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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON

THE DRAFT AMENDMENTS TO THE

LAW ON THE HIGH JUDICIAL COUNCIL

OF

SERBIA

on the basis of comments by

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** This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents*

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I. INTRODUCTION

1. The Venice Commission received a request for an opinion on the draft Law on the High Judicial Council (and on the State Prosecutorial Council) of Serbia by letter of 26 June 2014 from Mr Nikola Selaković, Minister of Justice of Serbia.

2. Mr Johan Hirschfeldt, Mr Konstantine Vardzelashvili and Mr Jan Velaers were invited to act as rapporteurs for this opinion.

3. This opinion is a part of a series of opinions that were adopted by the Venice Commission on the judicial reform in Serbia, notably the Opinion on the Constitution of Serbia (CDL-AD(2007)004), the Opinion on the draft Law on the High Judicial Council of the Republic of Serbia (CDL-AD(2008)006), the Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia (CDL-AD(2008)007) and the Interim Opinion on the draft decisions of the High Judicial Council and of the State Prosecutorial Council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia (CDL-AD(2011)015). It takes into account the standards referred to by the Venice Commission in its opinions on judicial councils established in other countries, for instance in Armenia[1], Bosnia and Herzegovina,[2] Montenegro[3] and Turkey[4].

4. On 28-29 August 2014, the rapporteurs met with the Serbian authorities in Belgrade to discuss the draft amendments to the laws on the High Judicial Council and on the State Prosecutorial Council. The delegation met with the President of the Supreme Court of Cassation and the High Judicial Council; the President of the State Prosecutorial Council; representatives of the OSCE and diplomatic representations; the Judges Association of Serbia; the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia; the State Secretary and Assistant Minister of the Ministry of Justice of Serbia; the President of the National Commission for the implementation of the Strategy for the reform of justice and representatives of the Working Group responsible for the draft amendments to the laws on the High Judicial Council and the State Prosecutorial Council of Serbia.

5. The Venice Commission is grateful to the Serbian authorities and to other stakeholders for the excellent co-operation during this visit.

6. This opinion is based on the translation from Serbian into English of the draft amendments to the Law on the High Judicial Council of Serbia (CDL-REF(2014)029, hereinafter, the “draft Law”). The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

7. The present opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …).

[1] Joint Opinion on the draft Law amending and supplementing the Judicial Code (evaluation system for judges) of Armenia (CDL-AD(2014)007).
[2] Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (CDL-AD(2014)008).
[3] Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro (CDL-AD(2013)028).
[4] Interim Opinion on the draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey (CDL-AD(2010)042).

II. GENERAL REMARKS

A. Background

8. In order to place the draft Law submitted for assessment into the context that prevails in Serbia today regarding the High Judicial Council (hereinafter, the "HJC") – it is important to take into account the main developments that relate to the implementation of the National Judicial Reform Strategy of Serbia since its adoption by the Serbian National Assembly in 2006.

9. This Strategy was introduced in 2006 to reform the Serbian justice system, which was *"widely perceived by the Serbian public as being corrupt"*.[5] Within the context of this reform process, the Serbian authorities decided to introduce, in 2009, a reappointment process of all existing judges (and prosecutors) in Serbia. This procedure ended in December 2009 and the newly appointed judges (and prosecutors) took office in January 2010. The Venice Commission and the European Commission stated, at the time, that the decisions by the HJC not to reappoint all judges (and the State Prosecutorial Council not to reappoint all prosecutors) without providing reasoned decisions were tantamount to dismissals.

10. According to the information the Venice Commission's delegation received, the members of the "first composition" of the HJC (who were elected in 2009) had made, within the context of the reappointment procedure, the decisions that effectively dismissed (nearly) all the judges in the country. The members of the "permanent composition" of the HJC (who were elected in 2011) were then given the task of considering all the complaints received from the judges on the reappointment process carried out by the "first composition" of the HJC. The "permanent composition" of the HJC then had to decide to either reinstate those judges that were dismissed or confirm their dismissal (i.e. the HJC was given the task of reviewing its own decisions on the reappointment of judges – albeit under a different composition). This led to most of the judges seeing their dismissals confirmed and, reportedly, to the enduring distrust of the HJC today.

