and the insufficient number of judges in certain towns. It should be borne in mind that the "distribution" of judges depends on the judicial and administrative power – the HJC – and that the network of courts and their jurisdiction are subject to legal provisions and hence in the responsibility of the legislative and executive branches.

4. **The questionable proposals for certain constitutional concepts for the judiciary**

Here we want to point out, as the Network said in the text in question, to "the key issues for judicial independence, namely to certain concepts that are proposed in that document as potential amendments to the Constitution. The latter did not so far address some of these matters. However, some of these concepts, considered by the Judges' Association as threatening for the judiciary, are already mentioned in the National Strategy for the Reform of the Judiciary[29] (hereinafter: "the National Strategy"), the Action Plan for Implementing the National Strategy for the Reform of the Judiciary[30] (hereinafter: "AP"), and the Action Plan for Chapter 23[31] (hereinafter: AP 23). We remind that the professional associations of judges and prosecutors did not participate in the drafting of the National Strategy for the Reform of the

[29] The National Strategy for the Reform of the Judiciary for the period 2013-2018, *Official Gazette of the RS*, number 57/13 from 03/07/2013.

[30] Action Plan for the Implementation of the National Strategy for the Reform of the Judiciary for the period 2013-2018, *Official Gazette of the RS*, number 71/13, 55/14, Conclusion on the Approval of the Revised Action Plan for the Implementation of the National Strategy for the Reform of the Judiciary for the period 2013-2018, *Official Gazette of the RS*, number 106/16 from 29/12/2016.

[31] The European Commission issued a positive opinion about the last version of the Action Plan for Chapter 23 on 25/09/2015 The Action Plan for Chapter 23 was adopted by the Government in its technical term after the elections, on the session held on 27/04/2016. The Plan has not been published in the Official Gazette.

Judiciary, since their requests for establishing the responsibility for rule of law violations in the re-election and its review, were not accepted. They also requested elections to be held for the members of the HJC and SPC from the ranks of judges and prosecutors, which was denied.

These are the following questionable proposals: to determine precisely the types of undue influence on the judiciary (Article 149 of the Constitution); to weaken the principle of irremovability of judges (Article 150 of the Constitution), allegedly in order to achieve greater efficiency of the justice system; to narrow down the immunity of judges (Article 151), although it is already quite narrow in the functional sense; to prescribe the participation of the President in the procedure of appointing judges; to introduce case-law as a source of law in the Republic of Serbia (Articles 142, paragraph 2 and 145, paragraph 2); to equalize the notion of competence of judges as a necessary prerequisite for judicial office with one of the possible types of training (through the Judicial Academy) and the evaluation of judge's work, as a manner of assessing the competence of judges, as well as to raise the Judicial Academy and the evaluation of judges to the constitutional level.

As to the HJC (apart from the proposals to remove the representatives of the executive and the legislative branch from membership in the HJC and to cease electing a member from the ranks of judges from the territory of autonomous provinces, which proposals the Judges' Association supports), disputed are the proposals to completely change the HJC concept, in terms of further changes to the composition of the HJC by proposing that the President of the HJC should not be a judge and that HJC should include, apart from law professors, *"renown jurists possessing recognized knowledge and experience in the area of organization, functioning and reform of the judiciary, which would be elected by the National Assembly at the proposal of competent parliamentary judiciary committee, as it is the case with the judges of the Constitutional Court")*, to reduce the number of HJC members (from 11 to 10); to have the HJC function differently ("the golden vote" of the President of the HJC); to shorten the term of office of HJC members from five to four years; to narrow down the jurisdiction of the HJC and to have the Constitutional Court decide about the remedies lodged against all decisions of the HJC on the status of judges.

Also contentious are the proposed concepts to narrow down the immunity of judges, which is already tightly connected to the discharge of judicial office; on abandoning the principle of adjudication by a panel of judges (collegiality), namely pushing out the lay jurors from the trial (and, alternatively, the introduction of the jury instead of lay jurors, or replacing lay jurors with trainee judges, namely those attending the initial training in the Judicial Academy).

Finally, what is also contentious is the absence of proposals on certain important issues that deserve to be included in the Constitution (the content of judicial power, the material guarantees for independence, the reasons for termination of judicial office), which remain undeservedly outside of the scope of constitutional concepts.

The Judges' Association stresses that, in its proposals for potential constitutional concepts tabled to the Ministry of Justice on 30/06/2017, it presented a series of proposals that are completely different from the ones cited above, especially regarding the HJC, proposals it still stands by to this day.

5. On specific contentious issues

5.1. To precisely determine the types of undue influence on the courts (Article 149 of the Constitution)

The Judges' Association is of the opinion that there is no problem whatsoever with the overly extensive interpretation of the present provision of Article 149, paragraph 2 of the Constitution, which prescribes that any influence on the judge in performing his/her judicial duties shall be prohibited.

The Judges' Association is not aware of a single case where the legislator or the executive branch were prevented, by such constitutional provisions, from passing a law or bylaw or taking other steps from their area of competence that would pertain to the judiciary (permitted influence), namely where they were undermined by such constitutional provisions. On the contrary, the Constitutional Court established several times that certain laws and other legal acts concerning the judiciary were unconstitutional, stressing that the legislative and executive branch participated in the adoption of such acts.

If, however, the legislative and executive branch have been blocked in their attempt to do something (which would constitute undue influence on the judiciary), then the goal of Article 149, paragraph 2 of the Constitution would have been achieved and shown its meaningfulness. Therefore:

The Judges' Association proposes the constitutional prohibition of any influence on the judge in performing his/her function, contained in the provision of Article 149, paragraph 2 of the Constitution, to remain unchanged.

5.2. Weakening the principle of irremovability of judges (Article 150 of the Constitution)

5.2.1. The irremovability of judges as a guarantee of judicial independence

Irremovability is one of the guarantees of judicial independence and it may not compensate for the poor performance of the legislative and executive branch, based on which the courts network and the jurisdiction of courts are defined.

As opposed to the correct understanding that the main problems in the judiciary are insufficient independence, inadequate training of judges and the uneven caseload for judges and between different courts, the executive and judicial and administrative powers, as well as the authors of the said text, believe that the principal issues in the judiciary, apart from the excessive requests for independence, lie in poor efficiency and inconsistent case-law (case-law will be analyzed below).

Although the citizens rightfully expect the courts to become more efficient, the government, by excessively and unnecessarily[32] insisting on speeding up the proceedings and adjudicating as many cases as possible in the shortest possible time[33],

[32] See the part on the structure of the violations of rights in the decisions the ECHR adopted against Serbia, which shows that a violation of the right to fair trial was established in less than in 1/5 of the cases.

[33] As opposed of such aberrant understanding of efficiency, the Recommendation of the Council of Ministers of the Council of Europe Rec. 2010(12) to member states on the independence, efficiency and

measures taken in past have sacrificed the quality of trials for the sake of achieving a semblance of efficiency. Such attempts result in unwanted outcomes – violations of the rights of citizens to a fair trial[34], since these measures, paradoxically, lead to longer trials, an increase in the backlog of old cases in first-instance and second-instance courts, plummeting quality of judgments and, consequently, the dissatisfaction of citizens with the justice system.

5.2.2. The misconception of raising the "efficiency of the courts" to the level of the highest priority

The requirement of efficiency at all costs, even at the cost of weakening the principle of irremovability, as one of the elements of judicial independence, is not based on a realistic understanding of the reasons for the aforementioned backlog. Therefore, it may lead to the unacceptable conclusion that, due to the provisions of Article 150[35] *"Our Constitution has a much more rigid approach to the possibility of movability of judges than it is prescribed by EU standards* and that *"it has consequences at several levels, the most important of which is the impossibility to meaningfully influence, through the mobility of judges on improving the courts network and thus improve the access of citizens to justice, although the latter should precisely be the priority"*[36].

In accordance with the Recommendation of the Committee of Ministers of the Council of Europe Rec.2010(12) to member states about judges: independence, efficiency and responsibilities, *"The authorities responsible for the organization and functioning of the judicial system are obliged to provide judges with conditions en-*

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responsibilities defines efficiency in the following manner: "Efficiency is the delivery of quality decisions within a reasonable time following fair consideration of the issues." (Paragraph 31.).

[34] In early May 2014, the President of the Supreme Court of Cassation first requested the other court presidents to take measures in order to reduce the backlog of cases (for preferential treatment i.e. skipping the queue, adjudicating and expediting cases where the procedure has been going on for longer than 5 years – for criminal cases and up to 10 years – for civil cases until 15/11/2014). Then, all the court presidents did the same in each specific case and ordered formally the judges to complete and expedite old cases by 15/11/2014. It was not only unlawful, but impossible and simply did not happen, and not only due to the protests of attorneys at law. Part of the judges understood the request for speed as the ultimate imperative and started to adjudicate cases hastily. It happens that, in order to speed up cases, especially old ones, the necessary evidence is not presented, in spite of the proposals of the parties. If the higher instance should repeal a decision, certain judges would merely transcribe (literally) their previous judgment. The court of second instance may repeal a decision only once and if, in the appellate procedure, they do not uphold the repeated decision of the court of first instance, they must open the debate in the appellate proceedings, which slows down their work, both in the given case and in other second-instance cases. Furthermore, for the sake of quicker adjudication, it happens that courts of second instance confirm the repeated first-instance decisions, although they had previously repealed an identical decision. Therefore, it was observed that the Constitutional Court has been increasingly acknowledging the fact that the court decisions, even those of the highest courts, have been violating the right to fair trial, including the right of the party to a reasoned court decision.

[35] Article 150 of the Constitution prescribes that a judge shall have the right to perform his/her judicial function in the court to which he/she was elected, and may be relocated or transferred to another court only on his/her own consent (paragraph 1), and that in case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may exceptionally, without his/her consent, be permanently relocated or transferred to another court, in accordance with the Law (paragraph 2).

[36] The said text, the ROLAN Network, page 27.

abling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality" (paragraph 32); *"Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently"* (paragraph 33); *"A sufficient number of judges and appropriately qualified support staff should be allocated to the courts"* (paragraph 35).

In its Opinion number 17(2014), paragraph 5, the CCJE says that: *"judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice*[37]*, such as a lack of financial resources*[38]*, problems concerning the initial and in-service training of judges* [39] *and the unsatisfactory elements regarding the organization of the judiciary and also the possible civil and criminal liability of judges* [40]*."*

The European standards for the judiciary are merely the minimum that each state should integrate in its legal system. In a country such as the Republic of Serbia, which must boost its judicial independence as the main prerequisite for judicial impartiality and the right of the citizens to a fair trial, no constitutional guarantee of independence can do no harm and that includes the provision on irremovability.

Furthermore, it is evident that the irremovability of judges does not undermine the efficiency of the justice system. As in the case of medical treatment, where one must first recognize the type of ailment and only then apply the appropriate medicine, in the justice system too the causes of the problems must first be identified in order to proceed with finding the proper applicable solutions.

On the other hand, access to justice, which would allegedly be improved by doing away with the principle of irremovability of judges, must be viewed from multiple aspects: the physical (geographic), legal and time aspect, of which only a few will be mentioned here. Not a single one of these aspects has been achieved so far by the measures introduced and such situation is unlikely to change, although the Serbian justice system has been "in reforms" since 2000.

5.2.3. About the causes of the lack of efficiency of the courts

The hitherto courts network, which included 138 municipal courts[41] was completely changed in 2010, as it has already been mentioned, by the formation of 34 basic courts with 98 court units. The new courts network was allegedly also set up in order to speed up the procedures and to make the system cheaper[42]. However, in

[37] See CCJE Magna Carta of Judges (2010), paragraphs 3 and 4.

[38] See CCJE Opinion number 2(2001), paragraph 2.

[39] See CCJE Opinion number 4(2003), paragraphs 4, 8, 14 and 23-37.

[40] See CCJE Opinion number 3(2002), paragraph 51.

[41] The Law on Seats and Regions of Courts and Public Prosecutors Offices, *Official Gazette of the RS*, number 63/2001 and 42/2002.

[42] Changes to the courts network were said to be carried out in order to speed up the proceedings and making the system cheaper, to crack down on the corruption chain (the defendant, the parties, the counsel, the policeman, the prosecutor, the judge), while adhering to "random judge principle" and even caseload for all courts and judges. It was announced that the cases will be randomly distributed to each judge in the basic court and that the judges, not the citizens, will be travelling to the courts, to reach the citizens. As to civil cases (litigation, probate proceedings, extrajudicial), the situation differed from court to court, since every court president was authorized to organize on his own the trials in the

reality, such a new setup "introduced", both in the geographic and financial sense, as well as time wise, an uneven access to justice, i.e. it placed the citizens in an uneven position in terms of access to justice. Although it seemed logical, until a meaningful analysis of the situation and the effects of the potential changes is made, to return the courts network to its previous state, it was finally changed as of 01/01/2014, as it was already mentioned, with the introduction of another 32 basic courts and with the reduction of the number of court units to 29. This has only partially removed the disruptions that emerged after the system that existed for decades was hastily changed.

The efficiency of the court system and the access of citizens to justice is also affected by the many legal amendments. Instead of the Labor Law from 2001[43], a new Law was adopted in 2005, which was, in turn, amended five times[44]. The Law on Companies[45] from 2004 was amended in 2011, and a new Law[46] was adopted that same year, which new Law was, in turn amended the same year and subsequently two more times; the Law on the Market of Securities and Other Financial Instruments[47] from 2002 was amended as many as six times by 2006, when the new Law was passed[48], which was replaced in 2011 by the Law on the Capital Market[49] which, in turn, was amended in 2015 and 2016, while the Law on the Takeover of Joint Stock Companies[50] was passed in 2006, only to be amended in 2009, 2011 and 2016.

The Law on Privatization[51] from 2001 was amended another 9 times and the new Law was passed[52] in 2014, only to be amended twice in 2015 and a third time in 2016; the Law on the Privatization Agency[53] from 2001 was amended in 2004, 2010, 2014 and 2015 and ceased to be effective on 01/02/2016 with the coming into force of the Law on the Amendments to the Law on the Law on Privatization[54]; The Law on the

court units in the region of "his" court. Hence, in some courts, judges were "travelling" along with their staff to the court units, while in other courts, only some judges worked in court units (most often those that lived in the same units).

[43] The Labour Law, *Official Gazette of the RS*, number 70/2001, 73/2001

[44] The Labour Law, *Official Gazette of the RS*, number 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 - decision of the Constitutional Court.

[45] The Law on Companies, *Official Gazette of the RS,* number 125/2004 and 36/2011 – other law.

[46] The Law on Companies, *Official Gazette of the RS*, number 36/2011, 99/2011, 83/2014, 5/2015.

[47] Law on the Market of Securities and Other Financial Instruments, *Official Gazette of the FRY,* number 65/2002 and *Official Gazette of the RS,* number 57/2003, 55/2004, 45/2005, 101/2005 - other law, 85/2005 – other law and 46/2006 – other law.

[48] Law on the Market of Securities and Other Financial Instruments, *Official Gazette of the RS,* number 47/2006.

[49] Law on the Capital Market, *Official Gazette of the RS*, number 31/2011, 112/2015, 108/2016.

[50] Law on the Takeover of Joint Stock Companies, *Official Gazette of the RS*, number 46/2006, 107/2009, 99/2011 108/2016.

[51] Law on Privatization, *Official Gazette of the RS*, number 38/2001, 18/2003, 45/2005, 123/2007, 123/2007 – other law, 30/2010 – other law, 93/2012 and 119/2012, 51/2014, 52/2014 – decision of the Constitutional Court.

[52] Law on Privatization, *Official Gazette of the RS,* number 83/2014, 46/2015, 112/2015, 20/2016 – original interpretation.

[53] Law on the Privatization Agency, *Official Gazette of the RS*, number 38/2001, 135/2004, 30/2010, 115/2014 and 89/2015.

[54] Law on Amendments to the Law on the Privatization Agency, *Official Gazette of the RS,* number 112/2015

Shareholders Fund[55] from 1998 was replaced by a new Law in 2001[56], was amended in 2005, only to be scrapped on 15/05/2010 pursuant to Article 16, item 1 of the Law on the Privatization Agency; The Law on the Business Registers[57] from 2004 was amended in 2009 and 2011, respectively, the same year which saw the adoption of the Law on the Procedure of Registration in the Business Registers Agency[58], which was amended in 2014.

The Law on Bankruptcy Proceedings[59] from 2004 was amended in 2005 and replaced by the Bankruptcy Law[60] in 2009, which was, in turn, subsequently changed three times; The Law on Rehabilitation, Bankruptcy and Liquidation of Banks[61], which was changed six times in 11 years (since 1990) and was replaced by the Law on Bankruptcy and Rehabilitation of Banks and Insurance Companies[62] from 2005, which was, in turn, amended twice and a new Law[63] in February in 2015.

The problematic and often uncoordinated amendments to procedural laws had a negative impact on the course of court proceedings.

The Law on Civil Procedure from 2004[64] was amended three times, while the current Law[65] adopted in 2011 was also changed three times already. The Law on Enforcement Procedure[66] from 2000 was amended as early as the same year and then again the next; the new Law[67] was adopted in 2004, only to be replaced to the Law on Enforcement and Security[68] from 2011, which was, in turn, replaced by a different law[69] and subsequently amended another three times; the current Law on Enforcement and Security[70] was amended as early as in 2016.

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[55] Law on the Shareholders Fund of the Republic of Serbia, *Official Gazette of the RS*, number 44/98.

[56] Law on the Shareholders Fund, *Official Gazette of the RS*, number 38/2001 and 45/2005.

[57] Law on the Business Registers Agency, *Official Gazette of the RS,* number 55/2004, 111/2009 and 99/2011.

[58] Law on the Registration Procedure in the Business Registers Agency, *Official Gazette of the RS*, number 99/2011, 83/2014.

[59] Law on Bankruptcy Procedure, *Official Gazette of the RS*, number 84/2004 and 85/2005 – other law.

[60] Law on Bankruptcy, *Official Gazette of the RS*, number 104/2009, 99/2011 – other law and 71/2012 – decision of the Constitutional Court, 83/2014.

[61] The Law on Rehabilitation, Bankruptcy and Liquidation of Banks, *Official Gazette of the SFRY*, number 84/89 and 63/90 *and Official Gazette of the FRY*, number 37/93, 26/95, 28/96, 44/99 and 53/2001.

[62] Law on Bankruptcy and Rehabilitation of Banks and Insurance Companies, *Official Gazette of the RS*, number 61/2005, 116/2008 and 91/2010.

[63] Law on Bankruptcy and Rehabilitation of Banks and Insurance Companies, *Official Gazette of the RS*, number 14/2015.

[64] Law on Civil Procedure, *Official Gazette of the RS*, number 125/2004, 111/2009, 36/2011, 53/2013 – Decision of the Constitutional Court.

[65] Law on Civil Procedure, *Official Gazette of the RS*, number 72/2011, 49/2013 – Decision of the Costitutional Court, 74/2013 – Decision of the Constitutional Court, 55/2014.

[66] Law on Enforcement Procedure, *Off. Gazette of the FRY*, number 28/2000, 73/2000 and 71/2001.

[67] Law on Enforcement Procedure, *Official Gazette of the RS*, number 125/2004.

[68] Law on Enforcement and Security, *Official Gazette of the RS*, number 31/2011, 99/2011 – other law, 109/2013 – decision of the Constitutional Court, 55/2014, 139/2014.

[69] The provisions of articles 300 and 311 of the Law on Enforcement and Security have ceased to be effective on January 4, 2012, on the day when the Law on Amendments to the Law on the Business Register Agency, *Official Gazette of the RS*, number 99/2011.

[70] Law on Enforcement and Security, *Official Gazette of the RS*, number 106/2015, 106/2016 – original interpretation.

The Penal Code[71] from 2005 was amended the same year, as well as twice in 2009, and once in 2012, 2013 and 2014. The Criminal Procedure Code [72] from 2001 was amended as many as nine times by 2010; the next Criminal Procedure Code[73] from 2006, though it was never implemented, was amended in 2007 and 2008, while the current Criminal Procedure Code[74] adopted in 2011 has already been amended five times – the first time was even before it started to be applied, the same year when it was adopted, followed by amendments in 2012 and on two occasions in 2013 and once in 2014.

The same situation exists with laws pertaining to the status and organization of the justice system: The Law on the High Judiciary Council[75] from 2001 was amended five times, while the Current Law on the High Judiciary Council[76] from 2008 – three times; the previous Law on the Organization of Courts[77] from 2001 was amended six times, and the current one, from 2008, ten times[78]; the previous Law on Judges[79] from 2001 was changed 11 times in eight years, while the existing Law on Judges[80] from 2008 as many as 15 times in less than nine years.

One does not need to be an expert to understand that such a dynamic of introducing amendments to laws, which laws are mostly already not entirely satisfactory or mutually aligned, as well as the frequent "wandering" in relation to different legislative concepts, all undermine the quality and efficiency of trials, the quality and consistency of judgments, legal certainty, access to justice and confidence of the citizens in the justice system.

The legislative and executive branch should make a strategic decision that a systemic, carefully planned, harmonized and applicable approach to long-term prob-

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[71] Penal Code, *Official Gazette of the RS*, number 85/2005, 88/2005 – corrigendum, 107/2005 – corrigendum, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.

[72] The Criminal Procedure Code, *Official Gazette of the FRY*, number 70/2001 and 68/2002 and *Official Gazette of the RS*, number 58/2004, 85/2005, 115/2005, 85/2005 – other law, 49/2007, 20/2009 – other law, 72/2009 and 76/2010.

[73] The Criminal Procedure Code, *Official Gazette of the RS*, number 46/2006, 49/2007 and 122/2008.

[74] The Criminal Procedure Code, *Official Gazette of the RS*, number 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, 55/2014.

[75] Law on the High Judiciary Council, *Official Gazette of the RS*, number 63/2001, 42/2002, 39/2003, 41/2003 – corrigendum, 44/2004 and 61/2005.

[76] Law on the High Judiciary Council, *Official Gazette of the RS*, number 116/2008, 101/2010, 88/2011, 106/2015.

[77] The Law on the Organization of Courts, *Official Gazette of the RS*, number 63/2001, 42/2002, 27/2003, 29/2004, 101/2005, 46/2006 and 116/2008 – other law.

[78] The Law on the Organization of Courts, *Official Gazette of the RS*, number 116/2008, 104/2009, 101/2010, 31/2011 – other law, 78/2011 – other law, 101/2011, 101/2013, 40/2015, 106/2015, 13/2016, 108/2016.

[79] The Law on Judges, *Official Gazette of the RS*, number 63/2001, 42/2002, 17/2003 – decision of the Constitutional Court RS, 25/2003 – corrigendum of decision CCRS , 27/2003, 29/2004, 35/2004 – decision of the Constitutional Court, 44/2004, 61/2005, 101/2005, 46/2006 – other law and 21/2009 – decision of the Constitutional Court.

[80] The Law on Judges, *Official Gazette of the RS*, number 116/2008, 58/2009 – decision of the Constitutional Court, 104/2009, 101/2010, 8/2012 – decision of the Constitutional Court, 121/2012, 124/2012 – decision of the Constitutional Court, 101/2013, 111/2014 – decision of the Constitutional Court, 117/2014, 40/2015, 63/2015 – decision of the Constitutional Court, 106/2015, 63/2016 – decision of the Constitutional Court, 47/2017.

lem solving in the judiciary is necessary. In addition to the requirement for laws to be aligned with the Constitution and international standards, laws must be logical, have clear goals and provide for clear rules, be equal for everyone and essentially to allow for the system to be reviewed and improved. In order to have an applicable and functional judicial system, it is best to reflect on all the necessary and possible amendments at the same time and in a comprehensive manner. Due to the importance of comprehensiveness and systemic changes, all the planned solutions require a careful analysis of potential consequences and applicability, as well as a precise, synchronized and transparent elaboration and implementation in stages. This will enable the laws to be applied in the planned time, without subsequent amendments and delays; this will also allow the newly introduced concepts to yield the desired results. The goals of the reform may be achieved with enabling a system where the judiciary is given the conditions to genuinely perform its duties in an independent way, which, in turn, is a prerequisite for impartial and fair trial. Such conditions are provided not only by removing external political influence by the executive and legislative branch, but also by having the judiciary avoiding to transmit these influences on the courts – it should rather be a bulwark against such undue influence. Every shortcut and insincerity in this procedure may render the reforms meaningless; in such a case, it will merely be a semblance of a reform and it will ultimately lead to a "decay" of good ideas. The achievement of the initial goals will be made impossible.

Not wanting to undermine the role and responsibility of judges, we must stress that the reforms process primarily depends on having the relevant applicable laws in place (that the legislator adopts at the proposal of the executive), which regulate the courts network, the jurisdiction of courts and procedural rules. Therefore, an *ad hoc* measure of moving the judges may not, in that respect, bring about long-term results in terms of efficiency of the system and access to justice. On the contrary, that measure would most definitely mean reducing the level of judicial independence guarantees and open the room for further attempts to undermine it and therefore undermine the rights of citizens to a fair trial.

Therefore:

The Judges' Association proposes to retain the constitutional measures on the irremovability of judges contained in Article 150 of the Constitution, as well as to amend them as follows:

If court or major part of the jurisdiction of the court to which the judge has been appointed is repealed, the judge may, as an exception, without his/her consent, be permanently moved only to the court of the same type and level.

5.3. Involvement of the President of the Republic in the appointment procedure for judges

The Judges' Association hereby reminds that the constitutional amendments are being carried out, inter alia, due to insufficient independence guarantees. Namely, the Constitution allows for political influence on the judiciary, enabled by the powers (as provided for in the Constitution) of the National Assembly, as the legislative branch, to elect first-term judges, court presidents and all HJC members, which, in turn, elect all judges for a permanent term.

The Judges' Association is aware of the practice of certain European countries with a longstanding democratic tradition, where a representative of the authorities (the Minister of Justice or President of the Republic) appoints judges at the proposal of other bodies. Such a practice, along with the democratic tradition of these countries, does not have a major impact on the actual independence of the judicial branch, although in theory it is not entirely compliant with the principle of separation of powers and judicial independence.

However, in view of the historical experience and the practice in the Republic of Serbia, it is likely that, if such a concept was embraced, judicial independence would come under threat.

The concept under which the HJC would elect judges, as it is already prescribed by the Constitution, which concept is otherwise fully in accordance with the principle of separation of powers and independence of the judicial branch, is the optimum solution for Serbia and should not be abandoned. Therefore:

The Judges' Association believes that the Constitution should not provide for the involvement of the President of the Republic in the procedure of appointment of judges and therefore remains at its proposal for the High Judiciary Council to elect all judges.

5.4. Introduction of case-law as the source of law in the Republic of Serbia (Articles 142, paragraph 2 and 145, paragraph 2)

5.4.1. On case-law in general

Case-law is the totality of aligned and consistent legal positions expressed by the courts of a country in their decisions. Consistent court decisions allow for equality of every citizen before the Law, the predictability of court decisions and hence legal security.

As opposed to Anglo-Saxon countries, which have a common law system, based on precedents (court decisions), Serbia belongs to the European, so-called continental system, which was developed for more than two thousand years on the foundations of Roman Law. The European legal system is centered on written law, which contains the general principles and institutes, based on which, depending on the facts of each particular case, legal conclusions are drawn and the judgment is delivered. In both system (including, therefore, common law), there are problems with an inefficient and expensive structure and inconsistent court decisions.

In the Republic of Serbia, the legal positions accepted in case-law are not binding and formally speaking case-law is not a source of law. But, since judges most often accept and embrace case-law, court decisions, especially those issued by the highest courts, are *de facto* an informal source of Law.

5.4.2. On court decisions in so-called transition countries

Starting from the year 2000, the Serbian judiciary has been in a state of "reforms" and the laws have been changing frequently, incessantly and inconsistently[81].

[81] See part 4.2 about the proposal to give up the irremovability of judges allegedly for the sake of greater efficiency.

Drastic changes to procedural laws have a particularly harmful effect on legal certainty and security.

The principle of material truth, both in criminal and civil procedure, has been abandoned and the procedure was "handed over" to the parties, abruptly and contrary to the existing system. That results in having different outcomes in similar or identical situations – the party that is more astute (meaning that it is able to pay lawyers, expert witnesses, detectives, irrespective of whether it is in the "right" or not) is in the better position of "winning". Moreover, depending on the claim formulation by the attorney of the parties as to the violation of the procedure, which are not controlled anymore by the court ex officio, the court that decides about the appeal in generic situations adopts different decisions (upholds or repeals the decision of lower instance).

The influence and consequence of frequent and inconsistent amendments on the court system of a state has been commented by the ECHR[82] several times when:

- Concludes that *"while amendments may reflect the development of the legal environment, frequent changes result in inconsistent case-law and contribute to a general lack of legal security (which is a violation of the Convention per se);*
- Calls on the relevant states *"to avoid too frequent changes and to consider carefully all legal and financial consequences of the changes before introducing them; and*
- Warns that *the excessive number of new laws and guidelines will not ensure actual and effective protection, since only effective enforcement of the law can provide such protection.*"

5.4.3. The Court in Strasbourg on the inconsistency of court decisions

While there is no doubt that the courts (this phenomenon exists in the courts of all countries) deliver different decisions in seemingly identical factual and legal situations, this must not always mean that the Law has been violated. On the other hand, it is understandable that governments seek to resolve this problem.

The ECHR has also voiced its opinion about the subject, including in the decision against Serbia[83], when it said that:

"54. (ii) ***The possibility of conflicting court decisions is an inherent trait of any judicial system***[84] *which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court.* ***That, in itself, cannot be considered contrary to the Convention*** *(see Santos Pinto v. Portugal, number 39005/04, § 41, 20 May 2008, and Tudor v. Romania, cited above number 21911/03, § 29, 24 March 2009);*

(iii) ***The criteria*** *that guide the Court's assessment of the conditions* ***in which conflicting decisions*** *of different domestic courts ruling at last instance are* ***in breach*** *of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in*

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[82] Ramadi et. al. v. Albania (13/11/2007), Manuhsaqe Puto and others v. Albania (31/07/2012), Bjacy v. Romania (09/12/2009).

[83] *Vučkovic and others v. Serbia*, *Chamber judgmnet from 28/08/2012; as well as of the Grand Chamber from 25/03/2014, which, in paragraph 89, acknowledges the finality in terms of the inadmissible petition due to inconsistent case-law.*

[84] The bold font in the cited excerpts of ECHR decisions is taken from the original text.

*1) **Establishing whether "profound and long-standing differences" exist** in the case-law of the domestic courts,*

*2) **Whether the domestic law provides for machinery for overcoming** these inconsistencies, and*

*3) **Whether that machinery has been applied**, and*

*4) If appropriate, to what **effect** (Iordan Iordanov and Others v. Bulgaria, number 23530/02, cited above § 49-50, 2 July 2009; Beian v. Romania (number 1), number 30658/05, cited above § 34-40, ECHR 2007-V (extracts); Ştefan and Ştef v. Romania, nos. 24428/03 and 26977/03, § 33-36, 27 January 2009; Schwarzkopf and Taussik v. the Czech Republic (dec.), cited above number 42162/02, 2 December 2008; Tudor and Tudor, cited above, § 31; Ştefănică and Others v. Romania, number 38155/02, cited above § 36).*

Such an assessment must also be based on the principle of legal security. That principles guarantees stability in legal situations and contributes to greater confidence of the public in the courts.

However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law, since Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.

Court decisions and case-law should therefore not be set in stone forever. The Law, to the extent to which it is possible, leads and shapes social relations and, where appropriate, contributes to their development. The judges, which administer the Law, have the duty to do it in the proper way and, in the process, to interpret it in a dynamic way."

5.4.4. The approach of the Serbian authorities to harmonizing court decisions

As opposed to the aforementioned position of the ECHR, the executive branch in Serbia, just like the said Network, has been advocating for several years now for a completely different approach to addressing the issue of inconsistent court decisions. The executive clearly believes that certain partial solutions may help building a shortcut towards establishing an optimum balance in the legal system.

The court system is a complex structure consisting of mutually connected and synchronized parts and therefore hasty interventions in it should be avoided. Four main indicators must be taken into account: the number of cases that are to be adjudicated, the time of adjudication, the quality of adjudication and the resources available to the system for such a purpose (laws, judges with their assistants and staff, equipment, the courts and the associated budget and the organization of regions and jurisdiction of the courts). If one of these indicators is to be addressed without the proper safeguards, the rest will be disrupted.

However, that very approach was reflected both in the National Strategy and the AP, which provide for the establishment of the Certification Commission[85], and in

[85] The National Strategy and the Action Plan provide for the introduction of a Certification Commission. Under the AP, the Certification Commission should consist of the President of the Case-Law Department of the Supreme Court of Cassation, four appellate courts, the Commercial Appellate and Administrative Court. The Commission would be assisted, albeit in undefined form for the time being,

AP 23, which says that the normative framework regulating the issues of the mandatory nature of case-law will be analyzed and changed appropriately (1.3.9.1.).

The Judges' Association calls for caution and avoidance of hasty conclusions that the undisputed inconsistency of court decisions that exists may be dealt with by a seemingly simple shift towards a completely different legal system (common law), which is contrary to the historical, educational and legal tradition harbored by Serbia, both during its medieval statehood and its modern, two-century long sovereignty. Hasty and flawed solutions are quick to produce damage that the best court proceeding is then unable to rectify for decades to come.

5.4.5. European standards and opinions of the Venice Commission on the intended way to harmonize court decisions in Serbia

The aforementioned, seemingly simple solutions open the path to a series of serious problems. They are not only contrary to the legal system and tradition of Serbia[86], but they would also undermine the internal independence of judges. In practice, there have been situations with disciplinary proceedings instituted against judges reluctant to change their decision, since they disagreed with the view of their peers. This led to a debate within the courts and the phenomenon was cited in official documents, as a threat to judicial independence[87].

Furthermore, European standards precisely point to the need not to restrict the discretion of judges. Hence, in Recommendation CM/Rec (2010)12 of the CoE Committee of Ministers to member countries from 17/11/2010:

„5. Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.

Chapter III – Internal independence

22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organization should not undermine individual independence.

23. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law."

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by law professors and attorneys at law. Its task would to be to identify court decisions that represent the "best practice" or "best case-law" in certain types of disputes and to have all other decisions in such cases delivered in accordance with the established case-law, namely to prevent decisions being issued from courts, which, in the opinion of the Certification Commission, diverge from case-law. This would provide for equal adjudication by the courts. Moreover, there are already proposals to have bylaws prescribe disciplinary accountability of judges whose decisions have, in the opinion of the Certification Commission, diverged from best case-law, if these judges refuse to change their position in their decisions.

[86] Modern Serbian statehood was established in the XIX century. Serbia adopted its first constitution in 1835 (when only nine states in Europe had a written constitution) and its Civil Code from 1844 was the third civil code in Europe, after the French and the Austrian ones.

[87] Report of the Ombudsman of the Republic of Serbia for 2013, page 3 and EC Progress Report for Serbia for 2014, page 70.

With regards to the situation in Serbia, the Venice Commission commented three times in the last 15 years on the issue of mandatory case-law in relation to the Law on Courts in Serbia and its opinion was negative each time. In the opinion from 24/06/2002, in the Law on Courts, experts Natalie Fricero, Professor of the Faculty of Law in Nice and Giacomo Oberto, Judge from Turin, said they were strongly opposed to such a system of imposed interpretation: "*The Supreme Court should ensure the uniformity of application of the Law rather through the convincingness of the reasoning of the decision, than by the force of some kind of arrêts de règlement, which were rejected by Western European societies two centuries ago.*" In Opinion number 467/2007 from 19/03/2008, on the Draft Law on Judges and the Draft Law on Courts, the Commission said: *"Article 31 states that «The Supreme Court of Cassation determines general legal views in order to ensure uniform application of law by courts». It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction.*" (Paragraph 109)

In Opinion 202/2012 dated 11/03/2013 on the Draft Amendments to Laws on the Judiciary of Serbia, in paragraphs 103-108, the Venice Commission commented on the changes in Article 31 of the Law on Courts, prescribing *that the Supreme Court of Cassation "determines general legal views in order to ensure uniform application of law by courts; gives opinions on draft laws and other regulations governing issues of relevance for the judicial branch",* saying it was explained to it that *"this task was introduced in order to unify the case law, as there are many cases before the European Court of Human Rights on the equal access to justice. It was said that these legal opinions were only mandatory for the judges of the Supreme Court of Cassation (not for lower courts). In addition, it should be regarded as an interpretation of the law, not as an instruction". "105 Nevertheless, the Venice Commission has criticized this method, because it gives the Supreme Court of Cassation a general "rule-making" power, which can conflict with the separation of powers. The exchange of views between judges of different instances, which is provided for in the draft (the new paragraph 3 of Article 24) is as such good and could therefore be recommended. However, when it is combined with Article 31, it becomes less clear. The need to unify practice should in principle be solved by an appeals procedure that could be designed to also solve problems that usually, only or mostly, occur in different categories of small claims cases.*

106. It is not clear whether the Supreme Court adopts general views outside the specific case or while exercising its competence as a court of cassation. In case of the former, this approach will conflict with the principle of the independence of the judiciary. The argument that "general legal views" are adopted with the aim of remedying the most common errors of the judicial system, which due to some reason do not end up at the level of the highest court, seems flawed. It also fails to explain why it is impossible to remedy such errors in appeal or cassation proceedings.

107. The rationale behind such an approach is also questionable in the light of the argument that such "general views" would prevent future applications to the European Court of Human Rights, which already faces a considerable number of cases related to the equal access to justice. If decisions of the lower courts and/or courts of appeal may

end up in front of the European Court of Human Rights, then it may be reasonable to allow similar appeals to reach the Supreme Court of Cassation (or the Constitutional Court) thus allowing the Supreme Court of Cassation (or the Constitutional Court) to establish a precedent within the context of the specific case.

108. The Venice Commission's comments in its previous opinion are therefore still valid: "Article 31 states that «The Supreme Court of Cassation determines general legal views in order to ensure uniform application of law by courts». It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction."

In terms of the concept pertaining to the Certification Commission, it should be added that such body would constitute a "quasi-court", under the undue influence of the executive branch through the appointment of associated members (professors, attorneys), while the "judges" of that "court of the courts", as opposed to judges that have delivered and signed a decision, would not be held accountable for their decisions and would be vested with enormous and unacceptable power over the judges: they would issue orders to them, direct them as to how to adjudicate and that would stifle any discretion and free opinion of the judges. Furthermore, imposing the mandatory nature of case-law in some other way, including the constitutional prescription of case-law as a source of law, would undermine the internal independence of judges and increase their inertia (which is not only a characteristic of judges in Serbia), as well as stereotype trials, discourage judges from passing decisions based on their convictions and generally undermine the fairness of trial and produce the same effect on the confidence of citizens in the judiciary, as an indispensable ingredient of the rule of law in every democratic society. The report of the Venice Commission on the independence of the judiciary CDL-AD (2010)004 from 16/03/2010 speaks precisely about such consequences for the internal independence of the judiciary, which would be caused if the Constitution of Serbia, as a continental law country, is amended so as to prescribe that case-law has become o mandatory source of law.

„68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that "judges are subject only to the law". This principle protects judges first of all against undue external influence. It is, however, also applicable within the judiciary. A hierarchical organization of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle.

69. The basic considerations are clearly set forth by the CCJE:

„64. The fundamental point is that a judge is in the performance of his functions no one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognized that judicial independence depends

not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation R(94)12, Principle I(2)(d). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the latter case).

70. The practice of guidelines adopted by the Supreme Court or another highest court and binding on lower courts which exists in certain post-Soviet countries is problematic in this respect.

71. The Venice Commission has always upheld the principle of the independence of each individual judge: al judge: "Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgments of lower courts, it should not supervise them.» (CDL-INF(1997)6 at 6).

72. "Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialized Courts (art. 50.1) the possibility to address to the lower courts «recommendations/explanations» on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium." (CDL-INF(2000)5 under the heading "Establishment of a strictly hierarchical system of courts").

73. "Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection for judicial independence, both "internal" and "external", can be assured by a High Judicial Council, as it is recognized by the main international documents on the subject of judicial independence." (CDL(2007)003 at 61).

To sum up, ***the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is in disharmony with the subordination of the judges in their decision making."***

5.4.6. Proposal of the Judges' Association in relation to the harmonization of court decisions

The harmonization of court decisions is a lengthy process, which requires solutions that are in harmony with the European-continental legal system and tradition, embraced by Serbia. It is important to understand that case-law is not to be imposed, since that would undermine the internal judicial independence. Case-law should be embraced; the establishment of consistent case-law is a process that should include not only judges, but also other social players. Judges should hold joint sessions of the highest courts, make court decisions accessible and well-classified, invest steady efforts to develop their knowledge and skills and understanding of the wider social developments, clearly argument and explain their decisions, carefully develop a balance between the need for consistent case-law, on one hand, and the delivery of a fair judgment, even if such judgment deviates from case-law, on the other hand.

The legislative and executive branch and the state authorities managing the court system (the Ministry of Justice, the Ministry of Finance, the HJC), each within their own mandate, must provide solutions that are appropriate and in accordance with our (European continental) legal system and tradition, good and mutually harmonized laws, a stable legal system and other conditions in which the judges can pay the required attention to their respective cases. When the judges are provided with the proper working conditions, which means easy access to computers and the Internet, to a database of regulations and case-law, the assistance of court assistants and other staff, a reasonable caseload without excessive mutual disparities, they will be in the position to deliver decisions that will be carefully reasoned and consistent.

Therefore:

The Judges' Association proposes that the constitutional provisions about sources of law, contained in Article 142, paragraph 2 of the Constitution, are not amended by a provision adding case-law to the existing mandatory sources of law.

5.5. The equalization of the notions of the competence of judges as the prerequisite for office and the possible ways to increase competence

5.5.1. The competence of judges and its purpose

The goal every society based on the rule of law strives for is to have experts with integrity for judges, which will permanently maintain and improve their knowledge and skills by undergoing quality training that will be thorough and diversified, especially in relation to adjudication skills, since competence and professionalism are an important prerequisite for independence. Moreover, the quality of legal protection, including efficiency, is best improved by raising the level of competence of judges and by enhancing the skills required for judicial office.

It is clear that Serbia too needs to have judges "coming" into the judiciary with guaranteed competence and integrity. This matter is directly related to the initial

training of jurists, which is a tool helping the formation of judges that will be *"capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness"*[88].

In European countries there is no uniform system of training for judges and prosecutors. Apart from the mentoring system, which has always been applied in Serbia and which still exists in Germany or Austria, there is the training system within the academy, typical of France, Portugal or Spain; in these systems, it is possible to become a judge without having graduated from the Academy. Furthermore, there are systems, such as the ones in the Netherlands or Italy, combining thematic seminars in judicial centers with the mentoring system. *"There are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary. Some countries offer lengthy formal training in specialized establishments, followed by intensive further training. Others provide a sort of apprenticeship under the supervision of an experienced judge, who imparts knowledge and professional advice on the basis of concrete examples, showing what approach to take and avoiding any kind of didacticism. Common law countries rely heavily on a lengthy professional experience, commonly as advocates. Between these possibilities, there is a whole range of countries where training is to varying degrees organized and compulsory".*[89] All these methods and systems of training are equally functional and applicable, depending on the tradition and economic strength of each and every state.

In any case, training should be provided by an "*independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programs meet the requirements of openness, competence and impartiality inherent in judicial office*"[90], whereas training must be administered by renowned quality lecturers in an interactive manner. Judges should possess comprehensive and thorough knowledge outside of the realm of applicable law, encompassing all the relevant social domains; judges should possess and improve skills necessary for working in courtrooms (such as debating skills, listening skills, running the procedure, etc.) and personal qualities (self-confidence, politeness, composure, communication skills, conflict resolution skills, competence and willingness to make decisions, to effectively organize their work, to assist in matters of wider significance to the court and the judiciary, meticulousness).

Such training of judges makes it possible for the judiciary to protect itself from undue influence and is a guarantee of judicial independence and impartiality and the prerequisite for confidence in and the respect for the judiciary and for the judiciary itself to be worthy of respect and confidence.

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[88] Opinion number 10(2007) of the CCJE on the Council for the Judiciary in the Service of Society, paragraph 68.

[89] Opinion number 4(2003) of the CCJE on appropriate initial and in-service training for judges at national and European levels, paragraph 6.

[90] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 57.

5.5.2. Training in Serbia

The Judges' Association has always believed that the competence of judges is the starting point for the reform of the judiciary and therefore it has sought solutions that would enhance such competence. For that reason, as early as in 2001, the Judges' Association, jointly with the Government of the Republic of Serbia, established the Judicial Centre. The then Constitution (or the actual one) have never been an obstacle for the existence of the Judicial Centre or the Judicial Academy, or for the initial and permanent training. The Judges' Association, however, has never believed that graduating from these institutions automatically means that such a judge possesses the requisite proficiency. It has always been clear that they were only one of the paths and tool to improve the competence of judges.

As the successor of the Judicial Centre, the Judicial Academy (hereinafter: "the Academy") started its activities on 01/01/2010, although it was only in 2015 that it received the approval of the HJC and SPC for its initial training program. The Academy was established with the purpose of contributing to the professionalism, independence, impartiality and efficiency of judges and prosecutors and their activity[91], but that goal was realized only partially, in terms of initial training. The permanent training of judges was mainly reduced to getting to know the newly adopted laws and certain aspects of European law.

Nonetheless, the Academy was tasked with providing training in each individual case, where a judge should need, based on performance evaluation, professional development in a certain area or activity, when a judge is assigned to matters differing from his usual area of competence, as well as in other cases where there exists a need or interest by the concerned judge. The Academy has simply failed to deliver on that expectation. The training of court personnel has actually been insufficient and there has simply been no training whatsoever for assistant judges and assistant public prosecutors. The capacities of the Academy remain insufficient and its criteria for the election of its commissions, mentors and lecturers are not reliable enough in order for that institution to become the only "gateway" to the judiciary.

From the very beginning of its activities, the Judicial Academy faced a problem arising from the insufficiently well-conceived status of initial training. Under the Law on Judges and the Law on the Public Prosecutor's Office, as well as the Law on the Judicial Academy, the HJC and the SPC had to give the priority, in the procedure of proposing the candidates for judges or public prosecutors, to candidates that graduated from the Judicial Academy. These laws had "forgotten" about almost 2000 assistant judges and prosecutors at the time, who joined the judiciary before 2010 and who had legitimate expectations, since there were not enough vacancies to accommodate these aspiring judges and public prosecutors, that they would have the right to apply for the positions of judge or deputy public prosecutor after they had passed the bar examination and worked for years in the judiciary. The Constitutional Court declared the provisions of the aforementioned laws unconstitutional

[91] Law on the Judicial Academy, *Official Gazette of the RS*, number 104/2009, 32/2014 – Decision of the Constitutional Court, 106/2015, Article 3.

on 06/02/2014[92], having found they were violating the principle of equality of citizens in the same legal situation, restricting the constitutionally prescribed jurisdiction of the HJC and SPC, as well as *"concepts according to which persons that have not completed initial training on the Judicial Academy are by that fact essentially eliminated from the circle of candidates for first-term judges in a certain type of courts and first-time deputy public prosecutors in a certain type of public prosecutors', are constitutionally and legally unacceptable. This is particularly true having in mind that the students of the Academy, during their initial training, primarily discharge the duties of assistant judges and assistant public prosecutors, just like assistant judges and assistant public prosecutors that are not the "beneficiaries" of such training."*[93]

Therefore, after eight years of existence of the Judicial Academy, Serbia still lacks systemic and functional training courses for judges, implemented by renowned and respected magistrates and academics, which training would include comprehensive and interactive programs that would always be available and predictable, so that the judges may choose and plan their training time at least a year in advance. For that it would be necessary for the entity conducting the training to be independent from the executive and legislative branch[94], the responsibility and supervision of the training to be vested with the judiciary, where the association of judges may also play a major role[95].

Meanwhile, the training method is not of paramount importance, particularly regarding initial training; it may involve a mentoring system, which, just like in Austria for example, is the most current and feasible mode for Serbia, but it may also be a combined system like in the Netherlands or in Italy, which requires certain investments. Finally, training on the Academy, which is the most expensive and the most difficult to implement, is still new for Serbia and requires time to be functional. As for initial training, *"In view of the diversity of the systems for training judges in Europe, the CCJE recommends:*

1) *That all appointees to judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure,*
2) *That training programs more specific to the exercise of the profession of judge should be decided on by the establishment responsible for training, and by the trainers and judges themselves,*
3) *That these theoretical and practical programs should not be limited to techniques in the purely legal fields but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution (ADR),*

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[92] Decision of the Constitutional Court on the Unconstitutionality of the Provisions of Article 40, paragraphs 8, 9 and 11 of the Law on the Judicial Academy (*Official Gazette of the RS*, number *104/2009), was published in the Official Gazette of the Republic of Serbia*, number 32/2014 from 20.03.2014.

[93] *Ibid.*

[94] CCJE Opinion number 4(2003), paragraph 13.

[95] *Ibid,* paragraph 16.

4) *That the training should be pluralist in order to guarantee and strengthen the open-mindedness of the judge,*
5) *That, depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form.*

29. The CCJE recommends the practice of providing for a period of training common to the various legal and judicial professions (for instance, lawyers and prosecutors in countries where they perform duties separate from those of judges). This practice is likely to foster better knowledge and reciprocal understanding between judges and other professions.

30. The CCJE has also noted that many countries make access to judicial posts conditional upon prior professional experience. While it does not seem possible to impose such a model everywhere, and while the adoption of a system combining various types of recruitment may also have the advantage of diversifying judges' backgrounds, it is important that the period of initial training should include, in the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers' practices, companies, etc.)"[96].

The working group for making the analysis of the amendments to the constitutional framework[97] on the judiciary in the Republic of Serbia says the following about the Academy, in item 6: *"Regarding the prescription of the Judicial Academy as the mandatory condition for the election of first-term judges and public prosecutors, this working group supports the position taken by the Working Group for Reforming and Developing the Judicial Academy, according to which the Judicial Academy should not become a constitutional category. Prescribing the Judicial Academy as a mandatory condition for the election of first-term judges and public prosecutors may be set as a strategic goal that is feasible after a thorough reform of the Academy's concept."*

The politicians in Serbia, helped by the all-too-conventional practice by EU bureaucrats and their insufficient understanding of our domestic circumstances, persist with a particular zeal in their intent to make the still feeble Academy the only or at least the dominant manner of appointing young trainees for judges. Such zeal seems to justify the concerns of judges that the Academy might become a hidden,

[96] *Ibid*, paragraphs 28-30.

[97] The working group for the analysis of the amendments to the constitutional framework was established by the Commission for the Implementation of the National Strategy for the Reform of the Judiciary on 29/11/2013. The members of the working group were: Dragomir Milojević, Chairman of the working group and President of the Supreme Court of Cassation and HJC, Danilo Nikolić, PhD, Vice-Chairman of the working group, State Secretary in the Ministry of Justice and Public Administration; Snežana Andrejević, Judge of the Supreme Court of Cassation ; Đorđe Ostojić, Deputy Republic Public Prosecutor; Branko Stamenković, Special Prosecutor for High-Tech Crime, member of the SPC; Radovan Lazić, Chairman of the Managing Board of the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia; Dragana Boljević, Judge of the Appellate Court in Belgrade and President of the Judges' Association Serbia; Prof. Vladan Petrov, PhD, Associate Professor of Constitutional Law and Associate Dean of the Faculty of Law of Belgrade; Prof. Darko Simović, PhD, Professor of Constitutional Law of the Criminalistic Police Academy in Belgrade; Prof. Irena Pajić, PhD, Professor of Constitutional Law of the Faculty of Law of Niš; and Prof. Slobodan Orlović, PhD, Associate Professor of Constitutional Law of the Faculty of Law of Novi Sad.

but effective channel of political influence on the courts, which the government wants to establish, because it will have to give up the right to elect judges after the constitutional reforms. In this way, by picking the students of the Academy, in an insufficiently controlled and transparent procedure, the government influences in advance the choice of future judges. Therefore, it comes as no surprise that 65% of judges believe that the Academy should not be the main gateway for judicial office and that it is wrong to vest the graduates of the Academy with such a privilege. Furthermore, even more judges, as many as 83%, are in favor of free and equal access to judicial office for everyone[98].

5.5.3. The Judges' Association on the need for putting an equality sign between graduation from the Academy and the competence of judges and raising the former to the level of constitutional principle

The Constitution is the highest law of a state, which contains the general rules about the social order, the method of government and the limits to power, consisting of the fundamental freedoms and rights of individuals and the entity. Therefore, the Constitution should not contain rules of implementational character. After all, the Report of the Venice Commission on the independence of the judiciary CDL-AD 2010(004) from 16/03/2010 says: *"22. The Venice Commission strongly supports this approach. The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts"*[99]**.**

The appointment of capable experts with integrity is a goal that needs be enshrined in the Constitution. Paths or means/methods to reaching this goal may be many. The state should opt for some of these paths sincerely guided by European rule of law standards, on one hand and its own tradition and capacities, on the other, while bearing in mind that such path must be functional and applicable in the shortest possible time.

Therefore, for the already mentioned reasons, it would be wrong to put an equality sign between the competences of newly elected or already elected judges with one of the possible modalities of training. In the same way, it would be wrong for the evaluation of a judges' competence to be based solely on an institution that is yet to be stabilized and reinforced by actual and applicable guarantees of independence, in order to be able to encourage and strengthen the competence and integrity of judges. In the case of Serbia, whose society is constantly undergoing change and going back to square one over and over, with insufficient capacities, which logically undermines the court system, we should retain the exiting methods and gradually develop new ones, a process which has not until now encountered any obstacles from the part of the Constitution.

After all, even in states that have had judicial academies for a long time now, these academies are not enshrined in their respective constitutions. On the con-

[98] Survey on the views of judges about the situation of the courts and the judiciary in Serbia was published by the Judges' Association and the Center for Free Elections and Democracy in the publication *Strengthening the Independence and Integrity of Judges in Serbia*, the Judges' Association of Serbia, Belgrade 2017, page 9.

[99] The bold font is taken from the original text.

trary, constitutional prescription for only one path and method would represent a hurdle for the arrival in the judiciary of competent judges with integrity.

Therefore,

The Judges' Association believes that methods and means that encourage and strengthen the competence and integrity of judges should not be part of the Constitution and proposes the following:

- **The Constitution should provide for competence and integrity to be the main criteria for judicial office.**
- **The constitutional provision on the election of judges (Article 147) should be amended by the following provision: "*The High Judicial Council elects a judge based on his integrity and competence developed in the court or a different independent institution, in the manner, a procedure and under the condition regulated by the Law, which provide for the independence of judges and courts and access to judicial office to everyone under the same conditions.***

5.6. Making individual evaluation of judges a constitutional category

Amid longstanding violations of the guarantees of judicial independence and the plummeting confidence of the citizens in the judiciary, the Judges' Association has been constantly advocating for the evaluation of the performance of judges[100], believing that the **purpose** of evaluation is creating legal security based on quality law, through establishing the conditions for efficient judicial work – meaning delivering quality decisions – in a reasonable time, after having fairly considered all the aspects of a case[101], which would reinstate and reinforce the confidence of the citizens in the work of judges and courts.

However, when reflecting about evaluation, it should be borne in mind that individual evaluation is not considered indispensable in European justice systems. Countries where there is no individual evaluation (such as Denmark, England and Wales, Finland, Ireland, the Netherlands, Sweden and, to a certain extent, Spain) appraise the performance of the judicial system as a whole[102]. Moreover, the CCJE stops short of recommending, but merely leaves it to the discretion of the states if they will formally evaluate the performance of judges: "*Two key requirements of any judicial system must be to produce justice of the highest quality and proper accountability in a democratic society. Some form of evaluation of judges is necessary to meet these requirements. The fundamental question is whether such evaluation must be of a "formal" character. The CCJE encourages all member states to consider this question. The answer each member state gives will be in accordance with its judicial system, traditions and culture. If a member state decides that these two key requirements can*

[100] The Judges' Association published as early as back in 2007, after a two-year survey, the first and so far only book in Serbia Evaluation of the Performance of Judges, which deals with the quantitative aspect of judges' work and gives proposals to take further measures in studying this matter.

[101] Efficiency is defined in the following way – see paragraph number 31. Recommendations CM/Rec (2010)12 from 17.11.2010.

[102] See the Opinion of the European Commission on Democracy by Law (Venice Commission) number 528/2009 dated 15.6.2009 on the Draft Criteria and Standards for the Election of Judges and Court Presidents in Serbia.

be met by means other than formal evaluation of individual judges, it could decide not to have such a formal evaluation. If it concludes these requirements cannot be met by other means, the CCJE recommends the adoption of a more formal system of individual evaluation of judges as discussed below".[103] Stopping short of insisting on the introduction of formal evaluation, *"The CCJE encourages all member states to use informal evaluation procedures that help improving the skills of judges and thereby the overall quality of the judiciary. Such means of informal evaluation include assisting judges by giving them an opportunity for self-assessment, providing feedback and informal peer-review (paragraph 25)."*[104]

In Opinion number 17(2014) dealing with the evaluation of the work of judges and their independence and which is not accidentally entitled: On the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, the CCJE gives primacy to the independence of judges over evaluation: *"The main rule for each individual evaluation of judges must be that such evaluation reflects the complete respect for judicial independence*[105]*. When an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges*[106]*, including the presidents of courts" (paragraph 6.).*

The Report of the European Network of Judicial Councils (hereinafter: ENCJ) makes a difference between countries using "formal" and "informal" evaluation "*8…The systems are essentially the following:*

Formal

9. In the case of formal evaluation systems, the purpose of the evaluation, the criteria used, the composition of the evaluation body, the evaluation procedure and its potential consequences are clearly set before any valuation is performed. If the evaluation is carried out in a formal way, the rights and obligations of the evaluated judge and of the evaluated body are regulated by the Law or bylaws.

Informal

10. Informal evaluation does not use formalized assessments or criteria. There are mainly no direct consequences for the judge that is evaluated. Informal evaluation may be performed in the form of an interview, which would give the opportunity to the evaluated judge to address the problems, show his/her capabilities and harmonize his

[103] CCJE Opinion number 17(2014), paragraph 23.

[104] *Ibid, paragraph* 49.4.

[105] See CCJE Opinion number 1(2001), especially paragraph 45, CCJE Opinion number 6(2004), paragraph 34.

[106] See CCJE Opinion number 1(2001), paragraph 66, Recommendations CM/Rec(2010)12, paragraphs 22-25.

career goals[107]*. Informal collection of information about the judge that is the candidate for promotion*[108] *may also be considered as informal evaluation.*"[109]

The direct goals realized with the evaluation of judges' work are:

- Effective management of the court system in order to achieve quality justice, by creating quality personnel, a merit-based promotion system for judges, improving the overall capacity of all judges as a whole and also individually, through adequate training, specialization and motivation of each judge, by making optimal use of the skills of each judge within the court system by adequate task planning at the annual level, by appointing the necessary number of judges and monitoring the efficiency and the caseload of judges and courts;
- Setting the status of judges and their professional "movements" – vertical (elections and promotions) and horizontal (by assigning judges within the given court);
- Establishing a system of personal accountability of judges in their job and tasks, while protecting at the same time their independence, since any attempt to call judges to account in relation to their work threatens their independence.

"The 'quality' of justice should not be understood as a synonym for mere «productivity» of the judicial system"[110]*. CCJE warns that insufficient financing and budget funds may result in excessive reference to "productivity" by the justice system in individual evaluation of judges. Therefore, CCJE reiterates that all the general principles and standards of the Council of Europe on the funding and management of courts place a duty on states to make financial resources available that match the needs of the different judicial systems*[111]*. CCJE believes that quality and not only quantity of the judge's decision must be at the core of individual evaluation. In Opinion 11 (2008), CCJE addressed the importance of high quality judgments. In order to assess the quality of a judge's decision, the evaluators should focus on the methodology that the judge is using in his/her work in general, before evaluating the meritum of specific decisions*[112]*. The latter must be determined solely in appellate proceedings. The evaluators must take into account all the aspects of successful adjudication and particularly legal knowledge, communication skills, hard work, efficiency and integrity. Therefore, the CCJE stresses that neither the number of appeals nor their rate of success necessarily reflects on the quality of the decisions subject to appeal*[113]*, unless the number of successful appeals and the modalities of such adjudications clearly show that the judge lacks the requisite knowledge of laws and procedures. It was noticed that the Kyiv Recommendation*[114] *and the ENCJ Report*[115] *have come to the same position"*[116]*.*

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[107] See, for example, the systems in Finland and the Netherlands.

[108] As it is the case in the United Kingdom.

[109] CCJE Opinion number 17(2014).

[110] See CCJE Opinion number 6(2004), paragraph 42.

[111] See Recommendations CM/Rec (2010)12, paragraph 32, and CCJE Opinion number 2(2001), paragraph 4.

[112] See CCJE Opinion number 11(2008), paragraph 57.

[113] See CCJE Opinion number 11(2008), paragraph 74, and CCJE Opinion number 6(2004), paragraph 36.

[114] See Kyiv Recommendations (2010), paragraph 28.

[115] See ENCJ Report 2012-2013, section 4.12.

[116] CCJE Opinion number 17(2014), paragraph 35.

In any case, even in the countries that have opted for a formal system of evaluation of judges' work, the CCJE clearly states that *"…the rights and duties of the evaluated judge and the evaluating body will be regulated by means of primary or subordinate legislation."*[117] Just like with the dilemma whether to put an equality sign between the competence of judges and their manner of training, the same applies to evaluation. The Constitution is the highest law of a state, which contains the most general principles and it should not contain implementation norms. The Constitution has, after all, never been an obstacle to the evaluation of judges' work, which is prescribed by the Law on Judges.

As in the case of the proposal to prescribe in the Constitution that case-law shall be a source of Law, the same applies here: the goal society is striving for is to have capable experts with integrity. Evaluation of competence is just a tool and tools can be many.

Therefore,

The Judges' Association proposes that the Constitution should not contain standards about the evaluation of judges' work.

5.7. Remedy against all decisions of the HJC on the status of judges before the Constitutional Court

Opinion number 3(2003) of the CCJE On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality: *the arrangements regarding disciplinary proceedings in each country should be such as to allow* ***an appeal*** *from the initial disciplinary body (whether that is itself an authority, tribunal or court)* ***to a court*** (paragraph 77v).

Opinion number 10(2007) of the CCJE on the Council for the Judiciary at the service of society:

"A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, as indicated by CCJE Opinion Number 3 (2002), it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body" (paragraph 63.), *The Judiciary Council is vested with a mandate in the area of ethics; it may also be addressed by citizens involved in a trial before the court, with their complaints. In order to avoid conflict of interest, disciplinary proceedings in first-instance, when they are not dealt with by the disciplinary court, should be adjudicated by the disciplinary commission, consisting of judges elected by their peers that are not members of the Judiciary Council, with the possibility of* ***appeal to a higher court***[118] *"*(paragraph 63.).

[117] *Ibid,* paragraph 9.

[118] See paragraph 71 of Opinion number 3(2003) CCJE.

The Judges' Association believes it is a higher guarantee of independence and therefore it is necessary for appeals against all decisions pertaining to the status of judges to be dealt with by the court.

The mandate of the Constitutional Court to deliver a decision on the appeal of a judge against the final decision on his/her dismissal from office would not be touched by such a concept.

5.8. Leaving certain important matters outside of the Constitution

5.8.1. Defining the content of judicial power

The need to define the content of judicial power as enshrined in the Constitution is particularly important in light of the fact that the last decade has been marked by various attempts to "extract" certain matters related to key human rights from the jurisdiction of courts and thereby from judicial power and entrust such matters to other state authorities, which do not enjoy any guarantees in terms of independence and impartiality. Changes in the justice system in the last couple of years (establishing the Business Registers Agency instead of the commercial register, the cadastral property records instead of the land registry, the introduction of public notaries and enforcement officers) have "extracted" from the courts a great deal of affairs formerly dealt with by the latter, vesting non-judicial institutions and the Ministry of Justice (or departments subordinated to it) with the power to deal with such affairs, thereby increasing the influence of the executive on the judiciary.

Stripping the courts of their jurisdiction was carried out with the explanation that it will relieve the justice system from the burden of affairs that are not typically judicial, which will give judges more time to focus on purely judicial work. However, there has never been an analysis to respond to the question what are these tasks that are "typically not judicial" (namely, where is the border between the judicial branch and the remaining two branches of power), how many judges are there in the system that discharge such tasks and what would be the pros and cons for the state and the citizens if these affairs would be kept in the jurisdiction of courts, as opposed to them being entrusted to different generic professions.

The Law on Enforcement and Security (LES) from 2011 introduced a new judicial function – enforcement officer, vested with the authority to carry out, in alternation with the courts, enforcement and security procedures. It is a natural person appointed by the Justice Minister to carry out, as an official person, enforcement from the jurisdiction of the court.[119] The enforcement officer is also vested by Law to

[119] Public opinion associates the high number of enforceable cases (unrealized enforcements) with the inefficiency of the courts, although the causes differ and are not only related to the courts. Had the statistical analyses been dealing with the causes, instead of focusing on the mere number of enforceable cases, different situations would have been identified: inactivity of the creditor, insolvency of the debtor (liquidation and bankruptcy of legal persons, the debtor does not possess property and the creditor uses his procedural right to retain the proposed enforcement means, although the account of the debtor has been blocked), specific statutory concepts, etc. In a great deal of cases, the courts have undertaken the enforcement measures prescribed by the Law, but the procedures cannot be completed for different reasons. Furthermore, the physical and technical infrastructure of the courts in Serbia are uneven and mostly inadequate; there are not enough judges and supporting and administrative staff,

appoint his (temporary) deputy. The legislators explained the introduction of enforcement officers with the need to shorten the enforcement procedure, reduce the number of enforceable cases and to reduce the burden on the courts. The mandate of the enforcement officer, appointed by the Minister to carry out part of the mandate of the courts in the interest of the public, under the Law on Enforcement and Security, to be allowed to vest a third party with the said mandate of the court by his/her decision is intolerable in principle, since it undermines the independence of the judicial branch and opens the door to serious abuse. Transferring public powers to enforcement officers has also resulted in less revenue from court fees and increased the expenditures of the citizens in relation to fees and costs of enforcement officers. Abandoning the two-instance system/concept (the possibility of lodging an appeal) has undermined the right to fair trial, which must exist in the enforcement procedure too, caused uncertainty in the enforcement procedure, since the councils, which were set up in 36 basic courts in order to adjudicate in procedures on complaints, started to adjudicate differently in cases with the same facts, placing the citizens in an uneven position before the court in the process. Therefore, the current Law on Enforcement[120] has reinstated the appeal in the enforcement procedure.

The citizens have already complained against the practice of enforcement officers concerning the manner in which they carry out enforcement, as well as over the increased costs of procedure, particularly in view of the increasing poverty. Furthermore, statistical analysis[121] have shown that a total of 2,239,927 cases remained open at the end of 2014, of which 1,893,157 enforceable cases. However, according to data for 2014, in which enforcement procedures were carried out by both the courts and enforcement officers, 197 enforcement officers completed 167,000 enforceable cases. The enforcement officers were vested with the authority to collect financial claims, which are the quickest and easiest to enforce and they were also allowed, as opposed to the courts, to have access to data of the Republic Pension and Disability Fund and particularly to the citizens' identification number, which facilitates considerably attempts to find the executive debtor and carrying out the actual enforcement. In the same period, slightly less enforcement judges (195) completed 326,000 enforceable cases, twice as much as the enforcement officers. It should be borne in mind that the judges were carrying out all types of enforcement, which are complex (handing over a child in family dispute-related enforcement, sale of property, etc.) and require time due to the need to take a series of actions in several stages. Nonetheless, at the time of the adoption of the current Law on Enforcement and Security[122], the legislator estimated it was more reasonable to invest, not in the capacity of

enforcement officers, vehicles; judges and their staff have insufficient training time left, in view of the constant changes of systemic laws in an extended period of time, etc.

[120] Law on Enforcement and Security, *Official Gazette of the RS*, number 106/15 from 21/12/2015, implementation started as of 01/07/2016.

[121] Supreme Court of Cassation, *Analysis of the work of courts of general and specific jurisdiction for 2014*: http://www.vk.sud.rs/sites/default/files/attachments/ANALIZA%20rada%20sudova%20za%202014%20%20KONA%C4%8CNI_0_0.pdf (03/09/2016).

[122] Law on Enforcement and Security, *Official Gazette of the RS*, number 106/15 from 21/12/2015, implementation started as of 01/07/2016.

the courts, but in the enforcement system that is de facto managed and supervised not by the judicial branch, but by the executive branch.

The Law on Public Notaries[123] has introduced yet another new, for modern Serbia, legal profession – public notaries, also aimed at relieving the courts from the excessive burden of tasks the legislator branded as "atypically judicial" (certification of legal transactions, affairs related to the safeguarding of money, rectification of securities and other cases, as well as other tasks entrusted by the court). The Law on Public Notaries vested the Justice Minister, inter alia, to determine the number of public notary positions and seats of public notaries, to determine their tariffs, decide about the examination for public notaries, who will be in the examination commission, to select public notaries and to supervise their work and their Chamber, to be the second-instance authority in disciplinary proceedings, as well as to dismiss public notaries.[124] The motives of the legislator are unclear as to the fact that

[123] And Law on Public Notaries, *Official Gazette of the RS*, number 31/2011 from 09/05/2011, 85/2012, 19/2013, 55/2014, 93/2014, 121/2014, 6/2015, 106/2015, adopted on 05/05/2011. (implemented since 01/09/2012), the same day as the Law on Enforcement and Security, Legal Profession Act, Law on the Enforcement of Criminal Sanctions, among others, in the scope of the "package" of fifteen laws passed on that day. Interestingly, all of the fifteen laws were discussed within a single debate, which automatically prevented the MPs to review the draft laws and hence to prepare themselves appropriately for the debate that was also shortened due to the single debate format.

[124] With the adoption of the Law on Public Notaries, the Justice Minister (who was the proposer of the Law), introduced the mandate for himself directly, or for the Ministry, to determine the number of public notary positions (Article 15), to decide who will be a public notary (article 2, paragraph 3) and to dismiss public notaries (Article 31, paragraph 2), to supervise the activities of public notaries (Article 13) and of the Chamber of Notaries (Article 132), to give his approval for the Statute of the Chamber of Notaries (Article 120, paragraph 3), to receive requests for taking the public notary examination (Article 144, paragraph 1) and pass final decisions establishing the fulfilment of conditions for taking the examination (Article 144, paragraph 2), to regulate the passing of the examination and the curriculum of the examination (Article 145), to set up an examination commission (Article 146) and keep records on the persons that have passed the examination (Article 148), to act as a second-instance authority for disciplinary offences and to determine the composition, work and decision-making of the commission (Article 158), to adopt the tariff of public notaries (Article 135) give his approval for the Statute of the Chamber of Notaries (Article 120, paragraph 3), to receive requests for taking the public notary examination (Article 144, paragraph 1) and pass final decisions establishing the fulfilment of conditions for taking the examination (Article 144, paragraph 2), to regulate the passing of the examination and the curriculum of the examination (Article 145), to set up an examination commission (Article 146) and keep records on the persons that have passed the examination (Article 148), to act as a second-instance authority for disciplinary offences and to determine the composition, work and decision-making of the commission (Article 158), to adopt the tariff of public notaries (Article 135) and determine the seats of public notaries (Article 180).

The Justice Minister has also wide powers over the enforcement officers. He appoints enforcement officers (Article 312, paragraphs 3 and 316) and deputy enforcement officers (Article 334), draws up the program of the examination for enforcement officers and the carrying out of the examination, as well as the composition and work of the examination commission (Article 314, paragraph 3), appoints the commission for the examination for enforcement officers (Article 313, paragraph 3), gives his approval for the acts of the Chamber regulating other activities incompatible with the tasks of the enforcement officer, and the content, submission and verification of data from the report on the assets of the enforcement officer (Article 314, paragraph 5), determines the number of enforcement officers (Article 315, paragraph 1), calls the open competition for enforcement officers (Article 315, paragraph 3), appoints the commission that carries out the competition (Article 315, paragraph 6), sets the general conditions for concluding an insurance contract and the lowest amount of insurance (Article 319,

he omitted to prescribe the obligation of the public notary to pay part of the fee for services rendered to the State, since public notaries were entrusted the certification services the fees for which used to be paid in the state budget (collection of court fees).[125] It is undisputable that several European countries have public notaries or similar occupations, which are also appointed, along with judges, by the justice minister. In Serbia, however, the concept according to which the Justice Minister would select and dismiss judges and prosecutors would clearly not be a good one and therefore caution is required in relation to similar professions related to the judiciary.

The Law on Court Expert Witnesses has prescribed "re-election" for court expert witnesses too, which lost that capacity if the Justice Minister did not to reappoint them by 08/07/2011.

The aforementioned arrangements have practically enabled the Ministry of Justice to control and determine, on its own, who will become a lay judge, court expert witness, enforcement officer and public notary and how they will work.

The issue of defining the content of judicial power is also relevant for delimitating the jurisdiction of courts, as the sole holders of judicial power, as well as the Constitutional Court, which, under the Constitution, is not a holder of judicial power.

Article 143, paragraph 1 of the Constitution, stipulates that "Judicial power in Serbia shall belong to courts of general and special jurisdiction", Article 98 says that the National Assembly shall be the holder of legislative and constitutional power, Article 122 that the holder of executive power is the Government. The content of legislative and executive power is defined by the Constitution by prescribing the jurisdiction of its holders, the National Assembly in Article 99 and the Government in Article 123. On the other hand, the Constitution stops short of defining the content of judicial power, since it does not provide for the jurisdiction of courts, as holders of judicial power, nor does it define such power in any other way.

Therefore,

The Judges' Association proposes the content of judicial power to be potentially also defined in the following way:

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paragraph 1), gives his approval for the act of the Chamber on the requirements for the office and the necessary equipment (Article 319, paragraph 2), dismisses enforcement officers (Article 322), regulates in more detail the records of cases according to which the enforcement officers is acting (Article 328), adopts the tariff (Article 330), supervises the work of the enforcement officer (Article 346), appoints the members of the disciplinary commission (Article 354), proposes the initiation of disciplinary proceedings against enforcement officers (Article 355, paragraph 1), regulates the disciplinary proceedings (Article 355, paragraph 5).

[125] It is only with the Amendments to the Law on Public Notaries, *Official Gazette of the RS*, number 121/2014 from 05/11/2014, adopted during the months-long protests of attorneys at law, that the legislator prescribed the duty of the public notary to pay 30% of the fees collected (without VAT) on a designated public revenue account, within 15 days of collection (Article 134, paragraph 6), whereas that amount will be allocated for the current expenditures of courts and improving the material condition of court employees, as well as for other expenditures and investments in courts, in accordance with the Law (Article 134, paragraph 6). It remains unclear on the basis of which calculations has that percentage been determined, but it provides at least some kind of budget revenue from the affairs that had previously been charged by the courts through court fees.

The judicial power settles disputes about a right that ensures the rule of law.

5.8.2. Additional guarantees of judicial independence – reasons for termination of judicial office and material guarantees

6. Just like it is necessary, for the sake of judicial independence, to regulate the proper way to be elected/appointed to judicial office, the manner of termination of office is also one of the guarantees of judicial independence. It is therefore necessary for the Constitution to regulate the conditions for the termination of office and the reasons for dismissing a judge. It must be borne in mind that *"An unfavorable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard. These conclusions must follow a proper procedure and be based on reliable evidence (paragraphs 29, 44)."*[126]

In the Report of the Venice Commission on judicial independence CDL-AD 2010(004) dated 16/03/2010, the Commission relied upon:

„44. Recommendation (94) 12 provides that judges' remuneration should be guaranteed by law (Principle I.2b.ii) and "commensurate with the dignity of their profession and burden of responsibilities" (Principle III.1.b). The Charter, supported by the CCJE, extends this principle to guaranteed sickness pay and retirement pension.

45. The CCJE adds in Opinion Number 1:

„62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living." Therefore,

„46. The Venice Commission shares the opinion that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. The example of the Polish Constitution, which guarantees to judges remuneration consistent with the dignity of their office and the scope of their duties is a commendable approach. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses which include an element of discretion should be excluded."

Therefore,

The Judges' Association proposes that the Constitution should amend the guarantees of judicial independence by prescribing the following:

Judicial office shall be permanent.

The judge's office shall cease at his/her request or when he/she will have fulfilled the criteria for old-age retirement as prescribed by the Law.

[126] CCJE Opinion number 17(2014), paragraph 49.12.

The judge may not be relieved of office against his/her own will, save in the case of an unconditional sentence for a criminal offence to a prison term of no less than six months or for a punishable offence incapacitating him/her for judicial office, when he/she discharges his duty incompetently and without due diligence or in the case of permanent loss of working capacity for judicial office.

The judge has the right to a salary and pension in accordance with the dignity and responsibility of judicial office.

The pension may not be less than the last salary of the judge.

The salary and pension of the judge may not be reduced.

6.1. Proposals for the remaining contested concepts

Summing up the proposals tabled by the Network, the Judges' Association views as contested the proposed concepts that primarily concern the HJC, both in terms of the total change of the composition of the HJC (by excluding the President of the highest court from HJC membership, the President of the HJC from the ranks of non-judge members, proposals for the members of the HJC, with the exception of law professors, to include *"renown jurists possessing recognized knowledge and experience in the area of organization, functioning and reform of the judiciary, which would be elected by the National Assembly at the proposal of competent parliamentary judiciary committee, as it is the case with the judges of the Constitutional Court")* and in terms of reducing the number of HJC members (from 11 to 10 members), the functioning of the HJC ("golden vote" of the President of the HJC); shorter term of office of the members of the HJC (four instead of five years); narrowing down the mandate of the HJC.

Furthermore, the Network has also proposed the already functional immunity of judges to be "narrowed down", abandoning the concept of collegial adjudication (adjudication by a panel of judges), namely pushing out lay judges from the trial (and alternatively, instead of lay judges, the introduction of a jury or replacing lay judges by trainee judges, namely those attending the initial training at the Judicial Academy).

These issues are very important. The matter of the HJC is particularly complex and extremely important for judicial independence. However, the format of the written contribution does not allow for these issues to be elaborated on at the same time. After all, these issues have not been tabled for discussion on the second round table scheduled for 07/09/2017.

7. Proposal of the Judges' Association for further discussion

The Judges' Association, just like the other participants of the round table, proposed on the first round table held on 21/07/2017 and hereby reiterates that proposal, that each of the aforementioned contested issues, especially related to the HJC, as well perhaps other relevant issues, be paid particular attention and be subject to a separate discussion.

In view not only of the different positions on the aforementioned matters that are regulated by the Constitution, but also the considerable social impact of the

open issues that are yet to be regulated by the Constitution and divergent views about them,

The Judges' Association of Serbia:

- Finds that each of these specific issues warrants a separate debate;
- Just like the other professional associations and the majority of non-governmental associations, proposed in its memo 45/17 from 30/06/2017, delivered to the Ministry of Justice the same day, to abandon the possibility to respect the deadlines set in the AP for the adoption of the amendments to the Constitution by the end of 2017 and to provide for realistic deadlines, in order to have a genuinely thorough and comprehensive public debate.
- Particularly emphasizes that the dialogue must include all key institutions and organizations, while informing and involving the citizens in that process, both through civil society organizations and their political representatives, stressing that the invitation of the Ministry of Justice to such round tables about specific professional matters must not be the only framework for dialogue, nor should it be used for creating a semblance of a comprehensive public debate;
- Proposes that a public debate be organized successively about each of the aforementioned issues individually and in different formats (round tables, thematic TV programs);
- Proposes to invite to each of these debates the representatives of the competent bodies of the National Assembly, the HJC, the SPC, the Commission for the Reform of the Judiciary and its Working Group for the Analysis of the Constitutional Framework for the Judiciary, Courts and Prosecutors' Offices, experts for constitutional law and the law on courts and especially constitutional law professors, professional associations of judges and prosecutors, the Bar Association, as well as other interested professional and citizens' associations.

CHAPTER III

JANUARY VERSION OF AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA AND REACTIONS OF THE PROFESSION

22 January 2018

MINISTRY OF JUSTICE'S WORKING VERSION OF THE DRAFT AMENDMENTS TO THE CONSTITUTION (WITH EXPLANATION AND REFERENCES)

Introductory remarks

In accordance with the obligations undertaken by the Republic of Serbia through the adoption of the Action Plan for the Chapter 23, Ministry of Justice (hereinafter: the Ministry) drafted the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia (hereinafter: Working text). During the drafting process, the Ministry was guided primarily by standards defined by the Venice Commission in its opinions and other relevant documents as well as written proposals received within a consultative process conducted by the Ministry in cooperation with the Office for Cooperation with Civil Society conducted in the period May-November 2017. The working text is defined with the preliminary assistance of the CoE expert Mr. James Hamilton.

In order to facilitate understanding of the proposed solutions, an overview of some of the most important positions of the Venice Commission in relation to subject matter (together with the precise references) has been provided beneath the text of the amendments (or thematic related groups of amendments) that bring significant and substantive changes in relation to the current Constitution.

The working text presents the starting point of the public debate on the amendments to the Constitution of the Republic Serbia which will be organized in February and March 2018. After the conduction of the public debate the Draft of the Constitution will be submitted to the Venice Commission on opinion.

Amendments I through XXIV to the Constitution of Serbia

Amendments I through XXIV are an integral part of the Constitution of the Republic of Serbia, which shall enter into force on the day of promulgation by the National Assembly.

A Constitutional Act shall be passed to implement the Amendments I through XXIV of the Constitution.

AMENDMENT I

The National Assembly shall:

1. adopt and amend the Constitution, *Competences*
2. decide on changes concerning the borders of the Republic of Serbia,

3. call for the Republic referendum,
4. ratify international contracts when the obligation of their ratification is stipulated by the Law,
5. decide on war and peace and declare state of war and emergency,
6. supervise the work of security services,
7. enact laws and other general acts within the competence of the Republic of Serbia,
8. give previous approval for the Statute of the autonomous province,
9. adopt defence strategy,
10. adopt development plan and spatial plan,
11. adopt the Budget and financial statement of the Republic of Serbia, upon the proposal of the Government,
12. grant amnesty for criminal offenses.

Within its election rights, the National Assembly shall:

1. elect the Government, supervise its work and decide on expiry of the term of office of the Government and ministers,
2. appoint and dismiss judges of the Constitutional Court,
3. *appoint and dismiss the Supreme Public Prosecutor of Serbia, five members of the High Judicial Council and five members of the High Prosecutorial Council*
4. appoint and dismiss the Governor of the National Bank of Serbia and supervise his/her work,
5. appoint and dismiss the Civic Defender and supervise his/her work,
6. appoint and dismiss other officials stipulated by the Law.

The National Assembly shall also perform other functions stipulated by the Constitution and the law.

The present Amendment shall supersede article 99 of the Constitution of the Republic of Serbia.

AMENDMENT II

Method of decision making in the National Assembly

The National Assembly shall adopt decisions by a majority vote of deputies at the session where a majority of deputies are present.

By means of a majority vote of all deputies the National Assembly shall:

1. grant amnesty for criminal offenses,
2. declare and call off the state of emergency,
3. order measures of departure from human and minority rights in the state of war and emergency,
4. enact the Law by which the Republic of Serbia delegates particular issues falling within its competence to autonomous provinces and local self-government units,
5. give previous approval for the Statute of the autonomous province,
6. decide on the Rules of Procedure pertaining to its work,
7. cancel immunities of deputies, the President of the Republic, members of the Government and Civic Defender,
8. adopt the Budget and financial statement,

9. elect members of the Government and decide on the end of the term of office of the Government and ministers,
10. decide on response to interpellation,
11. elect judges of the Constitutional Court and decide on their dismissal and end of their term of office,
12. elect and dismiss the Governor of the National Bank of Serbia, Governors' Council and Civic Defender,
13. also perform other election competences of the National Assembly.

By means of a majority vote of all deputies, the National Assembly shall decide on laws which regulate:

1. referendum and national initiative,
2. enjoying of individual and collective rights of members of national minorities,
3. development and spatial plan,
4. public debt,
5. territories of autonomous provinces and local self-government units,
6. conclusion and ratification of international contracts,
7. other issues stipulated by the Constitution.

By means of a three-fifths majority vote of all deputies, the National Assembly shall elect the five members of the High Judicial Council, the five members of the High Prosecutorial Council and the Supreme Public Prosecutor of Serbia. If a three-fifths majority is not achieved within next 10 days another election shall be held requiring a five-ninths majority vote of all deputies. A five- ninth majority vote of all deputies is also required for the dismissal of the five members of the High Judicial Council, the five members of the High Prosecutorial Council and the Supreme Public Prosecutor of Serbia.

The present Amendment shall supersede article 105 of the Constitution of the RS.

EXPLANATION OF THE REVISION OF THE JURISDICTION OF THE NATIONAL ASSEMBLY:

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available. *JUDICIAL APPOINTMENTS CDL-AD (2007)028 , para.25*

AMENDMENT III

7. Courts

Judiciary principles

Judicial power shall belong to the courts as autonomous and independent state autorities. Judicial power shall be unified on the territory of the Republic of Serbia.

Courts shall be established and dissolved by the law. The types of courts, jurisdiction, territory of courts and court proceedings shall be regulated by law.

Provisional courts, courts•martial or emergency courts may not be established. Court decisions shall be passed in the name of the people.

A court decision may only be reviewed by an authorised court in a legal proceedings prescribed by the law.

The hearing before the court shall be public and may be restricted only in accordance with the Constitution and law.

The court shall sit in a panel, unless prescribed by the law that the court shall be presided by a single judge.

Lay judges may also take part in the trial, pursuant to the law.

The present Amendment shall supersede article 142 of the Constitution of the RS.

AMENDMENT IV

Independance, Permanent Tenure of Office and Non•transferability of Judge

A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international contracts, law and other general acts. The uniformity of the jurisprudence shall be regulated by law.

As a judge in the courts with exclusively first-instance jurisdiction may only be elected a person who has completed special training in a judicial training institution established by the law.

A judicial tenure shall last from the moment of the appointment until the retirement.

A judicial tenure of office shall terminate earlier upon personal request, in case of permanent disability for judicial function or in case of dismissal.

A judge shall be dismissed if he/she has been sentenced of imprisonment for a criminal offense; if he/she has been convicted for an act that renders him/her unworthy for the judicial function; if he/she incompetently performs the judicial function, or in case of imposing a disciplinary measure of termination of judicial function.

A judge and a president of the court shall have the right to lodge an appeal against a decision relieving him/her of duty with the Constitutional Court. The lodged appeal shall exclude the right to lodge a Constitutional appeal.

A judge may not be transferred to another court without their consent, except in cases of reorganization of the judicial system by a decision of High Judicial Council.

The present Amendment supersedes article 143 of the constitution of the RS. EXPLANATION OF THE REMOVAL OF THE PROBATIONARY PERIOD FOR JUDGES:

The Venice Commission and the Directorate reiterate that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. *CDL-AD(2014)031, para.32*

The Universal Declaration on the Independence of Justice (2.19-2.20) contains guarantees concerning the permanent tenure, stipulating that „Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists. The appointment of temporary judges and the appointment of judges for probationary periods are inconsistent with judicial independence. Where such appointments exist, they shall be phased out gradually."

The Venice Commission took the stand that setting probationary periods can undermine the independence of judges, since they might feel under pressure to

decide cases in a particular way. Bearing this in mind, the Commission took the standpoint that this should not be understood as exclusion of a possibility to have temporary judges. This particularly in the states having relatively new judicial systems, where there may be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment or appraisal that the election should not take place. At any rate, if probationary periods are considered indispensable, „refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office. *CDL-AD (2007)028, par. 40-41*

EXPLANATION: The abovementioned provision shall leave the room for the subsequent regulation of the uniformity and the harmonisation of the jurisprudence by law (*Opinion of the Venice Commission on the same CDL-AD (2017) 019*).

AMENDMENT V

Immunity and Incompatibility

A judge and a lay judge cannot be held accountable for an opinion expressed within the court proceedings or voting in the process of passing a court decision, unless they commit a criminal offense.

A judge may not be deprived of liberty in the legal proceedings against him/her for a criminal offense committed while performing judgeship without the approval of the High Judicial Council.

A function of a judge or court president is incompatile with other public or private function, a legally defined activity or job, or political activities.

The present Amendment shall supersede article 144 of the Constitution of the RS.

AMENDMENT VI

The Supreme Court of Serbia

The Supreme Court of Serbia shall be the highest court in the Republic of Serbia

The Supreme Court of Serbia shall ensure uniform application of the law by the courts. The present Amendment shall supersede article 145 of the Constitution of the RS.

AMENDMENT VII

President of the Supreme Court and Presidents of Courts

The president of the Supreme Court of Serbia shall be appointed by the High Judicial Council upon obtaining opinion of the general session of the Supreme Court of Serbia. The President of the Supreme Court of Serbia shall be appointed for a for a five-year term.

The same person cannot be appointed more than once as President of the Supreme Court of Serbia.

The High Judicial Council shall elect presidents of other courts for a five-year term.

AMENDMENT VIII

High Judicial Council

Jurisdiction of the High Judicial Council

The High Judicial Council is an autonomous and independent state body that ensures the autonomy and independence of the judicial branch by deciding on the issues of the status of judges, presidents of courts and lay judges determined under the Constitution and the law.

The High Judicial Council shall appoint and dismiss the President of the Supreme Court of Serbia as well as presidents of other courts; appoint judges and lay judges and decide on the termination of their tenure ; collect statistical data relevant to the work of judges ; evaluate the performance of judges and presidents of courts; decide on the transfer and temporary relocation of judges; appoint and dismiss the members of the disciplinary bodies ; determine the number of judges and lay judges ; propose to the Government the amount of funds required for the work of courts in matters within its competence, and shall decide on other issues related to the status of judges, presidents of courts and lay judges provided by law.

Disciplinary proceedings and the procedure for the dismissal of a judge and a president of the court may also be initiated by the minister in charge of the judiciary.

The present Amendment shall supersede article 147 of the Constitution of the RS.

EXPLANATION OF THE REVISED JURISDICTION FOR THE APPOINTMENT OF JUDGES AND PRESIDENT OF THE COURTS :

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available. *JUDICIAL APPOINTMENTS CDL-AD (2007)028 , para.25*

AMENDMENT IX

The Composition of the High Judicial Council

The High Judicial Council shall be composed of ten members of whom five judges elected by their peers and five prominent lawyers elected by The National Assembly.

The National Assembly shall elect five members of the High Judicial Council upon the proposal of the competent parliamentary committee after having conducted a public competition, by a three-fifth vote of all deputies. In case they are not all elected in this manner, the remaining deputies shall be elected within the next ten days by a five-ninth vote of all deputies, otherwise the election procedure is repeated after fifteen days, for the number of members who have not been elected.

The principle of equal representation of courts shall be taken into account in the process of election of judges as members of the High Judicial Council.

Presidents of courts may not be members of the High Judicial Council.

The present Amendment shall supersede article 148 of the Constitution of the RS.

EXPLANATION OF THE REVISED COMPOSITION OF THE HJC:

The Venice Commission considers that a composition in which there is a parity of members coming from the judiciary and from the rest of society and in which the

President of the Judicial Council will be elected from among the lay members would ensure a better balance between the autonomy and independence and the accountability of the judicial power. *CDL- AD(2011)010 , para.14*

In the Venice Commission's view, this composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicization and autocratic government. *CDL-AD(2011)010 , para.20*

In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised." 13

Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management". *CDL-JD(2007)001, par. 29 and CDL-AD (2007)028, par. 29-30*

AMENDMENT X

Term of Office of Members of the High Judicial Council

Members of the High Judicial Council shall be elected to a five-year term of office. The same person may not be reelected as member of the High Judicial Council.

The term of office of a member of the High Judicial Council shall terminate for reasons and in the procedure prescribed by law.

AMENDMENT XI

President of the High Judicial Council

The High Judicial Council shall have a president.

The president of the High Judicial Council shall be elected among members who are not judges.

The term of office of the president is five years.

The present Amendment shall supersede article 150 of the Constitution of the RS.

EXPLANATION:

In the Venice Commission's view, however, it would have been preferable, instead of entrusting ex officio the President of the Supreme Court with the chairmanship of the Judicial Council, to provide that the President be elected by the Judicial Council among the lay members, in order to ensure the necessary links between the judiciary and the society, and to avoid the risk of an "autocratic management" of the judiciary. *CDL-AD (2007)047, para.96*

Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council. *CDL-JD(2007)001, par. 34 and CDL-AD (2007)028, par. 35*

AMENDMENT XII

Work and Decision-making of the High Judicial Council

The High Judicial Council shall adopt decisions by the votes of at least six members of the Council or the votes of minimum five members of the Council including the vote of the president of the High Judicial Council, at a session where at least seven members of the Council are present.

The High Judicial Council shall publicly announce and explain their decisions. The decisions on the election and termination of office of judges, presidents of courts, lay judges, decisions on the transfer and temporary relocation of judges, and decisions on the appointment and dismissal of members of disciplinary bodies shall be based on the criteria determined in accordance with the law and under a legally prescribed procedure.

The present Amendment shall supersede article 151 of the Constitution of the RS.

EXPLANATION:

In the *Opinion on two sets of draft amendments to the Constitutional provisions relating to the judiciary of Montenegro (CDL-AD (2012)024, para. 19*), the Venice Commission stated that the casting vote of the President, mainly in disciplinary proceedings, is an important part of the balance between independence and accountability of judges.

AMENDMENT XIII

Immunity of the members of the High Judicial Council

Members of the High Judicial Council cannot be held accountable for an opinion expressed or vote given in decision-making within the Council, unless they have committed a criminal offense.

The members cannot be deprived of liberty in the proceedings against them for a criminal offense they have committed as members of the High Judicial Council without the approval of the Council.

The present Amendment shall supersede article 152 of the Constitution of the RS.

AMENDMENT XIV

8. Public Prosecutor's Offices

Status

The Public Prosecutor's Office shall be an autonomus state body which shall prosecute the perpetrators of criminal offenses and other punishable actions and shall protect the constitutionality and legality, human rights and civil freedoms.

The Public Prosecutor's Office shall perform its function in accordance with the Constitution, ratified international treaties, laws and other general acts.

The establishment, organization, and jurisdiction of the public prosecution service shall be regulated by the law.

The Supreme Public Prosecutor's Office shall be the highest public prosecutor's office in the Republic of Serbia.

The Supreme Public Prosecutor of Serbia shall perform the function of the public prosecution within the rights and duties of the Republic of Serbia.

The present Amendment shall supersede article 153 of the Constitution of the RS.

EXPLANATION OF THE DEFINITION OF THE STATUS AND THE ROLE OF THE PUBLIC PROSECUTOR:

The Committee of Ministers of the Council of Europe concludes that the "public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. *Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, para.1*

A crime is a wrong against society as a whole, although in many cases the same act will also amount to a private wrong against the individual victim. *CDL-AD (2010)040-e Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, para.11*

In all criminal justice systems, public prosecutors:

- decide whether to initiate or continue prosecutions;
- conduct prosecutions before the courts;
- may appeal or conduct appeals concerning all or some court decisions.

In certain criminal justice systems, public prosecutors also:

- implement national crime policy while adapting it, where appropriate, to regional and local circumstances;
- conduct, direct or supervise investigations;
- ensure that victims are effectively assisted;
- decide on alternatives to prosecution;
- supervise the execution of court decisions;
- etc.

Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, para. 2,3

Apart from those tendencies, there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

A clear distinction has to be made between a possible independence of the prosecutor's office or the Prosecutor General as opposed to the status of prosecutors other than the prosecutor general who are rather 'autonomous' than 'independent'. The prosecutor's offices are often referred to as 'autonomous' and individual prosecutors would be referred to as 'independent'.

CDL-AD(2010)040-e Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service para. 28,29

AMENDMENT XV

Responsibility

The Supreme Public Prosecutor of Serbia shall manage the Supreme Public Prosecutor's Office. He/she shall be responsible to the National Assembly, both for the work of the public prosecution and his/her own work.

Public prosecutors in other public prosecutor's offices are responsible for the work of the prosecutor's office and their own work to the Supreme Public Prosecutor of Serbia, and public prosecutors of lower-instance prosecutor's offices also to the public prosecutors in immediately higher prosecutor's offices.

Deputy public prosecutors are responsible to the public prosecutor.

The present Amendment shall supersede article 154 of the Constitution of the RS.

AMENDMENT XVI

Public Prosecutors and Deputy Public Prosecutors

A public prosecutor shall perform the prosecution function.

A deputy public prosecutor shall substitute a public prosecutor in performing prosecution function and shall act upon instruction from the public prosecutor.

The present Amendment shall supersede article 155 of the Constitution of the RS.

EXPLANATION OF THE HIERARCHICAL STRUCTURE OF THE PROSECUTION SERVICE:

The independence of the prosecution service as such has to be distinguished from any "internal independence" of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for noninterference from their hierarchical superior.

CDL-AD(2010)040-e Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, para. 31

AMENDMENT XVII

Election of the Supreme Public Prosecutor of Serbia and Public Prosecutors

The National Assembly shall elect the Supreme Public Prosecutor of Serbia to a five-year term of office, upon the proposal of the High Prosecutorial Council, after having conducted a public competition, by a three-fifth vote of all deputies. If a three-fifths majority is not achieved, s/he shall be elected within the next ten days by a five-ninths vote of all deputies, otherwise the entire election procedure shall be repeated after fifteen days.

The same person cannot be reelected as the Supreme Public Prosecutor of Serbia.

The High Prosecutorial Council shall elect public prosecutors to a five-year term of office.

In the case of their dismissal, the Supreme Public Prosecutor of Serbia and public prosecutors shall retain the position of deputy public prosecutor in the public prosecutor's office which they managed prior to the dismissal.

The Supreme Public Prosecutor of Serbia and public prosecutors shall have the right to lodge an appeal against a decision relieving him/her of duty with the Constitutional Court. The lodged appeal shall exclude the right to lodge a Constitutional appeal. The present Amendment shall supersede article 156 of the Constitution of the RS.

EXPLANATION:

In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. However one would need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock.

It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change.

CDL-AD(2010)040-e Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, para. 36,37

AMENDMENT XVIII

Life Tenure, Transfer and Temporary Relocation of Deputy Public Prosecutors

The function of deputy public prosecutor shall last from the moment of the appointment until the retirement.

A tenure of deputy public prosecutor shall terminate earlier upon personal request, in case of permanent disability for prosecutorial function or in case of dismissal.

As a deputy prosecutor in prosecutor's offices of lowest instance may only be elected a person who has completed special training in a judicial training institution established by the law.

A deputy prosecutor shall be dismissed if he/she has been sentenced of imprisonment for a criminal offense; if he/she has been convicted for an act that renders him/her unworthy for the prosecutorial function; if he/she incompetently performs prosecutorial function, or in case of imposing a disciplinary measure of termination of prosecutorial function.

A deputy public prosecutor shall have the right to lodge an appeal against a decision relieving him/her of duty with the Constitutional Court. The lodged appeal shall exclude the right to lodge a Constitutional appeal.

A deputy public prosecutor may be transferred or temporarily assigned to another prosecution office without their consent, under a decision of the Supreme Public Prosecutor in accordance with the law.

The present Amendment supersedes article 157 of the Constitution of the RS.
EXPLANATION OF THE REMOVAL OF THE PROBATIONARY PERIOD FOR DEPUTY PROSECUTORS :

Prosecutors should be appointed until retirement. Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her. *CDL-AD(2010)040-e Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, para.50*.

EXPLANATION OF STANDARDIZATION OF THE NECESSARY TRAINING BEFORE THE APPOINTMENT OF DEPUTY PROSECUTORS:

Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. *Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, para.7*

AMENDMENT XIX

Immunity and Incompatibility

A public prosecutor and a deputy prosecutor cannot be held accountable for an opinion expressed or a decision made in performing prosecutorial function, unless they have committed a criminal offense.

The function of a public prosecutor and deputy prosecutor is incompatible with other public or private function, a legally defined activity or job, or political activities.

The present Amendment shall supersede article 158 of the Constitution of the RS.

High Prosecutorial Council

Jurisdiction of the High Prosecutorial Council

The High Prosecutorial Council is an autonomous state body that ensures the autonomy of the public prosecution service by deciding on the issues related to the status of public prosecutors and deputy prosecutors, which are determined under the Constitution and the law.

The High Prosecutorial Council shall appoint and dismiss public prosecutors; appoint deputy public prosecutors and decide on the termination of their tenure; propose the appointment and dismissal of the Supreme Public Prosecutor of Serbia to the National Assembly; evaluate the performance of public prosecutors and deputy prosecutors; appoint and dismiss the members of the disciplinary bodies ; submit the annual report on the work of the public prosecution to the National Assembly ; propose to the Government the amount of funds required for the work of public prosecutor's offices in matters within its competence and shall decide on other issues related to the status of the Supreme Public Prosecutor of Serbia, public prosecutors, and deputy prosecutors provided by the law.

The present Amendment shall supersede article 159 of the Constitution of the RS.

