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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**SERBIA**

**DRAFT OPINION**

**ON THE DRAFT CONSTITUTIONAL AMENDMENTS  
ON THE JUDICIARY  
AND THE DRAFT CONSTITUTIONAL LAW  
FOR THE IMPLEMENTATION OF THE CONSTITUTIONAL  
AMENDMENTS**

**on the basis of comments by**

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## I. Introduction

1. By letter of 5 February 2021, Mr Michael Aastrup Jensen, Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion from the Venice Commission on the constitutional and legal framework governing the functioning of democratic institutions in Serbia. This request was followed by a request by letter of 9 July 2021 from Mr Ivica Dačić, Speaker of the National Assembly of Serbia on the draft Act amending the Constitution of Serbia and includes the draft Constitutional Law for the implementation of Amendments I to XXIX to the Constitution of Serbia (both texts appear in document [CDL-REF\(2021\)075](#)).

2. The present opinion will bring both requests together within the limits set out below (see “Scope of the opinion,” below).

3. Ms Regina Kiener, Mr Martin Kuijer, Ms Angelika Nussberger, Mr Jean-Claude Scholsem, Mr Kaarlo Tuori and Mr Pere Vilanova Trias acted as rapporteurs for this opinion.

4. Owing to the health situation due to the Covid-19 pandemic, all meetings for the preparation of this opinion took place online. A first meeting with the Working group established by the Committee on Constitutional Affairs and Legislation of the National Assembly (hereinafter, the “Working group”) for the preparation of the draft Act amending the Constitution of Serbia (hereinafter, the “draft Amendments”) and of the draft Constitutional Law for the implementation of the amendments to the Constitution of Serbia took place online on 20 July 2021. The participants included: Ms Jelena Kovačević Žarić, President of the Committee for Constitutional Affairs of the National Assembly and the Chairperson of the Working group; Mr Vladan Petrov, Professor at the Faculty of Law at the University of Belgrade and judge at the Constitutional Court (Mr Petrov is member of the Venice Commission in respect of Serbia); Mr Bojan Milisavljević, Professor at the Faculty of Law, University of Belgrade; Mr Miloš Stanić, Professor at the Institute of Comparative Studies, Belgrade; Mr Miroslav Đorđević, Professor at the Institute of Comparative Studies, Belgrade; Mr Branko Marinković, Deputy Secretary of the National Assembly of Serbia; Mr Vladimir Vinš, Ministry of Justice; Mr Jovan Ćosić, Ministry of Justice; Mr Darko Radoičić, Deputy Director of the Secretariat of Legislation (Government); Mr Dragana Boljević, President of the Judges of Serbia and Mr Goran Ilić, Association of Prosecutors of Serbia.

5. The text of the draft constitutional amendments was sent to the Commission by the Committee on Constitutional Affairs and Legislation on 23 September 2021. A second set of online meetings took place from 28 to 30 September 2021, with the following interlocutors and representatives of the following institutions: Ms Ana Brnabić, Prime Minister; Ms Maja Popović Minister of Justice of Serbia; Mr Ivica Dačić, Speaker of the National Assembly; members of the Committee on Constitutional Affairs and Legislation of the National Assembly (members of the parliamentary majority) and members of the parliamentary opposition; State Prosecutorial Council; Public Prosecutor and Deputies, as well as the State Prosecutorial Association of Serbia; President and Judges of the Constitutional Court and the Supreme Court of Cassation; the High Judicial Council and the Judges Association of Serbia.

6. This opinion was prepared in reliance on the English translation of the above-mentioned provisions. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

*7. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings with the authorities of Serbia, and other relevant stakeholders [and the written comments on the draft Opinion submitted ...]. It was examined at the joint meeting of the Sub-commissions on the Rule of Law and on Democratic Institutions on ... [Following an*

*exchange of views with ...], it was adopted by the Venice Commission at its ... Plenary Session (Venice and online, ... 2021).*

## **II. Timeline of events regarding the draft Amendments**

8. A two-year old initiative to amend the Serbian Constitution of 2006 was relaunched by the current political majority in the Government of Serbia on 3 December 2020 by addressing a proposal to amend the Constitution to the National Assembly.

9. The proposal to amend the Constitution refers to the Venice Commission's opinion of 2007 on Serbia's Constitution of 2006 ([Opinion on the Constitution of Serbia adopted by the Commission at its 70th plenary session \(Venice, 16-17 March 2007\)](#)), which, among others, criticises the involvement of the National Assembly in judicial appointments and in the appointments in the High Judicial Council for raising a real risk of politicizing these processes.

10. The Working group started its work on the basis of the amendments prepared by the Ministry of Justice in 2018, which were submitted to the Venice Commission for an opinion which was adopted in June 2018 i.e. Opinion on the draft amendments to the constitutional provisions on the judiciary ([CDL-AD\(2018\)011](#)). In this opinion, the Venice Commission welcomed the intention of the Serbian authorities to revise the chapter of the Constitution on the judiciary, which had been criticised by the Venice Commission in the past, but addressed a considerable number of recommendations to the authorities for further improving the text. The main recommendations concerned the composition of the High Judicial and the High Prosecutorial Council, the dissolution of the High Judicial Council, the grounds for the dismissal of judges, the methods for ensuring the uniform application of laws and the need to remove the links between parliament and public prosecutors and deputy public prosecutors.

11. After the adoption of this opinion, the Ministry of Justice of Serbia prepared a first revised version of the amendments in September 2018 and submitted to the Venice Commission on 12 October 2018 a second revised version of these amendments. The Secretariat of the Venice Commission prepared a memorandum, analysing the compatibility of the draft amendments with the Venice Commission's recommendations and concluded that the new version of the amendments complied with the main recommendations as well as other recommendations contained in the opinion. Such Secretariat memorandums are strictly focused on the follow up of an opinion. However, memorandums do not in any way prevent the Venice Commission from deciding to further elaborate on the issue in the future.

