

With regard to the completion of the constitutional amendment process the Justice Ministry of the Republic of Serbia has been conducting, the Judges' Association of Serbia¹, the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia², the Judicial Research Centre - CEPRIS³, the Association of Judicial and Prosecutorial Assistants of Serbia⁴, the Association of Judicial Associates of Serbia⁵, the Lawyers' Committee for Human Rights – YUCOM⁶ and the Belgrade Centre for Human Rights⁷ are issuing the following

OPEN LETTER

To:

The National Assembly of the Republic of Serbia

The Government of the Republic of Serbia, and

The Justice Ministry of the Republic of Serbia

Aware of the importance of amending the constitutional provisions governing the judiciary, we responded to the Justice Ministry's invitation and took part in the so-called consultative process on amending the Serbian Constitution, which was launched in mid-2017. The debate should have focused on –the establishment of judicial independence – had been disregarded from the very start of the process. The process did not have the character of a public debate and did not enable its participants to engage in genuine consultations – there was no text to be discussed, judicial authorities and law school professors were not involved in the process, and the discussions were characterised by open disparagement of individual participants, especially judges and prosecutors, by the representatives of the Justice Ministry. In light of the circumstances, we withdrew from the consultative process on 30 November 2017 and [notified](#) the Justice Ministry and the domestic and international public of our reasons for doing so in detail.

The Justice Ministry published the [Working Version of the Draft Amendments to the Constitution of the Republic of Serbia](#) (hereinafter: Working Text) on 22 January 2018, and again invited us to participate in the four round tables at which they were to be discussed. The first two round tables, held in Kragujevac and Novi Sad, were conducted in the same way as the 2017 consultations, wherefore we were again forced to withdraw from participation; we [notified](#) the public of our decision as well.

In this open letter, we draw attention to the formal deficiencies of the process conducted to date before the Working Text is forwarded to the Venice Commission: not only has the process been devoid of real debate and the written submissions ignored; the Justice Ministry conducted activities it is not authorised to under the Constitution as well. This should particularly be borne in mind by the Government, which is authorised to propose constitutional amendments, and the National Assembly, which plays the most important role in the constitutional amendment procedure; on 5 March 2018,

¹ Established in 1997, 1080 members – judges, member of the International and European Associations of Judges and the *Magistrats européens pour la démocratie et les libertés* – MEDEL

² Established in 2001, 577 members – public prosecutors and deputy public prosecutors, member of the International and European Associations of Judges and *Magistrats européens pour la démocratie et les libertés* – MEDEL

³ Established in 2016

⁴ Established in 2012, 440 members

⁵ Established in 2014, 200 members

⁶ Established in 1997

⁷ Established in 1995

two Assembly Committees⁸ decided to dismiss the deputies' motion for a Public Hearing on the Constitutional Amendments.

Non-Compliance with the Constitutional Revision Procedure and the Chapter 23 Action Plan

Under Article 203 of the Constitution, the constitutional amendment procedure shall be initiated by the submission of a proposal to amend the Constitution, which must be upheld by a two-thirds majority of all Assembly deputies. The drafting of the new constitutional provisions may begin only once the Assembly adopts such a decision. We hereby note that the Assembly has not adopted a decision to launch the constitutional amendment procedure yet. The constitutional amendment process to date is informal and conducted by the Justice Ministry, which is not authorised to propose amendments to the Constitution – such a proposal may be submitted only by a third of the Assembly deputies, the Serbian President, Government or by at least 150,000 voters. The Government, which is authorised to propose constitutional amendments, has not yet publicly voiced its opinion on constitutional change.

The authorities have blatantly disregarded the [Chapter 23 Action Plan](#), which the Serbian Government adopted on 27 April 2016, and failed to implement the constitutional amendment activities within the set deadlines: they have apparently ignored the [2014 Legal Analysis of the Constitutional Framework on the Judiciary](#), they have failed to initiate the amendment of the Constitution in the National Assembly or to form a working group to draft the amendments, at least officially. The identity of the authors of the Working Text published in January 2018 remains unknown. Given that this Working Text does not fulfil the two above mentioned formal requirements specified in the Chapter 23 Action Plan, the submission of the Text to the Venice Commission would amount to yet another violation of the Constitution and the Action Plan, even in the event the Venice Commission agrees to review such a deficient text.

In terms of content, the amendments proposed in the Working Text do not fulfil any of the three obligations Serbia assumed under point 1.1 of the Action Plan. Under the Working Text, the judges will essentially be in the minority in the High Judicial Council (HJC), because they will have five out of 11 votes; the prosecutors will be in the minority in the High Prosecutorial Council (HPC),⁹ as they will elect four out of this Council's 11 members. The National Assembly's role in the election of the two Councils will not be merely declaratory, as laid down in the Action Plan, but substantive – because the Assembly will elect the members of the Councils and the Councils could be controlled via the Council Chairpersons, (non judicial member) who have the casting vote, or majority of votes together with other non-judicial member of the HJC and HPC.