11. Most of the judges who saw their dismissals confirmed by the "permanent composition" of the HJC, appealed to the Constitutional Court (under Article 155 of the Constitution). The Constitutional Court judgments led to the reinstatement of all the judges that had been dismissed in Serbia.

12. Following these events, in its 2013 Opinion on the draft amendments to laws on the judiciary of Serbia[6], the Venice Commission urged the Ministry of Justice of Serbia to take stock of the situation in the country and take an active role in developing a clear concept on what the courts' network of Serbia should look like, since this task could not be carried out by the HJC on its own, due to the problems resulting from the unsuccessful reappointment procedure.[7] At the time, the Venice Commission already stated that the reform process should be measured and well prepared so as to be successful in achieving a right balance between speed and quality.[8]

B. Constitutional provisions and the current Law on the High Judicial Council

13. The Constitution of the Republic of Serbia, adopted by the National Assembly on 30 September 2006, established the HJC under Articles 153-155, rightly bringing this institution

[5] See Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia (CDL-AD(2008)007), paragraph 5.
[6] CDL-AD(2013)005, paragraph 12.
[7] Ibid, paragraph 15.
[8] Ibid, paragraph 16.

to the constitutional level. The Law on the HJC of 27 December 2008 then effectively introduced the HJC in Serbia.

14. The constitutional provisions define the HJC as an independent and autonomous body, which is to provide for and guarantee the independence and autonomy of courts and judges.

15. These provisions also determine the HJC's composition – eleven members consisting of three *ex officio* members, the President of the Supreme Court of Cassation, the Minister of Justice and the President of the authorised committee of the National Assembly, as well as eight electoral members elected by the National Assembly, in accordance with the law. Of these eight electoral members six are to be judges holding the position of permanent judge, of which one is to be from the territory of autonomous provinces, and two are to be respected and prominent lawyers (who have a professional experience of at least 15 years), of which one shall be a solicitor and the other a professor at a law faculty.

16. The constitutional provisions also determine the term of office of the HJC members – which is of five years, except for the members appointed *ex officio* – and the HJC's jurisdiction. It is to appoint and dismiss judges and to propose to the National Assembly the election of judges in the first election to the position of judge. It is to propose to the National Assembly the election of the President of the Supreme Court of Cassation as well as presidents of the courts in accordance with the Constitution and the law. It is to participate in the proceedings of terminating the tenure of office of the President of the Supreme Court of Cassation and presidents of courts in the manner stipulated by the Constitution and the law as well as perform other duties specified by the law. The Venice Commission recommends that the President of the Supreme Court of Cassation, who is also the President of the HJC, not participate in cases concerning his or her position.

17. The Constitution also provides for a legal remedy against the HJC's decisions before the Constitutional Court.

18. In its Opinion on the Constitution of Serbia, the Venice Commission criticised the constitutional provisions on the composition of the HJC saying that: *"All these members are elected, directly or indirectly, by the National Assembly. The six judges are not to be elected by their peers but by the National Assembly, the lawyer not by the Bar Association but by the National Assembly, the professor not by the law faculty but by the National Assembly. The judicial appointment process is thus doubly under the control of the National Assembly: the proposals are made by the High Judicial Council elected by the National Assembly and the decisions are then made by the National Assembly itself. This seems a recipe for politicisation of the judiciary and therefore the provisions should be substantially amended."* [9]

19. Although the current Law on the HJC addressed these concerns by providing a procedure whereby the National Assembly would only be presented with the name of the person elected by the authorised nominators in respect of each vacancy – the National Assembly is still entitled to reject the candidate, in which case another election would take place.[10]

20. In the light of the Venice Commission's earlier criticism, the delegation welcomed the information that it received in Belgrade about a Commission on revising the Constitution having been set up to deal with the relevant amendments to the Constitution.