EXPLANATION OF THE REVISED JURISDICTION FOR THE APPOINTMENT OF DEPUTY PUBLIC PROSECUTORS AND PUBLIC PROSECUTORS:

In view of the special qualities required for prosecutors, it seems inadvisable to leave the process of their appointment entirely to the prosecutorial hierarchy itself. Various methods can help to remove the danger that within a monolithic prosecution system instructions from above count more than the law. In order to prepare the appointment of qualified prosecutors expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason.

CDL-AD(2010)040-e Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, para.48

Composition of the High Prosecutorial Council

The High Prosecutorial Council shall have eleven members: four deputy public prosecutors elected by public prosecutors and deputy prosecutors, five prominent lawyers elected by the National Assembly, the Supreme Public Prosecutor of Serbia and the minister in charge of the judiciary.

The National Assembly shall elect five members of the High Prosecutorial Council upon the proposal of the competent parliamentary committee after conducting a public competition, by a three-fifth vote of all deputies. In case they are not all elected in this manner, the remaining members shall be elected within the next ten days by a five-ninth vote of all deputies, otherwise the election procedure is repeated after fifteen days for the number of members who have not been elected.

The principle of equal representation of public prosecutor's offices shall be taken into account in the process of election of deputy prosecutors as members of the High Prosecutorial Council.

Public prosecutors may not be members of the High Prosecutorial Council.

The present Amendment shall supersede article 160 of the Constitution of the RS. EXPLANATION:

Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. *CDL- AD(2010)040-e , Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, para.66.*

AMENDMENT XXII

Term of Office of Members of the High Prosecutorial Council and President of the HPC

Members of the High Prosecutorial Council shall be elected to a five-year term of office. The same person may not be reelected as member of the High Prosecutorial Council.

The term of office of a member of the High Prosecutorial Council shall terminate for reasons and in the proceedings prescribed by law.

The Supreme Public Prosecutor of Serbia shall perform *ex officio* the function of the president of the High Prosecutorial Council.

The present Amendment shall supersede article 161 of the Constitution of the RS.

EXPLANATION:

In the opinion of the Venice Commission, the Supreme State Prosecutor should chair ex officio the Prosecutorial Council, except in disciplinary proceedings. *CDL-AD(2012)024, Montenegro, para. 50*

"[…] [T]he hierarchical nature of the prosecution service and the obligation on the Supreme State Prosecutor to manage the prosecution service makes it appropriate that that person should also chair the Prosecutorial Council. […]" *CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, para.38*

AMENDMENT XXIII

Work and Decision-making of the High Prosecutorial Council

The High Prosecutorial Council shall adopt decisions by the votes of at least six members of the Council in a session with at least eight members present.

The High Prosecutorial Council shall publicly announce and explain their decisions. The decisions on the election and termination of office of public prosecutors and deputy prosecutors, decisions on proposal to elect or dismiss the Supreme Public Prosecutor of Serbia and decisions on the appointment and dismissal of members of disciplinary bodies shall be based on the criteria determined in accordance with the law and under a legally prescribed procedure.

The minister in charge of the judiciary and the Supreme Public Prosecutor of Serbia may initiate disciplinary proceedings and proceedings for dismissal against public prosecutors and deputy prosecutors, but cannot take part in the disciplinary procedure or dismissal procedure if they have initiated the same.

The present Amendment shall supersede article 162 of the Constitution of the RS.

EXPLANATION:

The system of discipline is closely linked to the issue of the hierarchical organisation of the prosecutor's office. In such a system, disciplinary measures are typically initiated by the superior of the person concerned. In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could handle disciplinary cases. An appeal to a court against disciplinary sanctions should be available.

CDL-AD(2010)040-e Report on European Standards as regards the Independence of the

Judicial System: Part II – the Prosecution Service para. 51,52

AMENDMENT XXIV

Immunity of Members of the High Prosecutorial Council

Members of the High Prosecutorial Council cannot be held accountable for an opinion expressed or vote given in decision-making within the Council, unless they have committed a criminal offense.

The members cannot be deprived of liberty in the proceedings against them for a criminal offense they have committed as members of the High Prosecutorial Council without the approval of the Council.

The present Amendment shall supersede article 163 and revoke articles 164 and 165 of the Constitution of the RS.

12 February 2018

ANALYSIS OF THE WORKING DRAFT OF AMENDMENTS TO THE CONSTITUTION OF SERBIA AS RELEASED BY THE SERBIAN MINISTRY OF JUSTICE

The Supreme Court of Cassation met in plenary session on 8 and 9 February 2018 to analyse Amendments I to XIII contained in the Working Draft of Amendments to the Constitution of Serbia as provided by the Ministry of Justice for consideration by the Court.

In considering the proposed amendments, judges of the Supreme Court of Cassation referred to the current provisions of Chapter 7, 'Courts', of the Constitution of Serbia ('the Constitution'), as well as key principles of the Constitution, in particular separation of powers (Article 4), and constitutional provisions on human and minority rights. In addition, the Court also took into consideration the guidelines contained in the National Judicial Reform Strategy (2013-2018), enacted by Parliament on 1 July 2013, that require the removal of the Parliament's responsibility for the election of court presidents, judges, and judge members of the High Judicial Council ('the HJC'), and reconstruction of the HJC to exclude officers of the legislative and executive branches of government. The Court in plenary session also prepared for this analysis by consulting the Legal Assessment of the Constitutional Framework Concerning the Judiciary developed by members of a Working Group created by the Commission to Implement the National Judicial Reform Strategy (2013-2018).[1] In the course of the debate, the judges also referred to the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia[2] ('the Kyiv Recommendations'), as well as arrangements in place in other jurisdictions of the former Yugoslavia (primarily Croatia and Slovenia).

The following text will present objections and recommendations pertaining to individual amendments, as well as conclusions on the Draft Amendments in their entirety, proceeding from the two-day discussion by the Supreme Court of Cassation meeting in plenary session.

Amendment III. *Principles of Courts*

This Amendment should exclusively govern the principles of courts (autonomy, independence, unified nature of the judicial power throughout Serbia, openness of court hearings to the public, collective decision-making in a bench trial by a panel

[1] This Working Group was comprised of Professor Dr Irena Pejić, Professor Dr Vladan Petrov, Professor Dr Darko Simović, and Professor Dr Slobodan Orlović.

[2] Originally published by the OSCE Office for Democratic Institutions and Human Rights in August 2010.

of judges, and finding of fact by jury), contained in its **Paragraphs 1, 2, 7, 8 and 9.**

Provisions of **III.3 and 4**, which pertain to organisational arrangements for courts, ought to be moved to a separate amendment, which would precede Amendment VI ('Supreme Court of Serbia') and read:

'Courts shall be established and dissolved by the law. The types of courts, jurisdiction, territory of courts and court proceedings shall be regulated by law.

No summary, temporary, or extraordinary courts may be established.'

Provisions of III.5 and 6, dealing with court rulings, should be removed to a separate article, as is the case with the current Constitution (Art. 145). We recommend that this article read:

'Court decisions shall be adopted in the name of the people.

A court decision may be reviewed only by a court competent to do so as stipulated by law, and in a procedure as stipulated by law.'

Judges have for years insisted on the establishment of a judicial budget as a guarantee of the institutional independence of courts. The Constitutional Court has its own budget, although it collects no court fees,[3] unlike other courts, whose fees make up a substantial portion of the Serbian government budget. Article 28.1 of the Law on the Constitutional Court stipulates that funds ('budget') for the operation of the Constitutional Court are to be secured in the central budget; 28.2 gives the Constitutional Court independence in spending these funds; and 28.3 prevents the Government from preventing, delaying, or limiting the execution of the Constitutional Court's budget. Without attempting to circumscribe the power and responsibility of the Government for proposing the national budget, or that of Parliament for enacting it, we feel that amending the Constitution to introduce a judicial budget would be both appropriate and justified. This would, on the one hand, contribute to greater independence and autonomy of the judiciary, and, on the other, make courts and the HJC more accountable in planning, proposing, and expending funds for the operation of the judiciary. As such, **Amendment III should be altered to include a provision allowing the judiciary its own budget.**

Amendment IV. ***Independence, Permanence of Tenure, and Non-Transferability of Judges***

This amendment sets out the **principle of independence of each individual judge** (personal independence of the judiciary) and provides a guarantee of that independence in the form of **permanence of tenure** and **non-transferability of judges.**

The **first sentence of IV.1** states that 'a judge shall be independent and shall perform his or her duties in accordance with the Constitution, ratified international contracts, law and other general enactments'; this defines the range of sources of law that court rulings can be based on. The **second sentence** calls for **legal regulation of 'uniformity of jurisprudence'**. Case law is hereby constitutionally enshrined as a source of law, although it enjoys no such status in Serbia. This impinges upon

[3] Article 6.2 of the Law on the Constitutional Court (*Official Gazette of the Republic of Serbia*, Nos. 109/07, 99/11, 18/13 – Constitutional Court Ruling, 103/15, and 40/15 – Other Law) states that no fees are payable in proceedings heard by the Constitutional Court.

the principle that judges should make decisions in accordance with their freely held convictions and allows the imposition of precedent set by a non-judicial body (a Certifying Commission envisaged under the Action Plan to implement the National Judicial Reform Strategy). We therefore recommend the **deletion of this second sentence of IV.1.**

Amendment IV.2 states that **only a person who has undergone specific training at a judicial training institution established pursuant to law may be appointed judge of a first-instance court. We propose that IV.2 be deleted in its entirety** for the following reasons:

1) Requirements for judicial appointment ought to be governed by statute, not by the Constitution, and should in particular not be placed amongst provisions governing the personal independence of judges.
2) The constitutionality of any such statutory provision would be debatable, and with good reason. Article 53 of the Constitution guarantees the right of all Serbian citizens to access public office under equal conditions; making appointment as a judge of a first-instance court contingent upon the completion of special training at the Judicial Academy[4] would deny such appointment to hundreds of judicial associates with considerable court experience, as well as judicial assistants who have amassed vast practical knowledge and understanding of legal issues whilst employed in other positions.
3) This arrangement contravenes the Kyiv Recommendations, which states that access to the judicial profession should be given 'not only to young jurists with special training but also to jurists with significant experience working in the legal profession'.[5]
4) Imposing training at the Judicial Academy as a mandatory requirement for initial judicial and prosecutorial appointment is also contrary to the view of the Working Group for Reform and Development of the Judicial Academy, which believes that the status of the Judicial Academy should not be governed by the Constitution for the time being.

Amendment IV.2 should, therefore, be deleted and replaced by **the current provision of Article 149.2 of the Constitution**, unjustifiably absent from this Amendment, which reads: **'Any influence on a judge in the exercise of their judicial office shall be prohibited'.**

Amendment IV.3 stipulates that judicial office is to last from appointment to retirement, so guaranteeing **permanence of tenure**. Nevertheless, the principle of permanence ought to be highlighted more prominently by altering this provision to read: 'Judicial office shall **be permanent and** last from the moment of appointment until retirement'.

One of the grounds for **termination of judicial office as listed in IV.4** is 'permanent disability for judicial function'. Not being able to undertake particular work or

[4] The Judicial Academy is currently the only 'judicial training institution established pursuant to law', in this case the Law on the Judicial Academy (*Official Gazette of the Republic of Serbia*, Nos. 104/09, 32/14 – Constitutional Court Ruling, and 106/15).

[5] Part II, Judicial Selection and Training, *Diversity of Access to Judicial Profession*, Item 17.

discharge an office is a very broad concept and may be construed in a variety of ways; as such, in similar cases this definition is universally interpreted to mean being medically unfit (this also applies to judges, as in Article 174.2 of the Constitution that governs dismissal of judges of the Constitutional Court).[6] Therefore, this reason for termination of office **should be clarified** by altering the wording to read **'(…) in the event of becoming permanently medically unfit to discharge judicial office'.**

Grounds for dismissal are currently governed by statute, and Amendment **IV.5** seeks to incorporate them into the Constitution. Here the proposed arrangement ought to be revisited: as it stands, it envisages the dismissal of a judge sentenced to a term of imprisonment (regardless of its length), instead of the current statutory provision that mandates dismissal only if imprisonment exceeds six months, which follows the usual practice for termination of employment with cause. Moreover, to give these constitutional provisions the clarity and precision they so sorely need, we propose reconsidering whether infringing judges are to be subject to the 'disciplinary measure of termination of judicial office' or 'disciplinary measure of dismissal'.

Amendment IV.7 concerns the **transfer of judges.** Since non-transferability is a personal guarantee of independence, removing a judge to a different court without his or her consent would constrain this independence. As such, situations in which this constraint can apply must be clearly and unambiguously stated. '**Re-arrangement' of the judicial system**, cited as a reason for transfer to a different court, does not meet the criteria of clarity and transparency. Firstly, the word 're-arrangement' is in itself unfit for use even in a byelaw, let alone the Constitution. Secondly, this expression is so vague and undefinable as to deny the provision any pretence at providing legal certainty.[7] This certainty is further undermined by the fact that the amendment does not define the level or type of court to which a judge may be transferred against their will, meaning that the paragraph could be construed rather arbitrarily in application. **Article 19 of the Law on Judges defines transfer of judges clearly and precisely**, allowing a judge to be transferred in the event that the court to which they are appointed is abolished, or where most of the court's jurisdiction is removed. Further, a judge may only be transferred to a court of the same level that has taken on the jurisdiction of the court which has been abolished or had most of its jurisdiction removed. **There is no valid legal argument against translating this current statutory provision into a constitutional amendment; we therefore propose that Amendment IV.7 be altered accordingly.**

Another guarantee of judicial independence is adequate remuneration for judges. **This amendment should therefore be revised to include a provision that would read: 'The remuneration of a judge shall reflect the position and jurisdiction of the court to which that judge has been appointed and the responsibilities**

[6] Article 174.2 of the Constitution states that a judge of the Constitutional Court shall be dismissed on becoming permanently medically unfit for the discharge of this office.

[7] Case law of the European Court of Human Rights has established criteria that must be met by legislation of a member state for it to comply with principles of rule of law, as applied by the Constitutional Court of Serbia. One of these criteria is that a law must be 'formulated with sufficient precision to enable [a] citizen to regulate his conduct' (see Case of the Sunday Times v. the United Kingdom, Application No. 6538/74, Paragraph 49).

the judge holds in the exercise of their office, and shall constitute a guarantee of their independence'.

Amendment V. ***Immunity and Incompatibility***

Amendments V.1 and 2 guarantee judges both substantive and procedural **immunity**. The proposed amendment would shield judges from being held accountable for opinions voiced in the course of proceedings in their entirety, unlike heretofore, as well as for votes cast when rendering court decisions. The word **'rendering'** should here be replaced by the broader expression **'adoption'**, which, unlike 'rendering', is common to all judicial proceedings.

Incompatibility of judicial office is defined in V.3. This concept derives from the principle of the separation of powers and the principle of prohibition of conflicts of interest (Articles 4 and 6 of the Constitution, respectively), and is currently regulated in Article 152 of the Constitution, which bans judges from engaging in political activity; the legislature is allowed to designate other offices, positions, or private interests that are incompatible with judicial office. Amendment V.3 elaborates upon the concept of incompatibility in greater detail, but it remains unclear as to what exactly is meant by 'private office', as the two words are mutually exclusive, as well as what may be deemed to constitute 'political activity'. We therefore recommend the deletion of the wording **'(…) or private office', clarification of public offices incompatible with judicial office, and a clear designation of what is meant by 'political activity'.**

Amendment VI. ***Supreme Court of Serbia***

It is not clear why the name of the Supreme Court contains the designation 'of Serbia', if this is meant to be the highest, and as such the sole, Supreme Court in the Republic of Serbia.[8] No similar geographical attributes are used in the names of the National Assembly, President of the Republic, Government, or Constitutional Court. It may have been legally justified at the time of the Federal Republic of Yugoslavia, when there was a Supreme Court of Montenegro in addition to the Supreme Court of Serbia. Consequently, **we propose that the name of the highest court in the Republic of Serbia be 'Supreme Court' rather than 'Supreme Court of Serbia'**, and that appropriate alterations be made to the name of the Court wherever it is referenced throughout this Amendment.

Amendment VI should also **include a provision stipulating that the Supreme Court is to have its seat in Belgrade**, as currently envisaged for the Supreme Court of Cassation under Article 143.5 of the Constitution.

As judges of the Supreme Court of Cassation already hold judicial office in a court that essentially exercises the jurisdiction of a supreme court, as it rules on the merits of cases on appeal,[9] and since permanence of judicial tenure is guaranteed by

[8] The inclusion of the identifier 'of Serbia' in the name of the Supreme Court leads to the conclusion that there may be other Supreme Courts in Serbia, such as, for instance, courts 'of Vojvodina', 'of Kosovo and Metohija', etc.

[9] The Legal Assessment of the Constitutional Framework Concerning the Judiciary (page 6) states: 'There are essentially two models of organising the highest court of a jurisdiction: the supreme court

the Constitution, Amendment VI should **include a separate paragraph affirming the right of judges of the Supreme Court of Cassation to continue in office as judges of the Supreme Court, pursuant to a decision of the HJC.**

Amendment VII. ***President of the Supreme Court and Presidents of Courts***

The only comment to this Amendment concerns the name of the Supreme Court of Serbia, which ought to be changed to 'Supreme Court' for the reasons outlined above.

Amendment VIII. ***High Judicial Council. Jurisdiction of the High Judicial Council***

Amendment VIII.1 defines the HJC as an autonomous and independent state body that ensures the autonomy and independence of the judicial branch by deciding on the issues of the status of judges, presidents of courts and lay judges determined under the Constitution and the law. The fact that the HJC is primarily charged with making decisions on issues related to the status of judges gives rise to the necessity of this body also guaranteeing the independence of judges,[10] rather than solely the institutional independence of courts. We recommend **altering Amendment VIII.1** to read '(…) that guarantees the autonomy and independence of courts **and judges** (…)'.

Amendment VIII.2 sets out the **powers of the HJC** by making it the sole body henceforth responsible for deciding on issues related to the status of judges, court presidents, and lay judges, including initial appointments to judicial office and appointment of court presidents, matters that are at present within the remit of the National Assembly. This excludes Parliament from direct decision-making in the appointment of judges and court presidents. The answer to the dilemma of whether this has essentially eliminated the influence of the legislature on the judiciary should be sought in other amendments applicable to the HJC.

If a judicial budget is established to bolster institutional guarantees of judicial independence, as recommended in our proposed alteration of Amendment III, **the remit of the HJC as set out in Amendment VIII.2 ought to be broadened to include proposing this judicial budget and allocating its funds.**

We recommend deleting VIII.3, which allows the Minister of Justice to institute disciplinary proceedings and procedure for the dismissal of judges and court presidents, as this provision amounts to a blunt violation of judicial independence by the executive.

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model, and the court of cassation model. The former sees the highest court decide on the merits of a case on appeal and render a judgment that constitutes the final resolution of that case. The latter, as a rule, does not involve the highest court ruling on the essential points of a case, but, rather, only on the legality of a judgment rendered by a lower court; here the court of cassation is able to overrule an illegal judgment and require a retrial of the disputed case. *In naming the highest court in the Republic of Serbia the "Supreme Court of Cassation", the authors of the Constitution have confused these two seemingly incompatible models (…) This is why the former name of the highest court – the "Supreme Court" – ought to be reinstated*'.

[10] Guarantees of the independence of judges are set out in Amendment IV.

Amendments IX to XIII

Composition of the High Judicial Council; Term of Office of Members of the High Judicial Council; President of the High Judicial Council; Operation and Decision-Making of the High Judicial Council; Immunity of Members of the High Judicial Council

Amendments IX to XIII pertain to the HJC and are all mutually related. They will therefore all be reviewed together below.

According to Amendment VIII, the HJC is to be an autonomous and independent state body that ensures the autonomy and independence of the judicial branch by deciding on the issues of the status of judges, presidents of courts and lay judges determined under the Constitution and the law. The proposed composition of the HJC, appointment of its members and President, and decision-making arrangements, as set out in Amendments IX, XI, and XII, raise serious concerns first and foremost about the independence and autonomy of this body, and, consequently, its ability to safeguard the constitutional guarantees of the independence and autonomy of courts and judges.

The proposed amendment envisages:

- That the HJC be composed of ten members, five elected by judges and five prominent jurists appointed by Parliament;
- That the President of the HJC be elected from among this body's non-judge members (i.e. those appointed by Parliament);
- That the HJC make decisions by the votes of at least six members of the HJC, or of five members of the HJC including the President (which would give a casting vote to the President, elected from among the HJC's members appointed by Parliament).

Pursuant to Article 153 of the Constitution, **the HJC currently numbers 11 members**:

- Three *ex officio* members (President of the Supreme Court of Cassation, also the President of the HJC; Minister of Justice; and Chairperson of the Parliamentary Justice Committee);
- Six judges; and
- Two reputable and prominent jurists with at least 15 years of professional experience, one being a legal practitioner and the other a law professor.

A comparison of the current constitutional arrangements and the proposed amendments reveals that the HJC has been reduced to ten members, an even number, as opposed to the currently envisaged odd number of 11 members. There is no reasonable justification for any of these changes. The broadened remit of the HJC warrants increasing its membership, or at least retaining the current number of 11 members, in contrast to the proposed reduction to ten. Further, a generally accepted rule is that collective decision-making bodies ought to have an odd number of members to facilitate deliberation and decision-making. Collective bodies with even-numbered membership are an exception: this largely inferior arrangement is used only where absolutely necessary to allow equal representation of authorities or terri-

torial units and prevent one group from being outvoted.[11] In this particular case, **there are no reasons to justify the need for the HJC to be composed of an even number of members and make decisions with the aid of its President's casting vote.**

It is unacceptable for the number of judges on the HJC to be equal to the number of its members appointed by Parliament, and for the President (who may exercise a casting vote) to be elected from among non-judge members. The proposed make-up of the HJC would allow Parliament to pack it with its nominees and so exert a decisive influence on all decisions made by this body on the appointment, dismissal, disciplinary accountability, and remuneration of judges, court presidents, and lay judges. Instead of removing Parliamentary responsibility for decision-making in issues of importance for the independence of courts and judges, as required under the National Judicial Reform Strategy enacted by Parliament itself, this arrangement would actually see the legislative strengthen its influence on the judiciary.

The Kyiv Recommendations argue that **judges should be in the majority on bodies such as the HJC**, as is only logical given the powers of these entities. **Amendment IX.1** relaxes the current requirement, which calls for two members of the HJC to be reputable and prominent jurists with at least 15 years of professional experience, by allowing the appointment of **'prominent lawyers'**, an entirely undefined category given the absence of any other criteria. **The elimination of the requirements of being a 'reputable jurist' and having 'at least 15 years of professional experience' as criteria for appointment to the HJC in the proposed amendments is inexplicable, as it is unthinkable for this body to comprise members without the requisite reputation or legal experience that would allow them to decide the status of judges and presidents of national-level courts.**

The conclusion, thus, is that the HJC ought to comprise an odd number of members, at least 11, where seven would be judges elected by their peers, whilst the remaining four would be appointed by Parliament (two law professors and two reputable and prominent jurists with at least 15 years of professional experience in the practice of law). In view of these two different modes of appointment and election, **the amendments would have to stipulate exactly at what time the HJC was to be deemed constituted** (as Article 101.4 does for the National Assembly).[12]

Concluding considerations

Provisions of the Working Draft of Amendments to the Constitution of Serbia, as released by the Serbian Ministry of Justice, that pertain to courts contravene the guidelines and directions of the National Judicial Reform Strategy (2013-2018), enacted by Parliament on 1 July 2013.

[11] This was the case with the Court of Serbia and Montenegro, composed of four judges each from Serbia and Montenegro to highlight the equality of the two Republics that made up the State Union of Serbia and Montenegro.

[12] The absence of a similar provision for the inauguration of the HJC in its initial convocation created substantial practical problems, as it raised the question of whether this body could be constituted, commence operation, and make decisions on judicial appointments before all of its members were duly elected or appointed.

The proposed amendments exclude Parliament from direct decision-making on the appointment of judges and court presidents; responsibility for making decisions on issues related to the status of judges, court presidents, and lay judges has been entrusted to the HJC. Nevertheless, the suggested composition of the HJC, mode of appointment and election of its members and President, and its decision-making, raise serious concerns first and foremost about the independence and autonomy of this body, and, consequently, its ability to safeguard the constitutional guarantees of the independence and autonomy of courts and judges. Allowing Parliament to appoint one-half of all members of the HJC, and stipulating that the President be drawn from among their ranks, would enable the legislature to exert a decisive influence on this body's decision-making. Instead of removing Parliamentary responsibility for decision-making in issues of importance for the independence of courts and judges, as required under the National Judicial Reform Strategy enacted by Parliament itself, this arrangement would actually see the legislative strengthen its influence on the judiciary.

The proposed amendments would also diminish constitutional guarantees of judicial independence, as evidenced by the envisaged deletion of the current prohibition on influencing a judge in the exercise of their judicial office. Moreover, the amendments would give the Minister of Justice the ability to institute disciplinary proceedings against judges and court presidents and seek their dismissal, a power seen as tantamount to blunt violation of judicial independence by the executive.

The proposed arrangement whereby appointments to first-instance courts are open only to graduates of a 'judicial training institution established pursuant to law', meaning the Judicial Academy, would deny such appointment to hundreds of judicial associates with considerable court experience, as well as judicial assistants who have amassed vast practical knowledge and understanding of legal issues whilst employed in other positions.

In conclusion, the proposed amendments discussed above are unacceptable, and many others require corrections, clarification, and adjustment. As such, a new set of draft amendments ought to be developed that would reflect the key criticisms and recommendations voiced in the course of public consultation.

13 February 2018

THE OPINION AND SUGGESTIONS OF THE HIGH JUDICIAL COUNCIL TO THE WORKING DRAFT OF THE MINISTRY OF JUSTICE AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

The High Judicial Council, as an authority which is, pursuant to the Constitution of the Republic of Serbia, autonomous and independent and guarantees autonomy and independence of courts and judges, has on its sessions held on 25 January 2018 (the Announcement was issued at this session) and on 13 February 2018, considered the Working Draft of the Ministry of Justice amendments to the Constitution of the Republic of Serbia and adopted the document "The Opinion and Suggestions of the High Judicial Council to the Ministry of Justice Amendments to the Constitution of the Republic of Serbia", presented to the judges, court staff and the public, same as the initiator of constitutional amendments and international entities participating in this process.

THE OPINION AND SUGGESTIONS OF GENERAL, PRINCIPAL AND PROCEDURAL CHARACTER

On 22 January 2018, the Ministry of Justice of the Republic of Serbia has published on their website the Working Draft of the Ministry of Justice Amendments to the Constitution of the Republic of Serbia and a special document of the subtitle "With the rationale (sentences of the Venice Commission)". The introductory remarks of this document state the following: "In accordance with obligations assumed by the Republic of Serbia by adopting the Action Plan for Chapter 23, Ministry of Justice elaborated the Working Draft of the Amendments to the Constitution of the Republic of Serbia (hereinafter referred to as: the Working Draft). In the elaboration of the Working Draft, the Ministry was guided primarily by the standards defined in its abundant practice by the Venice Commission, same as by the written reports received during the consultative process implemented by the Ministry of Justice and Office for Cooperation with Civil Society of the Republic of Serbia, in the period July- November 2017. The Working Draft was compiled in cooperation with the Council of Europe expert, Mr James Hamilton. …Working Draft represents a starting basis for the public debate on the amendments to the Constitution of the Republic of Serbia, planned for February and March 2018, whereafter the text of the amendments is to be forwarded to the Venice Commission for opinion."

The High Judicial Council is, naturally, familiar with the obligations assumed by our state under the Action Plan for Chapter 23, and especially in relation to preparation of the working draft of the amendments to the constitutional framework for the judiciary and expert discussion which should have been organised in 2017. Moreover, according to the said Action Plan, the Ministry of Justice is the authority to initiate this task. We are thankful for the role to be played in this process by the esteemed legal experts from the Venice Commission, by means of their Opinion. At the same time, we are convinced that the initial standpoint and accountability of all entities participating in amending Constitution, starting from initiating and implementing new constitutional solutions, implies that judicial system and judicial power within it is to be regulated and improved for the sake of our citizens and in line with the needs in this respect, identified and determined by the competent authorities and bodies of the Republic of Serbia, especially from the justice sector, prior to passing the Action Plan for Chapter 23, based on the internationally recognised democratic standards.

Instead of representing the elaboration of guidelines contained in the National Judicial Reform Strategy for the period 2013- 2018 (adopted on 1 July 2013 by the National Assembly of the Republic od Serbia), with all due respect of the opinion of the Working Group comprising university professors of constitutional law, found in the document *Legal Analysis of the Constitutional Framework on the Judiciary of the Republic of Serbia*, and the debate published in the Serbian judiciary at the end of 2016, by the proposed solutions Ministry of Justice manifested intention of downgrading the existing level of guarantees of independence and autonomy of the courts and public prosecutor's offices.

Specific, most important, issues from the said Legal Analysis of Constitutional Framework on the Judiciary of the Republic of Serbia, have neither been mentioned nor recognised, which is especially visible in the document: "WORKING DRAFT OF THE INISTRY OF JUSTICE AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA" with Rationales (recommendations of the Venice Commission)", where the reasons for proposal of specific amendments are being briefly and incompletely elaborated on, along with referring to specific Opinions of the Venice Commission. In reviewing the considered Amendment VI to Amendment XIII, we have realised that certain articles of the currently applicable Constitution of the Republic of Serbia are being cited, and their titles and content do not correspond to the titles and content of the amendments replacing them.

One of the questions left without the answer of the initiator of constitutional amendments are the contestable positions on the constitutional principle regarding the division of power referred to in Article 4, paragraphs 3 and 4 of the Constitution of the Republic of Serbia ("The relationship of the three branches of power shall rest upon the balance and mutual control", paragraph 3 and "Judicial power shall be independent" paragraph 4) which are in mutual discord, but also some other issues which have to be taken into account, while surpassing the frameworks of normative-legal analysis. For example: the normative-legal analysis of constitutional framework on the judiciary may only be part of a broader analysis of the entire constitutional system; what should be considered in parallel are the systemic guar-

antees of judicial independence and rules on the accountability of political powers for creation of a social ambience where the judiciary is to act idependently or in relation to setting forth the Judicial Academy as a mandatory requirement for the first election of judges and prosecutors, whereby the position of the Working Group was ignored according to which Judicial Academy should not become the constitutional category.

We hereby particularly emphasise that the proposed working draft of the Ministry of Justice amendments to the Constitution of the Republic of Serbia envisage passing the Constitutional Law implementing the Amendments I to XXIV to the Constitution of the Republic of Serbia entering into force on the day of their adoption. Given that judges and prosecutors have extremely bad experiences with interpretation and implementation of the previous constitutional law, based on which the 2009 re-election was delivered, it was necessary to offer the working draft or the draft text of this document to the public together with the proposed constitutional amendments. In this chapter, the executive branch should state its position if the upcoming amendments to the Constitution based on their initiative, given that changing the name of the highest court is also being proposed, implies shortening the term of office and/or re-election of the judicial office holders.

The High Judicial Council has, in line with its competences, elaborated comments, proposals and suggestions in relation to the working draft of the Amendments I to XIV of the Ministry of Justice to the Constitution of the Republic of Serbia, comprising the second part hereof.

THE OPINION AND SUGGESTIONS ON THE AMENDMENTS I-XIV OF THE WORKING DRAFT OF THE MINISTRY OF JUSTICE AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

An important portion of the working draft of the Ministry of Justice amendments to the Constitution of the Republic of Serbia contravenes the National Judicial Reform Strategy for the period 2013-2018 (Part V, point 2) and Action Plan for Chapter 23 – envisaging the necessity to ensure the independence of the judicial office holders from political influence, and this could also challenge the constitutional principle of division of power.

The position of the High Judicial Council is that the multiple proposed positive solutions serving the function of strengthening independence and autonomy of courts and judges (like the exclusive jurisdiction of the HJC regarding the election and dismissal of judges and court presidents, abolishing the first election of judges to a prabatory term of office of three years- members of the HJC based on the candidacy and voting of judges, etc.) entirely derogates from the other proposed amendments to the Constitution, and especially those referring to the HJC composition and manner of decision-making.

The proposed amendments to the Constitution (Amendment IX regarding the Amendements I, II, XI and XII) alter the composition and number of members of the High Judicial Council thus making this authority having ten members (instead of the present eleven, as an odd number being more convenient for decision-mak-

ing and also being present in the practice of many countries having such authorities), five from the ranks of judges and five from the ranks of the pronounced jurists elected by the National Assembly). The number of the elected members of the High Judicial Council who are not judges and who are elected by the National Assembly upon the proposal of the Judicial Committee is being increased from two to five, whereas the number of the elective members of the High Judicial Council from the ranks of judges, directly elected by the judges, is being reduced from six to five. If this is supplemented by the fact that the president of the High Judicial Council is elected from the ranks of the Council members who are not judges, and that the decisions are to be passed by the votes of at least five members of the Council including the vote of the High Judicial Council President (the President has the so called "golden vote"), then it becomes clear that decisions can be made without a single vote of the High Judicial Council members from the ranks of the judges. With such a decision-making, it may occur that all on all important issues pertaining to the position of judges (election, dismissal, disciplinary accountability, material position, etc.) decision are being made by the High Judicial Council members who are not judges (prominent jurists elected by the National Assembly), all leading to the increased influence of the legislative power on the judiciary.

The very name of the authority- the High Judicial Council, implies this is the highest body of courts and judges, and given that the judges should not be represented by someone who has been elected by another branch of power- legislative, in such a composition, the High Judicial Council can not guarantee independence and autonomy of courts and judges. The proposed solutions jeopardise the rule of law as the fundamental principle of the Constitution, excercised by the division of power and independence of the judicial power (Articles 3 and 4 of the Constitution of the Republic of Serbia). Those contravene European standards implied in the Opinion No. 10 (2007) of the Consultative Council of European Judges and recomendations of the Council of Europe GRECO Committee (2015).

The term "prominent jurist" is highly unspecificed and depends exclusively on the person making the assessment, and as such it leaves the wide possibilities for abuse. The Constitution has to clearly define the ranks from which the members of the High Judicial Councils not being judges are to be elected.

The High Judicial Council is the highest authority of the judicial power, deciding on all issues concerning the position of courts and judges, and ensuring the autonomy and independence of courts and judges. As such, the role of the High Judicial Council defined in the Counstitution specifies its composition where the majority has to be comprised by judges directly elected by the judges they are represeting. The High Judicial Council should have 11 members, of which 7 judges directly elected by their peers. The remaining 4 members of the Council may be elected by the National Assembly, two from the ranks of the law school university professors proposed by the academic community, and two proposed by the judicial commitee, following the public call. Only in such a composition, the High Judicial Council may address its constitutional position and guarantee autonomy and independence of the courts and judges.

Due to all this, in respect to the composition, manner of electing the members and manner of operation of the HJC we hereby make the following suggestions:

Modification of the Amendments I, paragraph 2, point 3, so as to the word "five" members of the High Judicial Council to be replaced by the "four" members of the High Judicial Council,

Modification of the Amendment II, paragraph 4, so as to replace the word "five" in the second row by the word "four",

Modification of paragraph 1, Amendement IX so as for the High Judicial Council to have 11 members: 7 (seven) members elected by the judges and 4 graduate jurists elected by the National Assembly, of which 2 (two) from the ranks of the law school university professors proposed by the academic community, and two proposed by the judicial commitee, following the public call.

In the first row of paragraph 2 of the Amendment IX, instead of the word "five", there should be "four".

Modification of paragraph 2, of the Amendment IX so as to read "The President of the High Judicial Council shall be elected among the Council members from the ranks of the judges".

Modification of paragraph 1, of the Amendment XII so as to read "The High Judicial Council shall make decisions by votes of at least 6 (six) members of the Council".

In the Amendment III the term "The Principle on the Courts" instead of the expression from the valid Constitution – "The Judicial Principles" has been used. We consider the term "Judicial Principles" more adequate and appropriate, especially since this Amendment refers not only to the courts, but to the judicial power, judicial decisions, judges and lay judges.

We hereby stress the importance of the remark referring to paragraph 1 of this Amendment envisaging that: "The judicial power shall belong to courts as autonomous and independent state authorities". The position of the HJC is that this definition should exclude the attribute "state". The applicable Constitution does not label the courts as state authorities, therefore we do not see the reason for the courts, as implementers of the judicial power, to be exclusively labelled as "state authorities". Judicial power is and should be one of the branches of power and the principle of independence presuming freedom from any unallowed influence imposes for the Constitution to establish institutional and normative frameworks for the ambience in which the court and judges shall be liberated from medling of the state, other institutions or private persons in the tasks under the jurisdiction of the court.

The principles of the judiciary have to be more precisely and systemically defined, so as to list at the beginning of the section (in several articles) the fundamental constitutional guarantees (institutional and personal) regulating the position of court and judges, and not to have them scattered across the entire section. In our opinion, the proposed amendments to the Constitution reflected in the Amendments III, IV and V, have not only failed to successfully elaborate the listed guidelines of constitutional subject matter experts, but the proposed solutions are, by many parameters, below the quality of the currently applicable provisions of the Constitution of the Republic of Serbia.

In addition to this, omitted was the division to the courts of general and special jurisdiction, as defined in the applicable Constitution, while having in mind that the Council of Europe in its recommendations to the constitutional solutions of the date had suggested further elaboration of the constitutional division of courts done in this way.

The suggestions:

The Constitution has to define the types of courts, which is why we are suggesting to, instead of the proposed paragraph 1, keep the existing solution referred to in Article 143, paragraph 1 of the valid Constitution, and to add in this part of the working draft of the Constituion, i.e. systematise differently the following provisions:

Judicial power is unique in the territory of the Republic of Serbia;

– Judicial power shall belong to courts;
– Judicial power shall be autonomous and independent;

We consider that the systematised part on the Judicial Principles is the place for the provision that:

"The courts shall adjudicate pursuant to the Constitution, international treaties and other applicable sources of law" instead of the contestable formulation in the proposed Amendment IV, paragraph 1.

We consider the second paragraph of Article 143 of the applicable Constitution: "Establishing, organisation, jurisdiction, system and structure of courts shall be regulated by the law", to be more adequate than the proposed formulation in paragraph 3 of Amendment III ("The courts shall be established and abolished by law. The law shall regulate the types, jurisdiction, areas and proceedings before the couts").

Paragraph 5 states that court decisions are passed in the name of the people, and in case law this refers to judgements, thereofore one should consider specifying this paragraph, to read as follows for example:

"Hearing before the court shall be public and judgements shall be pronounced publicly, in the name of the people" (alternatively: on behalf of the Republic of Serbia). The proposed paragraph 7 would be more accurate and complete from the aspect of the profession if the word "limit" would be followed by the words "or exclude", due to the fact that pursuant to the provisions of certain laws, for the criminal legal area for instance, judges have the option to entirely exclude the public in the proceedings. The two listed paragraphs could be merged into one article, which could be entitled "Publicity of court hearings and rulings".

Paragraph 6 should undergo language editing corrections given that the expression used was "envisaged court" instead of the current expression "competent court", whereas the expression "in the certain proceedings" should be replaced by the expression "regulated proceedings", as a more precise one from the legal and linuguistic point of view. Finally, if paragraph 9 of the same Amendment states that lay judges may take part in a trial, this is not "in accordance with" but "in the manner" set forth in the law, which is a more adequate expression for the text of the Constitution.

Suggestions in relation to Amendment IV:

Instead of the contestable formulation proposed in Amendment IV, paragraph 1, a new formulation has already been proposed in part of suggestions relating to Amendment III ("The Courts shall adjudicate pursuant to the Constitution, laws, international treaties and other sources of law").

The part of the same paragraph relating to harmonisation of case law by law should be deleted since not all theoretical and practical implications of entering such a provision in the Constitution have been considered, e.g. whether case law would in this way become the source of law.

Instead of this paragraph, another paragraph with different content could be embedded as follows: "Any influence on the judge in performing their judicial office shall be prohibited." Here it should be considered whether to enter in the Constitution paragraph from Article 6 of the Law on Organisation of Cours "any influence on the courts and participants in the proceedings shall be prohibited".

Suggestions regarding the proposal contained in paragraph 2 of Amendment IV:

The current Constitution does not lay down the conditions for election to judicial office, but this is rather regulated by the law.

This Amendment, in an unclear and inconsistent manner, sets forth only one of the conditions for election (without listing additional conditions to be met by such a candidate) and only for a specific group (not even type) of courts.

We consider the Constitution should not contain election conditions, therefore this paragraph should be deleted.

If the Constitution is to lay down conditions, then all general conditions should be listed first (citizenship, law school degree, bar exam passed?…).

In case of defining the conditions, we consider that completed special training at the judicial training institution should not be a mandatory condition for election to judicial office in courts of first-instance jurisdiction. Such a solution contravenes point 17 of Kyiv recommendations on the judicial independence, recommending that access to judicial profession should be given "not only to young jurists with special training but also to jurists having significant experience gained working in the legal profession".

In case this training is defined as a condition, then the training institution has to be defined as part of the judicial power in the Constitution (with all guarantees of independence) and it needs to be independent from the executive (point 19 of the Kyiv recommendations).

The Constitution should envisage as a competence of the High Judicial Council (currently Amendment VIII) that the High Judicial Council shall regulate the procedure and criteria for recruitment of candidates for training, same as for the election of judges elected for the first time to a judicial office.

Another contestable issue is whether compulsory training needs to be envisaged for the "first-instance jurisdiction courts" or it would be better to define this for the candidate being elected to the judicial office for the first time.

Moreover, in case such a solution is adopted, transition period would need to be defined.

In relation to paragraph 3, we compliment the fact that there would be no limitation of the term of office of three years for a judge being elected to a judicial office for the first time.

However we consider that the permanent character of the judicial office needs to be explicitly guaranteed, therefore this paragraph should read as follows: "judicial office shall be permanent and last from when one has been elected a judge to their retirement".

In relation to reasons for termination of judicial office prior to retirement age, our position is that instead of the proposed paragraphs 4 and 5 this should read as follows: "a judge

shall be dismissed from the judicial office:

- if they ask for it themselves;
- if they permanently lose the capacity to perform their office;
- if convicted of a crime and sentenced to imprisonment over 6 months or of a punishable offense making them unworthy of the judicial office;
- if pursuant to the law, due to committed severe disciplinary offence, so is decided by the HJC.

We consider that unprofessional performance of judicial office should not be the reason for dismissal of a judge defined in the Constitution.

Such a formulation is imprecise, and not in accordance with international documents (Recommendation no. VI of the Council of Europe GRECO Committee of 18 October 2017) envisaging that evaluation of judicial performance should be aimed at improving their work and career advancement, and not sanctioning. Sanctions for many forms of unprofessional performance of judicial office (delaying the proceedings, untimely drafting of decisions, etc.) have been envisaged in the disciplinary procedure, with the more severe disciplinary offences already being envisaged as the reason for dismissal.

Our rationale why we consider why the terms termination of judicial office and dismissal should not be used implies that fact that judicial office is never terminated automatically, i.e. ex lege but by the decision of the HJC. This entails from the proposed HJC activities (Amendment VIII, paragraph 2) where one of the listed competences says that the HJC "shall elect judges and lay judges and decide on the termination of their office". The use of the term "decide" implies that the HJC assesses the fulfillment of conditions or better said existence of reasons, and if those are met, dismisses the judge from the office entrused to them by their election. This is why it would be better to use for all cases the term "dismissal", and define in the law different procedures depending on the reason for dismissal.

Pursuant to the proposed amendment of paragraphs 4 and 5 of Amendment IV, the formulation in Amendment VIII, paragraph 2 "shall elect the judges and lay judges and decide on the termination of their office" should be replaced by the formulation "shall elect and dismiss judges and lay judges".

Paragraph 7 of Amendment IV repeals (amends) well defined constitutional guarantees on non-transferability of judges, contained in Article 150 of the Constitution. Re-arrangement is not a legal term, thus it does not define in a clear and precise manner the cases in which a judge may be transferred without their own

consent. This is why we propose to keep the current solution that a judge may be transferred without consent only in cases of revocation of the court or the substantial part of part of jurisdiction of the court where the judge is performing their office.

Amendment IV is lacking the paragraph which would read as follows: "A judge shall be entitled to salary in accordance with the dignity of the judicial office, which guarantees their independence".

Suggestions in relation to Amendment V:

Paragraph 1 of this Amendment envisages that the judge and lay judge can not be held accountable for an opinion given in the court proceedings and voting in pronouncing a court decision except in cases when they have committed a crime.

Our suggestion is to, in paragraph 1 of this Amendment after the words "commit a crime", add the words "violation of the law by the judge".

For paragraph 2 we propose the word order to be replaced, so as to read: "in the proceedings initiated due to the criminal offence commited in performing judicial office, the judge may be deprived of liberty only following the approval of the HJC".

Paragraph 3 is contravening the UN Basic Principle of Independence of the Judiciary and European Charter on the Statute for Judges.

Therefore we propose to amend it so as to read: "The judge shall be prohibited from political action, and the law shall determine the offices or tasks that can not be linked with the judicial office".

Suggestions in relation to election and term of office of the court presidents:

The High Judicial Council considers that better solution than the one proposed in Amendment VII is to enable one person to be elected the president of the Supreme Court in the Republic of Serbia twice. Namely, we consider the Constitution of the Republic of Serbia to represent a logical and consolidated whole. Article 116 of the currently applicable

Constitution enables the president of he Republic to run for office twice. The High Judicial Council is of the opinion that the same right should be granted to the judge enjoying the highest respect and trust of their peers in the entire judiciary and the Supreme Court in the Republic of Serbia. Our view is that the term of office of the president of the Supreme Court of Serbia should be 4 years with the possibility of reelection one more time. Having in mind that the solution proposed in this way which is in line with the recently amended Law on Judges, we hereby propose to supplement Amendment VII to include presidents of other courts and to allow them to be elected to a 4-year term of office and to be elected twice.

Suggestions in relation to Amendment X:

In accordance with the solutions we have proposed for the presidents of courts, we consider the members of the High Judicial Council may be allowed to run for an additional term of office. We think that the term of office of the HJC members should be four years with the possibility of re-election. Hereby we especially emphasise that this solution was accepted in all countries in the region.

Suggestions in relation to Amendment VIII:

Paragraph 1 of Amendment VIII defines the High Judicial Council as an indepentent and autonomous "state" authority which guarantees autonomy and independence of the courts. A careful analysis does not make it difficult to identify several changes in relation to the applicable Constitution:

The High Judicial Council is defined as a state authority which, in the opinion of the HJC is weakening of the independence capacity of this authority. The valid Constitution did not specify the nature of power held by the HJC, given that it can not be claimed for sure whether this is a judicial authority or the authority of public power. We are not clear what the idea of the proponent was in defining the HJC as a "state authority", nor did the proponent propose the explanation for this.

The High Judicial Council, as the highest authority of judicial power, should not be labelled as a "state authority" given that the HJC must be different compared to other classical public administration authorities or Constitutional Court, as a specific state authority not being the part of the judiciary. According to this, the Constitution has to define the High Judicial Council as the highest authority of judicial power. Such a solution is contained in the constitutions of other EU countries. All this raises a justified question: Is in this way a possibility being made to change something in the character of this authority, e.g. that the HJC is a judicial- administrative authority in the narrow sense of the word.

Inter alia, the opinion of the HJC is that the word "shall vouch" is inadequate and should be replaced by the words from the applicable Constitution: "shall guarantee" and "ensure", especially since the word "vouch" is a synonym or a derivative. By using the words "ensure and guarantee" instead of the word "vouch" an incomparably higher level of independence and autonomy is being given to the courts and judges.

Having in mind previously said, same as the fact that modern theories imply judges under autonomy and independence of courts, we hereby suggest that after the word "courts" the word "judge" should be added. Judicial power is incomplete and unprotected if both of its components are not being realised: institutional and personal, which have to be guaranteed and ensured by the Constitution.

The suggestion:

The conceptual determination of the High Judicial Council referred to in Article 153, paragraph 1 of the applicable Constitution is by all important parameters character of the authority it defines, versatility and precision, more adequate than the "definition" of this authority being proposed now, therefore it should be kept in the future text of the Constitution.

Amendment VIII, paragraph 2 – Jurisdiction of the High Judicial Council

If, without the necessary upgrade, the solutions proposed in the working draft of the Amendment VIII, paragraph 2 are endorsed, instead of extending jurisdiction of the High Judicial Council (HJC) as envisaged under the National Judicial Reform Strategy for the period 2013-2018, Action Plan for Chapter 23, and the Law on Organisation of Courts ("Official Gazette of RS", no. 116/08, … and 113/17 – deferred implementation for 1 January 2019), we will have in place derogation from the agreed positions and reduction in the HJC competences.

In paragraph 2 hereof speaking about the HJC jurisdiction, inter alia, the following formulation was proposed: "shall propose to the Government means for operation of courts in issues under its jurisdiction". Jurisdiction formulated in this way does not represent progress in strengthening HJC capacities. We consider that the HJC has to have its budget and that the proposed solution contravenes recommendations of the competent Council of Europe bodies. It is necessary for the HJC to set the level of funds needed for operation of courts, and not only propose to the Government the level of funds pertaining to its jurisdiction. We hereby suggest for the HJC, being a direct budget beneficiary, to determine the level of funds necessary for the operation of courts and judges.

The manner of determining competences of the HJC in the proposed Amendment by listing (primarily that it shall elect and dismiss president of the Supreme Court of Serbia and presidents of other courts, elect judges and lay judges and decide on termination of their office), with the formulation referred to in paragraph 1 of the same Amendment implying that the HJC is realising its function by "deciding on other issues pertaining to the position of judges, court presidents, and lay judges defined by the Constitution and law", in our opinion, narrows down the possibility to, apart from the explicit jurisdictions listed in the Constitution, regulate this issue by law in a more meaningful and comprehensive manner.

We hereby point out that in such a situation, HJC can not successfully realise the function of the guarantor of the judicial autonomy and independence, if other important jurisdictions, besides the listed ones, и have not been entrusted to it by the Constitution, given that it is contained in the Opionin no. 10 (2007) of the Consultative Council of European Judges.

The suggestion:

To extend the content of jurisdictions of the HJC stated in the Amendment VIII, paragraph 2, along with the jurisdictions mentioned in this text to: deciding on disciplinary accountability of judges in accordance with the law, education and professional development of judges, judicial ethics, giving opinion on the draft laws and bylaws relating to courts and judges, and even the issues pertaining to protection of judges' reputation, international cooperation and public accountability.

The HJC does not deem it acceptable (**Amendment VIII, paragraph 3**) for the disciplinary procedure and the procedure for dismissal of judges and court presidents to be initiated by the minister in charge of justice. Such a right of the Ministry in charge of justice as the part of the executive power is not typical for the majority of democratic societies.

Therefore a positive step forward would be for the HJC to be the only authority to initiate disciplinary proceedings against a judge (Opinion of the Venice Commission CDL-AD – 2013/014). Our recommendation is for the minister in charge of justice not to be included at all in deciding on disciplinary proceedings against judges (Opinion of the Venice Commission CDL-INF – 1998/009).

Namely, according to the applicable legal provisions, disciplinary proceedings are initiated by the disciplinary prosecutor, whereas the dismissal proceedings are initiated by the High Judicial Council, however the initiative may be launched by any person, therefore also the minister in charge of justice, thereby their initiative would, in comparison to initiatives of other citizens, have a far greater weight.

Suggestions in relation to Amendment XIII:

Provisions on the immunity of the HJC members should be amended in the same way as in the part pertaining to the immunity of judges.

Our suggestion is to in paragraph 1 of this Amendment after the words "commit a crime" add the words "violation of the law by the judge".

We propose paragraph 2 to read as follows: "in the proceedings initiated due to the criminal offence commited in performing the office of a member of the High Judicial Council, the member of the High Judicial Council may be deprived of liberty only following the consent of the High Judicial Council".

It is necesary to once again salute the recommendations to exclude from the National Assembly decision-making the first election of judges, to exclude the probation, to exclude the election of the court presidents and members of the High Judicial Council. However, the composition, same as the manner of decision-making of the HJC is more than disputable and it represents a step back in relation to the achieved level of judicial independence in the Repulic of Serbia.

Such a proposal allows the legislative and executive powers to predominantly decide on all rights relating to the courts and judges. The predominance of the legislative and executive power comes to the full effect especially in provisions contained in Amendments IX, XI and XII. The solution for the president of the HJC to be elected among the members not being judges, and granting them the so called "golden vote" contravenes the Opinion no. 10 (from 2007) of the Consultative Council of European Judges on the composition of judicial councils, whereby stating that if the Council should have a mixed composition, then the majority should be made of judges and the president of the Council is to be elected from the ranks of judges.

Such a solution devolves the role and significance of judges in the highest judicial body, therefore, as stated in one of his interviews by the HJC president: "Judges would serve only to ensure the quorum", which is why the HJC would no longer be a guarantor of autonomy and independence of the courts and judges…

Having in mind the aforesaid, and especially the number and seriousness of the stated remarks, the High Judicial Council hereby concludes that the Working Draft of the Ministry of Justice Amendments to the Constitution of the Republic of Serbia, can not be taken as a staring point for a quality public debate. Therefore we propose for the offered text to be withdrawn from the public debate, to include in the drafting of the new initial proposal representatives of science (especially from the area of constitutional law), to have the new working drafts considered by the Commission implementing the National Judicial Reform Strategy, and only then organise a public debate, for which much more time has to be envisaged than it is currently the case.

19 February 2018

At their session of 19 February 2018, the State Prosecutors' Council, pursuant to art. 164, para 1 of the Constitution of the RS and art. 13, para 1, item 14 of the Law on the State Prosecutors' Council, considered the working version of draft Amendments to the Constitution and issued the following

OPINION

1. Draft amendment 1

Purview of the National Assembly

The National Assembly shall:

3. Elect and dismiss the Supreme Public Prosecutor of Serbia, five members of the High Judicial Council and five members of the High Prosecutorial Council;

The present Amendment shall supersede article 99 of the Constitution of the Republic of Serbia.

Comment

Para 2, item 3 implies that the Supreme Public Prosecutor[1] of Serbia is elected by the National Assembly. This solution is not unknown in many comparative systems.

However, with the given solution, the Republic of Serbia misses the opportunity to grant the public prosecution guarantees of a full and factual independence from the legislative and executive branches.[2] Namely, if election by the National Assembly gives democratic legitimacy to holders of prosecutorial function, still, in a society where the tradition of the rule of law is not at a remarkable level, this kind of solution may bring about not more than an increased risk of politicisation of the selection procedure for the HPC, and consequently of criminal prosecution under the shadow of politics. The risk of politicisation is also reflected in the fact that the proposed Draft text keeps the strictly monocratic, extremely hierarchic structure of the public prosecution[3], whereby the HPC would exercise the jurisdiction of the entire public prosecution in Serbia. Thus, the outdated organisational model of the prosecution which can be managed from one single point remains intact. In view of this, it is clear that the ruling majority in the parliament may govern the entire public prosecution service just through the supreme prosecutor, on whose election they also decide.

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[1] Hereinafter, the HPC.

[2] More on the concept of prosecutorial autonomy in the comments on amendment 14.

[3] See amendments15 and 16 which retain the strict hierarchy and the concept of 'deputy public prosecutor'.

A model where the election of the Supreme Public Prosecutor is entrusted to the parliament caused concern of the Venice Commission and their suggestion about the necessity of developing additional safeguards against the risk of politicisation of the election procedure:

36. In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. However one would need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock, [4]

The Venice commission expressed their concern in their Opinion:

"The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of democratic legitimacy of such appointments, on the one hand, and the requirement of depoliticisation, on the other. Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office.

The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. […]

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §19, 20 and 27

As regards the election of the members of the High Prosecutorial Council[5] by parliament, the Venice Commission is familiar with this model of election, while retaining certain reserve about it:

"[…] There is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament. […] This position has not prevented the Venice Commission from subsequently questioning legislation providing parliament with very significant powers as to electing members of a prosecutorial council. […]"

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§43 and 44

Although, the amendments, in principle, provide that the Supreme Public Prosecutor (SPP) and the members of the HPC are elected by a qualified majority in the parliament, it seems that the method of election, and the possibility of election by

[4] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 36.

[5] Hereinafter, the HJC.

an unqualified majority do not allow for the implementation of the described standards for protection from politicization in the election procedure (more on this in the comments on amendment 2).

It should also be noted that this amendment is in contradiction to the National Judicial Reform Strategy which says that:

„Certain goals of this Strategy require amending of the Constitution. For instance, solutions like the exclusion of the National Assembly from the election procedure for presidents of courts, judges, public prosecutors/deputy prosecutors, as well as members of the High Judicial Council and the State Prosecutors' Council"[6]

2. Draft amendment II

Decision-making in the National Assembly

The National Assembly takes decisions by a majority vote of deputies in the session where a majority of the deputies are present. A 3/5 majority of all deputies is required to elect the five members of the HJC and of the HPC, as well as the Supreme Public Prosecutor of Serbia. If they are not elected in this manner, they will be elected within the following ten days by a 5/9 vote of all deputies, which is also required for their dismissal. This amendment shall supersede art. 105 of the Constitution of the RS.

Comment

The Draft provides for a 3/5 majority for the election of members of the HJC and HPC. We assume that the reason for this is to achieve a wider social and political consensus in the election procedure, or to ensure a democratic legitimacy for the election of the members. Nevertheless, said solution is only an illusion of the consensus, given that in case the 3/5 majority is not possible, the required majority goes down to a level just barely higher than a simple majority – 5/9 (which is in most cases sufficient for the ruling majority, or just 5% more than a simple majority). A 5/9 majority can in no way ensure the consensus necessary to give legitimacy to the procedure and earn public trust; on the contrary, under the veil of seeming consensus, there is a threat of increased politicisation of the selection procedure. Furthermore, the 5/9 majority, although introduced under the pretext of ensuring *anti-deadlock*, can by no means serve that purpose. Just the opposite, the ruling majority will have no single reason to try to reach a consensus – if they fail to elect the desirable candidates in the first round, they will easily do it in the second; all they need to do is just wait for another ten days.

The Draft is contrary to several opinions of the Venice Commission who explicitly warns about the risk of politicisation and the need for a qualified majority as a safeguard against politicisation:

The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments.

[6] The National Judicial Reform Strategy 2013-2018, p.6. https://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 36

If members of such a council were elected by Parliament, preferably this should be done by qualified majority.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 66

"According to Article 65(2) of the draft revised Constitution, the Prosecutor General is elected for a six years term by a majority of the total members of the Parliament. The requirement of a qualified majority in Parliament for the election of the Prosecutor General is recommended."

CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §83

In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. […]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§35-38, 40

"[…] [A]ll members of the prosecutorial council are appointed and dismissed by parliament with no qualified majority. The prosecutorial system […] is therefore totally under the control of the ruling party or parties: [t]his is not in conformity with European standards."

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §104;

See also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §13

It is also contrary to the National Judicial Reform Strategy which says that it is necessary to exclude the National Assembly from the process of election of SPC members.[7]

Said solution raises additional concern due to the fact that just a slight majority of 5/9 is necessary for dismissal. It is not logical that one majority is required for selection (qualified 3/5), and another, insignificantly higher than simple majority (5/9) for dismissal. It should be particularly noted that the Draft provides that the minister of justice may initiate a dismissal procedure on his/her own.[8] This solution, along with the fact that the lever for dismissal may lie in the hands of the executive (minister of justice) may result in a dismissal of the SPP or HPC just if the executive branch loses trust in them. This is directly opposite to the opinion of the Venice Commission.

"[…] [It] seems inappropriate for a Prosecutor General removed from that position on a vote of no confidence."

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[7] The National Judicial Reform Strategy 2013-2018, p.6. https://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf.

[8] See amendment 23. More on this in the part related to amendment 23.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §125

3. Draft amendment XIV

Public Prosecution Offices

Status

The public prosecution is an autonomous state organ which prosecutes perpetrators of criminal and other punishable acts and protects the constitutionality and legality, human rights, and civil freedoms.

The public prosecution shall perform their duty pursuant to the Constitution, ratified international agreements, laws, and other general acts.

The establishment, organization, and jurisdiction of the public prosecution service are regulated by the law.

The highest public prosecution office in the Republic of Serbia is the Supreme Public Prosecution of Serbia.

The Supreme Public Prosecutor of Serbia shall exercise the jurisdiction of the public prosecution within the rights and obligations of the Republic of Serbia.

This Amendment shall supersede article 153 of the Constitution of the RS.

Comment

Para 1 – the prosecution is defined in a traditional way that does not reflect the real nature of this service. Public prosecution service is still just an autonomous body, without the guarantees of independence in relation to the executive and legislative branches[9], that is, the political influence. Autonomy, *per se*, without the guarantees of functional independence, i.e. independence from the legislative and executive in performing their duties, is not a sufficient safeguard against political influence, particularly in societies without a long tradition of rule of law and judicial independence. Thus, according to the European standards, not only that independence is not contrary to the nature and function of public prosecution, but rather necessary for the development of the rule of law in a democracy; although the independence of the judiciary and of the prosecution cannot be equated in all aspects.[10]

Although the European standards, largely contained in the Council of Europe Committee of Ministers (CM) Recommendation (2000) 19, allow for a plurality of models regarding the position of the public prosecution service, they do clearly point to what the Venice Commission also found:

[9] See comments re Amendment 1., the request of the ECHR from the *Guja v. Moldova case (Grand Chamber), no. 14277/04, § 86.u* Kolevi v. Bulgaria, no. 1108/02, 05/02/2010, § 142., and The Role of Public Prosecutors in the Criminal justice System Rec (2000) 19 COUNCIL OF EUROPE (two requests for prosecutors).

[10] "Still, independence or autonomy of the public prosecution is not that categorical as independence of courts. If the public prosecution service is independent, there can still exist a hierarchical control of decisions and activities of all except of the supreme prosecutor." Report on European standards as regards the independence of the judicial system, Prosecutors Venice Commission, 2010., Part two – the prosecution service, pg 7.

"[…] The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. […]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §26

It is also useful to note the opinion of the Consultative Council of European prosecutors:

"on European norms and principles concerning prosecutors" encourages the tendency to enhance independence and states that the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. The general tendency to provide for the effective autonomy of the prosecution service also in financial terms is therefore to be encouraged.

CCPE Opinion 9 of 2014

The independence of the prosecution service is also important with regard to the right to fair trial, and the reasons for the prosecution to be independent are explained in the ECHR judgements *Moulin*[11] *and Medvedyev*[12]*, Kolevi*[13].

It is questionable whether the autonomy of the prosecution service is a sufficient barrier for politically motivated criminal prosecution or evasion of criminal prosecution. This was also an issue that the ECHR considered in the cases *Vera Fernandez Huidobro*[14] and *Salov v Ukraine*[15]. The ECHR concludes that the lack of prosecutorial independence has negative effects, especially regarding the effects in the phase preceding the trial, when evidence that sets up the framework of trial is collected. Bearing in mind the expanded powers of the public prosecution service in Serbia following the transfer of investigative phase from the court to the prosecution service, the requirement for independence becomes even more important, since the prosecution service is acquiring pseudo judicial powers which enter the domain of multiple human rights.

On the independence of the prosecution service, European trends and forms of independence, the Venice Commission expressed their opinion in numerous papers, pointing out that there is a remarkable tendency towards independence of the prosecution service:

"Yet, certain more detailed standards and recommendations do exist. Thus, the Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from 'unjustified interference' with their professional activities. The Rome Charter, adopted by the CCPE in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE encourages the general tendency towards greater independence of the prosecution system. In many member states of the Council of Europe, a tendency of giving more independence to the prosecution service may be seen, particularly as regards decisions reached by the prosecution in criminal cases. […] The Venice Commission further notes that in many coun-

[11] 37104/06), Judgment, 23 November 2010.
[12] Medvedyev and others v. France (Application no. 3394/03), Judgment, 29 March 2010.
[13] Kolevi v. Bulgaria (App. No. 1108/02), Judgment, 5 November 2009.
[14] Vera Fernandez Huidobro v. Spain (App. No. 74181/01), Judgment, 6 January 2010.
[15] Salov v. Ukraine (Application no. 65518/01), Judgment, 6 September 2005.

tries 'subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases'."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §16

"There are no international standards that require the independence of the prosecution service. But, at the same time, it is clear that there is a general tendency towards introducing the independence of the prosecution service. […]."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §20

"The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society."

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution […]

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

CEPEJ[16] have also given their opinion on the functional independence of prosecutors:

„The principle of functional independence of prosecutors appears as a basic guarantee which became a truly European standard. This sort of independence is assessed in relation to the executive and legislative branches, but also to all other government authorities or factors within the prosecutorial system (outer independence), as well as with regard to the organizational model of the prosecution (inner independence). Harmonization of national legislation is an increasingly evident tendency regarding both aspects. 32 states or entities stated that prosecutorial independence is guaranteed under the law, usually by the constitution. 13 states said that their prosecution system is under the auspices of minister of justice or other body of central government. Finally, only eight countries, of which some already positively answered the first question, stated that the situation is different in these countries."[17]

As regards the part where the purview of the public prosecution service is expanded to include the protection of constitutionality and legality, human rights and

[16] The European Commission for Efficiency of Justice, https://www.coe.int/T/dghl/cooperation/cepej/default_en.asp.

[17] European Judicial Systems, Efficiency and quality of the judiciary, CEPEJ Report no.23, issue 2016 (data from 2014); pp. 26. https://www.coe.int/t/dghl/cooperation/cepej/profiles/20161%20-%20CEPEJ%Study%2023%20-%20Overview%20-%202016%202014BIH.pdf.

civil freedoms, we consider this a positive change. At the same time, our opinion is that the public debate should include discussion of the question as to what extent and in which manner the public prosecution service should carry out this new authority.

Para 2 – the opportunity has been missed to rectify the inconsistency from the current Constitution found in art. 156, para 2. Namely, this article, being a source of law concerning public prosecution, fails to quote the generally accepted rules of international law, although art. 16 para 2 of the Constitution implies that the generally accepted rules of international law and the ratified international agreements are an integral part of the legal system of Serbia. In regard to the foreseen new powers of the public prosecution related to the protection of human rights and civil freedoms, we are of the opinion that this should be done.[18]

Para 5 – it is provided that the Supreme Public Prosecution (SPP) carries out the competencies of public prosecution within the rights and duties of the Republic of Serbia. Therefore, a strictly monocratic structure has been kept which allows for an easy management and control of the system by the legislative or executive branches or for any other undue influence.[19] This implies that the SPP is the holder of the entire competence of the public prosecution service and the only "true" prosecutor, while all the others are 'surrogate' prosecutors with an incomplete capacity. In such a system, if there are no clear guarantees of independence and protection from political influence, there is a threat that the public prosecutor may have the role of an agent of the will of political majority.

4. **Draft amendment XV**

Responsibility

The Supreme Public Prosecutor of Serbia manages the Supreme Public Prosecution of Serbia, and s/he is accountable to the National Assembly both for the work of the Prosecution and his/her own work.

Public prosecutors in other public prosecution offices are accountable for the work of the prosecution office and their own work to the Supreme Public Prosecutor, and public prosecutors of lower-instance prosecution offices also to the public prosecutors in immediately higher prosecution offices.

Deputy public prosecutors are accountable to the public prosecutor.

The present Amendment shall supersede article 154 of the Constitution of the RS.

Comment

Para 1 is inconsistent, given that the SPP, pursuant to the previous article, performs the competence of public prosecutor as a whole, and pursuant to this paragraph, s/he only manages the SPP as the supreme prosecution office. On the other hand, amendment 16 implies that the public prosecutor carries out the function of public prosecution. The working text is inconsistent when it comes to the concepts

[18] See art. 18, para 2 of the Constitution.

[19] See standard about the issue of hierarchy – decision *Kolevi v. Bulgaria*.

of public prosecution, performance of the function of public prosecution and management of public prosecution. Namely, pursuant to proposed solutions, the SPP performs the competence of public prosecution only by managing the supreme prosecution office, but does not perform the function of public prosecution – all other prosecutors do this.

The working text failed to define guarantees of independence/autonomy of the SPP from the legislative or executive branches in performing their function (functional independence). The Venice Commission has stated the following:

It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be:

- *A guarantee of the independence of the general prosecutor of the Republic in the performance of his functions;*
- *The method of his appointment;*
- *The method of his removal from office."*

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

Also, we think that the phrasing "accountable to the National Assembly for his/her work" is not appropriate, since this would mean the possibility that the accountability of the SPP may be founded on political and partisan reasons, which generally prevail in parliament over the professional and expert ones. By introducing political accountability of the SPP as the top of prosecutorial hierarchy, political accountability of the public prosecution service is indirectly introduced. The question of accountability to parliament is very complex and it has to ensure guarantees of protection from politicisation and from accountability for acting and decision-making in individual cases:

[A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §42

[A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out. In case the accountability leads to a dismissal procedure, a fair hearing should be guaranteed.

CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §82

Para 2 – it has kept the Soviet system of rigid hierarchy, which is outdated and unable to fight corruption. On the other hand, a system where each subordinate prosecutor is relying on the responsibility of the superior prosecutor in the hierarchy, and the top prosecutor on accountability to politics, is inappropriate if we want to develop the value of integrity as one of European standards in the judiciary.[20] Let us recall the ECHR decision in *Kolevi v. Bulgaria*[21], which deals with the issue of independence/autonomy of prosecutors. The Court states that it is necessary to have guarantees, of safeguards, such as guarantees for a functional independence of prosecutors not only from external influences but also from internal hierarchy.

[20] *Ibid.*

[21] Kolevi v. Bulgaria, no. 1108/02, 05/02/2010, § 142.

Para 3 –the draft retains "deputy public prosecutors", although it is a relic of the Soviet system which has been abolished in most East European countries. In other words, a strictly monocratic structure of the prosecution service stays.[22]

5. **Draft amendment XVI**

Public prosecutors and deputy public prosecutors

A public prosecutor shall carry out the function of public prosecution.

A deputy public prosecutor shall substitute a public prosecutor in performing prosecutorial function and shall act upon instruction from the public prosecutor.

The present Amendment shall supersede article 155 of the Constitution of the RS.

Comment

Para 1 – the text is inconsistent. The distinction between carrying out competence and function is unclear. Thus, the SPP carries out the competence, and a public prosecutor carries out the function of public prosecution.

Para 2 – a deputy public prosecutor is defined not as the holder of function of public prosecution, but only as someone who substitutes the public prosecutor, or acts on his/her behalf. Therefore, a deputy public prosecutor derives their function from the function of public prosecutor. In view of that, a deputy public prosecutor is not the original holder of prosecutorial function, but only the public prosecutors. A deputy prosecutor, without the original prosecutorial function, is no more than an ordinary civil servant with a low degree of accountability for their decisions. Given the fact that with the proposed solution, which we will reflect upon below in the text, a deputy public prosecutor also loses autonomy and criminal immunity, the idea of creating a bureaucratic/clerical prosecution service becomes evident. A prosecution service of this type will not be able to combat corruption or any serious form of crime. Furthermore, a bureaucratic prosecution service is not favourable ground to develop integrity, as an essential element of the rule of law. It is not clear why the outdated concept of the "deputy public prosecutor" has been kept, since it has been discarded in most systems. The rigid subordination system is clearly not a contemporary European trend. The European concept of hierarchy in the prosecution service significantly surpasses the proposed model:

a well-designed hierarchy, with no place for insidious bureaucracy, in which all members of the Public Prosecution service should feel responsible for their own decisions and capable of taking the initiatives needed to do their particular job (see also paragraphs 9 and 10 on this point);

The Role of Public Prosecutors in the Criminal justice System rec (2000)19 COUNCILE OF EUROPE, 36.

The Venice Commission gave their opinion on hierarchy in the prosecution service warning about the danger of rigid hierarchical instructions:

Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

[22] On deputy public prosecutors, see comments on amendment 16.

[…] *Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.*"

CDL-AD(2016)007, Rule of Law Checklist, §§91, 92 and 95 CDL-PI(2015)001 - 34 - GRECO also gave their opinion on the issue of hierarchy suggesting a softer type which ensures a consultative and egalitarian approach and remedies in respect of issued instructions:

The independence (or autonomy) of prosecutors differs from the independence of judges due to the internal hierarchical structure of the prosecutor office which further subjects individual prosecutors to instructions by higher prosecutors. However there appears to be a trend within CoE members towards models based on consultative and egalitarian approaches within the prosecutor office's structure and to limit and regulate the types of instructions that can be issued. Remedies are also being developed in respect of illegal instructions.

The position expressed by GRECO in respect of the instructions is that they are in line with the CoE standards but nevertheless represent a risk of a strict understanding of the hierarchical system: the key goal of instructions should be ensuring consistency in the application of the law.

The proposed solution, by which a deputy prosecutor is bound by instructions from the public prosecutor, is contradictory to item 10 of the Council of Europe Committee of Ministers (CM) Recommendation No. 19 regarding the role of public prosecution in the criminal justice system. The Recommendation provides for a procedure under which a prosecutor may ask to be replaced in a case, if they deem that they are issued an instruction that is contrary to the law or against their conscience.[23] Hence, the international standards provide for functional independence of prosecutors, not only from the executive and legislative branches, but also from internal hierarchy. Nevertheless, we are of the opinion that said provision is not a constitutional but legal matter and that the law should precisely define the manner of issuing instructions and of guarantees for protection from abuse of the same. Also, it should be noted that this should not possibly concern individual instructions to a public prosecutor in individual cases, but only general instruction. Both the Venice Commission and GRECO expressed their opinion on this:

"[…] [T]he power to give instructions [to a junior prosecutor] extended only to general instructions but not to giving instructions how to deal with particular cases. […] Such a limitation should be clearly spelled out in the Law."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §19

More recently in its IV evaluation round the GRECO, while in principle acknowledging their admissibility as long as there were sufficient guarantees of transparency and impartiality, expressed a strong negative view of individual instruction. (While allowing general instructions) as it became evident that they have been mostly used exactly in politically sensitive cases to exert influence on the proceedings.

[23] *Ibid*, item 10.

6. **Draft amendment XVII**

Election of the Supreme Public Prosecutor of Serbia and Public Prosecutors

The National Assembly shall elect the Supreme Public Prosecutor to a term of office of five years, upon the proposal of the High Prosecutorial Council, after having conducted a public competition, by a three-fifth vote of all deputies. In case s/he is not elected in this manner, s/he shall be elected within the next ten days by a five-ninths vote of all deputies, or otherwise the entire election procedure shall be repeated after 15 days.

The same person cannot be reelected as the Supreme Public Prosecutor of Serbia.

The High Prosecutorial Council elects public prosecutors to a five-year term of office.

The Supreme Public Prosecutor of Serbia and public prosecutors who are relieved of duty shall carry on as a deputy prosecutor in the public prosecution office which they managed.

The Supreme Public Prosecutor of Serbia and public prosecutors may file an appeal to the Constitutional Court against the decision on dismissal, which rules out the possibility of constitutional appeal.

The present Amendment shall supersede article 156 of the Constitution of the RS.

Comment

Para 1 – see the comment on the method of election in the National Assembly. It refers to the viability of a qualified majority as a source of democratic legitimacy and to mechanism for preventing blockade. Technically, it is unacceptable to have the provision on the manner of election more than once in the Constitution.

Regarding the proposal about the term of office of five years for the SPP, we are of the opinion that this is an unnecessary risk of politicising the function, since the term is too short and almost coinciding with the mandate of the government. It is also contrary to the opinion of the Venice Commission:

"[…] Article 122 of the Constitution should be amended to provide for a longer mandate than the current five years and should exclude re-election in order to protect persons appointed as Prosecutor General from political influence."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §117

"[…] [T]he proposed seven year term of the Prosecutor General rather than the current five years is to be welcomed as this is both a sufficiently long period that goes beyond the term of any one government or of the President, and it also removes a significant threat to independence by excluding re-appointment. This gives effect to the Venice Commission's general recommendation concerning the term of office for a Prosecutor General."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §89

"[…] for the institution to be in line with Council of Europe standards, the Prosecutor General should be appointed for a single term, either considerably longer than five years or until retirement. The grounds for dismissal (serious violations of the law) should be laid down in the constitution."

CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §41

Para 2 – it is proposed that the same person cannot be reelected as the Supreme Public Prosecutor, which implies that, unlike this, the same person may be reelected as a public prosecutor. We think that this is a bad solution and that it would be beneficial for strengthening functional autonomy of the prosecution service if a public prosecutor could not have more than one term of office. By preventing creation of "professional bosses", the influence of politics on their work and consequently the work of deputy prosecutors would be smaller.

Para 4 – in any case, this provision should not have the level of constitutional matter. It is also rather vague. It may be interpreted, which certainly was not the intention of the author(s), as it means that the public prosecutor who has committed a criminal offence (reason for dismissal) continues their function as a deputy public prosecutor, and the public prosecutor whose office ends due to the end of the term of office (and was not dismissed, for instance, due to committing a criminal offence) cannot continue office as a deputy public prosecutor. It is clearly nonsense. Also, through evident omission, the Draft fails to govern the situation where a public prosecutor takes office coming from a hierarchically higher public prosecution office. According to this solution, after the term of office ends, the prosecutor could not go back to the position of deputy public prosecutor with the hierarchically higher public prosecution office where they previously worked as deputy public prosecutor.

Para 5 – non constitutional matter

7. **Draft amendment XVIII**

Life Tenure, Transfer and Interim Assignment of Deputy Public Prosecutors

The function of deputy public prosecutor lasts from the appointment till the retirement age.

The function may end earlier only if a deputy public prosecutor requests so, in case s/he becomes permanently disabled to perform the function, or in case of dismissal.

A deputy prosecutor in prosecution offices of lowest instance may only be a person who has completed special training in a judicial training institution established by the law.

A deputy prosecutor shall be dismissed if they are sentenced to prison, or in case of committing a crime that renders them unworthy of prosecutorial function; if they incompetently perform prosecutorial function, or in case of imposing a disciplinary measure of termination of prosecutorial function.

A deputy public prosecutor may file a complaint to the Constitutional Court against a decision on termination of function, which rules out the right to constitutional complaint.

A deputy public prosecutor may be transferred or temporarily assigned to another prosecution office without their consent, under a decision of the Supreme Public Prosecutor in accordance with the law.

The present Amendment supersedes article 157 of the Constitution of the RS.

Comment

Para 1 – here the function of deputy public prosecutor is mentioned for the first time, although, previously in amendment 16, it is explicitly said that public prosecutor carries out the function of public prosecution, and deputies only act as a replacement. Thus, according to amendment 16 – a deputy public prosecutor does not hold the original function, but only the derivative one, and according to this amendment – a deputy public prosecutor becomes the holder of the original function. Although it might seem irrelevant and confusing, we think that it is necessary to clearly define who the holders of prosecutorial function are, since the text of the amendment implies that not even the SPP does carry out the function of public prosecution – they carry out the competence of public prosecution and manage the Supreme Prosecution Office. This issue may also have practical ramifications – what happens when the public prosecution office is left without the prosecutor, like in case of death? Can in this case, and until the new prosecutor is appointed, deputy prosecutors perform the prosecutorial function?

Para 3 – provides that training completed in a judicial training institution is a requirement to be selected as a deputy public prosecutor in the basic prosecution office. This implies that the High Prosecutorial Council, in the selection procedure, is bound by the prior decision of the judicial training institution (decision on admission and completion of training) which enjoys no single guarantee of independence from the executive and legislative branches. Therefore, a body to which the Constitution tends to guarantee independence is bound by decisions of an institution that is neither autonomous nor independent. This solution might work if such institution were a working body of the HJC or HPC.

In any case, this is not a constitutional matter, and the question is why it is included in the Constitution. In many countries there are training institutions within the judiciary, but they are not a constitutional category, but legal or even a by-law matter found in the decisions of judicial councils. There is concern that this institution serves to establish direct control of entry into the judiciary and thus additionally weaken the position of the HJC and HPS which will essentially have no possibility of choice but only of confirmation of already made decision of the training institution. The Ministry of Justice supported this solution by item 7 of Council of Europe Committee of Ministers (CM) Recommendation No. 19 which implies that training is the right and obligation of prosecutors. The purpose of said Recommendation is to support improvement of quality of work. However, if this was the intention of the authors, one wonders why the Draft fails to define mandatory training after taking office, or mandatory training in case of promotion, that is, a general right and obligation of judicial officers to continuous professional training. It is also surprising that the Draft mentions this requirement and fails to mention, for instance, the requirement of possessing a degree in law and the bar exam.

This provision is also contradictory to item 5 of the same Recommendation which explicitly states that the procedure for selection, transfer and promotion has to be fair and impartial and prevent favouring the interests of any possible group. Since in the Serbian system, there have long since been two major groups of candidates – judicial assistants and candidates who completed initial training at the Judi-

cial Academy, the introduction of such a rule in the selection procedure would directly favour one group at the detriment of the other.

The working group which produced draft Legal Analysis of the Constitutional Framework related to the Judiciary in Serbia also stated their opinion on possible introduction of a judicial training institution into the Constitution. It reads as follows:

„The Working Group supports the position taken by the Working Group for reforming and developing the Judicial Academy, which states that the Judicial Academy should not be a constitutional category (session of 02 April 2014). The requirement of Judicial Academy training as mandatory condition for first appointment of judges and prosecutors could become a realistic strategic goal only after a thorough reforming of the concept of the Judicial Academy."[24]

Para 6 – this solution is not a constitutional matter, but legal. It should be noted, though, that in our legal system, for a long time, non-transferability has been an achieved standard of inviolability of prosecutorial function, and therefore there is no reason to diminish this standard. Furthermore, in a politicized system, there is concern that the mechanism of transfer could be used as a means of influencing the work and decision-making of prosecutors. Item 5 of the Council of Europe Committee of Ministers (CM) Recommendation No. 19 implies that promotion and transfer should be founded on objective and pre-defined criteria based on competence and experience[25]. Said standard leaves no room for interpretation that transfer can be used for punishment purposes.

Although the opinions of the Venice Commission say that public prosecutors, unlike the judges, do not have guarantees of irremovability, the Commission is of the opinion that certain guarantees should still exist, at least the possibility of complaint. The Draft does not allow for this possibility:

"[…] The principle of irremovability applies to judges and not to prosecutors. Nonetheless, prosecutors should have a possibility to appeal against compulsory transfers."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §80

8. **Draft amendment XIX**

Immunity and Incompatibility

A public prosecutor and/or deputy prosecutor cannot be held accountable for an opinion expressed or a decision made in performing prosecutorial function, unless they have committed a criminal offence.

The function of a public prosecutor and deputy prosecutor is incompatible with other public or private function, a legally defined activity or job, or political commitment.

The present Amendment shall supersede article 158 of the Constitution of the RS.

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[24] Draft Legal Analysis of the Constitutional Framework related to the Judiciary in Serbia, p.5. https://www.mpravde.gov.rs/files/analiza%20Ustava%20(2).doc.

[25] Council of Europe Committee of Ministers (CM) Recommendation No. 19, 2000, on the role of public prosecution in the criminal justice system, and Explanatory Memorandum https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168o4be55a.

Comment

Para 1 – the existing guarantee of a narrow functional immunity has been further decreased. Till now, there has been immunity for opinion and decision making, except if a prosecutor/ deputy prosecutor has committed a criminal offense – *Breach of law by a judge, public prosecutor or deputy prosecutor*. With the proposed solution, this extends to any criminal offense. Thus, a prosecutor may be held accountable upon a private lawsuit filed by the defendant for *Libel*, since the defendant found that the text of the indictment that the prosecutor wrote is offensive. On the other hand, it should be noted that in our legal system there are full functional immunities for various categories, such as for the employees of the Securities Commission (not only for members).

Opposite to this proposal, the Venice Commission supports a wider concept of functional and procedural immunity:

"It is important for their independence that prosecutors enjoy inviolability, although this should not be absolute (an exception may be made, for example, in cases of corruption). As stated in Article 35.1, inviolability (partial or full) of prosecutors is meant to contribute to the protection of prosecutors' independence in decision-making. Article 35 actually appears to cover both functional (substantial) immunity and procedural guarantees (judicial inviolability).

The restriction on powers of search and seizure in Article 35.2 aimed at protecting the inviolability of a prosecutor is in principle appropriate. However, the restriction extends only to 'his/her' goods, objects, documents or correspondence rather than what is in his or her possession. This could lead to unjustified interference with the right to respect for private life under Article 8 of the ECHR and to a breach of the prohibition on self-incrimination under Article 6(1) as a result of undue emphasis on who has title to the items in question at the time of the search and seizure. Hence, the inviolability mentioned in Article 35 should cover all items in the prosecutor's possession.

Article 35.3 notes that a prosecutor 'cannot be held legally liable for his/her opinion expressed within criminal prosecution and in the process of contributing to justice'. Whilst this provision appears to cover some aspects of the prosecutorial function, e.g. statements by the prosecutor that in his/her opinion, a person is guilty of a crime, it does not cover the entire range of actions undertaken by prosecutors in the fulfilment of their duties, such as ordering various investigative activities, procedural actions, etc. The provision should be phrased more widely, for example by stating that the prosecutor enjoys inviolability/immunity for lawful official actions taken in the course of his/her duties."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§110-112

Para 2 – this provision does not deserve to be constitutional matter. It is not fully clear either, particularly because it uses a boundless term of "private function". "Private function" is a known term, but it is not fully clear. Using such a boundless term in the supreme legal act is potentially dangerous and opens the door for the law to use the term of "private function" as comprising a wide array of activities, which may be opposite to the national and European standards achieved. The right to association is a basic human right and it can be limited for holders of judicial

functions/prosecutors only in one, smaller part, for the purpose of safeguarding the principle of impartiality.[26].

The following standard regarding immunity of a public prosecutor and appropriate activities should be noted:

Prosecutors should not benefit from a general immunity, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.

There are various standards on the acceptability of involvement of civil servants in political matters. A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §§17, 19, 22, 61-62;

See also CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§33 and 34

We also note item 6 of Recommendation 19 which states that prosecutors have an effective right to association, assembling and freedom of expression[27].

9. **Draft amendment XX**

High Prosecutorial Council

Purview

The High Prosecutorial Council is an autonomous state body that guarantees the autonomy of public prosecution offices by deciding on the issues pertaining to the position of public prosecutors and deputy prosecutors, which are determined under the Constitution and the law.

The High Prosecutorial Council shall elect and dismiss public prosecutors; elect deputy public prosecutors and decide on their dismissal; propose to the National Assembly to elect or dismiss the Supreme Public Prosecutor; evaluate the performance of public prosecutors and deputy prosecutors; appoint and dismiss members of disciplinary bodies; submit to the National Assembly the annual report on the work of the public prosecution; propose to the government the resources required for the operation of the public prosecution in matters from its purview, and decide on other issues related to the position of the Supreme Public Prosecutor, public prosecutors, and deputy prosecutors provided by the law.

The present Amendment shall supersede article 159 of the Constitution of the RS.

Comment

Para 1 –the Draft changes the name of the prosecutorial council – instead of the State Prosecutors' Council the new name is the High Prosecutorial Council. Still,

[26] See: Council of Europe Committee of Ministers (CM) Recommendation No. 19, 2000, on the role of public prosecution in the criminal justice system, and Explanatory Memorandum, item 5. https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804be55a.

[27] The Role of Public Prosecutors in the Criminal justice System rec (2000)19COUNCILE OF EUROPE, item 6.

the Draft explains the nature of this body and states precisely that it is a state body. We think that the term "state" associates with a body of the executive branch and tehrefore this determination is unnecessary; particularly due to the fact that the public prosecution service represents public interests which are not necessarily those of the executive.

The Venice Commission also stated their opinion on the relationship of state power and public interest:

A distinction needs to be made between the interests of the holders of state power and the public interest. The assumption that the two are the same runs through quite a number of European systems. Ideally the exercise of public interest functions (including criminal prosecution) ***should not be combined or confused with the function of protecting the interests of the current Government,*** *the interests of other institutions of state or even the interests of a political party*[28]

The proposed solution reduces the existing guarantees. Namely, the present competence to ensure and guarantee the autonomy of public prosecutors and deputy prosecutors is reduced to the competence of guaranteeing the autonomy of public prosecution offices as institutions, insofar as it (the Council) decides on the issues related to the position of public prosecutors and deputy prosecutors. Thus, the SPC does no longer have the obligation to ensure and guarantee, but a milder obligation of guaranteeing. As for the object of protection by the HPC, it has shifted from public prosecutors and deputy prosecutors to public prosecution service as a state body. Consequently, autonomy is warrantied for public prosecution offices (institutions) and not for the holders of prosecutorial function. With this provision, public prosecutors and deputy prosecutors lose autonomy and guarantees of autonomy. Institutions are autonomous, but not those who carry out the function of prosecutorial institution. Personal autonomy is revoked and institutional autonomy introduced.

Above said is also corroborated in the part where it is stated that the HPC decides on the position of public prosecutors and deputy prosecutors, but not on their status. As already mentioned, this provision reinforces the idea of a bureaucratic prosecution service. In a strictly hierarchical organisation of public prosecution with the subordination principle where deputy prosecutors are not holders of prosecutorial function, one can conclude that the institutional autonomy protects only the top one in the hierarchy – the SPP. On the other hand, the manner of selection of the SPP opens the door for politicisation of the entire system. The competencies of the HPC described in the Draft can in no way protect any public prosecutor or deputy prosecutor from political influence or other undue unfluence, or offer a framework for strengthening of integrity.

Para 2 is unclear and largely a matter to be governed by a law or by-law. Yet, it should be noted that the HPC does not conduct disciplinary procedure but only selects bodies which do that. In practice, this means that disciplinary proceedings

[28] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 71.

may be conducted before a body designated by the legislator, which opens the door for removal of disciplinary bodies from the HPC and thus for undue influence and possibility of abuses. Also, the part referring to resources is not in line with the Chapter 23 Action Plan, item 1.1.4.7, which clearly provides for the obligation of transfer of this competence from the ministry of justice to the State Prosecutors' Council.

10. **Draft amendment XXI**

Composition of the High Prosecutorial Council

The High Prosecutorial Council has eleven members: four deputy public prosecutors who are elected by public prosecutors and deputy prosecutors; five distinguished lawyers who are elected by the National Assembly, the Supreme Public Prosecutor, and the minister in charge of the judiciary.

The National Assembly shall elect five members of the HPC upon the proposal of the competent parliamentary committee after conducting a public competition, by a three-fifth vote of all deputies. In case they are not all elected in this manner, the remaining members shall be elected within the next ten days by a five-ninth vote of all deputies, or otherwise the election procedure is repeated for the number of missing members.

The requirement of equal representation of public prosecution offices shall be taken into account in electing deputy prosecutors into the High Prosecutorial Council.

Public prosecutors may not be members of the High Prosecutorial Council.

The present Amendment shall supersede article 160 of the Constitution of the RS.

Comment

Para 1 – the number of prosecutors in the HPC is decreased and the composition changed. Currently, the SPC has 6 representatives of public prosecutors/ deputies. The ofered solution is a step backwards or diminishing of the level of prosecutorial autonomy achieved. The current constitutional provision results in the majority of prosecutors in the Council, and the new one in a minority. It is unclear why the drafters chose this composition of the Council, particularly in light of the fact that in the prosecutorial councils of all former Yugoslav countries, prosecutors make the majority. The proposed composition where a significant majority is made of members elected by parliament (5 distinguished lawyers, SPP and minister of justice) is potentially problematic from the point of view of depoliticisation of the prosecution service. Also, the term of "distinguished lawyer" is boundless and potentially problematic.

The proposal is not in line with the report of the Venice Commission which suggests that the composition of the council should be balanced and that preference should be given to a composition including prosecutors, lawyers and representatives of civil society as it can „relatively ensure protection from political influence"[29].

[29] Report on European standards as regards the independence of the judicial system, Prosecutors Venice Commission, 2010., Part two – the prosecution service, стр.12 http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)040-e.

The proposed solution is also not in accordance with the opinions of the Venice commission regarding the majority of prosecutors, participation of the minister and the manner of election:

"It is recommended that a substantial element or a majority of the members of the HJPC be elected by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. […]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §45

"[…] The balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers also seems appropriate. It is also welcome that the power to appoint half of the members of the Prosecutorial Council be given to different bodies: it helps to avoid a corporatist management of the prosecution service and can provide a democratic legitimacy to it. Furthermore, it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §38

[…] The self-governing nature of the SCP might be questioned given the ex officio membership of the Minister of Justice and of the President of the Superior Council of Magistracy. It is suggested to consider their membership being one without voting rights.

Regarding the civil society members of the SCP, it could be useful to specify, in the light of their relevance to the functioning of the criminal justice system, the most relevant sectors that they should come from (the bar, human rights NGOs etc.) and their suitable legal training/experience. In addition, their appointment by the Parliament seems problematic if the goal is really to have a Council free of political influence. If this system is maintained, one option could be to establish a committee within Parliament, on which all parties are represented equally, to deal, according to a transparent procedure, with the issue of appointment of civil society members. Another solution could be to provide for their appointment by representatives of their profession – Lawyers' Union, assembly of university senates, etc."

CDL-AD (2015), Joint opinion on the Draft Law on the Prosecution Service of the Republic of Moldova, 131-133

The proposal is neither in compliance with the requirements of the ECHR which state that the public prosecution should not only be free from political influence, but should seem to be independent from political influence to a viewer.[30] The participation of minister of justice in person in the HPC, as a strong political figure, does not leave room for such possibility.

Furthermore, the proposed composition of the HPC is in contrast with the result of the activity 1.1.1. from Chapter 23 Action Plan which states that the result *inter alia* is: "The roles of the High Judicial Council and the State Prosecutors' Council in managing the judiciary and in overseeing and controlling of the work of the ju-

[30] See cases: Moulin v. France, Kolevi v. Bulgaria.

diciary have been strengthened; there is at least 50% of members from among the judges and/or prosecutors who are elected by their peers who represent different levels of jurisdiction (while the role of the national Assembly is but declaratory)".

Para 2 – See comments on amendment 2. They refer to whether qualified majority is justified and to the *anti-deadlock* mechanism. Also, the following should be noted:

If members of such a council were elected by Parliament, preferably this should be done by qualified majority.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 66

In view of nomotechnic discipline, it is unacceptable that the same provision (in this case on the election and dismissal of members of the HPC) appears more than once in the Constitution.

Para 3 – it is not clear why public prosecutors are not allowed to be members of the HPC, especially in light of the fact that, according to the Draft, they are the holders of public prosecutorial function.

11. **Draft amendment XXII**

Term of Office of Members of the High Prosecutorial Council and President of the HPC

The term of office of a member of the HPC is five years.

The same person may not be reelected into the HPC.

The term of office of an elected member of the HPC shall cease for reasons determined by the law and under a legally prescribed procedure.

The Supreme Public Prosecutor is *ex officio* President of the HPC.

The present Amendment shall supersede article 161 of the Constitution of the RS.

Comment

Para 3 – the Draft fails to provide for constitutional guarantees of autonomy and permanence of office for the function of member of the HPC, as well as grounds for termination of office. With regard to the provision under which members of the HPC are releived from office by a 5/9 majority in parliament (only 5% more than a simple majority), it is necessary to explicitly state legal grounds for such a decision, so as to avoid the situation where members are dismissed due to a loss of trust from the ruling political majority. If such a thing were possible, it would be clasiccal political responsibility. The opinion of the Venice commission on this is as follows :

"A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the SPC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the SPC members. The disciplinary procedure must therefore

only focus on the question whether the SPC member failed to perform his or her duties 'in compliance with the constitution and law'. This question must not be confused with the question whether said member still enjoys the confidence of the public prosecutors and deputy public prosecutors who participated in his or her election. The disciplinary procedure has to guarantee the SPC member a fair trial. While a reference to a fair trial is made under Article 46a, details on related guarantees should be provided.

In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, for instance, an 'impeachment' of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. In fact, the draft Law lacks specific provisions on disciplinary issues in respect of SPC members and merely focuses on dismissal. An appeal to a court of law should also be provided.

[…] Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced."

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§52-54 and 56

"Furthermore, elected members of the SPC may be dismissed by the National Assembly (even if on proposal by the SPC in the case of public prosecutors or deputy public prosecutors, by the Bar Association for lawyers, by deans of faculties of law for professors). This role of the National Assembly could easily lead to the politicisation of the work of the SPC as its decisions are not strictly based on objective grounds. The danger of politicisation in this situation is clear when compared to a system of an independent Prosecution Service, but it is even more pronounced than in the case of a Prosecution Service that comes under the Executive (where the decisions on dismissal made by a minister – or other state official – and the political accountability of the minister are, in principle, separate from each other).

There is an additional factor that increases the danger of politicisation: the proposed vote of confidence in the dismissal procedure. A vote of confidence has its place in the political sphere and is a tool that should only apply in the political decision-making process. […]

A vote of confidence should be seen as specific to political institutions and is not suited for institutions such as the SPC. The members of the SPC are elected for a fixed term and their mandates should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons (see comments under Chapter V below). The Venice Commission therefore strongly recommends that the amendment to Article 9a on the suspension of office due to a vote of confidence not be kept."

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§27, 28 and 38

"The exemption (dismissal) of members of the prosecutors' council without any criteria is problematic. As per Section 9.2 ASPGPOPEPC more than one half of the valid votes cast shall be required for exemption from membership. The council can dismiss one of its members by simple majority. The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary,

Para 4 – the idea of having the SPP for the *ex officio* president of the HPC is dubious. The Venice Commission supports the idea of selecting the president from within the Council itself.

"The election of the chairman by of the Council by its members is welcomed (Article 85)."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §62

"[…] [T]here are no common European standards on who should preside a prosecutorial council […].

However, the introduction of an election-based system may be seen as a step towards improving the autonomy (guaranteed by Article 164 of the Constitution) and the legitimacy of the SPC […]".

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§31 and 32 CDL-PI(2015)001-63-

"Even if the Minister is a member of the Prosecutorial Council ex officio, having him/her chair the Council may raise doubts as to the independence of this body. It would be advisable to have the Chairperson elected by the members of the Prosecutorial Council from their ranks (with the Minister him/herself ideally being excluded as a possible nominee). The Council shall be given opportunity and time (e.g., one month from the date when all members have been appointed and it is fully functional), to elect its own Chair by simple majority"

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §40

12. **Draft amendment XXIII**

Work and Decision-making of the High Prosecutorial Council

The High Prosecutorial Council shall take decisions by the votes of at least six members of the Council in a session with at least eight members present.

The High Prosecutorial Council shall publicly announce and explain their decisions, and shall found their decisions on the election and termination of office of public prosecutors and deputy prosecutors; decisions on proposal to elect or dis-

miss the Supreme Public Prosecutor, and decisions on the appointment and dismissal of members of disciplinary bodies, on the criteria determined in accordance with the law and under a legally prescribed procedure.

The minister in charge of the judiciary and the Supreme Public Prosecutor of Serbia may institute disciplinary proceedings and proceedings for dismissal against public prosecutors and deputy prosecutors, but cannot take part in the disciplinary procedure or dismissal procedure if they have instituted the same.

The present Amendment shall supersede article 162 of the Constitution of the RS.

Comment

Para 1 – this is a matter for a law or by-law. The question of majority and quorum is certainly not a constitutional matter.

Para 2 – this is a matter for a law or by-law, not a constitutional matter.

Para 3 – this is also a matter for a law and not the Constitution. Still, it is worth commenting . The right of minister of justice and the HPC to institute disciplinary proceedings is dubious. It is justifiable that they have the right to initiate the proceedings, but the right to institute should be strictly within the competence of the disciplinary prosecutor. The possibility for the minister of justice and the SPP to institute disciplinary proceedings indicates that the disciplinary prosecutor as an independent body has no longer exclusive powers of disciplinary prosecutor. This is contrary to the opinion of the Venice Commission on Two Sets of Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro[31] which says that the parity of members of a judicial council and lay-persons does not refer to disciplinary proceedings where the minister has the right of vote. Hence, this opinion states that the minister should not decide on disciplinary accountability, and the draft Amendments tend to go in the opposite direction – strengthening the role of the minister in disciplinary proceedings.

On the other hand, it is totally unclear in what way the minister of the HPC can institute disciplinary proceedings and dismissal procedure and what that means. We assume that instituting of disciplinary proceedings could mean bypassing the disiplinary prosecutor and direct presentation of the disciplinary case to the disciplinary commission for adjudication. It could also mean bypassing of the entire disciplinary proceedings and directly presenting the case to the HPC for adjudication. In the case of dismissal procedure, it could mean that the minister also has the right to initiate the dismissal procedure before the parliament against any holder of judicial function only due to a loss of trust in their work, and a decision on dismissal requires a simple majority of plus 5% (as proposed – 5/9). This solution potentially introduces direct political accountability of each prosecutor/deputy pros-

[31] Strasbourg, 17 December 2012, Opinion No. 677/2012, CDL-AD(2012)024Engl.only. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), OPINIONON TWO SETS OF DRAFT AMENDMENTS TO THE CONSTITUTIONAL PROVISIONS RELATING TO THE JUDICIARYOF MONTENEGRO, Adopted by the Venice Commission at its 93rd Plenary Session, (Venice, 14-15 December 2012). http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)024-e (30.1.2018).

ecutor for any action in any individual case. This is highly concerning with a view to politicisation of the prosecutorial system.

