Comments of the Association of Prosecutors of Serbia, the Committee of Lawyers for Human Rights and the Belgrade Centre for Human Rights on the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia

Amending the Constitution in the part that refers to the judiciary represents the obligation of the Republic of Serbia in the process of European integration and an integral part of the Action Plan for Chapter 23, as well as one of the transitional criteria listed in the European Union Common Position on Chapter 23.[1] The objective of amending the Constitution is to align it with the recommendations of the Venice Commission and the European standards. One of the requirements is that the related consultation process be inclusive.

The National Assembly of the Republic of Serbia has adopted the National Strategy for Judicial Reform for the period 2013-2018, as a continuation of the reform activities set out in the National Judicial Reform Strategy for the period 2006-2011, in which the following was stipulated on page 7: "Certain solutions laid down in this Strategy call for amendments to the Constitution. They include the following: exclusion of the National Assembly from the process of appointment of court presidents, judges, public prosecutors/deputy public prosecutors as well as members of the High Judicial Council and the State Prosecutorial Council; changes in the composition of the High Judicial Council and the State Prosecutorial Council aimed at excluding the representatives of the legislative and executive branches from membership in these bodies."

On 22 January 2018, the Ministry of Justice published the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia (hereinafter referred to as: the Working Version) and invited interested parties to submit their comments. The Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, the Belgrade Centre for Human Rights and the Committee of Lawyers for Human Rights are hereby submitting their joint comments on the Working Version of the Draft Amendments to the Constitution, in the part pertaining to the organisation of the public prosecutor's office and the holders of prosecutorial office.

The working version of the draft amendments represents a step backward in relation to the expectation that it would serve to establish a depoliticised and accountable judiciary. If the working version does not undergo significant changes, the opportunity to depolitise the judiciary will be missed, and what will occur instead is the relocation of political influence and its concentration. Instead of modernising the prosecutor's office in line with European tendencies, all the solutions that ensure the control of superiors and politics have been retained.

The enactment of the Constitutional Law on the Implementation of the Constitution of the Republic of Serbia is also envisaged, for the purpose of implementing the amendments that

[1] Serbia adopts new Constitutional provisions bearing in mind the Venice Commission recommendations, in line with European standards and based on a wide and inclusive consultation process. Serbia subsequently amends and implements the Laws on the Organisation of Courts, on Seats and Territorial Jurisdiction of Courts and Public Prosecutors' Offices, on Judges, on the Public Prosecutor's Office, on the High Judicial Council and on the State Prosecutorial Council, as well as the Law on Judicial Academy.

will enter into force on the day of promulgation. Given our bad experiences with the previous Constitutional Law, which served as grounds to conduct a re-election, we are of the opinion that it is necessary to present the draft version of the Constitutional Law together with the draft version of the amendments to the Constitution, to allow for a for a single working debate.

Given our experiences with the adoption of the 2006 Constitution and the Constitutional Law that prescribed a re-election of all judges and public prosecutors, we are of the opinion that the amendments to the Constitution i.e. the Constitutional Law could lead to the termination of office of the elected members of the High Judicial Council and the State Prosecutorial Council, and to the possibility of a new re-election of judges and public prosecutors. Therefore, we would like to point to the standards and decisions of the European Court of Human Rights concerning the shortening of bodies' terms of office due to changes in the organisation of the judiciary. In the case of Baka v. Hungary,[2] the European Court of Human Rights took the view that the shortening of the term of office of the President of the highest court in Hungary (Kúria) was causally connected with his criticism of the announced judicial reform. The Court also considered the justification of interference, and found that the early termination of office could not have been aimed at preserving the independence of the judiciary, "but the exact opposite". The Court therefore concluded that the interference of the Hungarian authorities was not based on a legitimate objective. In addition, the decision pointed out that the criticisms of the legislative reforms presented by Baka were of a professional nature, and that they referred to an issue of public interest.[3] The European Court of Human Rights was of the opinion that reforming the Constitution and changing constitutional categories did not, in and of itself, constitute a justifiable reason for putting an end to the regular system of protection of acquired rights. Such a message from the European Court of Human Rights will have far-reaching consequences on all future reforms, as it imposes a requirement for the states to clearly present justified interests when infringing upon acquired rights.

