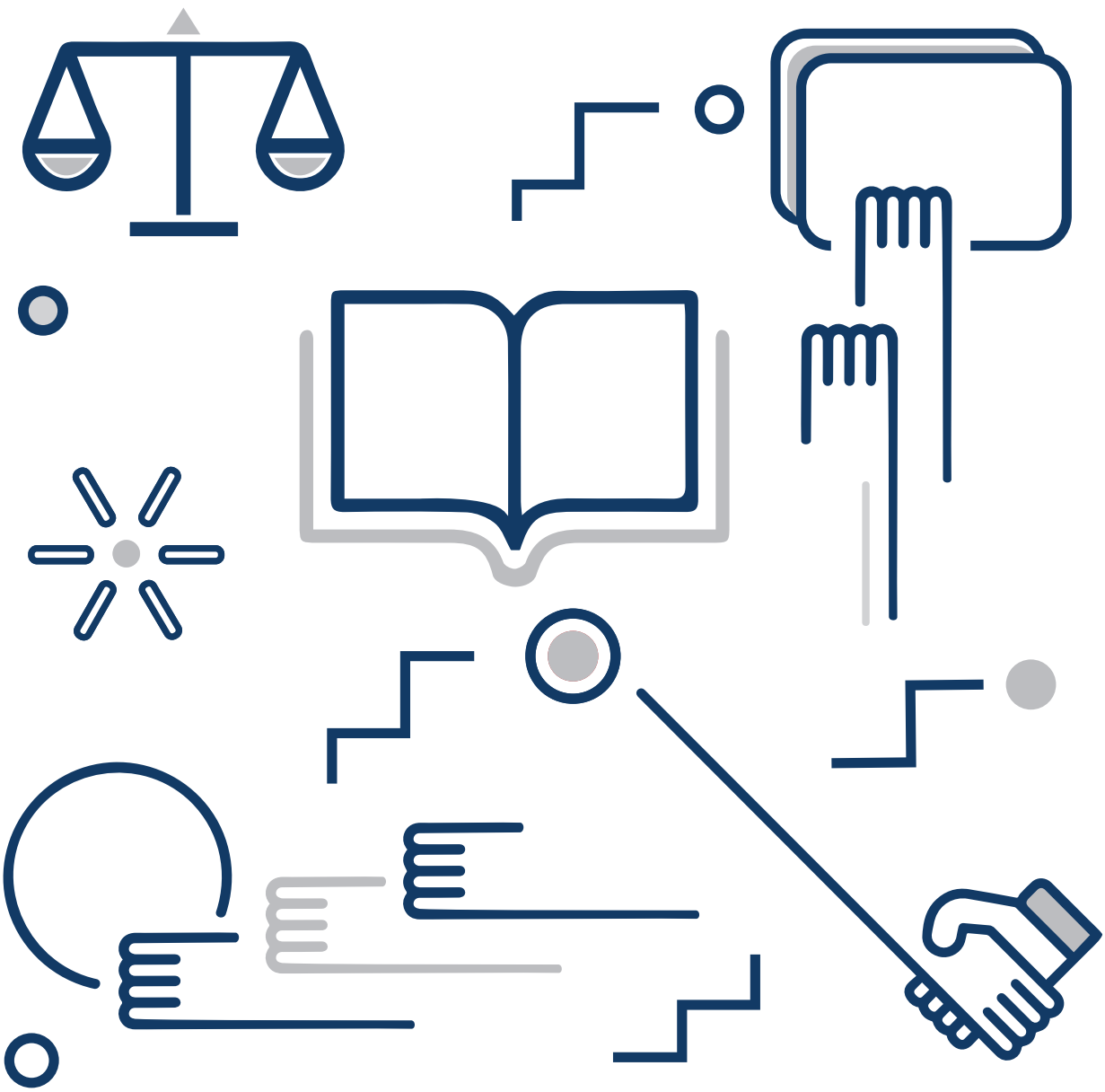
Working Paper

PROCEDURE FOR PROPOSAL OF CONSTITUTIONAL AMENDMENTS



Working Paper

PROCEDURE FOR PROPOSAL OF CONSTITUTIONAL AMENDMENTS

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This Working Paper was prepared for the conference "Civil Society for Responsible Authority", to be held on February 4th and 5th in Belgrade. Working Paper will provide a basis for participants' dialogue in this area, identification of key problems and the formulation of specific recommendations. Conferences conclusions will be used in the preparation of the Final version of this Paper.

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ABBREVIATIONS

NA – National Assembly

MoJ – Ministry of Justice

SCC – Supreme Court of Cassation

HJC – High Judicial Council

SPC – State Prosecutorial Council

VC – Venice Commission

NCEU – National Convention on the EU

HPC – High Prosecutorial Council

SPP – Supreme Public Prosecutor

Problem identification – influence against content

The Constitution and the Rules of Procedure of the National Assembly (NA) prescribe the procedure for amendment of the Constitution.[1] The authorised proposers are at least one third of the total number of deputies, President of the Republic, Government and minimum 150,000 voters. The responsible committee establishes whether the proposal made by the authorised proposer is in the prescribed form, including the reasoning. The NA reviews the proposal in presence of the proposer and enacts the decision on the proposal by two-thirds majority of the total number of deputies, whereas such proposal may not be changed. If the proposal fails to be adopted, the issues contained in the submitted proposal may not be subject to proposal for another year. If it is adopted, the responsible committee drafts the act on amendment of the Constitution with reasoning and proposal for the Constitutional law for implementation of constitutional amendments, in presence of the proposer. The adopted proposals are submitted to the deputies along with a proposal to call for referendum. The NA reviews the proposal of the act for amendment of the Constitution and proposal of the Constitutional law and upon the concluded debate it decides upon them, calls for referendum and after the referendum report it passes a decision on proclaiming the Constitution and the Constitutional law.

The Principles of the current Constitution[2] determine the holders of sovereignty and stipulate that sovereignty shall be vested in citizens who exercise it through referendum, people's initiative and through their freely elected representatives.[3] Interestingly enough, one should recall the procedure of adoption of the current Constitution. Before the adoption, there was no public debate on draft Constitution.

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* The report is a result of research work and semi-structured interviews with representatives of institutions (National Assembly, Ministry of Justice, Supreme Court of Cassation, High Judicial Council and State Prosecutorial Council), representatives of academic community, professional associations of judges and prosecutors and civil society.

1 Article 203-205 of the Constitution of the Republic of Serbia; Article 142 of the Rules of Procedure of the National Assembly, *Official Gazette of RS no.* 20/2012, consolidated text

[2] Official Gazette of RS no. 98/2006

[3] Article 2, para. 1 of the Constitution of the Republic of Serbia.

