

Ministry of Justice's Working Version of the Draft Amendments to the Constitution (with explanation and references)

Introductory remarks

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

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

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

Amendments I through XXIV to the Constitution of Serbia

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

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

AMENDMENT I

Competences

The National Assembly shall:

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

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

Within its election rights, the National Assembly shall :

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

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

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

AMENDMENT II

Method of decision making in the National Assembly

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

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

1. grant amnesty for criminal offenses,
2. declare and call off the state of emergency,
3. order measures of departure from human and minority rights in the state of war and emergency,

4. enact the Law by which the Republic of Serbia delegates particular issues falling within its competence to autonomous provinces and local self-government units,
5. give previous approval for the Statute of the autonomous province,
6. decide on the Rules of Procedure pertaining to its work,
7. cancel immunities of deputies, the President of the Republic, members of the Government and Civic Defender,
8. adopt the Budget and financial statement,
9. elect members of the Government and decide on the end of the term of office of the Government and ministers,
10. decide on response to interpellation,
11. elect judges of the Constitutional Court and decide on their dismissal and end of their term of office,
12. elect and dismiss the Governor of the National Bank of Serbia, Governors' Council and Civic Defender,
13. also perform other election competences of the National Assembly .

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

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

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

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

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

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

AMENDMENT III

7. Courts

Judiciary principles

Judicial power shall belong to the courts as autonomous and independent state authorities.

Judicial power shall be unified on the territory of the Republic of Serbia.

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

Provisional courts, courts-martial or emergency courts may not be established.

Court decisions shall be passed in the name of the people.

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

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

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

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

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

AMENDMENT IV

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

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

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

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

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

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

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

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

The present Amendment supersedes article 143 of the constitution of the RS.

EXPLANATION OF THE REMOVAL OF THE PROBATIONARY PERIOD FOR JUDGES:

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

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

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

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

AMENDMENT V

Immunity and Incompatibility

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

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

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

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

AMENDMENT VI

The Supreme Court of Serbia

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

The Supreme Court of Serbia shall ensure uniform application of the law by the courts.

The present Amendment shall supersede article 145 of the Constitution of the RS.

AMENDMENT VII

President of the Supreme Court and Presidents of Courts

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

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

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

The present Amendment shall supersede article 146 of the Constitution of the RS.

AMENDMENT VIII

High Judicial Council

Jurisdiction of the High Judicial Council

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

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

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

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

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

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

AMENDMENT IX

The Composition of the High Judicial Council

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

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

of all deputies, otherwise the election procedure is repeated after fifteen days, for the number of members who have not been elected.

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

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

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

EXPLANATION OF THE REVISED COMPOSITION OF THE HJC:

The Venice Commission considers that a composition in which there is a parity of members coming from the judiciary and from the rest of society and in which the President of the Judicial Council will be elected from among the lay members would ensure a better balance between the autonomy and independence and the accountability of the judicial power. *CDL-AD(2011)010 , para.14*

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

In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised." 13 Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management". *CDL-JD(2007)001, par. 29 and CDL-AD(2007)028, par. 29-30*

AMENDMENT X

Term of Office of Members of the High Judicial Council

Members of the High Judicial Council shall be elected to a five-year term of office.

The same person may not be reelected as member of the High Judicial Council.

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

The present Amendment shall supersede article 149 of the Constitution of the RS.

AMENDMENT XI

President of the High Judicial Council

The High Judicial Council shall have a president.

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

The term of office of the president is five years.

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

EXPLANATION:

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

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

AMENDMENT XII

Work and Decision-making of the High Judicial Council

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

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

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

EXPLANATION :

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

AMENDMENT XIII

Immunity of the members of the High Judicial Council

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

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

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

AMENDMENT XIV

8. Public Prosecutor's Offices

Status

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

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

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

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

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

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

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

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

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

In all criminal justice systems, public prosecutors:

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

In certain criminal justice systems, public prosecutors also:

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

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

Apart from those tendencies, there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor’s office. Even when it is part of the judicial system, the prosecutor’s office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence

has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

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

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

AMENDMENT XV

Responsibility

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

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

Deputy public prosecutors are responsible to the public prosecutor.

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

AMENDMENT XVI

Public Prosecutors and Deputy Public Prosecutors

A public prosecutor shall perform the prosecution function.

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

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

EXPLANATION OF THE HIERARCHICAL STRUCTURE OF THE PROSECUTION SERVICE:

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

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

AMENDMENT XVII

Election of the Supreme Public Prosecutor of Serbia and Public Prosecutors

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

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

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

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

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

The present Amendment shall supersede article 156 of the Constitution of the RS.

EXPLANATION:

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

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

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

AMENDMENT XVIII

Life Tenure, Transfer and Temporary Relocation of Deputy Public Prosecutors

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

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

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

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

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

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

The present Amendment supersedes article 157 of the Constitution of the RS.

EXPLANATION OF THE REMOVAL OF THE PROBATIONARY PERIOD FOR DEPUTY PROSECUTORS :

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

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

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

AMENDMENT XIX

Immunity and Incompatibility

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

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

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

AMENDMENT XX

High Prosecutorial Council

Jurisdiction of the High Prosecutorial Council

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

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

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

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

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

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

AMENDMENT XXI

Composition of the High Prosecutorial Council

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

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

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

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

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

EXPLANATION:

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

AMENDMENT XXII

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

Members of the High Prosecutorial Council shall be elected to a five-year term of office.

The same person may not be reelected as member of the High Prosecutorial Council.

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

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

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

EXPLANATION:

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

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

AMENDMENT XXIII

Work and Decision-making of the High Prosecutorial Council

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

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

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

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

EXPLANATION:

The system of discipline is closely linked to the issue of the hierarchical organisation of the prosecutor's office. In such a system, disciplinary measures are typically initiated by the superior of the person concerned.

In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could handle disciplinary cases. An appeal to a court against disciplinary sanctions should be available.

CDL-AD(2010)040-e Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service para. 51,52

AMENDMENT XXIV

Immunity of Members of the High Prosecutorial Council

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

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

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