[9] CDL-AD(2007)004, paragraph 70.
[10] CDL-AD(2008)006, paragraph 11.

III. DRAFT AMENDMENTS TO THE LAW ON THE HIGH JUDICIAL COUNCIL

A. Comments on the draft amendments – Article by Article

Article 6 – President and Deputy President of the Council

21. The Venice Commission's delegation learned, during its meetings in Belgrade, that the wording of Article 6 should be *"President and Deputy President of the Council shall be elected and dismissed by a Council from the ranks of judge~~s~~ ~~of the elected~~ members of the Council… by majority vote of all members...".*

22. Changes in the government or parliament should not influence the judiciary. In the particular case of the HJC, such changes will not affect its elected members, but they may influence the appointment and termination of office of *ex officio* members. Under the current Law, the President of the Supreme Court of Cassation is, by virtue of office, the President of the HJC and the deputy president is elected from among the ranks of judge members of the HJC.

23. There may be different approaches with regard to the role of presidents of supreme courts within judicial councils. Some countries choose not to impose any restrictions and allow the President of the Supreme Court to be elected/appointed President of the Council and hold both positions simultaneously (as still is the case in Serbia, but is now proposed to be abandoned). In view of enhancing the independence of the judiciary others may prefer to separate the administrative positions within the judiciary and the membership in the Council; and therefore, should the president of the court be appointed President of the Council, this person should then resign from his or her position at the Supreme Court (see paragraph 7 of the Kyiv Recommendations[11]).

24. The Venice Commission sees the introduction of an election-based system as a positive step that may increase the democratic legitimacy of the HJC (see also comments under Article 18 of the draft *"Independent Articles"* under the transitional provisions, below).

Article 9 – Immunity

25. Article 9 is based on Article 151 of the Constitution (the immunity of judges) and equates the immunity of the members of the HJC with those of the judges themselves. Article 151 defines a judge's immunity as functional immunity setting out that: *"A judge may not be held responsible for his/her expressed opinion or voting in the process of passing a court decision, except in cases when he/she committed a criminal offence by violating the Law."* The Venice Commission agrees that judges should enjoy only functional immunity.[12]

26. The first paragraph of Article 9 could be read as including the exception for a criminal offence, but the second paragraph sets out another general provision of its own, stating that the HJC member *"shall not be held responsible for his/her opinion of voting in the council"* without mentioning the exception for criminal offences. This gives rise to an inconsistency in the Article and should be clarified.

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[11] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, June 2010 (ODIHR and the Max Planck Institute for Comparative Public Law and International Law): *"Where the chairperson of a court is appointed to the Council, he or she must resign from his or her position as court chairperson."*

[12] Paragraph 61, Report on the Independence of the judicial system Part I: the independence of judges (CDL-AD(2010)004.

27. In addition, possible tension could arise between the provision on immunity and the issue of the confidence vote. The confidence vote under Articles 9a and 46b could be seen as a step in the procedure by which a member could be held responsible in front of his or her peers for having made a certain decision. The vote of no confidence might be due to the HJC member's *"opinion or voting in the council"* in a specific case (see Article 9, second paragraph).

Article 9a – Suspension from office of the Council member

28. The second paragraph of Article 9a introduces a new concept: suspension from the HJC on the basis of a no-confidence vote. The meaning of the words *"due to a vote of no confidence"* is not immediately clear, but once due consideration is given to the other amendments, it is clear that it refers to Article 46b.[13] This should however be made more explicit in Article 9a, second paragraph by adding *"due to a vote of no confidence, as foreseen in Article 46b of this Law"*.

29. On a technical issue, it would be more logical for both Articles on the suspension of a HJC member and the Articles on the dismissal of an elected member to be placed in the same chapter of the Law.