13. **Draft amendment XXIV**

Immunity of Members of the High Prosecutorial Council

Members of the High Prosecutorial Council cannot be held accountable for an opinion or vote given in decision-making within the Council, unless they have committed a criminal offense.

The members cannot be deprived of liberty in the proceedings against a criminal offence they have committed as members of the HPC, without the approval of the Council.

The present Amendment shall supersede article 163 and revoke articles 164 and 165 of the Constitution of the RS.

Comment

Para 1 – Functional criminal immunity of the members of the HPC is lifted. This provision introduces a backward solution even compared to the current Constitution. This is contrary to many opinions of the Venice Commission related to immunity of prosecutors, which we have commented with reference to amendment 19. If this proposal is accepted, we will be facing absurd situations, such as that a candidate may conduct criminal proceedings upon a private lawsuit against a member of the HPC only because the member of the HPC gave a negative opinion on the work of the candidate in a discussion about the candidate's job vacancy application.

14. **Constitutional Act**

The Introduction of the MoJ draft Amendments says that amendments I through XXIV are an integral part of the Constitution of the RS and shall enter into force on the day of promulgation by the National Assembly. To implement the amendments I through XXIV to the Constitution of the RS it is necessary to pass the Constitutional Act.

We are of the opinion that the Constitutional Act deserves particular attention of the professional and wider public and that the debate on the subject matter of the Constitutional Act should be part of the public debate. The reason for this is the experience with the Constitutional Act passed for the 2006 Constitution, which served as the basis for the general re-election of all judges and prosecutors. The Constitutional Act should contain unambiguous norms about continued office of judges, prosecutors and deputy prosecutors, that is, it should clear any doubt as to the permanency of office. Possible change of the title of a body should in no case be a reason for any sort of general election or re-election[32], because it is under no con-

[32] See: Opinion dealing with the status of prosecutors following amendments to the law concerning the State Prosecutor's Office in Montenegro vis-a-vis the standards developed by the CCPE and Recommendation Rec(2000)19. https://rm.coe.int/168074779f.

dition acceptable that the prosecutors who were lawfully appointed may lose their jobs due to changes in the Constitution.[33] On the other hand, the Constitutional Act should include an unambiguous norm that would confirm the continuation of term of office started under the current Constitution, in accordance with the practice of the ECHR as in *Baka v. Hungary*[34].

CONCLUSION

In view of the scope and essence of the comments presented in this Opinion, the State Prosecutors' Council proposes that the draft Amendments be withdrawn from the public debate. The State Prosecutors' Council deems that it is necessary to set up a working group that would include relevant representatives of the profession, such as professors of constitutional law, representatives of judges, prosecutors, lawyers and the civil sector, who would prepare a new draft Amendments to the Constitution taking into account all the comments presented to date. The new Draft would serve as the basis for a quality, meaningful and comprehensive public debate conducive to strengthening the rule of law. The SPC will take an active and constructive role in the public debate with their own proposal for the future constitutional position of the public prosecution service.

[33] *Ibid.*

[34] Baka v. Hungary, App.no20261/12, https://hudoc.echr.coe.int/eng#{"itemid":["001-115532"]}.

6 March 2018

COMMENTS OF THE ASSOCIATION OF PROSECUTORS OF SERBIA, THE COMMITTEE OF LAWYERS FOR HUMAN RIGHTS AND THE BELGRADE CENTRE FOR HUMAN RIGHTS ON THE WORKING VERSION OF THE DRAFT AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

Amending the Constitution in the part that refers to the judiciary represents the obligation of the Republic of Serbia in the process of European integration and an integral part of the Action Plan for Chapter 23, as well as one of the transitional criteria listed in the European Union Common Position on Chapter 23.[1] The objective of amending the Constitution is to align it with the recommendations of the Venice Commission and the European standards. One of the requirements is that the related consultation process be inclusive.

The National Assembly of the Republic of Serbia has adopted the National Strategy for Judicial Reform for the period 2013-2018, as a continuation of the reform activities set out in the National Judicial Reform Strategy for the period 2006-2011, in which the following was stipulated on page 7: "Certain solutions laid down in this Strategy call for amendments to the Constitution. They include the following: exclusion of the National Assembly from the process of appointment of court presidents, judges, public prosecutors/deputy public prosecutors as well as members of the High Judicial Council and the State Prosecutorial Council; changes in the composition of the High Judicial Council and the State Prosecutorial Council aimed at excluding the representatives of the legislative and executive branches from membership in these bodies."

On 22 January 2018, the Ministry of Justice published the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia (hereinafter referred to as: the Working Version) and invited interested parties to submit their comments. The Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, the Belgrade Centre for Human Rights and the Committee of Lawyers for Human Rights are hereby submitting their joint comments on the Working Version of the Draft Amendments to the Constitution, in the part pertaining to the organisation of the public prosecutor's office and the holders of prosecutorial office.

[1] 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 Organisation of Courts, on Seats and Territorial Jurisdiction of Courts and Public Prosecutors' Offices, on Judges, on the Public Prosecutor's Office, on the High Judicial Council and on the State Prosecutorial Council, as well as the Law on Judicial Academy.

The working version of the draft amendments represents a step backward in relation to the expectation that it would serve to establish a depoliticised and accountable judiciary. If the working version does not undergo significant changes, the opportunity to depolitise the judiciary will be missed, and what will occur instead is the relocation of political influence and its concentration. Instead of modernising the prosecutor's office in line with European tendencies, all the solutions that ensure the control of superiors and politics have been retained.

The enactment of the Constitutional Law on the Implementation of the Constitution of the Republic of Serbia is also envisaged, for the purpose of implementing the amendments that will enter into force on the day of promulgation. Given our bad experiences with the previous Constitutional Law, which served as grounds to conduct a re-election, we are of the opinion that it is necessary to present the draft version of the Constitutional Law together with the draft version of the amendments to the Constitution, to allow for a for a single working debate.

Given our experiences with the adoption of the 2006 Constitution and the Constitutional Law that prescribed a re-election of all judges and public prosecutors, we are of the opinion that the amendments to the Constitution i.e. the Constitutional Law could lead to the termination of office of the elected members of the High Judicial Council and the State Prosecutorial Council, and to the possibility of a new re-election of judges and public prosecutors. Therefore, we would like to point to the standards and decisions of the European Court of Human Rights concerning the shortening of bodies' terms of office due to changes in the organisation of the judiciary. In the case of Baka v. Hungary,[2] the European Court of Human Rights took the view that the shortening of the term of office of the President of the highest court in Hungary (Kúria) was causally connected with his criticism of the announced judicial reform. The Court also considered the justification of interference, and found that the early termination of office could not have been aimed at preserving the independence of the judiciary, "but the exact opposite". The Court therefore concluded that the interference of the Hungarian authorities was not based on a legitimate objective. In addition, the decision pointed out that the criticisms of the legislative reforms presented by Baka were of a professional nature, and that they referred to an issue of public interest.[3] The European Court of Human Rights was of

[2] European Court of Human Rights, Grand Chamber, Case of Baka v. Hungary (Application No. 20261/12), https://hudoc,echr,coe,int/eng#{"itemid":["001-115532"]}, (4 March 2018). The President of the Hungarian Supreme Court ceased to hold office prior to the expiry of its term exclusively as a result of the amendments to the constitutional provisions regulating the organisation of judicial bodies and the requirements for the election of the President of the highest court in Hungary. The applicant was deprived of the right to access the court, since his term of office was terminated due to a constitutional reform that did not foresee the possibility of challenging the decision on the termination of office before the Constitutional Court.

[3] Namely, Baka had expressed his views on the "constitutional and legislative reforms of the judicial system, independence and immunity of judges, and on lowering the time limit imposed for the exercise of judicial office". In view of the above, "the Court [had found] that the early termination of the applicant's office as President of the Supreme Court was contrary to the principle of preserving the independence of the judiciary. Termination of judicial office under such circumstances discourages other judges and court presidents from presenting their views on legislative reforms pertaining to the independence of the judiciary."

the opinion that reforming the Constitution and changing constitutional categories did not, in and of itself, constitute a justifiable reason for putting an end to the regular system of protection of acquired rights. Such a message from the European Court of Human Rights will have far-reaching consequences on all future reforms, as it imposes a requirement for the states to clearly present justified interests when infringing upon acquired rights.

Amendment II supersedes Article 105 of the Constitution of the Republic of Serbia. Its last paragraph prescribes a three-fifths majority in the process of election of the Supreme Public Prosecutor, members of the High Prosecutorial Council and members of the High Judicial Council. The assumption is that the objective of this solution is to achieve a wider social consensus in the decision-making process. However, the above represents only an illusion of consensus, because if the above described election is not possible, the required majority is reduced to a level that is just slightly above the simple majority. On the other hand, dismissal requires only a little above one half of the votes. It is illogical that election requires one type of majority vote, while dismissal requires another, considerably smaller.

We suggest that Amendment II be changed to stipulate that the Supreme Public Prosecutor shall not be elected by the National Assembly, but by the High Prosecutorial Council. The suggestion is in line with the ***"Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service",*** *which was adopted at the 85th Plenary Session of the Venice Commission and in which it is stated that it would be "ideal" if prosecutors were appointed by an independent body with "democratic legitimacy" such as the "prosecutorial council" or a "committee of higher level prosecutors".*[4] *Therefore, the Venice Commission is unambiguously of the opinion that the election of all public prosecutors, regardless of their position and role within the system, should be entrusted to a body whose majority is made up of the representatives of prosecutors.*

Amendment XIV supersedes Article 156 of the Constitution of the Republic of Serbia. However, it includes the "historical" definition of the public prosecutor's office that does not define either its legal nature or its relationship with other state bodies. The public prosecutor's office remains only a body that is autonomous, without guarantees of independence in relation to legislative and executive powers, i.e. political influence. In a society with no developed tradition of the rule of law and division of power, and no tradition of having an independent judiciary, political influence on the public prosecutor's office is a socially acceptable phenomenon.

That is precisely why constitutional provisions should establish additional guarantees for the functioning of the public prosecutor's office free of external influenc-

[4] European Commission for Democracy through Law (Venice Commission) Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), Study No. 494/2008, based on comments by Mr James HAMILTON (Substitute Member, Ireland), Mr Jorgen Steen SORENSEN (Member, Denmark) and Ms Hanna SUCHOCKA (Member, Poland), Strasbourg, 2011, p. 10. www.venice.coe.int (3 March 2018).

es. This is the reason why the public prosecutor's office should be re-defined into a functionally independent body, and public prosecutors and deputy public prosecutors into holders of prosecutorial powers independent in the exercise of their duties.

The only positive novelty envisages the public prosecutor's office as protector of human rights and constitutional freedoms. We believe that introduction into the Constitution of the obligation of the public prosecutor's office to protect human rights and freedoms is useful, precisely because of the cases when human rights and freedoms have been violated precisely by the public prosecutor's office.

We believe that the Constitution should contain a "functional definition" of the public prosecutor's office. In this respect, it is necessary to define the position of the public prosecution within the system of state governance (independent state body) as well as its predominant jurisdiction (judicial state body).

Explicit constitutional regulation of the independence of the public prosecution in relation to the executive and legislative powers is necessary in view of the new definition of the public prosecutor's office as an authority outside the system of legislative and executive powers. The fact that the public prosecutor's office exercises its competencies predominantly in the courts, and that only the courts can influence actions of the state prosecutor's office, determines the fundamental nature of the public prosecutor's office as a body that is part of the judicial system.

The exercise of the competencies of the public prosecutor's office would be absolutely impossible if the public prosecutor's office were to be under the supervision of the executive or other authorities, since the exercise of a public interest function should not be confused with the protection of the interests of the current Government or a political party.

Also, the fact that there is a clear intent to apply the accusatory system in criminal proceedings, and that the public prosecutor's office in Serbia has numerous competencies that resemble those of the courts (deferment of prosecution, plea bargaining, etc.), particularly justifies the need to define the prosecution as a judicial authority. The decisions of the public prosecutor's office i.e. public prosecutors directly affect the exercise and protection of human rights, without the possibility of their being reviewed by a court, which is why in many cases public prosecutors perform a judicial function, and thus, in accordance with Article 6 of the European Convention for the Protection of Human Rights, the prosecution must enjoy the guarantee of independence. Otherwise, there would be a systematic violation of the citizens' rights to a fair trial.

Although countries of the European Union apply different models of public prosecution, in the above quoted ***"Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service"*** the Venice Commission suggests that there is a widespread tendency of establishing public prosecutor's offices as independent authorities. The Venice Commission was of a similar view when it expressed its opinion on the amendments to the Law on Public Prosecution.[5]

[5] CDL-AD(2013)006, Opinion on the Draft Amendments to the Law on the Public Prosecution of Serbia, section 20.

Therefore, we suggest that the proposed Amendment be amended to read:

"1. The public prosecutor's office is a unique, autonomous, and in the exercise of its competencies independent judicial state body that prosecutes perpetrators of criminal and other punishable offences, protects constitutionality and legality, human rights and civil liberties.

2. The public prosecutor's office shall exercise its competencies based on the Constitution, laws, ratified international treaties and generally accepted rules of international law.

3. In exercising its competencies, the public prosecutor's office shall use all the resources provided to it by law.

4. In exercising its powers, the public prosecutor's office shall be independent from the executive and legislative branches of power.

5. Independence in the exercise of competencies and the autonomy of the public prosecutor's office, as well as other issues concerning the organisation and the operation of the public prosecutor's offices, shall be governed by the law that is adopted and amended by a two-thirds majority.

6. As regards personal status and financial position, public prosecutors shall be considered equal to judges."

Amendment XV supersedes Article 158 of the Constitution of the Republic of Serbia. However, the Working Version retains the obsolete Soviet model of rigid hierarchy, which is not appropriate for countering corruption. On the other hand, such a system, in which those on a lower level rely on the responsibility of those that are hierarchically higher, and the highest positioned person relies on politics, is inadequate for the development of values of integrity as one of the European standards in the judiciary.

Paragraph 3 of Amendment XV of the Working Version preserves the concept of deputy public prosecutors, even though they represent a relic of the Soviet system which has been abolished in most Eastern European countries. This relic corresponds to a hierarchical arrangement in which deputy public prosecutors are the executors of the orders of the prosecutor. When the independence of deputy public prosecutors is abolished, these holders of judicial function become nothing but mere officers. A public prosecutor's office so imagined will not be able to deliver in the fight against corruption, nor will it be able to respond to the European standards for integrity strengthening.

We believe that it is necessary to change the title of holders of prosecutorial office. Consequently, current deputy public prosecutors should be called public prosecutors, and current public prosecutors should be called chief public prosecutors. In prosecutor's offices organised in this manner, chief public prosecutors would manage the work, represent the prosecutor's office and have hierarchical powers without being the sole proprietors of the prosecutorial title. A changed model would imply that chief public prosecutor would be elected from the rank of public prosecutors, and that after the expiry of his/her mandate s/he would continue his/her duty as public prosecutor in the prosecutor's office from which s/he was elected.

We suggest that Amendment XV be amended to read:

"1. The Supreme Public Prosecutor shall head the Supreme Public Prosecutor's Office.

2. The Supreme Public Prosecutor may issue mandatory instructions to all public prosecutors in accordance with the law.

3. The Supreme Public Prosecutor shall be responsible for the work of the Public Prosecutor's Office and his/her work to the High Prosecutorial Council.

4. Chief public prosecutors shall be responsible for the work of the public prosecutor's office and their work to the directly superior chief public prosecutor.

5. Public prosecutors shall be responsible for their work to the chief public prosecutor."

Amendment XVI refers to public prosecutors and deputy public prosecutors, and supersedes Article 159 of the Constitution. This Amendment fails to provide a clear distinction between exercising the competencies and performing the duties of a public prosecutor. In paragraph 2 of the working version of the draft amendment, a deputy public prosecutor is defined as just someone who is replacing a public prosecutor, that is, acting on his/her behalf, and not as the holder of prosecutorial office. This solution envisages that office of a deputy public prosecutor is derived from that of a public prosecutor. Also, paragraph 2 prescribes a sort of absolute professional subordination of the deputy to the public prosecutor, since it introduces the obligation of the deputy to act upon the instructions of the public prosecutor. Such a ***solution is in contravention of item 10 of Recommendation 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System,*** which provides that there must be an adequate internal procedure whereby a prosecutor who believes that the instruction is either illegal or runs counter to his or her conscience may be replaced in a given case. A similar position is also cited in the 2016 Rule of Law Checklist of the Venice Commission.[6]

We suggest that Amendment XVI be amended to read:

"1. Chief public prosecutor shall head the public prosecutor's office.

2. The competencies of the public prosecutor's office shall be exercised by public prosecutors.

3. Chief public prosecutor shall be independent in the exercise of duties of public prosecutor.

4. Chief public prosecutor may issue mandatory instructions to public prosecutors from the public prosecutor's office s/he is heading, as well as to any directly subordinated public prosecutors.

5. Independence of a public prosecutor in the exercise of duties of public prosecutor shall be limited by the mandatory instructions of the chief public prosecutor, in accordance with the law."

Amendment XVII refers to the election of the Supreme Public Prosecutor and public prosecutors, and supersedes Articles 158 and 159 of the Constitution of the Republic of Serbia. As already stated in the comments concerning the Amendment II, we are of the opinion that the election of the Supreme Public Prosecutor by the National Assembly is not in line with the standards. The solution stipulating that state prosecutors (i.e. chief public prosecutors) shall be elected by the High Prose-

[6] CDL-AD(2016)007, Rule of Law Checklist, sections 91 and 95 CDL-AD(2016)007.

cutorial Council is in line with the already mentioned Recommendation 19 of the Committee of Ministers of the Council of Europe. It is also stated in sections 35-38 of the Venice Commission's "Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service" that in countries where Attorney General [Supreme Public Prosecutor] is elected by the Parliament there is an obvious danger of politicising the process of appointment.

In addition, we believe that it is possible to keep the solution from the Constitution of 2006 – the six-year term of office of the Supreme Public Prosecutor and public prosecutors (chief prosecutors), especially because of the exclusion of the possibility of re-election.

We suggest that Amendment XVII be amended to read:

"1. The Supreme Public Prosecutor shall be elected by the High Prosecutorial Council, by means of a vote of at least six members from the rank of public prosecutors, and two that are not public prosecutors.

2. The term of office of the Supreme Public Prosecutor shall be six years; s/he may not be re-elected and shall continue, after the expiry of the term of office, to perform the duties of a public prosecutor.

3. Chief public prosecutors shall elected by the High Prosecutorial Council from among the public prosecutors, in the manner prescribed by law.

4. The term of office of a chief public prosecutor shall be six years; s/he may not be re-elected chief public prosecutor of the same public prosecutor's office twice consecutively and shall continue, after the expiry of the term of office, to perform the duties of a public prosecutor."

Amendment XVIII refers to the permanence of tenure of deputy public prosecutors and the transfer and temporary referral of deputy public prosecutors, superseding Article 159 of the Constitution of the Republic of Serbia. Paragraph 3 of Amendment XVIII foresees training completed at the judicial training institution as a prerequisite for the election of a deputy public prosecutor to a prosecutor's office of the lowest instance. It follows from this provision that, in its decision-making process, the High Prosecutorial Council is bound by the prior decision taken by the judicial training institution, without a single guarantee of said institution's independence from the executive and legislative powers. This solution would make sense if the training institution was defined as the working body of the High Judicial Council and the High Prosecutorial Council.

Paragraph 6 of Amendment XVIII stipulates that, by the decision of the Supreme Public Prosecutor, a deputy public prosecutor may be transferred or temporarily referred to another public prosecutor's office against his/her will. The Venetian Commission, however, had pointed out that prosecutors must be provided with certain security guarantees, or the possibility of lodging a complaint in the event of a transfer.[7]

It is unclear why the working group that drafted the Working Version decided to include provisions on transfer and referral into the text of the constitutional amend-

[7] CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, section 80.

ments, given that these are provisions that govern the functioning of the public prosecutor's office that do not constitute *materia constitutionis* [constitutional matter]. As the drafters of the Working Version have decided to include this matter in the amendments, it remains unclear why they failed to also include restrictions regarding the above referral or transfer.

We suggest that Amendment XVIII be amended to read:

"Public prosecutors shall be elected to permanent tenure by the High Prosecutorial Council, in the manner prescribed by law."

Amendment XIX refers to immunity and incompatibility, superseding Articles 162 and 163 of the Constitution of the Republic of Serbia. The working version of the amendment abolishes the functional criminal immunity of public prosecutors and deputy public prosecutors, regardless of the fact that the need for the existence of functional immunity for actions performed in good faith and in accordance with duties is pointed out in the Report on European Standards as Regards the Independence of the Judiciary, sections 17, 19, 22 and 61-61.

Paragraph 2 of Amendment XIX governs incompatibility of public prosecutors' and deputy public prosecutors' office with the exercise of another public or private function. Since the working group defined incompatibility quite broadly, it also should have included international standards. Item 6 of Recommendation 19 requires prosecutors to have an effective right to associatiation, assembling and freedom of expressing their convictions.

We suggest that Amendment XIX be amended to read:

"1. Public prosecutors may not be held accountable for the opinions expressed in the discharge of the public prosecutor's office, except in the case of a committed criminal offence.

2. Public prosecutors may not be deprived of their liberty in the proceedings initiated for a criminal offence committed in the discharge of public prosecutor's office without the consent of the High Prosecutorial Council.

3. Political activity of public prosecutors is prohibited.

4. The law shall prescribe other functions, types of work or private interests that are incompatible with the public prosecutor's office."

Amendment XX refers to the jurisdiction of the High Prosecutorial Council and supersedes Article 165 of the Constitution of the Republic of Serbia. The text of Amendment XX reduces the existing guarantees, that is, the obligation of the present State Prosecutorial Council to ensure and guarantee autonomy. According to the working version of the text of Amendment XX, the High Prosecutorial Council only guarantees autonomy - and only that of the public prosecutor's offices, not that of public prosecutors and deputy public prosecutors. Such a solution deprives public prosecutors and deputy public prosecutors of the guarantee of autonomy, thus abolishing any form of their personal autonomy.

In the Working Version, it is stipulated that one of the competencies of the High Prosecutorial Council is to elect disciplinary bodies, but not to carry out disciplinary proceedings. This makes it possible to remove the disciplinary proceedings from the purview of the High Prosecutorial Council. Also, the part referring to

budget management is not in line with the Action Plan for Chapter 23, point 1.1.4.7, which clearly stipulates the obligation to transfer the budgetary competencies from the Ministry of Justice to the State Prosecutorial Council.

We suggest that Amendment XX be amended to read:

"1. The High Prosecutorial Council is an autonomous body that ensures and guarantees the autonomy and independence of public prosecutors in accordance with the Constitution.

2. The High Prosecutorial Council shall elect the Supreme Public Prosecutor, chief public prosecutors and public prosecutors, decide in the procedure terminating the office of chief public prosecutors and public prosecutors in the manner provided for by the Constitution and the law, decide on the immunity of members of the High Prosecutorial Council and public prosecutors, manage the budget of the public prosecutor's office, conduct disciplinary proceedings, draft the training programme, pass acts from its purview, and perform other tasks as stipulated by law."

Amendment XXI refers to the composition of the High Prosecutorial Council and supersedes Article 164 of the Constitution of the Republic of Serbia. The working version of the text of Amendment XXI reduces the number of prosecutors - members of the High Prosecutorial Council, in relation to the current number of members elected from the rank of prosecutors. The current solution from the Constitution of the Republic of Serbia stipulates that public prosecutors and deputy public prosecutors shall constitute the majority of the members, i.e. that they shall have six representatives in the State Prosecutorial Council, out of the total of 11 members. The newly presented solution represents a reduction in the achieved level of prosecutorial self-government, because it proposes that only four out of 11 members be representatives of public prosecutors or deputy public prosecutors. The proposed solution is not in line with the opinions expressed by the Venetian Commission concerning the judiciary of Bosnia and Herzegovina and Montenegro,[8] stating that the majority of the members should be prosecutors elected by their peers.

Also, the Working Version introduces a category of prominent lawyers, but fails to define the criteria for establishing who happens to be a prominent lawyer, or the profession or organisation s/he should be coming from. The solution from the current Constitution of the Republic of Serbia stipulates that representatives of prominent lawyers shall be elected from the rank of professors, i.e. attorneys.

In relation to the existing solution, we propose that prosecutors represent the majority, i.e. seven out of 11 members, and that the Minister of Justice be excluded in accordance with the National Judicial Reform Strategy for the period 2013-2018. We propose that the Constitution provide guarantees of independence of the above prominent lawyers, that is, incompatibility with the exercise of public offices with the exception of judicial office, during a certain period of time prior to their election to the High Prosecutorial Council.

[8] CDL-AD(2014)008, Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, section 45.CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, section 38.

Amendment XXII refers to the term of office of members of the High Prosecutorial Council and the President of the High Prosecutorial Council. The working version of the text of the amendment does not provide for constitutional guarantees of the autonomy and permanence of office of members of the High Prosecutorial Council. We are of the opinion that it is also necessary to list the legal grounds for their dismissal.

Another controversial provision stipulates that the Supreme Public Prosecutor shall *ex officio* be President of the High Prosecutorial Council. In its opinions, the Venice Commission has supported the idea of electing the President from among the members of the Council.[9]

We suggest that Amendments XXI and XXII be amended to read:

"1. The High Prosecutorial Council shall have 11 members: seven public prosecutors, one of which shall be the Supreme Public Prosecutor, and four distinguished and prominent lawyers. Prominent lawyers shall be lawyers of professional and moral integrity with at least 15 years of professional experience. Prominent lawyers may not be elected if they had served as state officials or officials in a political party during the period of 10 years prior to their candidacy. Other criteria for the selection of prominent lawyers and the election procedure shall be regulated by law. *(Alternatively: including one lawyer, one law faculty professor, one judge and one representative of a civil society organisation dealing, inter alia, with the protection of human rights in court proceedings).*

2. Members of the High Prosecutorial Council from the rank of public prosecutors shall be elected by direct and secret vote of all public prosecutors on the list for all levels of public prosecutors' offices.

3. Members of the High Prosecutorial Council that are not public prosecutors shall be elected by the National Assembly, by a qualified majority, on the proposal of an authorised proponent in accordance with the law.

4. The term of office of the members of the High Prosecutorial Council shall be five years."

Amendment XXIII refers to the functioning and the decision-making process of the High Prosecutorial Council. The working version of text of the Amendment envisages the possibility for the Minister of Justice and the Supreme Public Prosecutor to institute disciplinary procedure, thereby eliminating the exclusive competence of the Disciplinary Prosecutor to initiate such procedure. This type of authorisation is contrary to the Opinion of the Venice Commission on the Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro,[10] in which the Commission stated that "the parity of members of the Judicial Council who are judges and lay judges" does not apply to disciplinary proceedings "in which

[9] CDL-AD(2008)019, Opinion on the Draft Law on the Public Prosecutorsć Service of Moldova, section 62.

[10] Strasbourg, 17 December 2012, Opinion No. 667/2012, CDL-AD(2012)024, European Commission for Democracy through Law (Venice Commission), Opinion on the two sets of draft amendments to the constitutional provisions relating to the judiciary of Montenegro, adopted by the Venice Commission at its 93rd plenary session (Venice, 14-15 December 2012). http://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL/AD(2012)024-e (30 January 2018).

the Minister is not allowed to vote." In the Opinion of the Venice Commission, it is unquestionable that the Minister of Justice should not be able to decide on the disciplinary liability of members of the public prosecutor's office. Contrary to the intent expressed in the Opinion of the Venice Commission – that the Minister should be excluded from deciding on disciplinary offences – the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia provides the Minister of Justice with the authority to initiate disciplinary proceedings.

We suggest that Amendment XXIII be deleted.

Amendment XXIV refers to the immunity of members of the High Prosecutorial Council. The working version of the text of Amendment XXIV eliminates the functional criminal immunity of members of the High Prosecutorial Council, stipulating that members of the High Prosecutorial Council shall not be held accountable for the expressed opinion and vote, unless they commit a criminal offence thereby. In this way, criminal immunity is abolished while immunity from misdemeanour and civil liability remains. This solution is contrary to the numerous opinions of the Venice Commission mentioned in the comments relating to Amendment XIX.[11]

We propose that Amendment XXIV be amended to read:

"1. A member of the High Prosecutorial Council shall enjoy immunity as a public prosecutor.

2. The High Prosecutorial Council shall decide on the immunity of the members of the High Prosecutorial Council.

3. Members of the High Prosecutorial Council may not be deprived of their liberty in the proceedings instituted for a criminal offence they have committed in the capacity of members of the High Prosecutorial Council without the approval of the Council."

Belgrade, 6 March 2018

[11] "It is also contrary to the Opinion on the two sets of draft amendments to the constitutional provisions relating to the judiciary of Montenegro, in which it is clearly stated that a prosecutor should enjoy a strictly limited functional immunity."

8 March 2018

The Judges' Association of Serbia
COMMENTS ON THE WORKING DRAFT OF AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA, WITH STATEMENTS OF JUSTIFICATION (REFERENCING OPINIONS OF THE VENICE COMMISSION) INSOFAR IT PERTAINS TO THE JUDICIARY

I Introduction

Any constitutional reform requires a particularly pressing need within society for altering constitutional provisions governing particular issues, most crucially the functional and territorial organisation of government. It was not professional associations of judges and prosecutors that called for amendments to provisions of the Constitution of Serbia ('the Constitution') that regulate the judiciary: rather, it was the Government itself that identified the need to modify the Constitution in this regard as early as 2013, in the National Judicial Reform Strategy. The stated aim of this effort was to enhance judicial independence by eliminating *the influence of the legislative and executive power on the appointment and dismissal of judges and court presidents, public prosecutors and deputy public prosecutors, and appointed members of the High Judicial Council and the State Prosecutorial Council.*

The current Constitution envisages that a motion to amend it may be made by a 'petitioner with standing' (at least one-third of all Members of Parliament; the President of the Republic; the Government; or 150,000 registered voters); a two-thirds majority in the National Assembly is required to adopt proposed constitutional changes and draft and consider any enactment amending the Constitution. In contravention of this procedure, in mid-2017, the Ministry of Justice ('the Ministry') began what it termed 'consultations' with professional associations of judges and prosecutors and other civil society organisations, which it invited to submit their views regarding possible constitutional arrangements. The publication of the Working Draft of Amendments to the Constitution of the Republic of Serbia[1] ('Draft Amendments') in late January of 2018 re-ignited debate about changes to the Constitution's provisions governing the judiciary.

Any constitutional reform interferes with the established legal order; changes to the Constitution call for formidable procedural effort; and amendment of constitutional provisions defining the nature and extent of government also require public approval in a referendum. It is, therefore, pertinent to ask whether strengthening

[1] Available online from the Serbian Ministry of Justice [in Serbian]; accessed on 4 February 2018.

judicial independence requires changes to the Constitution at this time to, or whether this goal could more easily be achieved by only enacting appropriate legislation. The Judges' Association of Serbia has consistently demonstrated that current constitutional provisions were capable of yielding better results provided that robust laws are adopted. Independence is not gained solely by being proclaimed in the Constitution. This is evidenced by the fact that only 52% of judges in Serbia consider themselves independent, although their permanence of tenure is guaranteed by the Constitution.[2] Judges are convinced that greater independence could also be ensured under the existing constitutional framework provided there was the political will to do so. Legislation governing the status of judges and operation of courts intrudes upon the independence of judges and courts more than is permitted in the Constitution. Court presidents are given excessively broad powers, even benefiting from a separate set of retirement rules (they are able to remain in post until their term of office as court presidents expires, even after attaining retirement age). The Minister of Justice has been given responsibility for enacting the Court Rules of Procedure (a key document regulating the judiciary), determining criteria that govern staff numbers, and deciding on the procedure for admission of judicial assistants. Of particular concern is the ability of the executive to nominate representatives to the Board of Directors of the Judicial Academy and exert direct, institutional, and actual influence on the Academy. Addressing these issues and enhancing judicial independence need not wait for amendments to the Constitution. For instance, instead of the Minister of Justice being in control of the Court Rules of Procedure, the President of the Supreme Court of Cassation could be made responsible for their enactment, following consultations with all of the Court's judges. In addition, the duties currently performed by court presidents could be entrusted to a collective body composed of the court's president and a number of judges delegated by their peers at the same court, etc. *Experience has, however, shown that in many countries even the best institutional arrangements will not work without the good will of those responsible for implementing and executing them. As such, the implementation of existing standards is therefore at least as important as the identification of new standards needed.*[3]

If the Constitution is to be amended, this effort ought to be approached anew, systemically and thoroughly, based on clear and publicly stated objectives, and in compliance with the Constitution itself.

Since the Republic of Serbia has made the strategic commitment to joining the European Union and has consequently taken on a multitude of obligations and set time limits for taking the appropriate action, this document will deal with accession to the European Union and the Venice Commission to the extent necessary and in proportion to the Ministry's references to these issues.

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[2] *Strengthening Judicial Integrity and Independence in Serbia*, Društvo sudija Srbije, Beograd 2017, p. 91.

[3] Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, Study No. 494/2008 of 16 March 2010, Paragraph 10.

II Comments on the Introductory Remarks of the Draft Amendments

The Draft Amendments were published by the Serbian Ministry of Justice ('the Ministry') on 22 January 2018 on its web site. The Introductory Remarks of this document claim that the Ministry developed the amendments in accordance with commitments undertaken by the Republic of Serbia through the adoption of the Action Plan for the Chapter 23, as well as that '*[…] during the drafting process, the Ministry was guided primarily by standards defined by the Venice Commission in its opinions and other relevant documents as well as written proposals received within a consultative process conducted by the Ministry in cooperation with the Office for Co-operation with Civil Society conducted in the period May-November 2017. The working text is defined with the preliminary assistance of the CoE expert Mr. James Hamilton.*' The Ministry also states that *'[i]n order to facilitate understanding of the proposed solutions, an overview of some of the most important positions of the Venice Commission in relation to subject matter (together with the precise references) has been provided beneath the text of the amendments (or thematic related groups of amendments) that bring significant and substantive changes in relation to the current Constitution.*'

We will here clarify a number of claims advanced by the Ministry: 1) that it developed the amendments in accordance with commitments undertaken by Serbia in the Chapter 23 Action Plan; 2) that the Venice Commission of the Council of Europe (CoE) sets European standards; 3) that in drafting the amendments the Ministry was guided by the written proposals received as part of a consultative process conducted by the Ministry in co-operation with the Office for Co-operation with Civil Society from July to November 2017; and 4) that the amendments were drafted in collaboration with CoE Expert James Hamilton; and 5) that the Draft Amendments constituted the starting point for public debate on amending the Constitution of the Republic Serbia, planned for February and March 2018, after which the amendments were to be submitted to the Venice Commission for comments.

1. The assertion that the Draft Amendments comply with Serbia's commitments under the Chapter 23 Action Plan is correct insofar the government has undertaken to amend the Constitution. Commitments to this effect were undertaken by both Parliament, with the adoption of the National Judicial Reform Strategy[4] ('the National Strategy') and Government, which enacted the Action Plan to Implement the National Judicial Reform Strategy[5] and the Chapter 23 Action Plan.[6] In each of these

[4] National Judicial Reform Strategy, 2013-2018, *Official Gazette of the Republic of Serbia*, No. 57/13 of 3 July 2013. Professional associations of judges and prosecutors left the Drafting Group [Serbian] tasked with developing the Strategy, since their demands to establish responsibility for breaches of law in the re-appointment of judges and prosecutors and subsequent review of this process. Another demand ignored by the authorities was to call elections for judge and prosecutor members of the High Judicial Council and State Prosecutorial Council.

[5] Action Plan to Implement the National Judicial Reform Strategy, 2013-2018, *Official Gazette of the Republic of Serbia*, Nos. 71/13 and 55/14; Conclusion Endorsing the Revised Action Plan to Implement the National Judicial Reform Strategy, 2013-2018, *Official Gazette of the Republic of Serbia*, No. 106/16 of 29 December 2016.

[6] The European Opinion positively evaluated the final draft of the Chapter 23 Action Plan on 25 September 2015. The Action Plan was enacted by the post-election caretaker government on 27 April 2016. The Action Plan was never published in the *Official Gazette*.

documents the authorities linked reform of the judiciary with European integration, which is why *attention ought to be paid to European Union (EU) law – the acquis communautaire – and CoE recommendations and standards* that call for the participation of all relevant stakeholders, including professional associations of judges and prosecutors, as well as the civil society, in this reform. These guidelines also mandate *removing the responsibility of Parliament for appointing court presidents, judges, prosecutors and deputy prosecutors, and members of the High Judicial Council (HJC) and State Prosecutorial Council (SPC)* and *altering the make-up of the HJC and the SPC to exclude representatives of the legislative and executive power*; as well as *envisaging attendance of the Judicial Academy as a precondition for initial appointment as judge or prosecutor.*

However, the arrangements contained in the Draft Amendments in effect completely re-organise the judiciary. They significantly exceed the scope of changes planned in the documents cited above, including the Chapter 23 Action Plan. In addition, in implementing these provisions the state is not complying with the commitment it undertook to de-politicise the judiciary and strengthen its independence. This will be dealt with in greater detail below in the section devoted to the content of the proposed amendments.

2. In response to the assertion that the Draft Amendments comply with 'standards defined by the Venice Commission', one ought to be clear as to what the Venice Commission is and how it operates. The Venice Commission is an advisory body of the Council of Europe,[7] and all 47 member states of the CoE are represented on it. Each member state has one representative and one or two deputy representatives on the Venice Commission. These are usually high-ranking judges, sitting or former judges of constitutional courts, or law professors; nonetheless, some states (six at present) are represented by political appointees,[8] mainly cabinet ministers. Serbia is the only country represented on the Venice Commission by an Assistant Minister. The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure the dissemination and consolidation of a common constitutional heritage. It goes without saying that this support is primarily intended for countries generally and euphemistically termed 'countries in transition' or 'emerging democracies'.

It is not the primary task of the Venice Commission to set European standards, contrary to the claim made in the Introductory Remarks. Rather, the Commission, when (as a rule) asked to do so by a member state, gives its opinion on the extent to

[7] The European Commission for Democracy through Law, better known as the Venice Commission, was established in 1990 by 18 member states of the Council of Europe; it now numbers 61 nations. Plenary sessions of the Commission, held three to four times per year (in March, June, October, and December) are also attended by representatives of the European Commission and the OSCE.

[8] Kyrgyzstan is represented by a member of parliament, whilst Moldova, Montenegro, Romania, and Tunisia are represented by cabinet ministers. Since mid-2017, the Commission's member for Serbia has been Čedomir Backović, Assistant Minister of Justice; his deputy is Dr Vladan Petrov, a professor of constitutional law.

which that state's constitution (or major systemic law) is aligned with European (or international) legal standards, given the experiences of other nations and the comprehensive nature of legal standards contained in documents enacted by other bodies of the CoE, EU, and United Nations (UN). Key European standards for the judiciary are set out in individual rulings of the European Court of Human Rights (ECtHR), recommendations of the CoE Committee of Ministers, the highest 'binding' form of the CoE's so-called soft legislation, and in particular Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities. Another key document of the CoE is the 1998 European Charter on the statute for judges. Finally, standards are also set out in the opinions of dedicated CoE advisory bodies, such as the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), especially the CCJE's Opinion No 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges. European standards[9] applicable to the judiciary are contained in a number of documents released by several EU bodies (in particular the European Network of Councils for the Judiciary), as well as in UN enactments (Basic Principles on the Independence of the Judiciary, 1985; Bangalore Principles of Judicial Conduct, 2006).

Nevertheless, in the Draft Amendments the Ministry invokes only documents of the Venice Commission, in particular its March 2007 report Judicial Appointments CDL-AD (2007)028,[10] and in doing so creates the misleading impression that judicial standards are set out exclusively or primarily by the Venice Commission. The Ministry ignores the fact that in its 2007 report the Venice Commission mostly refers to standards defined by the entities cited above in their documents referenced herein. The Ministry also seems to disregard the fact that the Venice Commission produced its 2007 report as a contribution to deliberations of the CCJE that led to the adoption of its Opinion No. 10, as stated in the report's opening sentence. For one to properly interpret European standards, one ought also to understand how

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[9] In addition to the European Convention for the Protection of Human Rights and Fundamental Freedoms and case law of the ECtHR, the European Union also takes into account Recommendation of the Committee of Ministers of the Council of Europe CM/REC(2010)12, Judges: independence, efficiency and responsibilities; the Magna Carta of Judges; a number of opinions of the CCJE and the CCPE; reports of the Venice Commission on judicial appointments (2007) and judicial independence (2010) that constitute compilations of European standards; the European Charter on the statute for judges; the Basic Principles on the Independence of the Judiciary; the Bangalore Principles of Judicial Conduct; and a number of documents released by the European Network of Councils for the Judiciary:

- *European Network of Councils for the Judiciary (ENCJ), Development of minimum judicial standards I – V (appointment, evaluation, independence, disciplinary proceedings etc.)*
  encj.eu/images/stories/pdf/workinggroups/encj_distillation_report_2004_2017.pdf
  encj.eu/images/stories/pdf/workinggroups/encj_report_project_team_minimum_standards.pdf
  encj.eu/images/stories/pdf/GA/Dublin/final_report_standards_ii.pdf
  encj.eu/images/stories/pdf/workinggroups/final_report_encj_project_minimum_standards_iii_corrected_july_2014.pdf
- encj.eu/images/stories/pdf/workinggroups/encj_report_standards_iv_allocation_of_cases_2014.pdf.

[10] This opinion is available on the web site of the Venice Commission in both Serbian (venice.coe.int/webforms/documents/?pdf=CDL-JD(2007)001rev-srb) and English (venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e).

they were developed and how they are likely to evolve. In that regard, it should be borne in mind that the CCJE prepared its Opinion No. 10 (2007), on the Council for the Judiciary at the service of society,[11] throughout 2007 and adopted it in November of that year, so only after the Venice Commission released its report on judicial appointments. In its Opinion No. 10, the CCJE explains that in 2007 '*the Committee of Ministers of the Council of Europe entrusted the Consultative Council of European Judges (CCJE) with the task of adopting an Opinion on the structure and role of the High council for the judiciary or another equivalent independent body as an essential element in a state governed by the rule of law to achieve a balance between the legislature, the executive and the judiciary*' (Paragraph 1). Nevertheless, although in developing the Opinion the CCJE considered and reviewed the Venice Commission's March 2007 report on judicial appointments,[12] Opinion No. 10 contains features (standards) that differ from the views of this report on a number of important matters (such as the composition of councils for the judiciary). These features (standards) are what is actually relevant; the divergences in opinion between the CCJE and the Venice Commission ought to be reviewed carefully and understood properly.

The wide-ranging and significant Report on the Independence of the Judicial System, Part I: The Independence of Judges,[13] CDL-AD(2010)004, was adopted by the Venice Commission on 13 March 2010. The Commission here again references documents that contain standards for the judiciary[14] (Paragraphs 12 to 19). In this report, the Venice Commission cites the CCJE's Opinion No. 1 as the most impor-

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[11] Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society. A translation into Serbian is available on the web site of the Judges' Association of Serbia at sudije.rs/index.php/medjunarodni-akti/savet-evrope.html.

[12] Paragraph 7 of the CCJE Opinion No. 10 states: '*When preparing this Opinion, the CCJE examined and duly took into account in particular:*

- *the acquis of the Council of Europe and in particular Recommendation No.R(94)12 of the Committee of Ministers to member States on the independence, efficiency and role of judges, the European Charter on the Statute for Judges of 1998 as well as Opinions No. 1, 2, 3, 4, 6 and 7 of the CCJE;*
- *the report on "Judicial Appointments" adopted in March 2007 by the Venice Commission during its 70th Plenary Session, as a contribution to the work of the CCJE;*
- *the replies by 40 delegations to a questionnaire concerning the Council for the Judiciary adopted by the CCJE during its 7th plenary meeting (8-10 November 2006);*
- *the reports prepared by the specialists of the CCJE, Ms Martine VALDES-BOULOUQUE (France) on the current situation in the Council of Europe member States where there is a High Council for the Judiciary or another equivalent independent body and Lord Justice THOMAS (United Kingdom) on the current situation in states where such a body does not exist;*
- *the contributions of participants in the 3rd European Conference of Judges on the theme of "Which Council for justice?", organised by the Council of Europe in co-operation with the European Network of Councils for the Judiciary (ENCJ), the Italian High Council for the Judiciary and the Ministry of Justice (Rome, 26-27 March 2007).'*

[13] The Judges' Association has commissioned a translation of this report into Serbian, which may be found at sudije.rs/index.php/medjunarodni-akti/savet-evrope.html.

[14] The first paragraph of this report explains how it was brought about and what the Commission's task was: '*By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission to give an opinion on "European standards as regards the independence of the judicial system". The Committee is "interested both in a presentation of the existing acquis and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe"*'.

tant set of standards, and states that its contribution follows the structure of the CCJE document. As the Commission goes on to say that Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges is 'currently under review' and expresses hope 'that the present report will be useful in the context of this review' (Paragraph 14), it is clear that the Venice Commission developed both its 2010 and 2007 reports for a particular purpose: to contribute to the adoption of the revised Recommendation (94)12 and Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities. And yet in its Draft Amendments the Serbian Ministry never cites the CCJE Opinion No. 1, Recommendation (2010)12, or the 2010 report of the Venice Commission.

The 2007 report, as has already been established, was prepared for a particular purpose. In addition to it, in its justification of the Draft Amendments, the Ministry references a number of additional opinions of the Venice Commission on legislation of Georgia (CDL-AD(2014)031)[15], Armenia (CDL-AD(2017)019)[16], Albania (by referencing CDL-INF(1998)009 pertaining to Albania in Footnotes 10, 12 and 20 of Paragraphs 25, 29 and 34 of the 2007 CDL-JD(2007)001),[17] and three opinions in connection with Montenegro (CDL-AD(2007)047,[18] CDL-AD(2011)010,[19] and CDL-AD(2012)24).[20] Interestingly, the Ministry did not reference any of the opinions adopted by the Venice Commission on numerous occasions in connection with Serbian legislation governing the judiciary, not least its Opinion No. 405/2006 of 19 March 2007 on the Constitution of Serbia (CDL-AD(2007)004), as well as Opinions No. 464/2007 of 19 March 2007 on the Draft Law on the High Judicial Council (CDL-AD(2008)006) and the Draft Laws on Judges and on the Organisation of Courts (CDL-AD(2008)007), No. 709/2012 of 11 March 2013 on Draft Amendments to Laws on the Judiciary (CDL-AD(2013)005) and the Draft Amendments to the Law on the Public Prosecution (CDL-AD(2013)006), No. 776/14 of 13 October 2014 on the Draft Amendments to the Law on the High Judicial Council (CDL-AD(2014)028), and No. 777/14 of 13 October 2014 on the Draft Amendments to the Law on the State Prosecutorial Council (CDL-AD(2014)029).

Although the Ministry references European standards, it ignores the fact that European (or indeed international) legal standards are nothing other than rules of logical and rational behaviour arrived at through long-standing democratic practice, and that they are the shared legal heritage of all democratic nations. These rules

[15] Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts of Georgia, adopted on 11 October 2014.

[16] Opinion on the Draft Judicial Code of Armenia adopted by the Venice Commission on 7 October 2017.

[17] Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009.

[18] Opinion on the Constitution of Montenegro of 20 December 2007.

[19] Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro adopted by the Venice Commission on 17 June 2011.

[20] Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro adopted on 17 December 2012.

are applicable in every state wishing to improve its judiciary, on condition that the state in question truly has the political will to improve judicial independence and the rule of law. At any rate, these standards are not some miraculous patterns that only need to be copied for one to achieve all of one's declared objectives. Every country that endeavours to apply the body of law developed by democratic countries, Serbian included, should first and foremost look out for its traditions and its abilities, and, using these as its starting points and mindful of the essence of the standards in question, create its own rules of good conduct and so put into effect international standards and make them applicable and successful for its own purposes. Therefore, European (or international) standards are not idols whose very names must be worshipped by 'emerging democracies'; these nations should also avoid blindly trusting anyone who cites these norms to justify the validity his own proposals. If one is aware of the numerous relevant documents adopted by the multitude of bodies of the CoE and the EU that comprehensively enumerate and develop judicial standards pertaining to various issues, one will understand why it is not acceptable to have the Ministry reference only some sentences, taken out of context, found in only some documents of the Venice Commission. Moreover, this approach begs the question of why the Ministry has done so and what ultimate intention lies behind this approach.

The claim put forth by the Ministry, that when developing the Draft Amendments it was guided primarily by standards defined by the Venice Commission in its extensive body of opinions, serves to purposely diminish, or even abuse, the purpose, content, and importance of international and European standards for the judiciary; this also constitutes a methodologically unsound approach to justifying some of the provisions proposed. The impression that is being conveyed is that it is only these provisions that comply with the standards, although the standards are in actual fact designed to allow individual countries, with their separate legal traditions and different levels of readiness and ability to change, to establish their own legislation that fits their social and historical environment.

Besides, merely referencing observations made in documents of the Venice Commission does not imply justification of the proposed changes. On the contrary: it means only that the Venice Commission has concluded that one particular feature of the law of one particular country could be in alignment with European standards, in the context of all other requirements and given the legal system in force in that country. It goes without saying that this does not mean that the feature in question is the only one that complies with the standards, nor is this a guarantee that this feature could be acceptable or workable in any other legal system, given its overall characteristics and specificities, as well as the fact that it is by no means certain that an arrangement which works in one country must be functional in another. Finally, the opinion of the Venice Commission that one arrangement in one country accords with European standards does not mean that this arrangement is best, nor does it preclude there being other solutions for the same problem that would also accord with the standards, perhaps even more so. Different arrangements for the same issue (such as, for instance, initial training for judges) are equally successful in various European countries, and, as such, one ought to tread very carefully when choosing any solution.

During the public debates held so far, the Serbian Government has repeatedly underlined the importance that it will attach to the opinion of the Venice Commission (VC); so, it seems appropriate to analyse the position of the VC on the topics at issue. As it is well known, the VC, whose full name is "European Commission for Democracy through Law", is the Councils of Europe (CoE's) advisory body on constitutional matters. It provides legal advice to its member states, specifically to help those who intend to *"bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law."*[21] The **members of the VC***" are university professors of public and international law, supreme and constitutional court judges, members of national parliaments and a number of civil servants. They* ***are designated*** *for four years* ***by the member states, but act in their individual capacity.***"[22] Clearly, the opinion of the VC, authoritative as it might be, is not the opinion of the CoE and it has a mere consultative value. The position of the VC on the composition of a Judicial Council (JC) can be summarized as follows:

1. in order to eliminate any doubt of corporatism, the system should strike a balance between judicial independence/self-administration and accountability of the judiciary;
2. for the same reason, disciplinary procedures against judges should be carried out effectively and without any undue peer restraint;
3. the desired goal could be achieved through a JC with a balanced composition between its judicial and non-judicial members;
4. in this regard, there is no compulsory standard model;
5. since the administrative activities of the judiciary should be monitored by the other state branches of power, most statutes foresee the involvement in the JC of the legislative and the executive;
6. obviously, the judiciary must be answerable for its actions through a fair legal procedure;
7. there is general consensus that "*the* ***main purpose*** *of the very existence*" of a JC is the *"****protection of the independence of judges by insulating them from undue pressures from other powers of the State*** *in matters such as the selection and appointment of judges and the exercise of disciplinary functions*";
8. consequently, the judiciary itself should elect *"****a substantial element or a majority of the members****"* of the JC; however, *in order to provide for democratic legitimacy of the council*, those members should be balanced by *"****other members elected by Parliament among persons with appropriate legal qualification****"*;
9. an *overwhelming supremacy* of the judicial component *may raise concerns related to the risks of "corporatist management"*;
10. since the JC should be insulated from politics, active members of parliament should not be part of it;
11. where legislative bodies are entitled to elect part of the members of JCs among legal professionals, which happens frequently, a qualified majority should be re-

[21] http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN
[22] *Ibid.*

quired; in this way, a governmental majority would be obliged to find a compromise with the opposition, which would favour a balanced and professional composition of the JC;

12. in order to avoid inappropriate interference by the Government, the MoJ should not participate in all the JC's decisions, for example it should be excluded from those relating to disciplinary measures;
13. it is crucial that the chair of the JC be exercised by an impartial person who is not close to party politics; more specifically, in semi/presidential systems a balanced solution could be that the *chair of the council be elected by the council itself from among its non-judicial members.*[23]

Now, an attentive contemplation of the remarks above leads to the identification of two crucial and potentially controversial topics: a) the concept of a balanced composition of the JC, and b) the risks of an "overwhelming supremacy" of the judicial component of the JC. Regarding the first topic, the VC's position differs substantially from the CoE's one. The latter is clear: systems where at least half plus one of the members of the JC ***are not judges elected by their peers*** or, in other words, where ***judges elected by their peers*** are in minority, do not comply with the standard, which requires, as a minimum, an equal number of judicial and non-judicial members. On the contrary, the VC seems to accept a composition where members elected by judges are just *"**a substantial element or a majority**"* of the JC. This clearly means that a composition with judges in minority is perfectly acceptable, provided that this minority be a "substantial element" of the council. The second topic reveals an incredible ambiguity. For the VC, an "overwhelming supremacy" of the judicial component of the JC would open the door to the risk of "corporatist management" of the judiciary. The concept of "overwhelming supremacy", especially when referred to a body that can deliberate only by majority vote (be it simple or qualified), is far from being clear and is available to support any opinion. For example, bearing in mind that the VC holds that the judiciary should elect *"**a substantial element or a majority of the members**"*, would a composition of six judges against four non-judicial members be acceptable? Would such a composition represent an unacceptable "overwhelming supremacy" of the judicial members? In the opinion on draft amendments to the constitutional provisions relating to the judiciary of Montenegro, the VC took a clear stand. According to the amendments, the Montenegrin JC is composed by ten members: four judges elected by their peers, four "renowned lawyers" elected by the Parliament and the State President, and two members by right (the President of the Supreme Court and the Minister of Justice). So, in the end there are an equal number of judicial and non-judicial members. In case of a tie, like in the Serbian amendments, the tenure of all members of JC ceases to exist.

It seems crystal clear that the VC's idea of a "balanced composition" of the JC is that of a configuration where the judicial component should be in a potentially systematic situation of being overvoted. In spite of its acknowledging that "*the **main purpose** of the very existence*" of a JC is the "***protection of the independence of judg-***

[23] Report adopted by the Venice Commission at its 70th Plenary Session, 16-17 March 2007 CDL-AD(2007)028.

es by insulating them from undue pressures from other powers of the State", the VC suggests to achieve the balance between independence and accountability of the judiciary through a body in which judges cannot decide ever. The necessity emphasized by the CoE and accepted also by the VC, to have a judicial component in the JC shows that this presence is crucial to guarantee the independence of the judiciary. The idea to reach a balanced solution not by opening the JC to the presence of lay members, thus avoiding a cast of judges, but putting the judicial component in situation in which it cannot decide on any issue leads to the paradox of attaching more importance to a misunderstood concept of "balance" than to the "primary value", that is the independence of the judiciary. **The result is a puzzling rule: "there can be balance in the system only if those, whose independence should be guaranteed, agree with political representatives in the body established to guarantee their independence!** The observation regarding the qualified majority required in the parliament for the election of the lay members, does not change anything as it neglects the fact that the existence of a compromise between the Government parliamentary majority and the opposition might perhaps avoid undue influence from a certain political party or coalition, certainly not from the "political power" as a whole, which in the experience of many countries often has a convergent interest in limiting or affecting the functioning of an independent judiciary.

In conclusion, based on the arguments illustrated so far, the amendments regarding the composition and, above all, functioning of the Serbian HJC are far from ensuring that the council will carry out its main task, i.e. guaranteeing the independence of the judiciary, without any undue political interference. The viewpoint of the VC on the issue, in spite of the undisputed general authoritativeness of this institution, lacks solid grounds and is absolutely not persuasive. **While seeking for a balanced solution, the Venice Commission ends up with a totally unbalanced and paradoxical one.** The proposed amendments being apparently in line with the opinion of the VC are affected by the same decisive flaws.

Anyhow, the 'attractiveness' or workability of a particular arrangement in any state must not in and of themselves be the decisive factors in choosing that arrangement for Serbia. Our legal tradition, financing options, and capacities of the would-be reformers should all inform this choice. The guiding principle in selecting a particular arrangement should be its suitability for implementation, and this depends on the extent, number, cost, and duration of the measures required, number and capacity of the stakeholders, and whether the solution lends itself to gradual and harmonised introduction.

It is especially unacceptable to abandon a number of Serbia's home-grown arrangements that are eminently congruent with both European standards and the Serbian legal tradition, as well as to reduce the extent of current safeguards of judicial independence. All Constitutions of the modern Serbian state, from the 19th century onwards, have prohibited any influence on judges. For instance, the 1835 *Sretenje* Constitution stated that '*in rendering his judgment a judge shall not depend on anyone in Serbia save the Law of Serbia; no greater or lesser authority of Serbia shall have any right to deter him from doing so, or command him to render judgment otherwise than as set forth by laws*' (Article 80). Even the Ottoman Sultan's 1838 *hatt-*

i sharif, an edict promulgated for a Serbia that was still a vassal principality of the Ottoman Empire, stated that '*no officer of the Principality, whether he be civil or military, senior or junior, may interfere with the operations of the aforementioned three courts, but may only be summoned to execute their judgments*' (Article 44). As early as 1349, the Code of Emperor Dušan stipulated that '*all judges should pass judgment justly, as ordained in the code, and should not pass judgment in fear of my Imperial authority*' (Article 172); it is highly worrying to see the Draft Amendments turn the clock back on centuries of tradition to omit Article 149.2 of the current Constitution of Serbia, which prohibits any influence on a judge in the exercise of their office.

3. No arguments are provided for the Ministry's assertion that in developing the amendments it relied on '*written proposals received within a consultative process conducted by the Ministry in cooperation with the Office for Cooperation with Civil Society conducted in the period May-November 2017*'. This claim is untrue and is made by the Ministry to lend legitimacy to efforts undertaken to date to amend the Constitution.

To give the reader some context about how the constitutional amendments were developed, as mandated by the National Strategy (especially given the Ministry's insistence on the continuity of this process), it may be useful to briefly describe this effort. On 25 August 2013 the Government created the Commission to Implement the National Strategy,[24] which, on 19 November 2013, appointed an 11-member Working Party to prepare an assessment of the constitutional framework. This working group included four professors of constitutional law.[25] The Working Party was tasked with analysing constitutional arrangements with a view to remove Parliament's authority for appointing court presidents, judges, prosecutors, and deputy prosecutors; alter the make-up of the HJC and SPC to exclude representatives of the legislative and executive; and make attendance of the Judicial Academy a mandatory precondition for initial judicial appointment. The Working Party fulfilled its mandate by completing its Legal Assessment of the Constitutional Framework

[24] The Commission to Implement the National Strategy is a semi-permanent working party of the Serbian Government tasked under the National Strategy with operational implementation of the Strategy and the Action Plan. It is made up of 15 members (plus 15 deputies) who represent all institutions relevant for reforming the judiciary: the Ministry, Prosecution Service, Supreme Court of Cassation, High Judicial Council, State Prosecutorial Council, Parliamentary Justice, Public Administration, and Local Government Committee, professional associations of judges and prosecutors, Serbian Bar Association, Judicial Academy, law schools, Ministry of Finance, chambers of enforcement officers, notaries public, and mediators, European Integration Office, and Office for Co-operation with the Civil Society.

[25] The Working Party consisted of Dragomir Milojević, President of the Supreme Court of Cassation and HJC; Danilo Nikolić, at the time State Secretary at the Ministry of Justice; Snežana Andrejević, at the time judge of the Supreme Court of Cassation; Đorđe Ostojić, Deputy Public Prosecutor of the Republic; Branko Stamenković, at the time member of the SPC; Radovan Lazić, Chairman of the Board of the Prosecutors' Association of Serbia; Dragana Boljević, judge of the Belgrade Court of Appeal and President of the Judges' Association of Serbia; Zoran Jevrić, lawyer, at the time Vice-President of the Serbian Bar Association; and law professors Dr Vladan Petrov, Associated Professor and Vice-Dean of the Law School of Belgrade; Dr Darko Simović, Professor at the Criminal Police Academy of Belgrade; Dr Irena Pejić, Professor of the Law School of Niš; and Dr Slobodan Orlović, Associate Professor of the Law School of Novi Sad.

Concerning the Judiciary by September 2014. The sole divergent position concerned the Judicial Academy: here the Working Party backed the view assumed on 2 April 2014 by the Working Group to Reform and Develop the Judicial Academy, namely that attendance of the Academy could be made a requirement for initial judicial and prosecutorial appointment in due course and only after comprehensive changes to the concept of the Judicial Academy, which by that time ought not to be governed by the Constitution. The Legal Assessment was presented on 29 November 2016 by its Chairman, the President of the Supreme Court of Cassation at a meeting with all court presidents, having first solicited the opinions of all four appellate courts and all national-level courts. The meeting resolved that the entire judiciary accepted all findings of the Assessment save for limited exceptions (including with regard to the Minister's membership on judiciary councils). It was therefore only logical that the Assessment should become the official platform for debate on constitutional amendments (after additional fine-tuning, as had been envisaged in the National Strategy). Nevertheless, the Ministry utterly ignored the Assessment and kept it hidden from public view.

Instead, in May 2017 the Ministry invited professional associations and civil society organisations to provide comments and suggestions for constitutional amendments concerning the judiciary.[26] The Ministry itself, however, neither articulated

[26] Only entities that had submitted written inputs were invited to the 'consultation' on 21 July 2017; they were notified they had five minutes to present their views, that there would be no exchange of arguments between the participants, and that the meeting would be the last of this kind. This was judged as unacceptable and so the Ministry was compelled to organise an additional five roundtables from September to mid-November 2017, which, in spite of the Ministry's declarations, did not however constitute true public consultation. Disregarding the reasons for embarking on constitutional reform, for each of these meetings the Ministry chose to discuss issues unrelated to the Constitution and with no connection to strengthening judicial independence. The participants were never allowed to exchange ideas and views. The roundtables also often involved quite open disparagement of not only the attendees, but also of judges and prosecutors in general. On 17 October 2017, the Judges' Association complained to the Minister over statements made by the Ministry's officers to the effect that judicial discretion would be the first principle to be abolished in the constitutional amendments, that judges were seeking to transform the judiciary into a 'limited liability company' or a 'private business' that intends to make decisions about people's fates according to its 'whims', that judicial independence was a fetishised ideological myth, that the level of independence enjoyed by judges in Serbia, and especially that sought for judges in Serbia, was unheard of anywhere else in the world, and that judges' and prosecutors' proposals were ridiculous. Unfortunately, no response was forthcoming from the Minister: instead, her assistant, one of those who had made the statements, answered by claiming that the Judges' Association was opposed to a transparent exchange of arguments.

Faced with this obvious intention to legitimise the shift of political influence from one set of constitutional provisions to another, with avoidance of debate, and above all with attempts to deflect public attention from judicial independence, the primary issue at hand, on 30 November 2017 the Judges' Association of Serbia, Prosecutors' Association of Serbia, Centre for Judicial Research, Association of Judicial and Prosecutorial Assistants of Serbia, Association of Judicial Associates of Serbia, Lawyers' Committee for Human Rights (YUCOM), Belgrade Centre for Human Rights, and the Belgrade Bar Association notified the Ministry of their decision to withdraw from the process. At the same time, these associations called on the Ministry to do what the other participants in the consultations had already done before submitting the proposed amendments to the Venice Commission: to present its proposals for constitutional amendments to the public and, by doing so, permit true and wide-ranging debate between government authorities and society at large, thus conferring legitimacy on the constitution-making process. The associations indicated they would be ready to take part in debate on those terms.

nor presented its starting points for constitutional amendment. By 30 June 2017 the invitation had been accepted by 16 organisations, including the Judges' Association [Serbian]. The inputs submitted by these associations revealed that their views about the constitutional position of the judiciary were essentially similar to those adopted by the Working Party of the Commission to Implement the National Strategy.

A set of views that dramatically diverged from the opinions of other participants, and that could jeopardise judicial independence, akin to the positions previously voiced by the Ministry of Justice, was presented by the newly-created Rule of Law Academic Network, or Rolan [Serbian].[27] The 'network' advocated, amongst other things, relaxing the principle of non-transferability of judges, making case law a source of law, enshrining the Judicial Academy in the Constitution and making attendance a mandatory requirement for judicial appointments, and overhauling the HJC and SPC by removing the president of the supreme court from their membership, making a lay person the President of the Council, reducing overall membership from 11 to 10 and that of judges and prosecutors from 7 to 5, giving the casting vote to the President, and narrowing the Council's remit.

It is apparent that the Draft Amendments presented to the public by the Ministry on 22 January 2018 reflects arrangements put forward by this 'network', which are completely the opposite of what was proposed by all other stakeholders, including the Working Party of the Commission to Implement the National Strategy, judges' and prosecutors' professional associations, and actual non-governmental organisations involved in safeguarding human rights and issues of the judiciary. Key judicial institutions shared the views of the professional associations: the Supreme Court of Cassation came out with its Assessment [Serbian] on 12 February 2018; the HJC published its Opionion and Suggestions; the SPC released its Opinion on 19 February 2018; numerous courts have demanded that the Draft Amendments be withdrawn, a request also voiced by 15 reputable professors of constitutional law, theory of the state and legal theory, and law of the organisation of the judiciary, at a public hearing [Serbian] that took place on 20 February 2018.[28] Therefore, all the

[27] According to information available at the time on the Ministry of Justice web site, the Rolan was made up of the Institute for Criminological and Sociological Research, the Serbian Association for Legal Theory and Practice, Judicial Academy Alumni Club, and the Europius Civic Association (registered on 29 March 2017, according to the Associations Register maintained by the Business Registers Agency). The statutory representative of the association, Milica Kolaković-Bojović [Serbian] is a member of Serbian Association for Legal Theory and Practice and works for the Institute for Criminological and Sociological Research. In addition, she served on the Drafting Group for the National Judicial Reform Strategy, 2013-2018; co-ordinated the development of the associated Action Plan insofar as it concerned the efficiency of the judiciary; and also served as member and technical co-ordinator of drafting groups for amendments to the Law on the High Judicial Council and the Law on the State Prosecutorial Council (2013-2014). Since 2013, she has been active in EU accession negotiations: from 2014 to 2016 she co-ordinated the development of the Chapter 23 Action Plan, and from 2015 to 2017 she chaired the Council for Implementation of the Chapter 23 Action Plan.

[28] As a means of contributing to debate on the Working Draft of Amendments to the Constitution of Serbia, the Judges' Association of Serbia and Prosecutors' Association of Serbia organised the public hearing with the participation of 15 reputable academics, Professor Dr Ratko Marković, Professor Dr Irena Pejić, Professor Dr Darko Simović, Professor Dr Olivera Vučić, Professor Dr Dragan Stojanović, Professor Dr Marijana Pajvančić, Professor Dr Jasminka Hasanbegović, Dr Bosa Nenadić, Professor

relevant stakeholders, both in the judiciary and in academia, presented proposals for constitutional amendments in mutual agreement: these would remove political interference in the judiciary and promote judicial independence and prosecutorial autonomy, in accord with Serbia's legal traditions, needs, and abilities, on the one hand, and international legal standards, on the other. Yet not only did the Ministry withhold its reasons for rejecting the nearly unanimous proposals of the community of experts, but it never even mentioned them. Furthermore, the Minister's claims that she had 'yet to see' an opinion disputing the proposed arrangements, as well as that the Draft Amendments would not be withdrawn, show that she has failed to consult the materials submitted in the course of 2017, in particular the submission of the Judges' Association that commented on the features now put forward in the Draft Amendments, and, ultimately, reactions to the Draft Amendments themselves. The Ministry's assertion that it relied on written submissions received during the public consultation is therefore untrue.

4. The Ministry's claim that '[t]he working text is defined with the preliminary assistance of the CoE expert Mr. James Hamilton', as well as statements made by the Ministry's officers as to the proposals having been endorsed by the Venice Commission, mislead the public about the role of the expert in question and the Venice Commission in the process. At any rate, such pronouncements seem to be an attempt to lend credibility to the proposed arrangements in the absence of true argumentation.

5. Given the circumstances outlined above, and in view of the fact that as little as one month was allowed for the so-called public consultation, the Ministry's contention that the Draft Amendments *constituted the starting point for public debate on amending the Constitution of the Republic Serbia, planned for February and March 2018, after which the amendments were to be submitted to the Venice Commission for comments*. The Ministry's officers stated that only comments provided in writing that contained specific proposals to alter the Draft Amendments would be admitted if made no later than 8 March 2018, after the end of the consultation period (5 March 2018), the only appropriate conclusion is that the consultations were nothing more than a rubber-stamping procedure.

Even though the roundtables, which began on 5 February 2018, were presented as the continuation of the so-called 'consultation process' of 2017, the Draft Amendments do not contain justification for the Ministry's choice of arrangements put forward and its reluctance to take into account the arguments of professional associations and civil society organisations, made both orally and in writing during the 2017 'consultations', which indicated that the amendments would further politicise

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Dr Tanasije Marinković, Professor Dr Vesna Rakić-Vodinelić, Professor Dr Radmila Vasić, Professor Dr Zoran Ivošević, Professor Dr Marko Stanković, Professor Dr Violeta Beširević, and Professor Dr Kosta Čavoški of the Serbian Academy. All of the attendees differed in age, professional backgrounds, and political orientation, but shared their commitment to the theory and practice of law. All agreed that the amendments were deficient to such an extent that any efforts to improve them were doomed to failure, and that an entirely new text should be developed in compliance with constitutional procedure. An unedited video recording of the event can be found on the Judges' Association web site; written contributions of all 15 academics will be made available in a special publication.

the judiciary and make it dependent on political influence. Finally, the Ministry never even referenced the 2014 Legal Assessment, whose conclusions and suggestions underlie the proposals referred to above that accord with the legal order, tradition, and capabilities of Serbia, as well as with European standards.

The Ministry had decided to organise public consultation about the Draft Amendments in the form of four roundtables in four Serbian cities[29] in the space of one month (from 5 February to 5 March 2018). The first two events, in Kragujevac in Novi Sad, already demonstrated there would be no change in the approach used for the preceding consultations. The participants remained unknown; persons brought into contact with the judiciary by unfortunate series of events were allowed to speak and re-iterate their unfavourable experiences; there was no debate; and the Ministry's officers in attendance did not feel compelled to explain who proposed the amendments and why, although the arrangements drew criticism from judges, prosecutors, the Supreme Court of Cassation, HJC, SPC, and judges' and prosecutors' associations. Moreover, Čedomir Backović, Assistant Minister of Justice and member of the Venice Commission, who had previously disparaged and insulted the participants in the debate in his public and media appearances, expressed his amazement at the fact that some of those present were able to remain judges and prosecutors. He also openly threatened the President of the Judges' Association of Serbia and other judges during a televised interview on 15 February 2018, when he said 'I would be glad to do harm to you and those like you'. These circumstances forced the professional and other associations to again withdraw from the consultations, as explained in their joint statement [Serbian].

Professional associations of judges and prosecutors are aware that constitution-makers will be responsible for determining the organisation of the government, after having gained public endorsement for doing so in a referendum. Nevertheless, true legitimacy can only be ensured by an open exchange of professional arguments, especially in view of the government's invitation to professional associations, courts, prosecutors, and other bodies of the judiciary to participate in this process. The Government's power to alter the Constitution is not being disputed. What is being disputed, however, are its attempts to portray efforts to amend the Constitution as the result of the Government 'listening to the people' in a lightning-fast, one-month 'public consultation'. As the past 'consultation process', and the current roundtables in this 'public consultation', are all nothing but a sham that has no connection with either democracy or professional, properly argued debate, it is clear that no consultation has ever taken place. The Government's claims to that effect have to be backed up by appropriate action.

III Comments on the proposed arrangements

In its Report on the Independence of the Judicial System (CDL-AD (2010)004) of 16 March 2010, the Venice Commission, the sole authority referenced by the Ministry, lists the standards that '*should be respected by states in order to ensure in-*

[29] The roundtables were to be held in Kragujevac (5 February 2018), Novi Sad (19 February), Niš (26 February), and Belgrade (5 March), but no detailed agenda had been published by as late as 4 February.

ternal and external judicial independence', with the following standard cited first: 'The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability' (para. 82).

1. Missing features

1.1 Systematic regulation of the relationship between the three branches of government Certain officers of the executive power and other politicians, as well as a number of associations with close ties to the government, have in recent years claimed that government in Serbia was subject to no checks and balances, and that the principles of separation of powers and judicial independence, enshrined in Article 4 of the Constitution, were the *greatest challenge to establishing such checks and balances*. Overcoming this limitation, it has been claimed, would require placing constraints upon the judiciary that lacked any democratic legitimacy. Another view that was presented was that Serbia, an EU candidate country, was empowered to choose for itself any of the arrangements employed by the various European states in the absence of a common European *acquis* governing the judiciary.[30] It follows that the governing coalition believes too much attention has been given to the independence of the judiciary, which is insufficiently responsible and responsive, unpredictable (given the inconsistency in its decision-making), and devoid of legitimacy (as it was unelected and constituted a closed profession).

The issue of the legitimacy of governmental authority, which is gained by winning an election, on the one hand, and the separation of powers and independence of the judiciary, which must be professional, on the other, is nevertheless only a theoretical one. In common-law countries this problem may be somewhat more pronounced, as there in making decisions judges enter to some extent into the remit of the legislature. In civil law jurisdictions, such as Serbia, no constitution has ever prevented or hindered the legislative or executive power from adopting a law or regulation or taking any other action from its remit pertaining to the judiciary ('permitted influence'). On the contrary, on multiple occasions the Serbian Constitutional Court has even declared unconstitutional laws and other enactments applicable to the judiciary enacted by the legislative and the executive power, but not the judiciary itself. On the other hand, if the legislative and executive were denied the ability to exert any undue influence on the judiciary, Article 149.2 of the Constitution has achieved its purpose.

It is true that Article 4.3 of the Constitution, which stipulates that the government is based on 'balance and mutual control' is at odds with the principles of the separation of power (para. 2) and the independence of the judiciary (para. 4), as well as Article 145, which states that court decisions are obligatory for all and may not be subject to extra-judicial control (para. 3) but may only be reviewed by an

[30] The untenability of this approach has already been demonstrated in the section on European standards above (pages 5 to 9).

authorised court in a legal proceeding prescribed by law (para. 4). However, the relationship between the branches of government, as defined in Article 4(3) cited above, is applicable to a presidential system, rather than the parliamentary one applied in Serbia. If this principle is to be enshrined in the constitution at all, it should read: 'The relationship between the legislative and the executive branches of government shall be based on balance and mutual control'.[31] Moreover, even the Venice Commission's 2007 report on judicial appointments, so frequently cited by the Ministry, admits that '*[t]o the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model*' (para. 17).

The arrangements put forward in the Draft Amendments seem, by contrast, designed to bring the judiciary, which is 'excessively' independent, uncontrollable, and 'mutinous', back under the 'legitimate democratic' control of political authority. This is the only explanation for the absence from the Draft Amendments of the current constitutional provisions whereby court rulings are binding on all and may not be subject to extra-judicial control (145.3) and influence on judges in the exercise of their judicial function is prohibited (149.2).

1.2 Substance of Judicial Power

Neither the current Constitution nor the proposed amendments define the substance of the judicial power. This is a highly topical issue as over the past two decades judicial powers, and, consequently, the ability to make decisions concerning rights, have continuously and systematically been removed from the courts[32] and awarded to entities with no guarantees of independence[33] (Business Registers Agency, National Land Survey Agency, notaries public, enforcement officers, the prose-

[31] Ratko Marković *Устав Рейублике Србије – критички йреїлед* [*Constitution of the Republic of Serbia: A critical assessment*], ИПД Јустинијан д.о.о, 2006, pp. 15-16; *Правна анализа устављеног оквира о йравосуђу у Рейублици Србији,* Радна група за израду анализе уставног оквира Комисије за реформу правосуђа, pp. 5-6, 33, available online at mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php [in Serbian], accessed on 18 February 2018.

[32] A number of claims were advanced in justification of this, including the need to improve efficiency and reduce caseload and delays by relieving courts of duties not typically within their purview. And yet no analysis was ever performed of which of these duties were untypical for courts (or where exactly the border ran between the judiciary and other branches of government); how many judges were assigned to these duties; and what would the costs and benefits be for the government and the public of removing the powers in question from courts. Statistics for 2014, for instance, reveal that 197 enforcement officers completed 167,000 enforcement cases (involving collection of monetary claims, the simplest and easiest procedure to complete); enforcement officers, unlike courts, are able to access information held by the National Pension and Disability Insurance Fund and make use of personal identification numbers of members of the public, which makes it substantially easier to find debtors and use their assets to settle a claim. Over the same period of time, just slightly fewer enforcement judges (195) completed 326,000 enforcement cases, nearly twice as many as enforcement officers did. And in doing so the judges handled all types of enforcement, including cases that were highly complex (child custody, sale of real property, etc.) and time-consuming as they required numerous actions in several stages.

[33] These include the authority to maintain records of title to real estate and business registers; compile, certify, and issue public instruments regarding legal transactions, declarations, and facts underlying title, and certify private instruments and legal transactions and deal with matters of probate (although notaries public act in probate matters pursuant to court rulings, the judges are nevertheless expected to grant probate); enforcement (except for shared sale of immovable and movable property, issues related to family law, and reinstatement of employees).

cution service), although such independence is a necessary precondition for a fair trial in any proceedings. The status and organisation of some of these entities (such as enforcement officers and notaries public) is under the direct influence of the Ministry of Justice, an executive authority, which determines their numbers, seats, areas of jurisdiction, and fees; appoints and dismisses them; designs their licensing examinations; appoints their examination boards; supervises both them and their respective self-regulators; and serves as the appellate body in disciplinary proceedings. Therefore, proceedings pursued by these persons within their remits (although not 'trials') lack all the features required for a fair trial under Article 32 of the Constitution of Serbia and Article 6 of the European Convention on Human Rights (independence, impartiality, and publicity). This matter is also important for the delimitation of the powers of courts, which exercise judicial powers, and the Constitutional Court, which, according to the Constitution of Serbia, does not exercise judicial power.

The Constitution is eminently clear as who are the holders and what is the substance of the legislative and executive powers. Parliament is the legislative authority (Article 98), whereas the Government is the executive (Article 122). The Constitution defines the substances of these authorities by stipulating the competences of their powers: those of the Government are set out in Article 123, and those of Parliament in Article 99. The latter is now proposed to be amended by Amendment I, which would see the removal of Parliament's responsibility for initial judicial appointments and appointment of members of the HJC and court presidents (decision-making arrangements, currently regulated by Article 105 of the Constitution, are to be altered by Amendment II that envisages a special qualified majority of three-fifths of all MPs, or five-ninths for appointment of HJC members, as will be discussed in more detail below).

The Constitution does define the judicial power, by stipulating that '*[j]udicial power in the Republic of Serbia shall belong to courts of general and special jurisdiction*' (Article 143.1); this, however, is proposed to be changed by Amendment III, which defines courts as 'state authorities'.[34] Nonetheless, neither the Constitution nor the amendments define the substance of the judiciary, as neither prescribe or otherwise define the jurisdiction of judicial authorities (the courts). Moreover, the Constitution does not elucidate the relationship between courts and the Constitutional Court, although practice has here revealed a number of issues to be particularly sensitive for the status of the judiciary: these include deciding upon judges' appeals against the HJC's dismissal rulings, the need to clearly distinguish between the competences of courts and the Constitutional Court in human rights cases involving constitutional complaints,[35] and ruling in conflicts of jurisdiction.[36]

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[34] Paragraph 1 of Amendment III, *Courts*, states: 'Judicial power shall belong to courts as autonomous and independent state bodies'.

[35] For a detailed discussion, see Stojanović D., *Уставно-судско испитивање судских одлука* [*Constitutional-Legal Review of Court Rulings*], *Зборник радова Правног факултета у Нишу*, [Collecion of works of the Law Faculty in Niš] 74/2016, pp. 35-53.

[36] 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.' (UN Basic Principles on the Independence of the Judiciary, para. 3); 'Only judges themselves

1.3 Financial safeguards of independence

In countries that require the principles of the separation of powers and judicial independence to be further strengthened, it is both necessary and advantageous to guarantee the independence of judges and courts in the constitution and provide as comprehensive a definition as possible, as also enjoined by international standards.[37] In this regard, the Constitution must also contain financial safeguards of independence, both for the judiciary as a whole (in the form of a judicial budget)[38] and for individual judges,[39] by stipulating that each judge is entitled to a salary or pension compatible with the dignity and responsibility of judicial office, that the salary or pension must not be reduced, and that the pension must be reasonably proportional to the judge's final salary.

1.4 Freedom of expression and association of judges

Serbian Constitutions have to date not guaranteed freedom of expression and association to judges,[40] although these flow from the Universal Declaration of Human Rights and the European Convention on Human Rights (Articles 1 and 14), the only differences being that the particular duties and responsibilities entrusted to judges and the need to ensure the impartiality and independence of the judiciary are seen as legitimate justification for imposing limits on the freedom of expression, assembly, and association of judges, including on their political engagement.

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should decide on their own competence in individual cases as defined by law' (Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, chap. I, para. 10).

[37] Basic Principles on the Independence of the Judiciary (para. 1); European Charter on the statute for judges (para. 1.2), Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (para. 14); reports of the Venice Commission on Judicial Appointments (2007) (para. 5) and Independence of Judges (2010) (para. 22); Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities (chap. I, para. 7).

[38] Basic Principles on the Independence of the Judiciary (para. 7); European Charter on the statute for judges (para 1.6); Opinion No. 2 (2001) of the CCJE on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights (paras. 5, 10 and 14); report of the Venice Commission on the Independence of Judges (2010) (paras. 52 and 53); Recommendation CM/REC(2010)12 to member states on judges (para. 33); and the Magna Carta of Judges (para. 7).

[39] European Charter on the statute for judges (paras. 6.1-6.4); Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (para. 62); report of the Venice Commission on the Independence of Judges (2010) (paras. 46, 51); Recommendation CM/REC(2010)12 to member states on judges (para. 54); and the Magna Carta of Judges (para. 7).

[40] Documents other than the Basic Principles on the Independence of the Judiciary also recognise the entitlement of judges to these freedoms. These include the European Charter on the statute for judges (paras. 1.7, 1.8, and 4.2); CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (paras. 27, 28, 29, 39, 40, and 47 to 50); Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities (para. 60), **CCJE Opinion No. 7** (2005) on justice and society (paras. 34, 52, and 55); the Magna Carta of judges (para. 12); Opinion No 806/2015 Report on the Freedom of Expression of Judges, CDL-AD(2015)018 wherein the Venice Commission, replying to a question by Honduras, assessed the legal framework governing the freedom of expression of judges in Council of Europe member states, in particular Sweden, Germany, and Austria; and a number of judgments of the European Court of Human Rights, particularly ***Baka v. Hungary [GC]* – 20261/12,** Judgment of 23.6.2016.

And yet judges are citizens too, and so, as cited in the Basic Principles on the Independence of the Judiciary, they too must enjoy '*freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary*' (para. 8) and may '*form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence*' (para. 9). In the judgment of Baka v. Hungary, the European Court of Human Rights held that the applicant (a past President of the Hungarian Supreme Court) was not only entitled, but also bound by duty to express opinion about matters concerning the judiciary, which are a question of public interest, solely from a professional point of view. The Court found that the premature termination of the applicant's mandate discouraged other judges and court presidents from participating in public debate.

Moreover, the problems faced by Serbian judges in establishing a professional organisation and the experiences and achievements of Judges' Association of Serbia (and the Prosecutors' Association of Serbia) over the past twenty years have revealed that such professional associations were both watchdogs and correctives for undemocratic and illegal actions by government authorities. These organisations' efforts to preserve and strengthen the rule of law have safeguarded the constitutional order in alleviating (at least in part) the disastrous consequences of the so-called 2009 reform of the judiciary and have reinforced the need for strong guarantees to be put into place for freedom of expression and association of judges and prosecutors by enshrining these principles in the Constitution.

1.5 Constitutional Law to implement the amendments

Legal drafting logic, as well as experiences with the 2009 re-appointment of judges as mandated by the 2006 Constitutional Law to Implement the Constitution, mandate that the Constitutional Law be debated alongside the Constitution. Furthermore, the text of the Draft Amendments (ahead of Amendment I) states that '*Amendments I through XXIV are an integral part of the Constitution of the Republic of Serbia, which shall enter into force on the day of promulgation by the National Assembly*' (para. 1) and that '[a] Constitutional Act shall be passed to implement the Amendments I through XXIV of the Constitution' (para. 2). Doubtlessly, the true impact of the constitutional amendments can be ascertained only with reference to the content of the constitutional law intended to facilitate their implementation, but the Ministry has failed to make this piece of legislation available for public consultation.

Specific Provisions

The Working Draft includes 24 draft amendments, corresponding to the number of Articles of the Constitution on the judiciary – notably 14 articles on courts (Articles 142-155 of Chapter 7 Courts) and 10 articles on public prosecution services (Articles 156-165 of Chapter 8 Public Prosecution Services). The draft amendments are to replace the provisions of the following articles of the Constitution: Article 99 (Draft Amendment I), Article 105 (Amendment II), and all Articles in Chapters 7 and 8 of the Constitution, from Article 142 (to be replaced by Draft Amendment III)

to Article 165 (Draft Amendment XXIV is to replace Article 163 and Articles 164 and 165 of the Constitution are to be deleted). Due to technical reasons, only some of the draft amendments will be commented in this text.

Draft Amendment II[41] **–** ***Decision-Making by the National Assembly*****:**

The Ministry provides the following statements of justification of this amendment, which introduces a special qualified (three-fifths and unusual nine-fifths) majority of all deputies for the adoption of decisions on the election of the High Judicial Council, High Prosecutorial Council and the Supreme Public Prosecutor: *EXPLANATION OF THE REVISED JURISDICTION FOR THE APPOINTMENT OF JUDGES AND COURT PRESIDENTS The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. Judicial Appointments CDL-AD (2007)028, para. 25*[42].

This statement of justification clearly does not regard the content of the draft amendment. It might pertain to Draft Amendment I amending Article 99, which deprives the Assembly of the power to elect first-time judges to probationary three-year tenure, court presidents and the High Judicial Council (and deputy public prosecutors, public prosecutors and State Prosecutorial Council members).

The qualified majority by which the NA will elect HJC members needs to be borne in mind with respect to this Draft Amendment – it requires a three-fifths majority (150 deputies) and, *in the event they are not all elected in this manner, the remaining members shall be elected within the following ten days by a five-ninths majority* (138,9 deputies) *by which they shall also be dismissed.* The unusual five-ninths majority, which almost corresponds to the number of deputies the ruling majority has in the Assembly (104 deputies of the ruling SNS party + 42 deputies from the parties members of the ruling coalition), stands out.

There is no doubt that a qualified majority is preferable in order to establish an important institution, or in order to elect public officials of such high importance. Such qualified majority would mean the inclusion of the opposition and therefore ensure the element of social consensus and stability. However, in case such a majority is not provided, the Draft resorts to a solution in which the HJC membership is practically elected by the ruling majority. Special attention should be drawn here to Article 5(4) of the Constitution, under which political parties may not exercise power directly or subject it to their control.

Draft Amendment III ***7. Courts – Principles on Courts***

No statement of justification is provided for this Draft Amendment, which is to replace Article 142 of the Constitution entitled Judiciary Principles. Paragraph 1 of the Draft Amendment, under which *[J]udicial power shall be vested in courts as autonomous and independent state authorities,* is actually an amendment of para-

[41] The Ministry did not provide statements of justification for every draft amendment.

[42] Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e

graph 1 of Article 143 of the Constitution, which reads: *Judicial power in the Republic of Serbia shall be vested in courts of general and special jurisdiction*. Judicial power will thus be "lost" by the definition of courts as state authorities. The draft provision does not mention the types of courts (of general and special jurisdiction) either.

The deletion of paragraph 5 of Article 142, under which *[T]he law may also lay down that only judges may adjudicate in specific courts and specific matters,* is also interesting in view of the fact that the Constitution in this Chapter lays down guidelines for regulating the judiciary. Paragraph 5 was based on the legislator's intention to introduce the specialisation requirement to improve the quality and efficiency of court proceedings. Although its omission does not amount to a prohibition of the requirement that solely judges are to rule on specific matters, it allows for the establishment of another trend – the "plebeisation" of the courts because it introduces the possibility of lay judges participating in the work of appeals chambers of higher, appellate courts and in chambers of courts with special jurisdiction (commercial, administrative courts) and even of the highest court. The participation of eminent laymen – lay judges – in the adjudication of specific matters before first-instance courts is welcome, because they are part of the people in whose name the judgments are delivered, i.e. part of the community with specific values, which the courts also bear in mind when ruling on matters, which contributes to the understanding of how the court system functions and to confidence in the judiciary. However, the involvement of lay judges in the adjudication of matters requiring particular knowledge of law may also lead to the imposition of an unnecessary burden on the course of the court proceedings and even to the risk of pressures on the judges (to recall, the Working Draft omits the prohibition of influence on judges, now laid down in Article 149(2) of the Constitution). Lay judges are not prohibited from pursuing political activities or being members of political parties. If the tenures of lay judges are perceived as a way to "find a livelihood" for political sympathisers, which has already happened before, in exchange for which they would also perform the special role of "watchdogs" of judges, their participation in trials, particularly when they are in the majority in the trial chambers, may amount to undue influence on judges and perhaps even result in the rendering of court decisions "outside the court".

Draft Amendment IV – *Independence, Permanent Tenure and Non-Transferability of Judges*

This Draft Amendment is entitled Independence, Permanent Tenure and Non-Transferability of Judges. It is unclear why the Ministry offered only an explanation for the abolition of the "probationary" tenure and in such detail, as if that were the most controversial provision in the draft amendment. On the contrary, it is the least controversial one, wherefore the Ministry unnecessarily quoted the Venice Commission's 2007 Judicial Appointments Report again, particularly in view of the fact that the Commission precisely expressed its view on this issue in its Opinion on the Constitution of Serbia[43] of 18 March 2007.

[43] CDL-AD(2007)004, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e

Draft Amendment IV comprises seven paragraphs, each of which warrants attention. The text below will focus only on some of them. Nonetheless, the Ministry needs to explain (and this Draft Amendment is not accompanied by a statement of justification) why it omitted the provision in Article 149(2) of the Constitution prohibiting influence on judges.

> 1. *Judges shall be independent and perform their duties in accordance with the Constitution, ratified international treaties, the law and other general enactments. Consistency of case-law shall be regulated by the law.*

As opposed to the valid articles of the Constitution, notably Article 142(2), under which *[C]ourts shall be autonomous and independent in their work and perform their duties in accordance with the Constitution, the law and other general enactments, when so stipulated by the law, generally accepted rules of international law and ratified international treaties*, and the somewhat differently (more narrowly) defined sources of law under Article 145(2) of the Constitution, under which *[C]ourt decisions shall be based on the Constitution, the law, ratified international treaties and regulations adopted in accordance with the law*, paragraph 1 of Draft Amendment IV sets out the sources of law applied by judges.

The sources of law listed in paragraph 1 of Draft Amendment IV do not include generally accepted rules of international law or ratified international treaties, although they are an integral part of Serbia's legal order, as laid down in Articles 16(2) and 194(4) of the Constitution. If this provision is adopted, the constitutional provisions on sources of law forming an integral part of Serbia's legal order will be mutually inconsistent since the draft amendments do not include changes of the text of Articles 16(2) and 194(4).

The omission of the provision in Article 145(3) of the Constitution, under which [*C*]*ourt decisions shall be binding on everyone and may not be subject to extrajudicial control*, coupled with the second sentence of paragraph 1 of Draft Amendment IV, under which [*C*]*onsistency of case-law shall be regulated by the law,* will enable the introduction of a "Certification Commission", envisaged by the 2013-2018 Action Plan for the Implementation of the National Judicial Reform Strategy (Strategic Guidelines 2.7.1.-2.7.4),[44] or a similar body (the Chapter 23 Action Plan does not mention a Certification Commission but its Recommendation 1.3.9 refers to the need to improve the consistency of the case-law by various means)[45]. Namely, after

[44] Published in the Official Gazette of the Republic of Serbia 71/13, 55/14 and 106/16. Available at: https://www.mpravde.gov.rs/files/NSRJ_2013%20to%202018_Action%20Plan_Eng%202.1.pdf

[45] The Certification Commission is to comprise representatives of the Case-Law Departments of the Appeals Courts and the Supreme Court of Cassation, who are to work full-time on the "certification of judgments" with the support of "experts in the relevant legal areas and associates to act as *amicus curiae* – experts in various legal areas, representatives of lawyers and law professors". The Commission is to be tasked with identifying court decisions that represent best practices in specific types of disputes and ensure that other decisions in such cases are rendered in accordance with "established case-law", that is, to ensure that court decisions which, in the opinion of the Certification Commission, deviate from the case-law, do not leave the courts, and thus ensure consistent adjudication. Furthermore, there have been suggestions that judges, whose decisions are found to be deviating from the case-law and who do not want to change their views, are subject to disciplinary penalties. The establishment of a Certification Commission would amount to the establishment of a quasi court, a court

laying down that judges shall be independent and adjudicate in accordance with the Constitution, ratified international treaties, the law and other general enactments, paragraph 1 sets out that *"[C]onsistency of case-law shall be regulated by the law."* It is unclear why the amendment includes these norms when it is entitled *Independence, Permanent and Non-Transferability of Judges* unless case-law is set as a restriction of judicial independence.

As far as the provision regarding the Certification Commission is concerned, it needs to be noted that the establishment of a Certification Commission would amount to the establishment of a quasi court, a court above courts, on which the executive would have crucial influence by electing its associate members (lawyers and law professors). The "judges" of this "court above courts" would not be held responsible for the court decisions (responsibility for the judgments would remain with the judges who handed them down and signed them), but they would nevertheless have huge and unacceptable power over the judges – they would issue orders to judges and instruct them how to adjudicate, which would stifle all free judicial opinion. Furthermore, the imposition of the binding character of the case-law in another manner, including by a constitutional provision defining it as a source of law, would undermine the judges' internal independence and increase their inertia (a trait not only inherent to judges in Serbia), reduce trials to stereotype, discourage judges from rendering decisions based on their free opinion, lethally affect the fairness of trials and further impinge on public confidence in the judiciary, without which there can be no rule of law. The Venice Commission elaborates in detail the effects undermining the judiciary's internal independence by the introduction of case-law as a source of law in the Constitution in its Report on the Independence of the Judicial System, Part I: the Independence of Judges[46]: *68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. 73. [t]he issue of internal independence arises not only between judges of the lower and of the higher courts but also between the president or presidium of a court and the other judges of the same court as well as among its judges.* In paragraphs 71 and 72 of its Report, the Venice Commission states the following: "*Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection*

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above courts, on which the executive would have crucial influence by electing its associate members (lawyers and law professors). The "judges" of this "court above courts" would not be held responsible for the court decisions (responsibility for the judgments would remain with the judges who handed them down and signed them), but they would nevertheless have huge and unacceptable power over the judges – they would issue orders to judges and instruct them how to adjudicate, which would stifle all free judicial opinion (Ministry representatives have for months now been saying that they will abolish free judicial opinion).

[46] *CDL-AD(2010)004* of 16 March 2010, available at https://rm.coe.int/1680700a63.

for judicial independence, both "internal" and "external", can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence." (CDL(2007)003 at 61). 72. To sum up, ***the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity***.

The proposer's reference to the Venice Commission's Opinion on the Draft Judicial Code of Armenia[47] on the important role of the supreme court in ensuring case-law consistency when ruling on specific cases, with emphasis on the right of lower courts to deviate from the case-law of the supreme court in specific cases and its view that the supreme court may not act as the "legislator" is absolutely unnecessary since the Venice Commission has over the past 15 years given three consistent opinions on the consistent application of the law in Serbia[48]. Furthermore, the CoE Consultative Council of European Judges (CCJE) expressed an essentially identical, albeit more comprehensive, view on this issue in its Opinion no. 20(2017) on the Role of Courts with Respect to the Uniform Application of the Law[49], in which it, inter alia, underlined: the importance of argumentation set out in court decisions; the primary role of the supreme court and the important role of appeals courts in addressing inconsistent case-law, means for ensuring consistent and uniform case-law and development of law by ruling on court cases before them; that although legal interpretations, views, opinions, binding instructions, et al, may have a positive impact on uniformity of the case-law and legal certainty, they raise concerns from the

[47] Opinion *CDL-AD(2017)019* adopted on 7 October 2017, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)019-e.

[48] In their opinion of 24 June 2002, experts *Natalie Fricero*, a Nice Law School Professorm and *Giacomo Oberto*, a Turin judge, said they were strongly opposed to such a system of imposed interpretation. In its Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia (Opinion no. 464 / 2007 of 19 March 2008), the Venice Commission stated: "It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction." (paragraph 109)

In paragraphs 103-108 of its Opinion on Draft Amendments to the Laws on the Judiciary of the Republic of Serbia (Opinion No. 202/2012 of 11 March 2013, *CDL-AD(2013)005*), the Venice Commission commented amendment of Article 31 of the Law on the Organisation of Courts under which the Supreme Court of Cassation shall *give opinions on draft laws and other regulations governing issues of relevance for the judicial branch*. It said it had been *told that this task was introduced in order to unify the case law, as there are many cases before the European Court of Human Rights on the equal access to justice. It was said that these legal opinions were only mandatory for the judges of the Supreme Court of Cassation (not for lower courts). In addition, it should be regarded as an interpretation of the law, not as an instruction. 105. Nevertheless, the Venice Commission has criticised this method, because it gives the Supreme Court of Cassation a general "rule-making" power, which can conflict with the separation of powers. 106. It is not clear whether the Supreme Court adopts general views outside the specific case or while exercising its competence as a court of cassation. In case of the former, this approach will conflict with the principle of the independence of the judiciary. The argument that "general legal views" are adopted with the aim of remedying the most common errors of the judicial system, which due to some reason do not end up at the level of the highest court, seems flawed. It also fails to explain why it is impossible to remedy such errors in appeal or cassation proceedings.*

[49] Available at: https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3

viewpoint of the proper role of judiciary in the system of separation of state powers; that, under the civil law system, inferior courts may depart from settled case-law of hierarchically superior courts provided they set out their arguments for doing so; that a judge acting in a good faith, who consciously departs from the settled case-law and provides reasons for doing so, should not be discouraged from triggering a change in the case-law and that such departure from the case-law should not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary; and that all three branches of government have an obligation to foster coherent legal rules and coherent application of these rules[50]. This issue is also addressed in other European documents on standards, including Recommendation CM/REC (2010)12 (paragraphs 5, 22 and 23), albeit in a totally different way than the one planned by the Ministry; the former warn that free judicial opinion should not be restricted.

Caution should be exercised to avoid hasty conclusion that the identified and undisputed case-law inconsistencies can be addressed by a seemingly simple shift to an entirely different (common law) system or by another seemingly easy solution. Incorrect and rash solutions cause damage that cannot be remedied even by best adjudication and that take decades to rectify. The proposed provisions are not only in contravention of Serbia's legal system and tradition[51], but will also undermine the judges' internal independence. There have already been situations in practice of disciplinary proceedings being instituted against judges who did not want to change their decisions, because they disagreed with the views of their peers who thought they should. This led to a debate within the courts and the phenomenon was cited in official documents, as a threat to judicial independence[52].

2. *Only individuals who completed special training in a judicial training institution established by the law may be appointed judge in a court with exclusively first-instance jurisdiction under the law.*

One of the obligations Serbia assumed under the Chapter 23 Action Plan with respect to amending the constitutional provisions on the judiciary, with a view to ensuring (strengthening) its independence, and in regard to Venice Commission's recommendations[53] is to ensure *that the system for the recruitment, selection, ap-*

[50] More on the problems regarding the courts' (in)consistent application of the law in their decisions, differences between the common and civil law systems, and, in that regard, various causes of the inconsistent application of the law, many of which are outside the judiciary, and the European Court of Human Rights' views on the issue (in its judgment in the case of *Vučković and Others v. Serbia* (App. No. 17153/11 of 28 August 2012) in the JAS text "Comments on the Proposed Concepts and Concept Proposals for Amendments to the Constitution of the Republic Of Serbia" of 25 August 2017, pp. 20-30, available at: http://www.sudije.rs/index.php/en/aktuelnosti/constitution/250-judges-association-of-serbia-comments-on-the-proposed-constitutional-amendments.html.

[51] Modern Serbian statehood was established in the 19th century. Serbia adopted its first Constitution in 1835 (when only nine states in Europe had a written constitution) and its Civil Code adopted in 1844 was the third civil code to be adopted in Europe, after the French and Austrian ones.

[52] 2013 Annual Report by the Protector of Citizens of the Republic of Serbia, p. 3, and the European Commission's 2014 Serbia Progress Report, p. 70.