12. The text submitted to the Venice Commission for the present opinion was based on the 2018 amendments, which were then further amended and improved by the Working group.

13. The Venice Commission was informed that seven public consultations had taken place between 29 April and 2 June 2021 with (among others) judges of the Constitutional Court, judges, public prosecutors, members of the High Judicial Council, of the State Prosecutorial Council, of the Judicial Academy and representatives of the professional associations of judges and public prosecutors – with law professors and representatives of bar associations, civil society, representatives of the EU delegation in Serbia, of the Council of Europe, the OSCE and embassies of the EU, UK, US and Canada.

14. On 7 June 2021, the National Assembly adopted the Government's proposal to amend the Constitution and the Constitutional and Legislative Affairs Committee of the National Assembly was given the task of assessing the proposal and prepare the amendments. The procedure was then for the Constitutional and Legislative Affairs Committee to approve (by a majority vote) the draft Amendments, as well as the draft Constitutional Law for the implementation of the Amendments.

15. A qualified majority of MPs voting in favour is then required in the National Assembly for the adoption of the proposed Act of amending the Constitution. In addition, the decision to amend the Constitution must be confirmed by a referendum (in this respect, see the Venice Commission's Urgent Opinion for Serbia on the draft Law on the Referendum and the People's Initiative ([CDL-PI\(2021\)015](#))). The National Assembly announced on 23 June 2021 that this referendum was planned for the autumn of this year. This will depend on how quickly the draft Law on the Referendum will be adopted.

16. The Venice Commission rapporteurs held a preliminary and fruitful meeting with the Working group on 20 July 2021. The Venice Commission was then informed that the draft Amendments had been made public on 6 September 2021 and that public consultations took place thereafter around Serbia, notably in four of the biggest cities: Nis and Kragujevac (Central Serbia), Novi Sad (Vojvodina) and Belgrade. Some debates were even posted on YouTube. On 21 September 2021, the Constitutional and Legislative Affairs Committee of the National Assembly approved the draft Amendments, as well as the draft Constitutional Law for the implementation of the Amendments.

17. In comparison to the situation in 2018, there currently appears to be the necessary political momentum in Serbia to achieve a satisfactory result. The current process could be characterised as being sufficiently inclusive and transparent.

18. However, the fact that one party – the *For Our Children* (AV-ZND), led by the SNS – has won 60.7% of the vote and 188 out of 250 seats (acquiring more than the required two-thirds majority) coupled with the fact that the parliamentary opposition is (nearly) absent,<sup>1</sup> has led to a very strong need for adopting an inclusive approach. Such an approach should lend as broad a legitimacy to the constitutional reform as possible among all institutional actors and all political forces in Serbia. For this reason, the Venice Commission would like to urge the Serbian authorities to continue to actively seek the participation and involvement of the opposition.

19. On the other hand, the Venice Commission would like to draw attention to its 2010 Report on the role of the opposition in a democratic parliament:<sup>2</sup>

*“149. In a well-functioning parliamentary democracy there is a balance between the majority and the minority, which creates a form of inter-play that ensures effective, democratic and legitimate governance. This cannot be taken for granted, and there are many countries also within Europe that present a different picture. There are at least two main forms of abuse or dysfunction of the role of the opposition. Either the opposition completely blocks effective governmental work and/or effective parliamentary work, or the opposition does not offer any alternatives to the work of the government and/or to the proposals of the parliamentary majority and is therefore not visible in the political debate.”*

20. The Venice Commission therefore also urges the parliamentary and extra parliamentary opposition to take responsibility and contribute to the constitutional reform process. This includes the referendum process (see Urgent Opinion for Serbia on the draft Law on the Referendum and the People's Initiative, further referred to below).

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<sup>1</sup> The opposition's absence is due to their boycott of the parliamentary election held in June 2020 for the reason that this election was held despite the health risks posed by the COVID-19 pandemic and for the alleged lack of democratic standards for the campaign and free media (see, <https://freedomhouse.org/country/serbia/freedom-world/2021>).

<sup>2</sup> Venice Commission, [CDL-AD\(2010\)025](#); see also Resolution 1601(2008) of the Parliamentary Assembly of the Council of Europe on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament.

21. The constitutional reform process is closely linked to Serbia's EU accession negotiations. This might explain why priority is given to the chapter on the judiciary instead of embarking on a more holistic constitutional reform process.

22. The Venice Commission is aware and takes note of the time constraints partly due to the planned dissolution of the current National Assembly in view of holding early elections in the spring of 2022 (and the next round of EU accession negotiations). However, it is not for the Venice Commission to solve these time constraints.

23. In this respect, the Venice Commission refers to its Urgent Opinion for Serbia on the draft Law on the Referendum and the People's Initiative ([CDL-PI\(2021\)015](#)), where it made a number of important recommendations designed to improve that Law. To the extent that this Law will be applicable to the constitutional referendum which will be organised after the adoption of the draft Amendments, it is crucial for the Serbian authorities to amend the Law on the Referendum in line with the Venice Commission's recommendations by way of priority.

### III. Scope of the opinion

24. The draft Amendments (along with the draft Constitutional Law on their implementation), the subject of this opinion, are limited to the sections of the Constitution concerning the judiciary and are not a comprehensive revision of the entire Constitution of Serbia.

25. For this reason, the present opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the functioning of democratic institutions in Serbia. This could be the object of a second opinion, should PACE consider it necessary and useful. This opinion also does not deal with judicial reform as such, but only with these draft Amendments.