Amendment II supersedes Article 105 of the Constitution of the Republic of Serbia. Its last paragraph prescribes a three-fifths majority in the process of election of the Supreme Public Prosecutor, members of the High Prosecutorial Council and members of the High Judicial Council. The assumption is that the objective of this solution is to achieve a wider social consensus in the decision-making process. However, the above represents only an illusion of consensus, because if the above described election is not possible, the required majority is reduced to a level that is just slightly above the simple majority. On the other hand, dismissal requires only a little above one half of the votes. It is illogical that election requires one type of majority vote, while dismissal requires another, considerably smaller.

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[2] European Court of Human Rights, Grand Chamber, Case of Baka v. Hungary (Application No. 20261/12), https://hudoc,echr,coe,int/eng#{"itemid":["001-115532"]}, (4 March 2018). The President of the Hungarian Supreme Court ceased to hold office prior to the expiry of its term exclusively as a result of the amendments to the constitutional provisions regulating the organisation of judicial bodies and the requirements for the election of the President of the highest court in Hungary. The applicant was deprived of the right to access the court, since his term of office was terminated due to a constitutional reform that did not foresee the possibility of challenging the decision on the termination of office before the Constitutional Court.

[3] Namely, Baka had expressed his views on the "constitutional and legislative reforms of the judicial system, independence and immunity of judges, and on lowering the time limit imposed for the exercise of judicial office". In view of the above, "the Court [had found] that the early termination of the applicant's office as President of the Supreme Court was contrary to the principle of preserving the independence of the judiciary. Termination of judicial office under such circumstances discourages other judges and court presidents from presenting their views on legislative reforms pertaining to the independence of the judiciary."

We suggest that Amendment II be changed to stipulate that the Supreme Public Prosecutor shall not be elected by the National Assembly, but by the High Prosecutorial Council. The suggestion is in line with the ***"Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service",*** *which was adopted at the 85th Plenary Session of the Venice Commission and in which it is stated that it would be "ideal" if prosecutors were appointed by an independent body with "democratic legitimacy" such as the "prosecutorial council" or a "committee of higher level prosecutors".*[4] Therefore, the Venice Commission is unambiguously of the opinion that the election of all public prosecutors, regardless of their position and role within the system, should be entrusted to a body whose majority is made up of the representatives of prosecutors.

Amendment XIV supersedes Article 156 of the Constitution of the Republic of Serbia. However, it includes the "historical" definition of the public prosecutor's office that does not define either its legal nature or its relationship with other state bodies. The public prosecutor's office remains only a body that is autonomous, without guarantees of independence in relation to legislative and executive powers, i.e. political influence. In a society with no developed tradition of the rule of law and division of power, and no tradition of having an independent judiciary, political influence on the public prosecutor's office is a socially acceptable phenomenon.

That is precisely why constitutional provisions should establish additional guarantees for the functioning of the public prosecutor's office free of external influences. This is the reason why the public prosecutor's office should be re-defined into a functionally independent body, and public prosecutors and deputy public prosecutors into holders of prosecutorial powers independent in the exercise of their duties.

The only positive novelty envisages the public prosecutor's office as protector of human rights and constitutional freedoms. We believe that introduction into the Constitution of the obligation of the public prosecutor's office to protect human rights and freedoms is useful, precisely because of the cases when human rights and freedoms have been violated precisely by the public prosecutor's office.

We believe that the Constitution should contain a "functional definition" of the public prosecutor's office. In this respect, it is necessary to define the position of the public prosecution within the system of state governance (independent state body) as well as its predominant jurisdiction (judicial state body).

Explicit constitutional regulation of the independence of the public prosecution in relation to the executive and legislative powers is necessary in view of the new definition of the public prosecutor's office as an authority outside the system of legislative and executive powers. The fact that the public prosecutor's office exercises its competencies predominantly in the courts, and that only the courts can influence actions of the state prosecutor's office, determines the

[4] European Commission for Democracy through Law (Venice Commission) Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), Study No. 494/2008, based on comments by Mr James HAMILTON (Substitute Member, Ireland), Mr Jorgen Steen SORENSEN (Member, Denmark) and Ms Hanna SUCHOCKA (Member, Poland), Strasbourg, 2011, p. 10. www.venice.coe.int (3 March 2018).

fundamental nature of the public prosecutor's office as a body that is part of the judicial system.

The exercise of the competencies of the public prosecutor's office would be absolutely impossible if the public prosecutor's office were to be under the supervision of the executive or other authorities, since the exercise of a public interest function should not be confused with the protection of the interests of the current Government or a political party.