30. The third paragraph of Article 9a stipulates that *"An elected Council member may be suspended from office when a proceeding for their dismissal from office of Council member has been initiated i.e. when criminal proceedings have been initiated for a criminal offence which is grounds for dismissal."* The HJC should indeed have the power to determine whether suspension is necessary and adequate in a given situation. However, this should not automatically lead to suspension. Decisions on suspending a member should be linked to the gravity of the charges against him or her and/or be based on the reasoning that suspending the member is necessary for the effective functioning of the HJC. The Venice Commission therefore strongly recommends that the amendment to Article 9a on the suspension of office due to a vote of confidence not be kept.

Article 9b – Decision on suspension and term of suspension

31. According to Article 9b, "*The decision on suspension from office of Council member is made by the president of the Council."* While in some cases (such as in case of removal from office or conviction) this decision seems to be automatic, it would nonetheless be more reasonable for the HJC, and not just its President, to render a decision on the issue of suspension. This is all the more important as such a decision is likely to be a discretionary one in some cases. Furthermore, where the HJC renders a decision on the removal from office of a judge, who happens to be a member of the HJC, it seems logical to simultaneously render a decision on the issue of suspension.

32. Although according to Article 43, any member of the HJC has the right to initiate the dismissal of any other member, there are no mechanisms in the draft Law which would provide for the suspension or dismissal of the *ex officio* (non-elected) members if they act in violation of the Constitution or the law. This is further proved by the fact that Article 43

[13] Article 46b:
"The judges shall vote on confidence to an elected Council Member, by secret ballot, in accordance with Article 24, Paragraphs 5 and 6, of this Law.
The procedure of vote of confidence is subjected to the provisions of Article 31 to 34 of this Law.
An elected member received a vote of no confidence if voted by at least two thirds of judges who are entitled to vote and majority of them voted for dismissal.
The vote of confidence regarding the dismissal of the elected member of the council from the ranks of lawyers and law faculty professors, is taken by their authorized nominators in a manner and by the procedure applied to their election."

comes under Chapter V entitled *"Dismissal of Elected Member"* (and Article 42 on dismissal in the case of a conviction for a criminal offence). Such a differentiation between the members of the HJC seems problematic. A clarification as to whether suspension or dismissal may also be applicable to non-elected members, and under what conditions, is recommended. For instance, it is logical that in case of a criminal conviction of an HJC *ex officio* member, s/he be removed from his or her original function which then results in an early end of term as an HJC *ex officio* member under Article 39. However, this should be made explicit.

Article 12 – Term of office of members

33. According to the second paragraph of Article 12 *"Elected members of the Council may be re-elected, but not consecutively."* It would be advisable for the draft Law to provide for guidance on the minimum amount of time that should pass between the terms. For instance, will it be considered 'non-consecutive' if a member is re-elected shortly after his or her term ends due to the early dismissal or retirement of another member of the HJC?

Article 13 – Competence

34. This Article defines the competences of the HJC and also mentions the power to *"form its Working Bodies and permanent and ad hoc Commissions, and elect their Members".* In order to ensure consistency throughout the text, this might be combined with Articles 15-16 on permanent and *ad hoc* Commissions.

Article 14 – Manner of operation

35. This Article sets out that the HJC's sessions are open to the public and that it may decide to work in closed session in accordance with the rules of procedure. It is recommended that this be regulated by law rather than by the rules of procedure and clear criteria for *in camera* proceedings should be provided.

36. In addition, although the Venice Commission stated in a previous opinion[14] in 2008, that the – *"requirement for transparency cannot go so far as to force the Council to deliberate in public in general. It is important that the members can express themselves freely on certain issues, and public debates might hinder such free debates on certain issues, as the members may fear that their comments, for instance, might appear in the press"* [15] – establishing the requirement to conduct sessions in public may enhance the credibility of the HJC and this should be welcomed as a genuine effort toward strengthening the legitimacy of this institution.

