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B e l g r a d e

CONSTITUTIONAL AMENDMENTS RELATING TO THE JUDICIARY

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Introduction

In countries like ours, there is no fight against corruption and crime without independent judicial institutions, which is why the Council analyzes and submits a report on the situation in the judiciary to the Government every two years.

The National Judicial Reform Strategy adopted in 2013 determined that it was necessary to change the Constitution in order to reform the judiciary for the period 2013 to 2018. The Strategy and Action Plan for Chapter 23 provide a legal framework in which the changes to the Constitution should go, which should lead to the independence of the judiciary: exclusion of the National Assembly and the executive authority from the process of electing court presidents, judges, public prosecutors, deputy public prosecutors; members of the High Court Council and the State Prosecutorial Council; exclusion of representatives of the legislative and executive authorities from membership in these bodies and specifying the role of the Judicial Academy as a mandatory condition for the first election to the position of judge and prosecutor.

The Commission for the Implementation of the Strategy has appointed a Working Group to analyze and provide a legal framework for amending the Constitution. The Working Group composed exclusively of experts in constitutional law and justice presented an analysis of the framework of constitutional changes in 2016, which was not objected to by the Ministry of Justice, judicial institutions or relevant civil society.

In May 2017, the Ministry of Justice began its work on drafting the text of the amendment, as if no analysis had already been given by the expert Working Group. Only the Ministry of Justice, with the help of a Council of Europe expert, worked on drafting the text of the amendments, while judicial institutions, professional associations and the relevant civil sector did not participate in the work, because there were disagreements regarding the degree of judicial independence.

In this Report, the Council will address:

- different views of independence by the Ministry of Justice and other institutions envisaged to work on the amendments;
- participation of foreign experts in the work on this text;
- an explanation of the proposed amendments and
- remarks on the draft text of the amendment.

Different views of the independence of judicial institutions

In 2013, when the Strategy was drafted, at a meeting held on February 27, 2013, the Assistant Minister of Justice, Mr. Čedomir Backović, who is still in the same position, expressed the position of the Ministry that the trend of independence advocated by the judiciary was a "disastrous trend" that would lead to "a group of 2,000 irresponsible people (judges) turning into hajduks" and advocated that all rights be handed over to the Ministry of Justice, as is the case in Germany, because it is a system of independence that works well.

Assistant Minister of Justice, Mr. Backovic, at a meeting held on October 13, 2017 in Nis, where consultations were held regarding the amendments to the Constitution, stated that judges and prosecutors were in favor of the judiciary being a "craft shop" or a "society with limited liability", which would decide on human destinies as they please, while the special adviser to the Minister of Justice, Mr. Zoran Balinovac, stated that the independence of the judiciary was "fetishized", that it was an" ideological myth" and that judges and prosecutors were assailants who wanted to take over the power. How can judges take over the power when all three branches of power are independent, with each other having mutual control within the law, so that none of them can exercise their power over another branch of power.

Therefore, at all the above-mentioned meetings since 2013, the Ministry of Justice has clearly stated its position to oppose the independence of courts and the independence of prosecutors according to the standards valid in the European Union.

In its 2014 Judicial Reform Report, the Council addressed the standards by which independence is assessed, namely: a. the manner of election of judicial office holders; b. the duration of their term of office; c. the existence of guarantees for judicial office holders that prevent external pressures and influences from the executive authority; d. the impression that judicial institutions make on the public.

The position of judicial institutions, the Association of Judges of Serbia and part of civil society is that the above standards of independence must be applied, especially guarantees that prevent external influences by the executive authority, and that proposing amendments to the Constitution must follow an Action Plan that clearly excludes representatives of the of the legislative and executive authorities from deciding on the election of judges, prosecutors and members of the highest judicial authorities,

i.e. the High Court Council and the State Prosecutorial Council, as well as to eliminate the indirect influence of the Judicial Academy on the election of judges and prosecutors.

Participation of foreign experts in drafting the text of the amendments

It is good when the executive power seeks the professional help of foreign experts to draft some documents when there are no experts in our country who are recognized in the world.

The participation of Council of Europe experts in drafting this proposal is completely acceptable. However, the fact that some foreign experts give a positive opinion on some documents does not mean that these documents are applicable in our country and that their opinions are professional and only possible, i.e. that there is no other choice.

It should not be reminded that during the reform of the judiciary in 2009, all the opinions of experts were positive, although our expert public warned that the reform was not good and would not lead to an improvement in the situation in the judiciary. When foreign experts and our government admitted that, it was too late, because the failed reform cost the state a lot.

Also, we should not forget that sometimes applicable solutions in EU countries are not applicable in our country, our real situation in the country does not correspond to the situation in these countries because we are not at the level of development of those countries in relation to democracy, institutions, rule of law.

Therefore, there are no guarantees of independence in our country, which is the EU standard, and therefore, through the change of the Constitution, any possibility of direct or indirect influence of the executive and legislative power on the independence of judges and the independence of prosecutors must be eliminated.

