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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

Serbia

Secretariat Memorandum

**on the compatibility of
the draft Amendments to the Constitutional Provisions
on the Judiciary**

**as submitted by the Ministry of Justice of Serbia
on 12 October 2018
(CDL-REF(2018)053)**

**with the Venice Commission's Opinion on
the draft Amendments to the Constitutional Provisions
on the Judiciary
(CDL-AD(2018)011)**

I. Introduction

1. Following a request on 13 April 2018 by Ms Nela Kurubović, Minister of Justice of Serbia, an opinion (CDL-AD(2018)011) on the draft Amendments to the constitutional provisions on the judiciary (CDL-REF(2018)015) was adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).
2. There were two sets of draft Amendments prepared by the Ministry of Justice of Serbia.
3. The first set of draft Amendments were adopted by the Government of Serbia prior to their submission to the Venice Commission for an opinion (CDL-AD(2018)011).
4. At the time, the Venice Commission was concerned to learn that the important process of amending the Constitution of Serbia of 2006 in its sections pertaining to the judiciary to bring it into line with European standards began with a public consultation process marred by an acrimonious environment. The Venice Commission, in its opinion (CDL-AD(2018)011), encouraged the Serbian authorities to spare no efforts in creating a constructive and positive environment around the public consultations concerning this important process of amending the Constitution.
5. A second set of draft Amendments was prepared by the Ministry of Justice of Serbia after the adoption of the Venice Commission's opinion, and was submitted for public consultation on 18 September 2018. These draft Amendments were also sent to the Venice Commission for assessment.
6. Following public discussions and consultations between the Venice Commission and the Ministry of Justice of Serbia, the second set of draft Amendments were modified and sent to the Secretariat of the Venice Commission on 12 October 2018 (CDL-REF(2018)053).
7. The present memorandum examines whether, and to what extent, the text submitted to the Venice Commission on 12 October 2018 follows the recommendations contained in its opinion of 22-23 June 2018 (CDL-AD(2018)011).

II. Analysis of the recommendations made by the Venice Commission in its opinion CDL-AD(2018)011

A. Main recommendations of the Venice Commission

1) Composition of the High Judicial Council (HJC) and the role of the National Assembly

8. In the first set of draft Amendments, the amendment dealing with the election of non-judicial members of the HJC by the National Assembly provided for two rounds of elections: a first round of elections (3/5th majority) and a second round (5/9th majority). In the event that not all the candidates were elected, a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, would elect the remaining members by majority vote.
9. The Venice Commission indicated in its opinion that this structure would provide little incentive for the majority in the National Assembly to avoid a second round of voting to create a situation where half the members of the HJC form a coherent and like-minded group in line with the wishes of the current government.

10. The Venice Commission therefore recommended that this be changed and provided for four options:

(1) One would be to provide for a proportional electoral system that ensures the minority in the Assembly will also be able to elect members.

(2) Another option would be to give to outside bodies, not under government control, such as the Bar or the law faculties the possibility to appoint members.

(3) A third option would be to increase the number of judicial members to be elected by their peers.

(4) A fourth option would be to increase the majority requirement and to enable the five-member commission to choose from among the candidates who originally applied with the National Assembly for the membership in the HJC.

The opinion left it up to the Serbian authorities, based on the conditions in and experience of the country, to choose the most suitable option.

11. The text submitted to the Venice Commission has followed the fourth option by increasing the majority from 3/5th to 2/3rd in the first round. The second round has been taken out, but the text kept the commission as an anti-deadlock mechanism and is in line with the recommendations made by the Venice Commission.

2) Composition of the High Prosecutorial Council (HPC) and the role of the National Assembly

12. As recommended by the Venice Commission for the composition of the HJC, it was important that the HPC not be dominated by the current majority in the National Assembly so as to give it credibility and to gain public trust in the system. Having five out of 11 members elected by the National Assembly in addition to the Minister of Justice and the Supreme Public Prosecutor of Serbia – who is also elected by the National Assembly – gave rise to concern. As in the case of the HJC, a better solution to ensure pluralism in the HPC should be found, and the issues raised for judges in the HJC apply to the prosecutors in the HPC, to the extent applicable.

13. The text submitted to the Venice Commission is in line with the recommendation made and follows the same solution that was adopted for the HJC i.e. it increased the majority from 3/5th to 2/3rd in the first round of elections of members of the HPC by the Assembly. The second round has been taken out, but the text kept the commission as an anti-deadlock mechanism. It also excluded the Supreme Public Prosecutor of Serbia from the HPC. It is in line with the recommendations made by the Venice Commission.

3) Dissolution of the HJC

14. With respect to the dissolution of the HJC if it does not render a decision within 30 days, the Venice Commission recommended that this be either deleted or at least the conditions for dissolution tightened. The threat of dissolution could lead to the hastening in the decision-making process or to frequent dissolutions of the HJC. Taking into account the composition of the HJC of five-five, the deadlock in the decision-making process could potentially be provoked by the members of the HJC elected by the National Assembly part of the HJC against the judges or *vice versa*. This has the potential of rendering the HJC inoperative.

15. Although not the preferred solution, the text submitted to the Venice Commission is in line with this recommendation, as it lists the issues on which decisions need to be rendered and increases the period of time for the dissolution of the HJC from 30 to 60 days if a decision on an issue falling into the list is not made, thereby tightening the condition, as recommended.

4) Dismissal for incompetence

16. Although disciplinary responsibility for judges and for prosecutors is not covered by the draft Amendments, they set out very vague reasons for the dismissal of judges and of deputy public prosecutors. The Venice Commission recommended that more detail be provided in the draft Amendments regarding disciplinary responsibility and dismissal and the use of vague terminology such as “incompetence” without further specification should be avoided and therefore taken out.