The NA adopted it on 30 September 2006. Instead of one day, the referendum for adoption lasted for two days – 28 and 29 October 2006, which brought into question citizens' will and the issue of sovereignty. We can only assume various reasons that led to such hasty adoption of the Constitution (introduction of preamble; inter-party agreement to adopt a new Constitution and to call for early elections; final diversion from the regime of Slobodan Milošević and most rarely quoted reason – pressure from the EU and the international community).[4]

Only after the adoption, the Constitution was submitted for consideration to the Venice Commission (VC), which challenged the division of power and independence of judiciary. It noted the "excessive role of the NA in the appointment of judicial functions in general… the intention to tie the deputy to the party position on all matters at all times concentrates excessive power in the hands of the party leadership, which reinforces the risk of a judicial system within which all positions are divided among political parties and creates a real threat of a control of the judicial system by political parties".[5] Having in mind that all eleven members of the High Judicial Council (eight elective members: six judges, one practicing lawyer, one professor at a law faculty, and members *ex officio*: President of the Supreme Court of Cassation, Minister of Justice and President of the NA committee on judiciary) are elected directly or indirectly to the NA, the VC stated this was a "recipe for the politicisation of the judiciary".[6]

Such constitutional solutions were a basis for judiciary reform, wherefore new laws were adopted for regulation of this branch of power, and in 2010 a general re-election of judges and prosecutors was carried out. The very shortcomings and irregularities included in this procedure indicated the poor constitutional solutions that enabled the politicisation of judiciary and prosecutors and contributed to the unsuccessful reform.[7]

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[4] *Zašto je Srbiji potreban novi Ustav?* Open Society Foundation and Fabrika knjiga, Belgrade, 2013.

[5] European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of the Republic of Serbia no. 405/2006*, 19.3.2007 (CDL-AD(2007)004).

[6] *Ibid*.

[7] See more in the reports of the Belgrade Centre for Human Rights from 2010 to 2016 at: http://www.bgcentar.org.rs/obrazovanje/publikacije/izvestaji-o-stanju-ljudskih-prava/, 1 December 2018.

Having in mind the existing legal framework, it is questionable now whether it is necessary to partly amend the Constitution or instead to adopt a new one. A number of constitutionalists deem that it is neither necessary nor desirable at this moment to hastily amend the Constitution and that it would suffice to strive for a quality application of the provisions already in force. Serbia is on its EU integration path, but it is still far from the rights and obligations stemming from membership. This is why constitutional amendments are not necessary at the moment. However, according to the public opinion poll, most citizens (64%) believe that the Constitution should be at least partly amended. The poll also indicated that the most frequent opinion is that the division of power is somewhat in place (45%), that judiciary and NA are subordinate to the executive and that constitutional guarantees for judicial independence should be firmer. As many as 58% of citizens deem that judiciary in Serbia is entirely politicised, while 73% think that politicians and political parties influenced the election (re-election) of judges. Half of the citizens and 72% of the elite deem that the election of judges should be entrusted to a special body composed exclusively of professionals.[8]

In order to institute the amendment of the Constitution, it is necessary for the state and society to identify the need to regulate certain matters in a different manner. Despite the problems detected by the Venice Commission in relation to the current Constitution and the poorly implemented justice reform, constitutional amendments referring to this area were not initiated by professional associations of judges and prosecutors. The need to amend the Constitution was initiated by the state in 2013, which was set out in the National Judicial Reform Strategy[9] for the purpose of strengthening justice, depoliticisation and elimination of any possible influence of other branches of power in the procedure of election and dismissal of judges and presidents of courts, deputies and public prosecutors and members of the High Judicial Council (HJC) and State Prosecutorial Council (SPC). The Action Plan for the implementation of the National Judicial Reform Strategy was adopted[10]. In December 2015, the Government of RS established the Council for the

[8] *Zašto je Srbiji potreban novi Ustav?,* Open Society Foundation and Fabrika knjiga, Belgrade, 2013.

[9] National Judicial Reform Strategy for the period 2013 – 2018, *Official Gazette of Republic of Serbia, no.* 57/2013

[10] Official Gazette of Republic of Serbia, no.71/2013, 55/2014, 106/2016

Implementation of the Action Plan for Chapter 23. Recommendations and opinions of the VC on Constitution that refer to judiciary are integrated into the Action Plan for Chapter 23 (pages 30 and 31), which was adopted at the Government session of 27 April 2016 and which stipulates a series of activities for the amendment of the Constitution: proposal for the amendment of the Constitution should be adopted by the NA in the third quarter of 2016; preparation of the draft and public debate should be realised by the end of 2016; at the beginning of 2017 the proposal should be sent to the VC for consideration. None of the activities were realised until the end of 2017, which was noted in the Report 3/2017 for implementation of the Action Plan for Chapter 23 (page 6). Civil society organisations, which actively participate in the fulfilment of obligations of RS for EU accession, operate in the working group for Chapter 23 of the National Convention on the EU (NCEU).

On 19 May 2017, the Ministry of Justice (MoJ) and the Office for Cooperation with Civil Society of the Government of RS addressed the invitation to the civil society organisations to submit their proposals for the amendment of the Constitution in the part pertaining to judiciary. They subsequently requested that a list of all international sources regulating the matter of judicial independence be submitted as well. The so-called consultative process was therefore instituted. At the first meeting held on 21 July 2017 in Belgrade, the participants were allowed to make their presentations in a duration of five minutes and only for presenting the previously submitted and released proposal. There was no possibility for debate on the proposed solutions, nor did the MoJ present to the public their solutions for the amendment of the Constitution.

Another four roundtables were organised without public debate: on 7 September 2017 in Belgrade, on 13 October 2017 in Niš, on 30 October 2017 in Novi Sad and on 15 November 2017 in Belgrade. Topics were selected by the MoJ and some of them did not even refer to the Constitution. The others ensured mechanisms for enforcing political influence on judiciary, e.g. the insisting on Judicial Academy to become a constitutional category, without the necessary independence guarantees. This, still underdeveloped institution in search of its manner of operation, would serve to ensure the selection of specific candidate categories. It is noteworthy that only one state in Europe has awarded constitutional status to an academy. The statements at the meetings claimed that “the NA and the Government do not exert any pressure on the judiciary, they actually guarantee its independence”, “it would be dangerous to exclude the Government and the Parliament from the procedure of election of

judges and prosecutors, since judgments are enacted in the name of the people", and "the Ministry was not bound by the Constitution to hold a dialogue", as well as that "it is well known who can amend the Constitution and there is no word about the civil society organisations being in charge of that" (deputy from the NA). It is further stated that "incorporation of the Academy into the Constitution is the only way and it is requested by the European Commission", the "composition of the HJC and SPC represents a secondary issue", and that "taxpayers would also have to be included in some way since their money is used to finance judiciary" (Director of the Judicial Academy). There was another statement that "judicial independence was fetishism and an ideological myth, that the debate on it was a hotbed of judicial invaders acting superiorly and striving to have majority of judges and prosecutors in councils", that "proposals of prosecutors and judges are ridiculous" (special advisor in the MoJ). "Judges want to decide as they like… judiciary is a limited liability company, yet judges wish for an artisan shop" (Assistant Minister of Justice and head of the negotiating group for Chapter 23).[11]

Professional associations and civic associations warned that such MoJ approach indicated that the proposal for amendment of the Constitution would be adopted within a circle of Government officials. The proposal had to be presented to the public, whereas consultations had to be put back in a framework suitable for the seriousness and importance of the topic.[12] Having in mind the course and the manner of running the consultative process, the associations addressed the citizens of the RS via press release, indicating the importance of independent judiciary for the rule of law and democratic society. They also invited the executive and the legislature to openly debate on the amendment of the Constitution, which would

[11] Minutes from the meetings prepared on basis of audio recordings of organisers can be seen at the website of the Judges' Association of Serbia http://sudije.rs/index.php/aktuelnosti/2017-09-25-10-54-45/313-2017-12-13-10-34-37.html (Serbian), 1 December 2018.