[53] Venice Commission's Opinion no. 405/2006 on the Constitution of the Republic of Serbia of 19 March 2-17, *CDL-AD(2007)004*.

pointment, transfer and termination of judicial officials be independent of political influence and that entry in the judiciary be based on merit-based objective criteria, fair in selection procedures, open to all suitably qualified candidates and transparent in terms of public scrutiny. (1.1.1.1.).

Competence is prerequisite for the performance of judicial office and, in addition to judicial integrity, is one of the main criteria for becoming a judge. *The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality*.[54] It goes without saying that judges recruited into the Serbian judiciary must possess competence and integrity. This issue is directly linked to the initial training of law graduates, which is a way, a means, to facilitate to the forming of judges who are *capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness*[55].

There is no uniform system of training for judges and prosecutors in European countries[56]. Various training methods and systems are equally functional and applicable, depending on the tradition and economic strength of each and every state. In any case, [A]n independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office[57], and such training must be delivered by eminent and acknowledged lecturers and in an adequate interactive manner. Back in 2001, the JAS established the Judicial Centre in cooperation with the Serbian Government. Neither the then nor the valid Constitutions have created any obstacles to the existence or work either of the Judicial Centre or the Judicial Academy, wherefore the question now arises why the Ministry insists on including a judicial training institution in the Constitution, especially since the Judicial Academy is not independent of either the executive or the legislature[58]. The Justice Ministry thus apparently aims to preclude the repetition of the situation when the Constitutional Court (in its decision of 6 February 2014[59])

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[54] CCJE Opinion no. 17(2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, paragraph 1, available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=2256555&Site=COE&direct=true.

[55] CCJE Opinion no. 10(2007) on the Council for the Judiciary at the service of society, paragraph 68, available at: https://rm.coe.int/168074779b.

[56] More on the competences and training of judges and prosecutors, their purpose, practices in various European states, Serbia's experiences in this area, shortcomings, consequences and suggestions in the JAS' document Comments on the Proposed Concepts and Concept Proposals for Amendments to the Constitution of the Republic Of Serbia of 25 August 2017, pp. 30-37, available at: http://www.sudije.rs/index.php/en/aktuelnosti/constitution/250-judges-association-of-serbia-comments-on-the-proposed-constitutional-amendments.html.

[57] Recommendation CM/Rec(2010)12 of the CoE Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 57.

[58] CCJE Opinion no. 4 (2003) on Appropriate Initial and In-Service Training for Judges at National and European Levels, paragraph 13, available at:
https://www.inj.md/sites/default/files/CCJE%282003%29OPI4_en.pdf.

[59] Constitutional Court Decision on the unconstitutionality of paragraphs 8, 9 and 11 of Article 40 of the Judicial Academy Law (Official Gazette of the Republic of Serbia *104/2009), published in the Official Gazette of the Republic of Serbia* 32/2014 of 20 March 2014.

declared unconstitutional the provisions of the Judicial Academy Law restricting the constitutionally defined jurisdiction of judicial councils to elect judges and deputy public prosecutors (only from among the ranks of candidates selected by another entity) and violating the principle of equality of all citizens in the same legal situation by *concepts according to which individuals who have not completed initial training at the Judicial Academy are by that fact essentially eliminated from the list of candidates for first-time judges in specific types of courts and first-time deputy public prosecutors in specific types of public prosecution services, especially in view of the fact that the Academy graduates primarily discharge the duties of judicial or prosecutorial assistants during their initial training, just like judicial and prosecutorial assistants, who are not the "beneficiaries" of such training.*[60] *This view was also taken by the Supreme Court of Cassation in its Analysis of the Draft Constitutional Amendments of 12 February 2018, as well as the Working Group that drafted the Legal Analysis of the Constitutional Framework on the Judiciary. In paragraph 6 of the Introduction to its Legal Analysis, the Group specified: As per the introduction of the completion of the Judicial Academy as a mandatory eligibility requirement for first-term judges and public prosecutors, this Working Group supports the position taken by the Working Group for Judicial Academy Reform and Development, that the Judicial Academy should not become a constitutional category. The introduction of the completion of the Judicial Academy as a mandatory eligibility requirement for first-term judges and public prosecutors may be set as a strategic goal that will be feasible after a thorough reform of the concept of the Judicial Academy.*

Politicians in Serbia, aided by the all-too-conventional practices of the Brussels administration and their insufficient understanding of the domestic circumstances, persist with particular zeal in their intent to make the still feeble Academy the only or at least the dominant system for recruiting judicial officials from among recent law graduates. Such zeal seems to justify concerns that the Academy might become a hidden, yet effective channel of political influence on the courts, which the government wants to establish, because it will have to give up the right to elect judges and deputy public prosecutors after the constitutional reforms. In this manner, by selecting the future Academy students in an insufficiently controlled and transparent procedure, the government will in advance influence the recruitment of judges.

> *7. Judges may not be transferred to other courts without their consent, except in the event of the reorganisation of the court system pursuant to a decision by the High Judicial Council.*

Another obligation Serbia assumed under the Chapter 23 Action Plan with respect to the amendment of the constitutional provisions on the judiciary and with a view to ensuring its independence regards ensuring that the system of transferring judicial officials is independent of political influence. This has not been a problem in reality to date. Namely, Article 150 of the valid Constitution guarantees the non-transferability of judges. Under this Article, judges shall be entitled to exercise their office in the court they had been elected to and may be transferred or reassigned to another court only with their consent (paragraph 1). Paragraph 2 of that Article lays

[60] *Ibid.*

down that judges may exceptionally be permanently transferred or reassigned to other courts in accordance with the law and without their consent in the event of the abolition of the court they had been elected to or the revocation of the substantial part of the jurisdiction of that court.

However, paragraph 7 of Draft Amendment IV abolishes non-transferability, one of the safeguards of judicial independence[61]. The non-transferability guarantee has been omitted and the exception (transfers without the judges' consent) has become the rule. This gives rise to particular concern in view of the fact that the Draft Amendment "introduces" a vague and as yet legally unknown expression "reorganisation of the court system". Contrary to the obligation to ensure that transfer of judicial officials is independent of political influence, the ruling majority will be able to transfer judges against their will to other courts, of any kind, degree or jurisdiction, in case of the "reorganisation" of the court system (because it will have the votes of five members of the HJC it elects and the casting vote of the HJC Chairperson). In addition to the already listed negative effects, this will pave the way for punishing politically "disobedient" judges and prosecutors.

In its Opinion No. 17(2014), the CCJE has said that *judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice*[62] (paragraph 5)*, such as a lack of financial resources*[63]*, problems concerning the initial and in-service training of judges*[64] *and the unsatisfactory elements regarding the organisation of the judiciary and also the possible civil and criminal liability of judges*[65].

The problem of inequitable caseloads of courts and judges has indisputably reflected on lack of access to justice within a reasonable time because it takes the courts and judges shorter or longer periods of time to rule on the cases, depending on their caseloads. Access to justice within a reasonable time requires that trials, including enforcement of court decisions, be completed within a reasonable, as well as optimal and foreseeable time. The problem of inequitable caseloads of courts and judges is the consequence of the inadequate court network, inadequate jurisdiction of the courts, and lack of judges sitting on courts in some towns.

It needs to be borne in mind that the allocation of judges depends on the High Judicial Council whereas the network of courts and their jurisdiction are governed by the law, and hence the responsibility of the legislative and executive authorities. This is why European standards entail specific state obligations in that respect. Under Council of Ministers Recommendation Rec 2010(12) on judges: independence,

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[61] More on the inequitable caseloads of courts and judges, as one of the three main problems in Serbia's judiciary, alongside insufficient independence and training, in the JAS text "Comments on the Proposed Concepts and Concept Proposals for Amendments to the Constitution of the Republic Of Serbia" of 25 August 2017, pp. 4, 8, 9 and 13-20, available at: http://www.sudije.rs/index.php/en/aktuelnosti/constitution/250-judges-association-of-serbia-comments-on-the-proposed-constitutional-amendments.html.

[62] CCJE Magna Carta of Judges (2010), paragraphs 3 and 4.

[63] CCJE Opinion no. 2(2001), paragraph 2.

[64] CCJE Opinion no. 4(2003), paragraphs 4, 8, 14 and 23-37.

[65] CCJE Opinion no. 3(2002), paragraph 51.

efficiency and responsibilities, [*T*]*he authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality* (paragraph 32); *Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently* (paragraph 33); *A sufficient number of judges and appropriately qualified support staff should be allocated to the courts* (paragraph 35).

Insistence on the fulfilment of the efficiency requirement at all costs, including the weakening of the non-transferability principle, an element of judicial independence, is not based on a comprehensive analysis of the reasons for the courts' backlogs and the judges' inequitable caseloads. This is why it has led to the unacceptable conclusion that, due to the provisions in Article 150, *the Serbian Constitution includes a much more rigid approach to the transferability of judges than the EU standards, which has produced consequences at several levels, the most important of which is the impossibility of significantly improving the court network by judicial mobility and thus improving access to justice, although precisely the latter must be the priority*[66]. This is how ROLAN commented the provision that found its way in the Working Draft and JAS quotes it here in the attempt to understand why the proposer opted for this solution but failed to provide a proper statement of justification of the Draft Amendment. Easier and more frequent transfers of judges would undermine the efficiency of the court system and cause effects contrary to those adduced to justify the weakening of the guarantees of independence – the trials would last longer because the transferred judges would need time to familiarise themselves with the cases, the statutes of limitations in criminal cases would expire and the court system would become more expensive (because all the housing and travelling costs of the transferred judges would have to be covered). It is therefore clear that easier transfers of judges against their will cannot make up for the deficiencies in the work of the legislative and executive authorities, which are charged with defining the court network and the jurisdiction of the courts.

Without any intention of neglecting the role and responsibilities of the judges, it nevertheless has to be pointed out that the reform process primarily depends on the direction set in the Constitution and the adequate and applicable laws governing the court network, jurisdiction of courts and procedural rules, which are adopted in accordance with them (and these laws are not adopted by the judiciary, but by the legislature, which votes in legislation submitted by the executive government). The *ad hoc* judicial transfer measure, which this provision of the Draft Amenment turns into a rule for (mis)managing the court system, cannot, in the long term, improve the judiciary, notably the efficiency of the system and access to justice. It will, however, definitely result in lowering the level of judicial independence guarantees, provide for the possibility of further undermining judicial independence and thus of the citizens' right to a fair trial.

[66] Document outlining the amendments proposed by the Rule of Law Academic Network (ROLAN), page 27.

High Judicial Council: Draft Amendments VIII – Jurisdiction**; IX –** Composition; **XI –** Chairperson**; XII –** Work and Decision-Making

Eleven of the 24 draft amendments regard the judiciary; as many as six of them regard the High Judicial Council. They will be analysed together because that is the only way to gain insight in their effects. Section 1.1 of the Chapter 23 Action Plan on judicial independence (page 29) clearly states that the Republic of Serbia shall ensure the following in response to the EU's recommendations in the Screening Report: *The strengthening of the role of the High Judicial Council and State Prosecutorial Council in terms of the management of the judiciary, as well as the supervision and control of the judiciary; that they will have at least 50% of their members, selected by their peers, from amongst the ranks of judges and public prosecutors and representing different levels of jurisdiction (the role of the National Assembly is solely declaratory).* The JAS disagrees with this commitment, since it considers that it reduces the attained degree of independence and of the right to a fair trial (more below)

As per Draft Amendment VIII, the title of which leads to the conclusion that it regards the jurisdiction of the HJC, it is unclear why the Ministry gave the following title to its statement of justification: *Statement of justification of the Revised Jurisdiction for the Appointment of Judges and Court Presidents* or why it mentions judicial appointments and promotion and disciplinary measures against judges in its statement of justification. As elsewhere, the Ministry referred to the Venice Commission, notably its 2007 Report on judicial appointments[67], as the only source of standards governing this issue.

Draft Amendment VIII significantly limits the HJC's jurisdiction, which is "concealed" by the list of some of its competences that definitely should not be mentioned in the Constitution (e.g. collection of statistical data). Particular concern is caused by the fact that the HJC will no longer be charged with guaranteeing the independence of judges, but only with guaranteeing the independence of courts. The CCJE discussed the connection between the judicial council's composition and competences in its Opinion no. 10(2007) (paragraphs 44-47)[68]. Namely, if the Council has broad competences, especially if it manages the court budget, it needs to have a mixed composition, in order to ensure the legitimacy of its work. However, if it has fewer competences, which practically boil down to the judges' status-related issues, there is no justification for changing its composition and reducing the number of its members from among judges (which is what Draft Amendment IX envisages: a reduction of members from among the ranks of judges from seven to five):

[67] *Judicial Appointments CDL-AD (2007)028*, paragraph 25.

[68] *Also there should be a close connection between the composition and the competences of the Council for the Judiciary. Namely, the composition should result from the tasks of the Council for the Judiciary. Certain functions of the Council for the Judiciary may require for example members of the legal professions, professors of law or even representatives of civil society*. (paragraph 45.).

Among Councils for the Judiciary, a distinction can also be made between Councils performing traditional functions (e.g. in the so-called "Southern European model" with competences for appointment of judges and evaluation of the judiciary) and Councils performing new functions (e.g. in the so-called "Northern European model" with competences for management and budget matters). The CCJE encourages attributing both traditional and new functions to the Council. (paragraph 46).

When there is a mixed composition in the Council for the Judiciary, the CCJE is of the opinion that some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel.(paragraph 20).

The Draft Amendments change the number of members, the composition of the HJC and the way in which its members (Draft Amendment IX) and its Chairperson (Draft Amendment XI) are elected, as well its working and decision-making procedures (Draft Amendment XII). They therefore formally fulfil part of the obligations under the Chapter 23 Action Plan, because the judges will have 50% of the seats on the Council, which is the minimum Serbia committed to and much less than the judges have now. The HJC will now have 10 instead of 11 members; an even number of members is clearly inappropriate for a body, which will inevitably have problems adopting decisions in case of differences in opinion. As opposed to the current three *ex officio* members (the president of the highest court, the Justice Minister and the chair of the parliamentary committee for the judiciary) and eight elected members (one law professor, one lawyer and six judges), the Draft Amendment lays down that the HJC shall be composed of two, at first glance, equal groups of members – five judges, to be elected by their peers, and five "renowned law graduates", to be elected by the Assembly. The ruling political majority will be entitled to elect the five HJC members, who will boast the majority of votes and thus play a decisive role (their votes will also suffice to elect the HJC Chairperson), because, in the event the Assembly fails to elect the HJC members by a three-fifths majority, it shall elect them by a five-ninths majority of all deputies within 15 days (i.e. 139 deputies, precisely the number of deputies the ruling majority now commands in parliament). The formulation of Draft Amendment IX suffices to conclude that disparagement and mistrust of judges will be built in the foundations of Serbia's legal order, because the provision implies that judges are not "renowned law graduates", that only the HJC members elected by the Assembly are. The "renowned law graduates" will be elected in the following manner: they will themselves apply for the position, in response to a "public vacancy notice" published by the competent Assembly committee, which will review the applications and suggest to the Assembly which of the candidates to elect. It goes without saying that there is quite a good chance that none of the members of the parliamentary committee have a law degree or are capable of evaluating "the legal renown" of the self-nominated applicants and that such a lay body will be unable to genuinely assess which of them are "renowned law graduates"; it also goes without saying that the committee will definitely be capable of "receiving political signals" about which candidates are considered suitable by the ruling political echelons and uphold their candidacies. This provision does not even preclude the possibility of the Minister, provided s/he has a law degree, or any other law graduate working in the Minister, or, for that matter, a politician with a law degree, running for a seat on the HJC and being is elected to it, and thus becoming a "renowned law graduate".

The Ministry's references to the above-mentioned Venice Commission 2007 Report on judicial appointments and its 2011 Opinion on the Draft Amendments to the Constitution of Montenegro as well as on the Draft Amendments to the Law on Courts (hereinafter: Montenegro Opinion), or its 1998 Opinion on constitutional

amendments in Albania in its statement of justification are not persuasive either. In its Montenegro Opinion, which the Ministry refers to on a number of occasions, and which was co-authored by Mr. Hamilton, who assisted the Ministry in drafting the Working Draft in his capacity of CoE expert, does not prohibit the Justice Minister from sitting on the HJC, but explicitly says the minister is not to have any voting rights in disciplinary and removal proceedings. Therefore, allowing the Justice Minister to take part in disciplinary and removal proceedings, which s/he is entitled to initiate (under paragraph 3 of Draft Amendment VIII) is directly in contravention of even the Venice Commission's Montenegro Opinion the Ministry is referring to, as well as a number of judgments of the European Court of Human Rights.

In paragraph 13 of its Montenegro Opinion, the Venice Commission states that *through granting the final decision on both appointment and dismissal to the Parliament and restricting the term to five years, the proposal still conveys the impression of political control.* Therefore, both in this Opinion and in its 2007 Opinion on Serbia's Constitution (*CDL-AD(2007)004,* paragraphs 70 and 106*)* the Venice Commission alerts to the risk that the election of HJC members by parliament may result in the politicisation of the judiciary and mistrust in judicial independence. In the Montenegro Opinion, the Venice Commission suggests that, should the provision on the election of Council members by the parliament remain, they be elected by a two-thirds majority. The proposer of the Draft Amendments did not take on board the Venice Commission's suggestion that the HJC members be elected by a two-thirds parliamentary majority (167 deputies) and thus gain greater democratic legitimacy. Rather, the proposer introduced an absolutely novel majority of five-ninths (139 deputies), whereby it lowered the threshold for electing HJC members and, thus, their legitimacy.

In its statement of justification of the Draft Amendment XI provision prohibiting the election of the HJC Chairperson from among the ranks of judges, to prevent the corporatisation of the judiciary, which the Ministry is strongly insisting on, the Ministry refers to paragraph 96 CDL-AD (2007)047 of the Venice Commission Montenegro Opinion[69] (not mentioning that it topic has been elaborated in para.14 of the Venice Commission Montenegro Opinion CDL-AD(2011)010[70]) in which the Venice Commission does, indeed, propose a composition in which there is a parity of members coming from the judiciary and from the rest of society. This pluralism in composition is mentioned also in the Venice Commission Opinions on Montenegro CDL-AD(2012)024[71] and on Armenia CDL-AD(2017)019[72]. Nevertheless, other parts of that Opinion and other Venice Commission opinions also need to be

[69] Opinion CDL-AD (2007)047 of 19 March 2007, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)047-e 15.12.2007.

[70] Opinion CDL-AD(2011)010 of 17 June 2011, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)010-e

[71] Opinion CDL-AD(2012)024 on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro - 14-15 December 2012, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)024-e

[72] Opinion CDL-AD(2017)019 on the Draft Judicial Code - 6-7 October 2017, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)019-e

borne in mind to gain a clear picture of the context in which the Commission expressed this view. For example, the Ministry disregarded paragraph 19 of that Opinion, which clearly suggests that although the HJC should be comprised of five judges and five lay members, the parliament should not elect all five lay members because that would result in political control over the judiciary, the avoidance of which is the very purpose of the Venice Commission's endeavours. The Venice Commission even recommends who should elect the five lay members of the HJC: two members could be renowned lawyers elected by a two-thirds majority in parliament - one would be nominated by the majority, one by the opposition; one renowned member of the legal profession could be appointed by the President; one renowned member of the legal profession could be proposed by the civil society (which would require a mechanism in which NGOs, academia and bar association could participate); and the Minister of Justice, who is an *ex officio* member with no voting rights in disciplinary and removal proceedings. In the view of the Venice Commission, only once these requirements are fulfilled can the Chairperson elected from among lay members. Beside this, in Opinion CDL-AD(2017)019 on Armenia (Para. 90), Venice Commission welcomes that the chairpersons of the SJC are elected by rotation from amongst judge members and lay members, for a term of two and half years (Article 81). None of these considerations are reflected in the Draft Amendments, with the exception of the provision that the HJC Chairperson may not be a judge. On the other hand, the CCJE states the following in its Opinion no. 10 on the Council for the Judiciary at the service of society*: It is necessary to ensure that the Chair of the Council for the Judiciary is held by an impartial person who is not close to political parties. Therefore, in parliamentary systems where the President/Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge* (paragraph 33).

All the cited reports and opinions, including the Venice Commission's 2010 Report on the Independence of the Judicial System,[73] include the view that the judicial council should have a pluralistic composition (judges and non-judges) *with a substantial part, if not the majority, of members being judges* (paragraph 32). This view definitely cannot be construed as meaning that judges may account for the minority in the HJC, i.e. that they may be outvoted by other HJC members, as envisaged by the Draft Amendments.

As per attaching particular importance to the 2007 Report on Judicial Appointments, it needs to be noted that the Venice Commission says in the very first sentence of its Report that it adopted it as a contribution to the elaboration of CCJE's Opinion no. 10 on the structure and role of judicial councils, adopted in November 2007. The Venice Commission further states in this Opinion that *although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common* (paragraph 33) and refers to

[73] *Study No. 494/2008* of 16 March 2010 (*CDL-AD(2010)004*) *Report on the Independence of the Judicial System Part I: the Independence of Judges*, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e

the cases of France, Bulgaria, Romania and Turkey. (NB the case of France differs from the others, because the presence of the President, and the Justice Minister, in the Senate was undisputable when the President (Charles de Gaulle) was a representative of the nation rather than a political figure. Now, when this is no longer the case, the French are working on changing the composition of the Council, on which the Justice Minister will not sit any longer. The other countries listed by the Venice Commission recently established their Councils, rife with frictions and negative experiences caused by the Justice Ministers' participation in their work.) In any case, the Report explicitly says that *in order to insulate the judicial council from politics its members should not be active members of parliament* (paragraph 32).

A comprehensive, more recent and more important Venice Commission Report on the Independence of the Judicial System Part I: the Independence of Judges of March 2010 says inter alia, the following in paragraph 32: *To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers*. European standards, including on judicial councils, have been evolving and the 2010 Magna Carta of Judges states the following: *[T]he Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers.* (paragraph 13)

However, as far as judicial councils are concerned, the Venice Commission does not attach more relevance to any of its reports and opinions than to the above mentioned CoE Committee of Ministers Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities, the 2010 Magna Carta of Judges, or a number of CCJE Opinions, including Opinion No. 10(2007) on the Council for the Judiciary at the service of society[74]. The latter, adopted in November 2007, took account of the Venice Commission's 2007 Report[75] but included slightly different solu-

[74] Translated into Serbian by the JAS.

[75] When preparing this Opinion, the CCJE examined and duly took into account in particular:

the *acquis* of the Council of Europe and in particular Recommendation No.R(94)12 of the Committee of Ministers to member States on the independence, efficiency and role of judges, the European Charter on the Statute for Judges of 1998 as well as Opinions No. 1, 2, 3, 4, 6 and 7 of the CCJE;

- the report on "Judicial Appointments" adopted in March 2007 by the Venice Commission during its 70th Plenary Session, as a contribution to the work of the CCJE;
- the replies by 40 delegations to a questionnaire concerning the Council for the Judiciary adopted by the CCJE during its 7th plenary meeting (8-10 November 2006);
- the reports prepared by the specialists of the CCJE, Ms Martine Valdes-Boulouque (France) on the current situation in the Council of Europe member States where there is a High Council for the Judiciary or another equivalent independent body and Lord Justice Thomas (United Kingdom) on the current situation in states where such a body does not exist;

tions. It is the most comprehensive and relevant set of European standards on judicial councils and includes a series of guidelines referring to other relevant documents and standards (on appointment, accountability, et al)[76] and defines the councils' general mission (to safeguard the independence of the judiciary and the rule of law), its composition (judges account for the majority), resources for its functioning (to ensure financing, personnel, technical expertise and legitimate decisions of the council), extensive powers in order to guarantee the independence and the efficiency of justice (in the selection, appointment and promotion of judges, evaluation of their performance, guidelines on ethical and disciplinary accountability of judges, training, budget of the judiciary, court management and administration, protection of the image of justice, possibility to provide opinions to other powers of state, co-operation activities with other bodies on national, European and international level), all this in the service of accountability and transparency in the judiciary.

With respect to the composition of the council, this Opinion lays down that *it shall be such as to guarantee its independence and to enable it to carry out its functions effectively*. (paragraph 15). This view is shared by the Venice Commission as well, which says that *the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State* (paragraph 27 *CDL-JD(2007)001*). *Even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice*. (CCJE Opinion No. 10(12), paragraph 19).

As opposed to the Draft Amendments, which do not set any requirements HJC members need to fulfil, the Venice Commission recommends in its Montenegro Opinion from 2011 that the lay members of the HJC be elected from among lawyers and law professors (paragraph 18). Other European standards also require specific qualities individuals elected to judicial councils should possess: *Members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence*. (paragraph 21, CCJE Opinion No. 10(2007)), whereas *the non-judge members may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status.* (paragraph 22). In any case, *prospective members of the Council for the Judiciary, whether judges or non judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary.* (para-

- the contributions of participants in the 3rd European Conference of Judges on the theme of "Which Council for justice?", organised by the Council of Europe in co-operation with the European Network of Councils for the Judiciary (ENCJ), the Italian High Council for the Judiciary and the Ministry of Justice (Rome, 26-27 March 2007).

[76] This document is quoted as a document relevant to judicial councils also by the Working Group of the Judicial Reform Commission, which prepared the Legal Analysis of the Constitutional Framework on the Judiciary.

graph 23). "… *in other systems [where the President or Head of State does not have only formal powers], the chair should be elected by the Council itself and should be a judge*." (paragraph 33). As per the way in which judicial council members are appointed, the CCJE states in its Opinion that *[I]n order to guarantee the independence of the authority responsible for the selection and career of judges, there should be rules ensuring that the judge members are selected by the judiciary* (paragraph 25) and that it *does not advocate systems that involve political authorities at any stage of the selection process* (paragraph 31).

The Draft Amendments provide the National Assembly with the possibility of electing any law graduate to the Council, who will become a "renowned lawyer" by the very act of election to the Council. Furthermore, by providing the Council Chairperson, who may not be elected from among the ranks of judges, with the casting vote (i.e. two votes), the judges will become the minority in the Council. This is evident in paragraph 1 of Draft Amendment XII on decision making in the Council: The High Judicial Council shall adopt decisions by the votes of at least six of its members or the votes of at least five of its members, including the vote of the High Judicial Council Chairperson, at sessions attended by at least seven of its members. This means that the Council can adopt decisions with the votes of only five of the "political" members, provided the session is attended by at least two judges (even if they vote against those decisions); on the other hand, members from among the ranks of judges cannot adopt any decisions without the consent of at least one "political" member of the Council.

The Draft Amendments pervert the purpose of the existence of the HJC, which is to safeguard the independence of courts and judges[77]. It introduces a new channel of party influence on the judiciary, in contravention of Article 5(4) of the Constitution, which prohibits political parties from exercising power directly or subjecting it to their control. The draft amendments do not fulfil the commitment in the Chapter 23 Action Plan on the merely declaratory role of the National Assembly. On the contrary, the role of the Assembly, or, more precisely, the ruling majority, remains essential, because it is the one that will be electing half of the Council members, the very half that will have the majority of votes and thus a decisive role in the work of the Council.

IV Conclusion

Reasons for amending the Constitution

Serbia has undertaken to amend its Constitution in the National Judicial Reform Strategy with the aim of enhancing judicial independence by eliminating *the influence of the legislative and executive power on the appointment and dismissal of judges and court presidents, public prosecutors and deputy public prosecutors, and appointed members of the High Judicial Council (HJC) and the State Prosecutorial Council (SPC).* This same commitment to constitutional reform to secure judicial independence and accountability, in view of recommendations of the Venice Commission,[78]

[77] CCJE Opinion no. 10(2007) paragraphs 8-14.

[78] This refers to recommendations made by the Venice Commission in its Opinion on the Constitu-

is also undertaken in Serbia's Chapter 23 Action Plan. Serbia has committed neither to increasing political influence nor reducing the extent of human rights attained (which is, at any rate, prohibited under Article 20.2 of the Constitution); in addition, the right to a free trial, guaranteed by the Constitution to each citizen of Serbia (Article 32), includes the requirement not to reduce safeguards for the independence of judges.

Events leading to and following the publication of Draft Amendments

Aware of the significance of any changes to Constitutional provisions governing the judiciary, the Judges' Association of Serbia responded to the Ministry's invitation and took part in the 'consultations' on amending the Constitution of Serbia that began in mid-2017. From the very outset, this process neglected the issue the debate ought to have focused on in the first place, namely, securing judicial independence. The procedure was not cast as a formal public consultation and did not actually allow opinions to be solicited: no legal text was up for discussion, judicial bodies and academia were not involved, and the debate was marred by disparaging comments made by representatives of the Ministry about a number of participants, judges' professional associations, and judges and prosecutors as a body. In light of these circumstances, on 30 November 2017 the Judges' Association of Serbia withdrew from the consultations and notified the Ministry of Justice and the Serbian and international public of its decision to do so.

The Judges' Association again responded to an invitation to discuss the Draft Amendments in February 2018, but the roundtables held in the cities of Kragujevac and Novi Sad followed exactly the same pattern as seen in earlier consultations. Moreover, in addition to his continuing derision and insults aimed at participants in this debate, Čedomir Backović, Assistant Minister of Justice and member of the Venice Commission, publicly expressed his puzzlement at the fact that some of them could even serve as judges or prosecutors. In a television appearance on 15 February 2018, Mr Backović openly threatened the President of the Judges' Association of Serbia and other members of the profession, saying 'I would be glad to harm you and those like you'. These events forced professional and other associations to again leave the process, as outlined in their public announcement.

The Chapter 23 Action Plan, adopted by the Government on 27 April 2016, has been breached on multiple occasions, quite apart from failures to adhere to its time limits: the 2014 Legal Assessment of the Constitutional Framework Concerning the Judiciary in Serbia has been ignored; amendments to the Constitution were not proposed in Parliament; and no working party to draft the amendments has been established. The authors of the 2018 Draft Amendments remain unknown to this day. As this text does not meet the two formal requirements envisaged under the Chapter 23 Action Plan, its submission to the Venice Commission would constitute another violation of the Constitution and Action Plan, even if the Venice Commission were to consent to even considering such a flawed proposal.

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tion of Serbia, No. 405/2006, of 19 March 2007 (CDL-AD(2007)004).

Legal drafting issues

In technical terms, the quality of the Draft Amendments is quite poor: the 24 proposed amendments are accompanied by little or nothing in the way of justification. Whilst some amendments include inappropriate or incomplete statements of justification, no rationale is provided for as many as ten of them. This ought particularly to be highlighted if one recalls that some of the amendments are in no way connected with recommendations made by the Venice Commission or commitments from the Chapter 23 Action Plan, such as changes to provisions governing non-transferability of judges or positions incompatible with judicial office, or the deletion of the ban on influencing judges in the exercise of their judicial office. Moreover, the explanatory notes are at odds with the Serbian Common Methodological Rules for Legislative Drafting, which mandate that any proposed piece of legislation must contain a statement of reasons for its enactment, including an assessment of the current situation, issues the regulation is designed to address, objectives to be achieved, and why legislation is the best option for resolving the problem in question. The statements of justification also omit any findings of a regulatory impact assessment (i.e. who is likely to be affected by the proposed changes, and how). This oversight is more than just a formal error: it actually prevents any meaningful discussion about the adequacy of the proposed amendments.

The systemically arranged relation of three branches of power (Article 4 of the Constitution) is still lacking, the substance of the judicial power is not defined, nor is the relation of courts and the Constitutional Court, material guarantees of the independence of the judicial system as a whole, as well as pertaining to judges themselves, nor there are guarantees for freedom of expression and professional gathering of judges.

Provisions detailing the key principles of the judiciary – permanence, non-transferability, incompatibility, and immunity – are poorly worded. The amendments do not follow the fundamental tenet of legislative drafting, whereby the expressions used must be clear, precise, and definable (with the text needlessly using lay wording such as 'eminent jurist', 're-arrangement' of the legal system, 'private office', and 'first-instance court'). Given the appalling experiences the profession suffered during the 2009 re-appointment of all judges and prosecutors that contravened every established legal principle, the Draft Amendments are also greatly deficient in that they do fail to propose a Constitutional Bill to implement the Constitution, as only the totality of those provisions allows one to understand the exact scope of the changes sought. This omission is all the more glaring as, formally, a Constitutional Bill can only be introduced in the final phase of the amendment process, immediately before the new Constitution is about to be enacted. And, at this late stage, neither the public at large nor the expert community would be able to grasp the scope of the proposed changes in their entirety, which would preclude any transparent debate.

The reasons given for some amendments cite only one of the multiple opinions issued by the Venice Commission on Serbia's legislation (Judicial Appointments, CDL-AD (2007)028). The justifications also reference portions of the Commission's opinions on the legislation of Armenia, Georgia, Albania, and Montenegro: these

observations are taken out of context and do not contain general views, but rather only comments regarding specific features proposed in particular social and historical situations faced by countries with vastly different legal traditions. The explanations made do not reveal why any given solution has been selected over other applicable alternatives, and whether the option chosen is indeed the best for regulating the Serbian judiciary. The Venice Commission is wrongly presented as a source – or even as *the* source – of standards about the judiciary and judicial independence, although the Commission is an advisory body primarily tasked with giving opinions as to the alignment of specific legislation enacted by individual states with a set of standards developed by many other entities, including the European Court of Human Rights, Consultative Councils of European Judges and Prosecutors, European Network of Councils of the Judiciary, etc.

Amendments contained in the Draft Amendments

In terms of their content, the amendments meet none of the three commitments undertaken in Item 1.1 of the Action Plan. At first glance, it would appear that in developing the Draft Amendments the Ministry has addressed its pledges. The proposals include the abolishment of the 'trial appointment' of judges to three-year terms, incorporate requirements for the dismissal of judges into the Constitution, allow the HJC to appoint and dismiss all judges and court presidents, and formally remove the Minister of Justice and the chair of the Parliamentary Judiciary Committee from the HJC. However, the changes would leave judges in the minority on the HJC, with five votes of the total of 11. The role of the Serbian Parliament in appointing members of judicial councils would be more than just procedural, as required in the Action Plan: Parliament would play a decisive part by selecting members able to control the councils, either by means of presiding officers' casting votes or by simply being in the majority.

Other proposed amendments reinforce the impression that the ability of the legislative and executive branch to influence the judiciary has been shifted onto the governing political majority and the Judicial Academy. In addition, the HJC has been formally weakened and transformed into an instrument to be wielded by the Parliamentary majority of the day. Under the proposed model, the HJC would no longer be responsible for guaranteeing judicial independence and would become a mere puppet of the politicians, as evidenced by its composition (where actual judges would be in the minority) and its greatly circumscribed powers (as any decision could be made without the involvement of its judge members). The Judicial Academy will benefit from no guarantee of independence and will be faced with both formal and, to an even greater extent, informal influence of the Ministry.[79] Unlike in any other European nation, this institution will in fact have the power to vet candi-

[79] Just how powerful this informal influence of the executive on the Judicial Academy is was revealed by a statement made by the Director of the Judicial Academy on 27 January 2018. Addressing a group of judges and lawyers attending a training event at the Academy, the Director claimed he was the head of a Government institution and that he had to do as the Government said. This assertion was subsequently reported in writing to the HJC by a judge who had taken part in the event.

dates for appointment to courts with original jurisdiction by selecting students for its courses, who will then enter the profession by formally being appointed as judges by the HJC. Furthermore, this will prevent access to the judiciary for anyone other than graduates of the Academy, such as, for instance, judicial or prosecutorial assistants with appropriate training, or professors or legal practitioners.

The proposed amendments aim to curtail current constitutional guarantees of judicial independence (by omitting the ban on political influence on judges in the exercise of their office; authorising the Minister of Justice to bring disciplinary proceedings against judges and seek their dismissal; and introducing case law as a source of law). They also do away with the principle of non-transferability (by allowing judges to be transferred without their consent in the event of any 're-arrangement of the judicial system'), and define appointments or positions incompatible with judicial office broadly and vaguely (citing 'private' office, which raises the prospect of a ban on professional associations of judges) whilst allowing the schedule of incompatible positions to be easily amended by legislation.

The proposed introduction of 'case law' as a source of law, and its mandatory alignment with statutory law, would permit the imposition on judges of the requirement to base their rulings, against their freely-held convictions, on precedent set by, and according to the assessment of, a non-judicial authority. This is a retrograde arrangement that is not appropriate to the legal order of the Republic of Serbia or any other democratic nation.

Although the Draft Amendments aim to comprehensively revise Constitutional provisions governing the judiciary, they do not clearly regulate the relationship between the three branches of government to make it obvious that the system of checks and balances pertains to the legislative and executive, whilst the judiciary remains independent. Moreover, the amendments do not define the extent of the judicial system or stipulate substantive guarantees for the independence of judges and the judiciary, nor do they guarantee judges freedom of speech and association.

The Ministry also seems to have cherry-picked opinions of the Venice Commission in an attempt to justify the introduction of measures that would permit the judiciary to be controlled by the legislative and executive, whilst completely disregarding any of the Commission's views to the contrary. This fact, coupled with the concerns outlined above, seems to demonstrate that the Draft Amendments seek, unnecessarily, to replace the present organisation of the judiciary by a new concept that would diminish its current independence and enhance political influence over the justice system.

Recommendations of the Judges' Association of Serbia

Attached to this document of the Judges' Association of Serbia, as its integral part, there is a document: Key positions of professors. These positions were expressed on 20 February 2018 during *Public hearing of Professors* by: professor Ratko Marković PhD, professor Irena Pejić PhD, professor Darko Simović PhD, professor Olivera Vučić PhD, professor Dragag Stojanović PhD, professor Marijana Pajvančić PhD, professor Jasminka Hasanbegović PhD, Bosa Nenadić PhD, professor Tanasije Marinković PhD, professor Vesna Rakić-Vodinelić PhD, professor Radmila

Vasić PhD, professor Zoran Ivošević PhD, professor Marko Stanković PhD, professor Violeta Beširević PhD, Serbian Academy of Sciences and Arts Member professor Kosta Čavoški PhD. The Judges' Association of Serbia expresses its consent with all the key professions contained in the document Key positions of professors.

Discussions have revealed that the document is opposed by both civic and professional organisations that have taken part in consultations to amend the Constitution, as well as by the highest judicial authorities and experts never even invited to the public events. Serious criticism has been levelled at the Draft Amendments, with their withdrawal sought by the High Judicial Council, State Prosecutorial Council, Supreme Court of Cassation, and all courts that have to date met to consider the issue. The same demands were also made by key experts in constitutional law, political and legal theory, and judicial organisation who gathered on 20 February 2018 at the *Public Hearing of Professors* organised by the Judges' Association of Serbia and the Prosecutors' Association of Serbia. Nevertheless, the Ministry has sought to downplay this disapproval, and has attempted to gloss over calls from key judicial institutions and renowned law professors for the amendments to be withdrawn.

The Judges' Association of Serbia stands by the recommendations made in its Starting Points for debate on constitutional amendments concerning the judiciary (30 June 2017) and the Observations on proposals and recommendations for amendments to the Constitution of Serbia (25 August 2017). To permit meaningful and wide-ranging debate on Constitutional reform, a topic of exceptional importance for the Serbian public, the Judges' Association of Serbia recommends that the Government of Serbia

• Withdraws the Draft Amendments;

Sets a longer and more appropriate time limit for public consultations; revisit the 2014 Legal Assessment of the Constitutional Framework Concerning the Judiciary and use the views voiced therein as starting points for constitutional reform;

Considers comments submitted by all relevant stakeholders, including the Supreme Court of Cassation and all other courts, High Judicial Council, State Prosecutorial Council, academia and legal practitioners, professional associations of judges and prosecutors, and non-governmental organisations actives in civil rights and judicial issues, as minor alterations will inevitably diminish the current extent of judicial independence; and

Prepares a new set of amendments and put them up for public consultation alongside a working draft of a proposed Constitutional Bill, without which it is impossible to envision the true scope of the proposed changes.

CHAPTER IV

PUBLIC HEARING OF PROFESSORS
20 FEBRUARY 2018

20 February 2018

KEY POSITIONS OF PROFESSOR 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 con-

cerning 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.

Professor Ratko Marković, Ph.D.

MAY JUDGES AND PROSECUTORS THINK WITH THEIR OWN HEADS

Courts and Prosecutor's Offices play different roles in achieving the same goal – administration of justice. By using or abusing their power they can turn many destinies, political directions and careers upside down, hence the efforts of holders of political power, no matter how they may present themselves, to hold the courts and prosecutor's offices in their power. As Serbia wants to join an organized community of European countries, one of the conditions imposed on accession to that alliance of countries is that political parties and politicians keep their hands off the courts and prosecutor's offices, something they cannot come to terms with easily. They would rather have the government authorities to which they have been elected (parliament, chief of state, government), based on popular sovereignty, elect all judges and prosecutors for a limited time in office so as to make them develop, instead of a spirit of professionalism – a spirit of obedience.

It is difficult to justify the aspirations of the legislative and executive branches to obtain election authority and every other power over the judicial branch, yet such systems exist in the world. The first two powers are established by applying the principle of popular sovereignty, while the third is established by applying the principle of professionalism. Any voter can be a member of the first two, elected in direct elections or by a will of the people's representatives. A member of the third power can only be a citizen with professional qualifications who has complied with the statutory requirements connected with the profession. While politics is important for the election of holders of the first two powers (membership in a political party, as the election of a nonpartisan candidate as a member of parliament or even the chief of state is unthinkable today), expertise is key for the election of holders of the third power. That kind of choice cannot be made, based on the principle of popular sovereignty, that is, the electorate or its representatives, or by the chief of state elected either directly or indirectly (as in everything else there are exceptions to this, which are, at least when it comes to European countries, a deviation from the rule), but by an authoritative professional body, as it is the only one able to evaluate the key requirement of the selection–competence of the nominated candidates. In other words, the judicial power should elect itself. Should such election be left to the people's representatives or the chief of state, it could not go without proposals coming from the judicial power. The reason for this is that this is about two different grounds for legitimacy. The grounds for legislative and executive power is the trust of a majority of voters (people, citizens), the grounds for judicial power is the trust of legal professionals.

In Serbia, after the reinstatement of a multi-party system, such an understanding was only gradually breaking through, and as a matter of fact it hasn't been fully embraced till the present day. The national parliament elected chief judges (court presidents) and judges up until 2006 and in 1990 judges were granted a permanent term of office (from their first election to the time when they meet the retirement requirements). From 2006 onward, the parliament has elected a fewer number of judges (only those who are elected for the first time for a three-year tenure) and the chief judges of all courts while all other judges are elected by a non-judicial body – The High Court Council (HCC), which is comprised of members who are there based on their office (elected to office by the parliament) and elective members (judges and "distinguished lawyers") elected by the parliament based on nominations of the proponent authorized by law. Even so, the position of judges has been weakened because the grounds for their dismissal were transferred from the constitution into a law, which enabled easier dealing with "stubborn" judges.

As regards public prosecutors, their "independence" in 2006 shrank compared to that of 1990. At the Government's proposal and the proposal of the State Prosecutorial Council (SPC), the Parliament elects all public prosecutors and deputy public prosecutors for a three-year period. The term of office that was permanent in 1990, in 2006 was turned into a tenure limited to six years with possibility for re-lection. Deputy public prosecutors were elected by the SPC to a permanent tenure. In 2006, that body, like the HCC, became a constitutional entity. Its members were elected by the parliament, it was the same number (11) and the same grounds as for the members of the HCC, with necessary adaptations.

It became apparent that the 2006 changes in the judiciary were not a reliable defense against its politicization. Politics brutally expressed itself in the judicial reform of 2009, which was a complete disaster because it was done in a partisan and biased fashion.

On the same note, "the partisanship"- bias towards a political party in discharging public office, giving preference to the partisan over the public interests had a bad reputation in Serbia in the second half of the 19th century. After the enabling of a multi-party system, such bias showed itself, completely openly, in the so-called new democracies, that is, in the former communist countries with one-party systems. This is why one of the non-negotiable conditions for their accession to the alliance of European countries has been removal of space for the influence of political parties on the judiciary. In traditional European democracies the awareness of the democratic public is at such level that the politicization of the judiciary, even with appropriate institutional conditions in place, could not be able to survive without fierce public and judicial criticism. These countries have almost eradicated this phenomenon. This is why members of the alliance of European countries are not required to amend their constitution or constitutional conventions for the reasons of possible politicization of the judiciary.

The Serbian Ministry of Justice drafted a working version of 24 amendments that should either amend or delete 26 articles of the Constitution, in order to, allegedly, remove the possibility for politicization of the judiciary as a whole, first of all through election procedures and in regards to judges' accountability. Instead of

that, it is more likely that the Ministry tried to preserve such a possibility in a changed and concealed form. This effort could be supported by three "inventions" of the working text of the amendments. Those are: "distinguished lawyers", "a judicial training institution" and the authority of the Justice Minister to initiate "disciplinary proceedings and procedure for dismissal of judges and chief judges".

Instead of the currently "colorfully" mixed composition of the HCC, in the future it is proposed to include two types of members: five judges elected by judges and five "distinguished lawyers" elected by the National Parliament (in Montenegro those persons are called "reputable lawyers" and in Macedonia "respectable persons"). The Parliament elects "distinguished lawyers" upon the proposal of the competent parliamentary committee, after a completed public competition. They do not have to be necessarily distinguished among lawyers rather they become so by the election by the parliament. This is where the parliament is given an opportunity to influence the HCC, especially since its president is elected among those members rather than among judges, and because the president's vote, in case of a split vote, is worth double. Such influence could be somewhat mitigated if the election of "distinguished lawyers" would not concern candidates who applied for the public competition themselves, believing to be "distinguished lawyers" but those candidates nominated by professional and vocational organizations and academic institutions based on acknowledged, objective parameters and by pledging their reputation for truly distinguished candidates. In this way, the working text enables the competent parliamentary committee, proposing "distinguished lawyers", a group that may not include any lawyer and the parliament with the act of election to promote a mediocre "distinguished" lawyer. In real life it will happen that a lawyer, a low profile or fanatical party supporter, is given preference over an actually "distinguished lawyer".

Another tool of potential political influence on election of judges is "the judicial training institution". Namely, only a law graduate who has completed special training in that institution may be elected as a judge. Such a provision, too detailed for a constitution, can only be placed in a law. And even then it would be completely problematic. It would mean that the first and final selection of law graduates, among whom, after they complete training in the "judicial training institution", judges and deputy public prosecutors may be elected is done by that particular institution - a complete unknown for the constitution. Immediately after its establishment – due to its authority, it would be targeted by party champions and finally, it would become the prey of one or several parties. If the aim is to "clean up" the judiciary from political influence, the "judicial training institution" should not be allowed (especially not by the constitution!) to provide training of future judges and prosecutors as a monopoly. All law graduates, who comply with other statutory requirements, no matter where they had been trained, should be allowed to take part in elections for judges and deputy public prosecutors as equal candidates and be elected in the competence-based competition. The "judicial training institution" could be one of the training facilities preparing law graduates to become judges and prosecutors, but by all means not the only one.

The working text of amendments of the Ministry of Justice suggesting to move the reasons for dismissal of judges from the law to the Constitution (in 2006 it was

the other way around – they were moved from the Constitution into the law) supports the constitutional principle of permanence of judicial office. However, it is immediately weakened by a provision that was not in the Constitution before, according to which the justice minister can initiate "disciplinary proceedings and a procedure for dismissal of a judge". The dismissal procedure may include imposing a "disciplinary measure of termination of judicial office". This is why this provision needs to be deleted because the fact that an administrative official, who came to office by the will of the ruling party, can terminate a judicial office is incompatible with the principle of judicial independence.

Also, the main reason why the attempt to separate public prosecution service from politics by the Minister of Justice's draft amendments has yielded modest, almost nonexistent results is the nature of that function. The National Parliament would elect only the Supreme (now called "Republic") Public Prosecutor, although no longer at the proposal of the Government, but by the High Prosecutorial Council (HPC instead of the current SPC). The term of this office is shortened from six to five years. Along with that, the possibility for re-election is eliminated. Other public prosecutors would be elected by the High Prosecutorial Council, unlike the present when the National Parliament is doing so upon the proposal of the Government. Their term of office would also be shortened from six to five years, but the draft amendments do not read, unlike the current Constitution of 2006, that a prosecutor whose term of office has expired may be reelected. All deputy public prosecutors would be elected to serve from the date of election till retirement by the HPC (currently the National Parliament, upon the proposal of the SPC, elects those who are elected for the first time). The rule that those who are elected as deputy public prosecutors for the first time must be the persons who have completed special training in the "judicial training institution" applies much like it applies to judges. Such a provision could become a Trojan horse for a disguised team of law graduates who would be in fact the party's first choice of staff suitable to work in the public prosecutor's office. The politicization of public prosecutor's offices is certainly reduced as the candidates would no longer be nominated by the Government and elected by the National Parliament, the Supreme Public Prosecutor being the exception in regards to the latter. However, the provision of the current Constitution that the Supreme Public Prosecutor is reporting in regards "to the work of the public prosecutor's office and his own work …to the National Parliament" remained and a new one is added according to which the HPC "files with the National Parliament an annual report about the work of public prosecutors". The draft amendments do not contain, unlike the current Constitution, the provision that "public prosecutors report on the work of the public prosecutor's office and their own work…to the National Parliament", since it would no longer be responsible for their election.

Still, the National Parliament's right of influence on the election of public prosecutors has not been completely eliminated; rather it has taken a different form. That form is the HPC, which is supposed to "elect and dismiss public prosecutors". Of its eleven members, seven would be elected by the National Parliament. Among them are five "distinguished lawyers" proposed to the National Parliament by its competent committee after the completion of a public competition. Utterly unex-

pected, public prosecutors may not be elected for the HPC (those can be only four deputy public prosecutors elected by public prosecutors and deputy public prosecutors). The HPC is presided over by the Supreme Public Prosecutor. In regards to the High Prosecutorial Council the biggest nonsense is the fact that "public prosecutors cannot be elected" for the body that got its name by them!

This draft of the amendments to the current Constitution in the part that concerns the judiciary shows the extent to which politics is ready to put up a fight, irrespective of which party or coalition pursues it, against narrowing down of its power. From their initially necessary role involving channeling and orientation of a scattered electorate for representatives elections, which enabled the advent and functioning of representative democracy, in time political parties, in their tendency to equalize themselves with the state, have become a threat to the survival of democracy. It became apparent that parties cannot get enough of power, especially the state power. They, as Vladimir Jovanović, the father of Slobodan Jovanović, wrote a long time ago, "no longer fight for ideas and principles, for the public interest, but for power simply to "lord over" and enrich at the expense of people's interests and rights". (Uspomene/Memories, pg. 484). Such, open or disguised desire of the parties is spoiling the attributes of government institutions and the moral strength of people. Even if it could be institutionally difficult or completely impossible for the parties to put pressure on the judiciary and public prosecutor's offices, the question is how much time would need to elapse as of that moment for the judges and prosecutors to rely solely on the constitution, law and human liberty in their work. An American judge, Learned Hand once noted that "liberty lives in the hearts of men and women; when it dies there, no constitution, no law, no court can save it…" We believe that liberty in the hearts of many of our judges and prosecutors is still alive.

Professor Irena Pejić, Ph.D.*

CONTRIBUTION TO THE DEBATE ON DRAFT AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

Summary

The guarantees of judicial independence and autonomy given in principle match the general legal framework of the European states. However, their elaboration in the amendments, both in regard to selection procedure and termination of judgeship, almost fully counteracts the effect of the guarantees given in principle.

The first question to ask is: how one becomes a judge and how they are promoted in career? Considering the proposed solutions in the draft Amendments, attention should be given to two aspects: first, how one becomes a judge (election of judges) and second, how they are promoted in career (professionalization and training). Due to the nature of constitutional matter, the constitution should only deal with the former issue, and within that framework provide for an independent and autonomous judiciary. The latter aspect is a matter governed by the law, meaning that the law should provide for various types of training and specialization. Amendment IV para 2, reading: "A judge in the courts with exclusively first-instance jurisdiction may only be a person who has completed special training in a judicial training institution established by the law," is an example of a primitive positivisation of *materiae constitutionis*. More precisely, the drafters wanted to include under "constitutional umbrella" what is not the natural constitutional subject matter and thus start the procedure for election of judges long before it formally starts before the High Judicial Council. This would make possible a preliminary "selection" of candidates for judgeship, which renders senseless the function of the High Judicial Council as the guarantor of judicial independence. It is not our intention to depreciate the quality of special judicial training, but this is just one of various types of training in the process of professionalization that make the complex mosaic of legal training. All said can apply *mutatis mutandis* to amendment XVIII referring to the selection of deputy public prosecutors.

Let us further consider the role of the High Judicial Council as an independent constitutional body in the selection of judges. As a constitutional guarantee, the independence of the High Judicial Council cannot be questioned, but it is expected that its composition and functioning, that is, procedures through which it carries

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out its competencies are in accordance with the set guarantee. Elected representatives of the judiciary should make the majority in the Council; it is desirable that at least two thirds are judges who are directly elected in this branch of power. Representatives elected or appointed by the political power can provide a balance and to a necessary extent guarantee for "another opinion", which is good for the quality of decision-making. Hence, one should not completely ignore the dangers or threats of a Council composed only of judges, in the sense that the judiciary could self-produce itself.

However, the proposed amendments are completely contradictory in this aspect too. While on the one hand, the Council is set up as a special constitutional body which enjoys independence, on the other hand, its structure is conceived so as to minimize the participation of judge-members in the decision-making. It should be noted that this exceeds the limits of constitutional norms which are general and abstract, and precisely and in detail defines the procedure for decision-making of the Council. It is also unclear why the number of members of the Council is reduced from 11 to 10, without doing the same with the High Prosecutorial Council. Looking at the structure, competencies and constitutional position of both judicial councils, it can be said that the number of 11 members is adequate and could only be larger, if necessary.

On the other hand, by comparing the HJC with other constitutional bodies that enjoy special guarantees of independence, such as the Constitutional Court, it seems totally inappropriate that the framer of the Constitution deals with procedural matters related to the functioning of the Council, such as method of decision-making, majority required, election of the President of the council, etc. That this is not *materia constitucionis* is sufficiently illustrated by the fact that no constitution, including the Constitution of Serbia, does govern these issues, even in the case of government, although it would be expected, since it is a body of political power. The expert public is rightly concerned about the way a matter that is not standard constitutional matter is to be regulated. One can suppose that the material boundaries of independence will simply fade away in the plethora of procedural details, such as the "casting vote" of the president of the Council who is mandatorily selected from the half of the Council which is elected in parliament. We are led to the conclusion that the constitutional guarantees can easily turn into a constitutional mimicry if the constitutional matter is expanded as needed and *ad hoc*.

Keeping the existing organization of the two judicial councils, the judicial and prosecutorial, which have to protect the third branch from pressure and political influence can be considered acceptable, but it is unclear why both councils, in the proposed amendments, have got a completely different structure. While the HJC gets its "independent" five-member half, elected by the judges, the public prosecution service are allowed the "right" to four out of eleven members of the High Prosecutorial Council, who can be deputy prosecutors exclusively. The National Assembly elects the other seven members (directly in this process or indirectly in other electoral processes). Direct participation of the minister in charge of the judiciary and electoral powers of the National Assembly *vis a vis* the majority of the prosecutorial council are not in line with institutional guarantees of the autonomy of public

prosecution and personal guarantees of the independence of public prosecutors and their deputies.

Bearing in mind that a large number of domestic constitutional legal experts are in support of constitutional regulation of the grounds for termination of judgeship, this issue requires due attention. The draft Amendment IV defines the legal basis for termination of judgeship, but draft amendment VIII gives power to the minister in charge of the judiciary to institute "disciplinary proceedings and dismissal proceedings against judges and presidents of courts". Granting of this constitutional power to representatives of the political power does not only interfere with the separation of powers principle, but also annuls institutional and personal guarantees of the independence of the judiciary.

Finally, there is another principle in the Draft that should not be overseen – the principle of unity of judicial power in the Republic of Serbia. It would be fully in compliance with said principle to regulate under the Constitution, as a natural constitutional matter, the organization of courts in Serbia, which is not the case with this Draft. One can rightly wonder whether this omission will open a new field of "constitutional *provisorium*" and leave it to the Constitutional Act to regulate a *par excellence* constitutional matter, so that a "reorganisation" of the judiciary causes consequences as already seen after the general (re)election in the Republic.

To briefly conclude, the draft Amendments do not contain provisions which systematically and consistently govern constitutional guarantees for the judiciary. The subject matter of the amendments is mostly in dissonance with the desired values of the rule of law declared in the basic provisions of the Constitution of Serbia, such as the separation of powers principle, judicial independence, incompatibility of office and unity of judicial power.

Professor Darko Simović, Ph.D.

If some of the proposed amendments to the Constitution put forward by the Ministry of Justice are viewed in isolation, it may appear that a number of the provisions improve upon the existing constitutional framework. Yet these ostensible advances mask attempts at introducing more insidious channels for exposing the judiciary to political influence.

The working version of these amendments reveals a remarkable ignorance of legal drafting standards. Quite apart from the lack of clarity and the excessive detail evident in the text, it seems that the authors of these amendments were not consistent in employing terms used in the current Constitution; if the changes are enacted as proposed, these could create problems with interpreting constitutional provisions. A particularly glaring oversight is the fact that many of the amendments have no direct bearing on the articles of the Constitution they are intended to replace, which makes it difficult to understand why changes are sought. Moreover, the changes needlessly broaden the scope of the Constitution and encroach upon matters more properly regulated by law.

Under the proposal, the High Judicial Council (HJC) would be made up of equal numbers of judges and 'reputable jurists', and the President of this body, as a rule selected from the jurists, would be given a casting vote. These changes would allow the non-judge members of the HJC to make decisions about the status of judges. In the same vein, another controversial proposal is the way in which non-judge members of the HJC are to be appointed: these are referred to 'reputable jurists', but no definition of the term is provided. A prospective member could be appointed to the HJC regardless of their age or professional experience. No consideration is given to ensuring that the members come from different legal professions either: for instance, all non-judge members of the HJC could thus come from the same professional background, which cannot be considered good practice.

The proposed amendments are also unclear as to the majority needed to dismiss the non-judge members of the HJC. Such ill-defined provisions should not be retained, as differences in interpretation could seriously affect the status and independence of the HJC's members. No reasons are cited for dismissal of the non-judge members: as such, their removal from this body could also be sought on grounds of ineffectiveness.

Requiring prospective judges to attend additional courses at a special judicial training institution will allow pre-vetting of candidates for judicial office. Control over selection and enrolment at this institution will render the HJC's power of appointing judges utterly meaningless.

The proposed constitutional amendments would also weaken institutional guarantees of judicial independence. One of the amendments calls for a judge to be removed from office if their dismissal is the result of disciplinary action. Such a broad

provision may lead to judges being dismissed for minor breaches of discipline. Here it also ought to be noted that another amendment would give the Minister of Justice authority to initiate disciplinary proceedings and seek the dismissal of judges. This would give rise to a powerful institutional mechanism through which political pressure could be brought to bear on judges. The principle of non-transferability of judges would be side-stepped by a proposal allowing judges to be transferred to other courts without their consent, exceptionally, in the event of a 're-arrangement' of the judicial system. The term employed here, 're-arrangement', is excessively vague, meaning that even inconsequential institutional changes to the judiciary could be used as pretexts to breach the non-transferability rule.

The proposed amendments also stipulate that judicial office is incompatible with any other 'public' or 'private' office, where the wording 'private office' is lacking proper definition. Any violation of this incompatibility requirement could be sufficient reason to dismiss a judge following disciplinary action.

Another innovation proposed is that legislation be passed to harmonise case law. The legislature, and, indirectly, the Government (by means of its authority to introduce legislation) would so be allowed to directly affect adjudication standards. The two political branches of government would be allowed to influence the judiciary, and in doing so subtly undermine its independence.

Instead of contributing to greater judicial independence, the proposed amendments are by and large designed to introduce means of controlling the judicial branch. Therefore, due to their technical deficiencies – but even more so due to their ability to significantly jeopardise the independence of the judiciary – they ought to be withdrawn and re-written, with due consideration given to the views of the profession and constitutional legal theory.

Professor Olivera Vučić, Ph.D.*

A CONTRIBUTION TO THE DISCUSSION OF THE WORKING TEXT ON THE AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

Ministry of Justice has produced and published a working text on the amendments to the judicial branch of power. This text has started a long awaited revision of the Constitution of the Republic of Serbia, adopted not so long ago, in 2006. This constitutional revision was inspired, or maybe even provoked by the obligations which the Republic of Serbia has assumed in its accession process to the European Union. It represents a continuation of the Srbian short-lived constitutions. This approach is inadequate and unjustified since it treats the supreme legislation, that is the constitution in force, as the act of low importance, the act which can be revised often and easy. Again in Serbia we have a situation similar to the period of socialist constitutionality, in which the constitution in force is being revised although the neccesary revisions of the normative framework can be realised on the legislative level, by amending the laws in accordance to the constitutional norms in force. I am of the opinion that the amendments to the judiciary could have been realized through changes in respective laws, therefore keeping the integrity of the Constitution in force and the stability of the legal system, its guaranteed principles and established institutions. Despite these facts, well known to all constitutional lawyers, not only those academic ones, a different path was chosen by presenting a "massive" change of the Constitution in force through 24 amendments. This approach ignored a well known doctrine of the constitution as the act of supreme force, a symbol of society's stability through its own stability and longevity, a symbol of solid institutions established by it and of the determination of the will of the majority of people which enabled its adoption.

The amendments' creator, Ministry of Justice, states in the *Introductory remarks* that this "Working text" was adopted in accordance with the obligations assumed by the Republic of Serbia when it adopted the action plan for Chapter 23 and that the Ministry has been guided in its adoption by *principally* (italic by O.V.) the standards defined in the rich practice of the Venice Commission, as well as the written contributions received in the period of the consultative process organised by the Ministry of Justice and the Office for the cooperation with the civil society of the Republic of Serbia, in the period July-November 2017.

Careful reading of these *Introductory remarks* leads to the conclusion that two important facts are being declared to the public opinion in Serbia. First is the clear

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and unambiguous designation of the author of this text – the Ministry of Justice – which itself claims that this working text of the amendments to the Constitution of the Republic of Serbia will be sent to the Venice Commission for an opinion, as a text that represents a proposal by the Serbian state for the revision of the Constitution in force. The second is also related to the clear and unambiguous claim of the Ministry of Justice, its public statement that the standards defined by the Venice Commission were the guiding principle for the Ministry in its work on this constitutional text and were given primacy over all other possible solutions in this process. In the background were left the constitutional tradition of Serbian state and society, historical context of constitutionality, the will of people which according to this statement can be only ascertained through the acceptance or rejection of the *fait accompli*.

If this text, if only a working version, is a proposal for the revision of current constitutional provisions, one of the questions which immediately comes to mind is the observance of constitutional procedure for the revision of the Constitution. The observance of procedure for the adoption of any legal act is the formal condition of its legality, so there is no need to warn that this condition must be fulfilled as well in the adoption of the constitution as the supreme legal act. The constitutional norm from article 203(1) regulates that a proposal to amend the Constitution may be submitted by at least one third of the total number of deputies, the President of the Republic, the Government and at least 150,000 voters, so the Ministry of Justice's work shoud be probably interpreted as the advance proposal which will later be submitted by the Government. This takeover of the working text by the constitutionally authorized petitioner will conform to the constitutionally regulated procedure but would not change the fact that the text of the future constitution was prepared by the employees of the Ministry of Justice. Not intending to detract from the expertise of those peple, which has to be sufficient in order to fulfill the duties in one of the most important ministries, it is self-evident that constitution-making is not a part of their job. I would like to remind that constitutions are usually called by their factual makers, such as famous legal professors, notable constitutional lawyers or legal theorists. These constitutions were called "professorial constitutions", for example 1919 Weimar constitution because of Hugo Preuß or 1920 Austrian constitution because of Hans Kelsen. Due to their notable prestige among constitutionalists they were assigned the jobs of constitutional redactors. These constitutional texts are of highest quality, they are in force for decades, along with wise and moderate modifications, and represent part of the identity of the countries which have not given up on them even after deep social transitions. Behind this logic, the Ministry of Justice's amendments and the future constitution could be called "clerical", by the Ministry's employees. Constitution writing requires knowledge which integrates good legal expertise, constitutional in the first place, knowledge of general and national history, history of national institutions, great knowledge of comparative constitutional experiences and current solutions. The constitution is the basic and the supreme legal act which contains one state's law of highest rank and from which stems the whole legal system, it is written to be durable and to overcome necessary and incessant social changes. The authority of the constitution as the su-

preme law is being built and kept, among other things, by the authority of its creators and the measure of their dignity and authority.

The presentation modus to the public in Serbia of the working text of the amendments left that same public in dark whether the National Assembly was involved in the whole process, and if it was, in what manner and measure. Some questions can justly be asked - Did the National Assembly adopted a decision on the constitutional revision? Was the Ministry of justice authorized to develop a working text of the amendments? Can it be acceptable that the members of National Assembly introduce themselves with the text of the constitutional amendments as the *fait accompli?* Constitutional activity is due to its importance the greatest authority of the National Assembly (art. 99(1)), it adopts and amends the Constitution. This constitutionally established authority cannot be encroached by other organs. By leaving the National Assembly out from the constitutional process, especially its creative part, by putting the representative body of all Serbian citizens in front of a *fait accompli,* by usurping the right to create the constitution, not only the importance, role and constitutional position of the constitutional-making organ would be depreciated, but also the role and importance of the the constitution – supreme legal act, and the state in which the constitution is adopted in such manner.

Experts and wider public are well aware that Serbian accession process to the EU assumes the amendment of some constitutional solutions. In fact, neither the experts, nor the wider public is fully informed on the scope the required amendments. However, it is indisputable that courts and prosecutors are a part of this package. Let us remind once more that the Constitution of the Republic of Serbia is a rather young constitution in comparison with constitutions of the majority of European countries. Its provisions had passed through the expertise of the Venice Commission before being adopted in the national parliament. Therefore, this hurried and massive amendment of important parts of this constitution is suspicious. Some provisions contained in the majority of European "classical" constitutions – classical because of their longevity and because of their content – are acceptable to contemporary understanding of constitutional solutions on which the EU insists and which represent generally accepted values. A number of those countries are members of EU, full and indisputable, and differences in their current constitutional provisions are not an obstacle to their "European" status. Legal, especially constitutional legal tradition of these countries and the stability of their institutions, as well as the adherence to the democratic principles that enable the rule of law, guarantee that these constitutions are accepted by the EU. The situation in Serbia is totally different. It seems from the behavior of our relevant authorities that Serbia is expected not to finely tune the existing constitution with the requests from the EU, but to completely surrender its constitutionality in the hands of EU and the Venice Commission, as if our constitutional arrangement lacks any similarity with the European constitutional model. Serbia must be aware that the 2006 Constitution is a modern constitution, adapted to the reformed constitutional solutions and there are no essential reasons to give up on these solutions.

I do not dispute that it is logical, in a certain measure, on the road to constitutional amendments, for the purpose of finding a normative framework which will

prove to be more adequate to EU "standards", for the constitutional creator, that is the authorities legitimized for such activity, to consult with relevant institutions of EU administration, to discuss and exchange opinions. What, in my opinion, is illogical, and completely unacceptable, is to fully transfer the decision making power to the Venice Commission without giving any independent judgment on these matters.

Serbia does not lack in its own constitutional history. Let us remind that Serbia is a state in which consitutional acts have established the values relevant today even before many of great and powerful European states. Thus, in the middle of XIV century Dušan's codex was adopted, which contained norms on the independence and impartiality of courts and judges, and the obligation of judges to adjudicate by the law and justice. First Serbian constitution was adopted at the time when much larger and powerful European states did not have constitutions – 1835 Sretenje Constitution. At the time of socialist constitutionality Serbia has closely followed Germany and established a constitutional court as the organ for the protection of the constitution and constitutionality. Serbia is among the first ex-socialist countries which has retreated to its pre-socialist constitutional tradition with the adoption of the 1990 constitution – emanated in the 1888 Constitution which represented one of the most advanced acts of that period, with provisions close to those contained in the best European constitutions in force.

The manner in which the authors of proposed constitutional amendments have positioned themselves in relation to the Venice Commission, as the authoritative body according to whose opinion they will ultimately amend the final version of the text, is a kind of manner that is not expected from the constitutional creator. The manner of obedience in the creation of one's own constitutional amendments and in acceptance of requests and tasks is unacceptable for a sovereign country with constitutional tradition which from the start was in line with European constitutional institutes and principles. The announcement in advance of defending the solutions which represent the result of one's own statehood, tradition, constitutionality – represents obedience in the measure of degradation of one's own country status and minimal right to defend one's own opinion, based on past experience and achievements. By promoting such a relationship, amendments' creators show that they do not understand the nature of constitutional making power and its importance. Moreover, they negate the essence of constitutional making power, which expresses and confirms every state's sovereignty, therefore the Republic of Serbia as well. They explain every solution which they promote exclusively using arguments of the Venice Commission, designating them as definitive, conclusive, even the exclusive reason behind the amendments. Thus it seems that the new constitutional solutions will in essence be written by the Venice Commission with the technical support of the Ministry's employees. If the creator of these amendments was led by precise guidance of the Venice Commission, with binding and indisputable arguments, then we find ourselves in front of a kind of a modern obtrusion of a part of Serbian constitution. Every state, including Serbia, has its own constitutional reality, its legal and constitutional legal state of affairs and the necessities induced by them. Serbia, as every other state, has its own reasons to perceive some solutions

more acceptable and justifiable, since it perceives them as more in accord with its necessities and state of affairs. Therefore it is useful to adopt standards, to achieve values, but it is unacceptable to do this all the time, at any price, as the only possible and conditioned solution.

The Venice Commission itself, actually its under-commission for judiciary, speaks about old democratic systems that are famous for their democratic culture and respectable tradition. Therefore, the negation of one's own legal tradition, the total negation of its own existence, as seen in the approach of the Ministry of Justice which has fully left the destiny of constitutional changes in the hands of the Venice Commission, is the negation of Serbia's legal and state history. If Serbia objectively cannot be put in the category of countries leading in Europe in these features, it certainly cannot and must not be identified with those states that in their legal histories do not feature any date of importance. This approach is an expression of total lack of self-respect, which is unacceptable, even more when it comes to constitutional solutions. In addition, I am of the opinion that the Ministry of Justice is overriding Venice Commission's recommendations which clearly support differences among states in constitutional approaches, as long as these approaches do not endanger the independence of the judiciary and prevent the abuses of this independence.

Constitutional provisions that regulate judicial affairs are highly important part of constitutional matter. Constitutional-making power is in the words of one author the establishing power, while judicial, executive and legislative power are the established powers. All these three powers are organizationally and functionally determined by the constitution. The constitutor determines organic, material and formal aspects of these powers. No matter if the power is horizontally organized in accordance to the principle of flexible or hard separation of powers, judicial power is treated as independent and autonomous, in the rule of law system it is established and executed in the manner which secures its independence from legislative and executive powers. Judicial power gets its legitimacy from the constitution and it owes its status to the constitutional solutions which tie it by laws to the legislator, laws by which it is bound. The peculiarity of judicial power, which differentiates it from the other two, lies in the fact that its execution is given to persons which unexceptionally possess expertise in legal knowledge, which are chosen by a special constitutionally regulated procedure, which act by special, legally determined procedures. In addition, persons that exercise judicial function as their professional career should among high legal education and experienced legal knowledge possess personal integrity, sense of honor, sense of equity, capacity for judicial profession, courage, personal and professional. All these features are a consequence of quality education, personal traits and the developed sense of the importance of judicial profession in the whole of society. If these individuals that bear those traits should exercise judicial profession expertly, efficiently and independently, it is necessary to fulfill one more condition – adequate constitutional solutions for all questions related to judiciary and branch of constitutional law that regulates the normative framework of judges and courts. Those conditions are necessary for quality judiciary. By fulfilling these requirements conditions are established for responsible in-

dependent judiciary as one of the rule of law elements (art. 3 Constitution of the Republic of Serbia). Protected by constitutional norms from the influences of legislative and executive power, judicial powers would fulfill its mission by adjudicating on the basis of the constitution, laws and other normative acts, treaties and general principles of international law.

Having all said in mind, I am of the opinion that the aim of the constitutional revision would be not be secured by the proposed amendments. Moreover, authors of the amendments have further endangered the independence of judiciary and the rule of law with their normative proposals. The proposed working text thus lowers the level of guarantees for judicial independence achieved by the Constitution of the Republic of Serbia. I would try to illustrate this by a few examples.

Firstly, the working text of the amendments, although its' aim are changes in the judicial field, seriously disturbs those parts of the constitution in which the basic constitutional principles are contained. In the first place, the principle of rule of law, which according to the Constitution, "shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities" (art. 3(2)). Then, the principle of separation of power: "Government system shall be based on the division of power into legislative, executive and judiciary" (art. 4(2)) and according to which "Judiciary power shall be independent" (art. 4(4)). Amendments' text proposes the change in the competence of the National assembly, its elective competence (art. 99(2)(3)), as well as the method of decision making in the National Assembly (art. 105), and the whole idea of this activity is a breach of the provision on constitutional amendment (art. 203 (1 and 2)).

Many of concrete solutions not only stop the progress in the field of judicial independence, but they reverse it back. One of those solutions is the High Judicial Council, method of its election, constitution and decision making. 2006 Constitution for the first time established High Judicial Council as the organ fielding 11 members –President of the Supreme Court of Cassation, the Minister responsible for justice and the President of the authorised committee of the National Assembly as members *ex officio* and eight electoral members elected by the National Assembly, among which are six judges holding the post of permanent judges and two respected and prominent lawyers who have at least 15 years of professional experience, one a solicitor, and the other a professor at the law faculty (art. 153 (3 and 4). Amendment IX proposes to lower the number of members to 10, 5 would be elected by the National Assembly, 5 by judges. Although this equalises the influence of the National Assembly – the legislative power and the judges – the judicial power on the election process of members of the High Judicial Council, the solution from Amendment XII, the decision making method of the High Judicial Council, pushes this balance in favor of the legislation, giving the upper hand to the politics over the profession. Although the National Assembly must choose these members from ranks of "respected and prominent lawyers", there is no closer criteria on what "prominent" actually means, that is what criteria must be fulfilled so as to regard one person as the prominent expert in the field of law. The proposed method of election of the President of the High Judicial Council (HJC) ties this function exclu-

sively to non-judicial members of the HJC, leaving thus half of members, all judges with nor ight to be elected to this function. Apart from degrading judicial members of the HJC as persons who do not deserve the trait "respected", as if this is not the basic condition for someone to be even elected for a judge, now the additional discrimination is exercised towards judicial members since they are precluded from election to presidential position. The basis for this solution and the motivation of the amedment's author becomes clear when one reads the provision which due to even number of members gives the decisive cote to the president of the HJC. This "golden" vote is the proof of the wish for the non-judicial part of the HJC to dominate the judicial part, for politics to dominate profession. The role of judicial members of the HJC is relegated to quorum purposes – meaning that this part of membership is stripped of real decision making power. Designed as an organ which secures the independence of courts and judges, the HJC would upon these changes rather become an organ controlled by the National Assembly and its ruling political majority than an independent and autonomous organ.

The proposed decision making method in the National Assembly poses many questions over the purpose of this constitutional amendment. It is proposed that the National Assembly chooses by a 3/5 majority of all members five HJC members, five members of State Prosecutors Council and the Supreme Public Prosecutor. Proposed solution on the surface aims for high degree of consensus, constructive dialogue and agreement between various political parliamentary groups, but in case the majority cannot be achieved, amendments preview that after 10 days from the failure, the choice would be made by a 5/9 majority of MP's, which close to a simple majority. This "subsequent" majority is a much lowe obstacle for the ruling majority to promote their favorites and the influence of parliamentary minority is almost completely eradicated.

One more disputable proposal is the elimination of the norm which prohibits any influence on a judge while performing his/her judicial function (art. 149(2)), as well as the norm on the nontransferability of judge (art. 150(1 and 2)), which now states that a judge cannot be relocated or transferred to another court without his/her consent except for the reorganisation of judicial system, upon the decision of the HJC, while the " reorganisation of judicial system" is not precisely defined. This formulation opens possibilities for various interepretations that endanger legal security and predictability. The "reorganisation" of judicial system can be started from various reasons and in various ways and altogether interpreted if neccessary as a reason fot judge's transfer to another court. Such formulations should therefore be evaded.

Even those few ecamples of the working text of the Ministry of Justice's amendments testify that the adoption of proposed amendments would without doubt realise the domination of political branches of power – legislative and executive – over the judical one, in the measure much larger than it is in the current constitution. Of we reconsider the purpose of constitutional revision stated by the proposer – strengthening of judicial independence and rule of law – it is not hard to conclude that the chances for the realisation of this purpose through these changes are very poor. It is true that this purpose was never easy to achieve. Many other countries

experience difficulties on this path, especially those with inefficient institutions and the lack of loyalty to constitutionally promoted basic principles. However, the stated purpose is not impossible to achieve and can be realised by creating normative solutions which would precisely and consistently enable the process of "depolitisation" and "departisation", not only in the field of election of judges, but in the context of deneral positioning and functioning of judicial power. I am of the opinion that if proposed solutions were to be adopted, problem of our judiciary would only multiply. Chances are high that in that case we could expect one more dark period of Serbian judiciary. Proposed amendments can be understood as the basis of some new judicial reform. With memories still fresh of the previous one, it is neccessary to do everything possible to prevent the future one to provoke dire consequences for which the price would be paid not only by judges themselves but, at the end, by all Serbian citizens.

Professor Dragan Stojanović, Ph.D.

COMMENT ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF SERBIA

The proposed constitutional reform does not meet its supposed purpose – strengthening of judicial independence and rule of law. There is no doubt that the draft Amendments significantly change and amend the provisions on the judicial branch, no matter that some changes do not have a justified ***ratio***. Still, the constitutional reform is stuck half-way, and in view of some proposed solutions, particularly the High Judicial Council, it can be seen as a step backward. This reform project fails to strike a balance between the autonomy of the judiciary and the social responsibility of the judicial function, since it now uses the High Judicial Council to establish a marked primacy of social (political) control over the judiciary and its social (political) accountability, while in principle allowing for institutional and personal independence of judicial power.

The line of subordination of the judiciary to political will is established consistently and in all relevant matters; first, by the election of "distinguished" members of the HJC by the National Assembly where we have one predominant political will; then by the manner of managing this body, which is reserved for a "distinguished" lawyer as a recognized exponent of exclusively that same political will, and finally by the method of decision-making in this body, that is, by outvoting the judge-members of the Council. Perfectly fitting in this line is the power of the minister in charge of the judiciary to institute disciplinary proceedings and dismissal proceedings against judges and presidents of courts. The progress made with regard to the competencies of the Council, election, promotion and dismissal of all judges and presidents of courts, as well as abolition of temporary term of office for judges, have been annulled with a true supremacy now given to the political power, in particular the executive branch, primarily by shifting over the management and prevalence in decision-making to the non-judge part of the Council, which should allegedly guarantee and recognize the social responsibility of the courts and judges and prevent possible abuses of the judicial power.

The general assessment of the proposed amendments cannot be positive. It can rightly be said that the intention of the amendments, regardless of certain improvements, still goes in the direction of developing an accountable and controlled, rather than depoliticized, independent and impartial judiciary. The proposed reform of the judicial power calls for significant corrections. By sticking to mentioned principal solutions, the draft Amendments do not constitute an acceptable basis for parliamentary debate.

Professor Marijana Pajvančić, Ph.D.

The Constitution of a country is not the act of its government,
but of the people constituting a government.
H. Vorländer[1]

AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA – COMMENTS ABOUT PROVISIONS ON COURTS

I'll agree with the often-repeated argument that these amendments to the Constitution of the Republic of Serbia should first and foremost serve the citizens of Serbia.

It's precisely why the amendments on the judiciary cannot relate exclusively to the section of the Constitution in which the provisions on judiciary have been systematized. There has to be a link between the organizational arrangements and other constitutional provisions – those related to the basic principles, human and minority rights[2] in the first place, since "the independence of judiciary is not the ultimate value of the rule of law per se, but it possesses the instrumental value incorporated in the demand to ensure human rights and freedoms."[3] The international standards supporting the notion say that "the independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law."[4] The constitutional change is not an end in itself, but rather has a greater purpose of securing access to justice[5], the following in particular:

- The right to equal protection, the right to a fair trial, the right to a hearing within a reasonable time, effective protection of rights and the right to a public hearing – it's exactly what the organizational and individual independence of the judiciary is for, allowing "judges to decide matters before them impartially, in accordance with the law and their interpretation of the facts, without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any quarter or for any reason."[6].

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[1] H. Vorlander: *Ustav kao simbol i instrument*, Politička misao No. 4/2001. page 55.

[2] See more: Pajvančić M. *Ustavna zaštita ljudskih prava*, Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, 2011.

[3] Pejić I. *Imunitet sudija,* Zbornik Zakonodavni i institucionalni okvir nezavisnog sudstva u Republici Srbiji, Konrad Adenauer Stiftung i Pravni fakultet Niš, 2009, page 101.

[4] Item 11, Recommendation Rec (94)12 Council of Europe https://vss.sud.rs/…/Preporuka%20CM-Rec%282010%2912%20Ko *accessed on February 11, 2018.*

[5] More about the standards of access to justice here: Knežević S. *Dostup*https://vss.sud.rs/…/Preporuka%20CM-Rec%282010%2912%20Ko *accessed on February 11, 2018. nost pravde*, Zbornik Zakonodavni i institucionalni okvir nezavisnog sudstva u Republici Srbiji, Konrad Adenauer Stiftung, Pravni fakultet Niš, 2009, pages 159 -177.

[6] Basic Principles on the Independence of the Judiciary, United Nations General Assembly, 1985 http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/02/Osnovna-na%C4%8Dela-nezavisnosti-sudstva.pdf accessed on February 11, 2018

- Equal access to justice, equality before the law, the right to legal assistance, the organization and network of courts, etc., should serve the same purpose.

1. Below are the issues the Working Version of the Draft Amendments to the Constitution has failed to address, the constitutional provisions that have been eliminated, while they should have been kept instead, or those replaced by provisions the meaning of which has been described more accurately in the Constitution than in the draft version:

1.1 Reliable constitutional guarantees (institutional, organizational, personal and procedural) of the **independence of judiciary as one of the fundamental values of the rule of law**[7] are missing. The absence of these guarantees threatens the rule of law, indicating a lack of readiness to exercise power within the boundaries of the law, and to accept and respect the constitutional provision explicitly providing for a shift from a party state: "Political parties may not exercise power directly or submit it to their control."[8]

The Venice Commission, the Sub-Commission on the Judiciary[9] maintains that "*In older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary, because the executive is restrained by legal culture and traditions, which have grown over a long time*, as opposed to "*new democracies" that "did not yet have a chance to develop these traditions, which can prevent abuse, and therefore, at least* **in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges.**"

1.2 Neither the Constitution nor the amendments have defined judicial power,[10] whereas the legislative power,[11] the executive,[12] the Constitutional Court,[13] and the Civic Defender[14] have been defined. This, among other things, unveils the actual attitude towards this branch of power, whose primary role is to protect human and minority rights. Over the two centuries of constitutionalism, and more globally so in recent history, the legal standards have been developed to support the constitutionalization of judicial power, but the first and foremost role of this branch of power has yet to be regulated explicitly in the Constitution.

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[7] Article 3 of the Constitution of the Republic of Serbia

[8] Article 5 of the Constitution of the Republic of Serbia.

[9] Venice Commission, the Sub-Commission on the Judiciary (CDL-JD (2007)001rev) www.venice.coe.int/webforms/…/default.aspx?…CDL-JD(2007)001. *Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges* CDL-AD (2010)004 https://vss.sud.rs/…/Preporuka%20CM-Rec%282010%2912%20Ko *accessed on February 11, 2018.*

[10] See: Stanković M. *Ustavne odredbe o sudovima – da li je sudstvo u Srbiji zaista vlast?,* Zbornik Ustav Republike Srbije – pet godina posle (2006-2011), pages 201-207.

[11] Article 98 of the Constitution of the Republic of Serbia.

[12] Article 122 of the Constitution of the Republic of Serbia.

[13] Article 166 of the Constitution of the Republic of Serbia: "The Constitutional Court shall be an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms".

[14] Article 138 of the Constitution of the Republic of Serbia, Paragraph 1: "The Civic Defender shall be independent state body who shall protect citizens' rights and monitor the work of public administration bodies, body in charge of legal protection of proprietary rights and interests of the Republic of Serbia, as well as other bodies and organizations, companies and institutions to which public powers have been delegated."

1.3 The draft amendments **do not define the types of courts**. The constitutional provision that does[15] has been omitted, and the matter will be regulated by law.[16] Solutions like this, as provided by the draft amendments, suggest that matters of vital importance for the status of judiciary, including the establishment and closure of courts, are losing the privileged status of a constitutional matter to be regulated by law instead.

1.4 The amendments have failed to address **the relationship between courts and the Constitutional Court,** nor was the matter discussed while the amendments were being prepared. Practice has shown that some issues are particularly sensitive when the status of judicial power is concerned:

- Considering appeals by judges against the decisions of the High Judicial Council on the termination of a judge's tenure of office or dismissal;
- Setting clear boundaries between the jurisdiction of courts and the Constitutional Court over the cases involving the protection of human rights in constitutional appeal proceedings.[17]
- Resolving conflicts of jurisdiction.[18]

In the segment addressing the jurisdictions of the High Judicial Council and the Constitutional Court, the amendments have failed to specify their respective competence as to the nomination and election of one-third of the Constitutional Court justices.

1.5 The principle of legality. The constitutional provisions on the sources of international law,[19] which, together with the Constitution and the law, define a legal framework for judges to try and decide cases, are open to different interpretations, creating legal uncertainty[20] and threatening the principle of legality. This largely refers to the following:

- *Generally accepted rules of the international law* incorporated in the legal system,[21] which together with the Constitution, laws and ratified international treaties define a legal framework for judges to try and decide cases, have been omitted.[22]

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[15] Article 143, Paragraph 1 of the Constitution of the Republic of Serbia: "Judicial power in the Republic of Serbia shall belong to courts of general and special jurisdiction."

[16] Amendment III, Paragraph 4.

[17] See more: Stojanović D., *Ustavnosudsko ispitivanje sudskih odluka*, Zbornik radova Pravnog fakuteta u Nišu, br. 74/2016, pages 35-53.

[18] "The judiciary shall have jurisdiction over all issues of a judicial nature, and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law." (Item 3 of the Basic Principles on the Independence of Judiciary, United Nations General Assembly, 1985) "Only judges themselves should decide on their own competence in individual cases as defined by law" (Chapter I, Item 10 of the Recommendation Rec (94) 12, Council of Europe).

[19] See more: Radivojević Z. *Međunarodni standardi nezavisnog sudstva*, Zbornik Zakonodavni i institucionalni okvir nezavisnog sudstva u Republici Srbiji, Konrad Adenauer Stiftung i Pravni fakultet Niš, 2009. pages 37-55, and Uporedni pregled osnovnih načela o pravosuđu *https://www.americanbar.org/…/serb_basic_principles_judiciary_ser;accessed on February 11, 2018.*

[20] See more: Pajvančić M.: *Komentar Ustava Republike Srbije*, Konrad Adenauer Stiftung, Beograd, 2009. i Pajvančić M.: *Kontraverze ustavne zaštite ljudskih prava*, Zbornik Ustavne i međunarodnopravne garancije ljudskih prava, Niš: Pravni fakultet, Centar za publikacije, May 28, 2008, page 245.

[21] Article 16, Paragraph 2 of the Constitution of the Republic of Serbia.

[22] Amendment IV, Paragraph 1: "A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international contracts, law and other general acts."

- "*The practice of international institutions supervising the implementation of valid international standards in human minority rights,*" which serves as a basis for "*interpretation of the* (constitutional) *provisions on human and minority rights*"[23] – a court to rule on the protection of the rights applies and interprets these sources of law, which have been left out as well.[24]
- The amendments have failed to eliminate the inconsistent and confusing terminology referring to the sources of international law that has been used in the Constitution: generally accepted principles and rules of international law[25]; generally accepted rules of international law[26]; ratified international treaties[27]; valid international standards in human and minority rights[28]; the practice of international institutions which supervise the implementation of international standards in human rights[29]; international treaties.[30] In this context, the Venice Commission underlines[31] in a comment on Article 16 that "*rules similar to Article 16 appear, in a different wording, in Article 194*." **Such repetitions, especially if not identical, are undesirable since they risk opening delicate issues of interpretation.**"

1.6 The principle of public hearing. The Constitution[32] and the amendments[33] have only addressed the principle of *a public hearing* before the court, and the possibility of restricting it, *failing to regulate the principle and the duty of pronouncing a verdict in public,* which is one of the important standards of court proceedings.

1.7 The provisions on financial independence (salary levels and court budgets) are missing as well. Together with guarantees related to the independence, permanent tenure and retirement age of judges, the international standards[34] also include appropriate remuneration guaranteed by law, commensurate with the dignity of the profession and burden of responsibilities,[35] the right to a retirement pension, the level of which has to be as close as possible to the level of their final salary as a judge,[36] and the duty of states to provide courts with the appropriate means, making it possible for the judiciary to fulfil its functions efficiently.[37]

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[23] Article 18, Paragraph 3 of the Constitution of the Republic of Serbia.

[24] Amendment IV, Paragraph 1: "A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international contracts, law and other general acts."

[25] Article 16, Paragraph 1 of the Constitution of the Republic of Serbia.

[26] Article 16, Paragraph 2; Article 18, Paragraph 2; Article 142, Paragraph 2, Article 167, Paragraph 1, Item 1 of the Constitution of the Republic of Serbia.

[27] Article 16, Paragraph 2; Article 18, Paragraph 2; Article 142, Paragraph 2; Article 145, Paragraph 2; Article 167, Paragraph 1, Items 1 and 2 of the Constitution of the Republic of Serbia.

[28] Article 18, Paragraph 3 of the Constitution of the Republic of Serbia.

[29] Article 18, Paragraph 3 of the Constitution of the Republic of Serbia.

[30] Articles 17 and 75 of the Constitution of the Republic of Serbia.

[31] Venice Commission, Opinion on the Constitution of Serbia (CDL-AD(2007)004) www.venice.coe.int/webforms/documents/default.aspx?pdffile. *Accessed on February 11, 2018.*

[32] Article 32, Paragraph 3 of the Constitution of the Republic of Serbia.

[33] Amendment III, Paragraph 7.

[34] Item 11 of the European Charter on the Statute for Judges https://rm.coe.int/1680747686 *accessed on February 11, 2018.*

[35] Item b) Recommendation R (94)12 by the CoE Committee of Ministers.

[36] Item 6.4 of the European Charter on the Statute for Judges.

[37] Recommendation R (94)12 by the CoE Committee of Ministers.

1.8 Freedom of association for judges hasn't been addressed explicitly by either the Constitution or the amendments. The fact that this right was contested not so long ago, coupled with a provision in the amendments saying that the function of a judge is incompatible with other functions and activities, "other private function"[38] in particular, opens room for a wide range of interpretations. Besides, very specific international standards have been developed around this right, which together with the above arguments, calls for a more explicit provision to cover the matter.

The international standards guarantee the freedom of association to judges, who "shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence"[39] and to "protect the interests of judges"[40]. They have also provided for more specific definitions of "professional organizations set up by judges, to which all judges may freely adhere, contributing notably to the defense of those rights which are conferred on them by their statute, in particular in relation to authorities in bodies which are involved in decisions regarding them."[41]

1.9 The matters to be regulated by laws: The matters of great importance for the organizational and individual independence of courts and judges are to be regulated by laws. Local experience has shown that the laws addressing them are exposed to frequent changes, and that the substance of the change depends on the existing parliamentary majority, which makes this branch of power particularly unstable and fragile compared to the other two, exposing it to the influence of the executive and the legislature alike. There are quite a few vital issues falling in this context, for which the amendments have failed to set the principles the legislator must respect, or the boundaries of a legal framework.

These include the establishment and abolishment of courts, the types and territorial jurisdiction, and court proceedings[42]; the court authorized to review a court decision, and relevant court proceedings[43]; the reasons for restricting a public hearing before court[44]; a trial run by a single judge, and the participation of lay judges in a trial[45]; harmonization of case law[46]; special training to be completed in a judicial training institution established by law, which is the sole condition to be prescribed by the Constitution for the election of judges to the courts with exclusively first-instance jurisdiction[47]; the activities, jobs or political activity incompatible with the function of a judge[48]; a very broad provision allowing the High Judicial Council to…decide on the issues of the status of judges, presidents of courts and lay judges

[38] Amendment V, Paragraph 3.
[39] Items 7 and 9 of Basic Principles on the Independence of the Judiciary.
[40] Recommendation R (94)12 by the CoE Committee of Ministers.
[41] Item 1.7 of the European Charter on the Statute for Judges.
[42] Amendment III, Paragraph 3.
[43] Amendment III, Paragraph 6.
[44] Amendment III, Paragraph 7.
[45] Amendment III, Paragraph 8.
[46] Amendment IV, Paragraph 1.
[47] Amendment IV, Paragraph 2.
[48] Amendment V, Paragraph 3.

determined under the law[49]; the reasons to terminate the term in office of a member of the High Judicial Council, and the procedure to guide the decision-making process.[50]

On the other hand, the matters that do not deserve a constitutional rank have found their place in the draft, including a special judicial training institution,[51] a public competition for the members of the High Judicial Council, elected from prominent lawyers,[52] provisions of procedural nature referring to the Council's method of work[53] etc.

The Venice Commission, Sub-Commission on the Judiciary[54] underlines that *new democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse, and therefore,* **explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges**" finding also that "**the parliament is undoubtedly much more engrossed in political games and the appointment of judges, which could result in political bargaining in the parliament."**

2. A Comment on the principle of independence (institutional independence)

2.1 The principle of independence – division of power and a deputy's tied-up term in office. The way the Constitution is governing the division of power[55] is contrary to the principle of judicial independence, as it provides for "mutual control between three branches of power", including control over courts by the executive and legislative branches. A constitutional provision about a tied-up term in office for members of parliament is also noteworthy.[56] . The Venice Commission has warned at serious consequences such constitutional solutions might produce, their impact on the independence of judiciary in particular[57] :

"It seems that its intent is to tie the deputy to the party position on all matters at all times. This is a serious violation of the freedom of a deputy to express his/her view on

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[49] Amendment VIII, Paragraphs 1 and 2.

[50] Amendment X, Paragraph 3.

[51] Amendment IV, Paragraph 2.

[52] Amendment IX, Paragraph 2.

[53] Amendment XII, Paragraph 2.

[54] Venice Commission – Sub-Commission on the Judiciary, Judicial Appointments (CDL-JD (2007)001rev).

[55] Article 4 of the Constitution of the Republic of Serbia provides that "Relation between three branches of power shall be based on balance and mutual control". See more: Pajvančić M. *Ustavni položaj sudova u okviru organizacije vlasti – Normativni okvir, problemi normatvnog i faktičkog karaktera*, Glasnik advokatske komore Vojvodine, No. 3-4/2017, pages 173-190.

[56] Article 102 of the Constitution of the Republic of Serbia says: "Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at disposal to the political party upon which proposal he or she has been elected a deputy." See more: Marinković T. *Politika u granicama Ustava – o načelima predstavničke demokratije u jursprudenciji Ustavnog suda Srbije*, Zbornik Ustav Republike Srbije – pet godina posle (2006-2011), pages 171-180; Pejić, I. *Parlamentarno pravo,* Pravni fakultet Niš, 2011, pages 55-97; Pajvančić M. *Poslanički mandat i njegova zaštita,* Glasnik Advokatske komore Vojvodine, 2002, No 8, pages 236-251; Stojanović D. *Pravni položaj poslanika (na primerima Francuske, Austrije, Nemačke i Jugoslavije),* Pravni fakultet Niš, 1999, pages 209-229.

[57] Venice Commission, Opinion on the Constitution of Serbia (CDL-AD(2007)004).

the merits of a proposal or action. It concentrates excessive power in the hands of the party leadership. This is all the more worrying due to the excessive role of the National Assembly in judicial appointments in general and in particular in the reappointment process for all judges foreseen in the Constitutional Law on the Implementation of the Constitution. ***It reinforces the risk of a judicial system within which all positions are divided among political parties****."*

One of its closing arguments was: "*The main concerns with respect to the Constitution relate, on the one hand, to the fact that individual members of parliament are made subservient by Art. 102.2 to party leaderships and, on the other, to the excessive role of parliament in judicial appointments. Judicial independence is a fundamental prerequisite of a democratic constitutionalism and is also wholly necessary to ensure that the constitution is not merely a paper exercise but will be enforced in practice. Yet the National Assembly elects, directly or indirectly, all members of the High Judicial Council proposing judges for appointment and in addition elects the judges. Combined with the general reappointment of all judges following the entry into force of the Constitution provided for in the Constitutional Law on Implementation of the Constitution, this creates a real threat of a control of the judicial system by political parties*."

In the context of the constitutional provisions listed above, which the Venice Commission has also commented on, the amendments suggest the following:

- The National Assembly appoints five members of the High Judicial Council, selected from amongst prominent lawyers.[58]
- The High Judicial Council is composed of ten members – five judges elected by their peers, and five prominent lawyers elected by the National Assembly.[59]
- The National Assembly elects the prominent lawyers, making up one half of the composition of the High Judicial Council "at the proposal of the competent parliamentary committee, after having conducted a public competition." The election requires the support of three-fifths of all deputies (150 votes). If the required majority can't be reached, and not all the nominees have been elected, a vote for those who haven't been will be repeated within the next ten days. In the repeated vote, a majority of five-ninths of all deputies (139 votes, or 55.6 percent) is required. If the nominees fail to win the parliamentary support required for the appointment, "the election procedure is repeated after 15 days for the members who have not been elected."[60]
- The wording "in case they are not all elected in this manner" and "in case all the nominated candidates fail to win the required majority of votes" [61] opens an opportunity to nominate the exact number of candidates to be elected from among prominent lawyers (five), because there's no explicit rule to nominate more (as opposed to the Constitution of the Republic of Serbia, which stipulates very clearly the requirements for the nomination and election of judges of the

[58] Amendment I, Paragraph 2, Item 3.
[59] Amendment IX, Paragraph 1.
[60] Amendment II, Paragraph 3 and Amendment IX, Paragraph 2.
[61] Amendment IX, Paragraph 2.

Constitutional Court[62]). If so, it would be literally impossible for the National Assembly to choose between more candidates.

- For a decision to be adopted by the High Judicial Council, six out of 10 votes are required, while "a golden vote" is reserved for the president of the Council if an even number of members makes it impossible to pass a decision[63] (the votes of minimum five members of the Council are needed for a decision, including the vote of the president, at a session where at least seven members of the Council are present, forming a qualified quorum).
- The dismissal of a member of the High Judicial Council, elected from prominent lawyers, requires fewer votes (139) than his/her appointment does (150). The solution deviates from the standard that the same majority of votes be required for the election and the dismissal. If the majority requirements differ though, the rule of thumb is to prescribe a stricter majority for the dismissal.[64] The way the draft amendment has been articulated allows for a completely different conclusion as well. The meaning of the provision is ambiguous, creating room for different interpretations. The unclear rules demanding an interpretation should be avoided and replaced with unambiguous provisions instead.
- The president of the High Judicial Council is elected among members of the Council who are not judges, but rather prominent lawyers, whose nomination (by the National Assembly) and election (by the National Assembly) fall under the exclusive authority of the parliament.[65]

The best illustration that the opinions of the Venice Commission have been disregarded is that the provisions tying the term in office of a deputy to a political party remained in place, while new ones have been suggested instead, as follows: the composition of the High Judicial Council; the nomination and election of the members of the Council from prominent lawyers, in which the National Assembly acts at full capacity without pre-defined criteria; a majority required for their election, particularly the number of votes needed in the second round; the dismissal of a member of the Council that requires fewer votes (139, or five-ninths of the vote) than the number of votes required to install them in the first round (150, or three-fifths); the decisive vote by the president of the High Judicial Council, elected from amongst prominent lawyers, if a decision can't be reached because an even number of members attend. Still very relevant is a caution by the Venice Commission in the Opinion on the Constitution of Serbia RS[66] that solutions like these "*reinforce the risk of a judicial system within which all positions are divided among political parties*

The Venice Commission, the Sub-Commission on the Judiciary, maintains that the types of judicial appointments may differ in comparative constitutionality, but argues very strongly that the context is paramount, especially the fact that in "*old democracies*" there are "*systems in which the executive power has a strong influence*

[62] Article 172, Paragraph 2 of the Constitution of the Republic of Serbia.
[63] Amendment IX, Paragraph 2.
[64] Amendment II, Paragraph 4.
[65] Amendment XI, Paragraph 2.
[66] Venice Commission, Opinion on the Constitution of Serbia (CDL-AD(2007)004).

on judicial appointments, but they may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time."[67] In the same document, the Venice Commission has generally assumed that "*the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State*" in matters such as the selection and appointment of judges and the exercise of disciplinary functions." As for judicial councils, the Commission goes on to say that "*a basic rule appears to be that a large proportion of their membership should be made up of members of the judiciary, and that a fair balance should be struck between members of the judiciary and other ex officio or elected members,*" concluding that "*the parliament is undoubtedly much more engrossed in political games, and the appointments of judges could result in political bargaining*.

