The Draft Amendments to the Serbian Constitution: Populism before Judicial Independence

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Serbia is currently abuzz with draft constitutional amendments that should enhance judicial independence and move the country one step closer to EU accession. On 12 April 2018, after almost a year-long heated public debate on different proposals, mostly advanced by civil society, constitutional experts, and in the later phase, by the Ministry of Justice, the Serbian Government adopted the draft amendments to the Constitution and sent them to the Venice Commission. Although the Government has asserted that the draft amendments closely follow many of the experts' suggestions given publicly in what was a "'O. Captain! My Captain!" moment, it is true that they were drafted by civil servants. The proposed constitutional revision, quickly termed 'bureaucratic', has been harshly criticized both by judges and prosecutors' associations.

Why amend the Constitution?

Paradoxically, after the fall of the Milošević regime, the winning democratic forces have continuously resisted to liberate the judiciary from direct political and financial influence. Adopted in 2006, mostly to reassert sovereignty over Kosovo, the valid Constitution itself endorses politicization of judiciary. The excessive influence of the legislative and executive branch on the judiciary is particularly discernable in the election and composition of the "independent" bodies assigned with the appointment and dismissal powers: all of its eleven members are directly or indirectly elected by the National Assembly. Additional means for politicization of the judiciary are furnished by the constitutional provisions on the appointment of judges for probationary periods and the poorly drafted checks and balances principle that instigated interpretation inconsistent with the separation of powers.

Moreover, not only has the judicial power not been installed as a separate branch of government up to this date, but the members of judiciary who in Milošević's time betrayed the profession and served his autocratic regime, have not been lustrated. Therefore, in the EU accession process, the EU made it clear that no membership was possible without a thorough reform of the judiciary, including the necessary constitutional revision.

The amendments to the Constitution are drafted to satisfy this obligation in the EU accession process albeit with a significant delay (the deadline for their adoption was the end of 2017). A delay cannot be attributed to the Government's wish to avoid potential difficulties in the adoption procedure, because the ruling forces have the requested two-thirds parliamentary majority and enjoy a wide public support. Rather, the ruling populists' general strategy of frequent elections and government reshuffle caused institutional stasis (between 2012 and 2018, the parliamentary elections were held three times, the presidential once, while now, the Government, reshuffled in 2017, awaits yet another reshuffle). One may also speculate that the delay was caused due to the ruling forces intention to propose a last-minute constitutional revision on Kosovo, depending on an

agreement reached in the process of the ‘normalization of relations between Serbia and Kosovo’, currently under the spotlight.

Draft Amendments: A Tool for the Final Demise of Judicial Independence

Despite some envisaged improvements, including the absence of the representatives of political institutions in the appointment and dismissal of judges, the abolition of the appointment of judges for probationary periods, and the inclusion of many presently missing aspects of the personal independence of judges in the constitutional text, the draft amendments, if adopted, will further undermine the already compromised idea of judicial independence in Serbia.

Supported by the populist claim that Serbia needs not only independent but foremost *responsible* judiciary (‘citizens are entitled to judicial proceedings based on law and not on free judicial reasoning’), draft constitutional amendments do not eliminate but rather reallocate the sources of political influence on the judiciary. Instead through political institutions, the political influence will now directly steam from the ruling majority, confirming once again that populism is a ruling ideology in Serbia. Consider the following.

In the emerging democracies, crucial for judges’ independence is the process of their selection and appointments. On this point, several solutions envisaged in the draft amendments testify, to paraphrase Jefferson, that the dead hand of the past has not loosened its grip on the living present.

First, a proposal to elect judges for the first time*only* from among those who have undergone special training at a judicial training institution, might be a potential channel for the ruling majority to influence their selection, provided that it also controls the training institution itself. It might seem speculative, but given the present politics, it is worth pondering where this proposal may lead. The proposal is also constitutionally susceptible, because Article 53 of the Constitution guarantees the right to all citizens to assume public services and functions under equal conditions. In addition, it is inconsistent with the Kyiv Recommendations on Judicial Independence, endorsed by the OSCE, which insist on diversity of access to judicial profession.

Second, it is proposed that, composed of ten members, the High Judicial Council (the HJC) will be the only authority charged with appointment and dismissal powers. As to the members, five judges are to be elected by their peers, and five ‘prominent lawyers’ by the National Assembly. Compared to the present solutions, the HJC will have a monopoly on the appointment and dismissal of judges, but will have less judges than now and only half of its members will be elected among judges themselves. Moreover, its president will no longer be elected among judges but its non-judicial members.

