

The Sixth Amendment of the Constitution. Are we expecting an improvement in justice?

On December 20th, the Sixth Amendment of the Constitution of the Republic of Bulgaria became a fact. The constitutional amendments were voted on the third reading in the Parliament, with a roll-call vote. The amendments provided the following changes:

- The Supreme Judicial Council (SJC) is splitting in two – one for judges, one for prosecutors
- The powers of the Prosecutor General are limited and his term is reduced
- Citizens are allowed an indirect access to the Constitutional Court
- Dual citizens are allowed to become MPs and ministers
- The President's powers are narrowed regarding caretaker governments

This occurred after on the 16th and 17th of December the Constitutional Commission of the National Assembly examined and voted on the proposed amendments, submitted by “WCC-DB”, GERB and DPS on the second reading. The draft law on Amendments and Additions to the Constitution, submitted on 28 July 2023, sparked heated and controversial reactions, which led the Members of the National Assembly to make edits to the proposed texts. Some of the original proposals included:

- Dividing the SJC into a SJC and a Supreme Prosecutorial Council, abolishing the Plenum
- Different proportions of the parliamentary and judicial quota of members for the two councils
- May 24th to become the National holiday
- Shorter terms for the Prosecutor General and the Presidents of the SCC and the SAC
- Changes in the formation of caretaker governments

The Venice Commission expressed support for the division of the Supreme Judicial Council, but also criticism regarding the lack of public debate, as well as criticism regarding the distribution of members in the Prosecutorial Council, recommending a balanced representation of the prosecution. The committee's report also says that there is no international standard on the need for a Prosecutorial Council, but properly constituted councils strengthen the autonomy of the prosecution system in relation to other branches of government, as well as the internal autonomy of individual prosecutors. The independence of individual members of the Prosecutorial Council should not be a prerogative or privilege granted in their own interest, but a guarantee in the interest of the fair, impartial and efficient functioning of the prosecution system. The Commission recommends reviewing the composition of the Prosecutorial Council in order to avoid the risk of political influence on the prosecution service. Despite the recommendations, the final text remained the same.

What was adopted?

The President retains the power to appoint and dismiss the Prosecutor General and the Presidents of the Supreme Courts. In the original bill, this power was removed, but after criticisms and discussions, MPs decided to keep it among the powers of the head of state. A text was adopted according to which, if the President does not issue a decree appointing the President of the SCC, the SAC or the Prosecutor General within 7 days, the decision on the selection of the respective council or position will be promulgated and the appointment will come into effect.

The Prosecutor General retains the methodological leadership of the prosecution, and will establish a uniform standard for cases in the pre-trial phase, although they will not be prepared by him alone, but on the proposal of the Supreme Prosecution's Office.

The Supreme Judicial Council will be divided into two councils - the Supreme Judicial Council and the Supreme Prosecutorial Council. The new Supreme Judicial Council will have 15 members - the presidents of the SCC and the SAC, 8 members elected by judges and 5 by the National Assembly. The new Supreme Prosecutorial

Council will consist of 10 members - the Prosecutor General, two members elected by the prosecutors, one by the investigators and 6 by the Parliament.

A General Assembly will succeed the Plenum of the SJC, with its powers limited to deciding only on certain issues. In this Assembly, the Prosecutor General and the Minister of Justice will have no voting rights. It will be chaired by the President of the Supreme Court of Cassation and, in his absence, by the President of the Supreme Administrative Court.

The mandate of the Judicial Council will be four years, of the Prosecutorial Council also four, of the Prosecutor General - five, of the presidents of the Supreme Courts - seven. The proposal of "There is Such a People" that the Prosecutor General be elected by the general public was dropped.

The current composition of the SJC, although with an expired mandate, will continue to act for at least another nine months. This was adopted by transitional and final provisions, which stipulate that within six months after the entry into force of the amendments to the Constitution, the National Assembly "shall adopt the laws relating to the implementation of the amended texts". Thereafter, another three-month period is prescribed from the entry into force of the laws to conduct the procedure for the election of council members. The current SJC will now only be unable to appoint Presidents of Supreme Courts and a Prosecutor General.