37. It is, however, also important that provisions be included which allow the judge – whose position is being deliberated on – to request a closed session, especially where disciplinary proceedings are concerned. In its Joint Opinion on the draft Law amending and supplementing the Judicial Code (evaluation system for judges) of Armenia, the Venice Commission recommended *"... that sessions – as a general rule - be held in public and that they be held in camera only exceptionally, at the request of the judge. This would be more in line with Article 6 ECHR."* [16]

38. The second paragraph of Article 14 provides that *"The Council session is convened by the President on his own initiative or at the request of at least three members of the*

[14] Opinion on the draft Law on the High Judicial Council of the Republic of Serbia (CDL-AD(2008)006).
[15] Ibid, paragraph 38.
[16] Paragraph 97, Joint Opinion on the draft Law amending and supplementing the Judicial Code (evaluation system for judges) of Armenia (CDL-AD(2014)007).

Council." It is recommended that the minimum periodicity of the HJC's sessions also be defined in this draft Law.

Articles 15- 16 – Permanent working bodies - and Ad hoc working bodies

39. These Articles establish permanent working bodies in specific areas within the HJC's jurisdiction and *ad hoc* working bodies to consider specific issues within its competence and to make proposals, give opinions and provide expert opinions.

40. It is, however, not clear what the substantive difference is between the permanent and *ad hoc* bodies, although the latter appear to be subsidiary bodies set up for a specific or punctual purpose. The draft Law neither defines the powers of these bodies nor the procedure of selection of the members of these bodies. It merely makes reference to the rules of procedure and to subsequent special acts for their composition, establishment and operation (see Article 15 second paragraph and 16, second paragraph).

Article 32 – Polling boards and voting

41. This Article sets out that for each polling station the electoral commission shall appoint polling boards consisting of three judges who are not running for election. It is not clear how these judges are selected. Will it be a random selection? This should be clarified.

42. Unless these judges are from the appellate court in which the polling station is open or from the courts on the territory covered by a specific appellate court, it should be made clear that members of the polling boards are allowed to vote at the polling station where they perform their duties.

Article 33a – Procedure after voting

43. The fourth paragraph of this Article provides that *"If it is established that the number of ballot papers in the ballot box exceeds the number of judges who have voted, electoral committee shall be dissolved and a new one shall be appointed, the voting at that polling place shall be repeated within seven days."*

44. Since no "electoral committee" is defined in this draft Law, it should probably either read "polling board" or the "electoral commission". If the number of ballot papers in the ballot box at a given polling station does not match the number of judges who have voted, it would be disproportionate to dissolve the entire electoral commission.

Article 35 – Nomination of candidates from the ranks of judges

45. The third paragraph of this Article provides that *"In case when two or more candidates in one electoral list win an equal number of majority votes the council shall propose the candidate with longer tenure of office".*

46. A solution for the unlikely event where the length of tenure turns out to be the same for such candidates should also be provided for in this Law.

Articles 36-37 – Nomination of candidates from the ranks of attorneys – and Nomination of candidates from the ranks of professors

47. Article 36 sets out that the nomination of candidates for the Elected Member of the HJC from the ranks of attorneys shall be organised and conducted *"…in a manner ensuring the broadest possible representation"* and in accordance with the procedure *"set by the Bar Association of Serbia in its act"*. Article 37 defines that *"the nomination of candidates for*

Elected Members of the Council from among Faculty of Law professors shall be carried out under the procedure defined by an act of the joint session of Deans of all law faculties in the Republic of Serbia."

48. The Venice Commission's delegation was informed that the decision to leave the nomination of candidates among attorneys and professors out of the scope of the Law on the HJC was motivated by the desire to refrain from interfering in the constitutionally protected autonomy of the universities and the Bar Association. The draft Law therefore leaves the entire process of the election of two members of the HJC to the discretion of the Bar Association and the joint session of deans of law faculties. This approach is questionable because – although the respect for the autonomy of these institutions is relevant in the context of self-governance or other internal matters – the election of the HJC member is clearly not an internal matter of the university or the Bar Association. It is in the interest of society as a whole (rather than the legal community, academia or the judiciary) that the HJC operate in an effective and efficient manner so as to uphold the independence of the judiciary and the rule of law. The procedures for the election of the HJC candidates as well as detailed requirements for the candidates should be set out in this Law.