[12] Available statement: http://www.yucom.org.rs/saopstenje-povodom-objavljenog-radnog-teksta-amandmana-na-ustav-republike-srbije-i-javne-rasprave-koja-se-vodi-po-pozivu-ministarstva-pravde/, 1 December 2018.

include public involvement as well, whereas media would pay special attention to the objective reporting on the process of the amendment of the Constitution.[13]

The MoJ did not react to the civil society appeals regarding the transparency of the process of the amendment of the Constitution and, on 30 October 2017, the Judges' Association of Serbia, Association of Public Prosecutors and Deputy Public Prosecutors, Centre for Judicial Research, Association of Judicial and Prosecutorial Assistants, Lawyers' Committee for Human Rights and Belgrade Centre for Human Rights informed the public and the MoJ of their withdrawal from the consultative process[14].

First version – working text of the amendments

The working text of constitutional amendments was published on the website of the MoJ on 21 January 2018.[15] Until the end of discussion on the working text, its creator has not been disclosed to the public. It was unknown whether there was a working group and who its members were. The MoJ called for comments and suggestions referring to this text to be submitted by 8 March 2018. Four roundtables have been organised – on 5 February 2018 in Kragujevac, on 19 February 2018 in Niš, on 26 February 2018 in Novi Sad, when the representatives of professional associations and civil society left the meeting due to the inappropriate running of discussion, lack of reaction to insults addressed against judges and prosecutors and open threats. The last roundtable was held on 5 March 2018 in Belgrade, when the Minister of Justice informed the public that the working text of the amendments was drafted by the MoJ staff, and that she took part in that as well. Experts and professors of Constitutional law were neither consulted nor did they participate in preparation of text of the Amendments to the most important legal act of a country.

During this research, the interviewees have stated that it is still unknown who actually drafted the Amendments, which is unusual, since the authors are usually

[13] Document available at http://sudije.rs/index.php/en/aktuelnosti/constitution/274-proclamation-to-the-citizens.html , 1 December 2018.

[14] Statement available at http://sudije.rs/index.php/aktuelnosti/saopstenja-za-javnost/287-2017-10-30-09-09-46.html (Serbian), 1 December 2018.

[15] Available at https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php , 1 December 2018.

proud to have their signature at the end of the text.[16] Anyhow, the fact that the MoJ employees are the authors is considered as inadequate since, no matter their expertise, they do not have the capacity or relevant knowledge for drafting the Constitution.[17] The interviewees also noted the appearance of certain organisations and citizens who had equal opinions and messages as MoJ, and that it became obvious after the meeting in Novi Sad that such organisations were instructed by the MoJ itself.[18] That is why professional associations and civil society organisations started to submit written recommendations for Amendments.[19] Despite the promise of the Minister of Justice made at the NCEU that the MoJ would publish a document with concrete proposals of organisations, including a list of accepted proposals and the reasons for non-acceptance of others, it has not been done yet.[20] All of the above stated has not been published at the website of the MoJ, which is a regular procedure when it comes to the adoption of laws.[21]

During public debate, it was confirmed that the authors of the text did not respect the goal set out in the National Judicial Reform Strategy, Action Plan for its implementation and Action Plan for Chapter 23 – that the constitutional amendments should ensure depoliticisation of judiciary and guarantee independence of judiciary and judges, so as to provide the independent and responsible judiciary for the citizens. During the public debate, deputies from NA commented that "we can think and speak what we want, the only important thing is to make the constitutional amendments that are accepted by the VC and subsequently by the EU for political purposes". The arguments that were repeated were "that judiciary is irresponsible and of poor quality", "there is no division of power if judiciary is accountable to itself", "judges deliberate as they wish, they seize children, assets, jobs, send citizens to prison, and yet they are not accountable to anyone".[22] Legislature and the executive were designated as "needed and necessary

[16] Representative from the SPC.

[17] Representative from the civil society.

[18] Representative from the civil society and representative from the academic community.

[19] Representative from the civil society.

[20] *Ibid*.

[21] *Ibid*.

[22] TV show "Dan uživo", 15 February 2018, https://www.youtube.com/watch?v=HEeoRYQSsxA

controllers of judiciary for the sake of citizens' protection."[23] There was no longer political will for reform due to real needs and for resolving the issues in the country and in order to provide the citizens with the right to trial before unbiased court, instead the changes that were effected made us regress and embodied a poor attempt to satisfy the form. What became the real goal was to create a text that would ensure a satisfactory opinion of the VC, without a serious will to provide for depoliticisation of judiciary and create conditions for ensuring adequate reform that would enable the achievement of the established goals.

There was no reasoning, only fragments of the VC opinion for constitutions and laws of some other states have been mentioned. It was inaccurately stipulated that the VC defined European standards. The task of the VC is not to formulate standards, but to give opinion on the degree of alignment of the Constitution with European standards, considering the experiences of other states in application of legal norms contained in the documents of CoE, EU and UN bodies.

The working text of the amendments received negative comments in written analyses of professional associations, SCC, HJC, SPC, many courts and civic associations. Such estimate was also given by fifteen professors of Constitutional law, Theory of state and law and Court organisation law at the meeting "Public hearing of professors" held on 20 February 2018.[24] A general position that was expressed was that there was no possibility to amend the working text as is and it was suggested that an expert working group be formed, which has not been accepted.

The MoJ accepted a vast number of proposals of the informal network "Rolan", which advocated the loosening of the principle of judges' non-transferability, introduction of case law as a source of law in accordance with the law, the existence of Judicial Academy as a constitutional category and the completion of training at such academy to be a constitutionally-prescribed requirement for election to judiciary functions. Complete modification of the concept of judicial and prosecutorial councils was proposed (decreased number of members among judges

[23] *Ibid*.

[24] "Public hearing of professors" is available at YouTube via the following link https://www.youtube.com/channel/UCz9n1ssImAAT4_y7B4usk2w/videos, 1 December 2018.

and prosecutors, whereas ten members have been envisaged for the judicial council: five judges and five "prominent lawyers" (to be elected by the National Assembly), the existence of the "golden vote" of the judicial council president who is elected among the "prominent lawyers", as well as narrowing of council responsibilities). The proposals were accepted, although they were contrary to all other proposed solutions, including those of the working group of the Commission for judicial reform that were agreed on by the overall judiciary.

Statements of the MoJ representatives that Mr James Hamilton, expert from the CoE, took part in preparation of the amendments and that the proposed solutions were approved by the VC, introduced confusion into the entire procedure. The amendments did not regulate the manner of power division and the relation between the three branches of power (Article 4 of the Constitution). The abolishment of constitutional provisions stipulating that court decisions shall be obligatory for all and may not be a subject of extrajudicial control[25] and the provisions stipulating that any influence on a judge while performing his/her judiciary function shall be prohibited[26], particularly indicated the intention to restitute political control over judicial power. Judicial power remained undefined. Substantive guarantees for independence have not been set out. The holders of judiciary functions are not guaranteed freedom of association. The provision prohibiting any influence on judges has been deleted. The guaranteed non-transferability of judges and deputy prosecutors has been omitted i.e. significantly reduced. The content of the Constitutional law remained unknown and it was not subject to public debate. The manner of election of council members, their responsibilities, possibility for their dismissal, as well as the fact that all non-judicial and non-prosecutorial members were elected by the NA, further contributed to possibility for politicization of judiciary. The number of members of the High council is even, there are ten members – five judges and five "prominent layers" (president of the council is elected among the latter and he/she has the decisive "golden vote", which indicates that judges are practically a minority when it comes to decision-making). Considering that the possibility for first election as judge or deputy public prosecutor is reserved only for those candidates who have graduated from the academy, the role of the councils has been minimised. Selection of candidates for

[25] Article 145, para. 3 of the Constitution of RS.