26. In order for the judicial reform to succeed in bringing the Serbian judiciary in line with European and international standards, organic laws will need to be reformed that regulate very essential details such as eligibility criteria for judicial office and invest in practice. This constitutional reform is a necessary and important first step in the process, but does not constitute the completion of this process.

### IV. Analysis

#### A. General

27. The Venice Commission has issued several opinions for Serbia over the years in which constitutional provisions on the judiciary and the prosecutorial service were the focus. It started in 2007 with the Opinion on the Constitution of Serbia (CDL-AD(2007)004) and the latest includes the 2018 Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary (CDL-AD(2018)011, hereinafter the "2018 Opinion of the Venice Commission") and the Secretariat Memorandum on the compatibility of the draft Amendments to the Constitutional Provision on the Judiciary (CDL-AD(2018)023) as submitted to the Ministry of Justice of Serbia on 12 October 2018 (CDL-REF(2018)053).

28. The draft Amendments under consideration consist of 29 amendments (I to XXIX) and concern constitutional provisions on the judiciary and the prosecutorial service. Draft Amendment I sets the tone by introducing "*mutual checks and balances*" between the three branches of power, which is generally to be welcomed and meets the recommendation laid down in paragraph 14 of the 2018 Opinion of the Venice Commission. However, the word "mutual" before "checks and balances" should not be understood as allowing the executive to exert improper control over the judiciary.



29. It should be noted and welcomed that most of the draft Amendments are generally in line with the earlier recommendations made by the Venice Commission, for instance, the introduction of the principle of non-transferability of judges and of functional immunity for judges and prosecutors and the removal of the probationary period for judges and prosecutors. However, some issues in the draft Amendments might still raise concern. A detailed analysis of the draft Amendments will follow below.

## **B. Independence of the judiciary and principles relative to its functioning**

### **1. Draft Amendment VI (Independence of judges)**

30. Draft Amendment VI, which amends Article 144 of the Constitution and emphasises the independence of judges, states that judges shall rule in accordance with, *inter alia*, “*other general acts*”.<sup>3</sup> This should be clarified by stating that it is, for instance, delegated legislation. Broad and vague wording should be avoided.

31. The second paragraph of draft Amendment VI reads: “*Any influence on a judge while performing judicial function is prohibited*” [emphasis added]. Consideration should be given to adding the word “improper” or “undue” before the word “influence”, otherwise it might be argued that, for instance, news coverages during a trial potentially influence a judge. Adding the word “improper” or “undue” before the word “influence” would clarify that the material scope of the provision does not extend to such situations.<sup>4</sup>

### **2. Draft Amendment III (Election of judges) and draft Amendment VII (Conditions for election of judges)**

32. There is a great variety of different methods for the appointment of judges in domestic legal orders, with the result that there is no single ‘model’ that would ideally comply with the principle of the separation of powers and secure full independence of the judiciary.<sup>5</sup> Much also depends on the legal culture and traditions that have developed in a country over time. Nonetheless, European and international standards endorse the depoliticisation of the process.<sup>6</sup> Political considerations should not prevail over the objective merits of a candidate.

33. Draft Amendment III introduces a significant improvement by deleting items 12 and 13 of Article 105(2) of the Constitution, which held, *inter alia*, that the National Assembly was empowered to elect judges (including court presidents and the president of the Supreme Court). Draft Amendment XII (amending Article 150 of the Constitution) stipulates that judges in the future will be elected by the High Judicial Council. The removal of this competence from the National Assembly to elect court presidents, the Republic Public Prosecutor and public prosecutors and decide on the termination of their office as well as to elect judges and the deputy public prosecutors, follows the Venice Commission’s most fundamental criticism that arose from the concerns about judicial independence and the organisation of the Serbian judiciary and prosecutorial service. It is thus to be welcomed. The only judicial or prosecutorial official who would still be elected by the National Assembly is the Supreme Public Prosecutor, but several guarantees of its independence from the executive are provided i.e. permanent tenure, fixed reasons for dismissal.

34. Draft Amendment VII (amending Article 145 of the Constitution) deals with the eligibility criteria for judicial office. European and international standards require that judicial appointments be based on objective, transparent and non-discriminatory selection criteria, which can relate to

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<sup>3</sup> Cf Amendment XVII for a comparable issue.

<sup>4</sup> Ibidem.

<sup>5</sup> Venice Commission, [CDL-AD\(2007\)028](#), Report on Judicial Appointments by the Venice Commission, paragraph 3.

<sup>6</sup> Ibidem.

formal requirements (nationality, minimum age, qualifications, professional experience, etc.), judicial skills and human skills.<sup>7</sup> Various constitutional legislators have chosen to entrench such criteria on a constitutional level.

35. However, the Serbian constitutional legislator has opted for a system in which the eligibility criteria are laid down on a legislative level (and not the constitutional level) – which does not appear to be problematic as such. For instance, in its June 2020 Opinion on Malta, the Venice Commission stated that the core criteria for eligibility to be appointed to a judicial office should be formulated on the legislative level as the “*validation of such criteria and their adoption in the form of law would provide sufficient legitimacy for such an important feature of a vital state institution as is the Judiciary*”<sup>8</sup>. However, a model in which these criteria are raised to the constitutional level (as was done in the end by the Maltese authorities) could be given serious consideration.

### 3. Draft Amendment VIII (Permanent tenure of judicial office)

36. Draft Amendment VIII (amending Article 146 of the Constitution) regulates the tenure of a judge. The judge will have his or her permanent tenure terminated only in case of (a) retirement, (b) personal request by the judge, (c) permanent loss of ability to exercise the judicial function, (d) loss of Serbian citizenship, and (e) dismissal in case of a criminal conviction to at least six months imprisonment or a disciplinary sanction, if the HJC considers that the disciplinary *offence “seriously damages the reputation of judicial office or public confidence in the courts”*.