49. It is also not clear what would happen if the deans of faculties fail to meet in a joint session. There is very little that can be done under this draft Law in order to remedy that problem. An alternative might be to consider giving the HJC the power to organise an election in a way similar to the election of judges.

Article 38 – Election of Members

50. This Article sets out that the National Assembly elects the HJC members at the proposal of the authorised nominators. There is only one list for each instance and type of court (see Article 30, second paragraph), making the procedure in the National Assembly appear to be a mere formality, except where the National Assembly refuses to elect the proposed candidate and a new election process has to take place. It is understandable that this procedure is kept until a constitutional change is made, revising the excessive role of the National Assembly in the election of the HJC members.

Articles 39-40 – Grounds for termination; Early Termination of the Term of Office of HJC members

51. Article 39 contains a detailed list of grounds for termination, however, the sixth draft paragraph provides that *"The office of the elected Council Member shall also be terminated in other cases stipulated by law"* – which is too vague. The wording of this provision should either read *"... in other cases stipulated by this Law"* or refer to specific provisions in other laws.

52. According to the final draft paragraph of this Article, the HJC declares the termination of the elected member of the HJC at its first session after the grounds for termination arise. It would be useful and welcome to define in this draft Law the time frame in which the HJC must convene in order to declare the termination (Article 40 only provides that the HJC "*shall pass within 15 days"* the decision on the commencement of the procedure for the nomination of candidates in case of early dismissal of the elected members of the HJC). This is all the more important in the light of the fact that the current Law on the HJC does not provide for a minimum periodicity of HJC sessions.

Articles 41 and 42 – Reasons – and Dismissal in the case of the conviction for the criminal offence

53. Article 41 provides for three reasons for dismissal: (1) failure to perform the duty of the HJC member in compliance with the Constitution and law; (2) conviction *"with final court decision to unconditional imprisonment for a criminal offence"* and (3) conviction *"with a final court decision for* ***a criminal*** *offence which renders him/ her dishonourable of exercising office of the member of the council".* The words "renders him/her dishonourable" are too vague and should be replaced with more precise wording setting out what kind of criminal offence is being referred to. The word "criminal" is inserted here in bold italics because this word was added to the text in Belgrade where the Venice Commission's delegation was told that the Serbian and English versions of the draft Law did not coincide. Indeed conviction of a member of the Council for the criminal offence itself renders him/her dishonourable to exercise the function.

54. The same insertion should presumably be made in Article 42, which provides for a summary procedure in case of a dismissal for reason (2) and (3) above.

55. In the current Law, the ground *"breach of duty*" ("*fails to perform the duty*" in the draft Law) already exists. The Venice Commission was already critical of this wording in its 2008 opinion and recommended clarification: *"The definition of a member failing to perform his or her duty or his or her conviction of a criminal offence needs to be clarified. The notion of "fail to perform a duty" can cover many situations and could apply to a person who has made a mistake in the drafting of a decision or who was ill for several months etc."*[17] No such clarification was forthcoming and now the impact of this provision could be even more significant when used in conjunction with the newly introduced vote of confidence.

56. The Venice Commission's delegation was informed in Belgrade that there is no code of ethics or disciplinary provisions applicable to HJC members for their performance in the HJC. In the Venice Commission's opinion for Bosnia and Herzegovina on the High Judicial and Prosecutorial Council (2014), a similar provision was described by the Commission *"to be imprecise and therefore unsatisfactory from the standpoint of legal standards."*[18]

57. The result of these draft amendments is that there are now two ways to initiate the procedure for dismissing members of the HJC: one involves the HJC (i.e. initiated by any HJC member or the "authorised nominators" (see Article 43 of the draft Law) and the other is the motion of dismissal, which is initiated by at least 20% of the total number of the profession (see Article 45 of the draft Law)), which does not involve the HJC (see comments below on Article 46b).