Also, the fact that there is a clear intent to apply the accusatory system in criminal proceedings, and that the public prosecutor's office in Serbia has numerous competencies that resemble those of the courts (deferment of prosecution, plea bargaining, etc.), particularly justifies the need to define the prosecution as a judicial authority. The decisions of the public prosecutor's office i.e. public prosecutors directly affect the exercise and protection of human rights, without the possibility of their being reviewed by a court, which is why in many cases public prosecutors perform a judicial function, and thus, in accordance with Article 6 of the European Convention for the Protection of Human Rights, the prosecution must enjoy the guarantee of independence. Otherwise, there would be a systematic violation of the citizens' rights to a fair trial.

Although countries of the European Union apply different models of public prosecution, in the above quoted ***"Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service"*** the Venice Commission suggests that there is a widespread tendency of establishing public prosecutor's offices as independent authorities. The Venice Commission was of a similar view when it expressed its opinion on the amendments to the Law on Public Prosecution.[5]

Therefore, we suggest that the proposed Amendment be amended to read:

> *"1. The public prosecutor's office is a unique, autonomous, and in the exercise of its competencies independent judicial state body that prosecutes perpetrators of criminal and other punishable offences, protects constitutionality and legality, human rights and civil liberties.*
> *2. The public prosecutor's office shall exercise its competencies based on the Constitution, laws, ratified international treaties and generally accepted rules of international law.*
> *3. In exercising its competencies, the public prosecutor's office shall use all the resources provided to it by law.*
> *4. In exercising its powers, the public prosecutor's office shall be independent from the executive and legislative branches of power.*
> *5. Independence in the exercise of competencies and the autonomy of the public prosecutor's office, as well as other issues concerning the organisation and the operation of the public prosecutor's offices, shall be governed by the law that is adopted and amended by a two-thirds majority.*
> *6. As regards personal status and financial position, public prosecutors shall be considered equal to judges."*

[5] CDL-AD(2013)006, Opinion on the Draft Amendments to the Law on the Public Prosecution of Serbia, section 20.

Amendment XV supersedes Article 158 of the Constitution of the Republic of Serbia. However, the Working Version retains the obsolete Soviet model of rigid hierarchy, which is not appropriate for countering corruption. On the other hand, such a system, in which those on a lower level rely on the responsibility of those that are hierarchically higher, and the highest positioned person relies on politics, is inadequate for the development of values of integrity as one of the European standards in the judiciary.

Paragraph 3 of Amendment XV of the Working Version preserves the concept of deputy public prosecutors, even though they represent a relic of the Soviet system which has been abolished in most Eastern European countries. This relic corresponds to a hierarchical arrangement in which deputy public prosecutors are the executors of the orders of the prosecutor. When the independence of deputy public prosecutors is abolished, these holders of judicial function become nothing but mere officers. A public prosecutor's office so imagined will not be able to deliver in the fight against corruption, nor will it be able to respond to the European standards for integrity strengthening.

We believe that it is necessary to change the title of holders of prosecutorial office. Consequently, current deputy public prosecutors should be called public prosecutors, and current public prosecutors should be called chief public prosecutors. In prosecutor's offices organised in this manner, chief public prosecutors would manage the work, represent the prosecutor's office and have hierarchical powers without being the sole proprietors of the prosecutorial title. A changed model would imply that chief public prosecutor would be elected from the rank of public prosecutors, and that after the expiry of his/her mandate s/he would continue his/her duty as public prosecutor in the prosecutor's office from which s/he was elected.

We suggest that Amendment XV be amended to read:

> *"1. The Supreme Public Prosecutor shall head the Supreme Public Prosecutor's Office.*
> *2. The Supreme Public Prosecutor may issue mandatory instructions to all public prosecutors in accordance with the law.*
> *3. The Supreme Public Prosecutor shall be responsible for the work of the Public Prosecutor's Office and his/her work to the High Prosecutorial Council.*
> *4. Chief public prosecutors shall be responsible for the work of the public prosecutor's office and their work to the directly superior chief public prosecutor.*
> *5. Public prosecutors shall be responsible for their work to the chief public prosecutor."*

Amendment XVI refers to public prosecutors and deputy public prosecutors, and supersedes Article 159 of the Constitution. This Amendment fails to provide a clear distinction between exercising the competencies and performing the duties of a public prosecutor. In paragraph 2 of the working version of the draft amendment, a deputy public prosecutor is defined as just someone who is replacing a public prosecutor, that is, acting on his/her behalf, and not as the holder of prosecutorial office. This solution envisages that office of a deputy public prosecutor is derived from that of a public prosecutor. Also, paragraph 2 prescribes a sort of absolute professional subordination of the deputy to the public prosecutor, since it introduces the obligation of the deputy to act upon the instructions of the public prosecutor. Such a ***solution is in contravention of item 10 of Recommendation 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice***