37. In the last two paragraphs of draft Amendment VIII the following is set out: “*A judge shall have the right to lodge an appeal with the Constitutional Court against the decision of the High Judicial Council on cessation of judicial tenure, which shall exclude the right to lodge a Constitutional appeal.*” The difference between an appeal with the Constitutional Court and a Constitutional appeal should be clarified, unless this is a translation issue. The Venice Commission delegation was informed during the online meetings that the difference was clear under Serbian law.

38. The Venice Commission recalls that in the field of judicial discipline, a balance needs to be struck between, on the one hand, judicial independence and, on the other, the necessary accountability of the judiciary in order to avoid the negative effect of corporatism within the judiciary.

39. The Consultative Council of European Judges (CCJE) has stated that it does not believe it to be possible to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings.<sup>9</sup> Such codification of misconduct should be done at the national level. A comparative law research report entitled “*Judicial Independence in Transition*”<sup>10</sup> observed that in many European countries the grounds for the disciplinary liability of judges are defined in rather general terms. As an exception, in Italy the law provides an all-

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<sup>7</sup> M. Kuijer, *The Blindfold of Lady Justice*, Wolf Legal Publishers 2004, p. 222. See, *inter alia*:

○ [CM/Rec\(2010\)12](#), paragraph 44: appointments “should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.”

○ A similar provision is included in the [European Charter on the Statute for Judges](#) in sections 2.1 and 2.2. In doing so it mentions criteria related to legal knowledge (i.e. qualifications and professional experience), judicial skills (i.e. independent thinking and the ability to show impartiality) and human skills (i.e. the candidate’s capacity to respect human dignity and put the law into practice).

<sup>8</sup> Venice Commission, [CDL-AD\(2020\)006](#), Malta - Opinion on proposed legislative changes, paragraph 38.

<sup>9</sup> [CCJE \(2002\) Opinion no. 3](#) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality, paragraph 63.

<sup>10</sup> Seibert-Fohr, Anja (ed.); [Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht], *Beiträge zum Ausländischen Öffentliches Recht und Völkerrecht*; vol. 233, Berlin, 2012.



inclusive list of thirty-seven different disciplinary violations concerning the behaviour of judges both in-and outside their office.

40. Principle 5.1 of the European Charter on the Statute for Judges states that the grounds giving rise to a disciplinary sanction need to be “*expressly defined*”. A similar message can be discerned in the 2013 Volkov judgment of the ECtHR. In the absence of practice, domestic law needs to establish guidelines concerning vague notions to prevent arbitrary application of the relevant provisions: “*the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of “breach of oath” and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects*”.<sup>11</sup>

41. The notions used in draft Amendment VIII are formulated in a rather vague manner. However, it is unavoidable that a legislator uses open-ended formulas to a certain degree, in order to ensure the necessary flexibility. That has previously been recognised by the Venice Commission.<sup>12</sup> Relevant in this regard is also the fact that the task of interpreting and applying these notions will be assigned to the HJC, which enjoys sufficient institutional independence, but will also need to show legal knowledge and sensitivity to the issues of judicial conduct and judicial independence.<sup>13</sup> It is therefore possible to leave further development and concretisation of those open-ended standards to the HJC.

42. However, the Venice Commission has previously noted that concepts such as the “*dignity of a judge*” are too subjective to form the basis of disciplinary liability.<sup>14</sup> Similarly, the Venice Commission has previously commented that “*undermining the reputation of the court and judicial function*” is excessively vague.<sup>15</sup> Hence, consideration might be given to:

- (a) using a ‘mixed legislative technique’, i.e. retain the comprehensive formulas and accompany them with the most common examples of such disciplinary offences which would qualify as ‘*seriously damaging the reputation of judicial office or public confidence in the courts*’. These specific examples would cover the majority of situations and would at the same time serve as guidance for the High Judicial Council where an all-embracing formula may be needed.<sup>16</sup>

and/or

- (b) accompanying this constitutional provision with some sort of explanatory memorandum in which the relevant criterion is explained in more concrete terms in order to provide further guidance to the High Judicial Council<sup>17</sup>;

and/or

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<sup>11</sup> ECtHR, Oleksandr Volkov v. Ukraine of 9 January 2013, application no. 21722/11, paragraph 185.

<sup>12</sup> See, for example, Venice Commission, [CDL-AD\(2017\)018](#), Bulgaria - Opinion on the Judicial System Act, paragraph 108 and [CDL-AD\(2019\)024](#), Armenia - Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI, on the amendments to the Judicial Code and some other Laws, paragraph 40.

<sup>13</sup> The draft Amendment has to be read in conjunction with draft Amendment XV on qualified majority required to take a decision.

<sup>14</sup> Venice Commission, [CDL-AD\(2014\)018](#), Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, paragraph 22.

<sup>15</sup> Venice Commission, [CDL-AD\(2015\)042](#), Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of “The Former Yugoslav Republic of Macedonia”, paragraph 36.

<sup>16</sup> Venice Commission, [CDL-AD\(2017\)018](#), Bulgaria - Opinion on the Judicial System Act, paragraph 108.

<sup>17</sup> Cf. Venice Commission, [CDL-AD\(2018\)028](#), Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, paragraph 49.

- (c) ensuring that disciplinary liability may only be engaged for failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence.<sup>18</sup>

43. Similar considerations apply to public prosecutors (see for example Article 159 paragraph 6 of the Constitution, as amended by draft Amendment XXI, and Article 161 of the Constitution as amended by draft Amendment XXIII).

#### 4. Draft Amendment IX (Non-transferability of judges)

44. Draft Amendment IX (amending Article 147 of the Constitution) deals with the principle of non-transferability of judges. In some countries, it is not possible to transfer judges to another court against their will. In other countries, the possibility does exist, but only under certain conditions, and is assigned to a High Council of the Judiciary. [Recommendation CM/Rec\(2010\)12](#) on judges: independence, efficiency and responsibilities sets out that “A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system”.