[26] Article 149, para. 2 of the Constitution of RS

the Judicial Academy is not within the competence of a court authority, but instead of the Academy authorities that do not have any independence guarantees. New, non-defined terms such as “prominent lawyer” and “private function” have been utilised. The Minister of Justice, as a holder of executive power, no longer has the power only to initiate, but also to institute disciplinary procedure against holders of judiciary functions. This is an obvious increase of control over the independent judiciary by the executive. The introduction of “case law” as a source of law, which will be subject to a special law, represents a retrograde solution. The unification of case law can thus be realised according to the estimate of non-judicial bodies (according to the stipulations within the Action plan, it would be done by a certification commission).

Prosecutor’s office will remain an independent body, without the guaranteed functional independence relative to the executive and the legislature, therefore political impact will also remain. The Supreme Public Prosecutor and all other public prosecutors will be elected by the NA by the prescribed majority, which is practically represented by the ruling majority in the Assembly. The High Prosecutorial Council guarantees only for the independence of the prosecutorial institution, which is a step back compared to the current solution whereby the State Prosecutorial Council ensures and guarantees the independence of public prosecutors and deputy public prosecutors. The council is composed of eleven members: four deputy public prosecutors, five “prominent lawyers”, Supreme Public Prosecutor of Serbia and the Minister of Justice.

The proposed amendments abolish the probationary period for judges, which infringed the principle of permanence of judicial function and which was an undeniable subject of criticism of all participants in consultations.

Second version – draft amendments

After the finalisation of “discussion” that was held at four roundtables in four cities in Serbia and which lasted for one month (from 5 February 2018 until 5 March 2018) and after the expiry of deadline for submitting the opinions, the MoJ published the Draft amendments.[27] It could not be established with certainty who was indeed

[27] Published on the website of the MoJ, on the page Working versions of regulations – Ministry of Justice; https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php.

invited to the stated events, considering that all individuals who got the floor at all roundtables repeated the same negative experiences with prosecutor's offices and courts and threatened judges and other participants in the debates. During the discussion, the MoJ did not even disclosed the origin of certain accepted proposals. Opinions and proposals of members of the profession on substantive matters have not been acknowledged. Some improvements have been made compared to the Working text, but no guarantees have been ensured for preventing political influence on judiciary.

The amendments were incomplete, imprecise (provisions on incompatibility, non-transferability, capacity of "prominent lawyer", even number of HJC members half of which are elected in the NA, upon first election it is required that the candidates have completed the training at the Judicial Academy, unification of case law remains in the hands of the legislator). The Constitution did not define judiciary power, unlike the legislature[28] and the executive[29]. Courts are designated as state authorities, although the VC comments on judiciary and indicates that "only court may be a judiciary authority"[30]. Even the Draft did not specify regulation and division of power on basis of balance and mutual control. This is very important considering the claims that judiciary is "too independent; alienated; insufficiently accountable and must be controlled". By linguistic interpretation of this provision, it is possible to exert political control of judiciary. One can interpret the content of this provision as contrary to the provision prescribing that a court decision may only be reviewed by a legally designated court through a legally prescribed procedure. There is an impression that a possibility has been created for extrajudicial control of judgments, which is increasingly present in practice, including wrong interpretation and referring to constitutional powers for "the need to control the judiciary power". Types of courts have not been designated, only the Supreme Court has been mentioned. It arises therefrom that other courts would be established and abolished by law. Such a solution enabled a general re-election in 2009, mostly due to the

[28] Article 98 and 99 of the Constitution of RS, *Off. Gazz. of RS no.* 98/2006

[29] Article 122 and 123 of the Constitution of RS, *Off. Gazz. of RS no.* 98/2006

[30] European Commission for Democracy through Law (Venice Commission), Opinion no. 405/2006 CDL-AD(2007)004 of 19 March 2007 para 69, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e

changed names of judiciary bodies. In its opinion on the current Constitution[31], the VC recommended that it would be desirable to indicate types of courts in the Constitution. It remains unclear why this recommendation has not been accepted and the solution contained in the Draft amendments has been retained, whereas this still leaves space for court renaming under the law and for re-election of judges and prosecutors (except for the Supreme Court and the Republic Public Prosecution). This issue is of particular importance given the recent experience of the Republic of Serbia when the re-election was masked by the reasoning that it only represented the election into new courts and prosecutor's offices. This is supported by the fact that the Draft Constitutional law, which was not presented at the public debate, stipulates that only holders of judiciary functions, judges and prosecutorial staff employed in the Supreme Court of Cassation and Republic Public Prosecutor's Office will continue to perform their functions and remain employed in the Supreme Court and Supreme Public Prosecutor's Office. There is no legal certainty for other staff whether there would be new re-election or not.

There is still no guarantee for substantive independence, neither for the judicial system (judiciary budget) nor for the judges. These guarantees are regulated by numerous international standards that the MoJ failed to incorporate into the Draft constitutional amendments. There is no guarantee either for the right to association of holders of judiciary functions. The NA will elect and dissolve five members into the Council – "prominent lawyers", Supreme Public Prosecutor and all public prosecutors. If they are not elected with minimum qualified majority in NA in two rounds, the election would be done by five-member commission composed of president of the NA, president of the Constitutional Court, Supreme Public Prosecutor, Ombudsman and president of the Supreme Court. Such manner of election of members of both councils leaves space for political influence, considering the composition of the commission and the fact that the election may be done by a majority of only three members of the commission. This further extends the possibility for political influence on HPC composed of four deputy prosecutors, five "prominent lawyers", Supreme Public Prosecutor and Minister of Justice. The same problem lies with the Amendment stipulating the possibility to dissolve the HJC if it fails to render a decision within a prescribed deadline and with the necessary

[31] European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of the Republic of Serbia no. 405/2006*, 19.3.2007 (CDL-AD(2007)004).

majority of six votes. This may cause a forced decision-making. A judge may not be the president of the HJC. It is also unclear how an institute of uniform case law can represent a category of judges' independence and how a law enacted by the NA (the legislature) at the proposal of the Government (the executive) can ensure uniform case law. The solution deviates from the standard where unification of case law needs to be resolved within the limits of judiciary power.

Certain provisions from the current Constitution have been restituted to the Draft amendments (that any influence on a judge while performing his/her judiciary function shall be prohibited, the vague legal standard "private function" was omitted and the golden vote of the president of HJC has been abolished). It was elaborated that the "prominent lawyer" would be considered a graduate lawyer with passed Bar exam, minimum ten years of working experience in the field of law falling within the competence of the HJC i.e. HPC, proved by professional work and enjoying high personal reputation. Such definition of conditions eliminates most of the eminent professors of law faculties who have not passed Bar exam and attorneys who do not meet the second prescribed requirement. However, the proposed solution has opened the doors for deputies, ministers, civil servants from ministries, prominent members of political parties who meet the first to conditions for "prominent lawyer" to be elected into the councils.