The Supreme Administrative Prosecutor's Office is being closed. Thus, in practice, there will be no Supreme Cassation Prosecutor's Office and no Supreme Administrative Prosecutor's Office. The prosecutor's office will no longer be able to carry out checks in all administrations, but it will retain the right to attack administrative acts and to intervene in cases where the public interest or the interest of people in need of special protection must be protected.

Despite the opinion of the Inspectorate to the SJC of 5.12.2023 with a proposal to expand the composition of the Inspectorate and the number of the Inspectorate from 10 to 15 together with the

Inspector General, the Inspectorate remains unchanged. Inspectors will be eligible for re-election to the same position for another term.

The caretaker Prime Ministers will be elected from among the president of the National Assembly, the president of the Supreme Court of Cassation, the governor or sub-governor of the Bulgarian National Bank, the president or vice-president of the Court of Auditors and the ombudsman or his deputy. The original draft envisaged a narrower range of persons who could become caretaker Prime Ministers.

Dual citizenship is allowed for MPs. The original draft stipulated that they must have lived in the country for the last 18 months. This amendment also allows dual citizenship for ministers, and there will be no residency requirements for them.

The idea that the Parliament should not be dissolved if it is impossible to form a cabinet is maintained. This will avoid a legislative vacuum when elections are held. The new text now looks like this:

"Article 64. (1) The National Assembly shall be elected for a term of four years.

(2) In the event of war, martial law or any other state of emergency occurring during the term of office of the National Assembly, the term of office of the National Assembly shall be extended until such circumstances cease to exist.

(3) Elections for a new National Assembly shall be held not later than one month before the expiry of the term of office of the current National Assembly."

(4) The oath of office of the newly elected Members of the National Assembly shall terminate the powers of the previous National Assembly."

Through the courts, citizens will be able to appeal to the Constitutional Court. Any court can refer a case to the Constitutional Court at its discretion or at the request of a party, but only for the unconstitutionality of a law applicable to a particular case - there will be no possibility to ask for an interpretation of the Constitution.

The wording for the text on regulators will be broader: "The National Assembly shall respect

the principles of openness, transparency, publicity and reasonableness in the selection of members of bodies which it fully or partially appoints, in order to ensure their independence. Decisions on elections shall be adopted by a two-thirds majority of all deputies, where this is provided for by law," reads the new version of the text.

The proposal to change the national holiday from 3 March to 24 May was dropped.

The opposition is against the amendments of the Constitution.

The leader of "Revival" Kostadin Kostadinov said that they are unconstitutional and that "Revival" will attack all changes of the Constitution.

BSP leader Kornelia Ninova expressed suspicion that the government had opened the door for negotiations with President Rumen Radev because no explicit text had been adopted stating that a special law would limit the powers of the caretaker cabinet.

"There is Such a People" also strongly criticized the changes and expressed certainty that the Constitutional Court would stop them.

What opinions were given on the reforms?

The SCC, in an official opinion, strongly disagreed with the proposal that the President of the Supreme Court of Cassation be included in the circle of persons from among whom a caretaker Prime Minister should be appointed, as this would contradict the principle of separation of powers and would affect his independence. The opinion further states that the proposal thus made contradicts the independence of the judiciary proclaimed in Article 117 of the CRC and is unconstitutional.

The Supreme Bar Council made a proposal in its opinion to the Constitutional Commission to create a guarantee at the Constitutional level that the "public quota" will indeed be such and will not be political, by explicitly stating that members of political parties and organisations and MPs cannot be elected by the National Assembly. In its opinion, the SBC disagrees with the proposal to extend the powers of the Inspectorate through the proposed power to carry out inspections for systematic violations of the law and the rules of court procedure, as this would affect the independence of the judiciary.

The envisaged changes are criticized with regards to the exclusion of the Prosecutor General from the circle of subjects with general competence to appeal to the Constitutional Court in case of violation of rights and freedoms of citizens, otherwise the Prosecution would be deprived of a mechanism to carry out its function to ensure legality.