In the Opinion on the Constitution of Serbia,[68] the Venice Commission warns at the flawed composition of the High Judicial Council, underlining that "*At first sight, the composition seems pluralistic. This appearance of pluralism is, however, deceptive. All these members are elected, directly or indirectly by the National Assembly. The six judges are not to be elected by their peers but by the National Assembly, the lawyer not by the Bar Association but by the National Assembly, the professor not by the Law Faculty but by the National Assembly. The judicial appointment process is thus doubly under the control of the National Assembly: the proposals are made by the High Judicial Council elected by the National Assembly, and the decisions are then made by the National Assembly itself. This seems a recipe for the politicization of the judiciary, and therefore the provision should be substantially amended*."

The opinion by the Venice Commission aside, it is important to note that the standards of judicial independence have been developed by international bodies for the protection of human rights, too, chiefly through the practice of the European Court of Human Rights. These standards largely refer to the definition of the principle of independence and impartiality of the judiciary, and a test for the independence of the judiciary and the parameters it involves, molded against the Court's decisions.[69]

2.2 The obligatory character and control of court decisions have been addressed by the draft amendments so as to allow for extrajudicial control of courts as well. The constitutional provision that "court decisions shall be obligatory for all" has been omitted, along with the stipulation they "may not be a subject of extrajudicial control."[70] The draft amendments[71] have kept only the constitutional rule[72] that "a court decision may only be reconsidered by an authorized court in a legal proceedings prescribed by the law." Without a clear ban on extrajudicial control of

[67] Items 4 and 6 of the Report by the Venice Commission – the Sub-Commission on the Judiciary, Judicial Appointments (CDL-JD(2007)001rev).

[68] Venice Commission, Opinion on the Constitution of Serbia (CDL-AD(2007)004).

[69] See more: Radivojević Z. pages 44-53.

[70] Article 145, Paragraph 1 of the Constitution of the Republic of Serbia.

[71] Amendment Paragraph 6.

[72] Article 145, Paragraph 1 of the Constitution of the Republic of Serbia.

court decisions, meaning that the control of a court decision may follow an appeal only, remaining strictly within the court system, the draft version of the amendments creates an opportunity to carry it out outside the court system, too, by the Constitutional Court, for instance, if the law says so.

3. A comment on the principle of independence (individual independence)

There are just a few issues related to the status of judges directly related to their individual independence, which are also indicative of the independence of the judiciary, but the draft amendments to the Constitution have either failed to address them, provided incomplete relevant regulations or those that haven't incorporated international standards.[73] The previous comments on judicial appointments notwithstanding, in this section the emphasis is on the provisions on statutory issues (individual independence), missing in the draft.

3.1 Election of judges. The amendments have explicitly defined only one condition for the election of judges to courts, and only the courts with exclusively first-instance jurisdiction. It is a requirement to "*complete special training in a judicial training institution*" established by the law.[74]

This choice has disregarded the *international standards of judicial appointment*, involving the following:

- The election procedure, and the obligation to make sure that judicial appointments are never made for improper motives.[75]
- The requirements for judicial appointments including the integrity and ability of a person to be selected for judicial office, together with appropriate training and qualifications in law.[76]
- Prohibition of discrimination on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except for a requirement that "a candidate for judicial office must be a national of the country concerned, which is not considered discriminatory."[77] In this context,

[73] See more: Beljanski S. *Položaj suda i sudija u predstojećim promanama Ustava*, Glasnik advokatske komore Vojvodine, No. 3-4/2017, pages 190-204; Ilić G. *Zapažanja o uređenju sudske funkcije,* Glasnik advokatske komore Vojvodine, No. 3-4/2017, pages 204-215.

[74] Amendment IV, Paragraph 2.

[75] Item 10 of the Basic Principles on the Independence of Judiciary, adopted by the Seventh United Nations Congress held in Milan, from August 26 to September 6 1985, and endorsed by General Assembly resolutions. More specific provisions are to be found in the European Charter on the statute for judges and Recommendation R(94) 12 of the CoE Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges.

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the Venice Commission is pointing out that "in the light of European standards, the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency."[78]

- Matters of importance for *the status of judges are left unregulated*. For instance, the rights of judges in the election process are no longer protected; the protection pertains only to a violation of rights in the process of dismissal.[79] The circle of subjects entitled to appeal to the Constitutional Court against a decision to relieve a judge of duty has expended to include the president of the court, aside from the judge. Why?

3.2 Permanent tenure of office. The explicit and general constitutional guarantee of a permanent tenure[80] has been replaced with the stipulation that "a judicial tenure shall last from the moment of the appointment until the retirement"[81], which deserves a more specific definition, with respect to the international standards guaranteeing tenure until a mandatory retirement age, laid down at the time of the appointment.[82]

3.4 Independence of judges. "A judge shall be independent, and shall perform his/her duties in accordance with the Constitution, ratified international contracts, law and other general acts. The harmonization of jurisprudence shall be regulated by law."[83]

- *Generally accepted rules of international law and the practice of international institutions supervising the implementation of the international standards on human rights,* constituting an integral part of the legal system and the sources of law the judge uses in trying a case.[84]
- The constitutional provision *prohibiting any influence on a judge while performing his/her judicial function*[85] has been left out, even though it's an international standard involving the duty of the state to guarantee the independence of the judiciary by the Constitution and the law[86]; the duty of all government and other institutions to respect and observe the independence of the judiciary;[87] to guarantee the independence of judges "deciding matters before them impartially, on the basis of facts, and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason;"[88]; prohibiting any inappropriate

[78] Recommendation R(94)12 of the CoE Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges.

[79] Amendment IV, Paragraph 6.

[80] Article 146, Paragraph 1 of the Constitution of the Republic of Serbia

[81] Amendment IV, Paragraph 3.

[82] Item 12 of Basic Principles on the Independence of the Judiciary; Item 22 of Minimum Standards of Judicial Independence –International Bar Associaton, 1982 https://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1… *Accessed on February 11, 2018.*

[83] Amendment IV, Paragraph 1.

[84] Article 16, Paragraph 2 and Article 18, Paragraph 3 of the Constitution of the Republic of Serbia.

[85] Article 149, Paragraph 2 of the Constitution of the Republic of Serbia.

[86] Item 1 of Basic Principles on the Independence of the Judiciary.

[87] Item 2 of Basic Principles on the Independence of the Judiciary.

[88] Item 2 of Basic Principles on the Independence of the Judiciary.

or unwarranted interference with the judicial process;[89] providing for sanctions, prescribed by the law, against persons seeking to influence judges[90].

- The wording "other general acts" is much too broad, since it incorporates all general by-laws as well. The norm as provided by the Constitution is more restrictive, allowing a court to try a case based on "other general acts, only when provided by the law."[91]
- There is no contextual link between the rule that "the uniformity of the jurisprudence shall be regulated by law" and the subject matter of this amendment. As for the practice of "international institutions supervising the implementation" of human rights standards[92] that haven't been included in the amendments, there are two important questions – if the practice of the international institutions includes court practice as well, and if so, whether the latter is published in the Official Gazette.

3.5 Non-transferability of judges. "*Reorganization of the judicial system*" has been used as an exception permitting that a judge be transferred to another court against his/her will,[93] but the formulation lacks accurate legal meaning, paving the way to different interpretations. The existing provision of the Constitution does not lack any, making it very clear that such an exception can be made only "in case of revocation of the court or the substantial part of the jurisdiction of the court to which the judge was elected."[94]

The European Charter on the Statute of Judges has set out certain standards of the non-transferability of judges, saying that "*a judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighboring court, the maximum duration of such assignment being strictly limited by the statute*."[95]

3.6 Unlike the existing constitutional stipulation[96], prohibiting a judge from engaging in political actions and allowing the law to govern the matter, **incompatibility of judiciary function** has been partly regulated by the new amendments[97], permitting the legislator to regulate the activity or job, or political activities incompatible with the office of a judge.

The draft amendments suggest that a ban on political activity should not be constitutional, but rather a legislative matter. Likewise the legislator is offered a broad space to regulate the activities and jobs incompatible with the duties of judicial of-

[89] Item 4 of the Basic Principles on the Independence of the Judiciary.
[90] Principle IV, Item d) of the CoE Recommendation R (94) 12.
[91] Article 143, Paragraph 1 of the Constitution of the Republic of Serbia.
[92] Article 18, Paragraph 3 of the Republic of Serbia.
[93] Amendment IV, Paragraph 8.
[94] Article 150, Paragraph 2 of the Constitution of the Republic of Serbia.
[95] Item 3.4. of the European Charter on the Statute for Judges.
[96] Article 152, Paragraph 2 of the Contitution of the Repubic of Serbia.
[97] Amendment V, Paragraph 3.

fice. The meaning of the "private functions," used explicitly in the draft, remains unclear as well.

These matters, too, have been covered by international standards,[98] involving the right of judges to "freely carry out activities outside their judicial mandate, including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute,"[99] as well as their duty to "refrain from any behavior, action or expression of a kind effectively to affect confidence in their impartiality and their independence."[100]

3.7 The draft amendments have addressed the **immunity of judges**[101] together with the principle of incompatibility, even though the two entail completely different guarantees of the independence of judges. The provision is incomplete, as immunity pertains exclusively to "an opinion expressed within the court proceedings or voting in the process of passing a court decision," and not an opinion expressed in a court decision.[102]

The amendment on the immunity of judges should also incorporate the international standards of judicial immunity (i.e. judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions).[103]

The comments and the arguments supporting them suggest that the Working Version of the Draft Amendments to the Constitution should be withdrawn, and a new draft prepared instead, in strict compliance with the constitutional amendment process as provided by the Constitution of the Republic of Serbia and the Rules of Procedure of the National Assembly.

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[98] Item 6 of the European Charter on the Statute for Judges, which in four sub-items standardizes meticulously remuneration and social insurance for judges.

[99] Item 4.2 of the European Charter on the Statute for Judges.

[100] Item 4.3 of the European Charter on the Statute for Judges.

[101] See more about the immunity of judges in the context of constitutional solutions in comparative constitutionality as described in international conventions and the practice of the European Court of Human Rights:aljnije: Pejić I. Imunitet sudija, Zbornik Zakonodavni i institucionalni okvir nezavisnog sudstva u Republici Srbiji, Konrad Adenauer Stiftung and Pravni fakultet Niš, 2009, pages 37-55.

[102] Amendment V, Parlagraph 1.

[103] Item 16 of the Basic Principles on the Independence of Judiciary; Item 60 Paragraph 16 of the Basic Principles on the Independence of Judiciary; Item 60 of the Report by the Venice Commission on the Independence of the Judicial System, Part I: The Independence of Judges CDL-AD(2010)004 www.sudije.rs/…/VK2010_IZVETAJ_O_NEZAVISNOSTI_SUDSK accessed on February 12, *2018*.

Bosa Nenadić, Ph.D.*

COMMENTS ON THE WORKING DRAFT OF AMENDMENTS I TO XXIV TO THE CONSTITUTION OF SERBIA AS DEVELOPED BY THE SERBIAN MINISTRY OF JUSTICE

I

The first impression of the proposed Working Draft of Amendments I to XXIV to the Constitution of Serbia ('the Amendments') developed by the Serbian Ministry of Justice[1] is that the text lacks the substantive, functional, and formal characteristics required of a country's supreme legal document. The quality of constitutional provisions in general, including those introduced by means of amendments, must be ensured through sound legal drafting that is based upon in-depth and thorough knowledge and understanding of the nature of the features and relationships being governed and the purpose intended to be achieved by amending and developing the Constitution. A reading of the Amendments creates the impression that the proposed provisions were written in haste and suffer from a myriad deficiencies. First and foremost, a number of the Amendments cannot be said to be effective in remedying the shortcomings identified with the current constitutional provisions governing the judiciary, nor can they be seen as sound or reliable in terms of securing the proclaimed objective of the changes, namely an 'independent, accountable, and efficient judiciary'. It is particularly noticeable that some of the proposed Amendments are not compliant with the fundamental principles of the Constitution with regard to the rule of law, separation of powers, independence of the judiciary, guarantees for human and minority rights and freedoms; there also seem to be issues with incorporating them into the remaining portion of the Constitution, which is not being altered. The key principles of the Constitution and its provisions regarding inalienable human rights are not unsurmountable obstacles to robust new amendments governing the judiciary, as they are based upon standards to date unquestionably accepted by modern European societies based upon the rule of law: societies that our country has emulated in recent decades in an endeavour to join their ranks.

Countries with exceptional constitutional traditions exhibit the utmost respect for and emphasise the importance of their supreme legal documents. These nations rarely amend their Constitutions; when they do, it is 'with a trembling hand' (*d'une*

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* President of the Constitutional Court of Serbia, 2007-2010, Judge of the Constitutional Court of Serbia, 2002-2016.

[1] On 22 January 2018, the Ministry of Justice posted a document entitled 'Working Draft of Constitutional Amendments Governing the Judiciary' on its web site at mpravde.gov.rs/sekcija/53/radne-verzije-propisa [in Serbian].

main tremblante), to use the vivid French phrase. The main rationale for this approach is the need to particularly safeguard constitutional provisions from poorly though-through changes to preserve legal stability and safety of the constitutional order and minimise disputes as to what constitutional provisions mean and how they are to be implemented. In other words, this approach means that the Constitution ought to be safeguarded and applied and changed with the utmost care and caution only when there are reasonable and objective reasons to do so, after careful consideration of what needs to be changed and especially of how these changes should be made (and expressed), so that any amendments result in a more comprehensive, clearer, and more modern Constitution.[2]

For three decades now, the need to construct and establish an 'independent, accountable, and efficient judiciary' has been repeated as a mantra throughout Central and South-Eastern Europe (with the trio of characteristics above at times broadened to include epithets such as 'impartial', 'sound', 'professional', 'effective' and the like). This has perpetuated the misapprehension that constitutional and legal amendments could solve the judiciary's problems and amount to a 'reform of the judiciary'. Although the Constitution can to a great extent influence the institutional organisation and operation of the judiciary, it is not a magic wand that can establish legal security and complete equality 'before the Constitution and the law' and ensure impartiality and consistency of courts and prosecutors in practice. Today's many and varied problems with the judiciary pose significant social challenges throughout Europe, especially in countries such as Serbia that lack stable judicial institutions trusted by the public, constitutional (legal) or civic traditions, or even a custom of obeying the Constitution or laws. Issues with the judiciary, which ultimately lead to difficulties in safeguarding fundamental values enshrined in the Constitution, are in these countries the consequence of a multitude of interconnected institutional, political, economic, social, and cultural factors. As such it is unrealistic to expect such complex to be amenable to isolated measures, even ones as powerful as constitutional provisions. This is why the importance of constitutional amendments in addressing issues with the judicial protection of human rights and freedoms in Serbia should not be unduly emphasised, since constitutional (or, indeed, legal) provisions are not a quick way out. It is dangerous to be taken in by the illusion that changing the Constitution and, subsequently, laws, will in and of itself lead to the creation of an 'independent, accountable, and efficient judiciary'. If constitutional provisions are not clearly and unambiguously aimed at achieving the legitimate objectives of the rule of law, and if there is no political will to construct a democratic society, even the best Constitution will remain a dead letter.

II

Provisions of the current Constitution of Serbia ('the Constitution') pertaining to the judiciary, in particular their practical implementation, have always been subjected to justified criticism from the academic and professional communities. The need to amend the Constitution in this regard has not only been voiced in a multi-

[2] Cf. M. Jovičić, *op. cit.,* 141, J. Đorđević, *Уставно право [Constitutional Law]*, Belgrade 1975, p. 512.

tude of scientific papers but has also found its way into a number of key national documents, in particular the 2013-2018 National Judicial Reform Strategy[3] and the Chapter 23 Action Plan, the platform for negotiating the chapter of the European Union (EU) *acquis* devoted to the judiciary and fundamental rights.[4] In its opinion about the Constitution's provisions that pertain to the judiciary, the Venice Commission highlighted first and foremost the fact that the articles allow political authorities (the legislature and the executive) to exert influence on the judiciary. The Commission particularly underlined the technical deficiency of the text.[5] Whilst there is broad agreement in Serbia about the need to amend the constitutional provisions to better regulate the appointment of judges, prosecutors, and members of councils of the judiciary and reduce political and other influences on the judiciary, there is no such consensus about how those changes should be made and what they should entail to ensure an impartial, accountable, and efficient judiciary.

The Ministry of Justice began preparing amendments to the Constitution as early as one year ago. In January 2018, the Ministry prepared a 'working draft' of the amendments, citing obligations undertaken in the Action Plan, without Parliament – the source of constituent power – having initiated any changes to the Constitution. As Parliament is the only authority able to decide whether the Constitution will be amended, to what extent, and what the changes will involve, it is surprising to see no comment from the Government to date as to whether a motion to amend the Constitution has indeed been tabled. This motion is the sole procedural avenue by which an authorised petitioner may ask Parliament to initiate amendment of the constitution, the first stage in the process. Instead, the Ministry has come out with a set of amendments that belong to the second phase of the constitution-making procedure that is yet to be formally launched. Since the Constitution does not allow public authorities to propose constitutional amendments, it is only to be assumed that the Ministry of Justice developed the amendments at the prompting of the Government, which is formally entitled to table a motion to this effect (although the amendments are silent in this regard), and that the proposed text and its accompanying activities can be understood as an announcement of the Government's intention to propose constitutional amendments.[6]

No constitutional amendments put up for public consultation can be a matter for one public authority alone – the Ministry of Justice included, although its mandate includes drafting legislation and other regulations and byelaws concerning the judiciary. Drafting constitutional amendments is not part of the Ministry's remit,

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[3] 2013-2018 National Judicial Reform Strategy (*Official Gazette of the Republic of Serbia*, No. 57/13) and 2013-2018 Action Plan to Implement the 2013-2018 National Judicial Reform Strategy (*Official Gazette of the Republic of Serbia*, Nos. 71/13 and 55/14).

[4] Chapter 23 Action Plan, adopted by the Serbian Government on 27 April 2016. Available online at mpravde.gov.rs/files/Akcioni plan PG 23.pdf.

[5] See the Opinion on the Constitution of Serbia, adopted by the Venice Commission at its 70th plenary session, 17-18 March 2007, No. 405/2006, CDL-AD(2007)004.

[6] This conclusion is indirectly corroborated by the following statement made by Ana Brnabić, the Prime Minister, in March 2018: 'I am proud to live in a country where nine months have been devoted to constitutional amendments so that the judiciary can be more independent, accountable, and efficient. We are not doing this to comply with Chapter 23, but because it is in the public interest'. [in Serbian].

either *ex constitutionem* or *ex legem*.[7] In a country adhering to the rule of law, as the Republic of Serbia is according to its Constitution, which observes the principle of the separation of powers, and which upholds human and minority rights and freedoms, any initiative to change the Constitution, especially where the amendments are already being drafted, ought to take centre stage. This is particularly true in view of the extent of the proposed changes, their scope, and the way in which they are envisaged to be enacted.[8]

III

In this particular case, the Ministry of Justice has prepared a sizeable set of amendments (24 in total) that 'delete' and/or 'replace' outright all provisions of the current Constitution that pertain to the judiciary. These comprise Articles 142 to 165 of the Constitution, comprising the totality of Sections 7 ('Courts'), 8 ('High Judicial Council'), and 9 ('Public Prosecution') of Chapter V of the Constitution ('Organisation of Government'), as well as Articles 99 and 105 that govern the powers and decision-making of Parliament. In our view, it seems to have been unnecessary to 'delete' and 'replace' all of the above provisions, in particular those that were never disputed by constitutional law experts, never seen as controversial in the context of EU accession, and never identified as unworkable in practice. Moreover, such changes are not required by either the National Judicial Reform Strategy or the Chapter 23 Action Plan. Amending constitutional provisions that are not contentious, or deleting features that are part of the body of democratic provisions em-

[7] See Article 9 of the Ministries Law (*Official Gazette of the Republic of Serbia*, Nos. 44/14, 14/15, 54/15, 96/15, and 62/17).

[8] Nevertheless, the Ministry of Justice has claimed it has gone through an 'inclusive and transparent process of proposing the amendments, as two rounds of public consultation have allowed all stakeholders to voice their opinions; this includes representatives of professional associations, the civil society, members of the public, and legal practitioners'. See at mpravde.gov.rs/tekst/18323/komen tari-na-radni-tekst-amandmana [in Serbian]. Cf. also a letter sent to the Ministry of Justice by the Jurist Network with regard to the public consultation about the Working Draft of Amendments to the Constitution, available online at mpravde.gov.rs/vest/18191/pismo-koje-je-ministarstvu-pravde-uputila-mreza-pravnika-povodom-javne-rasprave-o-radnom-teksty-ustavnih-amandmana [in Serbian]. Institutions of the judiciary, professional associations of judges and public prosecutors, non-governmental organisations involved with the judiciary and human rights, lawyers' associations, academic experts in constitutional law, and other stakeholders have all expressed contrary views. In this regard, see primarily the announcement of the Supreme Court of Cassation and its assessment of the Working Draft of Amendments of 12 March 2018, available online at vk.sud.rs/sr/анализа-радног-текста-амандмана-министарства-правде-на-устав-републике-србије [in Serbian]; opinion and suggestions of the High Judicial Council regarding the Working Draft of Amendments, available online at vss.sud.rs/sr/саопштења [in Serbian]; announcement and opinion of the State Prosecutorial Council regarding the Working Draft of Amendments available online at dvt.jt.rs/wp-content/uploads/2018/02/misljenje-u-vezi-ustava-radni-tekst-i-amandmani [in Serbian]; multiple opinions and press releases of the Judges' Association of Serbia regarding the proposed amendments, available online at sudije.rs/index.php [in Serbian]; opinions, comments, and press releases of the Prosecutors' Association, available online at uts.org.rs/aktivnosti/vesti/1482 [in Serbian]; objections of the Serbian Bar Association on the proposed amendments, available online at aks.org.rs/cir/примедбе-акс-на-радни-текс-амандмана [in Serbian]; comments of the Prosecutors' Association, Lawyers' Committee for Human Rights, and Belgrade Centre for Human Rights regarding the proposed amendments, available online at uts.org.rs/aktivnosti/vesti/1482 [in Serbian]; etc.

ployed by modern constitutional systems to govern the judiciary, will produce exactly the opposite effect: they will hurt legal certainty and cause misalignment between regulations and the Constitution (as unconstitutional laws will remain in force during a transitional period required to enact compliant legislation), which is detrimental to creating a custom whereby all must adhere to the Constitution, without which there can be no rule of law or legal security. Therefore, constitutional amendments that are neither necessary nor justified neither lead to the consolidation of the constitutional order of a country nor strengthen the authority of the Constitution as the highest law of the land.[9]

The reader will be concerned and surprised to see that the Amendments are not accompanied by statements of justification in the proper sense of the term. The proposed changes concern an exceptionally sensitive segment of the country's highest legal document, which can, as such, be amended only in conjunction with Parliament and the public at large. Nevertheless, on its web site, under the heading of 'Statement of Justification', the Ministry posted a document entitled 'Ministry of Justice's Working Version of the Draft Amendments to the Constitution (with explanation and references)',[10] comprised of 'Introductory remarks' (five sentences in total devoted to technical issues) that precede the working draft of the Amendments.[11] Some of the individual Amendments, or groups of Amendments, that follow are accompanied by opinions of the Venice Commission on particular issues (sometimes with an indication that the reference is meant as a statement of justification, and sometimes with no such guide). Therefore, in the absence of proper justification for the features contained in the Amendments, it is difficult to ascertain the reasoning behind the proposed changes that 'replace' and 'delete' all of the current constitutional provisions governing the judiciary (although amendments should, as a rule, be employed to make partial changes to constitutional provisions: indeed, the word comes from the Latin *emendare*, meaning 'correct', 'improve', 'remedy', 're-

[9] Cf. M. Jovičić, *op. cit.,* pp. 217 and 360.

[10] See the Working Version of the Draft Amendments to the Constitution (with explanation and references), available online from the Ministry of Justice at mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php.

[11] The 'Introductory remarks' state:

'In accordance with the obligations undertaken by the Republic of Serbia through the adoption of the Action Plan for the Chapter 23, Ministry of Justice (hereinafter: the Ministry) drafted the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia (hereinafter: Working text). During the drafting process, the Ministry was guided primarily by standards defined by the Venice Commission in its opinions and other relevant documents as well as written proposals received within a consultative process conducted by the Ministry in cooperation with the Office for Cooperation with Civil Society conducted in the period May-November 2017. The working text is defined with the preliminary assistance of the CoE expert Mr. James Hamilton.

In order to facilitate understanding of the proposed solutions, an overview of some of the most important positions of the Venice Commission in relation to subject matter (together with the precise references) has been provided beneath the text of the amendments (or thematic related groups of amendments) that bring significant and substantive changes in relation to the current Constitution.

The working text presents the starting point of the public debate on the amendments to the Constitution of the Republic Serbia which will be organized in February and March 2018. After the conduction of the public debate the Draft of the Constitution will be submitted to the Venice Commission on opinion.'

vise', or 'cure'). No analysis of the proposed provisions can allow one to clearly understand the intention of the author in choosing the scope of any particular feature. No reasons or arguments are presented to show why the Ministry may have chosen the proposed provisions from a number of alternatives presented by Parliament and Government, contained in constitutional legal literature, and numerous assessments of the judiciary.[12] This problem is compounded by the inconsistent and illogical practice of calling for some provisions to be 'replaced', others both 'replaced and deleted', and still others 'deleted' outright. In sum, it is exceedingly difficult to understand what is to happen to current provisions, or, more appropriately, material features of the Constitution: which provisions (features) are to be changed; which ones are merely to be 'corrected' or 'improved'; which ones are to be reworded or 'revised'; which are to be 'removed' ('deleted'); which new features are to be introduced and what their benefits are; and so on. It goes without saying that each of the proposals ought to have been accompanied by a thorough explanation, addressing all possible points of contention, perhaps even alternative proposals, especially if one recalls that any amendments to the Constitution must be ratified by the citizens in a referendum on a text that must have been enacted by Parliament with a two-thirds majority. It was thus more than necessary to prepare a thorough and exhaustive statement of justification, at the very least to the same standard as applies to 'regular' laws.

IV

One should not dispute the fact that the Amendments *constitutionalise* a number of arrangements that uphold the independence and autonomy of the judiciary and that, at first glance, *reduce scope for political influence* on judicial and prosecutorial appointments and the operation of the judiciary and prosecution service. The prevailing opinion, also shared by the author, identifies a number of new features as steps in the right direction: these are giving the High Judicial Council (HJC) sole responsibility for appointing judges and court presidents; incorporating grounds for dismissal of judges into the Constitution; removal from the HJC of *ex officio* members (representatives of the legislative and executive power); increasing the number of HJC members from academia; raising the Parliamentary decision-making quorum for appointing HJC members; denying re-appointment to HJC members; etc. Improvements are also visible in proposals to broaden the remit of public prosecutors to include safeguarding human and minority rights and freedoms, as well as in arrangements promoting prosecutorial autonomy, including the appointment of prosecutors by the High Prosecutors' Council (HPC); nomination of the Supreme Public Prosecutor (SPP) by the HPC, coupled with a higher Parliamentary decision-making quorum for the SPP's appointment; denial of re-appointment to the SPP; incorporation of grounds for dismissal of deputy public prosecutors into the Constitution; removal of legislative officials from the HPC, and so on.

[12] We are here referring to primarily assessments made jointly by the judiciary and academia, as well as documents developed by non-governmental organisations dealing with the judiciary and human rights.

However, the Amendments contain a number of arrangements that greatly *reduce the effectiveness of the proposed guarantees of the constitutional role of the judiciary and prosecution service*, with some even running counter to them. These primarily pertain to the composition and decision-making of the HJC, including a reduction in its membership and award of the casting vote to its President; name, position, and slight changes to the composition of the HPC; introduction of a new 'double quorum', hitherto unknown to Serbian practice, with the employment of a mathematical formula for the appointment of HCC and HPC members and the SPP in Parliament (which, as worded, can always be circumvented or even abused by the political majority), which alters the relationship enshrined in other constitutional provisions that prescribe different Parliamentary decision-making quorums for issues of varying importance;[13] period for a repeat of an 'unsuccessful election' for members of the HCC and HPC and the SPP;[14] differences in Parliamentary quorums for the appointment and dismissal of members of the HCC and HPC; ability of a court president to appeal a judge's dismissal with the Constitutional Court; restricting judicial appointments to 'courts designated by statute as having only first-instance powers' and appointments of deputy public prosecutors to 'the lowest tier of public prosecutors' offices' only to alumni of 'special training at a judicial training institution established by law' (it is implied that these are not initial judicial or prosecutorial appointments); shortening of the term in office of the SPP (by contrast, this ought to have been extended, as the proposal denies re-appointment to the SPP and as deputy public prosecutors receive permanent appointments); unlimited reappointments of court presidents and public prosecutors, and the like. Moreover, the Amendments contain a number of illogical and mutually contradictory arrangements concerning the public prosecution service. These include provisions governing the position, status, and accountability of the 'public prosecution service' or 'public prosecution services' (Amendment XIV.8 seems to imply a reading of 'services', whilst the same amendment subsequently refers to 'the public prosecution service as an autonomous (but not independent – Author's note) state authority…'; poorly defined role of the public prosecution service in safeguarding 'constitutionality and legality, human rights, and civil liberties', given the identical definition of the Constitutional Court's remit in Article 166 of the Constitution,[15] and the fact that such powers can only be exercised by 'independent authorities', a status not conferred upon the prosecution service by the Amendments. Therefore, the proposed provisions governing the prosecution service exhibit a glaring incongruence

[13] Given the requirement for the Amendments to be able to fit into the remainder of the Constitution, in our view it was not necessary to come up with these additional decision-making quorums, all the more so as the Constitution already recognises three types of quorums applicable to Parliament (and other authorities), depending on the importance of the question under discussion. Rather, a two-thirds majority, or 'super-quorum', should have been included if the intention was truly to ensure that appointments to the HJC, HPC, and the office of SPP reflected broad consensus between the ruling majority and the opposition in Parliament.

[14] The amendments fail to answer the question of what is to happen if a new SPP is not appointed before the preceding holder's term in office expires. Will the original prosecutor continue in office until a new one is appointed (and for how long)?

[15] See Art. 156 of the current Constitution, which references 'measures to protect constitutionality and legality' to be taken by the prosecution service.

between the definition of the prosecution service and its organisation, powers, and authority, as well as the legal status of public prosecutors and their deputies. These arrangement are blatantly at odds with the justified demands for a constitutional definition of the role and position of the prosecution service and its relationship with the legislative and executive.

If guarantees of judicial independence are sought, *one cannot support* the arrangement envisaged by Amendment XII, where 'decisions on the election and termination of office of judges, presidents of courts, lay judges, decisions on the transfer and temporary relocation of judges, and decisions on the appointment and dismissal of members of disciplinary bodies *shall be based on the criteria determined in accordance with the law* and under a legally prescribed procedure', meaning that the decisions would not be based upon 'criteria determined by law', but, rather, upon 'criteria to be determined in accordance with law'. An identical feature is contained in Amendment XXIII, which states that the HPC's 'decisions on the election and termination of office of public prosecutors and deputy prosecutors, decisions on proposal to elect or dismiss the Supreme Public Prosecutor of Serbia and decisions on the appointment and dismissal of members of disciplinary bodies shall be based on the criteria determined in accordance with the law and under a legally prescribed procedure'. It is therefore clear that these criteria, which are of exceptional significance for the certainty of tenure of judges and prosecutors, are to be determined by a byelaw rather than by a law, whereas, in our view, this issue ought to at least to some extent be part of *materia legis*, rather than *materia sublegis*. Even from a legal drafting point of view, it is inappropriate for the Constitution to rely on secondary legislation. At any rate, the proposed amendments governing the powers of the HJC and HPC lack any mention of the Councils' authority to adopt these criteria. It ought to be remembered, however, that the HJC has to date failed to exercise its authority in this regard in the way intended by the Constitution and laws enacted pursuant to it, as should have been expected of a body whose fundamental and only purpose is to 'ensure and guarantee the independence and autonomy of courts and judges'. By contrast, the HJC's failure to act has led to the enactment of an unconstitutional law whereby the HJC's powers were usurped by the legislator in contravention of an explicit constitutional provision.[16]

[16] See more in the Constitutional Court's Ruling IUz-156/2014 of 26 March 2015, with dissenting opinions, whereby the Court found unconstitutional the Law Amending the Law on Judges (*Official Gazette of the Republic of Serbia*, No. 121/12). The Law had been enacted by Parliament on 24 December 2012 and entered into effect on 25 December 2012. Its sole amendment to the Law on Judges was to insert Article 100a into Chapter VIII of the Law ('Transitional and Final Provisions'), which introduced an 'interim' arrangement for the permanent appointment of a number of judges by way as an exception to the rule envisaged by the core provisions of both the Law and the Constitution. The Law stipulated that judges appointed for the first time under the Decision on the Appointment of Judges to Three-Year Terms of Office at General and Special Courts (*Official Gazette of the Republic of Serbia*, No. 111/09) and the Decision on the Appointment of Judges to Three-Year Terms of Office at General and Special Courts (*Official Gazette of the Republic of Serbia*, No. 52/10) that had never been evaluated throughout their three-year terms in office would receive permanent appointments by the HJC at the latest by 31 December 2012, and would be considered permanently appointed upon the expiry of their initial three-year terms. The decisions on appointment were to be published in the *Official Gazette of the Republic of Serbia*.

Another exceptionally important issue is *the limited role of the HJC in guaranteeing the independence and autonomy of courts* (not of judges as well, as the current Constitution stipulates). This remit is restricted by the phrase 'by deciding on the issues of the status of judges, presidents of courts and lay judges determined under the Constitution and the law'. Instead of reinforcing the HJC's constitutional role as an independent and autonomous body that 'ensures and guarantees the autonomy and independence of courts and judges', the Amendments first unjustifiably remove the HJC's constitutional ability to guarantee the personal, individual independence of judges, and then reduce the role of the HJC to merely 'ensuring', rather than 'guaranteeing', institutional independence and autonomy of courts, by doing nothing other than 'deciding on the issues of the status of judges, presidents of courts and lay judges'. There is a reason why this limitation is absent from the current Constitution, and the wording of Amendment VIII is also incompatible with provisions on the powers of the HJC. The same criticism can be made with respect to Amendment XX, which deals with the HPC. In sum, these arrangements neither reinforce the independence and autonomy of the HJC and HPC, nor bolster the constitutionally-guaranteed function and position of these 'authorities', but, rather, additionally confuse their constitutional positions and roles.

Also questionable is the *objective rationale for the proposed differences in legal status, composition, and decision-making between the HJC and HPC* (all the more so since some claim 'we do not need two High Councils' and that the Amendments should consolidate both into one body). Further to this, the purpose of reducing the HJC's membership to an even number is also unclear, especially given the broadening of the Council's powers and the number of judges and lay judges whose 'status and rights' the HJC is to decide on. Let us underline that the HPC's membership is proposed to remain unchanged at an odd number. Moreover, one could also question the utility of differences in selecting the two Councils' Presidents (i.e. why the HPC cannot choose its own President), their status, the weight attached to their vote (as, theoretically, the HPC could also face a tie), how the decision-making quorum is determined, and so on.

Finally, one must also ask the question of why provisions on the HJC are now grouped under Section 7, 'Courts', whilst those governing the HPC have been moved to Section 8, 'Public Prosecutors' Offices'. In the current Constitution, articles dealing with the HJC are, appropriately, given their own Section 8 ('High Judicial Council') of Chapter V ('Organisation of Government'). This placement has included the HJC amongst all other public authorities established in Chapter V. The Venice Commission also sees the HJC as an independent and autonomous body, which certainly does not belong with courts ('[o]nly a court can be a judicial body', according to the Commission).[17] Moreover, Amendment VIII substitutes 'state body' for 'court body'. The above presents no constitutional reason or, indeed, valid grounds to alter the position of articles governing the Council in the text. Further, we believe that provisions on the HPC ought to be placed under a separate Section so as to rectify the mistake made by the authors and revisers of the 2006 Constitution who deposited the HPC under Section 9 ('Public Prosecution').

[17] See the Venice Commission's Opinion on the Constitution of Serbia, p.15.

We therefore share the view that the Amendments that concern the composition of the HJC and HPC, appointment of their members, and their decision-making, seriously compromise first and foremost the independence and autonomy of these bodies, as well as their ability for providing the constitutional safeguards of independence and autonomy of courts and judges, and the autonomy of public prosecutors' offices and public prosecutors and their deputies.

V

The longevity of constitutional arrangements is one of the most important characteristics of any constitution. The very nature of the general provisions they contain means constitutions are made to last, so as to be able to steer social relationships in a particular direction and ensure that their projected institutions gain stability, and that the values enshrined in them are exercised and accorded effective protection where necessary.[18] However, by contrast, the Amendments propose to delete a number of exceptionally important arrangements, such as Article 149 of the current Constitution, which states that '[i]n performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law' and that '[a]ny influence on a judge while performing his/her judicial function shall be prohibited'. Also proposed for deletion is Article 143.1 of the Constitution, whereby '[j]udicial power in the Republic of Serbia shall belong to courts of general and special jurisdiction' (further destabilising the organisation of courts). Moreover, the proposal also seeks to remove the provision that '(…) organisation (…) system and structure of courts shall be regulated by the Law' (Art. 143.2), which begs the question of whether its deletion means these issues will no longer be governed by law. Conversely, Amendment XIV retains unchanged the current arrangement (Art. 157.1) which stipulates that the '(…) organisation (…) of Public Prosecutor's Office shall be specified by the Law'. Any amendments must clearly designate the scope of any laws that the author of the Constitution explicitly requires in the field of courts and the prosecution service to preserve 'unassailable personal freedom and security'. There can be no doubt that constitutional standards must present constitutional limits to political authority, as embodied by Parliament and Government, but also to judicial authority, which may be independent but is equally accountable and subject to the Constitution and law. Also unjustifiably removed is the right to appeal the HJC's decisions with the Constitutional Court (Art. 155 of the Constitution). The Amendments awkwardly fuse and, in doing so, dilute, provisions governing crucial guarantees of judicial independence, such as those on the non-transferability and immunity of judges (Arts. 150 and 151). The text of the Constitution would also omit the requirement for any sort of criterion of professional experience when appointing members of the HJC and HPC, except for mandating they be 'reputable jurists': a phrase that has taken on an almost farcical meaning in Serbian practice.

It follows that removing these arrangements significantly reduces current guarantees of judicial and prosecutorial independence to the detriment of civil rights, particularly the right to an independent and impartial court and effective prosecu-

[18] For a more detailed discussion, see M. Jovičić, *op. cit.*, pp. 62-103.

torial protection. These arrangements obviously do not uphold the fundamental constitutional principles of the rule of law, but, rather, lead one to question the intentions of the Amendments' authors.

Another justified question is why Amendment IV proposes to delete the provision whereby courts may also make decisions in accordance with 'generally accepted rules of international law' (as Article 142.2 now explicitly stipulates), and why Amendment XIV removes an identical stipulation for the prosecution service. There can be no doubt that the development of international (universal) and European law has contributed to the imposition of meta-legal restrictions on the constituent power of modern European states. The protection of human and minority rights and freedoms in today's Serbia is provided by means of Articles 16, 18, and 194 of the Constitution, as well as by the 'generally accepted rules of international law and ratified international contracts' that also allow international oversight of the respect for these rights and freedoms, as well as protection before international courts and other institutions (Art. 22 of the Constitution).

VI

In contrast to the deletion of several major features of the current Constitution, the Amendments also propose the *introduction* of a number of issues that both Serbian and foreign practice generally relegate to laws and byelaws. It is true that no modern constitution governs *materia constitutionis* alone: all contain some features of statute. Yet, to avoid degrading the Constitution by allowing it to become excessively similar to a 'mere law', one should eschew the habit of including matters into the Constitution that do not belong in it due to either their status, quality, or characteristics. Thus, for instance, under objective criteria of good constitution-making practice, *materia constitutionis* ought not to include issues such entitling the Minister of Justice to bring disciplinary proceedings against and seek the dismissal of judges and court presidents (Amendment VIII) and prosecutors and deputy prosecutors (Amendment XXII); conditioning judicial appointments, and only 'in the courts with exclusively first-instance jurisdiction' at that, by 'special training in a judicial training institution established by the law' (Amendment IV, meaning that persons not meeting this requirement could be appointed to other courts), and requiring the same training for 'deputy prosecutor[s] in prosecutors' offices of lowest instance' (Amendment XVIII, again meaning that this condition applies neither to prosecutors in these offices, nor to prosecutors and deputy prosecutors in other prosecutors' offices). Apart from reasons cited by constitutional law experts when recommending that these provisions be removed from the Amendments (as they allow the executive to exert influence upon the judiciary and prosecution service; prescribing the condition referred to above for the appointment of judges and deputy prosecutors is considered discriminatory in terms of access to the judicial and prosecutorial profession), we would here like to draw attention to a number of additional issues. Firstly, these provisions are quite vague, referencing as they do 'special training' in a 'judicial training' institution established by law; 'courts with exclusively first-instance jurisdiction'; 'prosecutors' offices of lowest instance'; and the like. Secondly, these provisions run counter to a number of judgments of the Con-

stitutional Court by reinstating features that the Court had repeatedly ruled unconstitutional and contrary to generally accepted standards. When the Amendments were drafted, it seems to have been forgotten that the Constitutional Court had found these (statutory) provisions did not violate only specific provisions of the Constitution governing the judiciary and human rights (first and foremost the constitutionally guaranteed right to assume public office on equal terms, as set forth in Article 53), but also the fundamental principles of the Constitution, which are not sought to be amended, as well as broadly accepted standards for the judiciary.[19] It would be a mistake to follow the practice established by the makers of the 2006 Constitution, who allowed the political authorities to chop logic with the Constitutional Court by introducing provisions such as Article 102.2 of the Constitution, which was followed first by political arguments, then by constitutional disputes, and finally by cases brought before European and international institutions.

Amendment VIII.2 is an example of a both unnecessary and poorly executed attempt to introduce a particular issue into the Constitution. It governs the powers of the HJC reproduces nearly unchanged a number of provisions of Article 13 of the Law on the High Judicial Council, whose content, tone, and style are by no means suitable for a constitutional text. By way of an illustration, as defined here, the HJC is to 'collect statistical data relevant to the work of judges' and rule on 'temporary relocation of judges' (although it does not say where to), although this is not one of the exceptions to the principle of non-transferability of judges set out in Amendment IV and additionally weakens constitutional guarantees of judicial independence. Also contentious is the provision whereby the HJC is to 'propose to the Government the amount of funds required for the work of courts in matters within its competence', directly compromising the already fragile financial independence of the judiciary. Similar observations can be made about Amendment XX and its definition of the powers of the HPC.

VII

In addition, the Amendments contain *unenforceable provisions*, such as that of Amendment IV, which states that '[t]he uniformity of the jurisprudence shall be regulated by law'. In a country based upon the principle of the separation of powers, including an independent judiciary power exercised by courts, case law cannot be aligned by statute but, rather, only by actions of courts. Inconsistent case law is a serious issue in Serbia (as also evidenced by a multitude of constitutional appeals

[19] See Decision IU-122/2002 and the identical Decision IU-28/2006. After the provision of the Law on Judges (2002) allowing the Ministry of Justice to seek the dismissal of judges was struck down, a new law was enacted that essentially (with minor revisions) incorporated the same provision that the Constitutional Court had previously deemed unconstitutional. The Court was, therefore, again compelled to review the law and abrogate the provisions for a second time. A similar process occurred with identical provisions of the Public Prosecution Law. In this case the legislator can be said to have played games with the Court, forcing it to repeatedly assess the constitutionality of what was essentially the same provision. For a discussion of these conditions for appointment of judges and prosecutors, see Decisions IUz-497/2011 of the Constitutional Court of 6 February 2014 (Law on the Judicial Academy), IUz-427/2013 of 12 June 2014 (Law on Judges), and IUz-428/2013 of 12 June 2014 (Public Prosecution Law).

and Constitutional Court rulings), but perhaps the only extent of statutory involvement here could be to govern 'the manner of ensuring uniformity of case law': at any rate, this is exactly as stated in the 'statement of justification' accompanying this Amendment that references the Venice Commission's Opinion CDL-AD (2017) 019. And, obviously, the legislator is always free to enact a law to govern a particular issue or social relationship, so ensuring that courts are guided by statute rather than by case law.

There are also features that *lack any reasonable justification*. For instance, Amendment XVII exculpates prosecutors following dismissal (even in the event they are convicted of a criminal offence making them unfit to serve as prosecutors). Absurdly, the Supreme Public Prosecutor and prosecutors are envisaged to 'retain the position of deputy public prosecutor in the public prosecutor's office which they managed prior to the dismissal'. The senselessness of this provision is compounded by the Amendment never even stipulating that prosecutors can be dismissed or establishing grounds for early termination of their five-year mandate (including dismissal), although it does so for deputy prosecutors (Amendment XVIII). There is, of course, nothing to prevent this guarantee from being extended to prosecutors after they leave office, but only if they have done so at their personal request.

Amendment III.7 is also telling in this regard: it pertains to the *openness of court hearings to public scrutiny* and, in contrast to the current arrangement (Article 142.3), allows the public to be excluded not only 'in accordance with the Constitution', but also 'in accordance with law', so permitting the legislator to introduce additional limits to public scrutiny. The Amendment loses sight of the fact that Article 32 of the Constitution explicitly establishes 'the right to a public hearing' as a component of the guaranteed 'right to a fair trial', and that the grounds for excluding the public are listed exhaustively in Article 32.3. In this regard one should also bear in mind Article 20 of the Constitution governing the restriction of human and minority rights and containing an explicit guarantee that the '[a]ttained level of human and minority rights may not be lowered' (Article 20.2).

Further to the above, one would also have to ask why *the openness of the HJC and HPC to public scrutiny was not included as a constitutional principle*, in particular given these two bodies' constitutional role (mission) and position, powers, mode of operation and decision-making, as well as the pressing need to ensure their transparency. This aspect of their organisation ought to have been defined especially if one bears in mind the fact that any mention of the accountability of these collective bodies is absent from the Constitution; in addition, no other authority is able to scrutinise the operation of the two exceptionally significant and highly-ranked 'state bodies'. Their openness to public scrutiny cannot be reduced to their requirement to 'publicly announce and explain their decisions', as stipulated in Amendments XII.2 and XXIII. The unconstitutional pronouncements and actions of these bodies have caused major shocks, not only in the judiciary but across society as a whole: they have enacted hundreds of unconstitutional decisions to remove judges and prosecutors; they have obstructed the regular work of the Constitutional Court due to the more than one thousand constitutional disputes arising from their decisions to remove judges, prosecutors, and deputy prosecutors; they have stalled and

refused to enforce the Constitutional Court's pilot judgments, so engaging in a protracted battle of wits with the Constitutional Court whilst overtly collaborating with the executive and receiving its support; their failure to enact criteria for the evaluation of judges appointed to three-year terms of office, and consequent inability to assess the performance of these judges, thwarted the application of the Constitution and led to the enactment of statute to permanently appoint hundreds of judges in contravention of the Constitution, etc.[20]

VIII

Any amendments, which are in effect partial changes to the Constitution, must be drafted so as to be able to seamlessly enter the main fabric of the Constitution, as well as allowing changes to be made consistently throughout the constitutional text. If this requirement is not observed, we will see cases such as that of *Article 172 of the Constitution*, which governs the composition of the Constitutional Court. This Article contains a set of unamended provisions governing the appointment of judges of the Constitutional Court, although the name of the highest court in the land has been changed, as have those of the judicial and prosecutorial councils proposing and nominating one-third of its judges. The makers of the Constitution have also ignored the broadly accepted inadequacy of the constitutionally mandated relationship between these three bodies in the appointment procedure. This is also an opportunity for the authors of the Constitution to re-examine Article 175, which governs decision-making by the Constitutional Court, as the Constitution does not allow the Court's Chambers to make 'decisions' (the Panels were introduced subsequently by statute), nor does it recognise the so-called 'double vote' or the Constitutional Court President's ability to veto any decision of the Grand Chambers due to his responsibility (introduced in the 2011 Law on the Constitutional Court) for chairing both sessions of the Court and those of its two Grand Chambers. Although more than 11 years have passed since the current Constitution came into effect, and nearly seven since the Constitutional Court's Chambers were created by law, there are still disputes (including within the Court) about whether the ability of the Court's Chambers to legitimately make decisions is compliant with the Constitution. The Chambers are not a constitutional category, and, according to it decisions can legitimately be made only by the Court in plenary session. Unlike the operation of decisions adopted following legislative review, *the effect of rulings made by the Court upon constitutional complaints* is not governed by the Constitution (i.e. whether court judgments are to be rescinded or set aside, or whether the Constitutional Court should just make a finding of violation of rights). It would therefore be both appropriate and necessary to elucidate these issues in the course of any future changes to the Constitution; this would at least partly defuse the tensions and disputes in interactions between the Constitutional and the Supreme Court (of Cassation).

[20] See numerous rulings of the Constitutional Court adopted following appeals by judges, prosecutors, and deputy prosecutors, especially those in the cases of Saveljić and Tasić, as well as Decision IUz-156/2014 referred to above, all available online at ustavni.sud.rs/page/view/160-101195/sudska-praksa [in Serbian].

To provide more legal security and stability in the exercise of judicial authority, we are deeply convinced that Amendment II ought to require a two-thirds Parliamentary majority for enacting *laws on the establishment and dissolution of courts, types, competences, and organisation of courts, and proceedings before courts (Amendment III), laws on the establishment, organisation, and competences of prosecutors' offices (Amendment XIII) and laws on the HJC and HPC, as these are particularly significant for the operation of the judiciary as a whole, and especially for safeguarding human rights.* The current Constitution allows legislation governing these issues to be easily amended, which has led political majorities to frequently change the pertinent laws. A good illustration (but obviously a poor example) of this state of affairs is provided by laws on judges and public prosecution, which were amended on multiple occasions between 2008 and 2017, and which the Constitutional Court has had to 'correct' several times, which in itself is a rare occurrence.[21] As nearly all of these laws will have to be amended to comply with the Amendments,[22] it is particularly important to provide for a restrictive decision-making quorum for their enactment, as mandating a simple Parliamentary majority can jeopardise the stability of the judiciary and the independence of judges and prosecutors, leading to legal insecurity and unpredictability in the protection of the rights and interests of members of the public and all other entities.

Finally, one has to ask why the Amendments do not *remedy any of the evident contradictions and flaws in the constitutional text*, such as Articles 16.2 and 194.4; Articles 5 and 102.2; Article 105.2.7 (otherwise proposed to be altered by Amendment II); Article 134.2, and so on. A Constitution containing such blatantly mutually contradictory provisions is not suited to a state where the rule of law is paramount.

IX

These and other material flaws of the Amendments (as identified by the community of experts, and in particular in the theory of constitutional law), coupled with their numerous deficiencies of legislative drafting, bear out the need to recall that, in a country that has prioritised the rule of law and constitutional democracy, the Constitution is the key means to construct the legal order and regulate the most

[21] See the Law on Judges (*Official Gazette of the Republic of Serbia*, Nos. 116/2008, 58/2009 – Constitutional Court ruling, 104/2009, 101/2010, 8/2012 – Constitutional Court Ruling, 121/2012, 124/2012 Constitutional Court Ruling, 101/2013, 111/2014 – Constitutional Court Ruling, 117/2014, 40/2015, 63/2015 – Constitutional Court Ruling, 106/2015, 63/2016 – Constitutional Court Ruling, and 47/2017) and the Law on Public Prosecution (*Official Gazette of the Republic of Serbia*, Nos. 116/2008, 104/2009, 101/2010, 78/2011 – Other Law, 101/2001, 38/2012 – Constitutional Court Ruling, 121/2012 101/2013, 111/2014 – Constitutional Court Ruling, 117/2014, 106/2015, and 63/2016 – Constitutional Court Ruling). The Law on the Organisation of Courts has also been amended eleven times to date (*Official Gazette of the Republic of Serbia*, Nos. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011, 101/2013, 106/2015, 40/2015, 13/2016, 108/2016, and 113/2017).

[22] The proposed amendments to the Constitution will necessitate changes to the Law on the Organisation of Courts, Law on Seats and Areas of Jurisdiction of Courts and Prosecutors' Offices, Law on Judges, Law on Public Prosecution, Law on the High Judicial Council, Law on the State Prosecutorial Council, Law on the Judicial Academy, and all procedural laws.

important relationships within society. Therefore, developing and drafting the main body of the Constitution and any subsequent amendments not just an exceptionally significant process, but also a highly demanding, difficult, and delicate one.[23] The legal language and style of the highest law of the land, its fundamental statute and source of all legal enactments in its legal order, must be clear and precise. In sum: only clauses worded so as to articulate the intention of the makers of the constitution successfully, reliably, and understandably (clearly) can allow the provisions of the Constitution to be effective in practice.

Taking the above as an assumption, we can make another key comment on the Amendments. This pertains to the *quality of the proposed provisions* as evidenced by their clarity, precision, predictability, unambiguity, and understandability. There is wide consensus that the legal drafting of many of the Amendments does not correspond to the standards of quality developed through the jurisprudence of European institutions, in particular the European Court of Human Rights.[24] Only clearly worded, precise, and understandable constitutional provisions (that are general and abstract by their very nature) afford a sufficient and reasonable measure of reliability to the Constitution and the arrangements it puts into place. It is well known that flaws in the language of a legal text can be exploited to attain political and other non-constitutional objectives, which can in practice easily take precedence over the exercise of the values enshrined in the Constitution that courts and prosecutors ought to defend and protect. The idea of the rule of law is 'not in the least favourably disposed' towards such legal drafting technique, in particular when the text of the Constitution is concerned, as 'unfinished and sloppy legislative provisions' (M. Jovičić) can always be hijacked to support autarchic and arbitrary exercise of power by any authority, the judiciary included, as well as by powerful individuals, political parties, and interest groups of all sorts. This is why it is absolutely essential for those who would write and enact a Constitution to consistently follow legal drafting standards. Therefore, care must be exercised at all times when crafting constitutional provisions (and especially when making them available to the broadest public), as these are the highest law of the land, and must be worded in accordance with the fundamental propositions of constitutional law and standards of constitutional drafting technique developed through the extensive constitution-making practice of European constitutional systems.

The *appropriate and consistent use of terms, expressions, and phrases* is equally important for the main body of a Constitution as it is to any amendments. In this regard, there must be a connection between amendments and the Constitution as a whole, since this is demanded by the principle of constitutional integrity. Our cur-

[23] This issue has been addressed by J. Đorđević, who has said that 'legal wording does not descend from heaven perfect and complete. We know full well what effort it takes (…) to create an (…) adequate legal provision'. See *Уводне најомене*, Анали Правног факултета у Београду, бр. 3-4/1973, p. 8.

[24] These standards, created through the jurisprudence of the European Court of Human Rights, have been additionally promoted by the Venice Commission itself, and its positions are cited by the authors of the Amendments. They are also extensively followed by European courts, including the Serbian Constitutional Court. Further to this, see Constitutional Court Rulings in cases IUz-27/2009, IUz-1503/2010, IUz-107/2011, IUz-299/2011, and IUz-51/2012.

rent Constitution cannot boast particular internal consistency, but the Amendments are even more flawed in this regard.[25] There are numerous provisions that can be held up as examples of poor legislative drafting technique, inappropriate to the nation's supreme legal document. By way of an illustration, the Amendments use the expressions 'human rights and civil liberties' (whereas the Constitution employs the term 'human and minority rights and fundamental liberties'); 'private function' (the Constitution has 'private interests' or 'private affairs'); 'reorganisation of the judicial system' and 'territory of courts' (whereas the Constitution employs 'judicial power' and 'organisation and competences (…) of courts'); 'permanent disability for judicial function' (in contrast to the 'loss of capacity to perform judicial office' used in the Constitution). Further, the names of the Supreme Court and the Supreme Public Prosecutor add the designation 'of Serbia', although this is lacking in the Constitution for any other entity established under it (National Assembly, Government, President of the Republic, and Constitutional Court). Provisions governing the prosecution service are especially notable for their lack of consistency in the use of the term 'performance of function' and 'performance of office' (so, for instance, the Supreme Public Prosecutor 'shall perform the function of the public prosecution', whilst public prosecutors 'shall perform the office of prosecution'; Amendments XIV and XVI). The name of the HPC is neither fitting nor accurate, as it comprises no prosecutors: perhaps a more appropriate name would be the High *(Public) Prosecutorial* Council, analogous to the High *Judicial* Council. The Amendments also employ phrases not appropriate or common to constitutional provisions, nor usual in legislative drafting in general. For instance, Amendment IV.3 opens with 'As for early termination…'; Amendments II, IX, and XVII, instead of inserting new paragraphs, employ the expression 'otherwise', or 'if he is not so appointed, he shall (…)'. Amendments XIII.2 and XXIV.2 invert the usual word order. The Amendments use the expression 'to pass a decision' instead of the customary 'to adopt'. Certain issues are dealt with in two places, which is not only redundant but bears out the view that the Amendments are technically deficient (provisions governing the appointment of the HJC, HPC, and SPP, contained in Amendments II, IX, XVII, and XXI, are good examples). Finally, the text requires comprehensive linguistic revision, as the Amendments are dotted by numerous spelling, punctuation, and typographical errors. We must again re-iterate that constitutional amendments, as part of the highest law of the land, must not only be appropriate in terms of their content, but also in terms of the application of rules used to craft their provisions as recommended by legal drafting science. Drafting knowledge and the skills of the legal writer are of the utmost importance here.

[25] Only a cursory glance at the proposed provisions governing the judiciary and prosecution reveals these are far from mutually aligned. The wording seems to indicate the involvement of more than one hand, with each author applying their own set of legal drafting rules. This is neither desirable nor acceptable for the country's supreme legal document, which ought to display unity of both form and content from beginning to end.

XI

In conclusion, the proposed Amendments – except for rare exceptions – have failed in remedying the deficiencies of the current Constitution insofar as the judiciary and prosecution service are concerned, as they still allow undue political influence to be exerted on the judiciary. The Amendments seem to indicate that the proposed constitutional provisions are used as a mere vehicle to attain a number of objectives that are difficult to reconcile, given the general and abstract language of the Constitution. The 'independence, accountability, and efficiency' of the judiciary are stated as the goal of the proposed arrangements, and some of the Amendments are truly useful steps in reaching this objective. It is also rightly stated that the judiciary and prosecution service, and judges and prosecutors, ought to be made more accountable for the professional and impartial exercise of their duties and more consistent action and effective protection of human rights and liberties, as well as of other values enshrined in the Constitution.[26] However, the accountability of these bodies is sought to be established primarily by means of special powers over them to be exercised by political authorities (the legislative and executive), not only by providing for legislation to develop constitutional provisions pertaining to the judiciary, but also by allowing major issues with regard to the judicature to be governed by both primary and secondary legislation, and especially through the introduction of broad-ranging (albeit somewhat modified) Parliamentary decision-making powers over the membership of the High Councils and the appointment and dismissals of prosecutors; imposition of inadequate requirements for the appointment of the Councils' professional members; removal of major constitutional guarantees of the independence and autonomy of courts; stipulation of one sole condition for judicial and prosecutorial appointments at particular courts and prosecutors' offices in contravention of Constitutional Court rulings and introduction of arrangements designed to sidestep Constitutional Court rulings; complicated and unfinished provisions; etc. Room is also created to control and the judiciary and subject it to political influence by not regulating a number of issues. In short, the Amendments still contain features that allow both direct and indirect political influence on the establishment and exercise of judicial authority, and even permit control over the judicature, justifying this approach by referencing the principle of separation of powers and the need for checks and balances between the three branches of government. Even though 'tension is an inherent feature of general provisions such as those of a Constitution', we feel that these features cannot be explained by any 'inevitable imperfection and incompleteness of constitutional arrangements' due to their general and generic nature: it seems that the intention here is for the political majority to retain a substantial influence over the judiciary. Unless the proposed provisions are subjected to a thorough overhaul, in terms of both their substance and form, they will not serve the purpose of these long-awaited constitutional reforms. The envisaged arrangements will not significantly reduce scope for political interference in the exercise of judicial power, nor will they make courts, judges, prosecutors, and deputy prosecutors more resilient to influences both from without and within, nor con-

[26] See Ministry of Justice news bulletin, available online at mpravde.gov.rs/vest/18854 [in Serbian].

tribute to greater accountability of courts and the prosecution service or the HJC and HPC in the exercise of their constitutional remit. We therefore believe that these objectives and purposes, intended to be achieved through amendments to the Constitution, cannot be attained solely through a 'review of the proposed Amendments' (as stated by the Ministry of Justice).[27] A review is certainly needed, as the Amendments are even poorer in terms of technical quality than the current Constitution, itself widely seen as omitting key issues and being insufficiently systematic and inconsistent, partly over-regulated, and poorly edited.[28]

Therefore, as the Amendments contain numerous provisions that require thorough modification and editing for compliance with legal drafting standards, a new set of amendments ought to be developed – one that would reflect the justified proposals and suggestions put forward during the public consultation – which would then be submitted to the Venice Commission and its opinion solicited. **Obviously, this requires Parliament to commence the constitutional amendment procedure as required under Article 203 of the current Constitution.**

Summary

Only sound constitutional arrangements and a democratic social environment can lead to thorough reforms of the judiciary. Acceptance of constitutional features that are difficult to substantiate using well-founded and reasonable arguments, and that clearly show their authors' intention to subject the judiciary to political power and advance the interests of the political majority, will not change the state of affairs in the judicature. Obviously, these features could only create the superficial impression that they are able to address some of the issues faced by our society with the judiciary, but their harmful consequences would quickly become apparent. Thus one can support only amendments that safeguard the constituency and integrity of the Constitution and that accord with its fundamental provisions, with their respect for European standards, for the simple reason that provisions which lack this quality contain within them 'a seed of disorder' that is liable to further damage judicial institutions. The judicial system can function only if its institutions are autonomous and independent in the exercise of their constitutionally-mandated functions and if they base their legitimacy and authority upon the professionalism, knowledge, and experience of their members, and on equal, equitable, and predictable action and consistent practice rooted in the Constitution.

[27] See, for instance, a statement of the Minister of Justice made on 5 March 2018 and published as 'No intentions to withdraw proposed Amendments'. In it the Minister claims that the 'draft Amendments to the Constitution of Serbia will not be withdrawn from procedure: they will be revised to reflect the opinions provided and afterwards submitted to the Venice Commission'. Available online from the Ministry of Justice at [in Serbian].

[28] A more extensive discussion of this issue is available in the 2014 Legal Assessment of the Constitutional Framework Concerning the Judiciary, developed by members of a working party appointed by the Commission to Implement the 2013-2018 National Judicial Reform Strategy), and available online at mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php.

Professor Jasminka Hasanbegović, Ph.D.*

CONSTITUTIONAL AMENDMENTS DRAFT ON THE JUDICIARY AND PROSECUTOR'S OFFICE: TOWARDS AN INDEPENDENT JUDICIARY IN SERBIA OR IN THE OPPOSITE DIRECTION

The author critically analyses the Working Paper of the Ministry of Justice's Amendments to the Constitution of the Republic of Serbia *but only from the perspective of three constitutional principles: legitimacy, checks and balances and rule of law, i.e. legal state. The reason for this is that during the so-called public debate in 2017, even before the* Working Paper *came to light, the representatives of the Ministry had been mostly referring to those principles as arguments supporting the solutions that appeared in the* Working Paper. *The aim of this review is to show whether those three principles are relevant for the proper judiciary, and why and in which way they are relevant or irrelevant, so that based on this analysis a conclusion can be reached on the values of constitutional solutions advocated by the Ministry of Justice in its* Working Paper.

In more than a quarter century of Serbia's transition towards modern democracy (or in more than 25 years, which is a lot of time not only for a single individual in any state but is also respectable from the standpoint of social history because it encompasses a whole generation, that is, a generation succession) several not only legal but also judicial reforms have been carried out in Serbia with the same experience repeated. We thought: *it will not happen this time*. However, it did happen each time, and it was even worse than we thought it would be.[1] Aware of this, we should

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[1] Due to the urgency and relevance of the document under the title of *Working Paper on Amendments to the Constitution of the Republic of Serbia by the Ministry of Justice – Including Explanations (References by the Venice Commission)*, which appeared only at the end of the so-called public debate on the constitutional amendments to the judiciary in Serbia conducted in the course of 2017, causing another, even larger series of debates on the new constitutional system of our judiciary, this paper is the author's 2017 contribution to the framework of the strategic project of the Faculty of Law of the University of Belgrade titled *Identity Transformation of Serbia*.

For more details, see Jasminka Hasanbegović, *Poslednjih dvadesetak godina demokratske tranzicije u okviru nešto više od dva veka modernizacije u Srbiji: Bilans bez perspektive (Last 20 Years or so of Democratic Transition within the Framework of Slightly Over Two Centuries of Modernisation in Serbia: Reckoning without Perspective)*, in Bojan Vranić and Goran Dajović (eds.), *Demokratska tranzicija Srbije: (Re)kapitulacija prvih 25 godina (Democratic Transition of Serbia: Summary of the First 25 Years)*, Belgrade, Faculty of Law, University of Belgrade, 2016, pp. 105-145, and for understanding the broader social framework of the transition concerned, see also the whole volume; see also, Jasminka Hasan-

also approach the debate on this *Working Paper on Constitutional Amendments to the Judiciary,* prepared by the Ministry of Justice.[2] Consequently, we may no longer think it will not happen, because, in addition to previous experience, there are also some other serious indicators that the amendments to our judiciary are going to leave it poorer. What are those indicators?

From a political stance, a judicial reform and the reform of this reform (2008-2012) was carried out primarily by the Democratic Party and the Democratic Party of Serbia, along with many other ruling coalition partners. This was followed, after the parliamentary elections in 2012, by the establishment of a new political regime by the Serbian Progressive Party, the Socialist Party of Serbia and others, who are in power to this very day. We are witness to this new political regime not at all taking a stand either towards the judicial reform, which nearly led to the devastation of the judiciary in our country, nor being ready to act by legal means and call to responsibility – primarily criminal responsibility – those who had neither reformed our judiciary by a reform followed by the so-called reform of the reform, nor reorganized it, but damaged it to a considerable extent. We are primarily talking about criminal legal responsibility for negligence at work and to some extent about other criminal acts of the members of the High Judicial Council, above all the President of this Council. The issue of her criminal legal responsibility has been formally raised, but things are still in their beginning. Moreover, it may be said that many other members of the High Judicial Council had been well rewarded for their harmful judicial activity under the guise of reform.[3]

Therefore, the new political regime of SPP-SPS, constituted after the 2012 elections, continued the policy of irresponsibility and impunity, as well as a form of electing members of the judiciary unacceptable to the profession.[4] Moreover, it is

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begović, *Pravna sigurnost u Srbiji u uslovima takozvane reforme pravosuđa i briselskog Sporazuma iz 2013 (Legal Certainty in Serbia under the Conditions of the So-Called Judicial Reform and the 2013 Brussels Agreement)*, in: Radmila Vasić and Ivana Krstić (eds.), *Pravna sigurnost u uslovima tranzicije (Legal Security under the Conditions of Transition)*, Belgrade, Faculty of Law, University of Belgrade, 2014, pp. 99-121, and other texts in the volume; and for understanding of the broadest framework and reasons of the events concerned, see Jasminka Hasanbegović, *O preprekama vladavini prava u Srba (On Obstacles to Rule of Law with the Serbs)*, *The Year-Book of the Faculty of Law in Eastern Sarajevo*, Year V, no. 1/2014, pp. 8-31.

[2] *The Working Paper on Amendments to the Constitution of the Republic of Serbia by the Ministry of Justice – Including Explanations (references by the Venice Commission)* is identical in two electronic editions, of which the second one also contains *Introductory Notes*, which is available as of 22 January 2018 at https://www.mpravde.gov.rs/files/amandmani%20za%20objavljivanje1.pdf, and at https://www.mpravde.gov.rs/files/Radni%20%20tekst%20amandmana%20na%20Ustav%20Republike%20Srbije%20sa%20obrazlo%C5%BEenjima%20(referencama%20Venecijanske%20komisije).pdf.

[3] Dragana Boljević has dedicated a number of papers to this issue in the last ten years or so. It is sufficient to mention two of them, one from the beginning and one from the end of this decade period: Dragana Boljević, *Pogled na reformu sudstva u Srbiji – Ugrožena dobra rešenja (A View of Judicial Reform in Serbia – Good Solutions Endangered)*, *Pravda u tranziciji (Justice in Tradition)*, no. 12, Belgrade, 2009, The War Crimes Prosecution Office, pp. 20-23; Dragana Boljević, *Uloga sudstva u uspostavljanju pravne sigurnosti – kontroverze i preduslovi (The Role of the Judiciary in the Establishment of Legal Certainty – Controversies and Prerequisites)*, in Radmila Vasić and Ivana Krstić (eds.), *op. cit.* in footnote 1, pp. 135-159, in particular pp. 135, 137-138, 152 and on.

[4] To understand international political critisism of the existing solution it is sufficient to refer to the National Judicial Reform Strategy for the period 2013-2018. See https://www.mpravde.gov.rs/files/Na-

not only that there was no political will to call to responsibility by legal means those who had devastated the judiciary, but one gets an impression that the constitutional amendments at issue continue in the same direction – they are still devastating for judiciary. Consequently, once again those without any knowledge – elementary knowledge at least – have the political strength to regulate and "bring under control" while actually subordinating the judiciary to themselves even more. They thus undermine, in a non-enlightened and authoritarian manner, an essential human right – the right to a natural or just judge, that is to say a professional and independent judge. They also influence the views and knowledge of ordinary people and to their legal culture regarding a properly regulated state and what an independent judiciary means as one of the basic pillars of rule of law or of legal state.

For this reason we will here discuss only the fundamental aspects of the *three principles* most often mentioned by the representatives of the Ministry of Justice in the so-called public debate, referring to the citizens themselves, the people, the sovereignty of citizens and the people, legitimacy of power and the like. The claims by the representatives of the Ministry were made to justify the solutions contained in *the Working Paper on Amendments to the Constitution of the Republic of Serbia by the Ministry of Justice*, the text prepared by the Ministry itself. Since absolutely unacceptable views were consistently repeated on those occasions, and because utterly untrue opinions were taken as axioms or postulates of judiciary regulation, it is necessary to here repeat well-known scientific opinions, at once also warning of consequences, to the extent that consequences issuing from such constitutional amendments could at this point be prevented at all.

We are talking about the following three principles:

- The principle of legitimacy;
- The principle of *checks and balances*;
- And the principle of legal state, *that is to say* the principle of rule of law. The issue explained in more detail later should be mentioned and underlined straight away: We can no longer talk about the principles of *legal state* and *rule of law* as *essentially different* principles, for which reason we may in no way say that a concept of independent judiciary was appropriated to a legal state, while a different concept of independent judiciary was suitable to the rule of law. On the contrary! All relevant modern legal history speaks of these as *substantially identical* concepts or principles in the modern world *since the second half of the 20th century*: these two phrases – legal state and rule of law – are *at present synonyms* in a linguistic sense.[5]

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cionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.pdf. For critisism of the existing solutions expressed by the profession and science, in lieu of all the articles that could be potentially cited, see Dragana Boljević, *Ustavni sud Republike Srbije i pravosudna reforma (The Constitutional Court of the Republic of Serbia and Judicial Reform)*, Master Paper, Belgrade, Faculty of Law, University of Belgrade, 2016, pp. 1-132, in particular pp. 1-28 *et passim*, and the literature used therein.

[5] In respect of Anglo-Saxon idea of rule of law and its history, the best study in Serbian is still the study by Lidija R. Basta – *Anglosaksonski konstitucionalizam u teoriji i praksi – Ideja o ograničavanju i kontroli političke vlasti i njena primena u Engleskoj (Anglo-Saxon Constitutionalism in Theory and Practice – An Idea of Limitation and Control of Political Power and Its Application in England)*, Doctor Dissertation, Belgrade, Faculty of Law, University of Belgrade, 1982, and the editions in 1984 and 2012. In respect of German idea of legal state and its history within German philosophy of state and law since

Thus, following our brief note, let us proceed in order:

First, *the legitimacy of the judiciary may in no way be derived from the legitimacy of a parliamentary representative body*, which is to say from the legitimacy of the majority formed in a parliamentary representative body on the grounds of election results, i.e. a party's electoral victory or post-electoral coalition. This is elementary to such an extent that it would be superfluous to mention had the representatives of the Ministry of Justice not mentioned it consistently and vehemently in the so-called public debate claiming it must be so and that it was the only proper state of affairs.[6]

As is known – and part of elementary knowledge – there are two types of legitimacy of authorities (state, and not only of state): one – formal legal and the other – with respect to content.[7] Of course, *in a formal legal sense*, the legitimacy of *all* authorities (whether divided into three types: legislative, executive and judicial; or divided into four types: legislative, executive, judicial and constitutional-judicial; or divided into five or six types, or divided into any other types; and of non-state authorities – for example, church, school, parental and any other) *derives*, ultimately, *from the constitution in force*. However, we also know that *in fact* there are different constitutions: facade constitutions, constitutions of authoritarian systems, constitutions of democratic systems, constitutions of liberal, of non-liberal and of illiberal systems, etc.

Therefore, it is not sufficient for the judiciary to be regulated as prescribed by the constitution in force for it to be valid and give good results: an independent judiciary as a pillar of the legal state or rule of law. Why is it not sufficient?

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the times of enlightenment liberalism to national socialism, the best is the study by Edin Šarčević *Begriff und Theorie des Rechtsstaats (in der deutschen Staats- und Rechtsphilosophie) vom aufgeklärten Liberalismus bis zum Nationalsocialismus*, Dissertation, Saarbrücken, Universität Saarland, 1991, or later Leipzig edition *Universitätverlag, Auflage Leipzig*, from 1996.

[6] The conduct and outlook of the so-called public debate can also be gleaned from the reports by some daily newspapers and weeklies during 2017 and at the beginning of 2018, but they can best be reviewed from the information published on their relevant websites by invited participants: The Judges' Association of Serbia, the Prosecutors' Association of Serbia, CEPRIS, the Belgrade Centre for Human Rights, YUCOM – Lawyers' Committee for Human Rights, etc., all of which clearly show a (non) culture of dialogue, cherished by executive authorities in charge of the judiciary. In lieu of numerous references, it is sufficient to mention the most flagrant illustrations of such culture and such a dialogue. See http://www.sudije.rs/index.php/aktuelnosti/2017-09-25-10-54-45/349-2018-02- 26-09-09-41.html, and the document *The Comment of the Judges' Association of Serbia on the Working Paper on Amendments to the Constitution of RS of 8 March 2018* (in particular p. 14), http://www.sudije.rs/images/2018_03_08_Komentari_Dru%C5%A1tva_sudija_Srbije_na_Radni_tekst_amandmana.pdf, and the information by the Prosecutors' Association on events at the round table held by the Ministry of Justice in Novi Sad on 19 February 2018: http://www.uts.org.rs/aktivnosti/vesti/1440-sudije-tuzioci-advokati-napustili-javnu-raspravu-u-novom-sadu-zbog-pomocnika-ministra.

[7] Leaving aside the history of the idea of legitimacy, which reaches as far as Chinese philosophy more than a thousand years B. C., but within the frame of modern European philosophy it certainly starts at least with the appearance of ethic formalism of Kant's legal state, it is sufficient – as a mirror of *prevailing understanding of the profession of our times* – to mention one of the most cited reviews of such understanding: Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework*, *Public Law*, 1997, pp. 467-487. Craig presents various types of legitimacy, more precisely, of rule of law, stating that formal conception is held by Joseph Raz, Albert Venn Dicey and Roberto Mangaberia Unger, while in terms of contents it is held by Ronald Dworkin, Sir John Lawes and Trevor R.S. Alan, allowing for the middle way (in recent works by Raz and with Jeffrey Jowell).

This is why we are here discussing two types of state authorities: the political and professional.[8] This is the very alphabet of state and law theory, which in a modern state are the legislative and executive political authorities, while judicial authorities are professional. The legitimacy of both can in no way be the same. Both authorities are, of course, ultimately regulated by the constitution, meaning that their *formal legal* legitimacy is in the final instance the same and derives from the constitution. However, the professional bodies – meaning judicial bodies more than any other – can only have actual legitimacy *in terms of contents* in their presented, proved, controlled, controllable and tested competence.

Notoriously, there are neither single representatives nor group representative of individuals concerned, who could be *competent for all* and who could thus (possessing expertise on all issues) guarantee competence and grant legitimacy by his/her election to officials who are members of expert bodies.[9] This too falls within the alphabet of theory of legitimacy.

It is worth noting that there are a further two types of legitimacy of power, that is, state authorities: legitimacy of *constitution* and legitimacy of *acting*.[10] Legitimacy of constitution refers to the manner of formation, the formation itself, the constitution of state authorities: professional bodies should be constituted in such a manner that the procedure of their formation guarantees that the most competent persons will be the members of the bodies concerned, which means in itself that incompetent persons from political authorities may not decide on it. Political authorities are, however, constituted in such a way that the procedure of their formation guarantees

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[8] Radomir D. Lukić with Budimir Košutić, *Uvod u pravo (Introduction to Law)*, Belgrade, *Naučna knjiga*, 1975, pp. 129-131.

[9] *Loc. cit.*, and *ibidem,* pp. 126-129.

[10] Leaving aside again the history of this idea of differentiation between (il)legitimately constituted power and power that is (il)legitimately exercised, also an idea considered – with regard to (non)justification of tyrannical murder – both in Ancient Times and in the Middle Ages, and certainly at the beginning of the Modern Age (maybe the best known, in *Vindiciae contra tyrannos*, Basel, 1579), on this occasion, we find that the latest considerations should be mentioned. For example, Fritz Scharpf makes a difference between, on the one hand, *input legitimacy*, in fact, legitimacy of constitution, deriving from the one who (i. e. subject, subjects) and from what and how (i. e. criteria and procedures), which together in co-action constitute the holders of power; on the other is *output legitimacy*, in fact, legitimacy of acting, deriving from quality of results and from effectiveness of the holders of power concerned. Compare Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?,* Oxford/New York, Oxford University Press, 1999; Fritz W. Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe*, Frankfurt am Main, Campus Verlag (Publication Series of the Max Planck Institute for the Study of Societies – Book 68), 2010. Vivien Schmidt adds to those two types of legitimacies the third one, transitional type – *throughput legitimacy*, throughput – transitional legitimacy. Compare Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, *Political Studies*, Volume 61/1, March 2013, pp. 2-22. It should also indicate that Uriel Abulof makes a difference between positive legitimacy, on one side, (in fact, legitimacy of constitution), talking about the origin of legitimacy and who is *legitimator*, who identifies the other, who grants legitimacy to another, namely about the holders of power, and, on the other side, about negative legitimacy (in fact, legitimacy of acting), talking about what is legitimate, namely, about what is good and what is evil (acting) of the holders of power. Consequently, it is only about the use of different expressions to indicate the same types of legitimacy. Compare Uriel Abulof, "*Can't buy me legitimacy": the elusive stability of Mideast rentier regimes*, *Journal of International Relations and Development*, Volume 20/1, January 2017, pp. 55-79.

that the persons with the largest political support in the given society will be members of the authorities concerned, *i.e.* persons enjoying the largest political support in a given society, which is expressed in election results; or according to long-accepted tradition, for example, inheriting certain functions or positions within the state authorities; or even maybe by charisma, which may suppress two previous types of political legitimacy. Max Weber taught us about it long time ago, differentiating traditional, charismatic and rational-procedural legitimacies of holders of political power, i.e. political authorities.[11]

Indeed, legitimate constitution of professional bodies is not only constitution in compliance with the constitutional provisions of any content but constitution that will make it possible for competent persons, and for the most competent ones, to be members of professional bodies, also including the judiciary and the prosecution service of our country.

Legitimacy of acting of the state authorities means that, once they are legitimately constituted, the state authorities should continue to exercise power legitimately – in accordance with law and ethics: to exercise correctly, properly and responsibly the powers vested in them, which is provided by control of their activities and possibilities to call to responsibility if they fail to do so. It follows that legitimate acting of state authorities may not be identical within the professional bodies and the political authorities.

Control of activities of professional bodies and calling officials in charge to responsibility because they do not perform their duties correctly, properly and responsibly, i.e. in accordance with law and professional ethics, may only be conducted by the same professional bodies or by even more professional ones. This is control of legal validity, i.e. of constitutionality and legality of their activities, and this control sometimes includes control of appropriateness of such activities, as well as control of their acting in accordance with professional ethics.

Control of activities of political authorities and calling to political and political-legal responsibility of political persons for acts and jobs within their jurisdiction (i.e. for political and legal acts and decisions) may only be conducted by those who elected them to be members of the authorities concerned (people, citizens, their representative bodies, in some cases the Constitutional Court or some other body controlling constitutionality – where they exist, and in some cases some special bodies). It is political and political-legal control and responsibility.[12]

Judicial bodies as *professional* bodies must therefore have both legitimacies: legitimacy of constitution and legitimacy of acting as true *professional* bodies. They should be formed and supervised by experts in the field of the judiciary and it is only they who may properly decide on their responsibilities. For this reason, the solutions proposed in the *Working Paper on Constitutional Amendments,* according to which the Minister of Justice is a member of the High Prosecutorial Council and is in charge of initiation of proceedings for establishment of disciplinary responsi-

[11] Compare Max Weber, *Privreda i društvo (Economy and Society)*, translated by Olga and Tihomir Kostrešević, Belgrade, Prosveta, 1976, Volume I pp. 21-25, 167-238, Volume II pp. 297-396.

[12] Radomir D. Lukić with Budimir Košutić, *loc. cit.*, *passim*.

bility, or proposals for discharge of holders of judicial functions[13] – are entirely unacceptable solutions. Accordingly, consistent constitutional regulation of both types of legitimacy of judicial bodies as professional bodies of special type at the level of consistently prescribed constitutional principles, definitions and solutions in the future constitution should make it possible that in our legal reality there are both these legitimacies of judicial bodies.

With respect to the legitimacy of political authorities, in European Serbia of the 21st century, they should naturally be rational, and not charismatic or traditional in the manner of the 19th century. This rational legitimacy implies not only certain procedures but certain contents as well.

We now come to a difficult issue of relations and possible mutual influence of political authorities and professional bodies, in particular judiciary ones. We will elaborate this issue in more detail immediately upon consideration of the second principle of *checks and balances*. But first we must consider what was superficial and wrong in the so-called public debate, what was stressed most and what was most striking. Even if the issue of regulation of relations between professional judicial bodies and political authorities is raised, we mostly refer to countries with a long tradition and developed legal and political cultures. Certainly, one should always refer to the best, but this reference must not be superficial. In respect to the election of judges in the United States of America, we should say that the system of election or appointment of judges on all levels (local, in some states and federally) is very different and complicated, that it contains very different solutions, and debates related to this matter are constantly conducted.[14] Therefore, at first, we should not think that all judges in the USA are elected in the same way as the judges of the Supreme Court of the United States of America.[15] Secondly, although also important, what may be even more important, we should know that election of judges of the Supreme Court of the United States of America is not a result of mere political preferences of the President of the United States of America and the Senate. It is not so. The key issue is assessment of candidate's *competence* (unqualified, qualified,

[13] For this, see amendment VIII paragraph 3 of the *Working Text on the Amendments to the Constitution of the Republic of Serbia by the Ministry of Justice – Including Explanations (References of the Venice Commission)*: "Disciplinary proceedings and judge and court president discharge procedure may be initiated by the Minister in charge of judiciary".

See also amendment XXI paragraph 1: "The High Prosecutors' Council consists of 11 members: four deputy public prosecutors elected by public prosecutors and deputy public prosecutors, 5 distinguished lawyers elected by the National Assembly, the Supreme Public Prosecutor Office of Serbia and the Minister in charge of judiciary."

See also amendment XXIII paragraph 3: "The Minister in charge of judiciary and the Supreme Public Prosecution Office of Serbia may initiate disciplinary proceedings and procedure for discharge of public prosecutors and deputy public prosecutors, but may not take part in disciplinary proceedings or in procedure for discharge if they initiated them."

[14] Robert A. Carp, Ronald Stidham, Kenneth L. Manning, Lisa M. Holmes, *Judicial Process in America*, Los Angeles/London/New Delhi/Singapore/Washington DC, CQ Press – Sage, 2017[10].

[15] In addition to the book mentioned in footnote 14, for the Supreme Court of USA see in particular Lawrence Baum, *The Supreme Court*, Los Angeles/London/New Delhi/Singapore/Washington DC, CQ Press – Sage, 2016[12]; and for criticism of federal judiciary see Richard A. Posner, *The Federal Judiciary: Strengths and Weaknesses*, Cambridge (MA), Harvard University Press, 2017.

very qualified) provided by the *American Bar Association*, although this assessment is formally and legally neither a condition nor a proposal, and looking at it historically and factually it is not decisive either.[16] People who are the most competent in the field of judiciary are its members and, in general, the most competent in the field of law in the United States of America and they assess competence of proposed and of potential candidates in general, and in most cases the President chooses a nominee to the Senate among those, without any doubt, most competent of the most competent candidates according to his political opinion. Therefore, as a rule the President does not propose judges from those who are not in the profession, let alone contrary to the professional opinions personified in the ABA, thus possibly reflecting the President's political favours in his proposal just as mere nuances (conservative or liberal) within incontestable facts of competence. To this we add the role of mass media and public opinion, which is not externally controlled, for an understanding of how competence of candidates for judges of the Supreme Court of the United States of America prevails in relation to their political eligibility (conservative *vs.* liberal). Expected loyalty to the party (and its ideology) whose nomination and votes elect the judge should not be mentioned at all, because it would be simply incomprehensible for any judge.

Does it need saying that the *American Bar Association* (as an association of U.S. lawyers with a bar examination in the first place, and of others, and even of law students) is in no way the same as the Lawyers' Association of Serbia? A legal transplantation of this U.S. solution would have catastrophic results with us; and in general, one should be very careful with legal transplants. It would be good if the Lawyers' Association of Serbia really existed, as a true professional association of lawyers, although this issue cannot be properly raised here. The status of this non-existing professional association of ours is only a mirror of our legal (non)culture and professional (ir)responsibility. We should follow the most respectable and model ourselves on legally and politically most developed countries in Europe and in the world, but we should also first know and understand (thoroughly and not superficially) the solutions of others and have a clear awareness and knowledge that such solutions may not be transferred mechanically.

In this sense, we should also mention in brief the following two principles:

Checks and balances is the principle used most during that so-called public debate regarding the forthcoming judicial reform and specifically the *Working Paper on Constitutional Amendments* to justify direct or indirect influence of our parliamentary representative body – really the party's majority in it – on the election of judges and prosecutors in our country. However, the principle of *checks and balances* is entirely unnecessary for good organisation of power in the state. Let us explain. The principle of checks and balances (or weight and counter-weight – as it is also called) is the principle of relations between *legislative and executive powers* and it may exist, although not necessarily, in a modern democratic legal state. Necessary

[16] In addition to the books mentioned *supra* in footnotes 14 and 15, see also *American Bar Association* (in particular, Section *Rating of Judicial Nominees*), https://en.wikipedia.org/wiki/American_Bar_Association.

to such a state is the de-concentration of power, i.e. *division of powers* into (at least) three technically separate parts: legislative, executive and judicial, and among those (minimally) three technically separate powers there needs to be an *independent judiciary*.[17] That is why it should be stressed that an independent judiciary is more than a principle of organisation of power: it is an *axiom* of the modern state. Independence of the judiciary does not exist in a pre-modern state as a request for good organisation of state authorities – not even at the level of principle, let alone as an axiom. If we look at ancient, medieval and modern states, we notice that independence of judiciary appears only in a modern state as an axiom of good organisation of state authorities. However, the relation between legislative and executive powers may also be very different in a modern state: it may be organised as presidential, semi-presidential, parliamentary, assembly system or as some version or sub-version of these.[18] However, the relation between legislative and executive powers is organised on the principle of *checks and balances* only in presidential, semi-presidential and parliamentary systems, as well as in their various sub-versions, while in assembly systems and in their various sub-versions it is not the case: there the relation between legislative and executive powers *is not* organized on the principle of *checks and balances.* On the contrary, there is clear supremacy of legislative parliamentary representative body in relation to executive power. This is often overlooked, and U.S. college professors, theorists and practitioners lose sight of the Swiss model in particular.[19]

Switzerland is a country in which the relation between legislative and executive powers *is not* organised on the principle of *checks and balances*. Switzerland has an independent judiciary. It is a legal state, there is rule of law, there is democracy, and of course, it is a modern democracy. It is a country of constitutional democracy. This country is exemplary in all respects but it is not organised on the principle of *checks and balances*. In the relation between executive and legislative powers in Switzerland there is clear supremacy of representative body in relation to executive power. This does not hinder the rule of law in Switzerland a bit. Why? Because there is an independent judiciary. This axiom is followed, set out and accomplished, and not the principle of *checks and balances*.

Third and final, the legal state and rule of law. As is known, these two ideas (legal state as a German idea and rule of law as an Anglo-American idea), which occurred and were theoretically shaped in the 19th century, were different in content.[20] How-

[17] See basic data on this in Radomir D. Lukić with Budimir Košutić, *op. cit.*, pp. 183-197, in particular pp. 185-192.

[18] See basic data on this in Ratko Marković, *Constitutional Law*, Belgrade, Faculty of Law, University of Belgrade, 2013[18], pp. 176-207.

[19] In addition to above mentioned books *supra* in footnotes 17 and 18, see also still relevant in Miodrag Jovičić, *Veliki ustavni sistemi: Elementi za jedno uporedno ustavno parvo (Great Constitutional Systems: Elements for Comparative Law),* Belgrade, Svetozar Marković, 1984, pp. 179-214. See also Thomas Fleiner & Lidija Basta Fleiner, *Allgemeine Staatslehre: Über die konstitutionelle Demokratie in einer multikulturellen globalisierten Welt*, Berlin/Heidelberg/New York/Hongkong/London/Mailand/Paris/Tokyo, Springer, 2004[3]; Thomas Fleiner & Lidija Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World*, Berlin/Heidelberg, 2009.

[20] See the books mentioned *supra* in footnote 5.

ever, after World War II and the experience with Nazism, those two principles of state and society legal organisation have converged, coming closer to each other and now have identical contents. To explain it in the simplest possible way, if we consult legal dictionaries today and look up how the contents of ideas of legal state and rule of law are defined, if we look at elementary definitions of notions of legal state and rule of law in the textbooks for beginners today, we will see that there is no essential difference between them.[21] If we took the view that they are still today, as before World War II, two different principles of legal state organisation, i.e. governmentality as exercise of power, and that they therefore differ in their contents, with one principle of independent judiciary suitable to a legal state and another independent judiciary suitable to rule of law, then we must also accept the view that Nazi Germany, Germany of the Third Reich, was certainly one of the most legal states in the world, if not the most legal one of all, because everything was done according to law: no concentration camp was built without a plan and a building permit, all confiscated property and all the burning, killing, suffocating – everything was done according to laws and other applicable regulations and all was meticulously noted. Certainly, this is not and may not anywhere be an idea of legal state at the beginning of the 21st century, and in particular not in Europe and in Serbia. We have learned from the experience of others and from our own experience that a legal state and rule of law have today essentially identical contents and it must be so in future. We have also learned that an independent judiciary is the main pillar of a legal state, i.e. of the rule of law.

Since the judiciary and the prosecutor's office are professional bodies, the competence of persons to be their members and the expertise of their already performed jobs may only be decided on, i.e. be professionally appraised by competent lawyers, and not by political persons, outsiders, non-lawyers. Wherever competence is required, decision-making based on the principle of majority, whatever the majority may be (including unanimity), cannot guarantee and ensure that the decisions are *right* if the body to adopt a decision is not composed of persons having *appropriate competence*. Thus, the proposed amendments to the composition of the High Judicial Council, the High Prosecutorial Council and the Supreme Public Prosecution Office of Serbia[22] are not acceptable. In any case, as is well known, even the principle

[21] Instead of many others, see Matthias Koetter, *Rechtsstaat* and *Rechtsstaatlichkeit* in Germany, https://wikis.fu-berlin.de/display/SBprojectrol/Germany, 6 December 2013, and, as the most important, recent (1969-2009), primarily but not exclusively German literature on the subject.

[22] See amendment I paragraph 2 points 2 and 3 of the *Working Paper*: "[… the National Assembly …] shall elect and discharge judges of the Constitutional Court; 3. It shall elect and discharge the Supreme Public Prosecutor of Serbia, five members of the High Judicial Council and five judges of the High Prosecutorial Council…"

In addition, see amendment II paragraph 2 point 11: "[… the National Assembly …] shall elect judges of the Constitutional Court and decide on their discharge and termination of their terms of offices…"

Also, see amendment II paragraph 4: "By the majority of three fifths of votes of all deputies the National Assembly shall elect five members of the High Judicial Council, the High Prosecutorial Council and the High Prosecution Office of Serbia, and if they are not to be elected this way, they shall be elected within the following 10 days by the majority of five ninths of votes of all deputies, and they shall also be discharged from their duties by the same majority."

of modern democracy cannot be reduced to the principle of majority, the principle of rule of majority, but must – in order to be different from ochlocracy, populism and other apparently democratic but in essence authoritative systems – also have its own substantial elements and designation. This also falls within the alphabet of good organisation of state.

Finally, there is the issue of legal competence, i.e. of lawyers' competence. By nature, this opens unavoidably the issue of education and knowledge of lawyers, both elementary, gained at the faculty (acquired by all members of the legal community), and of professional expertise guaranteed by the bar exam (acquired by members of the qualified legal community), as well as the highest professional judicial education of lawyers. Provided all things are as they should be in this field (although it is obvious they are not – which does not mitigate responsibility of lawyers for the conditions of their profession on all levels), the Judicial Academy shouldn't be the only way in the formation of members of the legal community with the highest legal expertise. And also contrary to the *Working Paper on Amendments*, it is well-established that Judicial Academy in no way falls under *materia constitutionis* – constitutional matters.

Law professors, as a special competent part of the legal community in our country, a part that is for this reason specifically responsible for the present conditions in both our legal community and in our legal system, but also judges and prosecutors and attorneys-at-law, have already committed numerous oversights[23] and have tac-

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The provision contained in amendment VII paragraph 2 is particularly interesting: "The same person may not be elected twice to the position of President of the Supreme Court of Serbia."

Clear intention of executive power, as an expression of political majority at the parliamentary representative body, to accomplish supremacy over judiciary may also be noted in amendment VIII paragraphs 2 and 3:

„The High Judicial Council shall elect and discharge from duty the President of the Supreme Court of Serbia and the presidents of other courts, elect judges and lay-judges and decide on termination of their functions, collect statistical data of importance for activities of judges, assess activities of judges and presidents of courts, decide on transfer and temporal assignment of judges, appoint and discharge from duty the members of disciplinary bodies, determine the number of judges and lay-judges, propose to the Government the funds for activities of courts for activities within its jurisdiction and decide on other issues related to positions of judges, presidents of courts and lay-judges as prescribed by law.

Disciplinary proceedings and procedure for discharge of judges and presidents of courts may be initiated by the Minister in charge of judiciary."

Although it is nomotechnically wrong and bad to repeat normative solutions within the same document, the Ministry of Justice has been repeating in the *Working Paper* it wishes to confirm supremacy of executive power over judiciary by repetition of content of paragraph 4 of amendment II and again in amendment IX paragraph 2: „The National Assembly shall elect five members of the High Judicial Council under a motion of the competent board of the National Assembly upon the completion of public announcement by votes of three fifths of all deputies, and if this is not the case, all the elected shall be elected within the next 10 days by votes of five ninths of all deputies. Otherwise, electoral procedure shall be repeated after 15 days for the number of members that had not been elected."

Failures and solutions contained in the following amendments are the same: amendment X paragraph 2; amendment XI paragraph 2; amendment XII paragraph 1; amendment XV paragraph 1; amendment XVII paragraphs 1 and 2; amendment XVIII paragraph 3; amendment XIX paragraph 2; amendment XXI paragraphs 1 and 2; amendment XXII paragraph 2; amendment XXIII paragraphs 1 and 3.

[23] For responsibility of lawyers for non-reacting to the conditions, events and proposals of solutions in the legal system, and for rare examples of reactions by the profession, see Jasminka Hasan-

itly agreed to numerous phenomena that should have been problematized. For example, a judge from our country with the Court in Strasbourg, in fact, the person who is to decide at the last instance whether human rights of individuals have been violated in our country, is someone who has not passed the bar exam and who could therefore not be a judge in our country.

Consequently, the most competent lawyers in our country bear particular responsibility for the legal constitution of our country as a modern democratic country with the rule of law. For this reason, participation in the public debate on the *Working Paper on Amendments* is a matter of professional responsibility, honour, knowledge, conscience and integrity, an obligation to react in respect of solutions that are obviously contrary to basic legal knowledge. In another example why the document called the *Working Paper on Amendments to the Constitution of the Republic of Serbia by the Ministry of Justice* should not legally be named this is that amendments to the constitution require the Government, and not only the Ministry of Justice, to adopt a decision regarding this question, followed by initiation of the relevant procedure, which is also missing. Thus, the Venice Commission will be misled concerning the formal legal nature of this Paper, on top of the opposition to its contents from the legal profession in Serbia. Yet, even worse than all this ignorance is the intention in this way to "push through" these amendments concerning the judiciary. Irrespective of the cause (ignorance or intention), the consequences to the judiciary and rule of law in Serbia will either way be ominous.

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begović, *Poslednjih dvadesetak godina demokratske tranzicije u okviru nešto više od dva veka modernizacije u Srbiji: Bilans bez perspektive (Some Last 20 Years of Democratic Transition within the Framwork of Slightly Over Two Centuries of Modernisation in Serbia: Reckoning without Perspective)*, *supra* in footnote 1, in particular pp. 123-129, 136-142, see also Jasminka Hasanbegović, *Pravna sigurnost u Srbiji u uslovima takozvane reforme pravosuđa i briselskog Sporazuma iz 2013 (Legal Certainty in Serbia under the Conditions of the So-Called Judicial Reform and the 2013 Brussels Agreement)*, *supra* also in footnote 1, in particular pp. 110-120.

Professor Tanasije Marinković, Ph.D.*

LAW WITHIN THE BOUNDS OF POLITICS – DO THE CONSTITUTIONAL AMENDMENTS ABOLISH THE RIGHT OF JUDGE TO INDEPENDENT CONVICTION?

The wave of populism is spreading across Europe. It has not missed the old Europe, and it is particularly powerful in young democracies, Serbia being one of them.

What is common to such diversified political actors like Nigel Farage and Marine le Pen, Viktor Orban and Jaroslav Katczinsky, Vladimir Putin and Recep Tayyip Erdogan are anti-elitism, anti-pluralism and the specific identity politics. Populists see the people as a holistic phenomenon and themselves as their exclusive interpreters. Therefore, they juxtapose a morally clean and totally unified (imaginary) people to allegedly morally, or otherwise, inferior elites (J.-B. Miller). Glorifying the sovereignty of the People, the populists despise institutions and mechanisms that enable their interaction. When they catch hold of power, they either discard or accept constitutionalism, calculatingly – as it suits themselves. Hence, the rule of law is criticized as an obstacle to the political unity of the People. The separation of powers and its prerequisite – judicial independence is seen as redundant and odd. The Constitution serves to preserve collectivity – the true political will of the People, and human rights are not only marginal but also dubious (P. Blocker). Politics is to limit the law, and not the other way round, as is the tradition of liberal constitutionalism since the Magna Carta Libertatum (1215).

Populist crack down on judges in Serbia

Populist constitutionalism is largely at work in Hungary and Poland. The constitutional and legislative changes in these countries, which violate judicial independence while calling to national sovereignty met with the condemnation of the Council of Europe and the European Union. Serbia treads this path too. This was seen, among other things, in the populist rhetoric of the prominent members of the ruling SNS party in the consultations on constitutional changes concerning the judiciary that the Ministry of Justice organised in the second half of last year. Thus, the president of the SNS party caucus Aleksandar Martinovic warns that "the idea to exclude the parliament and government from the procedure of election of judges and prosecutors" is very dangerous. Judgments are passed "in the name of the people", and if we totally exclude […] the National Assembly, which is the expression of the sovereignty of the people, we […] are going to another extreme, and

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that is […] to have a system that is functioning on its own and has no connections with the other two branches – the legislative and executive". Member of Parliament Vladimir Djukanovic even predicts a chaos if the judges elected themselves: "Just imagine allowing them to elect themselves; the rumours and frame-ups they would make; the chaos that would create; there has to be some sort of control in that election […]. Parliament represents the citizens; these judges are trying the same citizens, […], you cannot simply absolutely separate judges from the citizens and make them a kind of caste […]. I am in favour of keeping the election of judges with the parliament […] to avoid creating one more chaotic situation." However, one who went furthest with populist rhetoric was Advisor to the Minister of Justice Zoran Balinovac by saying that judicial independence is fetishism: "Judicial independence has become a myth, an ideological phrase […] and to touch a judge is to violate independence – that is simply not true! […] I have not heard a judge using the word 'responsibility', and I have not heard the citizens' representatives who came forward [and spoke in the consultations, *author's note*] speaking about independence, but just about responsibility. What are we speaking about then? We are speaking about struggling for power".