For the initial election of holders of judiciary functions at first instance, it is required that a candidate has completed the legally prescribed training at an institution for training in judiciary. There is only one such institution in the RS – Judicial Academy, which would thus become the key factor in election of judiciary functionaries. Aside from the lay judges, it is also envisaged that judicial assistants may participate in the proceedings.

Although several articles of the Constitution that have not been amended or supplemented by the Amendments stipulate that generally accepted rules of the international law will also represent a source of law in the RS and a part of its legal order, the Draft amendments do not envisage that the judges would, during proceedings, apply the generally accepted rules of the international law.

The possibility for judges' transfer, which has not been specified, completely jeopardizes the guarantee of non-transferability.

The new solutions that were not the subject of debate have been introduced into the Draft without any reasoning and one cannot assume that they would contribute to depoliticisation and strengthening of judicial independence.

Venice Commission

On 13 April 2018, the MoJ addressed to the VC a request for opinion on the Draft amendments of constitutional provisions on judiciary that had been previously adopted by the Government. The Draft was submitted without reasoning. The Minister of Justice provided the VC members with oral explanation of the Draft, which was not available either for professional or general public in Serbia and they were deprived of the authentic elaboration of the proposed solutions.

In the released opinion[32], the VC explained the dilemmas regarding the role of the CoE expert, stating that he had not participated in drafting of the provisions, but instead provided advice on the previously prepared concept. Concern was expressed regarding the fact that the process of preparation of the amendments of the Constitution started by public consultations in an "acrimonious" environment, hence it "encourages the Serbian authorities to spare no efforts in creating a constructive and positive environment around the public consultations".

The VC drew attention to Article 4 of the current Constitution that regulates the division of power and whose amendment was unsuccessfully insisted on by the professional public. It was noted that "it is important that the entire system is based on balance, but the expression 'mutual control' is a cause of concern… and may lead to 'political' control over judiciary". Although the professional public showed

[32] European Commission for Democracy through Law (Venice Commission), *Opinion no 921/2018 on the Draft Amendments to the Constitutional Provisions on the Judiciary,* 25.6.2018. This opinion was adopted by the VC at its 115th plenary session (Venice, 22-23 June 2018) after the consideration of the Sub-Commission for the Judiciary (21 June 2018) and exchange of positions with the Minister of Justice of Serbia; available at link https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)011-e; on the page of the working version of regulations – Ministry of Justice : https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php; and at the website of the Judges' Association of Serbia : http://www.sudije.rs/index.php/aktuelnosti/2017-09-25-10-54-45/411-2018-07-06-12-16-46.html

concern about such solutions on several occasions and indicated that judiciary cannot be controlled by the executive and the legislature, the MoJ ignored their requests and recommendations.

For 29 proposed amendments, the VC provided more than 40 comments (remarks). The conclusions were formulated through 6 groups of key recommendations referring to: 1. Composition of the HJC and role of the NA, since the amendment is not suitable for ensuring pluralism within the HJC; 2. The same recommendation was given for the HPC; 3. With regard to dissolution of the HJC, it was recommended that the stated paragraph would be deleted and that the conditions for dissolution would be tightened; 4. Dismissals for incompetence relating to disciplinary responsibility should be regulated in more detail; 5. The method to ensure uniform application of laws and 6. Method of election of public prosecutors and deputy public prosecutors. The VC noted that the provisions of the Draft should be reviewed and supplemented according to recommendations given in this opinion.

With regard to the "Competences of the NA" and the manner of decision-making in the NA with regard to the election of HJC and HPC, Supreme Public Prosecutor of Serbia and public prosecutors, the opinion of the VC is that the amendments need to be modified in accordance with recommendations. Another question is why only those who have passed the Bar exam fall into the category of "prominent lawyers". The criterion requesting ten years of working experience in the field of law falling within the competence of the HJC has been characterised as vague and unclear as to its purpose, and the main problem that was underlined was that all five members among "prominent lawyers" are elected by the NA by a 3/5 majority, which is a weak protection against the election of all members by the ruling majority. Considering that the overall solution is problematic, the VC suggested four options for the election of HJC members.

The stated remarks and vagueness pertaining to judges mostly refer to the prosecutors as well. The criteria and procedure for dissolution of council members may not be referred to the laws. The remarks have also been provided as to the possibility for council dissolution. The VC also expressed concern for the fact that the law regulates the manner of ensuring uniform application of laws by the courts, considering that this is a task for judiciary. If it is acknowledged that the "sole gatekeeper" to the judiciary is the Judicial Academy, then it needs to be protected by Constitution against undue influence. The fact that there is no longer

probationary period for the newly-elected judges has been welcomed. However, the dismissal of judges needs to be more precisely and more clearly regulated, which also applies to prosecutors. It has been recommended how to specify the possibility for transfer without consent and to generally improve the text of this Amendment, as well as to clearly define the incompatibility relating to political activities. With regard to public prosecutors, it has been outlined that it would only be acceptable if the NA elected the Supreme Public Prosecutor whose term of office should be extended. However, other public prosecutors should not be responsible to the NA.

Before the VC, very similar remarks and proposals for the Draft amendments were given by the highest judiciary institutions in Serbia, most of the lower courts, professional associations and civil society organisations. A critical reflection was also provided by the Consultative Council of European Judges[33], Consultative Council of European Prosecutors and international associations of judges. The MoJ has neither adopted them nor has it reflected on numerous submitted international acts, opinions and recommendations.

The MoJ did not respond to the question as to what proposals from professional associations and civil society organisations it had adopted. Since the comments of the VC largely correspond to the proposals of professional associations and civil society organisations, and a part of such comments was acknowledged, it remains unclear whether the MoJ acknowledged the recommendations of the VC or those of the professional associations and the civic sector.[34] A greater problem lies in the fact that the creators of the Amendment found new ways to politicize judiciary, disguised by reasons of undeniable need for competent judges and judges with integrity. The mechanisms are reflected in conditions for first election – completed training at the Judicial Academy which is not guaranteed its independence, limitation of free evaluation of evidence by imposing a new source of law – case law,

[33] Consultative Council of European Judges of the Council of Europe, Opinion of the CCJE Bureau following a request by the Judges' Association of Serbia to assess the compatibility with European standard of the proposed amendments to the Constitution of the Republic of Serbia which will affect the organisation of judicial power, 4 May 2018. In the Opinion it was stated that the proposed amendments of the Constitution can endanger judicial independence. Available at https://rm.coe.int/opinion-of-the-bureau-of-the-ccje-on-serbia-of-4-may-2018/16807d51ab

[34] Representative from the civic sector.

opening of possibility for this field to be regulated by law, narrowing the competences of the councils, composition and selection of council members, possibility to dissolve the HJC. All these issues indicate retention, and perhaps even strengthening of judiciary politicization.[35]

The Minister of Justice informed the citizens that she was satisfied because the content of the Amendment had "the right direction" and that "most of the remarks contained in the VC Opinion referred to the ambiguities caused by the text translation that the Ministry would correct as soon as possible". She subsequently reiterated that there would be no more public debate. The text of the Draft amendments would be aligned with six recommendations of the VC by September 2018 and submitted to the NA. The fears that the consultative process was only a formality became real.