Explanation of amendments

The Ministry of Justice, explaining the need to introduce "prominent lawyers" as members of the highest governing bodies in judicial institutions, introduces terms that can in no way be applied to the judiciary, which is the reason for introducing prominent lawyers, introducing inclusion in the judicial system, disabling autocratic management of the judiciary, prevention of the tendency of corporatization within the council and introduction of justified quality control and impartial justice.

From all the mentioned terms, it is clear that the proposer either does not know what the mentioned terms mean and uses them because they sound unknown and good, or the proposer who has been in power for more than five years does not trust the judicial system he/she established during his/her rule and control.

The Council will explain the terms used in order to show that unusable terms are used only to justify something that is impossible to justify.

"Inclusiveness" is a set of qualities, virtues, knowledge, skills, which make a person human, and all these qualities are an inseparable part of humanity. The proposer did not explain from where it came that the High Judicial Council with the majority of judges has not been inclusive so far and that this inclusiveness must now be ensured by "prominent lawyers", nor did he/she explain what "prominent lawyers" would do that that judges have not done so far.

"Autocratic governance" is when power is concentrated in the hands of a leader who governs people, shapes behavior, uses coercion, power, and authority. In the High Judicial Council, in which the majority of judges are, there can be no autocratic governance because judges have the same rights and obligations, the same authority, they know each other, which is why there is no leadership or coercive management. However, "prominent lawyers", like the majority in the High Judicial Council, can introduce autocratic rule, do not know the judiciary, become leaders and can act as leaders, are elected by the party assembly, are accountable to it and are allowed to govern the judiciary completely independently as if there are no prosecutors and judges because they have the "golden voice" of the President of the High Judicial Council.

"Corporatization" is a term known from commercial law, which has so far been used only for the management of companies, and means to manage in a corporation in

accordance with the standards of management according to the form of organization of the company. The corporatization of management in judicial institutions is a complete unknown, because the judiciary is not a corporation nor can it ever become one, it is not known what this term means in the judiciary and how this management system known in commercial law can be applied to the High Judicial Council this system of governance known in commercial law can be applied to the High Judicial Council, that is, how a judicial institution can grow into a "limited liability company", i.e. a "craft shop". If the Ministry of Justice is afraid of corporatization in the judiciary, then it should have been explained how "prominent lawyers" would prevent something that the judges could not.

"Justified quality control and impartiality of justice" - these terms are completely clear, and that is that the legislative and the executive power, through "prominent lawyers" wants to "justifiably" control the quality of work, trials, judgments, evaluation, promotion, punishment, imposition their vision of law and justice, as well as their opinions. For all these "quality controls", as the Ministry of Justice calls them, there are regulations and competencies, and that is certainly neither the executive nor the legislative power through its "prominent lawyers". In fact, through "prominent lawyers", the government will exert undue influence on the judiciary.

Therefore, any possibility to establish the complete dependence of the judiciary on the executive and the legislative power with the help of some other persons, such as "prominent lawyers" and bodies such as the Judicial Academy, must be excluded from this proposal.

Remarks on the draft amendments

1. Amendment IX

This amendment determines the composition of the High Judicial Council of 10 members of whom five judges elected by their peers and five "prominent lawyers" elected by The National Assembly upon theproposal of the competent parliamentary committee for justice. There is only one restriction in the election, that the presidents of the courts cannot be elected to the High Judicial Council and nothing else. This means that all deputies, all party members, all ministers and other workers in the ministries, all those who are close to the government, can be elected to those five members from the ranks of prominent lawyers, because the only condition for election

is to be lawyers. In relation to the term "prominent", the Council has several remarks, as follows:

a. Who are the prominent lawyers? Are there objective criteria on the basis of which "prominence" can be determined? Are prominent lawyers persons who declare their party affiliation or sympathy for the government in the media? Given that no restrictions, no conditions, no objective criteria for election have been given, the question arises as to whether the election will be conducted according to the system of Nero's election of senators, i.e. whether the National Assembly will only subjectively state that someone is a "prominent lawyer" and will be elected to such a responsible position to manage the judiciary.

b. Another remark is what guarantee is given to the judiciary, the people, the state, that the election of members of the High Judicial Council from among prominent lawyers will better prevent external pressures and influences from the executive and legislative authorities on the independence of the judiciary and the independence of prosecutors, regardless of the fact that these persons are elected by the National Assembly, i.e. what are the guarantees that the members of the High Judicial Council elected in such a way will be independent in relation to the executive and legislative power and will not allow the government to influence decision-making.

c. This composition and manner of electing the High Judicial Council did not establish any balance or inclusion that is discussed in the explanation of the amendment, on the contrary, it only allows the legislative and executive authorities to indirectly, through members elected by the National Assembly, jeopardize the independence of the judiciary.

d. The proposed amendments removed the Minister of Justice and the President of the Judiciary Committee of the National Assembly from the High Judicial Council, but the National Assembly was given the opportunity to elect five members instead of the two members, and in those five may be the Minister of Justice and the President the Assembly Committee for Justice, through which the National Assembly will put pressure on the judiciary, which the government is still doing.