That these statements of members of parliament and advisers to the ruling party are not just isolated cases could quickly be seen by the reactions of the President of the Republic and the Prime Minister after a salvo of insults that Milos Vucevic fired against judges end of last year. The high official of the SNS party and Mayor of Novi Sad addressed the judges in the wake of the first-instance acquitting judgment for former minister Predrag Bubalo, saying the following: "Ladies and gentlemen judges, I am asking you what the people of Serbia are wondering every day: when will you start to adjudicate pursuant to the laws of the Republic of Serbia, the law and justice, and not by the sum of money you are getting from proven "DoS" thieves[1]. Ladies and gentlemen judges, I would say "honourable", but my honour and our people do not allow me, because how can you be honoured if you are acquitting biggest thieves of their obvious guilt and fooling around with the people?" Instead of condemning his words, or at least refraining from further undermining of the authority and impartiality of the judiciary, Ana Brnabic directly backed him up: "I can understand Milos Vucevic, I called him this morning; I can fully understand the frustration; I think it is another sign we are in need of reforms in the judiciary". Never mind that the Code of Ethics for members of the government explicitly forbids the members to express opinions which violate the authority and impartiality of the court and prejudice outcome of the proceedings. Although the Code was passed at the time he presided the government, and although the Constitution on which he took an oath forbids "any influence over a judge in performing judgeship", Aleksandar Vucic could not help joining the campaign against the judges. He agreed that the Mayor had said the truth, adding that: "Now they are telling us that no one is guilty for crooked privatisations; that no one made themselves rich taking advantage of the people, and that those who pocketed millions of euros are now clean".

[1] (*translator's note*: Democratic Opposition of Serbia, who were in power before the SNS party).

Repercussions of the Amendments

The populist rhetoric was an intro for the working draft of Amendments to the Constitution that the Ministry publicised early this year. This text announces mechanisms to serve for direct suppression of substantive independence of judges – for putting the law under the thumb of politics. It is an apparently harmless and casual provision saying that "Harmonization of case law is governed by the law." Still, the position of this provision in the Draft Amendments and all that preceded its inclusion in the text clearly show that its purpose is to abolish the "independent conviction of a judge". Let's see what happens.

Substantive independence of a judge is reflected in the actions a judge takes in applying the law guided exclusively by the constitution and their own conscience. The law and only the law as defined by legislative bodies designated under the constitution and as a judge comprehends it in the collective consciousness of the community is the judge's only master (K. Lowenstein). It ensues that "independence reflects not only the relationship of the person who is judging another person, but also themselves. Outside, a judge has no other authority but the law. Inside, a judge is "his/her own judge": they measure and judge by their own conscience, conviction, knowledge and consciousness" (J. Djordjevic).

These are the common places of the theory and practice of constitutional law of modern states. Also, the standards of the Council of Europe, well known to the Ministry, explicitly say that "judges […] should have full freedom to impartially, in accordance with the law and their own interpretation of the facts, take decisions in the cases".

Nevertheless, during the consultations we could hear that "independent conviction of a judge" is a fad of Kardelj's[2] constitutional tradition. In caricaturing this category, Assistant Minister Cedomir Backovic says that in order to avoid that "defenders of the constitution could say ‚no, I have an absolute right to adjudicate as I wish', because this is what the philosophical category of independent conviction means, which, by the way, does not exist anywhere in the world […] we have come up to where we ask you to put something like that in the constitution and avoid that, for instance, article 149 [*author's note* : substantive independence of a judge] be used as a justification of the right to try as you like. […] Hence, […] does our constitution allow for the harmonization of the case law or prevent it, and should it, in that regard, be amended?"

What Mr. Backovic announced with this rhetoric, he also materialised by including in the draft Amendments that "Harmonization of case law is governed by the law", next to the provision which quotes the sources of judicial decisions: "A judge is independent and shall adjudicate pursuant to the Constitution, ratified international agreements, the law and other general acts".

Although it is unknown at the moment how the harmonisation of the case law will look like, much of it can be assumed. In the consultations and in the solutions

[2] Edvard Kardelj was a federal political leader in socialist Yugoslavia. He is considered the main creator of the Yugoslav system of workers' self-management.

contained in the Draft, the Ministry heavily relied upon the proposals of an NGO advocating that the case law be a source of law. In light of constant, sweeping qualifications coming from the assistant minister about the incompetence of the judges, it is likely that an indirect constitutionalisation of the case law as a source of law will lead to elimination of the independent conviction of a judge and thus to annulment of substantive independence of a judge. Moreover, by the Judicial Reform Action Plan, the government foresees a "Certification Commission" whose task is "to deal with certification of judgements and thus establish the case law". Also, in the Chapter 23 Action Plan, the National Assembly announces "changing the regulatory framework" in order to introduce "bounding case law".

Lessons of Constitutional Law

Our Constitution guarantees for a liberal democracy in the first article and provides for it throughout the text. This type of political system combines the rule of a democratic majority with the human rights values and thus strikes a balance between two frequently opposed principles – national sovereignty and limited power. Institutional dimension of the liberal component is primarily embodied in the autonomy and independence of the judicial branch, which protects human rights from assaults of the majority. Populists behave instrumentally not only *vis a vis* human rights and the mechanisms of their protection, but also *vis a vis* the will of a democratic majority which they seemingly glorify. It is true that they often use the moto "it is important what my people say", but they also do not fail to, first, by manipulating the media, serve to "their people" what to say.

Judge's function, even if only an act of application, and not also creation of the law, which it certainly is, to an extent, can and has to be subject to social control. Besides, the rule of law in its essence, calls for publicity of trial. This means competent monitoring and commenting on judicial cases and decisions. Public criticism of the judiciary is therefore woven into liberal democracy. However, due to fragility of the judicial branch compared to other two branches, the executive and the legislative could only exceptionally and extremely cautiously dare criticise the judiciary, and the codes of ethics of members of parliament and ministers on permissibility of commenting court proceedings draw clear boundaries in that regard.

Back in late 18th century, Alexander Hamilton explained that the judiciary, unlike the two other branches, has neither the sword nor the money in their hands. The strength of judges derives from their institutional legitimacy, which relies on the way judgements are passed and reasoned. Inconsistency of the case law is a serious problem of our justice system and truly violates the equality of citizens. The decisions of the ECHR against Serbia illustrate this. Still, it does not mean that the case law may be harmonised by certificates, decrees and similar measures, no matter whether they are integrated in the Constitution or not. If one can compare something with "Kardelj's constitutionality", or if there is something to overshadow it by creative imagination, then it is this grotesque attempt to unify the two major justice systems – the Euro-continental and the common law system by one provision in the Constitution.

Professor Vesna Rakić-Vodinelić, Ph.D.*

LEGAL AND POLITICAL GOALS OF CONSTITUTIONAL AMENDMENTS ON JUDICIARY

If there's ever more time in debates like this, one couldn't help but wonder why the state of Serbia had decided to amend the constitutional provisions on the judiciary in the first place. I don't believe it's wrong to say that it simply had to – yielding to external pressures, and making good on the promises given during the talks the state had completed before Chapters 23 and 24 were opened and the accession negotiations with the European Union (EU) continued, not to mention the requirements Serbia needs to meet for the chapters to be closed and the talks concluded. As a result, the text of the constitutional amendments looks more like a half-hearted and unsuccessful attempt at maintaining the status quo than a burst of constitutional energy by a society keen on achieving judicial independence.

This thesis can be proven empirically (however rare this might be in the creation of law). My arguments are based on four important groups of facts, arising from 1) preparations for the so-called working version of the draft amendments on the judiciary (hereinafter: the Draft) 2) specific solutions for high councils; 3) the way the rationales have been presented for the solutions suggested in the Draft, and 4) the absence of any indication as to the contents of the constitutional law for the implementation of the amendments.

1) Preparations for Drafting the Amendments on the Judiciary

Even before the draft constitutional amendments on the judiciary were publicized, there had been plenty of signals that the Ministry of Justice didn't have a clear understanding of the improvements the existing judicial system required, even though the goals and, to a degree, the means, too, had been in place since 2013, when the National Assembly passed the *National Judicial Reform Strategy 2013-2018* (hereinafter: the Strategy). Shortly before the Draft was published, the strategic goals and measures had been challenged in largely political comments, criticizing the principle of the separation of state powers. The Strategy was criticized for not being a source of law, which no one denied, but the criticism undermined commitment to the strategic goals and the methods of their realization. As it turns out, the Ministry of Justice feels that the constitutional amendments on the judiciary should be degraded to a mere declaration of principles of the independence of judiciary and judges, while the major novelties should be used to generate the bodies to elect judges and public prosecutors, diminishing constitutional guarantees of their position, non-transferability in the first place.

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The strategic goal of shielding the election, promotion and responsibility of judges and prosecutors, as well as the termination of their office, against the influence of politics, politicians, political parties and state officials – remains unfulfilled. It's not important any more if it's because it was never meant to be, or because the Draft failed to communicate the intent of reforming the sector. What does matter, however, is not to turn a blind eye to the serous signs that the fundamental idea was to formally implement recommendations from the European institutions dealing with judicial independence, while keeping the position of judicial and prosecutorial offices as dependent as it is today, but not only today.

Below are some of the signs:

The Ministry of Justice opened a public debate, but had failed to offer any text, ideas or theses of its own. During the debate, the ministry ignored the findings and conclusions of its own working groups. It was a fictive debate, and the ministry acted as if professional associations and non-government organizations hadn't prepared and offered their own constitutional drafts for discussion. As the process neared the finish line, it was clear the ministry was favoring only one idea, publishing it in the Draft. The ministry's advisors and civil servants didn't hesitate to confront the professional community with improper arguments, judges in particular.[1]

The unconvincing debate triggered a string of political accusations. In a comment on a specific first-instance verdict, the mayor of Novi Sad, speaking "as a citizen, and as a lawyer," accused judges of corruption and thievery. The President of the Republic, too, has made some serious comments against the judiciary and judges recently, judging them on political criteria only. It might have seemed to an untrained ear that he was accepting the criticism of the national judiciary, largely coming from the European Commission. He said he agreed with the remark from Brussels that Serbia's judiciary was inefficient and exposed to political influence, but insisted it was the problem Serbia had inherited.[2] True, political pressure on the judiciary exists, more open and ruthless than under previous governments, some would say "brutal" even. The previous cabinet did try to fake a judicial reform through the general election and re-election of judges and prosecutors from 2009 to 2012, but failed – owing to the (then) free media rather than the opposition, the incumbent president was a member of at the time. It is not true that only the "appointees of the Democratic Party"[3] can try and prosecute in Serbia today. The President of the Re-

[1] Report on the Reasons for Leaving the Debate: See: https://www.danas.rs/drustvo/civilni-sektor-zeli-konkretne-predloge/.

[2] In the same comment, he said: "When one political party, the Democratic Party, appoints all judges and all prosecutors in an ostensible judicial reform, it's only logical to have such problems. After all, you've heard that Jeremic's party has appointed Miskovic's private judge a vice-president, or a senior official today. It's a case of evident, even brutal political influence, and I can't but agree with the people from Europe, while I'm also confident that's also what they referred to," Vucic said to reporters. The president admitting to the existence of "brutal political influence" notwithstanding, the argument as to where it comes from is open to question.

[3] The judge the President of the Republic refers to is a former judge, Vladimir Vucinic. Vucinic was no longer a judge long before the president's statement, thanks to the influence of none other but today' ruling political officials, as well as the "high councils," "presidents of courts" and various other "independent and autonomous" judicial institutions, eternally loyal to them, and to all their predecessors for that matter. It's not true that Vucinic has ever been "Miskovic's private judge." He worked in strict

public has failed to mention a very important decision by the Constitutional Court of Serbia, passed back at the end of 2011, when judicial institutions were ordered to re-install to office all the judges and prosecutors that had been elected earlier, adhering to the procedure prescribed by the law. He also didn't say that they actually got their jobs back, under the then presidents of judicial bodies (one in office today), under a dominant influence by the then justice minister, a prominent member of his own party. In today's Serbia, those who "owe nothing" to the Democrats can try and prosecute as well. Another thing that's forgotten today is that nearly all the judges and prosecutors elected earlier did get back to the courts and prosecution offices, but *not in accordance with the procedure laid down by the law*, so the judicial authorities happened to elect to office the candidates who had been convicted by final judgment for the criminal acts that can't possibly be tolerated to any candidate for judicial office. It's all done before, and should be done again, under the incumbent government.

Yet there is a crucial standard that no one has been able to contest, either in Serbia or elsewhere - the executive political authorities constitute the most dangerous and most effective source of pressure on the judiciary – particularly those in power while pressure is exerted, i.e. the *incumbent government*.[4]

Item 18 of the Recommendation CM/Rec (2010)12 of the Committee of Ministers says:

"If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decision, other than stating their intention to appeal."

Aside from the generic achievements, boiling down to the independence of judiciary and the effective third power, i.e. legal authority over political, one might expect a constitutional judicial reform to respond to some specific needs of the given society. As for Serbia, the specific needs include a judicial response to different forms of corruption in all branches of power – executive, legislative and judicial,[5] the burden of war it has inherited,[6] and the revitalization of human rights in everyday life and in legal contexts alike.[7]

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compliance with the law, and it was only after he had decided not to be a judge any more that he received judicial satisfaction, which has a moral value rather than legal, as it arrived when no one, except for the former judge, cared any more. He had left his courtroom before that. One more thing – it wasn't *a judge* who was appointed "a senior official in Jeremic's party," but Mr. Vucinic, a *lawyer*.

[4] The President of the Republic has also allowed himself to play the roles of a judge and a prosecutor, saying that "we" prepared the indictment that has failed to produce the conviction he expected, and it was only the bad timing he has criticized the said "citizen and lawyer" for.

[5] It was actually the duty of the state under the National Anti-Corruption Strategy 2013-2018, which was passed in 2013, and published in the Official Gazette of the Republic of Serbia No. 57/2013.

[6] The obligation arises from the National Strategy for the Prosecution of War Crimes, passed by the Serbian government in 2016, and published in the Official Gazette of the Republic of Serbia No. 19/2016.

[7] There is no comprehensive strategy for the development of human rights, but there are a few partial strategic documents adopted by the Serbian government, namely, the 2010 Strategy for Personal Data Protection, the 2010 Strategy for Improvement of the Status of Roma, the 2010 Strategy for Free Legal Aid System Development in the Republic of Serbia, etc.

Serbia endorsed the National Judicial Reform Strategy for a period between 2013 and 2018. The Strategy was passed by the National Assembly, and most of the MPs were members of today's ruling party. The strategic goals were edited in a way typical of countries in transition, under the obvious influence of recommendations by the Committee of Ministers of the Council of Europe (CoE), the European Commission and the Venice Commission. The action plan that came in the wake of the Strategy provided for tentative deadlines, which, when constitutional amendments on the judiciary are concerned, came and went.

The Ministry of Justice, in charge of outlining the constitutional change in a draft, set up two working groups. One of them, called the *Working Group for Analysis of Amendments to the Constitutional Framework for the Judiciary* was established in 2014. The group decided at its first session to analyze the existing constitutional provisions on the judiciary first, and then to create new ones, presenting them in the form of a constitutional text.

The analysis was completed, and published on the Ministry of Justice website.[8] Criticizing the constitutional stipulations on judiciary provided by the 2016 Constitution, the working group found any of them contrary to the recommendations of the CoE Committee of Ministers, the standards voiced in the decisions of the European Court of Human Rights, the documents issued by the Venice Commission, etc. describing them as systemically unorganized, and the like.

The state, acting through the Ministry of Justice, also set up the *Working Group for the Guidelines for the Reform and Development of the Judicial Academy.* In its *Guidelines* and *Recommendations*, and the minutes show that at the sessions, too, the working group was very critical of the development of the Academy. At some point, the two groups agreed that the Judicial Academy should not be considered a constitutional category, or be included in the Constitution, especially not under the same name.[9]

Having published their respective research, the two groups stopped working, and, as the ministry's website shows, nothing has happened since. The *Working Group for the Analysis of Amendments to the Constitution Framework for the Judiciary* should have produced amendments on the judiciary in the form of a constitutional text, but it's never done the job, and no public explanation has been offered for the failure to do so. One of the comments by the Minister of Justice suggests that the draft version of the constitutional amendments was prepared by the ministry's staff, which means it wasn't the group as such. The careful reader would notice, however, that the working version of the amendments was largely based on the ideas that a new organization, the Rule of Law Academy Network,[10] had shared in the public debate organized by the Ministry of Justice. Clearly this impairs the cred-

[8] Published on the Ministry of Justice website /www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php.

[9] Published on the Ministry of Justice website https://www.mpravde.gov.rs/tekst/5868/radna-grupa-za-izradu-smernica-za-reformisanje-i-razvoj-pravosudne-akademije.php; See Pravna analiza ustavnog okvira o pravosuđu u Republici Srbiji, page 5, for more about the argument that the Judicial Academy should not be a constitutional category.

[10] The Rule of Law Academy Network (ROLAN).

ibility of the justice minister's words that the draft was made in the Ministry, by its staff, unless they worked for the Academy Network,[11] or vice-versa.

In a word, the preparation procedure for the review of constitutional amendments on the judiciary had been impromptu, rather than based on a carefully planned agenda; deadlines were missed and strategic and action documents disregarded, while the work of the very same bodies the state had established (the working groups) was hindered.

2) **The Draft Version of Constitutional Amendments on the Judiciary – High Councils**

a) *Previous issues*

The preparations described above couldn't possibly produce a well-thought-out text of the constitutional amendments. Instead of improving the declared independence and autonomy of judges and judiciary, the amendments have diminished them, unable to establish the judiciary as the third branch of government; not only have they filed to reduce the influence of political state bodies, but increased it instead (that of the National Assembly in particular); the amendments have once again betrayed the idea of reform as a positive social change, underestimating the basic knowledge of constitutionalism and judiciary. More than ever before, the amendments are designed to subjugate the citizens.

Many government officials and civil servants would argue that the National Assembly, is "pulling back" from the judiciary as a political body. This argument is one of the important objectives of the 2013-2015 National Judicial Reform Strategy, but the draft amendments do fail to reflect the importance.

It's noteworthy that neither in any of the strategic documents, nor the draft versions of the constitutional amendments to shape the judiciary - including the justice ministry's and those authored by non-governmental organizations and political parties alike – anyone would go so far as to ask this: Does Serbia need both the High Judicial Council and the State Prosecutorial Council? These two councils are a new legacy, and not a positive one. The system involving two councils was established by the 2006 Constitution, and there never was a proper explanation why there should be two judicial councils – one for judges, the other for prosecutors. Under the 2001 law, we had only one, the High Judicial Council.

The arguments in favor of a single council are not at all insignificant.

First, Serbia is a small country, and even the much bigger ones, whose judicial councils were the inspiration behind the establishment of such bodies in nearly all European states after the fall of the Berlin Wall, have a single judicial council. Even though the number of judges per 100,000 inhabitants is fairly high in Serbia, when compared to other European states,[12] the total number of judges, magistrates in-

[11] The ROLAN's suggestions as to how to edit the constitutional amendments on the judiciary are available on the website of the Office for Cooperation with Civil Society: https://www.civilnodrustvo.gov.rs/vest/konsultacije-u-vezi-sa-izmenom-ustava-republike-srbije-u-delu-koji-se-odnosi-na-pravosu%C4%91e.37.html?newsId=829.

[12] The CEPEJ statistics (https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, page 161) say that in 2012 Serbia recorded 40.5 judges per 100,000 inhabitants. The European average was 19.7 (page 159).

cluded, oscillates around 3,000. According to a report by the European Commission for the Efficiency of Justice (CEPEJ), the number of public prosecutors and their deputies was 1088 in 2012.[13] They are not elected, promoted, dismissed or launched disciplinary action against every day.

Following reforms in criminal proceedings, the positions of judges and public prosecutors are much closer now – prosecutorial investigation has replaced judicial investigation, and many of the powers of the investigating judge have been transferred to the public prosecutor. For the reform to work, they should have been granted not only autonomy, but independence, too, and the new amendments have done the opposite.

The practice of the European Court of Human Rights shows that the right to a fair trial involves control of the work of prosecutors during an investigation, providing many substantial and systemic reasons for strengthening their independence.[14]

In the end, it's only logical, and prudent, to place the professional development of judges and prosecutors under the control of a single judicial council, as the requirements of the profession are very similar. The CEPEJ reports that in 2012 general training of judges and prosecutors in courts or prosecution offices was mandatory in 18 states, members of the Council of Europe. Serbia was one of them at the time.[15] There's a standard established for this type of training that it has to be controlled by a body independent from the executive and legislative branches of power, largely composed of judges and/or prosecutors.[16] According to the 2012 CEPEJ evaluation, Serbia owned an institution for the initial and continuous training of judges and prosecutors (the Academy), offering no qualification as to its mandatory character.[17]

b) *Composition and Generation of High Councils*

According to the Draft, the new High Judicial Council should have 10 members. As opposed to the existing constitutional solution, there are no ex officio members, which is the only advantage of the Draft. Everything else is less favorable for the independence of judges compared to what the Constitution offers.

Five members of the Council are the judges elected by judges themselves, and the remaining five are the so-called prominent lawyers, elected by the National Assembly. The president of the High Judicial Council cannot be a judge, but rather "a prominent lawyer," Under the Constitution, the number of judges exceeds the number of other members of the Council, and the president of the Council is a judge – the president of the Supreme Court of Cassation. The Draft suggests that the vote of

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[13] In other words, there were 15.1 prosecutors and their deputies per 100,000 inhabitants, against the mean figure of 11.7 (CEPEJ). https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, str. 293.

[14] The position, taken as far back as 1989, has survived to date. For more arguments see the leading decisions in the cases *Imbrioscia* v. Switzerland, No 13972/1989 and Vera Fernandez-Huidobro, No 74181/2001.

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[16] CEPEJ, https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, str. 292.

[17] CEPEJ, https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, str. 295.

the president of the Council (who is not a judge) is worth double – if a split vote occurs, the judges can never be in the majority. The conclusion is that if the number of votes counts, and not the number of members (which is not always relevant for a decision), it is the members elected by the *National Assembly* that constitute a majority in the Council.

The CoE Committee of Ministers suggests the following in Item 27 of the Recommendation CM/Rec (2010)12, (allegedly used in the Draft):

„Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary, and with respect for pluralism inside the judiciary."

In a word, this is supposedly a constitutional method to "pull back the parliament from the election of judges," our way. A well-calculated one though, as there are no ex officio members imposed by the Constitution (which has been the target of severe criticism), and the National Assembly does not elect all members, as judges elect the judges (the election of the entire Council, too, has been strongly criticized by the parliament). The presidents of courts cannot be members of the High Judicial Council. All wrapped up in a neat little package, but the result is *a certain dominant influence* by the National Assembly over the work of the High Council, which, at least in theory, could have been *uncertain* until today.

A group of important powers of the High Judicial Council includes the election and promotion of judges, disciplinary liability and dismissal. In other words, the National Assembly will have a decisive say over who can be a judge, and where – a *certainly* decisive say at that.

The question is how I can be so sure, knowing that the National Assembly elects the *prominent lawyers*. The answer lies in Amendment IX, Paragraph 2 of the Draft:

"The National Assembly shall elect five members of the High Judicial Council upon the proposal of the competent parliamentary committee after having conducted a public competition, by a three-fifth vote of all deputies. In case they are not all elected in this manner, the remaining deputies shall be elected within the next ten days by a five-ninth vote of all deputies, otherwise the election procedure is repeated after fifteen days, for the number of members who have not been elected."

In a word, it's not the number of quotes, the professional reputation and standing in the research community to define *a prominent lawyer*, but rather *a parliamentary majority* determined in quite an unusual way – three fifths, five ninths – as though having the composition of the current assembly in mind.

The same goes for the High Prosecutorial Council (Amendment XXI), in a slightly heightened context though, as a new actor comes into the game with an imposing name – the Supreme Public Prosecutor, and the Minister of Justice stays on the Council under the constitution. On the whole, the position of public prosecutors, their deputies in particular, has worsened. Formally, they are no longer elected by the National Assembly, but the High Prosecutorial Council, whose composition is affected by the political role of the parliament even stronger that the High Judicial Council's. More specifically, there are fewer deputy prosecutors elected by prosecutors, and the ratio is far less favorable than in the High Judicial Council. The deputy prosecutors, doing the lion's share of the work anyway, have been placed under tighter control by the public prosecutors. Instead of the Republic Public Prosecu-

tor, the Draft suggests that Serbia should have a Supreme Public Prosecutor, who is elected by the National Assembly, and accountable to it, while all prosecutors account to the Supreme Public Prosecutor.

Yet the contents of the draft provisions on the status of judges and prosecutors do not begin with the high councils.

About judges:

One of the conditions for a judge to be appointed to some courts is to be admitted to the Judicial Academy first. And to graduate, of course, but it's just a matter of routine.[18] I need to note again that the working bodies established by the Ministry of Justice have agreed that the Judicial Academy cannot be a constitutional category, especially under the same name. On the other hand, Amendment IV, Paragraph 2 says:

„As a judge in the court with exclusively first-instance jurisdiction may only be elected a person who has completed special training in a judicial training institution established by the law. "[19]

The Judicial Academy has become a constitutional category after all, not under the same name though, but described in less specific terms: "a judicial training institution established by the law." There are no two such institutions, but only one – the Judicial Academy. The very same Academy that since the establishment has never set up or carried out preparations for the bar exam, without which it's impossible to work as a judge or a prosecutor anywhere. (Not that anything in the Law on the Judicial Academy has prevented it from doing so either.) The very same Academy that has published on its website the scantiest version of a curriculum possible. The same Academy whose organization and performance have been criticized by the Working Group the Ministry of Justice established precisely to evaluate its work. The Minister of Justice is calming the anxious spirits with the words that it's only a draft, tolerating the fact that it coexists with the critical report on the same webpage. It was the Alumni Club of the Judicial Academy, a body bringing together the Academy's graduates, which had requested publicly that the Academy should be upgraded to a constitutional category. It is reasonable to believe that the bodies of the Academy, the council and the dean, have supported the move. Indeed, from a strictly legal point of view, it is not difficult to detect political influence in the

[18] See the items 17, 20 and 24 of the Guidelines and Recommendation of the Working Group for the Development of the Judicial Academy: https://www.mpravde.gov.rs/tekst/5868/radna-grupa-za-izradu-smernica-za-reformisanje-i-razvoj-pravosudne-akademije.php.

[19] I'm just touching on the vague wording "the courts with exclusively first-instance jurisdiction." This is a rather uncommon formulation. I presume it's a basic court of general jurisdiction, a minor offences court or a commercial court the editors might have had in mind. (Perhaps an administrative court, too.) Yet aside from the minor offences court, there's no court with exclusively first-instance jurisdiction, at least today. The basic and commercial courts can both rule on a motion for retrial, which is an extraordinary remedy, and if the motion is granted, they might be in a situation to nullify a higher court's decision. Likewise, the two courts may decide on complaints to payment orders, which is a regular remedy, if there is a special legal interest to open a separate litigation process, instead of enforcement procedure. Let alone legal remedies in out-of-court and enforcement proceedings. Can we expect the categorization of courts and their jurisdiction to be changed entirely, along with procedural laws? Did the editors choose the phrase following the Aristotelian concept of defining a term, or defined it typologically? Could it be, perhaps, that they were not completely aware of what they were writing either?

Academy's admission process.[20] A candidate for judge may be an excellent student, who has come through the bar exam with flying colors, but he/she doesn't stand a chance of having a judicial future unless he/she has graduated from the Academy, one not exactly exemplary institution, judging by the contents of the website of the justice ministry, suggesting that, of all things, it should be a constitutional category. All things considered, today's judicial assistants are facing an uncertain fate. If the suggested solutions have been accepted, the assistants planning to become judges will have to learn again what they have learned before. The Republic of Serbia is the founder of the Judicial Academy. It's a public institution, which means that the Serbian taxpayers will have to pay again for judicial and prosecutorial assistants to learn again what they already know.

3) **Rationale for the Draft Constitutional Amendments: Recommendations by the CoE Council of Ministers and the Venice Commission – an Excuse or the Actual Rationale?**

The constitutional solutions presented in the Draft are allegedly based on the opinion of the European Commission for Democracy through Law (the Venice Commission) LCD-AD (2007)028.

Having in mind the 17 years of Serbian experience behind the existence of judicial councils and their role in the election of judges and prosecutors, the following positions are relevant (listed in the same order as mentioned in the report):

- In terms of guarantees of independence, the Venice Commission makes *a difference between consolidated and new democracies, as the latter did not yet have a chance to develop the tradition of independence, which is why explicit constitutional provisions are needed to prevent political abuse by other state powers in the appointment of judges*;[21]
- *Appointments of ordinary judges are not an appropriate subject for a vote by Parliament, because the danger that political considerations prevail over objective criteria cannot be excluded*;[22] this position was repeated in the Strategy passed by the National Assembly in 2013;
- The European Charter on the Statute for Judges (DAJ/DOC(98)23), adopted in Strasbourg, in 1998, which the Venice Commission refers to, maintains: "*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers, within which at least one half of those who sit are judges elected by their peers, following methods guaranteeing the widest representation of the judiciary*." The Exploratory Memorandum clarifies that "the intervention" of the independent authority implies an opinion, a recommendation or an actual decision;[23]

[20] The Council of the Judicial Academy consists of nine members, four of whom are appointed by the High Judicial Council, two by the State Prosecutorial Council and three by the Government of the Republic of Serbia. Today's High Judicial Council and State Prosecutorial Council are elected by the National Assembly. The reasonable expectation is for the Academy to carry out the government's policy, and it has met the expectation in different ways.

[21] Item 6 of the Report LCD-AD (2007)028.

[22] Item 12 of the Report LCD-AD (2007)028.

[23] Item 19 of the Report LCD-AD (2007)028.

- *The mere existence of a high judicial council cannot automatically exclude political considerations in the appointment process;* Croatia's solution has been described as a negative example: The Council is composed of seven judges, two lawyers and two law professors, but the Minister of Justice can nominate all the candidates to the parliament;[24]
- The Venice Commission argues that "*judicial councils should have a decisive influence on the appointment and promotion of judges, and (maybe via disciplinary bodies) on disciplinary measures against them; an appeal against disciplinary measures to an independent court should be available as well;*[25]
- *A balance needs to be struck between judicial independence and self-administration on the one side, and the necessary accountability of the judiciary on the other side, in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively, and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members;*[26]
- *The main purpose of the very existence of a Supreme Council of Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the state in matters such as the selection and appointment of judges and the exercise of disciplinary functions;*[27]
- All things considered, the vital guarantee is that "*a majority of the members of the Judicial Council should be elected by the judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament, among persons with appropriate legal qualifications, taking into account possible conflicts of interest*;[28]

  * In a nutshell, *the ultimate legal and political goal of the existence of a high judicial council is to ensure the independence of the judiciary, and to prevent the influence of other state powers (executive and legislative) on the election, promotion, disciplinary liability and the termination of office of a judge.*

  * The way to do it is to bring about a balanced composition. *At least one half of those who sit should be judges (prosecutors), but a majority of the members (be they professors, lawyers or prominent lawyers) should be elected by the judiciary itself.* A minority is to be elected by Parliament.

  * *The balance is necessary primarily to make sure that disciplinary procedures against judges are carried out properly, securing also judicial (prosecutorial) accountability and preventing corporatism,* which emerged pronouncedly in the High Judicial Council and the State Prosecutorial Council during the so-called judicial reform, that is, the general election and re-election of judges in 2009. First, *the same* judges (prosecutors), members of the two

[24] Item 23 of the Report LCD-AD (2007)028.
[25] Item 25 of the Report LCD-AD (2007)028.
[26] Item 27 of the Report LCD-AD (2007)028.
[27] Item 28 of the Report LCD-AD (2007)028.
[28] Item 29 of the Report LCD-AD (2007)028.

councils, made in an irregular procedure a selection of judges who had been elected with no restriction to their terms in office. Some were selected, some weren't, but all the judges and prosecutors who weren't got their jobs back after a change of government.

In a bid to "defend" the Draft, representatives of the Ministry of Justice have criticized judges for a lack of liability and discipline.

On the other hand, two amendments to the Law on Courts, i.e. two actions by a *legislative* authority, not the judiciary as such, might have a stronger impact on the lack of liability of judges than the effort to achieve that liability, more precisely, political discipline, through the new amendments generating high councils.

At the proposal of the government, the National Assembly amended Article 6 of the Law on Judges, alleviating their civil liability insofar as remuneration of the damages paid is allowed only if the damage was caused with intention, and not by gross negligence as before.[29]

The term in office of the presidents of courts - perceived by the general public *and* the legal community as the transmitters of the executive power into judicial power – has been extended in a fast-track legislative procedure based on a proposal by the head of the parliamentary group of the then ruling party, still in power today.

It's nearly forgotten, and it shouldn't have been, that judges and prosecutors, members of the high councils, have selected their peers before only to give it up later on, during the 2009-2012 judicial "reform."

This is why the voice of judges and prosecutors needs to be heard loud and clear this time. They need to find a way to explain why the constitutional amendments do not constitute "a strategic issue" for judges and prosecutors only. It's rather a matter of importance for all citizens, the issue of security, freedom, life and property. Otherwise, we are not going to have independent judges and, consequently, neither the rule of law, providing for legal security and certainty, as opposed to political self-will. Legal qualifications and the value of research papers will be established by a parliamentary majority. The question all of us need to think about very carefully is if the way the judiciary is being positioned right now - including the procedure, specific solutions, methods of debate and the general legal and political climate - leads to the rule of law or the prerogative state, which coexists with the rule of law, but in a grey area, making it effectively the dual state.[30]

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[29] From the viewpoint of the legislator, the civil liability of judges is a measure of judicial independence. Comparative law offers a wide variety of different solutions, related to the liability itself, and the considerations of a judge's remuneration of the damages paid by the state. Even the United States, quite close to the idea of absolute immunity for judges, witnessed calls for partial immunity. The U.S. Supreme Court confirmed the principle of judicial immunity under Justice Warren. Justice Douglas, on the other hand, filed an often-quoted dissent:" It is one thing to protect a judge from his honest mistakes, but it is something quite different for the judicial system to protect judges who purposely use their authority to inflict harm or deprive others of their rights." (Block, J. R., *Stump v. Sparkaman and the History of Judical Immunity*, Duke Law Journal, *vol.* 1980, u f. N. 4, page 906).

[30] "On the one hand was the "normative state," bound by rules, procedures, laws and conventions, and consisting of formal institutions, such as the Reich Chancellery, the Ministries, local authorities and so on, and on the other there was the "prerogative state," an essentially extra-legal system that derived its legitimation entirely from the supra-legal authority of the leader." Richard J. Evans, *The Third Reich in Power, 1933-1939*, Penguin, 2005, page 45.

4) **The Constitutional Law Governing the Implementation of the Amendments**

Before the 2006 Constitution was passed, the text had been kept secret until it was distributed to the deputies. The intentions of the executive are now known, which is better than before, but they happen to be equally problematic as before.

The magnitude of the detriment the 2006 Constitution was about to cause to the judiciary remained indistinct until the Constitutional Law on Implementation of the Constitution was published. It wasn't until the law came out that it became clear a general election and re-election of judges and public prosecutors was in store, along with a defective "reform," the effects of which are still felt today. One of the reasons behind the political victory of today's government and regime was precisely the fiasco of the "reform." Is political self-will eternal here, perhaps? I'd rather avoid categorical views, but there are many reasons to believe that the new constitutional law will be similar to the one passed in 2006. For, the constitutional laws are the "details" the Venice Commission doesn't tend to analyze specifically. The opportunity to draw its attention to it must not be missed.

Professor Radmila Vasić, Ph.D*

PUBLIC HEARING OF LAW PROFESSORS: WORKING DRAFT OF AMENDMENTS TO THE CONSTITUTION OF SERBIA AS PROPOSED BY THE MINISTRY OF JUSTICE

Discussion

1. The working draft of amendments to the Constitution of Serbia, as put forward by the Ministry of Justice, was prepared without serious or reasonable public consultation. This means that the views of the profession (the so-called 'civil sector', represented primarily by professional associations and practitioners' bodies) were not duly taken into consideration, although both the Ministry of Justice and the public at large had been made aware of the findings of a timely critical review of constitutional provisions pertaining to the judiciary, accompanied by well-argued reasons for their amendment and improvement in line with principles of the rule of law inherent to modern civilisation and principles enshrined in the Constitution. The authorities and the professional institutions should have developed these amendments together: they ought to have set up a joint working party, composed of authoritative and knowledgeable individuals, to exchange opinions and reach a compromise to select the most appropriate options based on credible arguments to be cited in the statement of justification.

2. A general criticism that can be levelled at the amendments concerns their effect on the fundamental constitutional principle of the separation of powers (as enshrined in Articles 3 and 4). This principle denotes the original and abiding quality of a 'legal state', or the 'rule of law', as the Constitution refers to this arrangement of governmental power and legal order that corresponds to the theoretical concepts cited above. 'The relationship between the three branches of government shall be based upon balance and mutual control' (Article 4.3); 'The judiciary shall be independent' (Article 3.4). The Constitution declares the 'rule of law' to be its 'fundamental assumption' (Article 3.1), and at the heart of it lies the constitutionally promulgated separation of powers. The natures of the three branches of government are distinct, which is why it is necessary to define and emphasise the principle of balance and mutual control. All three branches of government are subservient to the Constitution and the law. As well they ought to be, since laws flow from popular representation, the fount of legitimacy in democratic societies. However, although it may be legitimate to constrain the executive by the operation of law, this can by

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no means be said of the 'independent judiciary'. Such constraints would be introduced under the proposed amendments, which would envisage crucial involvement of non-judge members of the High Judicial Council in making decisions on the appointment, advancement, and dismissal of judges. In such circumstances, judges would ever be fearful for their status, and could hardly remain independent and autonomous. Judicial independence, which ought to be the key guarantee of human and minority rights, also a cornerstone of both the concept and practice of a state following the rule of law (Article 3.2 of the Constitution), would be erased, and this would also deprive the fundamental principles of the Constitution of any meaning.

3. Amendments VIII ('Powers of the High Judicial Council') and IX ('Composition of the High Judicial Council') provide ample evidence to substantiate this general comment. The Council is intended to 'ensure the autonomy and independence of the judicial branch by deciding on the issues of the status of judges, presidents of courts and lay judges determined under the Constitution and the law', and is to comprise five judges and five 'reputable jurists' appointed by Parliament at the proposal of the Parliamentary Justice Committee following a public call for applications. This mode of choosing those who are to decide on judicial appointments ('selection of selectors') does not guarantee the personal autonomy of judges nor the institutional independence of courts. It would only take for the legislature and the executive to use its appointed members of the Council to suggest or oversee decision-making about the status of judges for the judiciary to be less than 'comfortable' (obviously, within the bounds of the Constitution and the law) in exercising its powers. One of the many shortcomings of the procedure envisaged under the proposed amendments is its complete lack of assurance that 'reputable jurists', recognised as such by the public (in particular the community of experts), will be appointed to the High Judicial Council. Amendment XI ('President of the High Judicial Council') calls for the President to be elected 'from non-judge members'; his or her casting vote can be used to break a tie. When these provisions are considered in light of the final paragraph of Amendment VIII, which allows the Minister of Justice to 'initiate disciplinary proceedings and seek the dismissal of judges and court presidents', it becomes apparent that such a degree of control that can be exercised by the legislative and the executive over the judiciary is contrary to the principle of separation of powers. By introducing 'balance and mutual control' between the three branches of government, the proposed amendments seek to utterly expunge the independence of the judiciary.

4. If rule of law is to truly be put into effect, as it must, the constitutional principle of judicial independence must be supported, reinforced, and bolstered by organisational arrangements, as reflected in the composition, powers, and decision-making procedures of the High Judicial Council. The judges themselves must play a crucial role in its deliberations. Invoking popular representation as the undisputed source of legitimacy would be wrong in the case of the judiciary. Not everything that Parliament decides to enact in the Constitution or a law need necessarily be legitimate. As the old adage about the British legislature goes, 'Parliament can do everything but make a woman a man and a man a woman'. In other words, it should be understood that the legislative is 'naturally superior' over the two other branches

of government. The nature of the judiciary, whose one but key function is to be the final bulwark of guaranteed human and minority rights, means that it must be autonomous and independent, but also professional and conscientious. The 'democratic selection of those who select judges' cannot therefore be deemed the source of legitimacy here. Such a mode of selection is a (potentially) powerful means of exerting control over judges and courts and presents a dangerous possibility for political meddling in their work. The public ought to be made aware that the professionalism of judges is the source of legitimacy of judicial office. Only judges themselves may and should assess the professionalism of their current and future fellow judges. Of course, this entails a well-ordered and transparent nomination and voting procedure.

Only such rule of law can be called upon to serve as the fundamental underpinning of the Constitution.

Professor Zoran Ivošević, Ph.D.*

CUCKOO'S EGGS IN JUDICIAL NESTS

Pursuant to the applicable Constitution, the courts and public prosecutor's offices are government authorities. Courts are autonomous and independent (Article 142, Paragraph 2), while the public prosecutor's office is independent on its own account (Article 156, Paragraph 1). While the meaning of these terms has not been defined in detail by the Constitution they were elaborated by laws.

Article 3, Paragraph 1 of the Law on Organization of Courts provides that courts are *independent* from the legislative and executive powers. Article 5 of the Law on Public Prosecutor's Office specifies that a public prosecutor and a deputy public prosecutor are *independent* in discharging their authority, and such position is guaranteed by "prohibition of any influence on handling cases by the executive and legislative powers by using public office, the media or in any other way, which may threaten the independence of the public prosecutor's office".

Looking at these provisions one may conclude that there is no significant difference between the independence of courts and that of public prosecutor's offices. Both attributes concern an aspiration to prevent influence of the executive and legislative powers on the third one.

The guarantor of the independence and autonomy of judges is the High Court Council, while the guarantor of the independence of public prosecutors and their deputies is the State Prosecutorial Council. This is currently provided under the applicable constitutional and statutory provisions.

And what does the working text of the amendments prepared by the Justice Ministry have to offer?

The amendments provide that courts are independent and autonomous authorities (a III Paragraph 1), and that the judges are independent, adjudicating on the basis of the Constitution, ratified international treaties, laws and other general regulations (a IV Paragraph 1). As regards the public prosecutor's office it stays an independent government authority (a IV Paragraph 1), however the amendments (as opposed to the current Constitution) say nothing of the independence of the public prosecutors or their deputies.

In terms of the above said, the working text of the amendments is not significantly different than the current constitutional provisions which are in effect. Serious differences appear, though, in amendments that pertain to the High Court Council and the High Prosecutorial Council (that is supposed to take over the prerogatives of the State Prosecutorial Council).

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Once this text has been published, the Justice Minister said that chief judges, judges, public prosecutors and deputy public prosecutors will not be elected by the National Parliament but the High Court Council, or the High Prosecutorial Council respectively. That much is true, however, her statement did not contain a word about amendments to the composition and operations thereof, as the provisions that regulate them contain nests with cuckoo's eggs that need to be exposed:

According to Article 153 of the applicable Constitution, the High Court Council has eleven members of whom six are elected from among judges and the seventh - the Chief Justice of the Supreme Court of Cassation who is, ex officio, the president of that body.

Amendment IX provides that the High Court Council is comprised of ten members: five judges – elected by judges and five distinguished lawyers – elected by the National Parliament. Chief Judges may not be elected to the Council and members of the Council elected from among judges may not be elected as President of the Council. In case of a split vote, the vote of the President of the Council is, according to amendment XII, "golden" and therefore a decision may be rendered even with only five votes of six present members (who make a quorum). As the "golden" vote is not granted to a member elected from among judges, the position of judicial officers in that body has been devastated and if this would remain the High Court Council could no longer be a true guarantor of the independence and autonomy of courts and judges.

Pursuant to Article 164 of the applicable Constitution, the State Prosecutorial Council has eleven members of whom six are elected from among public prosecutors or their deputies and the seventh – the Republic Public Prosecutor who is, ex officio, the president of that body.

Amendment XXI provides that the High Prosecutorial Council (the name that would be given to the State Prosecutorial Council) has eleven members: four deputy public prosecutors – elected by public prosecutors and their deputies and five distinguished lawyers – elected by the National Parliament, the Supreme Public Prosecutor of Serbia – ex officio and the minister in charge of the judiciary – ex officio. Public prosecutors could not be elected to the High Prosecutorial Council, however, according to amendment XII, Paragraph 4 the Supreme Public Prosecutor would be, ex officio, the president of the council. It is immediately noticeable that the High Prosecutorial Council is missing those who are mentioned in its name. It includes deputy public prosecutors, and since they act in line with the instructions of the public prosecutor (a XVI Paragraph 2), the question is whether they could vote differently than the President of the Council. Even when their votes support the same option, they wouldn't be sufficient to prevail if the members elected from among distinguished lawyers and the minister in charge of the judiciary would vote differently. Thus formed and organized the High Prosecutorial Council could not be a guarantor of the independence of public prosecutors, or holders of public prosecutorial office, all the more so because the National Parliament would keep the right, pursuant to amendments, it already holds under the applicable constitution, to elect and dismiss the highest ranking prosecutor in Serbia and whoever has got such an authority has also the leverage.

In addition to political influence on the judicial authorities, through the High Court Council and High Prosecutorial Council, Amendment IV, Paragraph 2 and XVIII, Paragraph 3 would also create leverage for that kind of influence. They provide that a judge in the lowest court, or a deputy public prosecutor could only be elected among "those persons who have completed special training in the judicial training institution established by law". Such an institution has already been established, it is called the Judicial Academy. If the training in the Academy becomes more important than the training under the mentorship of a judge, or a public prosecutor, then the courtroom simulation in the Academy or prosecutor's office simulation would be more important than the real courtroom, or real prosecutor's office. The bar exam is the most difficult and the most significant exam for any law graduate. Whoever passes it gains the ability to deal with the most complex legal professions. Therefore, any training after this exam is redundant. If it is introduced after all, and as the only condition for the election of judges or deputy public prosecutors to judicial authorities of the lowest level then there is something "fishy" about it. That's why professional associations of both judges and prosecutors and judicial and prosecutorial assistants, are reasonably warning that in that case the Judicial Academy would take on a problematic role of the National Parliament, which according to the applicable Constitution elects the first-time judges and deputy public prosecutors for a three-year term of office. The Academy would replace the National Parliament as the door to the judiciary. Still, it makes sense for the Judicial Academy to exist, but not as the only way in into the courts and public prosecutor's offices but as the means for career development of holders of judicial and prosecutorial offices. In any case, it cannot be part of the "constitutional substance".

The working text of the amendments conceals a cuckoo's egg, also, as it does not contain the provisions providing that decisions of a court may not be subject to extra-judicial review, something that the applicable constitution specifies in its Article 145, Paragraph 3. By deleting this provision the Constitutional Court is allowed to annul even the Supreme Court's decisions in proceedings initiated by a constitutional appeal. In this way, the working text of the amendments imposes on the highest court in the country extra-judicial review by the Constitutional Court. As an authority tasked with protecting constitutionality, the Constitutional Court could establish possible unconstitutionality but it would not have to annul the judgment of the highest court. Be deleting the provision on the prohibition of extra-judicial review of decisions of a court, the amendments want to introduce additional leverage of political influence on the courts or the judicial branch. This time through the Constitutional Court that, when it comes to politically sensitive cases, has already fallen under their influence. And that influence will grow stronger if the judges of the Constitutional Court are elected by the National Parliament, as anticipated by Amendment I, Paragraph 2, Item 2). As the Constitutional Court does not judge solely based on law but also about the laws themselves as adopted by the members of parliament, it would be more appropriate that judges of that court, much like members of parliament, are elected by citizens in direct elections.

The Justice Ministry considers that the composition of both high councils should prevent other branches of government to exert "inappropriate influence" on the

judiciary and public prosecutor's offices, which was written on the banner used for the roundtable titled "The Composition and Authority of High Councils", held in Niš on October 13, 2017. An "appropriate influence" would therefore be allowed. The independence of the judiciary and autonomy of public prosecutor's offices can't stand either appropriate or inappropriate influence. Holders of the judicial or public prosecutorial office should act solely on the basis of the Constitution, laws and other regulations. Equally towards all.

To this end, the amendments to the Constitution should regulate both judicial and public prosecutorial organization and operations on the basis of the same set of principles. The first step in that direction should be replacing the term "court power" with the term "judicial power". In such a judicial composition the current public prosecutors would become presidents of public prosecutor's offices. The Republic Public Prosecutor would become president of the Republic Public Prosecutor's Office or the Supreme Public Prosecutor Office (if that's how it would be called), while deputy public prosecutors would become – public prosecutors. The relationship between public prosecutors and presidents of public prosecutor's offices would no longer be based on hierarchy or subordination but would become the same as the relationship between judges and chief judges/court presidents. The chief justice would be elected by judges of his/her court and the president of the public prosecutor's office would be elected by public prosecutors in that office. The same principle would apply to all other chief judges and presidents of public prosecutor's offices.

Some European norms support rapprochement of the judicial and prosecutorial offices, that is, their amalgamation within the judicial power. In the Federal Republic of Germany, the State Prosecutor's Office has been provided by the law on courts and organized to mimic the nomenclature of courts. In Italy, public prosecutors offices are placed within courts, and are neither centralized nor hierarchically organized. The independence and autonomy of the judiciary and public prosecutor's offices are guaranteed by the single High Judicial Council which elects both judges and prosecutors. The highest-ranking prosecutor discharges his office within the highest court.

In such a judiciary there could be only one guarantor of the independence and autonomy of courts and prosecutor's offices and it would be called the High Judicial Council. In it, holders of the judicial power should be a majority and it should be co-presided over by the chief justice and the president of the highest prosecutor's office.

In order for the High Judicial Council to guarantee the independence of courts and public prosecutor's offices, as bodies of the judicial power, it is necessary to define within the Constitution what is understood as the independence of the judicial authorities. This attribute would suffice because the one who is independent is also autonomous. Provisions regulating that matter could read as follows:

"Independence of the Judiciary

Article …

The independence of the judicial authorities is reflected in their independence from the authorities of the legislative and executive powers that makes them resistant to influence.

The independence of the holders of judicial office is reflected in their liberty and dignity to discharge their authority based on their own understanding of laws and own evaluation of facts significant for implementation thereof, without any limitations, influence, incentives, pressure or interventions coming from anyone or for any reason".

In order for such a norm concerning judicial independence to become reality it is necessary to establish a special judicial budget.

According to the applicable Constitution (Article 145, Paragraph 1), decisions of a court are rendered in "the name of the people". The same has been anticipated by the working text of the amendments (a III Paragraph 5). It would be better, though, to render decisions of a court "in the name of the Constitution and law" (in other words – the rule of law), because Article 1 of the Constitution defines the Republic of Serbia as "a country of Serbian people and all citizens who live in it" and as "all citizens" are not the members of the Serbian people, it turns out that courts are rendering judgments only in the name of the "Serbian people".

The applicable Constitution treats equally all holders of the legislative, executive and judicial powers in terms of immunity. Holders of the legislative and executive powers may not be detained or subjected to criminal or other proceedings in which a prison sentence may be imposed, without the approval of the National Parliament (Article 103, Paragraph 3 and Article 134, Paragraph 2). Holders of the judicial power may not be deprived of liberty without the approval of the High Court Council, or the State Prosecutorial Council, only in proceedings initiated for criminal offense committed while discharging the judicial, or prosecutorial office (Article 151, Paragraph 2, and Article 162, Paragraph 2). – the working version of the amendments retained this difference instead of eliminating it because Article 4, Paragraph 3 of the Constitution bases the relationship of the three branches of government on – checks and balances.

For all of the above said, the working text of the amendments of the Justice Ministry does not deserve any backing. With it the Serbian judiciary can only make a step back.

Professor Marko Stanković, Ph.D.*

WEAKNESSES IN THE POSITION OF THE JUDICIARY IN THE 2006 CONSTITUTION OF SERBIA AND CONSTITUTIONAL AMENDMENTS PROPOSED IN 2018

Statutory provisions governing the organisation of the judiciary are a key element of constitutional law, as it is particularly important for a functioning democracy to ensure complete independence of the judiciary from the 'political' branches of government, the legislative and the executive. Only the Constitution can ensure autonomy of the judicature, since provisions of this fundamental legal document are not subject to interventions of either the legislative or the executive, and the Constitutional Court is empowered to set aside any attempt made by these to alter the Constitution by means of lesser enactments. Nevertheless, the authors of the 2006 Constitution of Serbia assumed a different view of this aspect of constitutional law, conferring upon the legislator wide-ranging powers to regulate fundamental issues of the judiciary, especially with regard to the appointment and dismissal of judges, and in doing so largely subordinated the judiciary to the legislature. The latitude given to Parliament has, unfortunately, resulted in the politicisation of the judiciary and jeopardised its position as an independent branch of government.

The 2006 Constitution of Serbia poses difficulties for judicial independence in five key regards. Firstly, it presents a flawed definition of the principle of separation of powers: the judiciary, which ought to be independent, is here placed in a relationship of 'balance and mutual control' with the political branches of government (Art. 4.3), even though 'mutual control' precludes any independence.

Secondly, the Constitution allows political authorities to influence the selection of judges. These are initially appointed to a 'trial' three-year term in office by Parliament, a political body; permanent judicial appointments are subsequently made by the High Judicial Council, comprised of members who all are, again, chosen by Parliament (Art. 147 of the Constitution). Thirdly, the authors of the Constitution have failed to stipulate grounds for the termination of the office of a judge, and, by removing this issue from the Constitution, allowed the legislature to exert undue influence on the judiciary: Parliament has been given free rein to define grounds for the dismissal of judges. This is yet another threat to judicial independence, since judges are always threatened with the proverbial Sword of Damocles, at all times in peril of being dismissed at the whim of politicians. Fourthly, the High Judicial Council has also been politicised: this body is defined as an 'independent and autonomous body' (Art. 153 of the Constitution), but this declared independence and autonomy has been wholly stripped away, with all 11 of the Council's members are either directly or indirectly selected by Parliament. Fifthly, the name of the highest court, the Supreme

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Court of Cassation (Art. 143 of the Constitution) is in itself contradictory. There are essentially two models of organising the highest court of a jurisdiction: the supreme court model, and the court of cassation model. The former sees the highest court decide on the merits of a case on appeal, and the latter involves the highest court ruling only on the legality of a judgment rendered by a lower court: here the court of cassation is able to overrule an illegal judgment and require a retrial of the disputed case. The highest court ought to be called either the 'Supreme Court' or the 'Court of Cassation'; using both terms is redundant. Although, of course, the name of the highest court of the land has no direct bearing on judicial independence, it provides ample proof of the ignorance of the authors of the 2006 Constitution and their inability to rise to the challenge posed by their pivotal task.

The working draft of the amendments does not address any of these five issues appropriately. Firstly, the separation of powers, one of the principles of the Constitution, is never even referred to in the amendments, meaning that the judiciary is set to remain in a position of 'balance and mutual control' with respect to the political branches of government. Nonetheless, the working draft does actually seem to allow political authorities to exert substantial control over the judiciary. Secondly, the proposed amendments give the High Judicial Council sole responsibility for appointing judges, but the Council's composition remains such that it does not guarantee independence from political interference (Amendment VIII). Moreover, training at a 'judicial training institution' (Amendment IV.2) is envisaged as a mandatory precondition for the appointment of a judge, which means the Council's hands are tied in this regard, whilst the judicial appointments system seems to have been wholly deprived of any substance. Thirdly, although the amendments propose the re-introduction into the Constitution of grounds for the dismissal of judges, this is done in an entirely inappropriate manner: one of the grounds foreseen is the imposition of the 'disciplinary measure of dismissal' (Amendment IV.5). Fourthly, the proposals see a thorough reshuffle of the High Judicial Council, which is to be reduced to a membership of ten, but its members appointed by Parliament ('prominent jurists') are set to retain the most influence, meaning that the Council would remain in the grip of politicians (Amendments IX, XI, and XII). And, fifthly, the amendments go on to propose changing the name of the highest court to 'Supreme Court', but do not stipulate its seat (Amendment VI), whilst removing existing provisions on the types of courts (Amendment IV) from the Constitution.

All of the above leaves one in no doubt that the working draft of the amendments leave too much room for the influence of political authorities on the judiciary, the branch of government which by rights ought to be subject primarily to the criterion of professionalism. As such, it seems that the proposed amendments cannot be improved upon, and that the only fitting and appropriate solution would be to withdraw them outright and develop a new set of proposals.

Nearly all of the issues raised here about the judiciary apply, *mutatis mutandis*, to contentious constitutional provisions governing the position of public prosecutors: appointment, dismissal, and composition of the State Prosecutorial Council, or the 'High Prosecutorial Council' as the proposed amendments would have this body designated in the future.

Professor Violeta Beširević, Ph.D.*

A TRUMP CARD IN THE WORKING DRAFT OF AMENDMENTS TO THE SERBIAN CONSTITUTION: POSITIONS OF THE VENICE COMMISSION AS SEEN FROM BELGRADE

1. Politicisation of the judiciary in the democratic evolution of Serbia

The many paradoxical trends in the democratisation of Serbia's society (formally inaugurated in 2000, with the fall of the Milosevic regime) have included the politicisation of the judiciary. All attempts to fully enshrine the principle of limited government in the Constitution have been met with systematic rejection of the idea of an independent judicature (and independent public prosecution).[1]

Although there is no single model of constitutional guarantees of an independent judiciary, two essential conditions must be met for a judicial branch to be autonomous in a separation of powers model based on checks and balances:

1. Only judges must be able to adjudicate cases; and
2. In adjudicating a case, a judge must be bound only by law enacted by elected popular representatives following a prescribed procedure.[2]

The independence of prosecution, or public prosecutors, does not necessarily have to mean the same as the independence of the judiciary and judges. That having been said, according to the 2006 report on *Judicial Reform in Countries of South East Europe* released by the Directorate-General for External Policies of the European Parliament, recognising prosecution services as independent bodies in the constitutional systems of emerging democracies would present 'undisputable merits'.[3] Noting that there was an international tendency to characterise the prosecutor

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[1] I have tackled this issue on a number of occasions. See Violeta Beširević, "Dancing with Judiciary? What Went Wrong with Judicial Reform in Serbia?", (2009), *European Review of Public Law*, Vol. 21, No. 4, pp. 1551-1576; Violeta Beširević, "'Governing *without* Judges': The Politics of the Constitutional Court in Serbia", *International Journal of Constitutional Law (I-CON)*, Vol. 12, No. 4, 2014, pp. 954-979; Violeta Beširević, Ana Trbović, "New Challenges of Democracy in Serbia: Global Issues in Local Perspective", u: *New Challenges of Democracy*, *European Review of Public Law, European Public Law Series*, London: EPLO & Esperia Publications, 2015, pp. 435-481; Violeta Beširević, "Миф О судебной реформе в Сербии", *Сравнительное конституционное обозрение* 2016. № 5 (114), pp. 105-116.

[2] For a detailed discussion, see Daniel Smilov, "The Judiciary: The Least Dangerous Branch?", in: *The Oxford Handbook of Comparative Constitutional Law,* M. Rosenfeld & A. Sajó (eds.), Oxford, Oxford University Press, 2102, pp. 859-873.

[3] See European Parliament, Directorate-General for External Policies*, Judicial Reform in Countries of South East Europe*, EP-Expol-B-2005-33, 13 September 2006, p. 12, available online at http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/06/pe381.386-en.pdf.

as an impartial organ (as expressed in the International Criminal Court Statute), the report goes on to claim that 'insulating the judiciary alone from undue political pressures while leaving prosecutors to the mercy of political interference would prevent prosecutors from investigating and taking to the bar corrupted segments of the institutions, as is invariably the case of many countries [in South-Eastern Europe]'.[4]

An independent judiciary and prosecution service is in the public interest: it is in the interest of all citizens of Serbia to have legal disputes adjudicated by independent and impartial judges, as well as for judicial protection of human and minority rights to be entrusted to such courts. Since prosecution is the key element in judicial proceedings, and the recently introduced central role of prosecutors in the so-called prosecutorial investigation system, it is in the interests of Serbian citizens to have investigations in criminal proceedings conducted by not only autonomous, but also independent, public prosecutors.

And yet, ever since the start of the country's democratisation, all governing political parties have considered an independent judiciary (and prosecution service) as a requirement imposed from the outside that they needed to put into effect so as to achieve their political objectives, but in such a way to avoid abandoning the old (authoritarian) system of concentrated government power and the newly instituted primacy of interest of the ruling party. Two facts support this conclusion.

Firstly, in the absence of a common model, and with the very idea seen as imposed from the outside, the current Constitution has undermined the principle of judicial independence, which was then virtually rendered null and void in the Constitutional Law enacted to put the Constitution into effect.[5]

Secondly, the working draft of constitutional amendments does not do away with the politicisation of the judiciary, but instead merely redistributes political influence. The text does not cite the democratic values that an independent judiciary ought to be based upon as the grounds for amending the Constitution, instead insisting on political reasons, referencing Serbia's accession to the European Union and the requirements that the country must meet to attain this goal.[6]

Particularly noteworthy is the fact that the working draft draws on justification for its proposals primarily on the opinions of one international body, the Venice Commission, rather than on the doctrine of judicial independence as the fundamental mechanism safeguarding the protection of individual liberties, this primary reason for the existence of a democratic state.

However inappropriate it may be for a sovereign nation, regardless of how nascent its democracy may be, to substantiate its constitutional amendments solely by referencing the opinions and recommendations of an international body, it must be

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[4] *Ibid*.

[5] For a more detailed discussion, see for instance Vesna Rakić-Vodinelić, Ana Knežević-Bojović, Mario Reljanović, *Judicial Reform in Serbia: 2008-2012*, Beograd, Pravni fakultet Univerziteta Union u Beogradu/Službeni glasnik, 2012; Tanasije Marinković, "O ustavnosti opšteg reizbora sudija", (2009) *Anali Pravnog fakulteta u Beogradu*, br. 1, pp. 283-291.

[6] See 'Introductory Remarks' in: *Ministry of Justice's Working Version of the Draft Amendments to the Constitution (with explanation and references)*, available online from the Serbian Ministry of Justice.

admitted that the views of the Venice Commission about the independence of the judiciary and constitutional position of the prosecution service are based on the principles of limited government and the requirement for judges and prosecutors to exercise their duties independent of political power.[7] As such, although exclusively relying on them in justifying the proposed amendments is insufficient, consistently following them is not only a desirable, but in fact the only possible approach. Yet the draft amendments do not do so: rather, they manipulate and misrepresent the opinions and recommendations of the Venice Commission in a bid to retain political control over the Serbian judiciary.

This short paper aims at exposing the selective, and in some cases underhand, references to positions of the Venice Commission by the authors of the working draft of amendments to the Constitution of Serbia made to conceal the proposed increase in influence of the legislature on judicial and prosecutorial appointments, as well as the envisaged introduction of new avenues by which the executive can impact the judiciary.

2. Results of the misrepresentation of positions assumed by the Venice Commission

2.1 Greater influence of the legislature on the appointment and actions of judges

The method by which judges are appointed is the key indicator of how independent a judiciary is; the current Constitution of Serbia has been sharply criticised due to the obvious ability of the legislative and the executive to influence judicial appointments. Proposed Amendment VIII replaces the current provision by an arrangement whereby judicial appointments are made the responsibility of the High Judicial Council (HJC), of ten members (a change from the current 11). In turn, the membership of the HJC is to be elected by judges and Parliament: five members would be selected by the body of judges, whilst the other five would be appointed by Parliament from 'reputable jurists'.[8] The proposal also calls for the President of the HJC to be elected among lay members and to have a casting (tie-breaking) vote in decision-making.[9]

An attempt to justify this arrangement references the positions of the Venice Commission whereby: (a) the judicial council ought to have a decisive influence on the appointment and promotion of judges; (b) the judicial council should be made up of equal numbers of judicial and lay members, and its president should be selected from the lay membership, as this ensures a better balance between the autonomy and independence of the judiciary, on the one hand, and its accountability, on the other; (c) a judicial council composed of equal numbers of judges and non-judges at the same time ensures social inclusion and avoids politicisation and government autocracy; and (d) in semi-presidential systems, the president of the coun-

[7] See European Commission for Democracy through Law, (Venice Commission), "Judicial Appointments", CDL-JD (2007)001, 14 March 2007; European Commission for Democracy through Law, (Venice Commission), "Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service", CDL-AD (2010)040, 17-18 December 2010.

[8] See the draft of Amendment IX.

[9] See the drafts of Amendments XI and XII.

cil can be elected by the council itself from its lay members, so striking a greater balance between the required independence of the president and the need to deter corporatism in the judicial council.[10]

The proposed amendments give the HJC full responsibility for making judicial appointments, which is by all means an improvement upon the existing arrangement. Nevertheless, the positions of the Venice Commission offered as justification for the proposed composition of the HJC, with judicial members not in the majority, seem to show the Ministry of Justice, the author of the proposed changes, feels that the dysfunctional state of judicial independence in Serbia is mainly down to the 'irresponsibility' and corporatism of the judiciary, rather than to any influence of the political institutions (Government and Parliament), as noted by the Venice Commission itself in its commentary on the current Constitution.[11]

Thus, either accidentally or on purpose, in proposing the make-up of the HJC, the body which ought to appoint all Serbian judges, the Ministry of Justice has not followed key positions of the Venice Commission about the composition of judicial councils. Although it has repeatedly stated that there was no single model for creating a judicial council, the Venice Commission has explicitly assumed the view that '***the main purpose*** *of the very existence of a Supreme Council of the Judiciary* ***is the protection of the independence of judges by insulating them from undue pressures from other powers of the State***',[12] as well as that the fundamental rule here is that 'a substantial element or majority of the members of the Judicial Council should be elected by the Judiciary itself'.[13]

Instead of eliminating political influence on the election and actions of judges, the proposed new composition of the HJC introduces a new channel for exerting political pressure on this body through the 'reputable jurists' appointed by Parliament using a mathematical formula. The wording of this proposal reveals that the governing coalition will have the final say in deciding who is to be considered a 'reputable jurist', which may not necessarily involve assessing a candidate's academic or professional reputation.[14] In addition, the statement of justification also glosses over a position of the Venice Commission designed to prevent political influence by a governing party (or coalition) that requires a qualified majority for electing members of a judicial council appointed by Parliament. If eliminating political influence were the key goal in our case, 'reputable jurists' would have to be elected by a two-thirds majority, but this is not the product of the mathematical formula presented in the proposed amendments.[15] It also ought to be added that the expression 'reputable jurist' does not comply with the recommendation of the Venice Commission

[10] See statements of justification for the drafts of Amendments II, VIII, IX, and XI.

[11] See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia*, no. 405/2006, 19 March 2007, para. 65.

[12] See. European Commission for Democracy through Law (Venice Commission), "Judicial Appointments", *op. cit*., para 27.

[13] *Ibid*., paras. 28 and 49.

[14] See the draft of Amendment IX.

[15] See European Commission for Democracy Through Law, (Venice Commission), "Judicial Appointments", *op. cit*., para 31.

that requires non-judge council members to be 'elected by Parliament among law professors and especially lawyers, who as the "clients" of the Judiciary have a direct interest in the proper administration of justice';[16] by contrast, the current Constitution pays heed to this view.

Finally, the amendments also controversially claim the intention to give the (lay) president of the HJC a casting vote in the Council is in accordance with the Venice Commission's views.[17] In its opinion on amendments to constitutional provisions governing the Montenegrin judiciary, the Venice Commission has noted that 'the casting vote of the President, mainly in disciplinary proceedings, is an important part of the balance between independence and accountability of judges'.[18] Yet it must be remembered that in Montenegro the lay president is elected by a two-thirds majority of the Judicial Council, in contrast to the Serbian arrangements for the HJC.[19] Under proposed Amendment XII to the Constitution of Serbia, the (10-member) HJC would make decisions by the votes of at least 6 members, or 5 members including the President, whereby the session would have to be attended by at least 7 members. As such, the judicial members of the HJC would be open to being outvoted, and the provision demonstrates its authors have again lost sight of the purpose of the HJC: to shield judges from political influence.

Therefore, selective references to positions of the Venice Commission show that political influence is set to remain a decisive factor in judicial appointments, as the (hitherto justifiably criticised) participation of the legislative power in this process will not be eliminated but, rather, merely articulated differently. The same holds for the executive, whose representatives may not actually sit on the HJC but would still have a plethora of new options to influence the actions of judges. The following sections will deal with this issue in greater detail.

2.1.1 Influence of the legislature on courts through statutory harmonisation of case law

In an arguably expected development,[20] the draft of Amendment IV, which pertains to the independence, autonomy, and non-transferability of judges, includes a provision that reads: 'A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international contracts, law and other general acts. *The uniformity of the jurisprudence shall be regulated by law*.'

The accompanying statement of justification mainly references positions of the Venice Commission to the effect that probationary periods can undermine the independence of judges, only for the closing sentence to add that the provision above will allow the harmonisation of case law to be regulated by statute at a later date, an ar-

[16] *Ibid*., para. 28.

[17] See the draft of Amendment XII.

[18] European Commission for Democracy Through Law, (Venice Commission), "Opinion on Two Sets of Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro", CDL-AD (2012)024, 14-15 December 2012, para. 19, f. 5, and para. 20.

[19] Amendment VIII to the Constitution of Montenegro, *Official Gazette of Montenegro*, No. 38/2013.

[20] This issue caused a great deal of controversy during the public consultations that preceded the drafting of the constitutional amendments.

rangement claimed to have the support of the Venice Commission.[21] The poor grasp of law drafting standards displayed by this amendment is the least of its issues. The true problem here lies in its promotion of the idea of harmonising case law by statute and its inappropriate reference to the Venice Commission to support this position.

Before I delve into the essence of this problem, I ought to mention that, wherever the working draft of amendments to the Constitution references to the opinions and recommendations of the Venice Commission, it cites the relevant document number and paragraph. However, only the document number is referred to here, whilst the paragraph number is lacking, in all likelihood as there is actually no paragraph that supports the concept of using statute to harmonise case law.

When looking for the relevant opinion in the Venice Commission document cited in the statement of justification for Amendment IV, I found that the most likely candidate was the Commission's opinion on Article 9.2 of the Draft Judicial Code of Armenia, which stipulates that the judge, in deciding a case, should 'take account of the practice of bodies operating on the basis of international human rights treaties'.[22] The Commission goes on to state that this 'implicitly refers to the case law of the European Court of Human Rights (the ECtHR). The Draft Code in this part reproduces the wording of Article 81 §1 of the Constitution [of Armenia]', which imposes the same requirement.[23] The Commission believes this formula to be acceptable, but claims that 'the Constitution does not prevent the legislator from developing this principle further, in a direction of giving the ECtHR case law more weight in the domestic legal order and requiring the courts to follow the ECtHR case law'. Finally, the Commission recommends that Armenia consider the German approach to addressing this issue.[24] Therefore, the thrust of this recommendation is not for the legislator to regulate case law as a matter of principle; rather, it recommends requiring judges to take into account case law of the ECtHR in making decisions, which is incidentally constitutionally mandated for Serbian judges.[25] Moreover, in its assessment of Articles 9 and 14 of the Draft Judicial Code of Armenia, which provide that lower courts may derogate from legal positions expressed by the Court of Cassation, the Venice Commission re-iterates that judicial independence does not mean only independence from other government bodies, but also the independence of individual judges, and that '[h]ierarchical judicial organisation should not undermine individual independence'.[26]

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[21] The relevant part of the statement of justification for the draft of Amendment IV states: 'The abovementioned provision shall leave the room for the subsequent regulation of the uniformity and the harmonisation of the jurisprudence by law.'

[22] European Commission for Democracy Through Law, (Venice Commission), "Armenia: Opinion on the Draft Judicial Code", CDL-AD (2017)019, 6-7 October 2017, para.18.

[23] *Ibid*.

[24] *Ibid*.

[25] Judges are already subject to this requirement under Article 18.3 of the Constitution of Serbia, which states: 'Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.'

[26] European Commission for Democracy Through Law, (Venice Commission), "Armenia: Opinion on the Draft Judicial Code", *op. cit*., paras. 25-31.

2.2 Continuing influence of the executive on judges

The proposed amendments only seemingly eliminate the influence of the executive on the judiciary. Under the new arrangement, the Minister of Justice would no longer serve on the HJC, meaning that he or she would no longer take part in judicial appointments, envisaged as being wholly the responsibility of the HJC.[27] By contrast, the draft of Amendment VIII stipulates that the Minister of Justice can bring disciplinary proceedings (before a disciplinary body to be established as part of the HJC), as well as that the Minister may also initiate the procedure for the dismissal of judges and court presidents to be administered by the HJC.

As justification for this arrangement the Ministry of Justice cites an opinion of the Venice Commission that 'a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council)'.[28] Although this is true, it is also true that the Venice Commission, whilst not opposed to membership of the Minister of Justice on the judicial council, has emphasised that 'the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures',[29] so as to preclude political influence by the executive on the judiciary.

The working draft of amendments to the Constitution of Serbia does not follow these recommendations of the Venice Commission, but, rather, disguises the participation of the Minister in the HJC's deliberations by removing this member of the cabinet from the Council but retaining their ability to bring disciplinary actions against judges and initiate their dismissal. This provides a useful lever for the executive to discipline judges perceived as 'disloyal', brutally violating judicial independence.

Moreover, the authors of the proposed amendments seem to have overlooked that the ECtHR recently found Macedonia guilty of infringing the right to a fair trial due to, among other things, the involvement of the Minister of Justice in disciplinary action against judges.[30] The Court found that the presence on the Macedonian State Judicial Council (SJC) of the Minister of Justice had impaired its independence, and concluded that the applicant's right to a fair trial had been infringed upon as the SJC was not an 'independent and impartial' tribunal.[31]

Therefore, enacting the proposed amendment to give the Minister of Justice the ability to initiate disciplinary proceedings will be detrimental not only to the independence of the judiciary, but will also cause financial harm to the citizens of Serbia, since the country will be required to pay just satisfaction for infringements of the European Convention of Human Rights.

2.3 Politicisation of the prosecution service

Another glaring example of a dubious reference to the Venice Commission appears in the statement of justification accompanying the draft of Amendment XXI,

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[27] See the drafts of Amendments VIII and IX.

[28] See the statement of justification for the draft of Amendment VIII.

[29] European Commission for Democracy Through Law, (Venice Commission), "Judicial Appointments", *op. cit*. paras. 32 and 33.

[30] See . odluku Evropskog suda za ljudska prava u predmetu *Gerovska-Popčevska v. The Former Yugoslav Republic of Macedonia*, Appl. No. 48783/07, 7 January 2016.

[31] *Ibid*., paras. 55-56.

which pertains to the composition of the High Prosecutorial Council (HPC). The proposal calls for the HPC to be composed of eleven members: four deputy public prosecutors elected by public prosecutors, five reputable jurists appointed by Parliament, the Supreme Public Prosecutor, and the Minister of Justice. The justification cites an opinion of the Venice Commission that '…a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority…'"[32]

Yet, the Ministry of Justice and its authors of the proposed constitutional amendments have not considered the Commission's view that the composition of a Prosecutorial Council ought to be balanced rather than dominated by lay members.[33] It is unacceptable to stipulate that the HPC should include only the Supreme Public Prosecutor (appointed by Parliament), and prefer deputy public prosecutors to public prosecutors, the key prosecutorial officers in Serbia. If the author had wished to comply with the Commission's recommendation that the HPC should include 'prosecutors from all levels', public prosecutors ought to have dominated this body and not be entirely absent from it, save the Supreme Public Prosecutor. It is also paradoxical to have deputy public prosecutors over-represented on the body appointing public prosecutors, hierarchically their superiors.

Corruption in public authorities has long been a key concern for Serbia. As such, the draft of Amendment XIV ought to have been harmonised with the recommendation of the European Parliament cited above that calls for prosecutors' services in South-Eastern Europe to be made independent and autonomous so as to be better able to tackle corrupt segments of government institutions, rather than using the HPC as a vehicle to further politicise the prosecution service.

3. Instead of a conclusion

The authors of the working draft of amendments to the Constitution of Serbia seem to have read, but not acknowledged, the opinions of the Venice Commission about the constitutional position of the judiciary. This flaw means that the proposed amendments will have to be withdrawn from the consultation process; efforts to regulate the constitutional position of the judiciary should be entrusted to professors of constitutional law, the only group able to rightly establish the requisite checks and balances in a system based on the separation of powers whilst considering arrangements in force in other jurisdictions and standards of international law. After a new set of constitutional amendments is developed (in compliance with legal drafting requirements), a fresh round of consultations should be launched, including submitting the proposals for consideration by the Venice Commission.

[32] See the statement of justification for the draft of Amendment XXI.

[33] European Commission for Democracy Through Law, (Venice Commission), "Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service", *op. cit.*, para. 65.

Professor Kosta Čavoški, Ph.D.*

UNKNOWN AUTHORS OF UNACCPETABLE AMENDMENTS

At the outset of my speech, as it is late and you are all tired, I'll try to amuse the audience with a question: "Do you know who the author of the Constitution of the Republic of Serbia of 2006 is? As even many professors of constitutional law don't know this, I'll tell you; they were Dragor Hiber and Zoran Lončar. The former is a professor of property law and the latter of administrative law. The former represented Boris Tadić and his Democratic Party and the latter Vojislav Kostunica and his Democratic Party of Serbia.

Therefore, constitutional law was not the specialty of either of them, and the question becomes what kind of a constitution they could have authored. In my view, they not only wrote it they more likely scamped it which I will prove by presenting three examples.

The first example is inconsistent terminology for which there is no excuse. Thus, Article 29, Paragraph 2 provides: "Any person deprived of liberty without a decision of a court must be brought before the competent court without delay, or within 48 hours at the latest or otherwise shall be released." Then Article 30, Paragraph 2 also includes mention of *48 hours*, and Paragraph 3 mentions 12 *hours* and 48 *hours*. Unexpectedly, Article 101, Paragraph 5 reads: "The decision rendered in connection with confirmation of terms of office is appealable to the Constitutional Court that is required to decide it within 72 *hours* (used different Serbian term for "hour")".[1] Our language permits both terms "čas" and "sat" – however, terminology in a general regulatory document must be consistent. This happened most probably because of the rushed preparation, not to say scamping, of the draft constitution, as the said professors did not have time to hire a professional philologist, an editor.

The second language error is also a material one. Thus, Article 143 and 144 mention the Supreme Court of Cassation. Such a title means that in addition to the Supreme Court there are other courts of cassation – trial and appellate cassation courts, like there used to be trial labour courts in addition to the Supreme Labour Court. Therefore, the highest court could have been designated as either the supreme or the cassation rather than by using both terms.

The third language error is even more serious. Article 32 that stipulates the right to a fair trial reads as follows: "Everyone shall have the right to have an independent, impartial tribunal established by law publicly, *fairly* and within a reasonable

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* A member of the Serbian Academy of Sciences and Arts.

[1] TN.

time hear and decide their rights and obligations, grounds for suspicion for which the proceedings were initiated and charges brought against them.» This provision is the basis for the right to constitutional appeal (Article 170) due to violation of the right to a fair trial. Had the authors of this Constitution known the essential difference between justice and fairness they would have used the clause "right to a *just* trial" , because as Aristotle wrote in his *Nichomachean Ethics:* „To go to a judge is to go to justice, for the ideal judge is so to speak justice personified."

Justice is the supreme value in law and it primarily means *equal treatment in* more or less identical cases. Fairness, however, represents *correcting* or *mitigating* the strictness of a general norm in law for the sake of making justice in an exceptional case that the creator of the norm could not have foreseen beforehand. For that reason the right to a *fair* adjudication cannot be foreseen or guaranteed by any norm, as it implies significant discretion of the court that as such cannot at all be regulated by a general norm in law. It seems that Dragor Hiber as a professor of civil law did not know the difference between justice and fairness and probably consider justice and fairness to be synonyms.

All these shortcomings of the Constitution of 2006 are probably the reason why nobody wants to admit publicly who authored it. This Constitution would have certainly been better had it been seriously discussed by the public before adoption, especially by professional circles. Instead, it was said that members of parliament were provided with the draft constitution one hour before its adoption and that they hadn't seen it before. Nikola Milosević told me that the draft had been provided two hours before voting, which means that no one had read it properly. The votes were cast blindly based on sheer trust. Hence, the Constitution has been so unacceptably defective.

The Constitution of 1990 deserves significantly different review and its author Ratko Marković can be proud of it. He not only scaled down the so-called constitutional substance to the right level by throwing out local communities, self-governing community of military institutions and other trinkets but composed a solid constitution adhering to drafting rules. This does not mean that there weren't disputable features, such as the semi-presidential system that I criticized at the time.

Something similar applies to "Legal Analysis of the Constitutional Framework of the Judiciary in the Republic of Serbia", written by professors Irena Pejić, Vladan Petrov, Darko Simović and Slobodan Orlović. They also can be proud of their analysis.

The same however could not be said for the "Working Text of the Justice Ministry's Amendments to the Constitution of the Republic of Serbia" whose authors are not known, most probably because they have nothing to boast about. They are represented by the Minister Nela Kuburović, a person I have never heard of before she entered office, which means that she left no trace in the world of serious legal profession.

It seems that the authors of this working text have no clue as to how amendments to constitutions are supposed to be drafted, which only confirms that they are not familiar with rules that govern drafting laws. For instance, their Amendment I is a literally copied Article 99 of the Constitution stipulating the authority of the National Parliament while the intention is to amend only paragraph 2, Item 3) to

read: "elect and dismiss the Supreme Public Prosecutor of Serbia, five members of the High Judicial Council and five members of the High Prosecutorial Council". Instead of repeating the whole article, it would be much simpler to say that Paragraph 2, Item 3) of Article 99 shall be amended to read – and then state the provision that has been quoted. This is the manner in which we amend the laws.

It seems that the authors of this working text wanted, though didn't know how, to apply the method modelled on the American system of adoption of amendments to the constitution introduced after the adoption of the SFRY Constitution of 1963. In that case the text of the current constitution would not be meddled with, it would stay unchanged, and the amendments of certain provisions or those introducing new features would be added and then it would be left to the interpreters of the constitution to explain which provisions were repealed.

The example that illustrates this is Article I, Section 3 of the US Constitution of 1787. The question that was discussed at that time concerned direct taxes and number of representatives of the member states in the House of Representatives. Southern slave states required that the number of their voters include slaves who, otherwise, did not have the right to vote. The compromise was found thanks to the provision that anticipated three fifths – Indians were excluded while one slave would be worth three fifths of a free citizen. Or even clearer, a thousand slaves were valued as six hundred free citizens whose votes are added to the votes of free citizens, thus making the vote of a southerner in elections of representatives in the House of Representatives worth more than a vote of a Yankee in northern free states. This provision was repealed by Amendment XIV of 1868. The provision still exists in the text of the US Constitution; however its publishers use a footnote to refer the reader to Amendment XIV which has repealed it.

This is the technique of presenting amendments to a constitution that Nela Kuburović's "experts" never heard of. In order to end her predicament and prevent further embarrassment on account of the said working text somebody should tell her that she can follow two techniques of presenting amendments to a constitution. One is the already mentioned, usual method to amend a law and the other is a method used to amend a constitution. If she preferred the latter then the text of the current constitution was not supposed to be touched, rather all amendments should be presented in two, four at the most, amendments. The first one would concern the judiciary and the other the prosecutor's offices. If one wants to have shorter and clearer amendments then the first may be dedicated to the judiciary, the second to the High Judicial Council, the third to the prosecutor's offices and fourth to the High Prosecutorial Council.

However, my intention is not to continue educating Minister Nela Kuburović and her ignorant associates as I am against any kind of constitutional amendments at this point in time. I'll tell you why. In order for you to understand it better, let me ask you a question: As the "Working Text of the Justice Ministry's Amendments to the Constitution of the Republic of Serbia" is so disputable aren't you wondering why no one among our foreign guests, who have continuously been warning us what we need to do in order to stay on our European path, required Minister Nela Kuburović to immediately withdraw the working text, as absolutely unacceptable.

And instead of having five or six European justice ministers immediately sit on a plane and fly to Belgrade and slap her on the wrist in order to withdraw the text as inappropriate for any amendment of the Constitution in the field of judiciary, they not only did not do so but they do not plan to do it any time soon. The question becomes, why.

Powerful foreign actors in Washington, Brussels, Berlin and Paris deem it much more important to eliminate from our constitution the preamble, Article 114, Paragraph 3 about the oath of the President of the Republic and Article 182, Paragraph 2 about the Autonomous Province of Kosovo and Metohija. If our leaders would agree with that, it would not be impossible (it is even very likely) that the great supporters of the rule of law and judicial independence would allow the current government in Serbia to cripple our judiciary one more time by the proposed constitutional amendments.

Also, disputable are provisions providing that a judge of a trial court as specified by law, and a deputy public prosecutor in the lowest public prosecutor's office may be elected only among those persons who have completed special training in a judicial training institution established by law. I do not understand why such a Judicial Academy should hold monopoly over the training of future judges. Secondly, aren't the existing schools of law providing students with appropriate knowledge and competence in order for them to be able to work in courts and prosecutor's offices?

In England, after completing a school of law, which lasts for three years, additional training is necessary in order for a candidate to obtain the title of a solicitor or barrister. Judges are, however, elected among the most successful attorneys after they have turned forty five years of age.

We should also rely on average scores in studies. In my view, persons with an average score below eight should not be allowed to be judges of the higher courts, and judges of the appellate court should be only those whose average was at least nine. I know that some will say that a judge with average score below eight can further improve his/her qualifications. That is certainly possible, and the improved qualifications suitable for the appellate court may be proven by acquiring the degree of a doctor of law (LL.D).

Another disputable norm in these amendments is the norm that the National Parliament elects five members of both the High Court Council and the High Prosecutorial Council among distinguished lawyers upon the proposal of the competent parliamentary committee after the completion of a public competition. So it turns out that this committee is a sort of jury able to assess the professional achievements of candidates and whether a candidate deserves to be appointed to these councils. It is almost unnecessary to note that this is another attempt of the ruling party to place its protégés on those councils and with that obtain a dominant role in the election of new judges and deputy prosecutors. Had that election been placed in the hands of the Serbian Academy of Sciences and Arts I would understand it, as it occasionally accepts the best attorneys in its membership. It would be logical to provide that full professors of schools of law elect five distinguished lawyers by secret ballot, while judges or prosecutors, would elect five of their representatives for these two councils.

Finally the judges themselves should show more respect for themselves and their job. I am asking you, is a court judgment an authored piece? If it is, why then the bulletins and magazines do not disclose the name of the judge who wrote the judgment, and why is that information redacted? And how can a judge sign a judgment written by his/her associate without even mentioning his/her name?

In the past several years I would frequently ask attorneys and some judges whether they could recall a judge in the last two hundred years who deserved his/her judgments to be collected and published. Nobody could come up with a name of such a judge.

That is not the case in England. Lord Nottingham in only nine years (from 1673 to 1682) decided 1,170 disputes and all of his judgments were preserved and later published in two volumes. And the judgments of Lord Eldon (from 1801 to 1827) were collected and published in 32 books and were all preserved. This is how judgments that are not only the source of law but true and valuable authored pieces are treated.

Finally, what protects a judge from any external influence is his/her firm and steadfast character. It happens, unfortunately, that even the highest ranking judges do not possess such character. Do you remember that Boris Tadić's trustee, Borislav Stevanović, concluded in Brussels four agreements on the cadastre, registry books, honouring university diplomas, check points along the border between the self-styled Kosovo and the rest of Serbia with a representative of the self-proclaimed country of Kosovo Albanians? In order to avoid ratifying those agreements, the Government has published them in the form of a regulation/decree. The Constitutional Court pronounced the first three to be unconstitutional while it failed to do so with the fourth one establishing the state border along which customs duty is charged, due to lack of courage. Because of that I proposed at that time to nail these judges, except four of them of whom three are sitting now in this room, to a pillar of shame.

There is no doubt that the constitutional and statutory norms must, as much as possible, secure judges and prosecutors' independence, especially in their election and promotion. However, the judges and prosecutors themselves must fight for and defend that independence with their competence and courage.

CHAPTER V

APRIL DRAFT AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

13 April 2018

AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

Amendments I through XXIX to the Constitution of Serbia

Amendments I through XXIX are an integral part of the Constitution of the Republic of Serbia, which shall enter into force on the day of promulgation by the National Assembly.

A Constitutional Act shall be passed to implement the Amendments I through XXIX of the Constitution.

AMENDMENT I

Competences

The National Assembly shall:

1. adopt and amend the Constitution,
2. decide on changes concerning the borders of the Republic of Serbia,
3. call for the Republic referendum,
4. ratify international contracts when the obligation of their ratification is stipulated by the Law,
5. decide on war and peace and declare state of war and emergency,
6. supervise the work of security services,
7. enact laws and other general acts within the competence of the Republic of Serbia,
8. give previous approval for the Statute of the autonomous province,
9. adopt defense strategy,
10. adopt development plan and spatial plan,
11. adopt the Budget and financial statement of the Republic of Serbia, upon the proposal of the Government,
12. grant amnesty for criminal offenses.

Within its election rights, the National Assembly shall:

1. elect the Government, supervise its work and decide on expiry of the term of office of the Government and ministers,
2. appoint and dismiss judges of the Constitutional Court,
3. *appoint and dismiss five members of the High Judicial Council, five members of the High Prosecutorial Council, the Supreme Public Prosecutor of Serbia and public prosecutors,*
4. appoint and dismiss the Governor of the National Bank of Serbia and supervise his/her work,
5. appoint and dismiss the Ombudsman and supervise his/her work,
6. appoint and dismiss other officials stipulated by the Law.

The National Assembly shall also perform other functions stipulated by the Constitution and the law. The present Amendment shall supersede Article 99 of the Constitution of the Republic of Serbia.

AMENDMENT II

Method of decision making in the National Assembly

The National Assembly shall adopt decisions by a majority vote of deputies at the session where a majority of deputies are present.

By means of a majority vote of all deputies, the National Assembly shall:

1. grant amnesty for criminal offenses,
2. declare and call off the state of emergency,
3. order measures of departure from human and minority rights in the state of war and emergency,
4. enact the Law by which the Republic of Serbia delegates particular issues falling within its competence to autonomous provinces and local self-government units,
5. give previous approval for the Statute of the autonomous province,
6. decide on the Rules of Procedure pertaining to its work,
7. cancel immunities of deputies, the President of the Republic, members of the Government and the Ombudsman,
8. adopt the Budget and financial statement,
9. elect members of the Government and decide on the end of the term of office of the Government and ministers,
10. decide on response to interpellation,
11. elect judges of the Constitutional Court and decide on their dismissal and end of their term of office,
12. elect the Supreme Public Prosecutor of Serbia and public prosecutors and decide on cessation of their term of office,
13. elect and dismiss the Governor of the National Bank of Serbia, Governors' Council and the Ombudsman,
14. also perform other election competences of the National Assembly.

By means of a majority vote of all deputies, the National Assembly shall decide on laws which regulate:

1. referendum and peoples initiative,
2. enjoying of individual and collective rights of members of national minorities,
3. development and spatial plan,
4. public debt,
5. territories of autonomous provinces and local self-government units,
6. conclusion and ratification of international treaties,
7. other issues stipulated by the Constitution.

By means of a three-fifths majority vote of all deputies, the National Assembly shall elect the five members of the High Judicial Council and the five members of the High Prosecutorial Council, and if they are not all elected in such manner, the remaining members shall be elected in the next ten days by means of five-ninths majority vote of all deputies, which is also required for their dismissal.

The present Amendment shall supersede Article 105 of the Constitution of the Republic of Serbia.

AMENDMENT III
7. Courts
Judiciary principles

Judicial power shall belong to the courts, as autonomous and independent state authorities.

Judicial power shall be unique on the territory of the Republic of Serbia. Court decisions shall be passed in the name of the people.

A court decision may only be reviewed by legally authorized court in the proceedings prescribed by law.

The hearing before the court shall be public and may be restricted only in accordance with the Constitution and the law.

The court shall sit in a panel, unless prescribed by the law that the court shall be presided by a single judge.

Lay judges and judicial assistants may also take part in the trial, pursuant to the law.

The present Amendment shall supersede Article 142 of the Constitution of the Republic of Serbia.

AMENDMENT IV
Organization of courts

Courts shall be established and dissolved by the law. The types of courts, jurisdiction, territory of courts and court proceedings shall be regulated by law.

Provisional courts, courts-martial or emergency courts shall not be established.

The present Amendment shall supersede Article 143 of the Constitution of the Republic of Serbia.

AMENDMENT V
Independence of judges

A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international treaties, laws and other general acts.

Any influence on a judge while performing his/her judicial function is prohibited.

The method to ensure uniform application of laws by the courts shall be regulated by law.

The present Amendment shall supersede Article 144 of the Constitution of the Republic of Serbia.

AMENDMENT VI
Conditions for election of judges

General and special conditions for the election of judges, presidents of courts and lay judges shall be regulated by law.

A person elected for a judge for the first time in the legally specified courts with exclusively first-instance jurisdiction may be elected only if he or she has completed one of the forms of legally stipulated training in a judicial training institution.

The present Amendment shall supersede Article 145 of the Constitution of the Republic of Serbia.

AMENDMENT VII
Permanent Tenure of Office

A judicial tenure shall be permanent and shall last from the moment of the appointment until the retirement.

A judge's tenure of office shall cease, prior to the retirement, at personal request, in case of permanent disability for judicial function or in case of dismissal. A judge shall be dismissed if he/she has been convicted for a criminal offense with at least six months of imprisonment or for a criminal offence that renders him/her unworthy for the judicial function, if he/she performs the judicial function incompetently, or if he/she has committed a serious disciplinary offense.

A judge and a president of the court shall have the right to lodge an appeal with the Constitutional Court against the decision of the High Judicial Council on cessation of judicial function, which shall exclude the right to lodge a Constitutional appeal.

The present Amendment shall supersede Article 146 of the Constitution of the Republic of Serbia.

AMENDMENT VIII
Non-transferability of Judge

A judge shall have the right to perform his/her judicial function in the court to which he/she was elected, and may be relocated to another court only by his/her own consent.

Regardless, in case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may be relocated to another court, without his/her consent, in accordance with the law.

The present Amendment shall supersede Article 147 of the Constitution of the Republic of Serbia.

AMENDMENT IX
Immunity and Incompatibility

A judge and a lay judge cannot be held accountable for an opinion expressed within the court proceedings or voting in the process of passing a court decision, unless they commit a criminal offense of violation of law by a judge, public prosecutor or his deputy.

A judge may not be deprived of liberty in the legal proceedings initiated against him/her for a criminal offense committed while performing judicial function without the approval of the High Judicial Council.

A judge and a court president shall be prohibited to engage in political actions, while other functions, activities or private interests which are incompatible with the judicial function shall be stipulated by the law.

The present Amendment shall supersede Article 148 of the Constitution of the Republic of Serbia.

AMENDMENT X
The Supreme Court of Serbia

The Supreme Court of Serbia shall be the highest court in the Republic of Serbia.

The Supreme Court of Serbia shall ensure uniform application of the law by the courts.

The present Amendment shall supersede Article 149 of the Constitution of the Republic of Serbia.

AMENDMENT XI

President of the Supreme Court and Presidents of Courts

The president of the Supreme Court of Serbia shall be appointed by the High Judicial Council, upon obtaining opinion of the general session of the Supreme Court of Serbia, for a five-year term.

The same person cannot be appointed more than once as President of the Supreme Court of Serbia.

The High Judicial Council shall elect presidents of other courts for a five-year term.

The present Amendment shall supersede Article 150 of the Constitution of the Republic of Serbia.

AMENDMENT XII

High Judicial Council
Jurisdiction of the High Judicial Council

The High Judicial Council is an autonomous and independent state body that ensures the autonomy and independence of the courts and judges and court presidents by deciding on the issues of the status of judges, presidents of courts and lay judges determined under the Constitution and the law.

The High Judicial Council shall appoint and dismiss the President of the Supreme Court of Serbia and the presidents of other courts; appoint judges and lay judges and decide on the cessation of their office; collect statistical data relevant to the work of judges; evaluate the performance of judges, presidents of courts and judicial assistants; decide on the transfer and temporary relocation of judges; appoint and dismiss the members of the disciplinary bodies; determine the number of judges and lay judges; propose the amount of funds required for the work of the High Judicial Council and the work of courts in matters within its competence and autonomously disposes of these funds, and shall decide on other issues related to the status of judges, presidents of courts and lay judges provided by law. The present Amendment shall supersede Article 151 of the Constitution of the Republic of Serbia.

AMENDMENT XIII

Composition of the High Judicial Council

The High Judicial Council shall be composed of ten members: five judges elected by the judges and five prominent lawyers elected by the National Assembly. A prominent lawyer shall be a law school graduate with a Bar exam who has at least ten years of working experience in the field of law falling within the competence of the High Judicial Council, who demonstrated professional work and enjoys personal reputation.

The National Assembly shall elect five members of the High Judicial Council upon the proposal of the competent parliamentary committee after having con-

ducted a public competition, by a three-fifth majority vote of all deputies, and in case they are not all elected in this manner, the remaining members shall be elected within the next ten days by a five- ninth majority vote of all deputies. If all the members are not elected even in that manner, the remaining members shall be elected, after 15 days, from among the proposed candidates, by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, by majority vote.

The competent committee of the National Assembly shall propose twice as many candidates as the number of members elected.

The principle of equal representation of courts shall be taken into account in the process of election of judges as members of the High Judicial Council.

Presidents of courts may not be members of the High Judicial Council.

The present Amendment shall supersede Article 152 of the Constitution of the Republic of Serbia.

AMENDMENT XIV

Term of Office of Members of the High Judicial Council

Member of the High Judicial Council shall be elected to a five-year term of office. The same person may not be reelected as member of the High Judicial Council.

The term of office of a member of the High Judicial Council shall cease for reasons prescribed by the Constitution and law and in the procedure prescribed by law.

The present Amendment shall supersede Article 153 of the Constitution of the Republic of Serbia.

AMENDMENT XV

President of the High Judicial Council

The High Judicial Council shall have a president.

The president of the High Judicial Council shall be elected from among members who are not judges.

The term of office of the president of the High Judicial Council is five years, or until the cessation of the term of office as the member of the High Judicial Council.

The present Amendment shall supersede Article 154 of the Constitution of the Republic of Serbia.

AMENDMENT XVI

Work and Decision-making of the High Judicial Council

The High Judicial Council may make decisions at a session where at least seven members of the High Judicial Council are present.

The decision shall be adopted by the votes of at least six members of the High Judicial Council.

In the case that the High Judicial Council does not make a decision in the matters in its jurisdiction presrcibed by law, within 30 days from the day of the first decision making on that matter, the term of office of all members of the High Judicial Council shall cease.

The High Judicial Council shall publicly announce and explain its decisions, and make the decisions on the election and cessation of the tenure of office of judges, presidents of courts, and lay judges, decisions on the transfer and temporary relocation of judges, and decisions on the appointment and dismissal of members of disciplinary bodies on the basis of the criteria determined in accordance with the law and under a legally prescribed procedure.

The present Amendment shall supersede Article 155 of the Constitution of the Republic of Serbia.

AMENDMENT XVII

Immunity of the members of the High Judicial Council

Members of the High Judicial Council cannot be held accountable for an opinion expressed or vote given in decision-making within the High Judicial Council, unless they have committed a criminal offense. The members of the High Judicial Council cannot be deprived of liberty in the proceedings initiated against them for a criminal offense they have committed as members of the High Judicial Council without the approval of the High Judicial Council.

The present Amendment shall supersede Article 156 of the Constitution of the Republic of Serbia.

AMENDMENT XVIII

8. Public Prosecutor's Offices

Status

The Public Prosecutor's Office shall be an autonomous state body which shall prosecute the perpetrators of criminal offenses and other punishable actions and shall protect the constitutionality and legality, human rights and civil freedoms.

The Public Prosecutor's Office shall perform its function in accordance with the Constitution, ratified international treaties, laws and other general acts.

Any influence on Public Prosecutor's Office in an individual criminal prosecution case is prohibited.

The establishment, organization, and jurisdiction of the Public Prosecutor's Office shall be regulated by the law.

The Supreme Public Prosecutor's Office shall be the highest public prosecutor's office in the Republic of Serbia.

The Supreme Public Prosecutor of Serbia shall perform the function of the public prosecution within the rights and duties of the Republic of Serbia.

The present Amendment shall supersede Article 157 of the Constitution of the Republic of Serbia.

AMENDMENT XIX

Responsibility

The Supreme Public Prosecutor of Serbia shall be responsible to the National Assembly for the work of the public prosecution and his/her own work.

Public prosecutors shall be responsible for the work of the public prosecution

and their own work to the Supreme Public Prosecutor of Serbia and the National Assembly, and public prosecutors of lower-instance prosecutor's offices also to the public prosecutors in immediately higher prosecutor's offices.