45. Against this backdrop, the draft Amendment does not appear to be problematic: a judge may not be transferred to another court against his or her will, except if the court to which the judge is assigned is dissolved or a substantial part of its jurisdiction has been revoked. Those exceptions seem reasonable, especially because they are accompanied by (a) the guarantee that the judge’s salary remains unaltered, and (b) the fact that a judge may lodge an appeal with the Constitutional Court. This is to be welcomed. The Venice Commission notes that, as a rule, the court system is stable and that the dissolution of courts making the transfer of a judge necessary is a rare exception.

#### 5. Draft Amendment X (Immunity and incompatibilities)

46. Draft Amendment X (amending Article 148 of the Constitution) concerns *inter alia* the immunity of a judge: “A judge cannot be held accountable for an opinion expressed within the court proceedings or voting in the process of passing a court decision, unless he/she commits a criminal offense of violation of law by a judge or public prosecutor.”

47. The Commission finds that the meaning of the expression ‘a criminal offense of violation of law by a judge’ should be clarified,<sup>19</sup> unless this is a translation issue.

48. This draft Amendment should cover both immunity from civil lawsuit and criminal prosecution, as follows.

##### a) Immunity

49. According to international and European standards, judges should enjoy functional, but not general, immunity. This means that a balance must be struck between the immunity of judges as a means to protect them against undue pressure and abuse from other state powers or individuals (functional immunity) and the fact that a judge is not above the law (accountability).<sup>20</sup>

- **Functional immunity from criminal prosecution**

50. Functional immunity from criminal prosecution means that judges should not benefit from *general* immunity, which would protect them against prosecution for criminal acts committed by them for which they should be answerable before the courts. On the other hand, judges should

<sup>18</sup> Cf. Venice Commission, [CDL-AD\(2017\)018](#), Bulgaria - Opinion on the Judicial System Act, paragraph 106.

<sup>19</sup> The same applies to draft Amendment XXIV for the prosecution.

<sup>20</sup> Venice Commission, [CDL-AD\(2017\)002](#), Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges, paragraph 53.

enjoy *functional* immunity, i.e. immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes.<sup>21</sup>

- **Functional immunity from civil lawsuit**

51. Functional immunity from civil lawsuit means that judges should enjoy freedom from liability in respect of claims made directly against them relating to the exercise of their functions in good faith. Judicial independence could otherwise be seriously threatened.<sup>22</sup>

52. This is reflected, *inter alia*, in Principle 16 of the United Nations Basic Principles on the Independence of the Judiciary: “[...] judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions”. A similar starting point can be found in Principle 5.2 of the European Charter on the Statute for Judges, albeit that this document allows a state to claim reimbursement from a judge under certain strict conditions: (a) the State may only ask for reimbursement in case of a “gross and inexcusable” breach; (b) only “within a fixed limit”; and (c) reimbursement can only be ordered after “legal proceedings”.<sup>23</sup>

- **For both functional immunity from criminal prosecution and from civil lawsuit**

53. The Venice Commission has previously summarised its position as follows:

*“[...] the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in case of ordinary negligence. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Civil (or criminal) liability may limit the discretion of an individual judge to interpret and apply the law. Therefore, the liability of judges should not be extended to judges’ legal interpretation in the adjudication process. Only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties,<sup>36</sup> criminal responsibility<sup>37</sup> or civil liability.”<sup>24</sup>*

54. The Venice Commission would recommend that the underlined wording be considered in draft Amendment X.

## **b) Incompatibilities**

55. Draft Amendment X stipulates that the law (i.e. not the Constitution) will regulate which “functions, activities or private interests are incompatible with the judicial function”.<sup>25</sup>

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<sup>21</sup> Venice Commission, [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part I: The Independence of Judges, paragraph 61.

<sup>22</sup> This is also reflected in the case-law of the ECtHR. See, for example: ECtHR 15 July 2003, Ernst - Belgium, appl. no. 33400/96 in which Belgian journalists complained about a lack of access to court as a result of the fact that their complaint was directed against a judge who enjoyed immunity from jurisdiction. The Court held that immunity from jurisdiction was a long-standing practice to be found in other domestic and international legal systems, which ensured a proper independent administration of justice.

<sup>23</sup> Other non-legally binding documents are in the same vein. The European Charter on the Statute for Judges states that the State can only ask for reimbursement after “prior agreement” of a High Council of the Judiciary. The Consultative Council of European Judges endorses all these points but adds that it should generally be considered inappropriate to impose any personal civil liability on judges, even by way of reimbursement of the state, except in cases of willful default.

<sup>24</sup> Venice Commission, [CDL-AD\(2017\)002](#), Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges, paragraph 27.

<sup>25</sup> See also draft Amendment XXIV for prosecutors.

56. Judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.<sup>26</sup>

57. The existing constitutional provision (Article 152) states that “*A judge shall be prohibited to engage in political actions.*” The wording used in Article 152 is perhaps overly broad and it might be better to formulate *all* incompatibilities in one legislative text, even though deleting this part of the Constitution sends an unfortunate signal to society (see 2018 Opinion of the Venice Commission, paragraph 54).

58. To that end, consideration should be given to the need for a detailed legislative text stipulating the various incompatibilities.