System, which provides that there must be an adequate internal procedure whereby a prosecutor who believes that the instruction is either illegal or runs counter to his or her conscience may be replaced in a given case. A similar position is also cited in the 2016 Rule of Law Checklist of the Venice Commission.[6]

We suggest that Amendment XVI be amended to read:

> *"1. Chief public prosecutor shall head the public prosecutor's office.*
> *2. The competencies of the public prosecutor's office shall be exercised by public prosecutors.*
> *3. Chief public prosecutor shall be independent in the exercise of duties of public prosecutor.*
> *4. Chief public prosecutor may issue mandatory instructions to public prosecutors from the public prosecutor's office s/he is heading, as well as to any directly subordinated public prosecutors.*
> *5. Independence of a public prosecutor in the exercise of duties of public prosecutor shall be limited by the mandatory instructions of the chief public prosecutor, in accordance with the law."*

Amendment XVII refers to the election of the Supreme Public Prosecutor and public prosecutors, and supersedes Articles 158 and 159 of the Constitution of the Republic of Serbia. As already stated in the comments concerning the Amendment II, we are of the opinion that the election of the Supreme Public Prosecutor by the National Assembly is not in line with the standards. The solution stipulating that state prosecutors (i.e. chief public prosecutors) shall be elected by the High Prosecutorial Council is in line with the already mentioned Recommendation 19 of the Committee of Ministers of the Council of Europe. It is also stated in sections 35-38 of the Venice Commission's "Report on the European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service" that in countries where Attorney General [Supreme Public Prosecutor] is elected by the Parliament there is an obvious danger of politicising the process of appointment.

In addition, we believe that it is possible to keep the solution from the Constitution of 2006 – the six-year term of office of the Supreme Public Prosecutor and public prosecutors (chief prosecutors), especially because of the exclusion of the possibility of re-election.

We suggest that Amendment XVII be amended to read:

> *"1. The Supreme Public Prosecutor shall be elected by the High Prosecutorial Council, by means of a vote of at least six members from the rank of public prosecutors, and two that are not public prosecutors.*
> *2. The term of office of the Supreme Public Prosecutor shall be six years; s/he may not be re-elected and shall continue, after the expiry of the term of office, to perform the duties of a public prosecutor.*
> *3. Chief public prosecutors shall elected by the High Prosecutorial Council from among the public prosecutors, in the manner prescribed by law.*
> *4. The term of office of a chief public prosecutor shall be six years; s/he may not be re-elected chief public prosecutor of the same public prosecutor's office twice*

[6] CDL-AD(2016)007, Rule of Law Checklist, sections 91 and 95 CDL-AD(2016)007.

consecutively and shall continue, after the expiry of the term of office, to perform the duties of a public prosecutor."

Amendment XVIII refers to the permanence of tenure of deputy public prosecutors and the transfer and temporary referral of deputy public prosecutors, superseding Article 159 of the Constitution of the Republic of Serbia. Paragraph 3 of Amendment XVIII foresees training completed at the judicial training institution as a prerequisite for the election of a deputy public prosecutor to a prosecutor's office of the lowest instance. It follows from this provision that, in its decision-making process, the High Prosecutorial Council is bound by the prior decision taken by the judicial training institution, without a single guarantee of said institution's independence from the executive and legislative powers. This solution would make sense if the training institution was defined as the working body of the High Judicial Council and the High Prosecutorial Council.

Paragraph 6 of Amendment XVIII stipulates that, by the decision of the Supreme Public Prosecutor, a deputy public prosecutor may be transferred or temporarily referred to another public prosecutor's office against his/her will. The Venetian Commission, however, had pointed out that prosecutors must be provided with certain security guarantees, or the possibility of lodging a complaint in the event of a transfer.[7]

It is unclear why the working group that drafted the Working Version decided to include provisions on transfer and referral into the text of the constitutional amendments, given that these are provisions that govern the functioning of the public prosecutor's office that do not constitute *materia constitutionis* [constitutional matter]. As the drafters of the Working Version have decided to include this matter in the amendments, it remains unclear why they failed to also include restrictions regarding the above referral or transfer.

We suggest that Amendment XVIII be amended to read:

"Public prosecutors shall be elected to permanent tenure by the High Prosecutorial Council, in the manner prescribed by law."