To justify the revised composition of the HJC, the drafters cherry-picked from the Venice Commission recommendations and referred to the Commission’s view that “an overwhelming supremacy of the judicial component [in judicial councils] may raise concerns related to the risks of ‘corporatist management’. However, (a) there is no overwhelming supremacy of the judicial component in the present composition of the HJC; and (b) the

Commission made it clear that a "substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself". Therefore, dancing with the Commission's position serves to manipulate the public audience, dissatisfied with the significant backlog in judicial cases.

Third, the National Parliament is to elect five 'prominent lawyers' defined as "a law school graduate with a Bar exam who has at least ten years of working experience…[and] who demonstrated professional work and enjoys personal reputation." Since academic credentials are no longer required, any non-compromised mid-career lawyer will fit for the post. Consequently, the posts might be easily vacated by the followers. Another way of achieving the same aim is secured by casting an insignificant role to the opposition in the election of 'prominent lawyers'. The required majority for the decision is rather unique: 'prominent lawyers' are to be elected by means of a *three-fifths* majority vote of all deputies (250), and if not achieved, within next 10 days another election will be held requiring a *five-ninths* majority vote of all deputies. To demystify, if a qualified majority is not achieved for the election of all candidates, the rest will be then elected by votes of 139 deputies, which makes the ruling majority capable to influence the process. Having in mind the present polarization in Serbian politics, this will be the rule and not the exception. However, there is a further wrinkle here. Candidates who remain non-elected in the second round, will be elected by the Commission whose members are directly or indirectly influenced by the ruling majority: the presidents of the National Assembly, the Constitutional Court and the Supreme Court, the Supreme Public Prosecutor and the Ombudsman. This time, a simple majority will do the job.

Fourth, and on the top of everything, the constitutional revision envisages that*the term of office of all members of the HJC shall be terminated* if the HJC fails to make a decision in the matter of its competence within 30 days from the day of its first consideration. For example, this may easily occur whenever the HJC fails to render a decision necessary to 'discipline' a 'disobedient' judge in politically sensitive cases.

In short, the ruling populists, standing behind the proposed amendments, made no room for the judicial power to become a separate branch of the government.

Now, according to the draft amendments, the future constitutional position of the prosecutors is also grim. Thus, the amendments completely ignore the fact that, in emerging democracies, "Insulating the judiciary alone from undue political pressures while leaving prosecutors to the mercy of political interference would prevent prosecutors from investigating and taking to the bar corrupted segments of the governments". Instead of providing prosecutors the high level of institutional independence, the drafters made sure the prosecutors would pursue the politics of the ruling majority. Thus, according to the revised composition of the Prosecutorial Council, the prosecutors are to elect *only four* among eleven members, and only from among deputy public prosecutors and not from among public prosecutors themselves (at present the State Prosecutors Council includes six prosecutors from among public prosecutors and deputy public prosecutors). The rest of the seven members will be elected by the National Assembly: five 'prominent lawyers' (to be elected in the same procedure envisaged for their election in the HJC), the Supreme Public Prosecutor and the Ministry of Justice. Goodbye fight against corruption, in the country in which corruption percentage index shows increasing tendency.

To summarize: while at present, the political influence on the judiciary comes from the political institutions, in the future, in case nothing changes in the amendment procedure, this influence will come from the ruling majority. The fact that the Government has endorsed such a constitutional revision, testifies that the constitutionalism in Serbia satisfies all components of populist constitutionalism as defined by Müller: (a) the ruling forces claim that they alone represent "the real people"; (b) there is a tendency to establish a 'populist constitution' endorsing a new set of rules for the political game; and (c) there is an anti-pluralist goal inaugurated by the ruling forces: they 'should perpetually be in office'.

Looking Ahead

It is uncertain whether and when the adoption of the draft amendments will follow. The constitutional revision has not yet been officially initiated. Thus, the Government promised it would not insist on the adoption without having the draft amendments endorsed by the Venice Commission, which, due to their shortcomings, is not likely to happen at once. Afterwards, the complex amending procedure is to follow: first, the proposal to amend the Constitution must be adopted by the two-thirds majority in the National Assembly; then, on the basis of the adopted proposal, the amendments are to be drafted by the parliamentary Committee for Constitutional Issues and also adopted by the two-thirds majority in the National Assembly; next, the amendments must be endorsed by the citizens by a referendum with the majority of votes; at the end of the day, if endorsed in the referendum, the amendments will come into force once promulgated by the National Assembly. Finally, if, in the meantime, Kosovo's knot mostly unfastens to Serbia's detriment, pressing for the adoption of the draft amendments might turn costly for the ruling majority. Yet, the recent election victories signal the ruling populists may find a way to appeal to 'the people' and win this battle as well.

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