The opinion of the VC regarding Draft constitutional amendments should be a serious impetus for the state to estimate whether we are "on the right path" towards ensuring the rule of law, depoliticized and independent judiciary or we would opt for constitutional amendments of judiciary with a developed mechanism for political influence.

General atmosphere during the amendment drafting

Frequent statements of government representatives who indirectly, and often directly, commented on the events relating to the adoption of court decisions can certainly be characterised as pressure on the work of courts and prosecutor's offices. The unprecedented press conference of Novi Sad mayor and vice president of the ruling Serbian Progressive Party, Miloš Vučević, was held at the end of December 2017. With reference to the first instance acquittal declared by the chamber of the Special Department of the Higher Court in Belgrade, acquitting the accused, including one former minister, Vučević stated: "Gentlemen judges, who do you serve, the people or the proved thieves? Who do you swear to, gentlemen judges - to the state, the Constitution and the legal order of Serbia, or to those who fill your pockets and who keep signing acquittals for themselves on your behalf? How much does your justice cost, gentlemen judges? What is the cost of your

[35] Representative from a professional organisation.

honour and your decency to convince all of us that thieves are not thieves?"[36] These statements caused the reaction of the Judges' Association of Serbia, Supreme Court of Cassation and its president, HJC, Serbian Bar Association and Belgrade Bar Association. Several days later, Vučević stated: "Don't tell me about their independence! Well, who are you independent from? You should be independent from the external centres of power and tycoons, don't be independent from the people"[37]. A comment was also given by the Prime Minister, stating that "she fully understands the frustration of Miloš Vučević and this is another proof that we certainly need judiciary reform."[38] Serbian President also commented on Vučević's statement and underlined that the latter "told the truth, whereas a part of judiciary was dependent on the former government composed of thief-tycoon coalition."[39]

At the press conference held on 23 May 2018[40] on the occasion of pronouncement of acquittal of president of the municipality, the town council of Šabac issued a statement that the decision was scandalous, that it was a precedent and an immense humiliation for the citizens of Šabac, who were disappointed by it. It stated that the reason for adoption of acquittal was obviously the fact that the judge's daughter, a kindergarten teacher, got a job at the kindergarten before the adoption of the court decision. It was noted that criminal charges would be filed and that such decisions were a disgrace for Serbia and for Šabac. Afterwards, on 4 June 2018, the judge sustained a verbal assault in the street. On 11 October 2018, the appellate court annulled the first instance judgment and returned the files for retrial.

In his interview to TV station INFO 24, the mayor of Valjevo also commented on judiciary, stating that certain judges in RS are of such political orientation that it is necessary to exclude them from the justice system, that certain judges are appointed by financially powerful persons and that the judges who publicly express their opinion on situation in judiciary should be candidates at political elections. The Judges' Association of Serbia reacted to these statements, nevertheless the message

[36] Available at N1, "Sudije uvređene, Vučević se ne kaje, a premijerka ga razume", http://rs,n1 info.com/a352497/Vesti/Vesti/Izjava-Vučevića-o-sudijama-reakcije.html, 1 December 2018.

[37] *Ibid*.

[38] *Ibid*.

[39] *Ibid*.

[40] Available at: https://www.youtube.com/watch?v=fcKMEVJ9K3c (Serbian)

addressed by the representatives of other branches of power to the judges remained.[41]

Representatives of the MoJ and high public functionaries hampered the independence of judiciary throughout the process of amendment of the Constitution, primarily by commenting on the court proceedings in course, both during the public debates and apart from them.[42] There was an obvious attempt to create a general atmosphere that Serbian judiciary was corrupt, unqualified and therefore it cannot be given real independence.

Establishment of GONGO's

When the MoJ realised that it had no support from professional associations and the civil society, which indeed represent the judicial profession, it organised its own organisations and civic associations, which have nothing to do with judiciary whatsoever.[43] The said associations started to state their opinion and provide support to the amendments.[44] This does not mean that shoemakers or florists should not be included in this process or state their opinion, however they cannot be at the same level as professional associations.[45] This is an indicator of the fictional character of the entire process.[46] An illusion has been created about the existence of different opinions within the civic sector as to the quality of the proposed constitutional changes.

The entire period of discussion on the Draft amendments was also marked by the establishment of the government-operated non-governmental organisations (GONGO), as a response to the initiative of professional organisations and non-government organisations to improve the proposed amendments. "For instance, a government officer, director of the Agency for Reconstruction, also established an

[41] Available at the website of the Judges' Association of Serbia http://www.sudije.rs/index.php/aktuelnosti/saopstenja-za-javnost/425-2018-08-31-11-04-58.html (Serbian)

[42] Representative from the academic community

[43] *Ibid*.

[44] *Ibid*.

[45] *Ibid*.

[46] *Ibid*.

NGO Network of Lawyers of Serbia, which sent a letter to support the MoJ. The letter was signed by 40 GONGO's, including a lot of unregistered associations, shoemakers and hairdressers. A newly-established Association of judges and prosecutors of Serbia is very active at the moment. Its president used to give quite opposite statements in his previous interviews, while he was one of the most active members of professional association of prosecutors."[47] Interestingly enough, in November 2018, the abovementioned new president of the association was elected into the higher prosecutor's office by majority of votes of the State Prosecutorial Council, some members whereof are also *ex officio* members. Only a few months before, they voted against his election, and now he is even proposed to the Government as a candidate for public prosecutor.[48]

An invitation to interview was addressed by the researches at this project to a representative of the professional association whose positions were until recently identical with the positions of the existing professional associations, and the invitation was accepted. In the meantime, the said professional association changed its positions and started to jointly act with the newly-established GONGO. A week after the acceptance of the interview invitation, the representative of this professional association informed the researchers that he had no free time for the interview.

Third version of the draft amendments – result of the "procedure"

On 11 September 2018, the MoJ has published on its website the third version entitled Draft amendments to the Constitution of the RS[49], without invitation to public debate. Although it was stated that all remarks of the VC were incorporated, this version did not eliminate the obvious possibilities for political pressure on judiciary. The possibility for re-election and transfer of judges was still not

[47] Available at www.nin.co.rs

[48] Available at Danas, "Predsednik novog Udruženja sudija i tužilaca unapređen" https://www.danas.rs/društvo/predsednik-novog-udruženja-sudija-i-tužilaca -unapređen/, (Serbian), 1 December 2018.

[49] Available at the website: working versions of regulations – Ministry of Justice https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php, 1 December 2018.

eliminated. Political influence on the Judicial Council and Prosecutorial Council was increased. Judicial Academy was not provided with any independence guarantees.

It is envisaged that the relation between the three branches of power will be based on mutual control and balance. Judiciary power is independent. It is still questionable whether the issue of judiciary independence has been adequately solved considering the possibility for its control by the other two branches of power.