58. In the Venice Commission's view, HJC members should be trusted to perform their duties independently and according to the law during the term of their mandate. It would therefore be more appropriate to deal with "breach of duty" cases through the usual disciplinary procedure, which should be clearly set out by the draft Law and an appeal to a court of law should be provided (in this respect, see Article 155 of the Constitution). The proportionality principle should be adequately taken into account and the dismissal should only be applied as a measure of last resort (in addition see paragraphs 65-70 below).

[17] See paragraph 63 (see also paragraph 64 on criminal offences), Opinion on the draft Law on the High Judicial Council of the Republic of Serbia, CDL-AD(2008)006.
[18] See paragraphs 51, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (CDL-AD(2014)008).

Articles 43, 44, 45, 46, 46a - 46v – Dismissal initiative/motion; dismissal procedure and decision; vote of confidence

59. Article 43 provides that "*each member of the council or authorized nominators"* may initiate the dismissal of an HJC member, who did not perform his or her duties in accordance with the Constitution and laws. The wording of this provision suggests that the HJC member may initiate the dismissal of any other member, including *ex officio* members of the HJC. If this is the case, it should be set out more explicitly because Articles 45 and 46 that describe procedures of motion and commencement of dismissal (that follow the initiative for dismissal) only provide regulations for dismissal of elected members. In addition, the entire Chapter V of the draft Law is dedicated to the dismissal of elected members.

60. These Articles provide a four-step procedure for dismissal for reason (1) under Article 41 (i.e. failure to perform the duty of the HJC member in compliance with the Constitution and law):

61. First step: there are two ways of starting a dismissal procedure (based on reason (1) under Article 41). One way is through the initiative of an HJC member or by authorised nominators (Article 43). The HJC decides on the admissibility of the initiative (Article 44). Another way is through a motion (proposal) for dismissal by at least 20% of the total numbers of judges who are entitled to vote on the election of elected members of the HJC; at least 20 % of the total number of lawyers registered in registry of lawyers in the Bar Association; at least 20 % of all law faculty deans (Article 45).

62. Second step: following the acceptance of the initiative by the HJC or after the motion/proposal (this should be harmonised) for dismissal has been submitted to the HJC, the procedure before the HJC begins (Article 46). It will be conducted in line with the principle of a fair trial. The HJC will render a reasoned decision on the admissibility of the initiative or a reasoned opinion on the proposal for dismissal, and this decision or opinion will be published on the webpage of the HJC (Article 46a).

63. Third step: a vote of confidence will be casted by secret ballot either by the judges that are entitled to elect the elected members of the HJC or by the authorised nominators of the members from the ranks of lawyers and law professors (Article 46b).

64. Fourth step: in case of a vote of no confidence, the HJC or the authorised nominators shall propose to the National Assembly the removal of the HJC member. The decision on dismissal, based on the proposals shall be enacted by the National Assembly (Article 46v). If the voting did not result in a no-confidence vote, Article 46v provides that *"The council shall suspend the procedure of dismissal of an elected member of the council, within eight days of the voting".*

65. The general impression of this new dismissal mechanism is that it is ambiguous and seems to confuse two different kinds of procedures: a procedure on the preservation of confidence and a disciplinary procedure.

66. A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the HJC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

67. A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of "lack of confidence". Article 41 clearly defines the reasons that can lead to a

dismissal of the HJC members. The disciplinary procedure must only focus on the question whether the HJC member failed to perform his or her duties "*in compliance with the constitution and law".* This question must not be confused with the question whether said member still enjoys the confidence of the judges who participated in his or her election. In addition, the disciplinary procedure has to guarantee the HJC member a fair trial. It is noted that a general reference to a fair trial is made under Article 46a, but further details on related guarantees would be needed.

68. In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, i.e. whether an "impeachment" of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how, by whom and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. In fact, the draft Law lacks specific provisions on disciplinary issues in respect of HJC members and merely focuses on dismissal.