## **6. Draft Amendment IV (Judiciary principles)**

59. Draft Amendment IV (amending Article 142 of the Constitution) deals with “*Judiciary principles*”.

60. Although this provision is not contrary to international and European standards, one may argue that it does not contain an exhaustive list of *all* the principles one would expect in such a provision. Furthermore, the word ‘independence’ should be favoured over ‘autonomous’ in regard to the judiciary. The word ‘autonomous’ is more appropriate in regard of the prosecutorial service. For this reason, it is recommended that the word ‘autonomous’ be taken out: “*Judicial power shall belong to [or: is vested in] judges who are independent*”. This would also be in line with the proposed wording of Article 144 of the Constitution (see draft Amendment VI).

61. In the final paragraph: “*A passed sentence may be fully or partially revoked without a court decision, by amnesty or presidential pardon*”. The provision does, however, not stipulate the general principle of the finality of court decisions. In the *Hornsby* case the ECtHR stated that the: “*Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6*”.<sup>27</sup> In the Venice Commission’s Rule of Law Checklist (paragraph 63), it is stated: “*Final judgments must be respected, unless there are cogent reasons for revising them*”.

62. It is recommended that the Serbian constitutional legislator takes these issues into account before adopting the amendments.

## **C. High Judicial Council**

### **1. Draft Amendment XIII (Composition of the HJC)**

63. Draft Amendment XIII (amending Article 151 of the Constitution) concerns the composition of the HJC. Draft Amendments II and III introduce consequential changes to respectively Article 99 and Article 105 of the Constitution.

64. The proposal entails that the HJC will be composed of 11 members: six judges elected by their peers and five “*prominent lawyers elected by the National Assembly*”. This proposal should be welcomed. It meets the parameters set out in Recommendation [CM/Rec\(2010\)12](#), which states that “*not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary*”.<sup>28</sup> In

<sup>26</sup> Venice Commission, [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part I: The Independence of Judges, paragraph 62.

<sup>27</sup> ECtHR 19 March 1997, *Hornsby - Greece* (Reports 1997, 495), paragraph 40.

<sup>28</sup> Paragraph 27. See also Venice Commission, [CDL-AD\(2015\)022](#), Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, paragraph 39; [CDL-AD\(2017\)018](#), Bulgaria -



addition, it meets a previous recommendation by the Venice Commission to choose an uneven number of members.<sup>29</sup> During the Venice Commission delegation's online meetings, the issue of what constitutes a "prominent lawyer" was raised several times. Notably, it was unclear who would fall into this category.

65. The alternative proposal, which would also be an HJC composed of 11 members, however there would only be five instead of six judges elected by their peers, the President of the Supreme Court and five prominent lawyers elected by the National Assembly. This would mean that less than half of the members would be judges, which is not recommended. The Venice Commission instead recommends that: *"In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers."*<sup>30</sup>

66. In addition, although the draft Amendments will remove the competence of the National Assembly to elect court presidents, the current President of the Supreme Court has been elected by the National Assembly and will remain in power according to Article 7 of the draft Constitutional Law for the implementation of Amendments I to XXIX to the Constitution of Serbia. This means effectively that the National Assembly has appointed six out of 11 members of the HJC i.e. the majority of the members of the HJC would be appointed by the National Assembly. This is not to be recommended, even if the Venice Commission is of the view that the National Assembly should not be excluded from the appointment procedure for members of the HJC nor that the President of the Supreme Court would be a member. GRECO goes even further in this respect; in its fourth evaluation round (corruption prevention in respect of members of parliament, judges and prosecutors) adopted on 29 October 2020, in its Recommendation iv. It provides that: *"(i) changing the composition of the High Judicial Council, in particular by excluding the National Assembly from the election of its members, providing that at least half its members are judges elected by their peers and abolishing the ex officio membership of representatives of the executive and legislative powers; [...]"*<sup>31</sup>

67. The procedure concerning the candidates elected by the National Assembly is regulated in this provision. After having conducted a public competition, ten candidates will be shortlisted by the responsible parliamentary committee taking into account the principle of 'broadest representation'. The (plenary) National Assembly will then proceed to elect five persons from the shortlist presented to it by the parliamentary committee. A candidate is elected if he or she receives two-thirds of the votes of *all* deputies. If the National Assembly fails to (timely) elect all five members, the *remaining* members will be elected by a special commission, comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman, by a simple majority vote.

68. In general, the proposal of a qualified majority is needed in the parliamentary vote and the provision envisages an adequate anti-deadlock mechanism. The Venice Commission does *not* object to a qualified majority vote of two-thirds, on the contrary, as it objected to the 3/5<sup>th</sup> majority in its 2018 Opinion of the Venice Commission (paragraph 61). However, the Venice Commission

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Opinion on the Judicial System Act, paragraph 14; [CDL-AD\(2019\)031](#), Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, paragraph 69; [CDL-AD\(2020\)035](#), Bulgaria - Urgent Interim Opinion on the draft new Constitution, paragraph 44.

<sup>29</sup> "Having an even number of members in the HJC is less usual than having an odd number, which is the current trend in many European states – there are only a few that have an even number of members in their judicial councils. [...]" (Venice Commission, [CDL-AD\(2018\)011](#), Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, paragraph 59).

<sup>30</sup> Venice Commission, [CDL-AD\(2010\)004](#), Report on the independence of the Judicial system Part I: the independence of judges, paragraph 32.

<sup>31</sup> GrecoRC4(2020)12, <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a07e4d>



is aware of the factual backdrop against which these theoretical proposals will operate in practice. As the current National Assembly is dominated by one political party, obtaining a qualified majority vote is not a problem. In order to reinforce depoliticization, while the two-thirds majority requirement should be kept, the Venice Commission recommends that (in)eligibility requirements be added. These could create a certain distance between the members elected by the National Assembly (the “prominent lawyers”) and party politics, which could make the HJC (and the HPC) more politically neutral and avoid conflict of interest, even if it may be difficult to completely insulate these members from any political influence. The Venice Commission has shown its appreciation of such criteria in its Urgent Opinion for Montenegro on the revised draft Amendments to the Law on the State Prosecution Service.<sup>32</sup>

69. In this latter regard, the provision only stipulates that a candidate must be a prominent *lawyer* with at least *ten years of experience* in legal practice. The Venice Commission does not object to these criteria, however they are not sufficient to alleviate the problem identified above. The Venice Commission recommends that either the wording “*other specifications shall be defined by the law*” be added to the draft Amendment or that a number of basic criteria be elaborated in the draft Amendment.