Amendment XIX refers to immunity and incompatibility, superseding Articles 162 and 163 of the Constitution of the Republic of Serbia. The working version of the amendment abolishes the functional criminal immunity of public prosecutors and deputy public prosecutors, regardless of the fact that the need for the existence of functional immunity for actions performed in good faith and in accordance with duties is pointed out in the Report on European Standards as Regards the Independence of the Judiciary, sections 17, 19, 22 and 61-61.

Paragraph 2 of Amendment XIX governs incompatibility of public prosecutors' and deputy public prosecutors' office with the exercise of another public or private function. Since the working group defined incompatibility quite broadly, it also should have included international standards. Item 6 of Recommendation 19 requires prosecutors to have an effective right to associatiation, assembling and freedom of expressing their convictions.

We suggest that Amendment XIX be amended to read:

[7] CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, section 80

"1. Public prosecutors may not be held accountable for the opinions expressed in the discharge of the public prosecutor's office, except in the case of a committed criminal offence.
2. Public prosecutors may not be deprived of their liberty in the proceedings initiated for a criminal offence committed in the discharge of public prosecutor's office without the consent of the High Prosecutorial Council.
3. Political activity of public prosecutors is prohibited.
4. The law shall prescribe other functions, types of work or private interests that are incompatible with the public prosecutor's office."

Amendment XX refers to the jurisdiction of the High Prosecutorial Council and supersedes Article 165 of the Constitution of the Republic of Serbia. The text of Amendment XX reduces the existing guarantees, that is, the obligation of the present State Prosecutorial Council to ensure and guarantee autonomy. According to the working version of the text of Amendment XX, the High Prosecutorial Council only guarantees autonomy - and only that of the public prosecutor's offices, not that of public prosecutors and deputy public prosecutors. Such a solution deprives public prosecutors and deputy public prosecutors of the guarantee of autonomy, thus abolishing any form of their personal autonomy.

In the Working Version, it is stipulated that one of the competencies of the High Prosecutorial Council is to elect disciplinary bodies, but not to carry out disciplinary proceedings. This makes it possible to remove the disciplinary proceedings from the purview of the High Prosecutorial Council. Also, the part referring to budget management is not in line with the Action Plan for Chapter 23, point 1.1.4.7, which clearly stipulates the obligation to transfer the budgetary competencies from the Ministry of Justice to the State Prosecutorial Council.

We suggest that Amendment XX be amended to read:

"1. The High Prosecutorial Council is an autonomous body that ensures and guarantees the autonomy and independence of public prosecutors in accordance with the Constitution.
2. The High Prosecutorial Council shall elect the Supreme Public Prosecutor, chief public prosecutors and public prosecutors, decide in the procedure terminating the office of chief public prosecutors and public prosecutors in the manner provided for by the Constitution and the law, decide on the immunity of members of the High Prosecutorial Council and public prosecutors, manage the budget of the public prosecutor's office, conduct disciplinary proceedings, draft the training programme, pass acts from its purview, and perform other tasks as stipulated by law."

Amendment XXI refers to the composition of the High Prosecutorial Council and supersedes Article 164 of the Constitution of the Republic of Serbia. The working version of the text of Amendment XXI reduces the number of prosecutors - members of the High Prosecutorial Council, in relation to the current number of members elected from the rank of prosecutors. The current solution from the Constitution of the Republic of Serbia stipulates that public prosecutors and deputy public prosecutors shall constitute the majority of the members, i.e. that they shall have six representatives in the State Prosecutorial Council, out of the total of 11 members. The newly presented solution represents a reduction in the achieved level of prosecutorial self-government, because it proposes that only four out of 11 members be representatives of public prosecutors or deputy public prosecutors. The proposed solution is

not in line with the opinions expressed by the Venetian Commission concerning the judiciary of Bosnia and Herzegovina and Montenegro,[8] stating that the majority of the members should be prosecutors elected by their peers.

Also, the Working Version introduces a category of prominent lawyers, but fails to define the criteria for establishing who happens to be a prominent lawyer, or the profession or organisation s/he should be coming from. The solution from the current Constitution of the Republic of Serbia stipulates that representatives of prominent lawyers shall be elected from the rank of professors, i.e. attorneys.

In relation to the existing solution, we propose that prosecutors represent the majority, i.e. seven out of 11 members, and that the Minister of Justice be excluded in accordance with the National Judicial Reform Strategy for the period 2013-2018. We propose that the Constitution provide guarantees of independence of the above prominent lawyers, that is, incompatibility with the exercise of public offices with the exception of judicial office, during a certain period of time prior to their election to the High Prosecutorial Council.