69. On the issue of the confidence vote, the proposal to involve the profession at two stages of the dismissal procedure: (a) the motion for dismissal under Article 45 and (b) the vote of confidence under Article 46b – remains difficult to understand. This includes both its underlying philosophy and its technical aspects.

70. While existing concerns with respect to the composition of the HJC and its legitimacy may be understandable in the light of the recent developments linked to the reappointment process, a cautious approach should be adopted when addressing the matter. The Venice Commission would like to point out that a vote of confidence regarding members of a judicial council is highly unusual. Members of judicial councils are independent and often have to make decisions that are unpopular or will not please judges. In subjecting them to a vote of no confidence, their independence will be reduced, making them too dependent on the wishes of the judges and removing them from their role of pursuing the goals of an independent and efficient judiciary for the state as a whole. Furthermore, such a vote is difficult to reconcile with the disciplinary functions of a judicial council.[19] The Venice Commission therefore strongly recommends for such a procedure not to be introduced.

Transitional and final provisions and the "Independent Articles of the Law", Article 17 to Article 19

71. The draft transitional provisions raise no technical problems as such.

72. When the draft Law come into force, new elections for the President and Deputy President will take place according to Article 18 of the draft "Independent Articles" under the transitional provisions. These elections shall be performed within 30 days from the day of the entry into force of the draft Law.

73. These types of changes can endanger the stability of institutions such as the HJC and should be avoided if possible. This applies especially where such changes affect

[19] See paragraph 194, Opinion on the draft Law on the review of the Constitution of Romania (CDL-AD(2014)010), it is noted that provisions in the Romanian law allowing revocation of magistrates members of the judicial council by general assemblies of judges/prosecutors have been found unconstitutional by the Romanian Constitutional Court.

the term of office of persons elected[20] under previous provisions – and in particular where their term of office is set by the Constitution (Article 153 of the Constitution).

74. In the particular case of the HJC of Serbia, this only applies to the Deputy President, who was elected, and whose term is set by the Constitution. The position of the President of the HJC is different: s/he is an *ex officio* member (i.e. not an elected member of the HJC) whose term of office is not set by the Constitution (but ends when the term as President of the Supreme Court of Cassation expires).

75. Therefore, in this case, the Deputy President of the HJC should be kept in his or her position.[21]

IV. CONCLUSIONS

75. The draft amendments to the Law on the HJC (the "draft Law"), on the whole, reflect the positive intention of the Serbian authorities to improve, among others, the appointment system and general status of the HJC. However, some of the draft amendments are limited by the problematic provisions on the HJC in the current Constitution.

76. It will be important to reduce the excessive role of the National Assembly in judicial appointments in the future amendments to the Constitution.

77. In addition, a number of the changes to the draft Law raise serious concern due to their potential of undermining the stability and independence of the HJC in the long run. This could have a negative impact on the entire judiciary of Serbia.

78. The Venice Commission strongly recommends that the dismissal procedure be reconsidered in the light of the concerns raised in this Opinion. In particular, the Venice Commission recommends that the motion for dismissal and the vote of confidence – both involving the professions represented in the HJC in the dismissal process of elected HJC members – should be removed. This kind of involvement is not suitable for institutions such as the HJC, where members are elected for a fixed term.

79. More generally, increased clarity would be welcome with regard to the different steps in the dismissal procedure. Dismissal should only be used as a last resort in a disciplinary procedure. The latter should be clearly set out in the draft Law.

80. Considering that the Law on the HJC will need to be amended again once the Commission on revising the Constitution has completed its work, it might be useful to wait with the amendments to the Law on the HJC until the Constitution has been amended.

81. The Venice Commission remains at the disposal of the Serbian authorities for any further assistance they may need.

[20] See Opinion on the draft Law on introducing amendments and addenda to the Judicial Code of Armenia (term of office of court presidents) (CDL-AD(2014)021).

[21] The text of paragraphs 74 and 75 will be further discussed at the meeting of the sub-commission on 10 October 2014.