70. The Commission however notes that – where the high quorums are not reached (i.e. once the situation in Serbia changes and the opposition returns to the National Assembly – the coming into play of the anti-deadlock mechanism (a five-member commission consisting of the Speaker of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court and the Ombudsman – deciding by simple majority) might then become the rule rather than the exception. Although foreseeing an anti-deadlock mechanism to avoid stalemates is a positive step, and the Commission had welcomed it in its 2018 Opinion of the Venice Commission, the danger is that in the end, it will be up to a small five-person commission to decide the composition of the HJC and the HPC, and as a consequence, the composition of the judiciary. In this respect, discussions with the stakeholders during online meetings with the Venice Commission delegation suggested that this issue might be partially resolved by altering the composition of this commission – and thereby making the pursuit of a consensus more appealing.

71. Lastly, during the Venice Commission delegation’s online meetings, the issue of the budgetary autonomy of the HJC was raised (this applies *mutatis mutandis* to the HPC) and including this principle in the Constitution, which is supported by GRECO<sup>33</sup> and should be considered.

## **2. Draft Amendment XV (Work and decision-making of the HJC)**

72. Draft Amendment XV summarily describes the working methods and decision-making process of the HJC.

73. Paragraph 1 stipulates that decisions of the HJC are taken if at least eight members (out of 11) vote in favour of the decision. In the Venice Commission’s view, that is a rather high threshold which could easily lead to a situation in which a decision is *not* adopted. That might be welcome with regard to decisions on the dismissal of a judge, but perhaps less so with regard to other decisions, such as the appointment of new judges.

74. Another issue is that the draft Amendments hardly regulate anything with regard to the observance of due process requirements by the HJC in its decision-making process (except for the fact that paragraph 2 stipulates that the HJC needs to reason and publish its decisions and

<sup>32</sup> Venice Commission, [CDL-AD\(2021\)030](#), Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service.

<sup>33</sup> GrecoRC4(2020)12, <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a07e4d>, paragraph 30.

paragraph 3 provides for judicial review). As the decisions of the HJC impact judicial careers, European standards call for certain due process safeguards. However, this should be regulated in the Law on the HJC. This is all the more recommended, as the eight-vote-majority could block the work of the HJC and could be more easily regulated in a law if different majorities are called for in respect of different types of decisions taken by the HJC.

75. The European Charter on the Statute for Judges requires *inter alia* that the proceedings be of an adversarial character involving full participation of the judge concerned.<sup>34</sup> In its 2016 Rule of Law Checklist, the Venice Commission stressed that “[t]he disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s).”<sup>35</sup> In contrast, very basic features, such as the adversarial nature of the proceedings, the possibilities of an adequate preparation by the judge (i.e. timely notification, the right to examine all relevant documents, etc), and the timeframe within which the HJC needs to adopt a decision, are not regulated in the draft Amendments.

76. Although the national legislative authorities do not need to regulate these issues on a constitutional level – if the constitutional legislator decides to regulate a particular issue, then *all* essential features need to be regulated in the constitutional provision, which is not recommended. In this respect, consideration might be given to streamlining the draft Amendments and regulate this in an ordinary law.

### 3. Other

77. It seems that under these draft Amendments, the HJC will no longer be dissolved if it does not render a decision within 30 days. This is to be welcomed, as the Venice Commission has previously recommended to delete that provision.<sup>36</sup>

## D. Public Prosecution Service

### 1. Draft Amendment XVII (Status) – External autonomy of the prosecutors’ office

78. Sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence.<sup>37</sup> The Venice Commission has previously stated that it would be ‘preferable’ to have such a safeguard on the constitutional level.<sup>38</sup> It is therefore to be welcomed that draft Amendment XVII stipulates that the public prosecutor’s office “*shall be an autonomous state body*”.

79. The impermissibility of the executive or the National Assembly to give instructions in individual cases to any public prosecutor should be laid down in ordinary law. This issue is to a certain degree covered by Article 156 paragraph 1 of the Constitution (see draft Amendment XVIII) which stipulates that the Supreme Public Prosecutor (being the most senior official in the

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<sup>34</sup> See also Principle 3 of the Conclusions of the meeting “The guarantees of the independence of judges – evaluation of judicial reform”, held in Budapest on 13-15 May 1998, organised by various Associations of Judges (to be found in: Council of Europe, *Independence, impartiality and competence of judges – Achievements of the Council of Europe* (doc. no. MJU-22 (99) 5), p. 49), which refers to “procedures which ensure sufficient guarantees for the protection of individual rights and freedoms of the judge, following the rules laid down in Article 6 of the European Convention of Human Rights”.

Principle 17 of the United Nations Basic Principles on the independence of the judiciary adds an additional element: “The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge”. This element can also be found in Principle 28 of the International Bar Association Code of minimum standards of judicial independence (New Delhi, 1982) and in Principle 2.32 of the Universal Declaration on the Independence of Justice (Montréal, 1983), but not in its European counterparts.

<sup>35</sup> Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, paragraph 78.

<sup>36</sup> Venice Commission, [CDL-AD\(2018\)011](#), paragraph 70.

<sup>37</sup> Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, paragraph 91.

<sup>38</sup> Venice Commission, [CDL\(1995\)073rev](#), Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6.

hierarchy of the public prosecution “*shall not be responsible to the National Assembly for acting in an individual case*”. It is recommended to clarify this issue further in the constitutional amendments.