Deputy public prosecutors are responsible for their work to the public prosecutor. The present Amendment shall supersede Article 158 of the Constitution of the Republic of Serbia.

AMENDMENT XX

Public Prosecutors and Deputy Public Prosecutors

A Public Prosecutor shall perform the function of the Public Prosecutor's Office.

A Deputy Public Prosecutor shall stand in for the Public Prosecutor in performing the function of the Public Prosecutor's Office and shall be obliged to act upon instruction from the public prosecutor.

A Deputy Public Prosecutor shall have available legal remedy against the instructions of the public prosecutor.

Prosecutorial assistants may perform certain legally determined actions within the jurisdiction of the public prosecutor.

The present Amendment shall supersede Article 159 of the Constitution of the Republic of Serbia.

AMENDMENT XXI

Election of the Supreme Public Prosecutor of Serbia and Public Prosecutors

The National Assembly shall elect the Supreme Public Prosecutor of Serbia to a five- year term of office, upon the proposal of the High Prosecutorial Council, after having conducted a public competition.

The same person cannot be reelected as the Supreme Public Prosecutor of Serbia.

The National Assembly shall elect public prosecutors on the proposal of the High Prosecutorial Council to a five-year term of office.

In the case of cessation of their term of office, the Supreme Public Prosecutor of Serbia and public prosecutors shall retain the position of deputy public prosecutor, in accordance with the law.

The present Amendment shall supersede Article 160 of the Constitution of the Republic of Serbia.

AMENDMENT XXII

Conditions for election of public prosecutors and deputy public prosecutors

General and special conditions for the election of public prosecutors and deputy public prosecutors shall be regulated by law.

The person who is elected for the first time as deputy public prosecutor in the lowest public prosecutor's office may be elected only if he or she has completed one of the forms of legally stipulated training in a judicial training institution.

The present Amendment shall supersede Article 161 of the Constitution of the Republic of Serbia.

AMENDMENT XXIII
Life Tenure of Deputy Public Prosecutors

The function of deputy public prosecutor shall be permanent and shall last from the moment of the appointment until the retirement.

A deputy public prosecutors' tenure of office shall cease, prior to the retirement, upon personal request, in case of permanent disability for function of deputy public prosecutor or in case of dismissal.

A deputy prosecutor shall be dismissed if he/she has been convicted for a criminal offense to a sentence of imprisonment of at least six months or if he/she has been convicted for a criminal offence that renders him/her unworthy for the function of deputy public prosecutor; if he/she incompetently performs function of deputy public prosecutor, or in case of committing a serious a disciplinary offense.

A deputy public prosecutor shall have the right to lodge an appeal with the Constitutional Court against a decision of the High Prosecutorial Council on cessation of the tenure of office, which shall exclude the right to lodge a Constitutional appeal.

The present Amendment shall supersede Article 162 of the Constitution of the Republic of Serbia.

AMENDMENT XXIV
Immunity and Incompatibility

A public prosecutor and a deputy public prosecutor cannot be held accountable for an opinion expressed or a decision made in performing prosecutorial function, unless they have committed a criminal offense of violation of law by a judge, public prosecutor or his deputy.

A public prosecutor and a deputy public prosecutor may not be deprived of liberty in the legal proceedings initiated against him/her for a criminal offense committed while performing prosecutorial function without the approval of the High Prosecutorial Council.

A public prosecutor and a deputy public prosecutor shall be prohibited to engage in political actions, while other functions, activities or private interests which are incompatible with the prosecutorial function shall be stipulated by the law.

The present Amendment shall supersede Article 163 of the Constitution of the Republic of Serbia.

AMENDMENT XXV
High Prosecutorial Council
Jurisdiction of the High Prosecutorial Council

The High Prosecutorial Council is an autonomous state body that ensures the autonomy of the public prosecutors' offices, public prosecutors and deputy public prosecutors by deciding on the issues related to the status of public prosecutors and deputy public prosecutors, which are determined under the Constitution and the law.

The High Prosecutorial Council shall propose to the National Assembly the appointment and dismissal of the Supreme Public Prosecutor and public prosecutors; appoint deputy public prosecutors and decide on the cessation of their tenure of office; evaluate the performance of public prosecutors, deputy prosecutors and

prosecutorial assistants; appoint and dismiss the members of the disciplinary bodies; submit the annual report on the work of the public prosecutors' offices to the National Assembly; propose the amount of funds required for the work of the High Prosecutorial Council and the work of public prosecutor's offices in matters within its competence and autonomously dispose of these funds and shall decide on other issues related to the status of the Supreme Public Prosecutor of Serbia, public prosecutors, and deputy public prosecutors provided by the law.

The present Amendment shall supersede Article 164 of the Constitution of the Republic of Serbia.

AMENDMENT XXVI

Composition of the High Prosecutorial Council

The High Prosecutorial Council shall have eleven members: four deputy public prosecutors elected by public prosecutors and deputy public prosecutors, five prominent lawyers elected by the National Assembly, the Supreme Public Prosecutor of Serbia and the minister in charge of the judiciary. A prominent lawyer shall be a law school graduate with a Bar exam who has at least ten years of working experience in the field of law falling within the competence of the High Prosecutorial Council, who demonstrated professional work and enjoys personal reputation.

The National Assembly shall elect five members of the High Prosecutorial Council upon the proposal of the competent parliamentary committee after conducting a public competition, by a three-fifth majority vote of all deputies and in case they are not all elected in this maner, remaining members shall be elected within the next ten days by a fiveninth majority vote of all deputies. If all the members are not elected even in that manner, the remaining members shall be elected, after 15 days, from among the proposed candidates, by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, by majority vote.

The competent committee of the National Assembly shall propose twice as many candidates as the number of members elected.

The principle of equal representation of public prosecutors' offices shall be taken into account in the process of election of deputy public prosecutors as members of the High Prosecutorial Council.

Public prosecutors may not be members of the High Prosecutorial Council.

The present Amendment shall supersede Article 165 of the Constitution of the Republic of Serbia.

AMENDMENT XXVII

Term of Office of Members of the High Prosecutorial Council and President of the High Prosecutorial Council

Article 165a

Member of the High Prosecutorial Council shall be elected to a five-year term of office.

The same person may not be reelected as member of the High Prosecutorial Council. The term of office of a member of the High Prosecutorial Council shall terminate for reasons and in the proceedings prescribed by law.

The Supreme Public Prosecutor of Serbia shall perform *ex officio* the function of the president of the High Prosecutorial Council.

AMENDMENT XXVIII
Work and Decision-making of the High Prosecutorial Council
Article 165b

The High Judicial Council may make decisions at a session where at least nine members of the High Prosecutorial Council are present.

The decision shall be made by the votes of at least six members of the High Prosecutorial Council.

The High Prosecutorial Council shall publicly announce and explain its decisions, and make the decisions on the proposal for election and cessation of the term of office of Supreme Public Prosecutor of Serbia and public prosecutors, on election and dismissal of deputy public prosecutors, and decisions on the appointment and dismissal of members ofd isciplinary bodies on the basis of the criteria determined in accordance with the law and under a legally prescribed procedure.

The minister in charge of the judiciary and the Supreme Public Prosecutor of Serbia may initiate disciplinary proceedings and proceedings against public prosecutors and deputy public prosecutors, but cannot decide in the disciplinary proceedings.

AMENDMENT XXIX
Immunity of Members of the High Prosecutorial Council
Article 165c

Members of the High Prosecutorial Council cannot be held accountable for an opinion expressed or vote given in decision-making within the High Prosecutorial Council, unless they have committed a criminal offense.

The members of the High Prosecutorial Council cannot be deprived of liberty in the proceedings initiated against them for a criminal offense they have committed as members of the High Prosecutorial Council without the approval of the High Prosecutorial Council.

13 April 2018

CONSTITUTIONAL LAW FOR THE IMPLEMENTATION OF AMENDMENT I TO XXIX TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

Article 1.

This constitutional law is being adopted for the implementation of Amendment I to XXIX to the Constitution of the Republic of Serbia.

Article 2.

Law on Judges ("Official Gazette of the Republic of Serbia", No. 116/08, 58/09 – CC, 104/09, 101/10, 8/12 – CC, 121/12, 124/12 – CC, 101/13, 111/14 – CC, 117/14, 40/15, 63/15 – CC, 106/15, 63/16 – US and 47/17), Law on the Organization of Courts ("Official Gazette of the Republic of Serbia", No. 116 / 08, 104/09, 101/10, 31/11 – other law, 78/11 – other law, 101/11, 101/13, 40/15 – other law, 106/15, 13/16, 108/16 and 113/17), Law on Public Prosecutor's Office ("Official Gazette of the Republic of Serbia", No. 116/08, 104/09, 101/10, 78/11 – other law, 101/11, 38/12 – CC, 121/12, 101/13, 111/14 – CC, 117/14, 106/15 and 63/16 – CC), Law on the High Judicial Council ("Official Gazette of RS" No. 116/08, 101/10, 88/11 and 106/15) and the Law on the State Prosecutor's Council ("Official Gazette of the Republic of Serbia", No. 116/08, 101 / 10, 88/11 and 106/15) shall be aligned with Amendments I to XXIX to the Constitution of the Republic of Serbia within 90 days from the entry into force of Amendments I to XXIX to the Constitution of the Republic of Serbia.

The Law on the Judicial Academy ("Official Gazette of RS" No. 104/09, 32/14 – CC and 106/15) shall be aligned with Amendments I to XXIX to the Constitution of the Republic of Serbia within 90 days from the entry into force of Amendments I to XXIX on the Constitution of the Republic of Serbia, in a manner that the forms of training shall depend on the length of the working experience and the jobs within the legal profession performed by the trainee.

Article 3.

The High Judicial Council and the High Prosecutorial Council shall be established in accordance with the laws that harmonize the election of their members and their jurisdiction with the Amendments I to XXIX to the Constitution of the Republic of Serbia, within 60 days from the entry into force of these laws.

The President of the High Judicial Council shall be elected within 15 days from the election of all members of the High Judicial Council.

Article 4.

Members of the High Judicial Council and the State Prosecutorial Council who were elected before the entry into force of Amendments I to XXIX to the Constitution of the Republic of Serbia shall continue to perform their functions in line with the jurisdiction specified by the laws that were in force at the time they were elected, until the establishment of the High Judicial Council and the High Prosecutorial Council in accordance with the laws that harmonize the election of their members and their jurisdiction with Amendments I to XXIX to the Constitution of the Republic of Serbia.

Article 5.

The High Judicial Council, the State Prosecutorial Council and the National Assembly shall continue to exercise their competencies with respect to judges, presidents of courts, public prosecutors and deputy public prosecutors entrusted to them according to the applicable laws, until the establishment of the High Judicial Council and the High Prosecutorial Council in accordance with the laws that harmonize the election of their members and their jurisdiction with Amendments I to XXIX to the Constitution of the Republic of Serbia, up until the High Judicial Council and the High Prosecutorial Council are constituted in accordance with the laws harmonizing the election of their members and their jurisdiction with Amendments I to XXIX to the Constitution of the Republic of Serbia.

Article 6.

Judges at the Supreme Court of Cassation and court staff at the Supreme Court of Cassation shall continue to perform their functions and be employed in the Supreme Court of Serbia.

The deputies of the Republic Public Prosecutor and prosecutorial staff at the Republic Public Prosecutor's Office shall continue to perform their functions and be employed in the Supreme Public Prosecutor's Office of Serbia.

Article 7.

Judges and deputy public prosecutors who were elected for a term of office of three years, before the entry into force of Amendments I to XXIX to the Constitution of the Republic of Serbia, shall be deemed to be elected as permanent judges or deputy public prosecutors, which shall be confirmed by an appropriate public confirmation issued to them by the High Judicial Council and the State Prosecutors Council.

Article 8.

The President of the Supreme Court of Serbia shall be elected within 30 days from the date of the establishment of the High Judicial Council in accordance with the laws harmonizing the election of members and the jurisdiction of the High Judicial Council with Amendments I to XXIX to the Constitution of the Republic of Serbia, while the Supreme Public Prosecutor of Serbia shall be elected within 60 days after the entry into force of the law harmonizing the election of the Supreme Public Prosecutor of Serbia with Amendments I to XXIX to the Constitution of the Republic of Serbia.

The President of the Supreme Court of Cassation and the Republic Public Prosecutor who were elected before the entry into force of the law of Amendments I to XXIX on the Constitution of the Republic of Serbia shall continue to perform their functions in line with the competencies determined by the laws that were in force at the time they were elected, up until the taking on duty of the President of the Supreme Court of Serbia, or the Supreme Public Prosecutor of Serbia, elected in accordance with the laws harmonizing their election with Amendments I to XXIX to the Constitution of the Republic of Serbia.

Article 9.

This constitutional law shall enter into force by promulgation at the session of the National Assembly

30 April 2018

JUDGES' ASSOCIATION OF SERBIA COMMENTS ON THE DRAFT TEXT OF THE AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SERBIA

Introduction

Serbia is in the process of changing the 2006 Constitution, which was planned by the National Strategy for the judiciary reform 2013/2018 and 2016 Action plan for Chapter 23 related to EU accession process. The reason for that is – depoliticization of judiciary and enhancing its independence.

On 22 January, 2018 the Ministry of Justice published a Working Version of the Constitutional Amendments regarding the judiciary. The text was discussed during one month at four round tables. On 13th April 2018, Ministry of Justice announced its revised version and at the same day sent the Draft of the Constitutional amendments (hereinafter: Draft Amendments) to the Venice Commission for its opinion, without any debate. Draft Amendments includes provisions unacceptable in modern constitutional democracies.

Some of the provisions of the Draft Amendments with far-reaching implications were not even mentioned in the Working Version of 22 January 2018, let alone debated. These provisions, notably, provide for the election of High Judicial Council members from among the ranks of prominent "lawyers" by a majority of votes of a five-member commission, i.e. by a total of three votes (Draft Amendment XIII 2) and for the dissolution of the High Judicial Council every time it fails to rule on an issue within its statutory remit within 30 days from the day it first ruled on it (Draft Amendment XVI 3). The same applies to the Working Version of the Constitutional Act on the Implementation of the Amendments, which the Justice Ministry completed on 13 April 2018 but has not said it had forwarded it to the Venice Commission together with the Draft Amendments, although the actual implications of the draft provisions can be grasped only when analysed in their entirety.

There are some differences between the Serbian and English versions of the Draft Amendments arising from the use of the words *elect* and *appoint* as synonyms for the Serbian word *birati*. In general, the translation suffers from numerous inconsistencies (e.g. the word *funkcija* – tenure is translated as *function, position* and *tenure of office*; various translations of the reference that an issue will be governed by law: *in accordance with the law, pursuant to the law, legally stipulated, legally determined, provided by law, prescribed by law, legally specified*; inconsistent use of capital and italic letters, prepositions and definite and indefinite articles).

In order to make this document more easily readable JAS has opted to use hyperlinks instead of attachments. There are only two attachments to this document: Key statements of the law professors followed by their texts related to the 22 January 2018 Working Version of the Constitutional Amendments and the Supreme Court of Cassation Analysis of above mentioned Working version.

List of abbreviations
EU – European Union
CoE – Council of Europe
CCJE – Consultative Council of European Judges
Constitution – Constitution of the Republic of Serbia
DC – Disciplinary Commission
DPr – Disciplinary Prosecutor
HJC – High Judicial Council
JAS – Judges 'Association of Serbia
JC – Judicial Council
MoJ – Minister of Justice
NA – National Assembly
NJRS – National Judicial Reform Strategy
SC – Supreme Court
SCC – Supreme Court of Cassation
SPC – State Prosecutorial Council
VC – Venice Commission

I PROCESS

1. Reason for Amending the Constitution

1. Serbia committed to amending the constitutional provisions on the judiciary in its 2013-2018 National Judicial Reform Strategy (hereinafter: NJRS), which was adopted by the National Assembly of the Republic of Serbia (hereinafter: NA) on 1 July 2013, and in its Chapter 23 Action Plan, which the Serbian Government adopted on 27 April 2016. The explicit reason to amend the 2006 Constitution is to **depoliticise** i.e. **strengthen the independence of the judiciary**.

2. Which of the Planned Activities Have Been Completed

2. The **establishment of a Working Group** by the Judicial Reform Commission in 2013 was the only activity that was completed in a timely fashion and in accordance with the NJRS. The Working Group conducted a Legal Analysis of the Constitutional Framework on the Judiciary **in the Republic of Serbia**[1] **in 2014** (hereinafter: Legal Analysis). This document was unanimously **upheld by all courts.**. The other activities (expert debates on the need for and course of amending the constitutional framework; reports on the requisite amendments of the constitutional framework: submission of such reports to the competent authorities) have not been conducted.

[1] Available in Serbian at: https://www.mpravde.gov.rs/tekst/2975/dokumenta-komisije.php.

3. None of the Chapter 23 Action Plan activities for amending the Constitution pursuant to the procedure prescribed by the Constitution **have been carried out**. Under Article 203 of the Constitution, the constitutional amendment procedure shall be initiated by the submission of a proposal to amend the Constitution, which must be upheld by a two-thirds majority of all NA deputies. The drafting of the new constitutional provisions may begin only once the NA adopts a decision upholding such a proposal. The NA has not adopted a decision to launch the constitutional amendment procedure to this day. Furthermore, on 5 March 2018, the NA dismissed the deputies' request to hold a Public Hearing on constitutional amendments. On 13 April 2018, the media reported that the Government "adopted a conclusion upholding the text of the amendments". To recall, as GRECO noted in its Compliance Report on Serbia published on 15 March 2018[2], Serbia has implemented either partly or not at all of the 13 recommendations GRECO made in its report Fourth Round Evaluation Report Greco Eval IV Rep (2014) 8E of 19 June 2015.

3. Justice Ministry's Informal Activities Regarding Constitutional Amendments

4. Although not entitled to propose the amendment of the Constitution (such proposals may be submitted only by at least a third of people's deputies, the Serbian President, the Serbian Government or at least 15,000 voters), the Justice Ministry (hereinafter: **Ministry**) **organised** an informal process (**"consultative process"** i.e. "public debate") on the constitutional amendments from 21 July 2017 to 15 November 2017. Notwithstanding, aware of the importance of amending the constitutional provisions on the judiciary, judicial and prosecutorial associations and civic associations (hereinafter: **associations**) responded to the invitation of the Ministry, which said it would review only written proposals, and **forwarded their written views** of the judiciary's constitutional status, departing from the Legal Analysis and the goal of the constitutional amendments specified in the NJRS and the Chapter 23 Action Plan – to strengthen the independence of the judiciary.

5. The Ministry organised six round tables during the "consultative process" in 2017, to which it invited the organisations that had submitted their suggestions in writing. The **process**, however, **did not have the character of a public debate**, nor did it enable actual consultations – **there was no text to be discussed on**, **judicial authorities and academia** were **not drawn in** the process, the issue the debate should have focussed on – **strengthening the independence of the judiciary** – was **disregarded** during the round tables and the **Ministry representatives** openly disparaged the participants, especially **judges and prosecutors**. Faced with such circumstances and the Justice Minister's refusal to condemn her associates' conduct, the associations issued a press release on 30 October 2017, in which they said they would not take part in the remaining two round tables and expressed the readiness to join in the debate when the Ministry published its views on constitutional amendments.

[2] https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680792e56.

6. After publishing the **22 January 2018** Working Version the Ministry organised four round tables, again indicating it would take into account only contributions submitted in writing. The Working Version **was** absolutely **in contradiction with** the **Legal Analysis** and the **associations' proposals**. The Ministry did not explain why it opted for the provisions it proposed. **Ministry** representatives have publicly **stated** on a number of occasions **that Council of Europe expert** James Hamilton had **taken part in the drafting of the amendments** and that everything was done in agreement with the Venice Commission.

7. However, the **debate** was conducted **in the same fashion as the one in 2017**: it was always attended by the same dissatisfied citizens (whose participation costs were refunded by the Association of Employers of Serbia) and NGOs that had not existed or had been inactive until then (GONGOs) and it was accompanied by insults of and threats against judges and prosecutors. Assistant Justice Minister and Venice Commission member Čedomir Backović, who moderated the round tables, continuously publicly **disparaged** and insulted the **judges and prosecutors** participating in the debate (publicly expressing his surprise that they were still judges and prosecutors) and openly threatened the JAS Chairwoman and other judges in a TV talk show, when he said: "I will gladly harm you and the likes of you".[3] Furthermore, at the round table in Novi Sad on 19 February 2018, one of the **participants physically threatened a judge** because the Assistant Minister, who was moderating the debate, did not deem it fit to react, wherefore guild and other associations were forced to walk out of the event, as they duly notified the public.[4]

8. Nevertheless, the **associations gave their contribution in the debate** and again **forwarded their written comments** on the Working version to the Ministry. Furthermore, as its contribution to the process, JAS and the Prosecutors' Association of Serbia **organised** on 20 February 2018 a **Public Hearing of Professors**[5]**,** notably fifteen of the most eminent professors of constitutional law, theory of state and law and court organisation law, who had not been involved in the process conducted by the Ministry, wherefore the Public Hearing was the first opportunity they had to voice their views on the Working Version.

4. Dissagrement of the Professionals with the Proposed Solutions

9. The highest judicial institutions – the Supreme Court of Cassation[6], the High Judicial Council, the State Prosecutorial Council, numerous courts and associations of judges and prosecutors, courts that have held plenary sessions on the amendments, leading constitutional law experts who voiced their views at the Public Hearing on 20 February 2018, a large share of attorneys, as well as renowned NGOs that have for years focused on human rights protection and the judiciary, have concluded that the politicians are fighting to preserve their power and subordinate the

[3] *Dan uživo* on TV N1 of 15 February 2018.

[4] See the press release, available in Serbian at: http://www.uts.org.rs/aktivnosti/vesti/1440-sudije-tuzioci-advokati-napustili-javnu-raspravu-u-novom-sadu-zbog-pomocnika-ministra.

[5] See Annex I.

[6] See Annex II.

judiciary by the draft amendments. **Not one professor or judge gave a positive assessment of the draft amendments**. All of them **called for the withdrawal of the document** and the drafting of an entirely new text, in compliance with the constitutional procedure and the principles of modern constitutional democracies. This **request was upheld by 45 non-government organisations** rallied in the Chapter 23 Working Group of the National Convention on the European Union, established to facilitate civil society's monitoring of Serbia's EU accession talks.

10. The Draft Amendments are based on the view that **the executive and legislative authorities will "improve" the judiciary through their control**, justified by the legitimacy they obtained from the citizens at (political) elections. In fact, that means that the **principle of separation of powers is misunderstood**, because the legislative and executive powers are based on political legitimacy stemming from the citizens' will expressed at the elections, while the judiciary's power stems from the profession, professional qualifications and type of work, the character of which precludes its performance by the people and thus its representatives (NA, the President). The **organisation of state government based exclusively on the legitimacy stemming from the citizens' will expressed at the elections** leads to the unity of powers, **is in violation of the principle of separation of powers, precludes the independence of the judiciary** and results in the judiciary's political accountability to the legislative and executive authorities, thus undermining the concept of the rule of law. The "**checks and balances**" rule applies to the relationship between the legislative and executive. It **does not apply to the judiciary** because that would eliminate the independence of the judiciary, and consequently divest the people of meaningful protection of their human rights.

11. Legal professionals are of the stand that the Draft Amendments neglect the fact that **all three branches of government are formally based on the Constitution**, i.e. in the same manner, and that, precisely because of the safeguards of its independence, the **judiciary is** the branch **most limited** and regulated by law: in terms of content, because it applies the norms laid down by the other two branches, in terms of procedure, since the law precisely lays down when and how judges are to act, as well as in terms of status, both with respect to the minimum legal expertise requirements judges must fulfil in order to hold tenure (whereas any adult with legal capacity can become the head of state or government) and with respect to limitations on the types of work they may perform, their communication with the public, promotion, etc.

12. Legal professionals have also alerted to the disregard of the fact that the independence of the **judiciary is the pillar of the rule of law and that the issue of judicial independence is not an issue of class but prerequisite for the protection of human rights**. Excessive judicial independence has not been registered anywhere, whereas cronyism and corporatism can only be the subject of theoretical debates in Serbia, since its judiciary is far from any chance of "freeing" itself from the influence of the other two branches of government.

II OVERALL OBSERVATIONS ON DRAFT AMENDMENTS

1. Semblance of Headway

13. At first glance, **it appears** that the Ministry responded in the Draft Amendments to the planned commitments. Ministry abolished the so-called probationary election of judges in NA, as well as three-year probationary tenure, it raised the judicial dismissal requirements to the constitutional level, entrusted the appointment and dismissal of all judges and court presidents to the HJC and formally abolish ex officio membership of the Justice Minister and NA Judiciary Committee Chairperson in the HJC. A Working Version of the Constitutional Act on the Implementation of the Constitutional Amendments has been drafted as well.

14. Although this text focuses only on the Draft Amendments on the judiciary, a **reliable conclusion about** the intention and actual **implications** of the Draft Amendments **can be drawn only when they are analysed together with**:

- provisions of the valid 2006 Constitution of the Republic of Serbia,
- reasons for the change of Constitution in regards Judiciary as stipulated by the National Judicial Reform Strategy, Action Plan for the Implementation of the National Judicial Reform Strategy and Chapter 23 Action Plan since Serbia is in negotiating process on accession in EU and the solutions for the Serbian Judiciary planned in those documents
- transitional provisions of the Draft Constitutional Law
- the provisions regarding the public prosecution services, which, for their part, greatly exacerbate the status these services currently enjoy under the Constitution
- reports and opinions of Venice Commission, especially about Serbia's legal enactments on a number of occasions
- documents of other UN and European bodies (EU and CoE) containing judicial standards.

2. Missing Features

15. Having in mind the reason for changing the Constitution – to depoliticise i.e. strengthen the independence of the judiciary**,** although the **Draft Amendments** totally change the constitutional provisions on the judiciary, it still **does not** systemically and clearly **regulate the relationship between the three branches of government**. Furthermore, Draft Amendments **does not define:**

- the **substance of the judicial branch**[7] **–** neither the Constitution nor the Draft amendments define the substance of the judiciary, as neither prescribe or otherwise define the jurisdiction of judicial authorities (the courts); moreover, they do not elucidate the relationship between courts and the Constitutional Court, although practice has here revealed a number of issues to be particularly sensi-

[7] The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.' (UN Basic Principles on the Independence of the Judiciary, para. 3); 'Only judges themselves should decide on their own competence in individual cases as defined by law' (Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, chap. I, para. 10).

tive for the status of the judiciary: these include deciding upon judges' appeals against the HJC's dismissal rulings, the need to clearly distinguish between the competences of courts and the Constitutional Court in human rights cases involving constitutional complaints, and ruling in conflicts of jurisdiction

- the **financial safeguards of independence**, both for the judiciary as a whole (in the form of a judicial budget)[8] and for individual judges,[9]
- **freedom of expression and association of judges**[10] although these flow from the Universal Declaration of Human Rights and the European Convention on Human Rights (Articles 1 and 14), the only differences being that the particular duties and responsibilities entrusted to judges and the need to ensure the impartiality and independence of the judiciary are seen as legitimate justification for imposing limits on the freedom of expression, assembly, and association of judges, including on their political engagement.[11]

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[8] asic Principles on the Independence of the Judiciary (para. 7); European Charter on the statute for judges (para 1.6); Opinion No. 2 (2001) of the CCJE on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights (para. 5, 10 and 14); report of the Venice Commission on the Independence of Judges (2010) (paras. 52 and 53); Recommendation CM/REC(2010)12 to member states on judges (para. 13, 33); and the Magna Carta of Judges (para. 7).

[9] European Charter on the statute for judges (paras. 6.1-6.4); Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (para. 62); report of the Venice Commission on the Independence of Judges (2010) (paras. 46, 51); Recommendation CM/REC(2010)12 to member states on judges (para. 54); and the Magna Carta of Judges (para. 7).

[10] Documents other than the Basic Principles on the Independence of the Judiciary also recognise the entitlement of judges to these freedoms. These include the European Charter on the statute for judges (paras. 1.7, 1.8, and 4.2); CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (paras. 27, 28, 29, 39, 40, and 47 to 50); Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities (para. 60), **CCJE Opinion No. 7** (2005) on justice and society (paras. 34, 52, and 55); the Magna Carta of judges (para. 12); Opinion No 806/2015 Report on the Freedom of Expression of Judges, CDL-AD(2015)018 wherein the Venice Commission, replying to a question by Honduras, assessed the legal framework governing the freedom of expression of judges in Council of Europe member states, in particular Sweden, Germany, and Austria; and a number of judgments of the European Court of Human Rights, particularly *Baka v. Hungary [GC]* – **20261/12,** Judgment of 23.6.2016.

[11] And yet judges are citizens too, and so, as cited in the Basic Principles on the Independence of the Judiciary, they too must enjoy '*freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary*' (para. 8) and may '*form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence*' (para. 9). In the judgment of Baka v. Hungary, the European Court of Human Rights held that the applicant (a past President of the Hungarian Supreme Court) was not only entitled, but also bound by duty to express opinion about matters concerning the judiciary, which are a question of public interest, solely from a professional point of view. The Court found that the premature termination of the applicant's mandate discouraged other judges and court presidents from participating in public debate.

Moreover, the problems faced by Serbian judges in establishing a professional organisation and the experiences and achievements of Judges' Association of Serbia (and the Prosecutors' Association of Serbia) over the past twenty years have revealed that such professional associations were both watchdogs and correctives for undemocratic and illegal actions by government authorities. These organizations' efforts to preserve and strengthen the rule of law have safeguarded the constitutional order in

3. Worsening

16. The existing constitutional guaranties of **the judicial independence will be diminished by** the solutions of Draft Amendments which:

- **enable judicial training institution** without any safeguard of independence **to preselect judges** by granting it a constitutional rank and imposing a completion of its training as the requirement for the appointment of judges for the first time to courts with exclusively first-instance jurisdiction and especially (Amendment VI 2)
- **formally weaken HJC** in every possible aspect (Amendments XII-XVII) and **diminish the attained degree of its independence** (Amendment XII)**,** does not provide its independence and consequently his role of the safeguard of judicial independence, thus the right to a fair trial, having in mind the provisions on HJC:
  - jurisdiction (Amendment XII 1)
  - composition (Amendment XIII 1)
  - way of election (Amendments II & XIII 2) and dismissal of the HJC members from the rank of the "prominent lawyers" (Amendments II & XIV 3)
  - chair person (Amendment XV 2)
  - work and decision-making (Amendments XVI 3 & 4)
  - ceasing of the term of office of its members in the case that HJC does not make a decision (Amendments XVI 3)
- **narrow the safeguard of the non-transferability** of judges (Amendment VIII)
- enable the **abolition of free judicial opinion – freie richterliche Überzeugung** by combining solutions in Amendment V 3 & X 2, NJRS, Action Plan for the Implementation of the NJRS and Chapter 23 Action Plan,
- **omit legal remedies against the HJC decision**s, aside in case of dismissal (Amendment XIV)
- prescribe **vague and extremely wide grounds for dismissal** (Amendment VII 3).

4. Risk of Misuse of European Standards

17. European (or indeed international) **legal standards are nothing other than rules of logical and rational behaviour arrived at through long-standing democratic practice**, and they are the shared legal heritage of all democratic nations. These rules are **applicable in every state** wishing to improve its judiciary, **on condition that the state** in question truly **has** the **political will** to improve judicial independence and the rule of law. At any rate, these standards are not some miraculous patterns that only need to be copied for one to achieve all of one's declared objectives. Every country that endeavours to apply the body of law developed by democratic countries, Serbia included, should first and foremost look out for its traditions and its abilities and, using these as its starting points and mindful of the essence of the standards in question, **create its own rules** of good conduct **and so put**

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alleviating (at least in part) the disastrous consequences of the so-called 2009 reform of the judiciary and have reinforced the need for strong guarantees to be put into place for freedom of expression and association of judges and prosecutors by enshrining these principles in the Constitution.

into effect international standards and make them applicable and successful for its own purposes. Thus, when applying, *acquis* should be understood in its totality, having in mind its purpose and goal and the reality of the particular state.

18. The provisions in the Draft Amendments are based on individual and **torn out of context excerpts of a VC 2007 Report** on Judicial Appointments[12] **and opinions** on the laws of Albania, Armenia, Georgia and Montenegro in which VC did not set out its general views but observations in response to particular draft provisions in specific socio-historical circumstances of particular countries with different legal traditions and at different levels of readiness and possibility for change. If one is aware of the numerous relevant documents adopted by the multitude of bodies of the CoE and the EU that comprehensively enumerate and develop judicial standards pertaining to various issues, one will understand why it is not acceptable to have the MoJ reference only some sentences, taken out of context, found in only some documents of the VC. Moreover, this approach begs the question of why the MoJ has done so and what ultimate intention lies behind this approach. The claim put forth by the **MoJ** during the so far debates, that when developing the Draft Amendments it was guided primarily by standards defined by the VC, serves to purposely **diminish, or even abuse** the purpose, content and importance of international judicial **standards**; this also constitutes a methodologically unsound approach to justifying some of the provisions proposed. The impression that is being conveyed is that it is only these provisions that comply with the standards, although the standards are in actual fact designed to allow individual countries, with their separate legal traditions and different levels of readiness and ability to change, to establish their own legislation that fits their social and historical environment.

19. Besides, merely referencing observations made in documents of the VC does not imply justification of the proposed changes. On the contrary, **it means only that** the VC has concluded that **one particular feature of the law** of **one particular country could be in alignment with European standards**, in the context of all other requirements and given the legal system in force in that country. It goes without saying that **this does not mean that the feature in question is the only one that complies with the standards**, **nor** is this a guarantee that this feature could be acceptable or **workable in any other legal system**, given its overall characteristics and specificities, as well as the fact that it is by no means certain that an arrangement which works in one country must be functional in another. Finally, the opinion of the VC that one arrangement in one country accords with European standards **does not mean that this arrangement is best**, **nor does it preclude there being other solutions for the same problem that would also accord with the standards, perhaps even more so**. Different arrangements for the same issue (such as, for instance, initial training for judges) are equally successful in various European countries and, as such, one ought to tread very carefully when choosing any solution.

20. It remains unclear why the legislator opted for particular solutions rather than a number of others and whether the selected ones are optimal for the Serbian judiciary. The authors of the Draft Amendments **did not take into account the sug-**

[12] **CDL-AD(2007)028** – 22/06/2007 – Judicial Appointments.

gestions the VC made about Serbia's legal enactments on a number of occasions, not only in 2007[13], but also in 2008,[14] 2013[15] and 2014[16], the **VC's thematic reports**[17], **or comprehensive legal standards set out in the documents of other CoE, EU and UN bodies**.[18]

III COMMENTS ON AMENDMENTS

Amendments I and II

Role of the National Assembly

21. The first, the second and the twelfth amendments address the main criticism brought by several international organisations (such as the EU, the CoE- etc.) that the election of judges (including court presidents) by the NA opens the door to political influence over the judiciary, thus infringing the principle of separation of powers and affecting judges' independence. The amendments vest the HJC with the power to appoint and dismiss judges, lay judges and court presidents. Undoubtedly, the amendments eliminate the mentioned problem. However, establishing whether the ultimate goal to strengthen the independence of the judiciary is achieved through the new system of appointment envisaged in the proposal requires further analysis.

22. The qualified majority by which the NA (that has 250 deputies) will elect HJC members needs to be borne in mind with respect to this Draft Amendment – it requires a three-fifths majority (150 deputies) and, *in the event they are not all elected in this manner, the remaining members shall be elected within the following ten days*

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[13] CDL-AD(2007)004 – 19/03/2007 – Opinion on the Constitution of Serbia adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007)

[14] CDL-AD(2008)006 – 19/03/2008 – Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008) i CDL-AD(2008)007 – 19/03/2008 – Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

[15] CDL-AD(2013)005 – 11/03/2013 – Opinion on Draft amendments to Laws on the Judiciary of Serbia Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013)

[16] CDL-AD(2014)028 – 13/10/2014 – Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014).

[17] **CDL-AD(2010)004** – 16 /3/2010 – Report on the Independence of the Judicial System Part I: the Independence of Judges, CDL-AD(2015)018 – 23/06/2015 – Report on the Freedom of Expression of Judges, **CDL-AD(2016)007** – 18/03/2016 – Rule of Law Checklist.

[18] The most important European standards on the judiciary are set out in some European Court of Human Rights judgments, CoE Committee of Ministers recommendations, especially its Recommendation CM/Rec(2010) 12 on Judges: independence, efficiency and responsibilities, (https://rm.coe.int/16807096c1) which must have the highest "binding" character in so-called CoE soft law; in other CoE documents (the 1998 European Charter on the Statute for Judges), and, especially, the opinions of CoE advisory bodies established for that purpose, such as the CCJE and the Consultative Council of European Prosecutors (CCPE) and, notably the 2001 CCJE Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges. European standards relevant to the judiciary are also set out in the documents of some EU bodies (especially of the European Network of Councils for the Judiciary) and the Organization of United Nations (1985 Basic Principles on the Independence of the Judiciary and the 2002 Bangalore Principles of Judicial Conduct).

*by a five-ninths majority (*138,9 deputies*) which is also required for their dismissal.* There is no doubt that a qualified majority is preferable in order to establish an important institution, or in order to elect public officials of such high importance. Such qualified majority would mean the inclusion of the opposition, and therefore ensure the element of social consensus and stability. However, in case such a majority is not provided, the Draft resorts to a solution in which the HJC membership is practically elected by the ruling majority, or **unusual five-ninths majority**, which almost **corresponds to** the number of deputies the **ruling majority** has in the Assembly (104 deputies of the ruling SNS party + 42 deputies from the parties members of the ruling coalition), stands out. The provision on qualified majority which is needed for the election of HJC members must be contemplate together with the provision of the Amendment XIII 2 which prescribes, **in case no above mentioned majority is reached**, for **election of the HJC members by only 3 individuals** – by majority of votes of a 5-member commission. These **solutions don't prevent** possibility of **excessive manipulation** in regards election of HJC members by smaller majority (5/9) or by only three men in the State, if ruling party's members of the NA do not enable the needed qualified majorities in NA.

23. Amendment II 4 introduces the **possibility for dismissal of the HJC members** (by the qualified majority). Still, Draft Amendments **does not give the grounds** for the dismissal of the HJC members. What more, the Amendment XIV 3 prescribes that: *The term of office of a member of the High Judicial Council shall cease for reason prescribed by the Constitution and law and in the procedure prescribed by law.*

24. Not only JAS, but legal professionals in Serbia, deem that **legislator just relocates the political influence** that NA had so far on election of judges from NA **to the training institution** (Judicial Academy is the only of its kind) **and ruling majority** in NA. Related to that, special attention should be drawn here to Article 5(4) of the valid Constitution which remains the same, under which *political parties may not exercise power directly or submit it to their control.* **These solutions do not provide for the adequate and sufficient Constitutional quarantines of the independent status of HJC members.**

Amendment III

Jurors/lay judges/ judicial assistants

25. The most relevant change refers to the position of jurors/lay judges and judicial assistants. The current Constitution makes the presence of lay judges compulsory in the justice system. The amendment delegates the decision whether to have jurors/lay judges to the ordinary law maker, thus making the elimination of lay judges possible. This is a purely political choice, which in any case will have little impact on the efficiency of the judiciary.[19] As for judicial assistants, the draft does

[19] However, JAS is of the point that the participation in trial of lay judges represents the involvement in case decision of the people of Serbia, in whose name judicial decisions are announced and could provide for the understanding and the trust of the citizens in proper functioning of judiciary. An additional reason of having lay judges in a justice system is to bring ordinary people's common sense in the judicial decision making process.

not clearly specify what their role in a trial could be. However, the fact that they are regulated together with lay judges evidently suggests that they will also be involved in case adjudication. Obviously, an ordinary law is necessary to make the novelty at issue implementable. The **participation in trial of judicial assistants**, who are civil servants, is very difficult to be justified. Moreover, neither the independence of whoever, without being a professional judge, participates in making judicial decisions nor the prohibition of any interference in this activity is unequivocally stated. In conclusion, the provision under discussion is open to a wide range of implementations (e.g., judicial assistants might be in majority in a trial panel) and **gives rise to many concerns** to the point that the best recommendation is to abolish it. In case this provision stays, it needs to be aligned and the Draft **Amendment XII should prescribe that HJC shall be in charged with appointing and dismissing judicial assistants**. In that way the Amendment XII and the Amendment III entitled "Courts. 7. Judiciary Principles" which reads as follows: *Judicial power shall belong to the courts, as autonomous and independent state authorities* (para 1*); Judicial power shall be unique on the territory of the Republic of Serbia* (para 2); and *Lay judges and judicial assistants may also take part in the trial, pursuant to the law* (para 7) would be consonant.

Amendment IV

Organization of courts

26. Article 143 "Types of Courts" of valid Constitution prescribes as follows: *Judicial power in the Republic of Serbia shall belong to courts of general and special jurisdiction* (Para 1); *The Supreme Court of Cassation shall be the Supreme Court in the Republic of Serbia* (Para 3). Aside Supreme Court of Serbia (Amendment X), Draft Amendments does not mention any other court or type of courts, contrary to the VC recommendation in the Opinion CDL-AD(2007)004 on Serbian 2006 Constitution that more detail on the organisation of the judicial system could have been provided in the Constitution[20]. Bearing in mind the unfortunate experience involving the re-election of all the judges and prosecutors of 2009, contrary to all the principles of legal civilisation, **omitting of at least types of the courts** might represent significant deficiency. Namely, it **could create** a risk of **large-scale transfers or reassignments** of judges, as indicated in the Comment of Amendment VIII "*Non-transferability of Judge***"**. Consequentlly, it might result in further undermining judicial independence and thus of the citizens' right to a fair trial.

Amendment V

The sources of the law

27. The sources of the law are inadequately prescribed by omitting the generally accepted rules of international law and by enabling that general acts of the executives as direct source of law (regardless the grounds in the law). The listed

[20] See paragraph 62, CDL-AD(2007)004 of 19 March 2007, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e.

sources of law do not include generally accepted rules of international law, although they are an integral part of Serbia's legal order, as prescribed in Articles 16(2) and 194(4) of the Constitution; the latter two provisions not amended by the Draft Amendments. This will bring into question the mutual compliance of the constitutional provisions with regard to the sources of law that are an integral part of Serbia's legal order. Unlike Current Art. 142(2) which prescribes that general act shall be the sources of Law *when stipulated by the Law,* the Amendment V 1 enables that the **general acts of the executives become** the direct **sources of Law**.

Harmonization of case law

28. Not only here one should bear in mind that the independence of judges might be undermined by various solutions in a relevant country, depending on the social and legal context as stated in the Opinion No. 17(2014) of the CCJE: *judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice*[21] (paragraph 5)*, such as a lack of financial resources*[22]*, problems concerning the initial and in-service training of judges*[23] *and the unsatisfactory elements regarding the organisation of the judiciary and also the possible civil and criminal liability of judges*[24]*.* The draft amendment stipulates that the *"method to ensure a uniform application of law by courts shall be regulated by law"*. Since the Para 3 is part of the Amendment V *Independence of judges,* one can logically assume that its **Para 3:** (T)*he* ***method to ensure uniform application of laws*** *by the courts shall be regulated by law* **is set as a restriction of** functional **judicial independence** in interpretation of the Law – **free judicial opinion – freie richterliche Überzeugung,** contrary to the Opinion no. 20(2017) on the Role of Courts with Respect to the Uniform Application of the Law.[25]

29. The lack of consistency in jurisprudence has been affecting the system for a long time[26]. In this context, the proposed draft amendment, at first sight, might appear banal and with no practical utility. The unavoidable question is: **why would such a provision be put in the Constitution?** Logically, two reasons can be imagined for that: a) making case law harmonization a value of constitutional rank, b) committing the primary law maker to pass a law regulating the topic, thus preventing other sources of law from dealing with it. Obviously, how the law maker will address the problem at issue is to be seen.[27].

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[21] CCJE Magna Carta of Judges (2010), paragraphs 3 and 4.

[22] CCJE Opinion no. 2(2001), paragraph 2.

[23] CCJE Opinion no. 4(2003), paragraphs 4, 8, 14 and 23-37.

[24] CCJE Opinion no. 3(2002), paragraph 51.

[25] Available at: https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3.

[26] Inconsistency of jurisprudence and the concerns expressed about the possible creation of a new source of law with the establishment of Certification commission has been addressed to in Para 126 of the Greco Eval IV Report (2014) 8E.

[27] In reality, the lack of uniformity in the jurisprudence is due to a structural shortcoming. Starting from the year 2000, the Serbian judiciary has been in a state of "reforms" and the laws have been changing frequently, incessantly and inconsistently. Drastic changes to procedural laws have a particularly harmful effect on legal certainty and security. The principle of material truth, both in criminal and

30. While there is no doubt that the courts (this phenomenon exists in the courts of all countries) deliver different decisions in seemingly identical factual and legal situations, this must not always mean that the Law has been violated. The **ECtHR** has also voiced its opinion about the subject, including in the decision against Serbia[28], when it **said** that:

54. (ii) ***The possibility of conflicting court decisions is an inherent trait of any judicial system***[29] *which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court.* ***That, in itself, cannot be considered contrary to the Convention*** *(see Santos Pinto v. Portugal, number 39005/04, § 41, 20 May 2008, and Tudor v. Romania, cited above number 21911/03, § 29, 24 March 2009);*

(iii) ***The criteria*** *that guide the Court's assessment of the conditions* ***in which conflicting decisions*** *of different domestic courts ruling at last instance are* ***in breach*** *of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in*

1) ***Establishing whether "profound and long-standing differences" exist*** *in the case-law of the domestic courts,*

2) ***Whether the domestic law provides for machinery for overcoming*** *these inconsistencies, and*

3) ***Whether that machinery has been applied****, and*

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civil procedure, has been abandoned and the procedure was "handed over" to the parties, abruptly and contrary to the existing system. That results in having different outcomes in similar or identical situations – the party that is more astute (meaning that it is able to pay lawyers, expert witnesses, detectives, irrespective of whether it is in the "right" or not) is in the better position of "winning". Moreover, depending on the claim formulation by the attorney of the parties as to the violation of the procedure, which are not controlled anymore by the court ex officio, the court that decides about the appeal in generic situations adopts different decisions (upholds or repeals the decision of lower instance).

The influence and consequence of frequent and inconsistent amendments on the court system of a state has been commented by the ECtHR several times – Ramadi et. al. v. Albania (13/11/2007), Manuhsaqe Puto and others v. Albania (31/07/2012), Bjacy v. Romania (09/12/2009), when:

- concludes that *"while amendments may reflect the development of the legal environment, frequent changes result in inconsistent case-law and contribute to a general lack of legal security (which is a violation of the Convention per se);*
- calls on the relevant states *"to avoid too frequent changes and to consider carefully all legal and financial consequences of the changes before introducing them; and*
- warns that *the excessive number of new laws and guidelines will not ensure actual and effective protection, since only effective enforcement of the law can provide such protection*."

This is why the existing remedies (meetings among judges, documentation, requests to the Supreme Court of Cassation – SCC- to issue an opinion, etc.) proved already to be ineffective and the measure included in the action plan (establishment within the SCC of a "certification commission" that should be *"in charge of certification of judgments, thereby establishing case law"* -2.7.1.3-) cannot help. In this regard, it is noteworthy that:

a) Higher Courts have mixed jurisdiction (of 1st and 2nd instance) in all matters;
b) decisions of Basic Courts can be appealed, depending on the value of the case or on the subject matter, before Higher Courts or Appellate Courts; and above all
c) there are 29 courts in the system where a decision can become final (25 Higher Courts plus 4 Appellate Courts).

[28] *Vučkovic and others v. Serbia*, Chamber judgmnet from 28/08/2012; as well as of the Grand Chamber from 25/03/2014, which, in paragraph 89, acknowledges the finality in terms of the inadmissible petition due to inconsistent case-law.

[29] The bold font in the cited excerpts of ECtHR decisions is taken from the original text.

*4) If appropriate, to what **effect** (Iordan Iordanov and Others v. Bulgaria, number 23530/02, cited above § 49-50, 2 July 2009; Beian v. Romania (number 1), number 30658/05, cited above § 34-40, ECHR 2007-V (extracts); Ștefan and Ștef v. Romania, nos. 24428/03 and 26977/03, § 33-36, 27 January 2009; Schwarzkopf and Taussik v. the Czech Republic (dec.), cited above number 42162/02, 2 December 2008; Tudor and Tudor, cited above, § 31; Ștefănică and Others v. Romania, number 38155/02, cited above § 36).*

Such an assessment must also be based on the principle of legal security. That principles guarantees stability in legal situations and contributes to greater confidence of the public in the courts.

However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law, since Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.

Court decisions and case-law should therefore not be set in stone forever. The Law, to the extent to which it is possible, leads and shapes social relations and, where appropriate, contributes to their development. The judges, which administer the Law, have the duty to do it in the proper way and, in the process, to interpret it in a dynamic way.

31. What gives particular rise for concern is the planned **establishment of a non-judicial certification body** – "Certification Commission", envisaged by the National Judicial Reform Strategy (NJRS) and by the Action Plan for the Implementation of the NJSR (Strategic Guidelines 2.7.1.-2.7.4)[30] or a similar body (the Chapter 23 Action Plan[31] does not mention a Certification Commission but its Recommendation 1.3.9 refers to the need to improve the consistency of the case-law by various means)[32]. This body is to be tasked with deciding which court decisions are "appro-

[30] Published in the Official Gazette of the Republic of Serbia 71/13, 55/14 and 106/16. Available at: https://www.mpravde.gov.rs/files/NSRJ_2013%20to%202018_Action%20Plan_Eng%202.1.pdf

[31] The European Opinion positively evaluated the final draft of the Chapter 23 Action Plan on 25 September 2015. The Action Plan was enacted by the post-election caretaker government on 27 April 2016. The Action Plan was never published in the *Official Gazette*.

[32] The Certification Commission is to comprise representatives of the Case-Law Departments of the Appeals Courts and the Supreme Court of Cassation, who are to work full-time on the "certification of judgments" with the support of "experts in the relevant legal areas and associates to act as *amicus curiae* – experts in various legal areas, representatives of lawyers and law professors". The Commission is to be tasked with identifying court decisions that represent best practices in specific types of disputes and ensure that other decisions in such cases are rendered in accordance with "established case-law", that is, to ensure that court decisions which, in the opinion of the Certification Commission, deviate from the case-law, do not leave the courts, and thus ensure consistent adjudication. Furthermore, there have been suggestions that judges, whose decisions are found to be deviating from the case-law and who do not want to change their views, are subject to disciplinary penalties. The establishment of a Certification Commission would amount to the establishment of a quasi court, a court above courts, on which the executive would have crucial influence by electing its associate members (lawyers and law professors). The "judges" of this "court above courts" would not be held responsible for the court decisions (responsibility for the judgments would remain with the judges who handed them down and signed them), but they would nevertheless have huge and unacceptable power over the judges – they would issue orders to judges and instruct them how to adjudicate, which would stifle all free judicial opinion (Ministry representatives have for months now been saying that they will abolish free judicial opinion).

priate" for specific factual and legal situations. The establishment of a Certification Commission, or any symilar body would amount to the establishment of a quasi court, a court above courts, on which the executive would have crucial influence by electing its associate members (lawyers and law professors) or influencing on who will become its member. The "judges" of this "court above courts" would not be held responsible for the court decisions (responsibility for the judgments would remain with the judges who handed them down and signed them), but they would nevertheless have huge and unacceptable power over the judges – they would issue orders to judges and instruct them how to adjudicate, which would stifle all free judicial opinion. Furthermore, the imposition of the binding character of the case-law, would undermine the judges' internal independence and increase their inertia (a trait not only inherent to judges in Serbia), reduce trials to stereotype, discourage judges from rendering decisions based on their free opinion, lethally affect the fairness of trials and further impinge on public confidence in the judiciary, without which there can be no rule of law.

32. The **VC elaborates in detail the effects undermining the judiciary's internal independence by the introduction of case-law as a source of law in the Constitution** in its Report on the Independence of the Judicial System, Part I: the Independence of Judges[33]: *68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. 73. [t]he issue of internal independence arises not only between judges of the lower and of the higher courts but also between the president or presidium of a court and the other judges of the same court as well as among its judges.* In paragraphs 71 and 72 of its Report, the VC states the following: "*Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection for judicial independence, both "internal" and "external", can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence.*" (CDL(2007)003 at 61). 72. To sum up, ***the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity***.[34] **In regards to Serbia, VC has** over the past 15 years **given three consistent opinions on the consistent application of the law**[35].

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[33] *CDL-AD(2010)004* of 16 March 2010, available at: https://rm.coe.int/1680700a63.

[34] Even in its Opinion on the Draft Judicial Code of Armenia CDL-AD(2017)019, 7 October 2017, VC is dealing with the important role of the supreme court in ensuring case-law consistency when ruling on specific cases, with emphasis on the right of lower courts to deviate from the case-law of the supreme court in specific cases and highlights that the supreme court may not act as the "legislator".

[35] In their opinion of 24 June 2002, experts ***Natalie Fricero***, a Nice Law School Professorm and ***Giacomo Oberto***, a Turin judge, said they were strongly opposed to such a system of imposed interpretation.

33. The CoE Committee of Ministers noted in its **Recommendation CM/Rec(2010)12** on judges: independence, efficiency and responsibilities[36]: *5. Recommendation CM/Rec(2010)12 of the CoE Committee of Ministers to member states on judges: independence, efficiency and responsibilities; 22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making, judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence. 23. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.*

34. Pursuant to paragraph 10 of the **Magna Carta** of Judges[37]: *In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.* Furthermore, the CCJE expressed an essentially identical, albeit more comprehensive, view on this issue in its **Opinion no. 20(2017) on the Role of Courts with Respect to the Uniform Application of the Law**[38], in which it, inter alia, underlined: the importance of argumentation set out in court decisions; the primary role of the supreme court and the important role of appeals courts in addressing inconsistent case-law, means for ensuring consistent and uniform case-law and development of law by ruling on court cases before them; that although legal interpretations, views, opinions, binding instructions, et al, may have a positive impact on uniformity of the case-law and legal certainty, they raise concerns from the viewpoint of the proper role of judi-

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In its Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia CDL-AD(2008)007, 19 March 2008, VC stated: "It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction." (paragraph 109)

In paragraphs 103-108 of its Opinion on Draft Amendments to the Laws on the Judiciary of the Republic of Serbia CDL-AD(2013)005 11 March 2013, VC commented amendment of Article 31 of the Law on the Organisation of Courts under which the Supreme Court of Cassation shall *give opinions on draft laws and other regulations governing issues of relevance for the judicial branch.* It said it had been *told that this task was introduced in order to unify the case law, as there are many cases before the European Court of Human Rights on the equal access to justice. It was said that these legal opinions were only mandatory for the judges of the Supreme Court of Cassation (not for lower courts). In addition, it should be regarded as an interpretation of the law, not as an instruction. 105. Nevertheless, the Venice Commission has criticised this method, because it gives the Supreme Court of Cassation a general "rule-making" power, which can conflict with the separation of powers. 106. It is not clear whether the Supreme Court adopts general views outside the specific case or while exercising its competence as a court of cassation. In case of the former, this approach will conflict with the principle of the independence of the judiciary. The argument that "general legal views" are adopted with the aim of remedying the most common errors of the judicial system, which due to some reason do not end up at the level of the highest court, seems flawed. It also fails to explain why it is impossible to remedy such errors in appeal or cassation proceedings.*

[36] Available at: https://rm.coe.int/16807096c1.

[37] Available at: https://rm.coe.int/16807482c6.

[38] Available at: https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3.

ciary in the system of separation of state powers; that, under the civil law system, inferior courts may depart from settled case-law of hierarchically superior courts provided they set out their arguments for doing so; that a judge acting in a good faith, who consciously departs from the settled case-law and provides reasons for doing so, should not be discouraged from triggering a change in the case-law and that such departure from the case-law should not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary; and that all three branches of government have an obligation to foster coherent legal rules and coherent application of these rules.

35. Caution should be exercised to avoid hasty conclusion that the identified and undisputed jurisprudence (case-law) inconsistencies can be addressed by a seemingly simple shift to an entirely different (common law) system or by another seemingly easy solution. Incorrect and rash solutions cause damage that cannot be remedied even by best adjudication and that take decades to rectify. During the constitutional debate **representatives of the MoJ state that the right** (and the duty as well) **to independently interpret and apply the law** (right to a free judicial opinion; freie richterliche Überzeugung) **shall be denied to judges** by the constitutional amendments. There have already been situations in practice of **disciplinary proceedings being instituted against judges who did not want to change their decisions**, because they disagreed with the views of their peers who thought they should. This led to a debate within the courts in Serbia and the phenomenon was cited in official documents, as a threat to judicial independence[39].

36. Having in mind the planned measures in above mentioned strategic legal documents, as well as the openly announced intentions of the representatives of MoJ, it is apparent that **provision of the Amendment V 3:** *"method to ensure a uniform application of law by courts shall be regulated by law*, **combined with the provision of the Draft Amendment X,** paragraph 2 which prescribes the only one constitutional role of the Supreme Court – to ensure uniform application of the law by the courts, but not limited to doing this within trials of specific cases[40] could essentially **allow** for the **abolition of free judicial opinion (freie richterliche Überzeugung).** The **proposed provisions** are not only in contravention of Serbia's legal

[39] 2013 Annual Report by the Protector of Citizens of the Republic of Serbia, p. 3, and the European Commission's 2014 Serbia Progress Report, p. 70.

[40] The SCC, in spite of Article 31 of the Law on Organization of Courts ("*The SCC shall determine general legal views in order to ensure uniform application of law by courts…*"), cannot be the place where jurisprudence is unified and harmonized because of the limited number of cases that, due to the legal framework, can reach it. Statistical data support this conclusion: in 2016, the entire Serbian court system produced more than 2 million decisions (2.304.231, according to the annual report published by the SCC) but the SCC solved only 12.457 cases and only 6.812 of them through a decision on the merits. There are 39 justices of the SCC.

It is clear that if the SCC is to be the court that orients the entire jurisprudence it should deal with a much higher number of cases, coming from all type of courts (the value of a case in this regard is totally irrelevant because obviously even a low value case may highlight a crucial legal problem, for example of a procedural nature). Discrepancies in the jurisprudence should be able to reach the Supreme Court of Cassation, where they would be addressed and solved. Simple opinions and/or "certifications" of any sort are no solution to a problem that requires the judicial (and not just consultative) intervention of the most authoritative court in the country.

system and tradition[41], but **will also undermine the judges' internal independence**.

Amendment VI

Requisites to become a judge

37. One of the obligations Serbia assumed under the Chapter 23 Action Plan with respect to amending the constitutional provisions on the judiciary, with a view to ensuring (strengthening) its independence is to ensure *that the system for the recruitment, selection, appointment, transfer and termination of judicial officials be independent of political influence and that entry in the judiciary be based on merit-based objective criteria, fair in selection procedures, open to all suitably qualified candidates and transparent in terms of public scrutiny*. (1.1.1.1.). **Requisites to become a judge are currently set by the Law on Judges** (Articles 43/45). The draft **amendment** at issue **establishes a reserve of law for** general and special conditions *"for the **election** of judges, presidents of courts and lay judges*". However, the Draft amendment itself **already envisages** an additional requirement **for first time candidates** to a judge's position **at a court of *"exclusively first-instance jurisdiction***". The **additional condition is to have completed*" in a judicial training institution, one of the types of training foreseen by law".*** Currently, the only institution of cuch kiind in Serbia is Judicial academy (hereinafter: Academy).

38. Competence is prerequisite for the performance of judicial office and, in addition to his/her **integrity**, is one of the **main criteria for becoming a judge**. *The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality*[42] and forming of judges who are *capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness*[43]. It goes without saying that judges recruited into the Serbian judiciary must possess competence and integrity. However, **while the competence and integrity of those who are to become judges are of utmost importance, the training method is not**, because the same effect (competence of a judge) could be achieved in various ways[44]. **All** these **methods** and systems of training **are equally functional and applicable**, depending on the tradition and economic strength of each and every state. In any case, *an independent authority should ensure, in full compliance with educational*

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[41] Modern Serbian statehood was established in the 19th century. Serbia adopted its first Constitution in 1835 (when only nine states in Europe had a written constitution) and its Civil Code adopted in 1844 was the third civil code to be adopted in Europe, after the French and Austrian ones. Serbia is a state of continental law system.

[42] CCJE Opinion no. 17(2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, paragraph 1, available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=2256555&Site=COE&direct=true.

[43] CCJE Opinion no. 10(2007) on the Council for the Judiciary at the service of society, paragraph 68, available at: http://www.legal-tools.org/doc/d1754d/pdf/.

[44] As for diversity of the systems for training judges in Europe and initial training, see the Opinion no. 4 (2003) on Appropriate Initial and In-Service Training for Judges at National and European Levels, para 6, 13.

autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office[45], and such training must be delivered by eminent and acknowledged lecturers and in an adequate interactive manner. In any case, judicial **training institution** or any system of education and professional development in any field **does not constitute constitutional matter**.

39. In order to understand the impact of this new provision over the existing system few words about the overall **socio-historical context** are necessary. The JAS has always believed that the competence of judges is the starting point for the reform of the judiciary. For that reason, as early as in 2001, JAS, along with the Serbian Government, established the Judicial Training Centre. The then constitution (or the actual one) have never been an obstacle for the existence of the Judicial Training Centre or the Judicial Academy (hereinafter: "the Academy"), or for the initial and permanent training. It is important, however, to bear in mind that the **training in** Judicial Training Centre or **Academy is just one of the possible paths** and tool **to achieve** the main goal – the **competence** of judges. The Academy started its activities on 01/01/2010, although it was only in 2015 that it received the approval of the HJC and SPC for its initial training program. The Academy is established with the purpose of contributing to the professionalism, independence, impartiality and efficiency of judges and prosecutors and their activity[46], but that goal was realized only partially, in terms of initial training and not without objections, even raised by EU in its Progress Reports on Serbia[47]. The **Academy** has simply **failed to deliver on that expectation**. The capacities of the Academy remain insufficient and its criteria for the election of its commissions, mentors and lecturers are not reliable enough in order for that institution to become the only "gateway" to the judiciary. From the very beginning of the Academy activities, Serbian judiciary faced a problem arising from the insufficiently well-conceived status of initial training. **Under the Law** on Judges and the Law on the Public Prosecutor's Office, as well as the Law on the Judicial Academy, the **HJC and the SPC had to give the priority**, in the procedure of proposing the candidates for judges or public prosecutors, **to candidates that graduated from the Academy**. These laws had "forgotten" about almost 2000 assistant judges and prosecutors at the time, who joined the judiciary before 2010 and who had legitimate expectations, after they had passed the bar examination and worked for years in the judiciary, that they would have the right to apply for the positions of judge or deputy public prosecutor. The **Constitutional Court declared**

[45] Recommendation CM/Rec(2010)12 of the CoE Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 57.

[46] Law on the Judicial Academy, *Official Gazette of the RS*, number 104/2009, 32/2014 – Decision of the Constitutional Court, 106/2015, Article 3.

[47] The permanent training of judges was mainly reduced to getting to know the newly adopted laws and certain aspects of European law. Nonetheless, the Academy was tasked with providing training in each individual case, where a judge should need (based on performance evaluation) professional development in a certain area or activity, when a judge is assigned to matters differing from his usual area of competence, as well as in other cases where there exists a need or interest by the concerned judge. The training of court personnel has actually been insufficient and there has simply been no training whatsoever for assistant judges and assistant public prosecutors.

the **provisions** of the aforementioned laws **unconstitutional** on 06/02/2014[48], having found they were violating the principle of equality of citizens in the same legal situation, restricting the constitutionally prescribed jurisdiction of the HJC and SPC, as well as *"concepts according to which persons that have not completed initial training on the Judicial Academy are by that fact essentially eliminated from the circle of candidates for first-term judges in a certain type of courts and first-time deputy public prosecutors in a certain type of public prosecutors', are constitutionally and legally unacceptable. This is particularly true having in mind that the students of the Academy, during their initial training, primarily discharge the duties of assistant judges and assistant public prosecutors, just like assistant judges and assistant public prosecutors that are not the "beneficiaries" of such training."*[49]

40. The **politicians in Serbia** misuse inadequate understanding of domestic circumstances of Brussels, **persist with a particular zeal** in their intent **to make the still feeble Academy the only or at least the dominant manner of appointing** trainees for **judges**. Such zeal justifies the concerns of judges that the **Academy is hidden, but effective channel of political influence on the courts,** which ruling politicians want to enhance because they will have to give up the right to elect judges in NA[50]. In this way, by selecting the students of the Academy, in an insufficiently controlled and opaque procedure, the ruling politicians influence in advance the choice of future judges. JAS, as well as professional public, is convinced that granting the constitutional level to the training institution, **MoJ aims to preclude any possibility of the review of the constitutionality** of the provisions of the Judicial Academy Law restricting the constitutionally defined jurisdiction of judicial councils to elect judges and deputy public prosecutors only from among the ranks of candidates selected by another entity (Judicial Academy). **This view was also taken by** the **Supreme Court of Cassation in its Analysis of the Draft Constitutional Amendments** of 12 February 2018, **as well as the Working Group that drafted the Legal Analysis** of the Constitutional Framework on the Judiciary back in 2014[51]. In paragraph 6 of the Introduction to its Legal Analysis, the Group specified: *As per the introduction of the completion of the Judicial Academy as a mandatory eligibility requirement for first-term judges and public prosecutors, this Working Group supports*

[48] Decision of the Constitutional Court on the Unconstitutionality of the Provisions of Article 40, paragraphs 8,9 and 11 of the Law on the Judicial Academy (*Official Gazette of the RS*, number *104/2009), was published in the Official Gazette of the Republic of Serbia*, number 32/2014 from 20.03.2014.

[49] *Ibid.*

[50] Therefore, it comes as no surprise that 65% of judges believe that the Academy should not be the main gateway for judicial office and that it is wrong to vest the graduates of the Academy with such a privilege. Furthermore, even more judges, as many as 83%, are in favour of free and equal access to judicial office for everyone. Survey on the views of judges about the situation of the courts and the judiciary in Serbia was published by the Judges' Association and the Center for Free Elections and Democracy in the publication *Strengthening the Independence and Integrity of Judges in Serbia*, the Judges' Association of Serbia, Belgrade 2017, page 9.

[51] The working group for the analysis of the amendments to the constitutional framework was established by the Commission for the Implementation of the NJRS on 29/11/2013. The members of the working group were, inter alia, four professors of Constitutional Law. The Legal Analysis is available at: https://www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php.

the position taken by the Working Group for Judicial Academy Reform and Development[52]*, that the Judicial Academy should not become a constitutional category. The introduction of the completion of the Judicial Academy as a mandatory eligibility requirement for first-term judges and public prosecutors may be set as a strategic goal that will be feasible after a thorough reform of the concept of the Judicial Academy.*

41. Now, in order to understand the impact of this new provision over the existing system another few words about the overall **legal context** are necessary. The primary legislation (mainly Law on judges and Law on the High Judicial Council) doesn't establish a real career system for the judiciary. As a matter of fact, each vacancy in the judges' organigram, regardless of its level (first instance, second instance or higher) is announced by the HJC and anybody who meets the requirements qualifies as a possible candidate. The consequence of this open system is that nobody can regard him/herself as a judge *tout court* but only as a judge of a specific court. In other words, candidates do not access the judiciary and become part of the institution for life, regardless of the specific court of justice where they work. In this context, the draft **amendment** will **create** a kind of "**roster**" **of potential candidates** for first time judges' positions, which would be accessible only through a *"judicial training institution*". Namely, **courts of *"exclusively first-instance jurisdiction"*** are misdemeanour (660 judges), basic (1.464 judges), commercial (178 judges) courts and Administrative court (40 judges), in total 2.342 positions out of 2.586 judges who effectively worked in the system at the end of 2017. In other words, the final selection of first time judges for certain positions, which represent the vast majority of judicial positions (**more than 90% of positions**), **will be made only among "preselected" candidates**.

42. Likewise for the problem of jurisprudence harmonization, also for the provision at issue (Amendment VI) an implementing **legislation is necessary** to specify many aspects that obviously the Constitution cannot detail. However, in this case **there is no reserve of law** (which is limited to general and special conditions to become a judge); **consequently**, also **secondary legislation may regulate** those **aspects**, some of which are **of a crucial importance**, like: the identification of the judicial training institutions; the procedure to identify them; the public or private nature these institutions should have; the possible existence of a fair limit to the fees that trainees should pay, in order to avoid that indirectly judges be selected (or "preselected") based on their income. In other words, a piece of secondary legislation adopted by the Government (e.g., a regulation) envisaging that "certified, private judicial training institutions" are authorised to organise and deliver the "types of training foreseen by law", would not be against the Constitution. Currently, the Judicial Academy seems to be the only training institution that could "preselect" candidates but a quick change in the direction described is possible and, as already underlined, would not be unconstitutional. Besides, the **existence of a *"preselecting institution"***(or of a number of them), **will essentially empty the role of the HJC**,

[52] The Guidelines of the Working Group for Judicial Academy Reform and Development are available at: https://www.mpravde.gov.rs/tekst/5891/smernice-za-reformisanje-i-razvoj-pravosudne-akademije-.php

whose duty/power to select and appoint judges will be limited, as far as "first time candidates to certain positions" are concerned, to those who possess the additional requisite. This situation, which in few years will affect practically all the candidates to the positions at issue, will bring up again the problem of the composition of the "authorised judicial training institutions" and of a possible presence of political influence upon them.

Amendment VII

Judges' office tenure

43. The draft amendment abolishes the probationary period; so, judges are appointed for life. This choice certainly cannot be criticised. Obviously, the primary legislation (which means, for sure, the Law on Judges) will have to be harmonized since every reference to judges' probationary period will become meaningless. What raises the concerns is the **ambiguity of the Draft Constitutional Law** for the Implementation of Amendments on the Constitution which prescribes that all judicial laws[53] shall be aligned with Constitutional Amendments (Art. 1). Draft Constitutional Law safeguards only the tenure of the judges of the current Supreme Court of Cassation by prescribing that they *shall continue to perform their functions* (Art. 6 1) *in the Supreme Court of Serbia*. Such wording of the Draft Constitutional Law is unclear and **opens the doubt about the continuity of the tenure of all other judges** in the courts which names, seats and competence could be change as well by the judicial laws[54], especially of judges in the courts of the first instance (almost 91% of them) who did not complete *one of the types of training foreseen by law*, *in a judicial training institution* (Amendment VI). Having the unfortunate experience with the 2009 re-election of all judges which left disasters and long-lasting consequences on Serbian judiciary, it would be much better to avoid that ambiguity and to stipulate that all judges shall continue to perform their functions.

Reasons for dismissal

44. The current Constitution delegates to the law maker the definition of reasons for dismissing a judge. The way in which the ground for dismissal are formulated in the Draft Amendments **may impinge on the certainty of judicial tenure since the ground are vague and extremely wide and do not provide for the adequate legal protection.** The Draft amendment lists specific reasons for judges' dismissal as fol-

[53] **Law on Judges** ("Official Gazette of the Republic of Serbia", No. 116/08, 58/09 – CC, 104/09, 101/10, 8/12 – CC, 121/12, 124/12 – CC, 101/13, 111/14 – CC, 117/14, 40/15, 63/15 – CC, 106/15, 63/16 – US and 47/17), **Law on the Organization of Courts** ("Official Gazette of the Republic of Serbia", No. 116 / 08, 104/09, 101/10, 31/11 – other law, 78/11 – other law, 101/11, 101/13, 40/15 – other law, 106/15, 13/16, 108/16 and 113/17), **Law on Public Prosecutor's Office** ("Official Gazette of the Republic of Serbia", No. 116/08, 104/09, 101/10, 78/11 – other law, 101/11, 38/12 – CC, 121/12, 101/13, 111/14 – CC, 117/14, 106/15 and 63/16 – CC), Law **on the High Judicial Council** ("Official Gazette of RS" No. 116/08, 101/10, 88/11 and 106/15), the **Law on the State Prosecutor's Council** ("Official Gazette of the Republic of Serbia", No. 116/08, 101 / 10, 88/11 and 106/15) and the **Law on the Judicial Academy** ("Official Gazette of RS" No. 104/09, 32/14 – CC and 106/15).

[54] See the comments of the Amendment VIII.

lows: 1) being sentenced to at least six months imprisonment; 2) committing a crime that makes the person unworthy of judgeship; 3) performing judicial functions incompetently, and 4) having committed a serious disciplinary offence. As for the last two grounds for dismissal, it seems that this Amendment served as the opportunity to lift to the constitutional level the systems of the professional evaluation and disciplinary accountability of judges. Just like with the issue whether to put an equality sign between the competence of judges and the training in the training institution, the same applies to evaluation. The **goal society is striving for is to have capable experts** with integrity and **evaluation** of judges work **is just a tool** to assess the competence. Since the Constitution is the highest law of a state, which contains the most general principles it should not contain implementation norms.

45. The first reason creates an automatism which is difficult to understand and justify. Suffice it to say that even a suspended sentence to imprisonment for a traffic accident (something that could happen to anybody) would lead inevitably to a judge's dismissal. The second reason refers to an absolutely vague concept such as "unworthiness for judgeship" as a consequence of a committed crime. The provision clearly requires the adoption of implementing legislation. However, the choice to leave undetermined the issue of "who" should establish the existence of the said "unworthiness" gives raise to serious concerns. In fact, the law maker could either define in general terms which criminal offences lead to a judge's unfitness or leave to the court (be it a penal or a disciplinary one) the related assessment on a case by case basis. On the contrary, in such a delicate matter any vagueness should be avoided. Probably, these two reasons should be reconsidered together. In effect, it is true on one side that someone who served a sentence to imprisonment, regardless of the related crime, cannot continue working as judge, but it is also reasonable on the other side that the commission of certain light criminal offences (e.g.: Failure to render aid), irrespective of the related, imposed punishment, which could be even just a fine, result in "unworthiness for judgeship". Also the division of roles between the constitutional and primary law maker should be reassessed.

46. The reason which refers to **professional incompetence is vague and extremely wide**, **thus easy to be manipulated**. Amid longstanding violations of the guarantees of judicial independence and the plummeting confidence of the citizens in the judiciary, the JAS has been constantly advocating for the evaluation of the work of judges[55], believing that the **purpose** of evaluation is creating legal security based on quality law, through establishing the conditions for efficient judicial work – meaning delivering quality decisions – in a reasonable time, after having fairly considered all the aspects of a case[56], which would reinstate and reinforce the confidence of the citizens in the work of judges and courts. However, when reflecting about evaluation, it should be borne in mind that individual evaluation is not con-

[55] The Judges' Association published as early as back in 2007, after a two-year survey, the first and so far only book in Serbia Evaluation of the Performance of Judges, which deals with the quantitative aspect of judges' work and gives proposals to take further measures in studying this matter.

[56] Efficiency is defined in the following way – see paragraph number 31. Recommendations CM/Rec (2010)12 from 17.11.2010.

sidered indispensable in European justice systems. In CCJE Opinion n°17 on the evaluation of judges' work, the quality of justice and respect for judicial independence CCJE gives primacy to the independence of judges over evaluation. [57] In fact, since nobody is 100% competent, the lack of any even rough definition and gradation (e.g. "gross incompetence") is very concerning. In regards this concern, **Greco Eval IV Report** (2014) 8E states (Para 118): *The GET is furthermore concerned that evaluations serve as grounds for dismissal if "unsatisfactory" and that the HJC can initiate evaluations outside the usual three-year cycle, which might carry a risk of possible harassment or pressure, in particular in the specific context in Serbia as described throughout this report. In the view of the GET, the* ***evaluation system needs to be focused on improving the judiciary as a whole and not on punishing individual judges.*** *It refers in this connection to Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe, 117 according to which "a permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions." In view of the above,* ***GRECO recommends*** *that the system of appraisal of judges' performance be reviewed (i) by introducing more qualitative criteria and (ii) by* ***abolishing the rule that unsatisfactory evaluation results systematically lead to dismissal of the judges concerned****.* In regards disciplinary accountability, as noted before, there have already been situations in practice of the **misuse of the disciplinary proceedings against judges** and the phenomenon was cited in official documents, as a threat to judicial independence[58]. In conclusion, taking into account all the remarks above the **current solution seems still preferable,** since amending primary legislation in case of evident shortcomings would be easier.

Legal remedy against the decision of High Judicial Council

47. In regards legal remedy, the Amendment VII 4 prescribes a right of a judge to a **legal remedy**, namely to *an appeal with the Constitutional Court* **only in cases of dismissal**. It is worthy to mention that, the Article 155 "Legal remedy" of the valid Constitution stipulates: *An appeal may be lodged with the Constitutional Court against a decision of the High Judicial Council, in cases stipulated by the Law* is omitted in the Draft Amendments. This raise two issues**. Firstly**, Recommendation CM/Rec(2010)12 stands on the point that there should be the legal remedy provided

[57] *"The main rule for each individual evaluation of judges must be that such evaluation reflects the complete respect for judicial independence. When an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges, including the presidents of courts" (paragraph 6.).*

[58] 2013 Annual Report by the Protector of Citizens of the Republic of Serbia, p. 3, and the European Commission's 2014 Serbia Progress Report, p. 70. Also, see the comments of the Amendment XII.

against the decisions of JC**:** *An* ***unsuccessful candidate should have the right to challenge the decision****, or at least the procedure under which the decision was made (Para 48).* **Secondly**, the **status of judges would be better protected if their appeals of decisions to dismiss them were ruled on by a independent court.** The same Recommendation declares: *Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy* (Para 8). The Constitutional Court is not part of the court system, its judges are appointed under vague criteria and in a non-transparent procedure and there are no guarantees of independence provided for the Constitutional Court.[59] The VC voiced such a view with respect to the Draft Constitution in 2005.[60] In regards the concerns opened with omission of the possibility to the legal remedies against other HJC decisions.

Amendment VIII
Judges' irremovability[1]

48. With respect of the **transfer of judge**, which is permanent measure, the solution of Draft Amendment VIII staid the same as in valid Constitution (Article 150): *in case of revocation of the court or the substantial part of the jurisdiction of the court to which judge was elected, a judge may be relocated to another court, without his/her consent, in accordance with the law.* Such solution remained as not adequate safeguard of the irremovability since it opens the possibility of the legal prescription that judge could be transferred in any court, regardless its type, level or seat. Therefore, **it does not guarantee that any new law will retain the provision of Article 19** of the current Act on Judges, **under which judges may be transferred only to courts of the same instance that have assumed the jurisdiction** *ratione materiae* of the court that has been abolished or of the court whose substantial part of jurisdiction *ratione materiae* has been abolished. So, **such provision**, currently contained in the law (Article 19 of the current Act on Judges) **should be prescribed by the Constitution**.

49. Irremovability of judge is narrowed by the fact that **the Amendment VIII** does not mention **temporary reassignment** of judge to another court, unlike current Constitution (Article 150) which prescribes that: *A judge shall have the right to perform his/her judicial function in the court to which he/she was elected, and may be relocated or transferred to another court only on his/her own consent* (Para 1) , and that: *In case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may exceptionally, without his/her consent, be permanently relocated or transferred to another court, in accordance with the Law* (Para 2). Therefore, it **does not guarantee that any new law will retain the provision of Article 20** of the current Act on Judges, under which judge can be **temporary reassigned** to work only in another court of same type and same or directly lower

[59] Magna Carta of Judges, paragraph 6. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

[60] Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, **CDL-AD(2005)023**, of 24 October 2005, paragraph 22, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)023-e.

instance **for a period no longer than one year** (Para 1). EU has already pointed out on the misusing of this measure.[61] So, **such provision**, currently contained in the law (**Article 20** of the current Act on Judges) **should be prescribed by the Constitution**.

50. Given that Article 2 of the Working Version of the Constitutional Act on the Implementation of the Constitutional Amendments lays down that the Act on Judges and other laws on the judiciary shall be aligned with the constitutional amendments within 90 days from the day the latter enter into force, there are no guarantees that the provisions on transfer in Article 19 of the Act of Judges will remain intact or that the duration of reassignment will not be extended. It goes without saying that judges (most often judges who are not the "politicians' darlings") perceive a year-long reassignment to a lower or any other court without their consent as harsh punishment. When these draft provisions on transfers and reassignments of judges to other courts are viewed in conjunction with the "omitted" definition of the types of courts[62] (in Article 143 of the Constitution) and the legal remedy against HJC decisions (provided in Article 155 of current Constitution), there is a real **risk** that the laws on the judiciary will change the types, names, jurisdictions *ratione materiae* and territorial jurisdictions of the courts and facilitate the **large-scale transfers or reassignments of judges to any other court** for considerable periods of time, depending on the actual provisions of the laws to be adopted, consent, which would be against the international standards[63]. Without any intention of neglecting the role and responsibilities of the judges, it nevertheless has to be pointed out that the **reform process** primarily **depends on the direction set in the Constitution** and the adequate and applicable laws governing the court network, jurisdiction of courts and procedural rules, which are adopted in accordance with them (and these laws are not adopted by the judiciary, but by the legislature, which votes in legislation submitted by the executive government). Enabing the possibility of the existence of **large-scale transfers or reassignments** of judges **cannot**, in the long term, **improve the judiciary**, notably the efficiency of the system and access to justice. **It could, however**, definitely **result in lowering the level of judicial independence** guarantees, provide for the possibility of further undermining judicial independence and thus of the citizens' right to a fair trial. Based on the remarks above, the conclusion is that **Draft Amendment** on non-transferability **let by the chance to enhance the independence** of judge what is the goal of the change of the Constitution. On the contrary, the **guaranty of the irremovability has been narrowed, thus weakened[64]**.

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[61] See EU 2016 Progress Report for Serbia (page 15).

[62] The Venice Commission noted in its Opinion that more detail on the organisation of the judicial system could have been provided in the Serbian Constitution, see paragraph 62, Opinion No. 405/2006 , CDL-AD(2007)004 of 19 March 2007, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e.

[63] According to those standards, non-agreed judges' re-assignments (including any change of his/her duties) or transfers are permitted only in three exceptional cases: 1) disciplinary sanction; 2) lawful alteration of the court system; 3) temporary assignment to reinforce a neighbouring court (European Charter of the statute for judges).

[64] It needs to be borne in mind that the allocation of judges depends on the HJC whereas the network of courts and their jurisdiction are governed by the law, and hence the responsibility of the legislative and executive authorities. This is why European standards entail specific state obligations in that

Amendment IX

Immunity and Incompatibility

51. Having in mind that the Draft Amendments omitted to safeguard the freedom of expression of judges, this could be the right place **to prescribe** additionally that **judge cannot be held accountable for an opinion expressed in protection of judicial independence**.

Amendment XII

General jurisdiction of the HJC

52. Aside of its **definition** which remains as **pure declaration**, the HJC essentially will no longer be the "body entrusted with the protection of the independence of judges, in the context of respecting the principle of separation of powers"[65] nor the body "obliged to safeguard from any external pressure or *prejudice* of a *political, ideological or cultural nature*, the unfettered freedom of *judges* to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law,"[66] or the body defined as fol-

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respect. Under Council of Ministers Recommendation Rec 2010(12) on judges: independence, efficiency and responsibilities, [*T*]*he authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality* (paragraph 32); *Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently* (paragraph 33); *A sufficient number of judges and appropriately qualified support staff should be allocated to the courts* (paragraph 35).

During the 2017 consultative process there were the arguments expressed that, due to the provisions in Article 150 *the Serbian Constitution includes a much more rigid approach to the transferability of judges than the EU standards, which has produced consequences at several levels, the most important of which is the impossibility of significantly improving the court network by judicial mobility and thus improving access to justice, although precisely the latter must be the priority.* Insistence on the fulfilment of the efficiency requirement at all costs, including the weakening of the non-transferability principle, an element of judicial independence, is not based on a comprehensive analysis of the reasons for the courts' backlogs and the judges' inequitable caseloads. Easier and more frequent transfers of judges would undermine the efficiency of the court system and cause effects contrary to those adduced to justify the weakening of the guarantees of independence – the trials would last longer because the transferred judges would need time to familiarise themselves with the cases, the statutes of limitations in criminal cases would expire and the court system would become more expensive (because all the housing and travelling costs of the transferred judges would have to be covered). It is therefore clear that easier transfers of judges against their will cannot make up for the deficiencies in the work of the legislative and executive authorities, which are charged with defining the court network and the jurisdiction of the courts.

The problem of inequitable caseloads of courts and judges has indisputably reflected on lack of access to justice within a reasonable time because it takes the courts and judges shorter or longer periods of time to rule on the cases, depending on their caseloads. Access to justice within a reasonable time requires that trials, including enforcement of court decisions, be completed within a reasonable, as well as optimal and foreseeable time. The problem of inequitable caseloads of courts and judges is the consequence of the inadequate court network, inadequate jurisdiction of the courts, and lack of judges sitting on courts in some towns.

[65] CCJE Opinion No. 10/2007 on the Council for the Judiciary at the service of society, paragraph 5.

[66] See Recommendation R (94)12.

lows: the *main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State*[67]. The CCJE discussed the **connection between the judicial council's composition and competences** in its Opinion no. 10(2007) (paragraphs 44-47)[68]. Namely, if the Council has broad competences, especially if it manages the court budget, it needs to have a mixed composition, in order to ensure the legitimacy of its work. However, if it has fewer competences, which practically boil down to the judges' status-related issues, there is no justification for changing its composition and reducing the number of its members from among judges (which is what Draft Amendment XIII envisages: a reduction of members from among the ranks of judges from seven to five): *When there is a mixed composition in the Council for the Judiciary, the CCJE is of the opinion that some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel* (paragraph 20).

53. Draft Amendment XII significantly **limits** the **HJC's jurisdiction**, **which is "concealed" by raising to a constitutional rank some competences that** definitely **should not be mentioned in the Constitution** (e.g. collection of statistical data). This is also the case with the evaluation of the judges' work and appointment and dismissal of the disciplinary bodies, having in mind that those are still new and not well developed systems[69] with significant scope of shortcomings, thus grunting them constitutional rank is premature and unnecessary. The Draft amendments even raises to a constitutional rank the power of the HJC to *independently dispose* of the funds allotted in the state budget for its operations. The current text of Article 154 of the Constitution lists a number of competencies of the HJC; however, such a list clearly is not a*numerus clausus*, because the final expression *and perform other duties specified by the law* gives the possibility, through primary legislation, to expand the number and types of competences attributed to the council. A manifest example of this is represented by Article 70 of the Law on Courts' Organization, which expressly vests the HJC with the duty/power to determine *general guidelines on internal court organization* or the Article 13 of the Law on HJC which vests numerous competences to HJC. Nevertheless, the **final clause** of the Amendment XII **is limited to *other issues related to the status of judges, presidents of courts and lay***

[67] VC Report CDL-JD(2007)001(Para 27).

[68] *Also there should be a close connection between the composition and the competences of the Council for the Judiciary. Namely, the composition should result from the tasks of the Council for the Judiciary. Certain functions of the Council for the Judiciary may require for example members of the legal professions, professors of law or even representatives of civil society*. (Paragraph 45)

Among Councils for the Judiciary, a distinction can also be made between Councils performing traditional functions (e.g. in the so-called "Southern European model" with competences for appointment of judges and evaluation of the judiciary) and Councils performing new functions (e.g. in the so-called "Northern European model" with competences for management and budget matters). The CCJE encourages attributing both traditional and new functions to the Council. (paragraph 46).

[69] The disciplinary system functions just last 6 years, and evaluation system since 1st July 2015, so the work of all judges should be regularly assessed this year for the first time. The problems in applying disciplinary accountability were noted in: EC 2013 Annual Report by the Protector of Citizens of the Republic of Serbia, p. 3, EU 2014 (page 70), 2015 (page 12) and 2016 (page 15) Progress Report on Serbia as well as in evaluation of judges' work – see EU 2015 (page 13) and 2016 (Page 15) Progress Report on Serbia.

judges provided by law. The inexorable consequence is that the law maker can expand the competences of the HJC only within this limited range. Conversely, any law provision that, like the one regarding guidelines on internal court organization, assigns to the HJC competences not included in the list and not related to the status of judges, presidents of courts and lay judges, should be considered unconstitutional. Likewise, just to give another example, **transferring to the HJC of budgetary competences (including selection and recruitment of judicial assistants) from the Ministry of Justice of, which is a state commitment under the NJRS and the Action Plan for Chapter 23, would be impossible without another constitutional amendment.**

Amendments XIII – XVI

High Judicial Council

54. These amendments refer to the composition, way of election and dismissal of the HJC members, chair person, rules of functioning of the HJC as well as to the term of office of its members. Such aspects are clearly intermingled; consequently, it is appropriate to assess all of them jointly. **In regards HJC, the amendments diminish the attained degree of its independence**, do not **provide its independence and consequently his role of the safeguard of judicial independence,** thus the right to a fair trial, **having in mind the provisions on HJC:**

- jurisdiction (Amendment XII 1)
- composition (Amendment XIII 1)
- way of election (Amendments II and XIII 2) and dismissal of the HJC members from the rank of the "prominent lawyers" (Amendments II and XIV 3)
- Chair person (Amendment XV 2)
- Work and Decision-making (Amendments XVI 3 and 4)
- ceasing of the term of office of its members in the case that HJC does not make a decision (Amendments XVI 3)

Composition and functioning of the HJC

55. According to the **current Constitution**, the HJC is composed of eleven members: three are members by right (the President of the SCC, the Minister of Justice, and the President of the competent committee of the Parliament) and eight are elected by the NA *in accordance with the law*; among the latter, six are judges with life tenure, and two are prominent and respected lawyers with at least 15 years of experience (one is an advocate and another an academician). Besides, based on Articles 6, 7, and 17 of the Law on the HJC: 1) the President of the SCC is the president of the HJC by right; 2) the vice-president is elected from among the judicial members; 3) the council adopts its decisions by way of majority vote. **Chapter 23 Action Plan** on judicial independence[70] (page 29) clearly states that the Republic of

[70] Available at: https://www.google.rs/search?q=Chapter+23+Action+Plan+on+judicial+independence&oq=Chapter+23+Action+Plan+on+judicial+independence&aqs=chrome..69i57.1227j0j7&sourceid=chrome&ie=UTF-8

Serbia shall ensure the following in response to the EU's recommendations in the Screening Report (section 1.1): *The strengthening of the role of the HJC and State Prosecutorial Council in terms of the management of the judiciary, as well as the supervision and control of the judiciary; that they will have at least 50% of their members, selected by their peers, from amongst the ranks of judges and public prosecutors and representing different levels of jurisdiction (the role of the National Assembly is solely declaratory)*. It is apparent that Serbian MoJ understood this commitment as its right to reduce the number of judges to the minimum (half of HJC members) even though current HJC has 11 members out of which 7 are judges (president of the SCC and 6 elective members).

56. The **Draft amendment XIII** proposes quite a different scheme of composition and functioning of the HJC. It will be composed of ten members: five judges elected by their peers and five prominent lawyers elected by the NA. Contrary to the criteria in paragraphs 21[71], 22[72] and 23[73] of CCJE Opinion No. 10/2007, minimum requisites to qualify as a "prominent lawyer" are: a degree from a law school, the Bar exam, ten years of working experience *in the field of law falling within the competence of the HJC*, having demonstrated *professional work*, enjoying personal reputation (Para 1). The NA elects these members of the council *upon proposal of the competent parliamentary committee after having conducted a public competition* by way of qualified majority. The parliamentary committee proposes ten candidates. In case the requested qualified majority cannot be reached within fifteen days, the draft envisages a mechanism to avoid a stall. In such a situation, a commission composed by the President of the NA, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor of Serbia, and the Ombudsman will elect the five lay-members of the council by majority of votes (Para 2). The president of the HJC will be elected by the council from among its non-judicial members (Draft Amendment XV 2). According to the Draft Amendment XVI there will be a *quorum* of seven members present in order that any decision can be legally adopted (Para 1). Resolutions will be passed by six votes (Para 2). In the event of a tie prolonged for 30 days from the first vote, the HJC is dissolved (Para 3). **The rules on composition and functioning of the HJC described above lead to an unsatisfactory setting.**

57. Though acceptable from the point of view of Chapter 23 Action Plan, **half of judges in HJC** membership**,** compared to 7 judges members out of 11 members of current HJC**, reduces the attained degree of its independence thus is not in ac-**

[71] Members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence.

[72] The non-judge members may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status. Modern management of the judiciary might also require wider contributions from members experienced in areas outside the legal field (e.g. in management, finances, IT, social sciences).

[73] Prospective members of the Council for the Judiciary, whether judges or non judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary. Each state should enact specific legal rules in this area.

cordance with *acquis*. The definition of a "prominent lawyer" is unclear, especially in terms of his/her working experience *in the field of law within the competence of the HJC*, which **allows for broad interpretation and arbitrariness** in assessing the criteria. The definition is **discriminatory** as well, because it renders ineligible for HJC membership most law college professors (who have not passed "a Bar exam") as well as numerous experts who do not have working experience in the field of law *falling within the competence of the HJC* but boast the expertise, experience, integrity, reputation, understanding of the judiciary, ability to reach decisions and understand the importance of judicial independence. At the same time, the Draft Amendments **does not lay down the requirement** indispensable for the independent functioning of the HJC, the one requisite for it to fulfil the purpose of its existence – **that active politicians cannot be members of the HJC**. This means that any politician with a law degree, a Bar exam and 10 years of working experience, including the Justice Minister or any other politician, may be declared a prominent lawyer and elected to the HJC. The "prominent lawyers" will self-apply in response to a "public vacancy notice" published by the competent NA committee, which will review the applications and suggest to the NA which of the candidates to elect; it goes without saying that there is a chance that none of the **members of the parliamentary committee** have a law degree or the capability to **genuinely assess which of the candidates are "prominent lawyers"**; it also goes without saying that the committee will definitely be capable of "receiving political signals" about which candidates are considered suitable by the ruling political majority and uphold their candidacies.

58. When compared to the **international standards**, the proposed new composition of the HJC is in line with paragraph of the 1.3 of the CoE European Charter on the statute for judges, of the which reads: *"In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which **at least one half** of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."* However, international standards, including on judicial councils**, have been evolving;** CCJE Opinion No. 10/2007 on the Council for the Judiciary at the service of society reads: ***When there is a mixed composition** (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, **a substantial majority** of the members should be judges elected by their peers* (Para 18), Recommendation CM/Rec(2010)12 recommends: ***Not less than half** the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary. Finally,* the Magna Carta of Judges states the following: *[T]he Council shall be composed **either of judges exclusively or of a substantial majority of judges** elected by their peers.* (Para 13). The **sense of the principle is clear: systems** where at least half plus one of the members of the judicial council are not judges elected by their peers or, in other words, **where judges elected by their peers are in minority, do not comply** with the standard, which requires, as a minimum, an equal number of judicial and non-judicial members. Conversely and inexorably, **systems where judges are in majority indeed comply**

with the standard. **VC's 2010 Report on the Independence of the Judicial System**[74] include the view that the judicial **council should have** a pluralistic composition (judges and non-judges) *with* ***a substantial part, if not the majority, of members being judges*** (paragraph 32).

59. As already said, the five non-judicial members are an important factor of balance but their election by the NA implies political influence over them, which is not eliminated by the qualified majorities required for their election. These **solutions don't prevent** possibility of **excessive manipulation** in regards election of HJC members by smaller majority or by only three men in the State, if ruling party's members of the NA do not enable the needed qualified majorities in NA (as explained in the comments of Draft Amendments I and II). The draft amendment guarantees a "balance" within the HJC but does not solve the problem of its politicisation and efficiency. The "dissolution rule" can create great obstacles to the functioning of the HJC and can also be easily abused (e.g., members of the HJC knowing that voting a certain decision would bring them to a tie could decide to put the issue aside, or to adjust its decision to the "political" part of the HJC thus avoiding being dissolved). To sum it up, an **even number of HJC members is clearly inappropriate** and **makes HJC dysfunctional and politically controllable.** While the presence in the HJC of a judicial component is crucial to guarantee the independence of the judiciary, it seems that a balanced solution, achievable by assigning a tight majority to that component and, at the same time, opening the HJC to a substantial number of lay members, thus avoiding a cast of judges, is deemed by the Government as unacceptable, to the extent that it is ready to sacrifice the efficiency of the institution not to allow a majority of judges. **At this point,** the unavoidable and **crucial question is** the following: 1) if, the competences attributed to the HJC require the intervention of an *authority independent of the executive and legislative powers*; 2) if the presence of lay-members and the existence of a quorum undoubtedly guarantee the exclusion of a "closed circle of judges" and/or cronyism; 3) **why a solution where the judicial members are in a position of tight majority** (i.e., six out of eleven members) **should not be accepted? Six out of 11 of HJC members elected from amongst the ranks of judges** is the **solution which undoubtedly would comply with the *acquis*.**

IV CONCLUSIONS AND RECOMMENDATIONS

1. Conclusions on Procedure

1.1. The constitutional amendment process has to date not been implemented in accordance with the procedure prescribed by the Constitution, or in compliance with the Legal Analysis of the Constitutional Framework on the Judiciary or the Chapter 23 Action Plan.

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[74] *Study No. 494/2008* of 16 March 2010 (*CDL-AD(2010)004*) *Report on the Independence of the Judicial System Part I: the Independence of Judges*, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e.

1.2. The provisions of the Draft Amendments have not been upheld by law professors, judicial institutions, judicial professionals and relevant civic organisations.

1.3. The way in which the MoJ organised and conducted the debate on constitutional amendment, "defended" the provisions in the 22.01.2018 Working Version and responded to criticism demonstrates the intention to use the constitutional amendments to diminish the achieved level of guarantees of judicial independence and strengthen political influence on the judiciary, in contravention of the goal declared in the NJRS and the Chapter 23 Action Plan – to strengthen the independence of the judiciary.

1.4. Given that the legislator is not drafting an absolutely new Constitution and that the constitutional amendments do not have the character of discontinuity in the judiciary, there is no justification for the early termination of office of the President of the SCC and the members of the incumbent HJC, prescribed by the Working Version of the Constitutional Act on the Implementation of the Constitutional Amendments.

2. Conclusions on Content

2.1. If remain unchanged, the Draft Amendments will increase political influence on the judiciary and diminish the existing constitutional guarantees of judicial independence:

2.2. The Draft Amendments does not systemically and clearly regulate the relationship between the three branches of government.

2.3. Draft Amendments does not define:

- substance of the judicial branch
- financial safeguards of independence
- freedom of expression and association of judges.

2.4. There is a risk of excessive political manipulation while electing HJC members from the rank of "prominent lawyers" and dependence of these HJC members from the ruling party (Amendments II and XIII 2).

2.5. The sources of the law are inadequately prescribed by omitting the generally accepted rules of international law and by enabling that general acts of the executives as direct source of law, by omitting the legal grounds for it (Amendment V 1).

2.6. The Amendment V 3 which stipulates that the method to ensure uniform application of laws shall be regulated by law allows the imposition of decisions on judges and creates a risk of abolition of free judicial opinion – freie richterliche Überzeugung.

2.7. First appointment of the judges will be preconditioned by the selection of the applicants for the course(s) in a judicial training institution which does not have the guaranties of the independence (Amendment VI 2).

2.8. The guaranties of irremovability are incomplete (Amendment VIII) and enable the possibility of large-scale transfers or reassignments of judges.

2.9. In regards the independence of judges, the existing constitutional guaranties of the judicial independence will be diminished by the following solutions of Draft Amendments:

- enabling the abolition of free judicial opinion – freie richterliche Überzeugung (by combining solutions in Amandment V 3 and X 2, NJRS, Action Plan for the Implementation of the NJRS and Chapter 23 Action Plan)
- granting a constitutional rank to judicial training institution which will preselect 90% of judges (Amendment VI 2)
- vague and wide dismissal grounds (Amendments VII 3)
- omitting legal remedies against the HJC decisions (Amendment XIV), aside in case of dismissal (Amendment VII 4)
- narrowing the scope of the irremovability of judges (Amendment VIII)
- formally weakening of HJC in every possible aspect (Amendments XII-XVII).

2.10. In regards HJC, the amendments diminish the attained degree of its independence (Amendment XII), do not provide its independence and consequently his role of the safeguard of judicial independence, thus the right to a fair trial, having in mind the provisions on HJC:

- jurisdiction (Amendment XII 1)
- composition (Amendment XIII 1)
- way of election (Amendments II and XIII 2) and dismissal of the HJC members from the rank of the "prominent lawyers" (Amendments II and XIV 3)
- Chair person (Amendment XV 2)
- Work and Decision-making (Amendments XVI 3 and 4)
- ceasing of the term of office of its members in the case that HJC does not make a decision (Amendments XVI 3)

3. Recommendations

With the intent to contribute to the improvement of the draft text, the following recommendations can be proposed:

1. The relations between state powers and the substance of the judicial power should be defined (D*raft amendments to be changed – Constitution*[75]);
2. The financial safeguards and the freedom of expression and association of judges should be safeguarded (*Draft amendments to be changed – Constitution*);
3. A thorough study should be conducted to identify the reasons for the regretted inconsistency in jurisprudence and appropriate remedies should be identified (*Draft amendments* V 3 and X 2 *to be changed – primary legislation*);
4. Fair, transparent, and unique method of selection and recruitment of judges (competence and integrity) should be clearly identified and established (*Constitution*) and regulated (*primary legislation*);
5. An independent training institution should be established altogether with transitional provisions related to the current judicial assistants (D*raft amendments to be changed – primary legislation*) and put under the managing power of the HJC (*primary legislation*);
6. Reasons for judges' dismissal should be reviewed (*Draft amendments to be changed – Constitution)* and any undue automatism and/or ambiguous notion eliminated;

[75] Per each suggestion the appropriate level of legislative intervention is indicated.