In the given interview, the representatives of institutions stated that the Judicial Academy was not suitable for the current situation in the RS,[50] as well as that it should not be a constitutional category and that it represented a possibility for entry of bad candidates into judiciary, since it was under large influence of the executive[51]. It is also stated that the Judicial Academy would be acceptable if it is clearly separate from the executive, primarily with regard to finance, and that it must be an absolutely independent body exclusively in the competence if the judiciary, which the amendments to not ensure.[52]

All of the interviewees answered that the councils in charge of election of judges and prosecutors in the composition envisaged by the amendments would not ensure the required quality of the elected judiciary officials. It was stated that the procedure of election had to be fully transparent.[53] It is primarily necessary to specify the conditions for election of the council members.[54] Such composition of the councils will not improve the quality of judges and prosecutors since the political will from the NA will transfer to the will of the "prominent lawyers". The absence of substantive independence of judiciary requires a more radical cure, which is the increase instead of the decrease in the number of judges and prosecutors in the councils. Even this is not enough for depoliticisation of judiciary, but it would be a good attempt.[55] Considering the degree of politicization of the previous process of the amendment of the Constitution and the practice of election of members of other

[50] Representative from the NA.

[51] Representative from the HJC.

[52] Representative from the SCC.

[53] *Ibid*.

[54] Representative from the NA

[55] Representative from a professional association.

bodies through NA, one can hardly expect the election of judges and prosecutors to be objective and to serve the election of top candidates.[56]

Besides constant statements that there would be no public debate, a roundtable was nevertheless organised on 18 September 2018 in Belgrade, where the Minister of Justice presented the latest version of the Draft amendments, in the presence of representatives of highest institutions (Prime Minister, presidents of the Supreme Court of Cassation and the Constitutional Court, Republic Public Prosecutor, ambassadors and representatives of a number of states, OSCE, EU, CoE, presidents of appellate courts, Ombudsman, representatives of professional associations and civil society, media representatives). Everyone had a possibility to discuss, with a limited time, considering the number of participants.

The interviewed representatives of institutions deem that the procedure of the amendment of the Constitution has not even started yet and that all that has been done so far was informal and hasty.[57] They also stated that the VC described the environment of the public debate as acrimonious and that there was no real public.[58] Previous procedure was brought down to the initiative and monopoly of the executive and the rights of institutions to equally participate in public debate was usurped.[59] It was noted that the MoJ invited civil society organisations to present their proposals, but it was only to serve the form and the procedure was equally non-transparent as the procedure for amendments of 2006 the Constitution – there was no proper dialogue between the MoJ and the civic sector.[60] The entire process was characterised by insults against the representatives of civil society and judiciary.[61] The debate can only be tentatively described as public considering that it had poor media coverage and it went by without dialogue, including setting-up and insults, wherefore it can also be only conditionally called a debate.[62]

[56] Representative from the civil society.
[57] Representative from the SCC.
[58] Representative from the SPC.
[59] Representative from the HJC.
[60] Representative from the academic community.
[61] *Ibid*.
[62] *Ibid*.

The Judges' Association of Serbia prepared a comparative presentation of Draft constitutional amendments with the recommendations of the VC and the Consultative Council of European Judges, as well as Action Plan for Chapter 23. It clearly stems therefrom that the MoJ statements that all VC comments and recommendations have been incorporated into the amended text and that the text has been aligned with the opinion of the VC are not in place.[63]

Fourth version of the draft amendments – one step forward, two steps back

Almost a month later, on 15 October 2018, the fourth version of the Draft amendments was published on the website of the MoJ and it was, according to the MoJ, improved by comments of the professional public.[64] According to this version, the law could stipulate again the participation of judicial assistants in proceedings, which is a solution that the VC had remarks on and which was omitted in the third version. Also, this version stipulates the obligation for a person elected for the first time as judge or prosecutor to have completed training at the Judicial Academy. Considering that the composition of the councils, their establishment, prescribed responsibilities and possibility for dissolving have not been changed, the councils remain susceptible to political influence.[65]

Judicial Academy has been introduced into the Constitution, while it has not been ensured any independence guarantees and it has been defined as an independent institution for the training of judges, public prosecutors and deputy public prosecutors, as well as candidates for such functions, as well as other activities stipulated by law. The composition of the managing bodies of the Judicial Academy reflects the composition of the HJC and the HPC. Considering that the composition of the HJC includes five judges and five "prominent lawyers" elected by the NA, and the composition of the HPC includes four deputies, Supreme Public Prosecutor, four "prominent lawyers" elected by the NA and the Minister in charge of judiciary, it is

[63] Available at the website of the Judges' Association of Serbia http://www.sudije.rs/index.php/aktuelnosti/2017-09-25-10-54-45/438-2018-10-09-10-47-00.html (Serbian)

[64] *Ibid*.

[65] *Ibid*, 19.

obvious that the justice profession has no majority either in the bodies of the Judicial Academy that provides for the entry of judges and deputy prosecutors into the judiciary.

The "prominent lawyers" who are not elected by the NA will be elected by the five-member commission whose members are directly or indirectly elected by the NA by possible majority of three votes. The requirement of passed Bar exam will no longer apply to "prominent lawyers", however they still need to have minimum ten years of relevant working experience in legal profession to be prescribed by the law, they need to be proved by professional work and to enjoy high personal reputation. The NA will only elect the Supreme Public Prosecutor. All other holders of judiciary authorities will be elected by the relevant council. President of the HPC will be Supreme Public Prosecutor, whereas the president of the HJC will be elected by its members among member judges. If the HJC fails to decide within 60 days after the initial deciding on certain issues, the term of office of the HJC members will cease. Ceasing of the term of office for all members will be decided by the president of the NA and such decision will be subject to appeal to the Constitutional Court. This solution can lead to a long-lasting judiciary's lack of the HJC, which, among other, decides on the election of judges and court presidents, their termination of office, transfer and delegation of judges, appointment and dissolving of members of disciplinary boards.

The Supreme Court of Serbia ensures uniform law application by courts through case law. The law sets out which functions, jobs or private interests are incompatible with judiciary functions. Transfer of judges to other courts is still possible without their consent, with precise indication when and under which circumstances this would be possible.

These Draft amendments stipulate that the relation between the three branches of power will be based on mutual control and balance.

When asked whether the proposed amendments ensured depoliticisation of courts, most interviewees provided negative answer.[66] As a reason for such attitude they indicated the composition of the councils with the envisaged number of "prominent lawyers" and the proposal that the president of the HJC would still be the president

[66] Representatives from the institutions HJC, SCC, SPC, NA, professional associations.

of SC, who should remain a council member.[67] It was stated that, if the composition of the councils remained as stipulated in the amendments, one can expect large impact of the dominant political majority.[68] It was added that the amendments did not improve the organisational structure of prosecutors' offices, hence they will have no capacity for fight against crime connected with political structures and powerful individuals.[69] All interviewees share a general opinion that it is also difficult to foresee how the Amendments would be applied, since there is a lack of understanding that the judiciary independence depends on political and legal culture of a society. Conduct of the President and the deputies provide an example for others, among other by preventing the realisation of ongoing court proceedings, they give a bad example to the citizens who lose confidence in judiciary which is not respected either by the executive or the legislative power.[70]

The MoJ representative, who was invited for an interview by researchers at this project, responded by notice that he was "an independent consultant providing support to the MoJ during this project, hence he had no authorisation to speak on behalf of the institution". It should be noted that all other representatives from the institutions gave their personal opinions and comments during the conducted interviews.

It is obvious that, during the preparation of Draft amendments, the MoJ opted to accept the minimum existing standards, which can hardly ensure a quality change of judicial system and judiciary depoliticisation, given the measure proposed and the current status of judiciary and the relation between the three branches of power.