The Supreme Bar Council also proposed that the powers of the Ombudsman and the SBC to refer cases to the Constitutional Court be expanded in view of the subject scope of the requests, by removing the restriction that the requests should be limited to the unconstitutionality of laws, which violate fundamental rights and freedoms of citizens, which in the practice of the Constitutional Court has been interpreted narrowly and deprives of the possibility to obtain constitutional protection all rights of citizens which are not regulated in Chapter Two of the Constitution and especially economic rights which are regulated in Chapter One.

Next, it was proposed that the possibility of referral to the Constitutional Court should be expanded by allowing the request not only to the unconstitutionality of the law applicable to the case, but also to the incompatibility of the law applicable to the case with an international treaty to which Bulgaria is a party.

The Supreme Judicial Council, for its part, expressed support for the envisaged majority of judges elected by judges in the Judicial Collegium, but considered the proposals to abolish the Plenum of the SJC and to create two separate councils unconstitutional, citing the Constitutional

Court's Decision No. 3 of 10 April 2003 in Case No. 22/2002 and Decision No. 3 of 10 April 2003 in Case No. 22/2002, according to which this can only be done by a Grand National Assembly. For this reason, the deputies adopted on second and third reading that the Plenum of the SJC should be called the General Assembly of the Supreme Judicial and Supreme Prosecutorial Council, since its abolition requires the convening of a Grand National Assembly.

Which are the problematic changes?

The texts regarding the judiciary have caused the most controversy in the public space. The idea that the public quota in the newly created Prosecutorial Council should prevail was criticised on the grounds that there should be no political influence in the state Prosecution. The aim of this change is to ensure that the Prosecutorial Council is not dominated by members nominated by the prosecution service, over whom the Prosecutor General has influence. In order to avoid political influence, it was accepted that the members elected from the public quota should not be party affiliated.

Allowing dual citizenship for MPs and ministers also raises concerns and mixed reactions. The main concerns are that this would open the door to foreign influence by giving foreign nationals access to the state government. According to the provisions adopted, a Bulgarian citizen who also holds another citizenship and has lived in the country for the last 18 months can be elected as an MP. The residency requirement will not apply to ministers. In the Constitutional Committee, when discussing the amendments on second reading, the experts from the Public Council raised the issue of the way "sedentariness" would be proved. It was also pointed out that this could lead to a potential case of discrimination, as a number of other positions are prohibited from holding dual citizenship.

As is clear from the opinion of the Supreme Court of Cassation, the inclusion of the President

of the Court in the circle of options for a caretaker prime minister could also lead to problems, as it creates a risk of violating the principle of separation of powers.

Public attitudes



According to the survey¹, of public attitudes conducted by the Bulgarian Institute for Legal Initiatives, the raising of standards in the election of the leadership of the independent regulators, the reduction of the mandates of the Prosecutor General, the Presidents of the SCC, the SAC and the SJC and the reduction of the powers of the Prosecutor General are widely welcomed with over 50% of respondents expressing approval. In contrast, allowing dual citizens to be elected as MPs is rather negatively received with 59% expressing disapproval.

¹ Bulgarian Institute for Legal Initiatives. Global Metrics Ltd. (2023, November), Attitudes towards changes in the Constitution and convening a Grand National Assembly. http://www.bili-bg.org/11/1163/news_item.html

Conclusions

The Constitutional amendments have been adopted by the Parliament, but the obstacles towards the Constitutional reform are not yet over. There are already requests from the opposition that the amendments will be attacked before the Constitutional Court. The Court could overturn the adopted texts if it finds that the ordinary National Assembly has encroached on the competence of the Grand National Assembly, as many experts have expressed fears about. Such a decision would create a normative vacuum and a host of problems, as declaring the new provisions unconstitutional would not automatically "resurrect" the old ones (see the Constitutional Court's Decision No. 3 of 2020).

In spite of all the criticism that the amendments to the Constitution have received, the sixth amendment of the Constitution was extremely necessary and desirable. These changes have their logic, following the dynamics of political life in Bulgaria in recent years. The absolute power of the General Prosecutor and the rule of the President's caretaker cabinets were among the main prerequisites for seeking and finding a solution in a democratic manner.

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