Absence of Rationales of the Amendments in the Working Text

Only 14 of the 24 constitutional amendments in the Working Text are accompanied by rationales, albeit inadequate ones. These rationales are not in accordance with the Uniform Methodological Rules for the Drafting of Regulations, under which each draft regulation is to be accompanied by an explanation of the reasons why it has to be adopted – an analysis of the current situation, issues it is to address and goals it is to achieve and why the adoption of the regulation is the best way to address the issues and achieve the goals. The rationales do not include analyses of the impact of the draft constitutional amendments - who they are likely to affect and how. This shortcoming is not only formal in character, but also precludes a genuine debate on the adequacy of the draft constitutional amendments.

Rationales of some amendments do not refer to any of a number of opinions the Venice Commission issued about Serbia's legal enactments, but only to its report Judicial Appointments CDL-AD (2007)028, and individual, torn out of context segments of its opinions on the legal enactments of

⁸ Constitutional Issues and Legislation Committee and EU Accession Committee

⁹ Former State Prosecutorial Council.

Albania, Armenia, Georgia and Montenegro, in which the Commission did not give its views in principle but those on specific draft provisions in the particular socio-historical situations of concrete states with different legal traditions. The rationales in the Working Text do not specify why specific solution were given priority over others and whether they are the most optimal for regulating the judiciary in the Republic of Serbia.

As noted above, no rationales have been provided for as many as ten amendments in the Working Text. This is particularly important in view of the fact that some of these amendments are totally unrelated to the requirements the Venice Commission issued Serbia or the Chapter 23 Action Plan – such are the draft amendments on the non-transferability of judges and incompatibility of judicial office or the deletion of the provision prohibiting any influence on a judge while performing his/her judicial function.

Exclusion of Experts and Professionals

Professional associations of judges, public prosecutors and judicial associates, as well as civic associations that took part in the so-called consultative process, submitted their reasoned proposals of draft constitutional amendments. These draft provisions differ significantly from those the Justice Ministry published. Although the Ministry did not heed the debate participants' request to explain why it dismissed the drafts they had submitted, it specified in the Introductory Remarks to the Working Text that the draft amendments were the result of public consultations with civil society, which is absolutely untrue and yet another formal obstacle to continuing the debate on the Working Text.

The debate has shown that the withdrawal of the document is proposed not only by civic and professional associations that took part in the public events on the constitutional amendments, but by the highest judicial institutions and experts, who had not even been invited to these events, as well. The Justice Ministry has downplayed the heavy criticisms of the Working Text and calls for its withdrawal, voiced both by the [High Judicial Council](#), the [State Prosecutorial Council](#), the [Supreme Court of Cassation](#), all courts that held judicial sessions on the amendments and the most eminent experts on constitutional law, theory of state and law and court organisation law in Serbia, who voiced their opinions at the [Public Hearing of Professors](#), which was organised by the Judges' Association of Serbia and the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia on 20 February 2018. The Ministry has been concealing that the withdrawal of the Text has been required not only by professional and civic associations, but by the highest judicial institutions and eminent law professors as well.

Doubts about the Outcome of the Procedure before the Venice Commission

The Justice Ministry representatives have repeatedly said that the Text, which is not a formal proposal for amending the Serbian Constitution, would be [decided](#) on by the Venice Commission.

We also wish to note that public appearances by Venice Commission member and Assistant Justice Minister Čedomir Backović at events and in the media to date have given rise to doubts about whether he will participate professionally and with goodwill in the work of the Venice Commission and its bodies, notably their review of the Serbian constitutional amendments. Apart from repeatedly publicly disparaging and insulting the participants in the debate, Backović also publicly expressed his surprise that some of them were still judges and prosecutors. He even openly threatened the Chairwoman of the Judges' Association of Serbia in a live talk show on [N1 TV on 15 February 2018](#), when he said: "I will gladly do you and the likes of you harm".

Doubts have also arisen with respect to the role of legal expert James Hamilton, who, according to the Justice Ministry Introductory Remarks to the Working Text, participated in the drafting of the amendments as a Council of Europe expert. Given that Mr. Hamilton is a Council of Europe expert

and a former member of the Venice Commission, we hereby draw attention to his unclarified role in the event the Venice Commission, a Council of Europe body, renders its opinion on the text of the constitutional amendments drafted by its expert. Mr. Hamilton never denied his participation in the drafting of the Working Text although he was asked to comment it. His role is all the more unclear given that the Draft Annotated Agenda of the Venice Commission's 114th Plenary Session scheduled for 16-17 March 2018 specifies that Mr James Hamilton will inform the Commission on progress in the constitutional reform process in Serbia.