2. Amendment XI

This amendment stipulates that the president of the High Judicial Council is elected from among the members of the council who are not judges. It is not clear why the judicial profession is so underestimated and incompetence is introduced, because a

"prominent lawyer" can be any lawyer who may never have worked in court, never judged or applied procedural or other laws, nor knows what Justice is.

The explanation of the amendment to prevent autocratic management of the judiciary in this way and to avoid corporatization within the High Judicial Council is not clear, about which the Council has already written. The Council believes that such a proposal only establishes incompetence and the possibility of autocratic management by members from the ranks of prominent lawyers, because those with five members and the golden vote of the president can manage the judiciary independently, without any influence of judges and prosecutors.

3. Amendment XII

This amendment gives a "golden vote" to the president of the High Judicial Council, so that decisions are made if only members of the council from the ranks of "prominent lawyers" vote. The explanation states that this establishes a balance. It is not clear to the Council what the balance is when legally valid decisions can be made by only five council members from the ranks of "prominent lawyers", and those decisions, no matter how they vote, cannot be influenced by judges, which means that there is no balance in High Judicial Council between judges and "prominent lawyers".

4. Amendment IV

This amendment enables the transfer of judges to another court if the decision is made by the High Judicial Council and if it is a matter of reorganization of the judicial system. However, it is not clear whether the reorganization of the judicial system must be regulated by law, so the Council thinks that only if it is regulated by law can there be a reason to transfer a judge to another court.

5. Amendment VIII

This amendment stipulates that the Minister of Justice may initiate disciplinary proceedings and dismissal proceedings. This again means that even when the executive and the legislative power, through "prominent lawyers", take over the complete management of the judiciary, it is not enough, but it is considered that the minister should participate in that power as part of the executive power.

6. Amendment XIV

This amendment retains the decision that the public prosecutor's office is only an autonomus body without guarantees of independence in relation to the executive and the legislative power. It is necessary to give the public prosecutor's office the status of

an independent institution. In recent years, the prevailing understanding in Europe is that the independence of the public prosecutor's office is important for the establishment of an independent judicial system, because public prosecutors are potentially the most important link in the chain of criminal justice. Public prosecutors decide on criminal prosecution, waiver of criminal prosecution, legal qualification of the act, propose criminal sanction, etc. Public prosecutors represent a barrier to the judicial system, that is, in case the public prosecutor decides not to prosecute a certain person, the judges are handcuffed.

7. Amendment XV

This amendment regulates the responsibility in the public prosecutor's office. The proposed solution retains the outdated model of rigid hierarchy, which is contrary to modern tendencies. This is a system in which each lower-instance prosecutor is responsible to a higher one in the hierarchy, and the highest to the legislative and executive power through an election system.

8. Judicial Academy

Amendments IV and XVIII regulate that as a judge in courts that have exclusively first-instance jurisdiction (i.e. as a deputy public prosecutor in the lowest public prosecutor's offices) may be elected a person who has completed special training in a judicial training institution established by law, which means only training in a state-owned institution. For the first time, an educational institution is regulated by the Constitution in the part related to the judicial system. The Council believes that this educational institution has no place in the judiciary, but in the educational system.

Our education system is open, which means that educational institutions can exist in all forms of ownership, not just state ownership, so that all institutions, schools or faculties that have a licensed training program in the judiciary can provide legally valid training

The question then arises as to why all other institutions except the state Judicial Academy, which was established by law, are discriminated, i.e. why there is no equality between all licensed institutions authorized to conduct training in the judiciary, and only a state institution that is the only one established by law is forced.

The state is forcing the Judicial Academy because through the Academy it affects the selection of judges, it affects who will be admitted to the training and who will thus gain the opportunity to apply for a judge and prosecutor, respectively.

This solution is not only good because of discrimination against other institutions licensed for judicial training, but also because it prevents courts and prosecutors' offices from selecting, receiving and training trainees, thus losing assistance in work that is very important for the work of the judiciary, but they also lose the opportunity to learn about the moral qualities of trainees that are important in the selection of judges and prosecutors.

Having in mind the importance of changing the Constitution as the highest legal act of our country, the Council gives the following recommendations to the Government:

RECOMMENDATIONS

1. It is necessary to withdraw the Ministry of Justice's Working Version of the Draft Amendments to the Constitution of the Republic of Serbia from further public debate because it was not given by the relevant actors of judicial reform envisaged by the National Strategy for Judicial Reform;
2. It is necessary to carry out a new procedure for drafting the Working Version of Amendments to the RS Constitution in which all institutions involved in judicial reform envisaged by the National Strategy for Judicial Reform will participate (National Assembly, Government, Supreme Court of Cassation and Courts, Republic Public Prosecutor's Office, High Judicial Council, State Prosecutorial Council, Judicial Academy, as well as professional associations, universities and the academic community ...).
3. It is necessary to incorporate European standards on the independence of judges and the autonomy of prosecutors into the new proposal of the Working Version of the Draft Amendments to the Constitution of the RS, and these are:

- manner and conditions of election of holders of judicial functions;
- the length of their term of office;
- guarantees of independence of judicial office holders.

VICE-PRESIDENT

Prof. dr. Miroslav Milicevic