[67] Representative from the SCC.

[68] Representative from the NA.

[69] Representative from a professional association.

[70] Representative from the academic community.

Positions of professional associations and civil society

Civic association Transparency Serbia estimated that the new constitutional amendments would not diminish political influence on judiciary[71]. Daily *Danas* wrote that the authorities would not waive the control over judiciary. Despite the suggestions of the VC, the MoJ did not give up its intention to make the judiciary subordinate to the executive and legislative power.[72] Association CEPRIS noted in its release of 19 September 2018 that "the procedure of amendment of the Constitution needs to be put into constitutional framework"[73] and that "the deputies, instead of the MoJ and the Government, should decide on the amendment of the Constitution and on the content of constitutional amendments"[74].

The MoJ had submitted to the VC the last, fourth version of the Draft amendments on 13 October 2018 (it is stated in the introduction that the text was submitted on 12 October 2018), before it was officially published in Serbia on the website of the MoJ. The Secretariat provided its opinion on this version within a Memorandum and concluded that it was acted in accordance with recommendations of the VC contained in the opinion CDL-AD(2018)011, further stating that the VC noted it at its 116th plenary session[75].

What was particularly characterised as a new method of influence and politicization was the possibility to dissolve the council when it decides on issues such as election and dissolution. This enables the blockade of the council work.[76]

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[71] Available at N1, "Amandmani neće smanjiti politički uticaj na pravosuđe", rs.n1info.com/a419945/vesti/TS-Amandmani-neće-smanjiti-politički-uticaj-na-pravosuđe.htm, (Serbian) 1 December 2018.

[72] Available at Danas, "Vlast ne odustaje od kontrole pravosuđa", https://www.danas.rs/društvo/vlast-ne-odustaje-od-kontrole-pravosuđa (Serbian), 1 December 2018.

[73] Available at CEPRIS, "Saopštenje CEPRIS-a o sadržini nacrta amandmana na Ustav Srbije", www.cepris.org/2018/09/14/saopštenje-cepris-a-o-sadržini-nacrta-amandmana-na-ustav-srbije/ (Serbian), 1 December 2018.

[74] *Ibid*.

[75] *Ibid*, 28.

[76] Representative from the HJC.

Professional associations and a number of civil society organisations published a release on 25 October 2018 stating that "the information given by the MoJ are incorrect. In the document "Memorandum of the Secretariat" it is stated that the Secretariat of the VC i.e. its administrative body, summarised the conclusion on conformity of the latest version with the previously issued recommendations. The VC members neither voted on this conclusion of the Secretariat, nor did they pass any decision thereon." [77]

The representatives from the institutions interviewed during this project deem that the professional associations were discriminated throughout the process, but that they maintained their integrity owing to periodic exclusion from the process and to the fact that they acted uniformly all the time.[78] Also, no version of the amendments incorporated any of the substantial proposals of professional associations and the civic sector, only minor comments regarding technical errors and "legal nonsense" have been accepted, hence the professional associations were to be thanked for nomotechnical improvement of the text of the amendments.[79] Finally, although a large number of amendments and meetings consumed a lot of energy and budget of state institutions, professional associations and the civic sector, the civil society did not fall behind but it took over the state's task i.e. the task of responsible government, which the latter did not prove to be.[80] Throughout the entire process there was a "constitutional autism" with the refusal on the side of the MoJ to responsibly, professionally and conscientiously act and to establish real cooperation with representatives of the civic sector and prepare the amendments in cooperation with them.[81]

[77] Available at the website of the Judges' Association of Serbia http://sudije.rs/index.php/en/aktuelnosti/constitution/444-reaction-to-the-ministry-of-justice-s-claims-regarding-the-venice-commission-s-positive-assessment.html (Serbian)

[78] Representative from the HJC.

[79] Representative from the SPC.

[80] Representative from the academic community.

[81] Representative from the academic community and representative from the HJC.

Reaction of the MoJ to the positions of professional associations and civil society

Following the statements of professional associations and the civic sector regarding the Draft constitutional amendments, the Assistant Minister of Justice and head of negotiating group for chapter 23 stated in his TV interview that "there are clans and cliques in judiciary which have been leading judiciary for 20 years now and they would like to privatize it." "They wish to elect themselves, to promote themselves, to define the working terms and salaries, to be accountable to themselves and yet to judge us." "Their goal is to judge whomever and however they want." "Those who oppose the ideas of the ministry belong to a former profession and to profession from the past, they disclose most obnoxious untruths and they judge in the same way." "Competent judges will judge in the future." He named presidents of associations who can "no longer be in judiciary". "They want to remain in power by the end of their working career. Well, this will change now." He also stated that "a five-member clique has been keeping their chairs in the civil society and would not change". "They want to privatize judiciary, but Europe has said that this cannot happen."[82]

On 18 November 2018, the Judges' Association of Serbia addressed an open letter to the Minister of Justice of Serbia, requesting that she declared whether the Assistant Minister of Justice expressed the position of the MoJ, since it would mean that the MoJ intended to come to terms with those holding different positions about the proposed solutions for amendment of the Constitution.[83] There has been no response.

[82] Available at https://youtu.be/AFJX4DIEBto, 1 December 2018.

[83] Available at the site of the Judges Association of Serbia http://www.sudije.rs/index.php/aktuelnosti/2017-09-25-10-54-45/445-2018-11-14-09-33-40.html (Serbian)

EPILOGUE

Almost two years after the outset of the MoJ activities, the envisaged procedure for the amendment of the Constitution has been instituted. Deadlines and the content of the action plans referring to constitutional amendments have not been respected so far. On 30 November 2018 the government has submitted to the NA, on basis of Article 203 of the Constitution and Article 142 of the Rules of Procedure of the NA, the proposal for amendment of the Constitution of the RS. It was proposed that Article 4 would be amended – the provision relating to courts and public prosecutor's offices, and/or Articles 142-165 and subsequently Article 99 (competences of NA), 105 (method of decision-making in NS) and 172 (election and appointment of judges into the Constitutional court). Reasoning for the Proposal was finally given. The Minister of Justice was designated as Government representative in the NA, and the appointed commissioners were state secretary, two assistants and one higher advisor to the minister of justice.[84] The prepared draft of the Constitution has neither been mentioned nor submitted along with the submitted proposal for the amendment of the Constitution. What can be expected from the upcoming procedure remains to be seen from the future procedure.

There is an impression that the prepared Draft amendments will be a basis in the procedure of the amendment of the Constitution before the NA. It is obvious that the most recent document of the Consultative Council of European Judges (dealing with the position of judiciary in the Council of Europe member states) with comments on the most recent Draft constitutional amendments, adopted in Strasbourg on 21 December 2018[85], has not been commented by the MoJ at all. The circumstance that the stated comments were almost identical with those expressed by professional organisations and a large number of civil society members and different from the opinions of the newly-established associations (GONGO's) is the additional cause for concern. It was also reiterated that the proposed constitutional amendments can be very dangerous for judicial independence.

[84] http://www.parlament.gov.rs/upload/archive/files/cir/pdf/akta_procedura/2018/010-3691_18_Predlog.pdf, 1 December 2018.

[85] CCJE-BU(2018)9 12 December 2018, available at https://rm.coe.int/opinion-on-the-newly-proposed-amendments-to-the-constitution-of-the-re/168090751b


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