17. The text submitted to the Venice Commission is in line with this recommendation, as it provides more detail and precision with regard to the disciplinary responsibility and dismissal of both judges and prosecutors. Notably, the wording now reads “*A judge may also be dismissed due to incompetence if, in a significant number of cases, he or she clearly does not meet the benchmarks of satisfactory performance prescribed by Law and evaluated by the High Judicial Council*”.

5) Method to ensure the uniform application of laws

18. The Venice Commission recommended that the third paragraph of Amendment V be deleted, which states that “*The method to ensure uniform application of laws by the courts shall be regulated by law*”. If, however, it was felt that a reference to the need to ensure proper harmonisation of case law should be included in the Constitution and if the reference to the role of the Supreme Court in Amendment X was not considered to be sufficient, then the first paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law.

19. The text submitted to the Venice Commission is in line with this recommendation as the Amendment on the independence of judges now states “*A judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws and other general acts, taking into account the case law*”; and, under the Amendment on the Supreme Court of Serbia, it now states “*The Supreme Court of Serbia shall ensure uniform application of the law by courts through its case law.*”

6) Public Prosecutors and Deputy Public Prosecutors

20. The Venice Commission recommended that public prosecutors should have no direct link to the National Assembly and hence not be elected by and responsible (accountable) to the National Assembly and that Amendments XIX and XXI should therefore be modified accordingly.

21. The text submitted to the Venice Commission is in line with this recommendation, as public prosecutors are no longer accountable to the National Assembly and are elected by the HPC.

B. Other recommendations by the Venice Commission

1) Recommendation regarding checks and balances

22. In its opinion, the Venice Commission noted that Article 4 of the current Constitution of Serbia states that the “*Government system shall be based on the division of power into legislative, executive and judiciary*” which is a general rule and then goes into more detail and states that “*Relation between three branches of power shall be based on balance and mutual control*”. The recommendation in this respect was to replace “*balance and mutual control*” with “checks and balances”.

23. This recommendation has been entirely followed in the text submitted to the Venice Commission.

2) Recommendation regarding the composition of the High Judicial Council (HJC)

24. In its opinion, the Venice Commission noted that the the criteria applied to the members of the HJC elected by the National Assembly raise the question as to why only those who have passed the Bar exam fall within the category of "*prominent lawyers*". This would exclude law professors, for instance, and the additional need for having had "*...at least ten years of working experience in the field of law falling within the competence of the High Judicial Council*" is very vague and unclear as to its purpose.

25. The text submitted to the Venice Commission addressed this issue and no longer refers to the Bar exam and took out the vague reference to *working experience in the field of law falling within the competence of the High Judicial Council*" and now states "*...relevant working experience as defined by law, ...*". This is in line with the Venice Commission's recommendation.

3) Recommendation regarding the composition of the High Prosecutorial Council (HPC)

26. The same recommendation was made by the Venice Commission with respect to the criteria applied to the members of the HPC elected by the National Assembly as were raised for the HJC, above.

27. The text submitted to the Venice Commission also addressed this i.e. taking out the reference for prominent lawyers to have had to pass the Bar exam and brought the rest of the text into line with the Venice Commission's recommendation.

4) Recommendation regarding the Judicial Academy

28. In its opinion, the Venice Commission explained that the Judicial Academy's role as the sole gatekeeper to the judiciary seems well founded with the aspiration and commitment to strengthen the calibre and professionalism of judicial and prosecutorial training. However, it recommended that the Judicial Academy be protected from possible undue influence by providing it with a firm status within the Constitution.

29. This recommendation has been followed since a separate article was introduced in the draft regarding the Judicial Academy and its status as an autonomous institution.

5) Recommendation regarding the transfer of judges

30. The Venice Commission has consistently supported the principle that transfers against the will of a judge may be permissible only in exceptional cases. In its opinion, it recommended that the wording in Amendment VIII "*in case of revocation of the court or the substantial part of the jurisdiction of the court*" needed more detail in order to narrow the situations down in a clear manner i.e. revocation of a court means the closure of the entire court and its transfer to another location or a transfer of jurisdiction from one court to another etc. It was also important to ensure that the same level of remuneration and an equivalent or similar position was guaranteed to the judge to be transferred and needed to be stipulated in this provision.

31. This concern has been addressed, including maintaining the same level of remuneration and an introduction of a right to appeal to the Supreme Court against the decision of relocation.

6) Recommendation regarding the political activity of judges

32. Amendment IX in its third paragraph prohibited judges and court presidents from engaging in political actions. While prohibiting membership in political parties is by no means unusual, the Venice Commission nevertheless recommended that “*political action*” be more clearly defined or replaced by introducing a prohibition of membership in a political party.

33. The text submitted to the Venice Commission took out the reference to “*political action*” and instead sets out that “*The law shall stipulate which functions, activities or private interests are incompatible with the function of a public prosecutor or deputy public prosecutor.*”

7) Recommendation regarding continuity/gradation in the terms of office of the President and the members of the HJC

34. Amendment XIV and Amendment XV dealt with the terms of office of the members of the HJC and the President of the HPC, respectively. The Venice Commission recommended that – in order to avoid all members of the HJC from changing at the same time every five years, including the President – a system of gradation in the turnover of the membership of the HJC be introduced.

35. There was an indication by the Serbian authorities that this would be included in the text of the constitutional law that will be adopted together with the draft Amendments, which would be welcome.

III. Conclusions

36. The recommendations formulated by the Venice Commission in its opinion CDL-AD(2018)011 were followed.