7. In case of dismissal and against a decision of the HJC in cases stipulated by the Law, judge should be entitled to lodge an appeal to a court (*Constitution*).
8. Judges' irremovability should include temporary assignments (*Draft amendments to be changed – Constitution*);
9. The safeguard of irremovability should be defined more clearly, for example: "Exceptionally, judge may be transferred or reassigned without his/her written consent to another court in case of abolishing or substantially changing the jurisdiction of the court to which s/he is appointed only to a court of the same instance which is assuming the jurisdiction of the court which ceased to operate or which jurisdiction has been substantially changed." (*Draft amendments to be changed – Constitution*);
10. Competences of the HJC should not be a *numerus clausus* and the law maker should be given the power to expand the competences listed in the Constitution D*raft amendments to be changed – Constitution*);
11. The efficiency of the HJC should be guaranteed through a mixed composition (judicial and lay-members) where the judicial component be put in a tight majority *(Draft amendments to be changed – Constitution*).

(Endnotes)

1. **On non-transferability of Judge Amendment VIII**

Due to the fact that the Draft Amendments to the Constitution of Republic of Serbia (Draft Amendments) was made public only after its submission to the Venice Commission and that there was no debate, Judges' Association of Serbia (JAS) was in the situation to act urgently and to submit its own comments of the Draft Amendments to the Venice Commission in the shortest possible time.

It was only after JAS sent its Comments on the Draft Amendments to the Venice Commission when it noticed the inconsistency in the translations of the Constitution, Law on Judges, Draft Amendments and in its own written contributions.

Namely, the **Draft Amendment VIII** – Non-transferability of Judge omitted the safeguard of non-transferability in the case of a transfer of judge to another court (as a temporary measure) by stipulating: *Regardless, in case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may be relocated to another court, without his/her consent, in accordance with the law.* It raises a real risk of the large-scale relocation or transfers of judges to any other court of any instance.

In this regards, **current Serbian Constitution** sets out two measures; one is permanent (*relocation*; in the translation of the Law on Judges the word: *transfer* is being used) and the another is temporary (*transfer*; in the translation of the Law on Judges the word: *assignment to another court* is being used) and safeguards that judge exceptionally may be relocated (permanently) or transferred (temporarily). In its Article **150** current Constitution prescribes that: *A judge shall have the right to perform his/her judicial function in the court to which he/she was elected, and may be relocated (*permanently*) or transferred* (temporarily) *to another court only on his/her own consent* (Para 1); *In case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may exceptionally, without his/her consent, be permanently relocated or transferred* (temporarily) *to another court, in accordance with the Law* (Para 2).

Article 19 of the **Law on Judges** – Relocation of Judge stipulates as follows (for the easier understanding, when quoting the Law on Judges, the term: *relocation,* from the Constitution, as a permanent measure is being used):

(1) A judge may be relocated, with his/her written consent, to another court of the same type and same or lower instance if there is a need to urgently fill out a vacancy which cannot be resolved by electing or transferring a judge, provided that presidents of both courts have given their consent.

(2) Notwithstanding paragraph 1 herein, a judge may be relocated without his/her written consent to another court in case of abolishing or substantially changing the jurisdiction of the court to which he/she is elected.

(3) The jurisdiction of the court is substantially changed when due to the change of actual competences, the founding of a new court or territorial jurisdiction where the court performs its jurisdiction the required number of judges has changed.

(4) In case of paragraph 2 herein, a judge may be relocated only to a court of the same instance which is assuming the jurisdiction of the court which ceased to operate or which jurisdiction has been substantially changed based on the criteria prescribed by the High Judicial Council

(5) A judge continues to perform his/her function permanently in the court to which he/she is relocated.

(6) The High Judicial Council issues the decision on relocation.

Article 20 of the **Law on Judges** – Transfer of Judge stipulates as follows (for the easier understanding, when quoting the Law on Judges, the term: *transfer,* from the Constitution, as a temporary measure, is being used):

(1) A judge may be transferred to work only in another court of the same type and same or immediately lower instance for a period no longer than one year.

(2) Exceptionally, a judge may be assigned to an immediately superior court if meeting the statutory requirements for election as a judge of the court to which he/she is transferred.

(3) A judge is transferred to the court in which the lack, absence, or recusal of judges or other reasons impede or slow down the work of the court.

(4) The High Judicial Council, with the consent of a judge, shall issue the decision on transfer of the judge from paragraphs 1 to 3 of this Article.

(5) Prior to bringing the decision on transfer of a judge referred to in paragraphs 1 to 3 herein, the High Judicial Council shall obtain the opinion of the session of all judges of the court of origin of the judge and the court of his/her destination.

Hence, given that Article 2 of the **Constitutional Law** on the Implementation of the Constitutional Amendments lays down that the Law on Judges and other laws on the judiciary shall be aligned with the constitutional amendments within 90 days from the day the latter enters into force, there are no guarantees that the provisions on relocation from Article 19 of the Act of Judges will remain intact or that the duration of transfer from the Article 20 will not be extended. It goes without saying that judges (most often judges who are not the "politicians' darlings") perceive a year-long reassignment to a lower or any other court without their consent as harsh punishment.

Having in mind that Draft Amendments omit safeguard of non-transferability which relates to temporary measure and the legal remedy against HJC decisions (provided in Article 155 of current Constitution) as well, currently provided in the Article 155 of the Constitution (Draft Amendments provides only a legal remedy against HJC dismissal decision), there is a real risk that the laws on the judiciary, which will be adopted within 90 days from the day Constitutional Amendments enter into force, will change the types, names, jurisdictions *ratione materiae* and territorial jurisdictions of the courts and facilitate the large-scale relocation or transfers of judges to any other court and of any instance courts for consider-

able periods of time, depending on the actual provisions of the laws to be adopted. Without legal remedy against such a decision of HJC, the judge does not have any other legal remedy but constitutional appeal to the Constitutional Court, which has too many pending cases and is deciding on such cases within timeframes as long as 3-5 years. So, a temporary measure could, in fact, become almost permanent. Such solution could, however, result in lowering the level of judicial independence guarantees, thus of the citizens' right to a fair trial. So, the **following wording should be added in the second paragraph of the Amendment VIII** (italicised and bold): *Regardless, in case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may be relocated* ***or transferred*** *to another court, without his/her consent, in accordance with the law.*

CHAPTER VI

REACTIONS OF THE INTERNATIONAL PROFESSIONAL PUBLIC

CCJE-BU(2018)4

Strasbourg, 4 May 2018

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Opinion of the CCJE Bureau

following a request by the Judges' Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of the Republic of Serbia which will affect the organisation of judicial power

The Judges Association of Serbia (JAS), in its letter of 16 April 2018 addressed to the President of the Council of Europe's Consultative Council of European Judges (CCJE), requested that the CCJE assess the compatibility with European standards of the proposed amendments to the Constitution of the Republic of Serbia which will affect the organisation of judicial power.

The Bureau of the CCJE has examined the draft of the Constitutional Law for the Implementation of Amendments I to XXIX of the Constitution of the Republic of Serbia and focused in particular on the amendments reproduced in Appendix I.

Following examination of the above-mentioned document in light of the Council of Europe's standards and, in particular, the adopted Opinions of the CCJE on the matters relevant to the issues raised by JAS, the CCJE Bureau has delivered the following Opinion:

1. As regards Amendment II, the qualified majority by which the National Assembly (NA) will elect the High Judicial Council (HJC) members requires a three-fifths majority (150 deputies).In the event that all members are not elected in this manner, the remaining members shall be elected within the following ten days by a five-ninths majority (138,9 deputies). This majority is also required for their dismissal. However, it is important that members of the HCJ are not elected according to the preference of any one dominant political party or parties. A qualified majority of three-fifths will normally ensure that this is the case. It would therefore be advisable to uphold the requirement for such a qualified majority for *all* of the five members of the HJC regardless at what stage of election process members are elected in the Parliament.This Amendment also introduces the possibility for the dismissal of HJC members, by a qualified majority of NA members. The draft Amendments do not, however, set out the reasons for such dismissal of HJC members.

Moreover, Amendment XIV 3 prescribes that: "The term of office of a member of the High Judicial Council shall cease for reasons prescribed by the Constitution and law and in the procedure prescribed by law". Upon analysis of this Amendment, first of all it should be emphasised that there should be internal coherence within the amendments and that if one amendment says that reasons must be given elsewhere in the Constitution, then this should be ensured. Not mentioning the reasons for dismissal and, moreover, effectively opening a door for doing it through simple legislation, leaves room for arbitrariness and politically motivated initiatives to have HJC members dismissed. This is clearly a direct threat to their independence, and to the independence of the judiciary as a whole.For these reasons, the Amendment is quite far from providing sufficient Constitutional guarantees for the independence of HJC members.

2. As regards Amendment V, in its Opinion No. 17(2014), the CCJE stated that judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice[1].Para 3 of Amendment V on independence of judges says: "The method to ensure uniform application of laws by the courts shall be regulated by law". This would seem to imply that this provision contains a restriction of functional judicial independence in the interpretation of the law - free judicial opinion – which would also be contrary to the Opinion No. 20(2017) of the CCJE[2].

While it is true that courts may deliver different decisions in seemingly identical factual and legal situations, this does not necessarily mean that the law has been violated. The European Court of Human Rights (ECtHR) has also taken a stand on the subject, including in a case against Serbia[3], in which the Court observed that:

"54. (ii) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention;

(iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts ruling at last instance are in breach

[1] See the CCJE's Opinion No. 17(2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, para 5: "… As the CCJE has indicated in its previous Opinions, judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice, such as a lack of financial resources, problems concerning the initial and in-service training of judges, unsatisfactory elements regarding the organisation of the judiciary and also the possible civil and criminal liability of judges".

[2] See the CCJE's Opinion No. 20(2017) on the role of courts with respect to the uniform application of the law, Chapter VIII (Main conclusions and recommendations), point A : "Regardless of whether precedents are considered to be a source of law or not or whether they are binding or not, reasoning with previous decisions is a powerful instrument for judges both in common law as well as in civil law countries", see also point D: "The need to ensure uniform application of the law should not lead to rigidity and unduly restrict the
proper development of law and neither should it jeopardise the principle of judicial independence".

[3] See ECtHR Vučkovic and others v. Serbia, Chamber judgment from 28/08/2012; as well as of the Grand Chamber judgment in the same case from 25/03/2014, which, in paragraph 89, acknowledges the finality in terms of the inadmissible petition due to inconsistent case-law.

of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect".

Such an assessment must also be based on the principle of legal certainty. This principle is a central tenet of the rule of law. It guarantees stability in legal situations and contributes to greater confidence of the public in the courts.

Lack of consistency in jurisprudence can negatively affect the legal system. However, the requirements of legal certainty and the protection of public confidence do not imply that case law development in itself is contrary to the proper administration of justice. It should be borne in mind that failure to maintain a dynamic and evaluative approach would risk hindering reform or improvement.

Court decisions and case law should therefore not be set in stone. The law, to the extent possible, leads and shapes social relations and, where appropriate, contributes to their development.

Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities (Rec2010(12)) states[4]:

"The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making, judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence".

"Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law".

The CCJE's Magna Carta of Judges (2010) states the following[5]: "In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law".

Furthermore, the CCJE expressed an essentially identical view on this issue in its Opinion No. 20(2017)[6]. Although legal interpretations, views, opinions and binding interpretative statements may have a positive impact on the uniformity of case law and legal certainty, they raise concerns from the point of view of the proper role of the judiciary within the separation powers[7]. In a civil law system, inferior courts may depart from settled case law of hierarchically superior courts provided they set out their arguments for doing so. Furthermore, the CCJE concluded that a judge acting in good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case

[4] See Rec2010(12), Chapter III - Internal Independence, paras 22-23.

[5] See the CCJE's Magna Carta of Judges (Fundamental Principles) (2010), para 10.

[6] This Opinion is on the role of courts with respect to the uniform application of the law.

[7] See the CCJE's Opinion No. 20(2017) on the role of courts with respect to the uniform application of the law, para 28.

law. Such a departure from the case law should be seen as an element of the independence of the judiciary and it should not result in disciplinary sanctions or affect the evaluation of the judge's work[8].

The CCJE advises against including this paragraph in the Constitution.

3. As regards Amendment VII, the way in which the grounds for dismissal of judges are formulated may endanger the principle of irremovability of judges since the grounds given are vague and extremely broad and are not accompanied by an adequate legal protection.

Three grounds for the dismissal of a judge are set out in draft Amendment VII 3:

- if a judge has been convicted of a criminal offense that carries a sentence of at least six months of imprisonment or of a criminal offence that renders him/her unworthy for the judicial function;
- if a judge performs the judicial function incompetently;
- if a judge has committed a serious disciplinary offense.

The CCJE Bureau wishes to recall the major principle of irremovability of judges and that "it is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office"[9]. The security of tenure for judges and their appointment until the statutory age of retirement are a corollary of judicial independence[10].

First of all, the reference in the Amendment to "incompetence" is far too vague and potentially very dangerous to judicial independence. As an example, in a case where a judge was dismissed for "breach of oath", the ECtHR ruled that "the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of "breach of oath" and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects. Against this background, it could well be assumed that almost any misbehaviour by a judge occurring at any time during his or her career could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge of "breach of oath" and lead to his or her removal from office"[11].

"Incompetence" as a ground for dismissal may even be more negative than "breach of oath" from the point of view of judicial independence and irremovability of judges, because while the "breach of oath" may somehow be still subject to guidelines, as it can be implied from the ECtHR judgment cited above, the "incompetence" may be much more difficult to assess, to measure and to quantify. "Incompetence" as a ground for dismissal raises more questions than answers, and it may easily become a tool for pressures and/or all sorts of manipulations, including political, exerted on judges, and thereby negatively affect judicial independence.

The CCJE Bureau recommends to delete "incompetence" as a ground for dismissal of a judge.

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[8] *Ibid*., para 39.

[9] See the CCJE's Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, para 57.

[10] Ibid., paras 52 and 57.

[11] See ECtHR Oleksandr Volkov v. Ukraine, Application no. 21722/11, FINAL 27/05/2013, para 185.

As regards dismissing a judge for a serious disciplinary offense, "the existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined"[12]. The CCJE also emphasised that in each country, the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed[13].

Therefore, the CCJE considers that this provision, as well as that related to a criminal offense as a ground for dismissal, clearly requires the adoption of strong and clear implementing primary legislation, both to set out the specific misconduct that may result in a dismissal, and the procedure to be followed in cases of possible dismissal. The essential elements of this procedure should be included in the Constitution.

The CCJE also recalls observations made by the Council of Europe's Group of States against Corruption (GRECO) as regards Serbia[14]:

"The GET is furthermore concerned that evaluations serve as grounds for dismissal if "unsatisfactory" and that the HJC can initiate evaluations outside the usual three-year cycle, which might carry a risk of possible harassment or pressure, in particular in the specific context in Serbia as described throughout this report. In the view of the GET, the evaluation system needs to be focused on improving the judiciary as a whole and not on punishing individual judges. It refers in this connection to Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe, according to which "a permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions"[15]. In view of the above, GRECO recommends that the system of appraisal of judges' performance be reviewed (i) by introducing more qualitative criteria and (ii) by abolishing the rule that unsatisfactory evaluation results systematically lead to dismissal of the judges concerned".

4. As regards Amendment IX, in particular its wording in subsection 3 and its rather broad definition, the CCJE Bureau would like to reaffirm Rec2010(12) according to which judges may engage in activities outside their official functions. To avoid actual or perceived conflict of interest, their participation should be restricted to activities compatible with their impartiality and independence[16]. Judges should of course be free to associate in organisations which will protect their independence and impartiality.

It is also important to keep in mind that judges should not be personally accountable where their decision is overruled or modified on appeal[17].

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[12] See the CCJE's Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, para 59.

[13] See the CCJE's Opinion No. 3(2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 77.i.

[14] See GRECO's Fourth Round Evaluation Report (2014)8E, para 118.

[15] See Rec2010(12), para 50.

[16] See Rec2010(12), para 21.

[17] See Rec2010(12), para 70.

5. As regards Amendments relating to the HJC, the CCJE examined the link between a judicial council's composition and competences in its Opinion No. 10(2007)[18].

The Draft Amendments change the number of members, the composition of the HJC and the way in which its members (Draft Amendment XIII) and its President (Draft Amendment XV) are elected, as well its working and decision-making procedures (Draft Amendment XVI).

The provisions would result in a reduction of members from among the ranks of judges from seven to five. The HJC will now have 10 instead of 11 members and be composed of two equal groups of members – five judges, to be elected by their peers, and five "prominent lawyers", to be elected by the Assembly. An even number of members is clearly inappropriate for a body, which will inevitably have difficulties adopting decisions in case of differences in opinion. The HJC President may not be chosen from among the ranks of judges.

It seems that the President of the HJC will not have the decisive vote when the opinion within the Council is split. This is commendable since it means that the non-judges of the HJC will not have a de facto majority.

On the other hand, for a body of this nature there will clearly be issues (not seldom sensitive and important ones) when the opinions of its members will be split down the middle.

The composition of the HJC should therefore be kept at an odd number, for example six judges and five non-judges. The CCJE Bureau wishes to recall in this regard that the Magna Carta of Judges (2010) states that "the Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers"[19].

Furthermore, Amendment XIII para 5 states that presidents of courts may not be members of the HJC. Since judges in the HJC should be elected by their peers, such a provision seems to unnecessarily restrict the judges' choice of representation.

As regards the make-up of the HJC, if a Council has broad competences, especially if it manages the court budget, it should have a mixed composition in order to ensure the legitimacy of its work. However, even when the composition is mixed, its functioning should allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and it should be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice[20].

If a Council has fewer competences, limited in practice to issues related to the status of the judges, as appears to be the case here, then there is no justification for reducing the number of its members from among judges as envisaged in Draft Amendment XIII.

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[18] See the CCJE's Opinion No. 10(2007) on the Council for the Judiciary at the service of society, paras 44-47.

[19] See the CCJE's Magna Carta of Judges (Fundamental Principles) (2010), para 13.

[20] See the CCJE's Opinion No. 10(2007) on the Council for the Judiciary at the service of society, para 19.

The provision on the dissolution of the HJC in the event it does not render a decision (when its votes are split) is particularly troublesome. It could be perceived as aiming at rendering the HJC dysfunctional and politically controllable. In the opinion of the CCJE Bureau, this would bring the HJC under undue pressure to avoid its own dissolution.

Membership of judicial councils should be such as to guarantee their independence and to enable them to carry out its functions effectively[21]. Other European standards set out specific qualities that individuals elected to judicial councils should possess: members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence[22], whereas the non-judge members may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status[23]. In any case, prospective members of the Council for the Judiciary, whether judges or non-judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary[24].

6. Conclusions:

A. The provisions on the dismissal of members of the HJC should provide the members with sufficient guarantees for their independence by stating possible grounds for dismissal (Amendment II, para 4).

B. The provision requiring legislation on the method to ensure uniform application of the law should not be included in the Constitution (Amendment V, para 3).

C. The way in which the grounds for dismissal of judges are formulated violates the principle of irremovability of judges and is potentially very dangerous to judicial independence. The "incompetence" as a ground for dismissal of a judge should be deleted. Provisions on other grounds for dismissal should require strong and clear implementing primary legislation, both to set out the specific misconduct that may result in a dismissal, and the procedure to be followed in cases of possible dismissal. The essential elements of this procedure should be included in the Constitution (Amendment VII, 3).

D. The HJC should be composed of an odd number of members, the majority of which should be judges. The possibility for judges if they so choose to be represented by a court president should be guaranteed (Amendment XIII).

E. The provision on the dissolution of the HJC in the event it does not render a decision should be deleted.

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[21] See the CCJE's Opinion No. 10(2007) on the Council for the Judiciary at the service of society, para 15.

[22] *Ibid*., para 21.

[23] *Ibid*., para 22.

[24] *Ibid*., para 23.

Appendix I

Proposed amendments to the Constitution of the Republic of Serbia

Amendment II:

"By means of a three-fifths majority vote of all deputies, the National Assembly shall elect the five members of the High Judicial Council and the five members of the High Prosecutorial Council, and if they are not all elected in such manner, the remaining members shall be elected in the next ten days by means of five-ninths majority vote of all deputies, which is also required for their dismissal".

Amendment V:

"A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international treaties, laws and other general acts.

Any influence on a judge while performing his/her judicial function is prohibited.

The method to ensure uniform application of laws by the courts shall be regulated by law.

The present Amendment shall supersede Article 144 of the Constitution of the Republic of Serbia".

Amendment VI:

"General and special conditions for the election of judges, presidents of courts and lay judges shall be regulated by law.

A person elected for a judge for the first time in the legally specified courts with exclusively first-instance jurisdiction may be elected only if he or she has completed one of the forms of legally stipulated training in a judicial training institution.

The present Amendment shall supersede Article 145 of the Constitution of the Republic of Serbia".

Amendment VII:

"A judicial tenure shall be permanent and shall last from the moment of the appointment until the retirement.

A judge's tenure of office shall cease, prior to the retirement, at personal request, in case of permanent disability for judicial function or in case of dismissal.

A judge shall be dismissed if he/she has been convicted for a criminal offense with at least six months of imprisonment or for a criminal offence that renders him/her unworthy for the judicial function, if he/she performs the judicial function incompetently, or if he/she has committed a serious disciplinary offense.

A judge and a president of the court shall have the right to lodge an appeal with the Constitutional Court against the decision of the High Judicial Council on cessation of judicial function, which shall exclude the right to lodge a Constitutional appeal.

The present Amendment shall supersede Article 146 of the Constitution of the Republic of Serbia".

Amendment IX:

"A judge and a lay judge cannot be held accountable for an opinion expressed within the court proceedings or voting in the process of passing a court decision, unless they commit a criminal offense of violation of law by a judge, public prosecutor or his deputy.

A judge may not be deprived of liberty in the legal proceedings initiated against him/her for a criminal offense committed while performing judicial function without the approval of the High Judicial Council.

A judge and a court president shall be prohibited to engage in political actions, while other functions, activities or private interests which are incompatible with the judicial function shall be stipulated by the law.

The present Amendment shall supersede Article 148 of the Constitution of the Republic of Serbia".

Amendment XII:

"High Judicial Council

Jurisdiction of the High Judicial Council

The High Judicial Council is an autonomous and independent state body that ensures the autonomy and independence of the courts and judges and court presidents by deciding on the issues of the status of judges, presidents of courts and lay judges determined under the Constitution and the law.

The High Judicial Council shall appoint and dismiss the President of the Supreme Court of Serbia and the presidents of other courts; appoint judges and lay judges and decide on the cessation of their office; collect statistical data relevant to the work of judges; evaluate the performance of judges, presidents of courts and judicial assistants; decide on the transfer and temporary relocation of judges; appoint and dismiss the members of the disciplinary bodies; determine the number of judges and lay judges; propose the amount of funds required for the work of the High Judicial Council and the work of courts in matters within its competence and autonomously disposes of these funds, and shall decide on other issues related to the status of judges, presidents of courts and lay judges provided by law.

The present Amendment shall supersede Article 151 of the Constitution of the Republic of Serbia".

Amendment XIII:

"Composition of the High Judicial Council

The High Judicial Council shall be composed of ten members: five judges elected by the judges and five prominent lawyers elected by the National Assembly. A prominent lawyer shall be a law school graduate with a Bar exam who has at least ten years of working experience in the field of law falling within the competence of the High Judicial Council, who demonstrated professional work and enjoys personal reputation.

The National Assembly shall elect five members of the High Judicial Council upon the proposal of the competent parliamentary committee after having conducted a public competition, by a three-fifth majority vote of all deputies, and in

case they are not all elected in this manner, the remaining members shall be elected within the next ten days by a five-ninth majority vote of all deputies. If all the members are not elected even in that manner, the remaining members shall be elected, after 15 days, from among the proposed candidates, by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, by majority vote.

The competent committee of the National Assembly shall propose twice as many candidates as the number of members elected.

The principle of equal representation of courts shall be taken into account in the process of election of judges as members of the High Judicial Council.

Presidents of courts may not be members of the High Judicial Council.

The present Amendment shall supersede Article 152 of the Constitution of the Republic of Serbia".

Amendment XIV:

"Term of Office of Members of the High Judicial Council

Member of the High Judicial Council shall be elected to a five-year term of office.

The same person may not be re-elected as member of the High Judicial Council.

The term of office of a member of the High Judicial Council shall cease for reasons prescribed by the Constitution and law and in the procedure prescribed by law.

The present Amendment shall supersede Article 153 of the Constitution of the Republic of Serbia".

Amendment XV:

"President of the High Judicial Council

The High Judicial Council shall have a president.

The president of the High Judicial Council shall be elected from among members who are not judges.

The term of office of the president of the High Judicial Council is five years, or until the cessation of the term of office as the member of the High Judicial Council.

The present Amendment shall supersede Article 154 of the Constitution of the Republic of Serbia".

Amendment XVI:

"Work and Decision-making of the High Judicial Council

The High Judicial Council may make decisions at a session where at least seven members of the High Judicial Council are present.

The decision shall be adopted by the votes of at least six members of the High Judicial Council.

In the case that the High Judicial Council does not make a decision in the matters in its jurisdiction prescribed by law, within 30 days from the day of the first decision making on that matter, the term of office of all members of the High Judicial Council shall cease.

The High Judicial Council shall publicly announce and explain its decisions, and make the decisions on the election and cessation of the tenure of office of judges, presidents of courts, and lay judges, decisions on the transfer and temporary relocation of judges, and decisions on the appointment and dismissal of members of disciplinary bodies on the basis of the criteria determined in accordance with the law and under a legally prescribed procedure.

The present Amendment shall supersede Article 155 of the Constitution of the Republic of Serbia".

Amendment XVII:

"Immunity of the members of the High Judicial Council

Members of the High Judicial Council cannot be held accountable for an opinion expressed or vote given in decision-making within the High Judicial Council, unless they have committed a criminal offense.

The members of the High Judicial Council cannot be deprived of liberty in the proceedings initiated against them for a criminal offense they have committed as members of the High Judicial Council without the approval of the High Judicial Council.

The present Amendment shall supersede Article 156 of the Constitution of the Republic of Serbia".

Strasbourg, 25 June 2018 CCPE-BU(2018)3

CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)
Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors

1. The Prosecutors Association of Serbia (PAS), in its communication of 20 April 2018 addressed to the Council of Europe's Consultative Council of European Prosecutors (CCPE), requested the CCPE to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors.

2. The Bureau of the CCPE has examined the draft Amendments I to XXIX to the Constitution of the Republic of Serbia. Following their examination in light of the Council of Europe's standards and, in particular, the adopted Opinions of the CCPE, as well as the documents of the European Commission for Democracy through Law (Venice Commission), on the matters relevant to the issues raised by PAS, the CCPE Bureau has delivered the following Opinion:

Amendment II – election and dismissal/cessation of the term of office of the five members of the High Prosecutorial Council (HPC), Supreme Public Prosecutor and public prosecutors

3. This Amendment stipulates that the qualified majority by which the Parliament (National Assembly) will elect five members of the HPC requires a three-fifths majority (150 deputies).

4. This is welcome since according to the Venice Commission, if members of such a council are elected by the Parliament, preferably this should be done by qualified majority[1].

5. In the event that all members are not elected in this manner, the remaining members must be elected within the following ten days by a five-ninths majority (138,9 deputies). Such majority (five-ninths) is also required for their dismissal.

6. However, it is important that members of the HPC are not elected according to the preference of any one dominant political party or parties. A qualified majority of three-fifths will normally ensure that this is the case. It would therefore be

[1] See Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 66.

advisable to uphold the requirement for such a qualified majority for all five members of the HPC regardless at what stage of the election process the members are elected by the Parliament.

7. Amendment II also introduces the possibility for dismissal of the HPC members by a qualified - but lower - majority of deputies (five-ninths). In this regard, the same qualified majority necessary for the election of the HPC members (three-fifths) should apply in the case of their dismissal, in order to avoid politicisation and political pressures from the ruling party.

8. Moreover, the Parliament will elect the Supreme Public Prosecutor and public prosecutors, as well as cease their term of office, by a simple majority vote at a session where a majority of deputies are present.

9. The manner in which the Prosecutor General is appointed and dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office[2]. The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal[3]. In countries where the Prosecutor General is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments[4].

10. Therefore, the qualified three-fifths majority (150 deputies) mentioned above for the election of five members of the HPC must be especially strongly required in the case of election of the Supreme Public Prosecutor, as well as for cessation of his/her term of office, in order to avoid politicisation and political pressures from the ruling party.

11. As regards appointment of public prosecutors, as the CCPE emphasised, member States should take measures to ensure that recruitment, promotion and transfer of prosecutors are carried out according to fair and impartial procedures, based on transparent and objective criteria, such as competence and experience, and excluding discrimination on any ground. Recruitment bodies should be selected on the basis of competence and skills and should discharge their functions impartially and based on objective criteria[5]. The appointment and termination of

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[2] See Opinion No.9(2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 55; see Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, paras 34-35.

[3] See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, paras 19, 20 and 27.

[4] See Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, paras 35-38, 40.

[5] See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 51.

service of prosecutors should be regulated by the law at the highest possible level and by clear and understood processes and procedures[6].

12. Furthermore, the proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, salaries, discipline and transfers which must be carried out only according to the law or with their consent. For these reasons, it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal[7].

13. Also, as the Venice Commission has stressed, when all prosecutors are appointed and dismissed by the Parliament with no qualified majority, the prosecutorial system is totally under the control of the ruling party or parties: this is not in conformity with European standards[8].

14. Therefore, in view of the above, although the recommendations given in Amendment XXI seem preferable, the qualified three-fifths majority (150 deputies) must also be required in the case of election of public prosecutors, as well as for cessation of their term of office, in order to avoid politicisation and political pressures from the ruling party.

15. As regards the grounds for dismissal of the HPC members, please see the analysis and recommendations for Amendment XXVII. As regards the grounds for cessation of the term of office of the Supreme Public Prosecutor and public prosecutors, please see the analysis and recommendations for Amendment XXI.

16. **For these reasons, Amendment II is quite far from providing sufficient Constitutional guarantees for the independence of HPC members, the Supreme Public Prosecutor and public prosecutors. It should be substantially re-drafted in accordance with what is indicated above (please also see the Summary of Recommendations at the end of this Opinion).**

Amendment XVIII – autonomy of the Public Prosecutor's Office

17. This Amendment, which describes the status of the prosecution service, does not in fact mention independence. Instead, it only refers to the prosecution service as an "autonomous state body". In this regard, the CCPE Bureau wishes to underline that autonomy is not always the same as independence, and independence is more than a simple autonomy, first of all as regards the decision-making process.

18. The Amendment mentions that "any influence on Public Prosecutor's Office in an individual criminal prosecution case is prohibited", however such a general declarative statement appears not to be enough. There should be guarantees of independence in relation to the executive and legislative powers and in particular

[6] See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 52.

[7] See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 53.

[8] See Venice Commission's Opinion on the Constitution of Montenegro, CDL-AD(2007)047, para 104; see also Venice Commission's Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, CDL-AD(2008)005, para 12.

against any political influence. Autonomy only is not in itself sufficient to provide for functional independence of prosecutors in performing their duties. The independent status of prosecutors is a basic requirement of the rule of law[9].

19. The CCPE underlines that the independence of prosecutors must be guaranteed by law, at the highest possible level, in a manner similar to that of judges[10], and that the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged[11].

20. The European Court of Human Rights (ECtHR) considered it necessary to emphasise that "in a democratic society both the courts and the investigation authorities must remain free from political pressure"[12]. The ECtHR has also referred to the issue of independence of prosecutors in the context of "general safeguards such as guarantees ensuring functional independence of prosecutors from their hierarchy and judicial control of the acts of the prosecution service"[13].

21. States must ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability[14]. Prosecutors should be in a position to prosecute, without obstruction, public officials for offences committed by them, particularly corruption, unlawful use of power and grave violations of human rights[15].

22. Prosecutors must be independent not only from the executive and legislative authorities but also from other actors and institutions, including those in the areas of economy, finance and media. Prosecutors must also be independent with regard to their cooperation with law enforcement authorities, courts and other bodies[16].

23. **Therefore, it is essential that this Amendment, first of all, declares independence of the Public Prosecutor's Office, and secondly, specifies both its organisational independence from executive and legislative powers and functional independence of individual prosecutors.**

Amendment XX – hierarchy and instructions within the Public Prosecutor's Office

24. This Amendment provides, in a very general way, for a kind of hierarchy within the prosecution system referring to the public prosecutors and deputy pub-

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[9] See Magna Carta of Judges (Fundamental Principles) (2010) of the CCJE, para 11.

[10] See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 33.

[11] See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, Section IV.

[12] See ECtHR Guja v. Moldova (Grand Chamber), no. 14277/04, para 86.

[13] See ECtHR Kolevi v. Bulgaria, no. 1108/02, 05/02/2010, para 142.

[14] See Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para 4.

[15] See Rec(2000)19, para 16.

[16] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Explanatory Note, paras 38-39.

lic prosecutors who are "obliged to act upon instruction from the public prosecutor". Even though the Amendment does specify that the "deputy public prosecutors shall have available legal remedy against the instructions of the public prosecutor", this seems not to be a sufficient guarantee for the impartiality of lower-level prosecutors and exclusion of the possibility of biased pressures and prejudices in instructions given by the higher-level prosecutors, particularly in specific criminal cases.

25. As regards the hierarchy, the CCPE stated that, while the hierarchical structure is a common aspect of most public prosecution services, relations between the different levels of the hierarchy must be governed by clear, unambiguous and well-balanced regulations[17]. It is essential to develop appropriate guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities, in particular in trial procedures, are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system[18].

26. The CCPE also stressed that instructions of a general nature must be in writing and, where possible, be published and transparent. While there is a general tendency for more independence of the prosecution system, which is encouraged by the CCPE, there are no common standards in this respect. Where the legislation still allows for such instructions, they should be made in writing, limited and regulated by law[19][19].

27. **Therefore, the CCPE Bureau recommends to clearly reflect the above-mentioned considerations in this draft Amendment.**

Amendment XXI – term of office of the Supreme Public Prosecutor and public prosecutors

28. This Amendment provides for a five-year term of office of the Supreme Public Prosecutor, elected by the Parliament upon the proposal of the HPC, without possibility of re-election. Likewise, public prosecutors will be elected on the proposal of the HPC for a five-year term of office. However, in their case, nothing is said about the possibility of their re-election or non-re-election.

29. The CCPE emphasised that the Prosecutors General should be appointed for a sufficiently long period to ensure stability of their mandate and make them independent of political changes[20].

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[17] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Explanatory Note, para 40.

[18] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Explanatory Note, para 42.

[19] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Explanatory Note, paras 46-47.

[20] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Explanatory Note, para 56; see also Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 37.; see also UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012, para 65.

30. The Venice Commission has pointed out in specific cases that a longer mandate than five years would be needed (excluding re-election) in order to protect persons appointed as Prosecutor General from political influence[21]. It has also welcomed what has been proposed, in some countries, of a seven-year term of office for the Prosecutor General rather than the current five years as it was both a sufficiently long period that went beyond the term of any one government, and it removed a significant threat to independence by excluding re-appointment[22].

31. Therefore, the CCPE Bureau advocates for introducing a seven-year term of office for the Supreme Public Prosecutor in Serbia, without the possibility of re-election.

32. As regards the term of office for public prosecutors, as the Venice Commission has pointed out, they should be appointed until retirement. Appointments for limited periods with the possibility of re-appointment carry the risk that the prosecutor will make his/her decisions not on the basis of the law but with the idea to please those who will re-appoint him/her[23].

33. The CCPE Bureau wishes to endorse this position of the Venice Commission and propose to consider appointment of public prosecutors on a permanent basis.

34. As regards the grounds for dismissal or cessation of the term of office of the Supreme Public Prosecutor and public prosecutors – the possibility of dismissal is mentioned in Amendment I and the possibility of cessation in Amendment II - they are not mentioned either in this or other Amendments and it is not clear how this issue would be regulated. In addition, nothing is said about the possibility of appeal against decisions of dismissal or cessation of the term of office.

35. Not mentioning the concrete grounds for dismissal or cessation of the term of office may leave room for arbitrariness, pressures and politically motivated initiatives, in which case it would clearly be a threat to the independence of the Supreme Public Prosecutor and public prosecutors.

36. As regards the Prosecutors General, the Venice Commission has specified that the grounds for their dismissal would have to be prescribed by law. Moreover, there should be a mandatory requirement that before any decision is taken, there must be sufficient grounds for dismissal. In any case, the Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament[24].

37. **The CCPE Bureau agrees with the Venice Commission and is of opinion that these crucial points indicated in the paragraph above should be expressly mentioned in Amendment XXI.**

38. **Furthermore, as regards grounds for dismissal or cessation of the term of office of public prosecutors, and recalling its own standards – that termination**

[21] See Venice Commission's Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, CDL-AD(2013)025, para 117.

[22] See Venice Commission's Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova, CDL-AD(2015)005, para 89.

[23] See Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 50.

[24] See Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, paras 39-40.

of service of prosecutors should be regulated by the law at the highest possible level and by clear and understood processes and procedures[25] – the CCPE Bureau recommends to integrate in Amendment XXI provisions stating that such grounds would have to be prescribed by law, there should be a mandatory requirement that before any decision is taken an independent body (like the HPC) has to ascertain whether there are sufficient grounds for dismissal, and in any case, the public prosecutors should benefit from a fair hearing in dismissal proceedings and the right to judicial appeal.

Amendment XXIII – term of office and dismissal of deputy public prosecutors

39. This Amendment provides for a permanent term of office for deputy public prosecutors which is welcome. However, it goes on to provide the grounds for their possible dismissal by the HPC, and in particular, including in the case "if he/she incompetently performs function of deputy public prosecutor".

40. As it was already mentioned, the CCPE indicated that the appointment and termination of service of prosecutors should be regulated by law at the highest possible level and by clear and understood processes and procedures[26]. Incompetent performance as a ground for dismissal seems to be a very broad and vague concept and it may be understood and interpreted in an arbitrary manner, opening the door for politically motivated or otherwise biased dismissals under the pretext of "incompetent performance".

41. **The CCPE Bureau therefore recommends either deleting this ground from the Amendment, or specifying that only very serious and repetitive incompetence cases established through due disciplinary procedure, with a possibility of judicial appeal, may lead to dismissal.**

Amendment XXV – jurisdiction of the High Prosecutorial Council (HPC)

42. This Amendment provides for the HPC as an autonomous state body that ensures the autonomy of the public prosecutors' offices, public prosecutors and deputy public prosecutors; however it does not mention the concept of independence.

43. The importance of independence of the prosecution service and individual prosecutors, in addition to their autonomy, was already thoroughly highlighted in this Opinion, therefore the CCPE Bureau would like to recall it in this particular context of the HPC, which in principle must be a guardian of prosecutorial independence.

44. **The Bureau of the CCPE recommends to include reference to this key role of the HPC in the Amendment, as well as to broaden the scope of powers of the HPC in order to enable it to protect the status and independence both of the prosecution service and of individual prosecutors.**

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[25] See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 52.

[26] See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 52.

Amendment XXVI – composition of the HPC

45. This Amendment establishes that the "HPC shall have eleven members: four deputy public prosecutors elected by public prosecutors and deputy public prosecutors, five prominent lawyers elected by the National Assembly, the Supreme Public Prosecutor of Serbia and the minister in charge of the judiciary".

46. Both the CCPE and Venice Commission have underlined that setting up a Prosecutorial Council is a very welcome step towards depoliticisation of a Prosecutor's Office and therefore, it is very important that it is conceived as a pluralistic body, which includes prosecutors, members of civil society and a government official. In order to ensure the neutrality of this body, the independence of the Prosecutorial Council and its members should be clearly stipulated[27].

47. The Venice Commission has also pointed out in particular that if such councils are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input into the appointment and disciplinary process and thus to shield prosecutors, at least to some extent, from political influence[28]. Moreover, in one of its previous opinions, the Venice Commission noted that the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers, seems appropriate[29].

48. **In light of the above, the Bureau of the CCPE recommends reconsidering the composition of the HPC and making sure that it is composed of a majority, at least slight, of prosecutors from all levels of the prosecution service, and that the other part includes lawyers, legal academics and members of civil society, while there remains only one member from the executive power.**

Amendment XXVII – term of office of members of the HPC

49. This Amendment stipulates that a "member of the HPC shall be elected to a five-year term of office. The same person may not be re-elected as member of the HPC. The term of office of a member of the HPC shall terminate for reasons and in the proceedings prescribed by law. The Supreme Public Prosecutor of Serbia shall perform *ex officio* the function of the president of the HPC".

50. The Venice Commission has pointed out that the election of the President of the Council by its members is welcome[30]. It would therefore be advisable to have the President elected by the members of the Prosecutorial Council themselves from

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[27] See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, paras 33-34.

[28] See Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 65.

[29] See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, para 36.

[30] See Venice Commission's Opinion on the draft law on the Public Prosecutors' service of Moldova, CDL-AD(2008)019, para 62.

their ranks. As regards the Minister of Justice being a member of the Prosecutorial Council *ex officio*, having him/her to chair the Council may raise doubts as to the independence of this body[31].

51. Therefore, the CCPE Bureau recommends pointing out in this Amendment that the HPC President should be elected by the HPC members themselves.

52. As regards the grounds for dismissal of members of the HPC – the possibility of dismissal is mentioned in Amendments I and II - they are not mentioned either in this or other Amendments and it is not clear how this issue would be regulated. In addition, nothing is said about the possibility of appeal against decisions of dismissal.

53. Not mentioning the concrete grounds for dismissal may leave room for arbitrariness, pressures and politically motivated initiatives, in which case it would clearly be a threat to the independence of the HPC members.

54. The CCPE agrees with the Venice Commission that the mandate of the members of such Councils should only end at the expiry of their term of office, on retirement, on resignation or death, or on their dismissal for disciplinary reasons. Members of prosecutorial councils should be autonomous and independent and should not be subjected to a vote of no confidence which will make them too dependent on the wishes of prosecutors. The Venice Commission strongly recommends that such a procedure not to be introduced[32].

55. **Therefore, the CCPE Bureau is of the opinion that these crucial points indicated in the paragraph above should be expressly mentioned in Amendment XXVII.**

Summary of Recommendations

56. Based on the above considerations, the Bureau of the CCPE recommends:

- **in Amendment II**, stipulate that five members of the HPC are elected, dismissed or the term of their office is ceased only by the qualified majority of three-fifths of the Parliamentary members, even when their initial election fails; that the Supreme Public Prosecutor and public prosecutors are elected, dismissed or the term of their office is ceased also by the same qualified majority of three-fifths; as regards the grounds and due process for dismissal or cessation of the term of office of all above-mentioned persons, please refer also to the recommendations for Amendments XXI and XXVII;
- **in Amendment XVIII**, stipulate the independence of the Public Prosecutor's Office and specify both its organisational independence from the executive and legislative powers and the functional independence of individual prosecutors;
- **in Amendment XX**, mention that instructions given to prosecutors by higher level prosecutors must be made in writing, limited and regulated by law;

[31] See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, para 40.

[32] See Venice Commission's Opinion on the draft amendments to the Law on the State Prosecutorial Council of Serbia, CDL-AD(2014)029, paras 52-54 and 56.

- **in Amendment XXI**, introduce a seven-year term of office for the Supreme Public Prosecutor in Serbia, without the possibility of re-election; introduce a permanent term of office – until retirement - for all other prosecutors; specify the grounds for dismissal or cessation of the term of office of the Supreme Public Prosecutor in the law, with a mandatory requirement that before any such decision is taken, there must be sufficient grounds for dismissal, and with the right of the Supreme Public Prosecutor to benefit from a fair hearing in such proceedings, including before the Parliament, and with the possibility of judicial appeal; specify the grounds for dismissal or cessation of the term of office of other prosecutors in the legislation, with a mandatory requirement that before any decision is taken, an independent body (such as the HPC) has to ascertain whether there are sufficient grounds for dismissal, and with the right of prosecutors to benefit from a fair hearing in such proceedings, and with the possibility of judicial appeal;
- **in Amendment XXIII,** either delete "incompetent performance" as a ground for dismissal for deputy public prosecutors, or specify that only very serious and repetitive incompetence cases, established through due disciplinary procedure regulated by law, with a possibility of judicial appeal, may lead to dismissal;
- **in Amendment XXV**, include reference to the key role of the HPC as a guardian of prosecutorial independence and to a broadening of the scope of powers of the HPC in order to enable it to protect the status and independence both of the prosecution service and of individual prosecutors;
- **in Amendment XXVI**, reconsider the composition of the HPC and make sure that it is composed of a majority, at least slight, of prosecutors from all levels of the prosecution service, and that the other part includes lawyers, legal academics and members of civil society, while there remains only one member from the executive power;
- **in Amendment XXVII**, point out that the HPC President is elected by the HPC members themselves; reconsider the role of the Minister of Justice as having the Minister chairing the HPC may raise doubts as to the independence of this body; specify that the mandate of the HPC members ends only at the expiry of their term of office, on retirement, on resignation or death, or on their dismissal for disciplinary reasons, after due process and with the possibility of judicial appeal; also mention that the HPC members cannot be subjected to a vote of no confidence.

25 May 2018

RESOLUTION
ON THE SITUATION OF THE JUDICIARY IN SERBIA

At its meeting in Berlin on 25 May 2018, the European Association of Judges (the EAJ) considered the current situation of the judiciary in Serbia, in particular the proposed amendments to the Constitution of the Republic of Serbia which will affect the organisation of judicial power.

The EAJ noted the Opinion of the Consultative Council of European Judges (the CCJE) issued on 4 May 2018 (CCJE-BU(2018)4) following a request by the Judges' Association of Serbia to assess the compatibility of the proposed amendments with European standards.

The EAJ shares the concerns expressed in this Opinion. Judicial independence and the separation of powers need to be safeguarded in any democratic society governed by the Rule of Law.

The EAJ notes the conclusions set out in paragraph 6 of the CCJE Opinion, as follows:

"A. The provisions on the dismissal of members of the HJC should provide the members with sufficient guarantees for their independence by stating possible grounds for dismissal (Amendment II, para 4).

B. The provision requiring legislation on the method to ensure uniform application of the law should not be included in the Constitution (Amendment V, para 3).

C. The way in which the grounds for dismissal of judges are formulated violates the principle of irremovability of judges and is potentially very dangerous to judicial independence. The 'incompetence' as a ground for dismissal of a judge should be deleted. Provisions on other grounds for dismissal should require strong and clear implementing primary legislation, both to set out the specific misconduct that may result in a dismissal, and the procedure to be followed in cases of possible dismissal. The essential elements of this procedure should be included in the Constitution (Amendment VII, 3).

D. The HJC should be composed of an odd number of members, the majority of which should be judges. The possibility for judges if they so choose to be represented by a court president should be guaranteed (Amendment XIII).

E. The provision on the dissolution of the HJC in the event it does not render a decision should be deleted."

The EAJ further notes the following provisions of the Universal Charter of the Judge :

"Article 2-2,3: No judge can be assigned to another post or promoted without his/her agreement".

"Article 2-2,4: A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only as the effect of disciplinary proceedings, under respect of the rights of defence and of the principle of contradiction".

Therefore, the EAJ:

- **Calls upon the Republic of Serbia to take the necessary steps to address the concerns raised by the CCJE in its Opinion issued on 4 May 2018.**
- **Calls upon the Republic of Serbia, in particular, to make the revisions set out in paragraph 6 of that Opinion.**
- **Calls upon the Republic of Serbia to ensure that the provisions of the Universal Charter set out above are duly observed.**

7 June 2018

MEDEL STATEMENT ON THE CONSTITUTIONAL REFORM IN SERBIA

In light of the process of constitutional amendments in Serbia with regard to the judiciary and the prosecutorial service Having in mind the proposed solutions in the 13th April 2018 Draft Amendments to the Constitution of the Republic of Serbia and the Draft of the Constitutional Law Recalling to the unjustifiable violation of the Rule of Law undertaken in 2009 by "re-election" of all judges, prosecutors and deputies of public prosecutors and in 2011/2012 during the review of the re-election Endorsing the Opinion of the Consultative Council of European Judges Bureau of 4 May 2018

MEDEL – Magistrats Européens pour la Démocratie et les Libertés, emphasises the following:

1. Achieved level of the independence of judges and the judiciary and autonomy of prosecutors and prosecutorial service must not be decreased. The judicial independence and prosecutorial autonomy in Serbia should be safeguarded and improved at the highest level in line with the *acquis* and best European practices.
2. The principles of separation of powers and the independence of the judiciary are the basis of the democratic society governed by the Rule of Law. The principle of functional autonomyfrom executive power, or principle of independency of the prosecutorial service is a prerequisite for independence and efficient judiciary.
3. As stated by Recommendation **CM/Rec(2010)12** of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, decisions concerning the selection and career of judges should be based on objective criteria pre established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity. There should be no discrimination against judges or candidates for judicial office.

The Constitution should enshrine that judicial councils, independent of the executive and legislative powers, should be entrusted to appoint judges and prosecutors based on their professional competence and personal integrity attained in the manner, in a procedure and under the condition regulated by the Law, which provide for the independence of judiciary and access to judicial office to everyone without any discrimination. As stated by the Venice Commission in its *Report on the Independence of the Judicial System*, of 12-13 march 2010, *"it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges"*.

4. Members of the judicial councils, having in mind it's functioning in Serbia, should not be active politicians, members of Parliament, the executive or the administration. They must be selected on the basis of their competence, experi-

ence, understanding of judicial life, capacity for discussion and culture of independence. Process of selection of members of the judicial councils and the functioning of the councils shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice. The provisions regulating the dismissal of members of judicial councils should provide the members with sufficient guarantees for their independence, by stating possible grounds for dismissal.

4a. High Judicial Council (HJC) should be composed of an odd number of members, the majority of which should be judges elected by their peers. The provisions on the dissolution of the HJC in the event it does not render a decision should be deleted.

4b. High prosecutorial Council (HPC) should keep composition with the majority of prosecutors elected by their peers.

5. MEDEL sees with much concern the inclusion in the Constitution of a provision requiring legislation of the method to ensure uniform application of the law.

In opinion nr. 20 (2017) of the CCJE (*"The Role Of Courts With Respect To The Uniform Application Of The Law"*) it is clearly stated that *"the need to ensure uniform application of the law should not lead to rigidity and unduly restrict the proper development of law and neither should it jeopardise the principle of judicial independence"* and that "it is primarily a role of a supreme court to resolve conflicts in the case law and to ensure consistent and uniform application of laws as well as to pursue development of law through the case law".

MEDEL demands that any method adopted must ensure that only a higher court, following a due process and with no external influence, can decide on the uniform application of the law, under criteria that, as stated in the quoted opinion *"should pursue the public function of the supreme court to safeguard and promote the uniformity of the case law and the development of law"* and safeguarding the possibility of a dissenting decision when *"a close and critical analysis would lead to the finding that the circumstances and the context of the cases do not match"*.

6. The way in which the grounds for the dismissal of judges are formulated violates the principle of irremovability of judges and is potentially very dangerous to the judicial independence. Provisions on grounds for dismissal of judges and prosecutors should require strong and clear implementing primary legislation both to set out the specific misconduct that may result in a dismissal, and the procedure to be followed.

7. The principle of nontransferability of judges implies not only judges' consent for transfer, but also for assignment (temporary measure) to another post and should be safeguarded in both aspects (permanent and temporary).

8. A judge should be guaranteed the legal remedy against a decision of HJC.

9. Election of all public prosecutors by the Parliament with a simple majority, as well as strong hierarchical structure, could make an impression of public prosecutors as holders of political mandate. Impression of political mandate and political control over the prosecutorial service should be avoided.

CHAPTER VII

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION): OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTIONAL PROVISIONS ON THE JUDICIARY

Strasbourg, 25 June 2018 **CDL-AD(2018)011**
Opinion No. 921 / 2018 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

SERBIA OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTIONAL PROVISIONS ON THE JUDICIARY

on the basis of comments by

Mr Johan Hirschfeldt (Substitute member, Sweden)
Ms Grainne McMorrow (Substitute member, Ireland)
Mr Jørgen Steen Sørensen (Member, Denmark)
Ms Hanna Suchocka (Honorary President)
Mr András Varga (Member, Hungary)

I. Introduction

1. In a letter dated 13 April 2018, Ms Nela Kuburović, Minister of Justice of Serbia, made a request for an opinion by the Venice Commission on the draft Amendments to the constitutional provisions on the judiciary (CDL-REF(2018)015, hereinafter, the "draft Amendments").

2. In November 2017, the Ministry of Justice of Serbia (hereinafter, the "Ministry of Justice") had asked the Venice Commission for assistance in drafting constitutional amendments pertaining to the judiciary. The Venice Commission appointed Mr James Hamilton, a former member of the Venice Commission,[1] to travel to Belgrade, Serbia and to attend meetings with the Ministry of Justice and other stakeholders with a view to providing assistance to the Ministry of Justice in drafting a constitutional amendment proposal on the judiciary, in line with previous Venice Commission opinions, and to report back to the Venice Commission.

3. Mr Hamilton travelled to Belgrade twice (November 2017 and January 2018) and submitted his report to the Ministry of Justice in January 2018. On 22 January

[1] Under the Horizontal Facility Programme for the Western Balkans and Turkey funded by the European Union and the Council of Europe and implemented by the Council of Europe.

2018, the Ministry of Justice published a working draft of amendments to the Constitution. Mr Hamilton informed the Venice Commission about his report and visits to Belgrade during its 114th Plenary Session in Venice, Italy on 16-17 March 2018.

4. The terms of Mr Hamilton's engagement were not to act as a representative of the Venice Commission, but to assist the Serbian authorities by informing them about previous relevant opinions of the Venice Commission. Mr Hamilton did not co-draft provisions, but provided advice on a previously drafted concept paper prepared by the Ministry of Justice.

5. For the present draft opinion, the Venice Commission invited Mr Johan Hirschfeldt (Sweden), Ms Grainne McMorrow (Ireland), Mr Jørgen Steen Sørensen (Denmark), Ms Hanna Suchocka (Poland) and Mr András Varga (Hungary) to act as rapporteurs.

6. On 10-11 May 2018, a delegation of the Venice Commission, composed of Ms Grainne McMorrow, Mr Jørgen Steen Sørensen, Ms Hanne Suchocka and Mr András Varga accompanied by Mr Thomas Markert and Ms Tanja Gerwien from the Secretariat, visited Belgrade and met with (in chronological order): Mr A. Vucic, President of Serbia; the Head of the Delegation of the EU to Serbia; the Prime Minister; the Minister of Justice; the Minister of European Integration; Committees of the National Assembly[2]; the President of the Supreme Court of Cassation, the Chair of the High Judicial Council (HJC); the HJC; representatives of IOs and members of the diplomatic community; the President of the Constitutional Court; the Republic Public Prosecutor, the Chair of the State Prosecutorial Council (SPC); the SPC; the Judicial Academy; Associations[3] and NGOs[4].

7. The draft Amendments were prepared by the Ministry of Justice, following the adoption of the National Action Plan for Chapter 23 of the accession negotiations by Serbia with the European Commission, opened in July 2016, with the aim of depoliticising the judiciary and to strengthen its independence. The draft Amendments were adopted by the Government of Serbia prior to being submitted to the Venice Commission for the present opinion. The Venice Commission was informed that the formal amendment process will be initiated by the National Assembly of Serbia after the adoption of the present opinion by the Venice Commission.

8. The Venice Commission was concerned to learn – from the numerous reports and comments that it had received and from its delegation's visit to Belgrade – that the important process of amending the Constitution of Serbia of 2006 in its sections pertaining to the judiciary in order to bring it into line with European standards, began with a public consultation process marred by an acrimonious environment. Nevertheless these consultations led to substantial – and positive – amendments to the draft. The Venice Commission would like to underline that this acri-

[2] Committee on the Judiciary, Public Administration and Local Self-Government; Committee on Constitutional and Legislative Issues and Committee on Human and Minority Rights and Gender Equality.

[3] Judges' Association of Serbia; Association of Prosecutors of Serbia; Association of Judicial and Prosecutorial Assistants; Association of Judicial Associates.

[4] Judicial Research Centre; Lawyers' Committee for Human Rights (YUCOM); Belgrade Centre for Human Rights; Rule of Law Academic Network (ROLAN) and the Serbian Network of Jurists.

monious environment is counter-productive for a process, the aim of which is to bring all relevant actors together in order to achieve a common goal, which is to bring Serbia's judiciary into line with European standards. It therefore encourages the Serbian authorities to spare no efforts in creating a constructive and positive environment around the public consultations to be held when the National Assembly will examine the draft amendments, in the interests of the country's entire process of judicial reform – a process that also involves the important alignment of secondary legislation on the judiciary with the amendments, all of which is to be achieved within a very short period of time.

9. The present draft opinion was prepared on the basis of contributions by the rapporteurs and on the basis of an unofficial translation of the draft Amendments. Inaccuracies may occur in this opinion as a result of incorrect translations.

10. This opinion was adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018), after having been discussed at the Sub-Commission on the Judiciary (21 June 2018) and following an exchange of views with Ms Nela Kuburović, Minister of Justice of Serbia.

II. General Remarks

11. The Venice Commission acknowledges the sincere efforts of the Serbian Government in pursuit of its aspirations to develop and evolve as a modern democracy for the benefit of all the Serbian people and in prioritising the need to meet the highest standards of compliance with international best practice and the rule of law. In order for a democratic state to function properly, it is essential that it has to have an independent, fair and impartial judiciary that is trusted by the people. To achieve this end, it is crucial that the judiciary be committed to upholding the rule of law and be free from political pressure or bias. The judiciary must also be seen to be efficient and accountable for the expeditious use of court time and resources and in the delivery of timely, quality judgments in order that a body of high standard reasoned case law and jurisprudence can be built up. It is thus imperative that the judiciary provide justice within a reasonable period of time – as justice delayed is justice denied.

12. Judicial independence, to function properly, must be accompanied by judicial integrity. A judge's integrity can only be evaluated by a vigilant, functional, fit for purpose and fair system of accountability. This necessarily involves the observance of the separation of the three branches of power – the judiciary, the executive and the legislature. Each branch must carry out its work, yet still be a part of a system of checks and balances to ensure that none of these branches gain too much unchecked power. In this context, it is important, as stated in the Venice Commission's Rule of Law Checklist, that: "*The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separa-*

tion of powers. Judges should not be subject to political influence or manipulation"[5] – but it is also crucial that this be understood as not excluding any interaction with the other branches of power.

13. This important interaction between the three branches of power was clearly explained by the Consultative Council of European Judges (CCJE) in its Opinion no. 18 (2015): *"In a democratic society it is the responsibility of the legislature to design the legal framework in which and by which society lives. The executive power is responsible for the administration of society (in so far as state agents have to carry it out) in accordance with the legal framework established by the legislature. The judiciary's function is to adjudicate between members of society and the state and between members of society themselves. Frequently the judiciary is also called upon to adjudicate on the relationship between two or even all three powers of the state. All this must be done according to the rule of law."*[6] And ***"Whilst all three powers share responsibility for ensuring that there is a proper separation between them, neither that principle nor that of judicial independence should preclude dialogue between the powers of the state. Rather, there is a fundamental need for respectful discourse between them all that takes into account both the necessary separation as well as the necessary interdependence between the powers****. It remains vital, however, that the judiciary remains free from inappropriate connections with and undue influence by the other powers of the state* [emphasis added]."[7] This means that, in checking a judge's integrity, the system governing accountability must be free from the executive's interference or it will undermine the separation of powers and in turn prevent a democratic state from functioning properly.

14. Although this is outside the scope of the draft Amendments examined in the present opinion, the Venice Commission finds it important to draw attention to Article 4 of the current Constitution of Serbia, which states that the *"Government system shall be based on the division of power into legislative, executive and judiciary."* This is a general rule. It then goes into more detail: *"Relation between three branches of power shall be based on balance and mutual control."* It is indeed important that the whole system, including the judiciary, be balanced. However, the wording "*mutual control*" raises concern. The word *control* could give rise to misgivings in interpretations regarding the role of the other powers, especially the executive power towards courts and lead to "political" control over the judiciary. For this reason, it would be better to delete the wording "*mutual control*" from the text of any future constitution and to replace it with the wording *"shall be based on checks and balances"*.

15. The Serbian authorities made it clear, in the meetings with the Venice Commission's delegation during its visit to Belgrade, that they were fully committed to having a functioning judiciary within a functioning democratic state and were ready to tackle any outstanding issues to achieve this goal. In the analysis below, the

[5] Rule of Law Checklist (CDL-AD(2016)007), paragraph 74.

[6] The CCJE's Opinion no.18 (2015) on "The position of the judiciary and its relation with the other powers of state in a modern democracy" https://rm.coe.int/16807481a1.

[7] *Ibid.*

Venice Commission will deal with those draft Amendments and address both the positive aspects of the draft measures and also those amendments that might create obstacles for achieving this goal.

III. Analysis

A. General comments

16. The Venice Commission has adopted a dozen opinions for Serbia relating to the judiciary[8] between 2005 and 2014, analysing the country's Constitution and subsequent legislation, as have other international bodies, including GRECO[9] and the CCJE.[10] Of the dozen opinions adopted for Serbia by the Venice Commission, the most relevant opinion for these draft Amendments is the Opinion on the Constitution of Serbia, adopted by the Venice Commission at its 70th Plenary Session in March 2007.[11]

17. The draft Amendments have strived to overcome what the Venice Commission had identified in its previous opinions as being one of the main problems with the process of the reform of the judiciary in Serbia, notably the prominent role given to the National Assembly by the Constitution with respect to judicial appointments.

18. In general, the draft Amendments contain a number of important and welcome principles that are fundamental in any democratic state. Certain draft Amendments require specific comments. However, we consider, with respect, that there are certain matters that should be dealt with by secondary legislation or bye-laws, but which are currently included in the draft Amendments and that there are

[8] Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia (CDL- AD(2005)023); Opinion on the Constitution of Serbia (CDL-AD(2007)004); Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia (CDL-AD(2008)006); Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia (CDL-AD(2008)007); Opinion on Rules of Procedure on Criteria and Standards for the Evaluation of the Qualification, Competence and Worthiness of Candidates for Bearers of Public Prosecutor's Function of Serbia (CDL-AD(2009)022); Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia (CDL-AD(2009)023); Interim opinion on the draft decisions of the high judicial council and of the state prosecutorial council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia (CDL-AD(2011)015); Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia (CDL-AD(2011)050corr); Opinion on Draft amendments to Laws on the Judiciary of Serbia (CDL-AD(2013)005); Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia (CDL-AD(2013)006); Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia (CDL-AD(2014)028); Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia (CDL-AD(2014)029).

[9] Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors.

[10] Opinion of the CCJE Bureau of 4 May 2018 (CCJE-BU(2018)4) following a request by the Judges' Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of the Republic of Serbia which will affect the organisation of judicial power (https://rm.coe.int/opinion-of-the-bureau- of-the-ccje-on-serbia-of-4-may-2018/16807d51ab).

[11] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e.

also a number of other matters, which should find their place in the Constitution, but for which reference is made to secondary legislation or bye- laws. This will also be addressed below.

Amendment I Competences (of the National Assembly) and Amendment II (Method of decision-making in the National Assembly)

19. These Amendments list the competences of the National Assembly, including with respect to the election of members of the High Judicial Council (HJC) and the High Prosecutorial Council (HPC), the Supreme Public Prosecutor of Serbia and public prosecutors and define the majorities required. The issues arising with respect to these elections will be addressed below. These Amendments will have to be amended in accordance with the recommendations provided below.

B. Courts

1. Amendment III (Judiciary principles)

20. It is important to set out that the administration of justice shall be carried out by independent courts. This has been spelled out. There are, however, a few provisions that are less clear, are missing from or, on the contrary, should not be included in the Constitution.

21. In its fourth paragraph, this draft Amendment refers to the review of court decisions, which may only be carried out by *"legally authorised courts in the proceedings prescribed by law*." This provision intends to guarantee the independence of courts against outside interferences in the work of courts. For the Venice Commission, it is evident that the Constitutional Court is one of the legally authorised courts in the meaning of this paragraph. To this effect, the suggestion is made to alter the text by stating the following: "*legally authorised courts, **including the Constitutional Court**, in the proceedings prescribed by law.*"

22. In the sixth paragraph, the draft Amendment refers to how the court shall sit, which is a technical matter that should be dealt with by secondary legislation, not the Constitution.

23. The seventh paragraph refers, amongst others, to judicial assistants. They are not lay judges and their status, role and remit remain unclear. The circumstances and parameters of their participation, if any, in court proceedings warrants precise definition. This could be more appropriately dealt with in secondary legislation.

24. An aspect that has been omitted altogether in the draft Amendments, and which is important for the independence of the judiciary, is its budget. Although international texts do not provide for the budgetary autonomy of the judiciary, there is a strong case in favour of taking the views of the judiciary into account when preparing the budget.[12] This might be added under this Amendment. Consid-

[12] See Report on the independence of the judicial system part I: the independence of judges (CDL-AD(2010)004), paragraph 54;the Rule of Law Checklist (CDL-AD(2016)007), E.1 a) x.

eration might usefully be given to the idea that the judiciary exercising control and being accountable for their own budget could impact positively on better use of court time and resources, thereby delivering a better judicial public service to the Serbian people.

2. Amendment V (Independence of judges)

25. This Amendment is an important provision. It addresses the principle of the independence of the judiciary, which is a fundamental principle and might be better placed in Amendment III, as well as the principle of legal certainty. Both are important for the administration of justice in a state based on the rule of law.

26. The first paragraph provides that *"A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international treaties, laws and other general acts"*. The subordination of ordinary judges to the Constitution (not only to the law) was a new regulation in many European states and was widely discussed among constitutional lawyers and judges of constitutional courts. Despite all the controversies around this solution, its main positive goal is the requirement that even an ordinary judge, not only a constitutional judge, should see the act on which s/he adjudicates within the context of the constitution, as a structural and axiological keystone in the system of law.

27. The end of the first paragraph refers to: "*other general acts*". The general acts of the executive, in the light of this formulation, are a direct source of law, and judges should be subordinated not only to the Constitution, ratified international treaties and laws, but also to general acts of the executive body. This is, in and of itself, not a problem if the wording "*other general acts*" refers solely to secondary legislation, such as regulations issued by the executive as authorised by law.

28. Paragraph three of this Amendment states that "*The method to ensure uniform application of laws by the courts shall be regulated by law.*" The Commission is conscious that there is concern in Serbia regarding a lack of legal certainty due to inconsistent case law. This may have many reasons, not only a lack of effort by the judges to ensure that their decisions take the existing case law into account. Nevertheless, under these circumstances it seems legitimate for the Constitution to provide a clear signal of the importance of ensuring consistency in the case law. While welcoming the intention behind this paragraph, the Commission is concerned about its wording and by the intentions of the phrase "*method to ensure…*". Does it refer to a special procedure or a special body? Useful mechanisms and models to establish a body of reasoned case law should be explored and consideration should be given to new ways of encouraging the application of precedent, *all of which should be the task of the judiciary*. This will result in more consistency in cases and engender greater public trust in the judicial system and more optimism that it will provide litigants with real remedies before the Serbian Courts.

29. Careful consideration must be given as to how a uniform application of the law is to be guaranteed. This is a difficult question, as it touches upon the *internal* independence of judges. The Venice Commission, in its Report on the independence of the judiciary (paragraphs 71-72) states the following: "*Judicial indepen-*

dence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts." Moreover, the future development in the case law should not be hampered by unduly rigid rules.

30. Many countries have grappled with this difficulty. The uniform application of the law and the harmonisation of case law are guaranteed in different ways, depending on the type of legal system of the country concerned. In common law countries this is done, to a great extent, by the rule of precedent. This means, for instance, that in the United Kingdom, decisions rendered by the Supreme Court and the Court of Appeal become precedents that all courts must follow in future cases. In continental or civil law systems, legislation is the primary source of law and judges will have a more limited authority to interpret it. In both systems, however, if the legislature is not satisfied with the interpretation of the law by the courts, it can change the law to that effect.

31. Also, it should be noted that the European Court of Human Rights (ECtHR) has held that conflicting court decisions or judgments are an inherent trait of any judicial system *"which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction."*[13] Conflicting decisions rendered at last instance, according to the ECtHR, are in breach of the fair-trial requirement when several conditions come together, which are: profound and long-standing differences in the application of the case law of the domestic courts; where there is no domestic law that provides for mechanisms and remedies such as an appeal or review capable of overcoming these inconsistencies or, if there are such mechanisms, they have neither been accessible nor effective.[14]

32. With respect to the principle of legal certainty and consistency in judicial decisions, the ECtHR has found that the enunciated principles outlined above in addressing the issue of ameliorating inconsistency *"guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts."*[15] However, it went on to state that if there were persistent conflicting decisions, this could create *"a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law."*[16]

33. The CCJE, in its Opinion no. 10, has stated that *"Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries."* Hence, taking case law into consideration when rendering decisions is useful and important. In addition, the CCJE has clearly stat-

[13] See European Court of Human Rights Judgment in the Case of Cupara v. Serbia http://hudoc.echr.coe.int/eng?i=001-164672.

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

ed in its Opinion no. 20 (2017) that: "*…while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision. It should explicitly follow from the reasoning that the judge knew that the settled case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated.*"[17]

34. According to European standards, it is important that consistency in the case law be achieved through the decisions of higher courts establishing a coherent and consistent jurisprudence and not through a higher court issuing general directives or instructions to lower courts.[18] As the Venice Commission has stated in its previous opinion, "*[T]he need to unify practice should, in principle be solved by an appeals procedure that could be designed to also solve problems that usually, only or mostly, occur in different categories of small claims cases.*"[19]

35. In any case, the sharing of case law by national courts is important and the methods of doing so may vary, but cooperation between courts in this process is key and very effective if a suitable mechanism exists that enables it. Although not mentioned in the draft Amendments, the delegation of the Venice Commission, which visited Belgrade, discovered that there was talk about the creation of a "certification commission" which would look into the harmonisation of case law, the composition of which was unclear. The Venice Commission has strong reservations with respect to any body outside the judiciary assuming such tasks. However, the Venice Commission is of the opinion that case law sharing by, for instance, case law departments in last instance courts (which can also be established in lower courts) would be the better choice.

36. The Venice Commission therefore recommends deleting the third paragraph. If, however, it is felt that a reference to the need to ensure proper harmonisation of case law should be included in the Constitution and if the reference to the role of the Supreme Court in Amendment X is not considered sufficient, then the first paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law.

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[17] Opinion no. 20 (2017) on the Role of courts with respect to the uniform application of the law, in paragraph 32.

[18] 18 Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, paragraph 23: "*Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.*"

[19] Opinion on Draft amendments to Laws on the Judiciary of Serbia (CDL-AD(2013)005), paragraph 105.

3. Amendment VI (Conditions for election of judges)

37. In order for the administration of justice to function properly and effectively, much will depend on the quality of its judges, its prosecutors and all staff that is involved in the process. However, it will rely most on the quality of its judges and there is a strong correlation between judicial training/continued training and the efficiency of the judiciary.

38. This Amendment is very general and the only specific aspect is the condition set out in the second paragraph, that a judge may only be elected for the first time if s/he has completed *"legally stipulated training in a judicial training institution"*. All other conditions are left to be regulated by law. In principle, the general conditions for the election of judges should either be regulated at the constitutional level, and can then include the obligation for judicial training, or otherwise be entirely left to secondary legislation.

39. The Venice Commission delegation, which visited Belgrade, was informed that the institution mentioned in the second paragraph refers to the Judicial Academy of Serbia, as there is no other judicial training institution in Serbia. It was also informed that this provision is meant to remedy a constitutional problem created by a decision rendered by the Constitutional Court of Serbia in February 2014, deeming such an arrangement unconstitutional under the current Constitution.

40. Two main objections were raised with respect to including an indirect reference to the Judicial Academy in the Constitution: the independence of this institution is not guaranteed by the Constitution and the practical experience of the judicial assistants, who are traditionally working in the court system with the expectation that this may open, for at least some of them, the possibility to become judges, is not taken into account. The Venice Commission delegation that went to Belgrade had received an unofficial translation into English of the "Law on Judicial Academy" (Official Gazette of the RS, no. 104/2009), and of the "Law amending and supplementing the Law on the Judicial Academy". The scope of the first Law is, according to its Article 1, to *"…establish the Judicial Academy (hereinafter referred to as: the Academy) and regulate its status, activity, governing and financing bodies, as well as the initial and continuous training of judges, public prosecutors and their deputies (hereinafter referred to as: prosecutors), the training of judicial and prosecutorial assistants and trainees and that of judicial and prosecutorial staff."* Article 3 on the status of this Academy states: *"The founder of the Academy shall be the Republic of Serbia. […] The internal organisation and activities performed by the Academy shall be regulated by the Law on public services unless otherwise stipulated by this law. The Ministry in charge of judiciary shall supervise the legality of work of the Academy."* In addition, under Article 7, this Academy has a steering committee:

> *"The Steering Committee shall be a body managing the Academy and it shall be made up of nine members.*
> *Members of the Steering Committee shall be: four members appointed by the High Judicial Council from the ranks of judges, two of whom are appointed at a proposal of the Association of Judges; two members appointed by the State Prosecutors' Council from the ranks of prosecutors, one of whom is appointed at the pro-*

posal of the Association of Prosecutors; and three members appointed by the Government, one of whom is the state secretary in the Ministry responsible for judiciary, in charge of professional advancement of those employed in judiciary and one is from among the employees of the Academy.
Members of the High Judicial Council and State Prosecutors' Council cannot be members of the Steering Committee.
The term of office of members of the Steering Committee shall be four years and they can be re-elected.
Members and the Chairman of the Steering Committee shall be entitled to remuneration for their work amounting to 30% of the basic salary of a basic court judge."

41. As regards the judicial assistants and associates, the Constitutional Law states the following in Article 1: "*The Law on the Judicial Academy („Official Gazette of RS" No. 104/09, 32/14 – CC and 106/15) shall be aligned with Amendments I to XXIX to the Constitution of the Republic of Serbia within 90 days from the entry into force of Amendments I to XXIX on the Constitution of the Republic of Serbia, in a manner that the forms of training shall depend on the length of the working experience and the jobs within the legal profession performed by the trainee.*" This will facilitate taking into account the practical experience of the judicial assistants and associates, but having regard to their large number – approximately 2,000 for a body of around 2,700 active judges in Serbia – it will not enable many of them to become judges.

42. Having a national judicial academy is welcome and not unusual by any means, for instance, France has the *École Nationale de la Magistrature*, and this is to be supported. Hence, the Academy's role as a sole gatekeeper to the judiciary seems well founded with the aspiration and commitment to strengthen the calibre and professionalism of judicial and prosecutorial training, but it would be advisable to protect the Academy from possible undue influence by providing it with a firm status within the Constitution.

43. The Venice Commission finds, in general, that Amendment VI should be rewritten to regulate more clearly the conditions needed to become a judge. As it stands, the content is not coherent with the title.

4. Amendment VII (Permanent Tenure of Office)

44. This Amendment deals with the stability of the judiciary. The probationary period no longer exists, which is to be welcomed. The Venice Commission always supported the abolition of this practice *"Probationary periods by definition raise difficulties for judicial independence but if they are to apply they should not be longer than is needed to assess a judge's suitability. (…)The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.*"[20]

45. This Amendment also deals with the dismissal of judges, which is an impor-

[20] Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia" (CDL-AD(2005)038), paragraph 30.

tant component of the independence of judges, because it has a direct effect on their tenure of office. In this respect, Recommendation CM/Rec (2010)12 of the Committee of Ministers *"on judges: independence, efficiency and responsibilities"* states that: *"50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds."*

46. The appointment and the dismissal of judges should be regulated in the Constitution[21] – which is the case, to some extent, with this Amendment. The first paragraph refers to the appointment of judges and to their life tenure, which is clearly spelled out and should be welcomed. The second paragraph then generally sets out situations in which tenure may end before a judge's retirement. With respect to dismissal, the grounds should be laid down in the Constitution and the competent court should be set out, as well as the right of appeal of the judge concerned.[22] The right to an appeal and the competent court have been provided for in this Amendment. The third paragraph of this Amendment provides for four reasons for a judge's dismissal: 1) being sentenced to at least six months' imprisonment; 2) committing a crime that makes the person unworthy of judgeship; 3) performing judicial functions incompetently, and 4) having committed a serious disciplinary offence.

47. The first reason raises no apparent issue. In the second, the wording *"a crime that makes the person unworthy of judgeship"* is vague and would benefit from more precise wording by setting out clearly what kind of criminal offence is being referred to.

48. The third reason poses a real problem as *"performing judicial functions incompetently"* is not precise and can cover a variety of situations, notably, it could apply to a judge who has made a mistake. As the Venice Commission has stated in the past: *"[…] [P]eriodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse."*[23] Incompetence is difficult to assess and any judge could be accused of having acted incompetently in specific cases. Therefore, this third reason needs to be set out in more precise wording, to exclude possible liability for mistakes, decisions in specific cases, and similar instances giving rise to potential abuse.

49. The fourth reason needs to provide detail on what these serious disciplinary offences are. It is important that there is an appropriate scale of sanctions for disciplinary offences and that they are applied in accordance with the principle of pro-

[21] Opinion on the Constitution of Finland (CDL-AD(2008)010), paragraphs 112-113; Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia (CDL-AD(2005)003), paragraph 105.

[22] *Ibid.* See also the European Charter on the statute for judges (1998), paragraph 5.1.

[23] Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania) (CDL(1995)074rev), p.4.

portionality.[24] Care should be taken that only failures performed intentionally or with gross negligence should give rise to this most severe sanction.[25] As stated by the Venice Commission *"Disciplinary proceedings should generally be initiated in case of professional misconduct that is gross and inexcusable, bringing the judiciary in disrepute."*[26]

50. In this respect, the Venice Commission has said in previous opinions, that *"For the […] reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned."*[27] The latter is provided in the fourth paragraph, which gives the judge (and president of the court) a right of appeal to the Constitutional Court against decisions of the High Judicial Council (HJC) on the cessation of judicial function. This is an important guarantee of the independence of the judiciary, and is to be welcomed.

5. Amendment VIII (Non-transferability of Judge)

51. The Venice Commission has consistently supported the principle that transfers against the will of a judge may be permissible only in exceptional cases.[28] Hence, transfer due to an organisational reform (or lawful alteration of the court system) or otherwise limited by precise conditions, against the will of the judge may be acceptable. In this Amendment, the wording *"in case of revocation of the court or the substantial part of the jurisdiction of the court"* needs more detail in order to narrow the situations down in a clear manner i.e. revocation of a court means the closure of the entire court and its transfer to another location or a transfer of jurisdiction from one court to another etc.

52. It is also important to ensure that the same level of remuneration and an equivalent or similar position is guaranteed to the judge to be transferred and needs to be stipulated in this provision.[29] A general strengthening of the wording of this Amendment is therefore recommended.

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[24] See Case of Oleksandr Volkov v. Ukraine, application no. 21722/11, 27 May 2013 (final judgment), paragraphs 182-185; see also the European Charter on the statute for judges (1998), paragraph 5.1; Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia (CDL-AD(2005)003), paragraph 105; Opinion on the draft amendments to the Constitution of Kyrgyzstan (CDL-AD(2002)033), paragraph 11.

[25] Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova (CDL-AD(2014)006), paragraphs 19 and 35.

[26] *Ibid.*, paragraph 35.

[27] Opinion on the Constitution of Finland (CDL-AD(2008)010), paragraph 113; Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR (CDL-AD(2005)003), paragraph105.

[28] Report on the independence of the judicial system part I: the independence of judges (CDL-AD(2010)004), paragraph 43.

[29] See, for example, Opinion on the draft laws on courts and on rights and duties of judges and on the judicial council of Montenegro (CDL-AD(2014)038), paragraph 58.

6. Amendment IX (Immunity and incompatibility)

53. This Amendment sets out that judges and lay judges are covered by functional immunity, which is to be welcomed.

54. The third paragraph of this Amendment prohibits judges and court presidents from engaging in political actions. This is by no means an unusual provision and most countries provide for some kind of restriction on the political activity of judges in their constitutions (or in laws or codes of conduct). It is the type of activity that is prohibited which differs from one country to the next – some countries have rules that ban the holding of more than one mandate (e.g. being a judge as well as a member of parliament or government),[30] some prohibit all political activity[31] or the membership in a political party[32] and so on. The Venice Commission has said that "*…judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges*".[33] However, the Venice Commission would like to suggest that "political action" be more clearly defined or replaced by introducing a prohibition of membership in a political party.

7. Amendment X (The Supreme Court of Serbia)

55. The Amendment describes the Supreme Court of Serbia as the highest court in Serbia. The only role of this Court that is regulated on the constitutional level is to ensure the uniform application of the law by the courts. It does not, however, indicate how this is to be done.

56. In light of what was said above for Amendment V, the Venice Commission would like to suggest that the following (italicised and bold) wording be added to the second paragraph of this Amendment: "The Supreme Court of Serbia shall ensure uniform application of the law by the courts ***through its case law***."

8. Amendment XIII (Composition of the High Judicial Council)

57. In countries which have them, the structure of judicial councils tends to vary from one country to the next. Serbia has chosen the model with two entirely separate bodies: one for judges and one for prosecutors (see Amendment XXV, below). This is one of the possibilities that exist for judicial councils in Europe.

58. As regards the establishment and the composition of a judicial council, the Venice Commission's view is as follows: *"While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so*

[30] For example in the Andorra, Denmark, Croatia, Czech Republic, Estonia, France.

[31] For example in Albania, Armenia, Azerbaijan, Belarus.

[32] The Austrian Code of Conduct made by judges for judges also advises against party membership.

[33] Report on the Independence of the Judicial System Part I: The Independence of Judges, paragraph 62.

consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers."[34] It also stated that, in the composition of this body *"A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.*"[35]

59. Amendment XIII proposes that the HJC be composed of ten members: five judges elected by their peers and five prominent lawyers elected by the National Assembly. The reason given for such a solution was to ensure that there would be no judicial corporatism. Having an even number of members in the HJC is less usual than having an odd number, which is the current trend in many European states – there are only a few that have an even number of members in their judicial councils.[36] There are European standards on the issue of the composition of a judicial council, notably Recommendation CM/Rec(2010)12 states in its paragraph 27 that: "*Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.*" No reference could be found on whether there should be an even or an odd number of members in such a council. In any case, where decisions are adopted by at least six members (see Amendment XVI), whether there is an even or an odd number of members will not make a difference.

60. The criteria for the members of the HJC are included in this Amendment. As regards members elected by the National Assembly, the criteria raise the question as to why only those who have passed the Bar exam fall within the category of "prominent lawyers". This would exclude law professors, for instance, and the additional need for having had "*…at least ten years of working experience in the field of law falling within the competence of the High Judicial Council*" is very vague and unclear as to its purpose.

61. The main problem with respect to this Amendment is, however, that the non-judicial members of the HJC are all elected in the same manner by the National Assembly: in the first round, they can be elected by a 3/5th majority. This majority, which is lower than the 2/3rd majority provided for in the initial draft, already provides for – depending on the electoral system for the National Assembly and the election results – only a weak protection against the election of all non-judicial members by the majority of the day. This provision, in any case, has little

[34] Report on the independence of the judicial system part I: the independence of judges (CDL-AD(2010)004), paragraph 32; the Rule of Law Checklist (CDL-AD(2016)007), E 1 a) viii, paragraph 81.

[35] Report on judicial appointments (CDL-AD(2007)008), paragraph 27.

[36] Those with an even number of members include Armenia, Belgium, Denmark, Italy, Netherlands, (Scotland), Slovakia, Spain.

meaning in practice, since the second round provides that a 5/9th majority may elect all these members and there is no incentive for the majority in the National Assembly to avoid a second round of voting. 5/9th is a low threshold and it seems likely that a government will often dispose of such a majority. While the Venice Commission has no inherent objection to the anti-deadlock mechanism provided in this Amendment should the 5/9th majority not be reached – i.e. *"the remaining members shall be elected … by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman"* – the Venice Commission considers that, in reality, it is unlikely to ever be triggered. Therefore, the 5/9th majority proposal should be removed. In order to be a mechanism suitable to ensure pluralism within the HJC, the choice of the five-member commission should not be limited to candidates proposed by a parliamentary committee.

62. In summary, this provision creates the possibility that half of the members of the HJC – including, according to Amendment XV, the President – will be a coherent and like-minded group in line with the wishes of the current government. This is very problematic and other solutions should be explored. Different options exist in this respect. One would be to provide for a proportional electoral system that ensures the minority in the Assembly will also be able to elect members. Another option would be to give to outside bodies, not under government control, such as the Bar or the law faculties the possibility to appoint members. A third option would be to increase the number of judicial members to be elected by their peers. A fourth option would be to increase the majority requirement and to enable the five-member commission to choose from among the candidates who originally applied with the National Assembly for the membership in the HJC. It will be up to the Serbian authorities, based on the conditions in and experience of the country, to choose the most suitable option.

63. It would also be possible to include *ex-officio* members in the HJC, such as the Minister of Justice or the President of the Supreme Court. This can be useful to facilitate dialogue among the various actors in the system. However, care must be taken that including *ex officio* members does not increase the risk of domination of the HJC by the political majority. If the Minister of Justice were to be included as an *ex-officio* member, he or she should not have the right to vote or participate in the decision-making process if it is a decision concerning the transfer of judges and disciplinary measures against judges.[37]

64. To sum up, in its current form, this Amendment is not suitable to ensure pluralism within the HJC and other solutions must be found.

[37] See for example, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine (CDL- AD(2010)003); Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania (CDL-INF(1998)009); Report on Judicial Appointments by the Venice Commission (CDL-AD(2007)028); Interim Opinion on Constitutional Reforms in the Republic of Armenia (CDL-AD(2004)044); Opinion on the reform of the judiciary in Bulgaria (CDL-INF(1999)005).

9. Amendment XIV (Term of Office of Members of the High Judicial Council) and Amendment XV (President of the High Judicial Council)

65. Under these Amendments, the mandate for members and of the President of the HJC is of five years without the possibility for re-election. This is a relatively short mandate, although a change in the position of the President every five years is to be welcomed. However, it would be unfortunate if all the members were to change at the same time every five years, including the President. The Venice Commission therefore suggests that a system of gradation in the turnover of the membership of the HJC be introduced.

66. According to the second paragraph of Amendment XV, the President of the HJC is to be elected among the lay members. It is true that the Venice Commission has stated that *"the chair of the council could be elected by the council itself from among the non judicial members of the council."*[38] However, this recommendation by the Commission is primarily aimed at situations where judges elected by their peers have the majority in a council and is not applicable if it increases the risk of domination of the HJC by the current majority in parliament.

67. Under the third paragraph of Amendment XIV, the term of office of a HJC member shall cease *"for reasons prescribed by the Constitution and law and in the procedure prescribed by law."* This provision appears to apply to all members of the HJC. The draft Amendments, however, contain no criteria for dismissal and so appear to leave this entirely to secondary legislation, which is a problem.

68. In addition, under Amendment I, in the third paragraph (National Assembly's election rights) and in the penultimate paragraph of Amendment II, the members of the HJC elected by the National Assembly may be dismissed by the Assembly by a 5/9th majority regardless of the majority with which they were elected. This should be revised, the majority required for dismissal should be higher, or at least equal to, the majority required for election. It is important that criteria for dismissal (and procedures) be laid down in the Constitution and not just left to legislation.

10. Amendment XVI (Work and Decision-making of the High Judicial Council)

69. This Amendment deals with the decision-making process of the HJC. It raises several issues, all of which are contained in the third paragraph leading to the dissolution of the HJC.

70. According to the third paragraph, if the HJC does not make a decision within 30 days, the term of office of all the members of the HJC shall cease. This raises the question, notably, of what is to be considered a decision? This may sound obvious, but what happens in a situation in which none of the applicants for a position as a judge is found to be qualified – does this qualify as a decision to reject all candidates or is it a decision not made? It may be an issue of translation, but it is important that this be clear.

[38] Report on judicial appointments (CDL-AD(2007)008), paragraph 35.

71. As it stands, the third paragraph effectively means that, in case of a tied vote, there is no decision and a very concrete danger that the term of office of all members will cease. This could lead to hastened decision making or frequent dissolutions of the HJC. The HJC is an independent body, which also means that its individual members should be regarded as independent and should not be dismissed "*en masse*" on the grounds that one member has not acted responsibly in the decision-making process. Also, taking into account the composition of the HJC of five-five, the deadlock in the decision-making process could potentially be provoked by the politically-elected part of the HJC against the judges. In other words, this provision could have the potential of rendering the HJC inoperative. This categorical rule should therefore be reconsidered and the third paragraph deleted or at least the conditions for dissolution tightened.

C. Public Prosecutor's Offices

1. Amendment XVIII (Status)

72. Regulations on the prosecution service tend to diverge much more from one country to the next than do regulations on courts. European standards on courts are stricter, however, European standards with respect to the prosecution service are catching up. For instance, one common standard is that the prosecution service should be deprived of its extensive powers in the area of general supervision, which should be taken over by the courts (general courts of law, administrative courts and the constitutional court) as well as by the institution of the ombudsman.

73. The broad power of the prosecutor to protect human and citizens' rights and freedoms, state and public interest raises doubts. This was often a concern raised by the Venice Commission.[39] A similar concern was raised in the Parliamentary Assembly's Recommendation 1604(2003) on the Role of the public prosecutor's office in a democratic society: *"as to non- penal law responsibilities, it is essential that any role for the prosecutors in the general protection of human rights does not give rise to any conflict of interests or act as a deterrent to individuals seeking state protection of their rights."*

74. In this context, it seems to the Venice Commission that the role of the Public Prosecutor's Office, as set out in Amendment XVIII, is too broad. The first paragraph of this Amendment provides that the Public Prosecutor's Office is an autonomous state body, that will "*prosecute the perpetrators of criminal offences […] and shall protect the constitutionality and legality, human rights and civil freedoms.*" Although the Public Prosecutor's Office obviously always has to act in accordance with the Constitution and the law, the general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. This should be the task of an ombudsman and/or of a specific human rights body.[40] In addition, the protec-

[39] See Report on European standards as regards the independence of the judicial system: part II – the prosecution service (CDL-AD(2010)040), paragraphs 73, 77-83.

[40] See the Principles relating to the Status of National Institutions (The Paris Principles), General Assembly resolution 48/134 of 20 December 1993.

tion of constitutionality in a state which has a Constitutional Court, such as Serbia, falls within the competence of that Court. The Venice Commission therefore suggests that the first paragraph be rephrased. Another possibility would be to replace it by the following wording: *"The law may grant other exceptional tasks for the protection of public interests to the Public Prosecutor's Office"*.

75. The third paragraph of the Amendment, which states that any influence on the Public Prosecutor's Office in an individual criminal prosecution case, is prohibited – should be welcomed. This leads us to the distinction that should be made between the independence of judges and that of prosecutors:

> *"30. Any 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government."*[41]

76. The Venice Commission delegation which visited Belgrade was informed that there is no internal independence granted to individual prosecutors in Serbia. Although there is, as such, no problem with this under European standards, as the "independence" of prosecutors by its very essence differs from that of judges – there are, however, a number of guarantees that apply to individual prosecutors that need to be heeded. In this context, the following should be noted:

> *"31. The independence of the prosecution service as such has to be distinguished from any "internal independence" of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for noninterference from their hierarchical superior.*
>
> *32. In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process."*[42]

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[41] Report on European standards as regards the independence of the judicial system: part II – the prosecution service (CDL-AD(2010)040), paragraph 30.

[42] *Ibid*., paragraphs 31-32.

2. Amendment XIX (Responsibility)

77. The Venice Commission has stated in the past that *"In countries where the prosecutor general is elected by Parliament, it often also has the power to dismiss him or her. In such a case, a fair hearing is required. Even with such a safeguard, there is a risk of politicisation: "Not only is there a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature." Consequently,* ***accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out****."*

78. This Amendment sets out the responsibilities (accountability) of the prosecutors within a hierarchical prosecutorial system and with respect to the National Assembly. Both the Supreme Public Prosecutor and the public prosecutors, i.e. the heads of prosecutors' offices, are responsible to Parliament (the public prosecutors in addition to their responsibility to the Supreme Public Prosecutor). This reflects the fact that, according to Amendment XXV, they are elected and dismissed by the National Assembly. This arrangement is, however, acceptable only for the Supreme Public Prosecutor, who is responsible for the overall law-enforcement policy. Other prosecutors cannot be responsible to the National Assembly. This would contradict the third paragraph of Amendment XVIII, according to which any influence in an individual criminal prosecution case is prohibited (see above). Moreover, double responsibility may lead to no responsibility at all.

3. Amendment XX (Public Prosecutors and Deputy Public Prosecutors)

79. This Amendment refers to a legal remedy against instructions from the public prosecutor that is available to deputy prosecutors, which is to be welcomed. However, is there a legal remedy for the public prosecutor against instructions from the Supreme Public Prosecutor? More precise wording, that also covers public prosecutors, would be welcome.[43]

4. Amendment XXI (Election of the Supreme Public Prosecutor of Serbia and Public Prosecutors)

80. The first paragraph of this Amendment sets out that the National Assembly elects the Supreme Public Prosecutor to a five-year non-renewable term. A suggestion might be made that, since the term of office is not renewable, to prolong the mandate from five to e.g. eight years. The Venice Commission has repeatedly recommended that the general prosecutor be elected by a qualified majority. In this case, an anti-deadlock mechanism should be envisaged for the election of the general prosecutor.

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[43] See Opinion on the act on the public prosecutor's office as amended (CDL-AD(2017)028), paragraph 45 onwards.

81. The third paragraph states that the National Assembly elects public prosecutors on the proposal of the HPC. It follows from Amendment XXV below, that the National Assembly also dismisses the prosecutors on the proposal of the HPC. Prosecutors other than the Supreme Public Prosecutors should have no link to the National Assembly (see above). The third paragraph should be deleted as well as the reference to public prosecutors in paragraph 12 of Amendment II.

5. Amendment XXIII (Life Tenure of Deputy Public Prosecutors)

82. The permanent tenure of deputy prosecutors is to be welcomed.

83. This Amendment, however, has the same shortcomings as Amendment VII above regarding judges, the grounds for dismissal need to be clearly set out and grounds such as "*incompetently performs function*" are too vague. In addition, rules on the cessation of the office of public prosecutors will have to be included, replacing the reference in paragraph 12 of Amendment II.

6. Amendment XXIV (Immunity and incompatibility)

84. The recommendations made for judges under Amendment IX, apply, *mutatis mutandis*, to the prosecutors.

7. Amendment XXVI (Composition of the High Prosecutorial Council)

85. High prosecutorial councils are becoming a common feature in individual states and although there are no European standards for introducing them,[44] the Venice Commission has always supported their introduction.

86. As regards their composition, the Venice Commission has addressed the difficulties encountered in this respect in the past: on the one hand, ensuring that such a council be composed of a significant number of prosecutors and, on the other, ensuring that it is not an instrument of pure self-government. In an opinion for Georgia, the Venice Commission had stated that:

"It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine), and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. Notably, in one of its previous opinions the Venice Commission noted that "the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers […] seems appropriate". At the same time, the Venice Commission stressed that the prosecutorial council "cannot be an instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament". If the proposed proportion of prosecutors vs. non-prosecutors within the Council is maintained, more safeguards are needed to ensure that the Prosecutorial Council is politically neutral. […]"

[44] Report on European standards as regards the independence of the judicial system: part II – the prosecution service (CDL-AD(2010)040), paragraph 64.

87. Under this Amendment, the HPC is composed of eleven members: four of whom are deputy public prosecutors elected by public prosecutors and deputy public prosecutors and five who are prominent lawyers elected by the National Assembly plus the Supreme Public Prosecutor of Serbia and the Minister of Justice. The Venice Commission has stated that: "*Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority.*"[45] This seems to be the case under Amendments II and XXVI. However, a problem arises with the anti-deadlock mechanism introduced here, which raises the same problems as the one proposed for the HJC under Amendment XIII, above, and should therefore be revised.

88. It is important that the HPC not be dominated by the current majority in the National Assembly so as to give it credibility and to gain public trust in the system. Having five out of 11 members elected by the National Assembly in addition to the Minister of Justice and the Supreme Public Prosecutor of Serbia – who is also elected by the National Assembly – gives rise to concern. As in the case of the HJC, a solution ensuring pluralism in the Council has to be found, and the issues raised for judges in the HJC apply to the prosecutors in the HPC, to the extent applicable.

89. In conclusion, the Venice Commission would like to reiterate that provisions on the judiciary and the administration of justice need to be guided by clear rules. Experience shows, however, that in many countries the best institutional rules will not work without the goodwill of those responsible for their implementation. Unclear or imprecise rules in a system in which such goodwill is lacking or too weak could lead to diminishing the role of the judiciary through political manipulation.

IV. Conclusion

90. The Venice Commission welcomes the draft Amendments and acknowledges the efforts of the Serbian Government in pursuit of its aspirations to develop and evolve as a modern democracy for the benefit of all the Serbian people and in prioritising the need to meet the highest standards of compliance criteria with international best practice and the rule of law.

91. Nevertheless, there are a number of outstanding issues that should be addressed in this important process of amending the Constitution of Serbia.

92. The Venice Commission would therefore like to make the following main recommendations:

1) *Composition of the HJC and the role of the National Assembly:*

The election of non-judicial members of the HJC by the Assembly, introducing a first round (3/5th majority) and a second round, in the event that not all the candidates are elected (this time by a 5/9th majority) provides little incentive for the majority in the National Assembly to avoid a second round of voting. This creates the possibility that half of the members of the HJC will be a coher-

[45] *Ibid*., paragraph 66.

ent and like-minded group in line with the wishes of the current government. This Amendment is therefore unlikely to be suitable to ensure pluralism within the HJC and the Venice Commission invites the Serbian authorities to find another solution.

2) *Composition of the HPC and the role of the National Assembly:*

As with the HJC, it is important that the HPC not be dominated by the current majority in the National Assembly so as to give it credibility and to gain public trust in the system. Therefore, having five out of 11 members elected by the National Assembly in addition to the Minister of Justice and the Supreme Public Prosecutor of Serbia – who is also elected by the National Assembly – gives rise to concern. As in the case of the HJC, a better solution to ensure pluralism in the Council should be found, and the issues raised for judges in the HJC apply to the prosecutors in the HPC, to the extent applicable.

3) *Dissolution of the HJC:*

If the HJC does not make a decision within 30 days the term of office of all its members shall cease. This could lead to hastened decision making or frequent dissolutions of the HJC. Taking into account the composition of the HJC of five-five, the deadlock in the decision-making process could potentially be provoked by the members of the HJC elected by the National Assembly part of the HJC against the judges or *vice versa*. This has the potential of rendering the HJC inoperative. This paragraph should be deleted or at least the conditions for dissolution tightened.

4) *Dismissal for incompetence:*

Disciplinary responsibility for judges and for prosecutors is not covered by the draft Amendments yet they set out very vague reasons for the dismissal of judges and of deputy public prosecutors. It is important that more detail be provided in the draft Amendments regarding disciplinary responsibility and dismissal. The use of vague terminology such as "incompetence" without further specification should be avoided and therefore taken out.

5) *Method to ensure the uniform application of laws:*

The Venice Commission recommends deleting the third paragraph of Amendment V, which states that "*The method to ensure uniform application of laws by the courts shall be regulated by law*". If, however, it is felt that a reference to the need to ensure proper harmonisation of case law should be included in the Constitution and if the reference to the role of the Supreme Court in Amendment X is not considered sufficient, then the first paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law.

6) *Public Prosecutors and Deputy Public Prosecutors*

The Supreme Public Prosecutor and the public prosecutors are elected by and responsible (accountable) to the National Assembly. While it is acceptable for the Supreme Public Prosecutor to be elected by the National Assembly and be accountable to it for the overall law-enforcement policy, other public prosecutors should have no direct link to the National Assembly. Amendments XIX and XXI should therefore be modified accordingly.

93. In addition, other provisions of the draft should be reviewed and amended as recommended in this opinion.

94. These draft Amendments provide a broad framework regarding the judiciary of Serbia. By their very nature, constitutional regulations should not be too detailed and the practical impact of the draft Amendments will depend, to a large extent, on the quality of the secondary legislation. The Venice Commission is ready to provide its expertise in the implementing legislation, if required.