Amendment XXII refers to the term of office of members of the High Prosecutorial Council and the President of the High Prosecutorial Council. The working version of the text of the amendment does not provide for constitutional guarantees of the autonomy and permanence of office of members of the High Prosecutorial Council. We are of the opinion that it is also necessary to list the legal grounds for their dismissal.

Another controversial provision stipulates that the Supreme Public Prosecutor shall *ex officio* be President of the High Prosecutorial Council. In its opinions, the Venice Commission has supported the idea of electing the President from among the members of the Council.[9]

We suggest that Amendments XXI and XXII be amended to read:

> *"1. The High Prosecutorial Council shall have 11 members: seven public prosecutors, one of which shall be the Supreme Public Prosecutor, and four distinguished and prominent lawyers.* Prominent lawyers shall be lawyers of professional and moral integrity with at least 15 years of professional experience. Prominent lawyers may not be elected if they had served as state officials or officials in a political party during the period of 10 years prior to their candidacy. Other criteria for the selection of prominent lawyers and the election procedure shall be regulated by law. *(Alternatively: including one lawyer, one law faculty professor, one judge and one representative of a civil society organisation dealing, inter alia, with the protection of human rights in court proceedings).*
> *2. Members of the High Prosecutorial Council from the rank of public prosecutors shall be elected by direct and secret vote of all public prosecutors on the list for all levels of public prosecutors' offices.*
> *3. Members of the High Prosecutorial Council that are not public prosecutors shall be elected by the National Assembly, by a qualified majority, on the proposal of an authorised proponent in accordance with the law.*

[8] CDL-AD(2014)008, Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, section 45.
CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, section 38.
[9] CDL-AD(2008)019, Opinion on the Draft Law on the Public Prosecutorsć Service of Moldova, section 62.

4. The term of office of the members of the High Prosecutorial Council shall be five years."

Amendment XXIII refers to the functioning and the decision-making process of the High Prosecutorial Council. The working version of text of the Amendment envisages the possibility for the Minister of Justice and the Supreme Public Prosecutor to institute disciplinary procedure, thereby eliminating the exclusive competence of the Disciplinary Prosecutor to initiate such procedure. This type of authorisation is contrary to the Opinion of the Venice Commission on the Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro,[10] in which the Commission stated that "the parity of members of the Judicial Council who are judges and lay judges" does not apply to disciplinary proceedings "in which the Minister is not allowed to vote." In the Opinion of the Venice Commission, it is unquestionable that the Minister of Justice should not be able to decide on the disciplinary liability of members of the public prosecutor's office. Contrary to the intent expressed in the Opinion of the Venice Commission – that the Minister should be excluded from deciding on disciplinary offences – the Working Version of the Draft Amendments to the Constitution of the Republic of Serbia provides the Minister of Justice with the authority to initiate disciplinary proceedings.

We suggest that Amendment XXIII be deleted.

Amendment XXIV refers to the immunity of members of the High Prosecutorial Council. The working version of the text of Amendment XXIV eliminates the functional criminal immunity of members of the High Prosecutorial Council, stipulating that members of the High Prosecutorial Council shall not be held accountable for the expressed opinion and vote, unless they commit a criminal offence thereby. In this way, criminal immunity is abolished while immunity from misdemeanour and civil liability remains. This solution is contrary to the numerous opinions of the Venice Commission mentioned in the comments relating to Amendment XIX.[11]

We propose that Amendment XXIV be amended to read:

"1. A member of the High Prosecutorial Council shall enjoy immunity as a public prosecutor.
2. The High Prosecutorial Council shall decide on the immunity of the members of the High Prosecutorial Council.
3. Members of the High Prosecutorial Council may not be deprived of their liberty in the proceedings instituted for a criminal offence they have committed in the capacity of members of the High Prosecutorial Council without the approval of the Council."

[10] Strasbourg, 17 December 2012, Opinion No. 667/2012, CDL-AD(2012)024, European Commission for Democracy through Law (Venice Commission), Opinion on the two sets of draft amendments to the constitutional provisions relating to the judiciary of Montenegro, adopted by the Venice Commission at its 93rd plenary session (Venice, 14-15 December 2012).
http://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL/AD(2012)024-e (30 January 2018).

[11] "It is also contrary to the Opinion on the two sets of draft amendments to the constitutional provisions relating to the judiciary of Montenegro, in which it is clearly stated that a prosecutor should enjoy a strictly limited functional immunity."

Belgrade, 6 March 2018

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