Draft Constitutional Amendments Increase Political Influence on the Judiciary

The Working Text demonstrates the executive authorities' aim to preserve its power and subjugate the judiciary, which is unacceptable in a modern constitutional democracy and undermines the level of achieved rights. At first glance, the proposed amendments reflect the suggestions the Venice Commission made in its Opinion on the Constitution of Serbia No. 405/2006 of 19 March 2007 [CDL-AD\(2007\)004](#) the three-year "probationary" period of judges has been scrapped; judges, court presidents, public prosecutors and their deputies will be appointed by the judicial councils; there will be no representatives of the executive and legislative authorities in the High Judicial Council. However, the proposed amendments open new channels of political influence on the judiciary:

1. The amendments transfer the appointment of judges and deputy public prosecutors from the Assembly to the Judicial Academy, which will, through its *de facto* selection of successful applicants for its training, preliminarily decide who will become a judge or deputy public prosecutor (because only Academy graduates will be eligible to apply for judicial posts in specific courts and public prosecution services); in the absence of guarantees of independence, the Academy, or any other institution with such powers for that matter, will fall prey to political parties, if it already has not.
2. The amendments substantively transfer the appointment of judges and deputy public prosecutors (to courts and public prosecution services with exclusive first-instance jurisdiction) from the High Judicial Council and High Prosecutorial Council, which will play a merely protocolary role in the appointment procedure (since the successful candidates will be appointed from among those selected by the Academy).
3. The amendments provide the ruling majority (which will have the votes of five High Judicial Council members it elects and the Council Chairperson's casting vote) with the opportunity to transfer judges against their will to another court, of any kind, instance or jurisdiction in case of "reorganisation" of the court system, which will effectively abolish non-transferability, one of the safeguards of judicial independence. The non-transferability of prosecutors, an achieved standard of prosecutorial autonomy, will also be abolished.
4. The amendment prohibiting judges and prosecutors from performing "private functions" undermines their right to associate in professional associations and facilitates persecution of politically "disobedient" judges and prosecutors.
5. The judiciary will be "disciplined" by the Justice Minister's power to initiate disciplinary proceedings against judges and the procedure to dismiss judges and public prosecutors, which will enable a senior public administration official to decide on the termination of judicial profession.
6. The reason for the existence and roles of the Judicial and Prosecutorial Councils will have been rendered meaningless, because the ruling political majority is authorised to elect any law

graduate to the Councils: notably, the Assembly Committee, which need not have a member with a law degree, is authorised to nominate to the National Assembly candidates for Council membership from among those who have themselves applied, and who will, for their part, become “prominent lawyers” by the very act of appointment to the Council.

7. The amendments introduce a new channel by which parties will be able to exert influence on the judiciary and they transfer the legislative authorities’ institutional influence on it from the Assembly to the ruling majority in the following manner:
- Five High Judicial Council members will be elected in the Assembly by a two-thirds majority, or in its absence, a five-ninths majority of all deputies (139 deputies, the number of deputies the ruling majority now boasts),
 - Judges may not be appointed Council Chairperson,
 - The Council Chairperson will have the casting (“golden”) vote in case of a tie,
 - The number of High Judicial Council members has been reduced from 11 to 10,
 - The number of judges sitting on the High Judicial Council and the number of prosecutors sitting on the High Prosecutorial Council have been reduced from seven to five,
 - Judges will be in the minority in the High Judicial Council, because they will account for five out of 11 members, and prosecutors will be in the minority in the High Prosecutorial Council, because they will elect four of the 11 Council members,
 - The High Judicial Council will be able to adopt decisions without any “votes from judges” because it will have a quorum if its session is attended by at least one judge: that judge’s vote will not be necessary for adopting decisions in such situations and decisions taken at such sessions will be valid even if that single present judge votes against them. The High Prosecutorial Council will be able to adopt decisions without the votes of any of the elected prosecutors.

Due to the numerous major deficiencies that cannot be eliminated by “fixing” the Working Text, the professional associations of judges, prosecutors and judicial associates, and human rights NGOs agree with the following view of the judicial institutions – the Supreme Court of Cassation, the High Judicial Council, the State Prosecutorial Council and numerous courts, as well as the most eminent law professors:

The proposed Working Text of the Constitutional Amendments should be withdrawn and the drafting of an entirely new text should be initiated, in compliance with the constitutional procedure and the principles of modern constitutional democracies.

The National Assembly and Government of Serbia have the institutional mechanisms to launch the Text withdrawal procedure. In our view, these mechanisms should be used not only because of the substantive deficiencies of the Working Text, but also because of its formal deficiencies, the disregard of which may gravely undermine Serbia’s international reputation. This particularly applies to the procedure before the Venice Commission, which is mentioned as the next instance to which the Justice Ministry will forward the Working Text of the Constitutional Amendments.

Attachments:

1. Public Hearing of Professors – Key Views on the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia
2. Letter to Mr James Hamilton of 7 February 2018