Republic of Serbia
Supreme Court of Cassation
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Belgrade

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

[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.

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 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

[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 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 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

[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.

[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.

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 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

[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).

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 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.**

[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 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'.*

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.

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,

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

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 territorial 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.

[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.

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.

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

[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.

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.

THE SUPREME COURT OF CASSATION
SITTING IN PLENARY SESSION