## 2. Draft Amendment XVII (Status) – Internal independence: hierarchical powers

80. Draft Amendment XVII concerns the public prosecutor’s office. Article 156 (although text says 155) of the Constitution is amended and the final paragraph stipulates that the Supreme Public Prosecutor and the Chief Public Prosecutor “*shall have hierarchical powers over the lower Chief Public Prosecutors and public prosecutors in regard to their acting in a concrete case*”. In the same vein, Article 157 of the Constitution (see draft Amendment XIX) will read: “*An immediately higher Chief Public Prosecutor may issue a mandatory instruction for acting in a particular case to the lower Chief Public Prosecutor, if there is doubt about the efficiency and legality of his or her acting. The Supreme Public Prosecutor may issue such instructions to any Chief Public Prosecutor*”. A mandatory instruction is binding on the lower public prosecutor. Article 157 of the Constitution stipulates that prosecutors “*shall act according to mandatory instructions*”.

81. There is no common European standard on the organisation of the prosecution service. In countries where the prosecution service is regarded as a part of the executive, it is not uncommon to find a hierarchical model. In such a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. It is important to make a distinction between general and case-by-case instructions: in a hierarchical system, not only general instructions but even case-by-case instructions are allowed – however only if certain safeguards are met. For instance, where a prosecutor other than the prosecutor general is given an instruction, he or she has the right to have the instruction in writing; also, any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal, a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.<sup>39</sup>

82. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty.<sup>40</sup> Therefore, according to the Venice Commission’s standards<sup>41</sup>, the hierarchical model is acceptable and some form of hierarchical control over the decisions and activities of prosecutors is allowed.<sup>42</sup> However, according to our Rule of Law Checklist, prosecutors “*must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law*” (paragraph 92). The latter issue is adequately addressed in Article 156 paragraphs 2 and 3 of the Constitution (draft Amendment XVIII) where reference is made to “*in line with the law*”. In addition, Article 157 of the Constitution (draft Amendment XIX) stipulates that a prosecutor “*who considers that the mandatory instruction is unlawful or ill-founded shall have the right to complain, according to the law*”.

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<sup>39</sup> Venice Commission, [CDL-AD\(2010\)040](#), Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, notably paragraphs 57-60. See also the Committee of Ministers of the Council of Europe’s Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system.

<sup>40</sup> Venice Commission, [CDL-AD\(2008\)019](#), Opinion on the draft law on the Public Prosecutors’ service of Moldova, paragraph 15.

<sup>41</sup> Venice Commission, [CDL-AD\(2010\)040](#), Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, paragraphs 28, 30 and 31.

<sup>42</sup> It is one of the reasons for which the Venice Commission prefers to use the word ‘autonomous’ over ‘independent’ with respect to public prosecutors.

### **3. Draft Amendment XX (Election and termination of the term of office of the Supreme Public Prosecutor and the Chief Public Prosecutor)**

83. The Supreme Public Prosecutor shall be elected by the National Assembly (see draft Amendment II referring to Article 99 and draft Amendment XX referring to Article 158 of the Constitution) upon the proposal of the HPC following a public competition by a majority vote of three-fifths of all deputies. The draft Amendments should set out the possibility for the HPC to nominate just one candidate for the post of Supreme Public Prosecutor to the National Assembly for validation/confirmation in order to depoliticise the appointment process as much as possible.

#### **E. High Prosecutorial Council**

##### **1. Draft Amendment XXV (Composition of the HPC)**

84. According to draft Amendment XXV (amending Article 163 of the Constitution) on the composition of the HPC, the latter will have 11 members: five members are elected by the prosecutors themselves, four “prominent lawyers” are elected by the National Assembly, and two *ex officio* members (the Supreme Public Prosecutor and the Minister of Justice). The question should be raised as to why there are now less prosecutors in the HPC than in the past.

##### **a) Members elected by their peers**

85. There is an ongoing discussion on whether prosecutorial councils should contain a majority of prosecutors elected by their peers. While the Consultative Council of European Prosecutors (CCPE) has advocated this approach in its opinions, it has not met general agreement.<sup>43</sup> The Venice Commission has previously stated that it is “*recommended that a substantial element or a majority of the members*” of a prosecutorial council be elected by their peers.<sup>44</sup> While it is not a majority (5 out of 11), the Serbian proposals meet the standard of a ‘substantial element’.

##### **b) Members elected by the National Assembly**

86. The Venice Commission has previously stated that “*there is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament*”.<sup>45</sup> If members of such a council are elected by Parliament, this should preferably be done by a qualified majority.<sup>46</sup> The Serbian proposals meet those parameters. However, the comments made above with regard to the HJC apply *mutatis mutandis* to the HPC and will not be reiterated here.

##### **c) Ex officio members**

87. With regard to the *ex officio* membership of the Minister of Justice, the Venice Commission has so far been cautious in its approach. In an opinion on Montenegro, it stated that “*it is wise that the Minister of Justice should not him- or herself be a member*”.<sup>47</sup> Similarly, in an opinion on Moldova: “*The self-governing nature of the SCP might be questioned given the ex officio membership of the Minister of Justice*”.<sup>48</sup>

<sup>43</sup> Venice Commission, [CDL-AD\(2020\)035](#), Bulgaria - Urgent Interim Opinion on the draft new Constitution, paragraph 47.

<sup>44</sup> Venice Commission, [CDL-AD\(2014\)008](#), Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, paragraph 45.

<sup>45</sup> Venice Commission, [CDL-AD\(2014\)029](#), Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, paragraph 43.

<sup>46</sup> Venice Commission, [CDL-AD\(2010\)040](#), Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, paragraph 66.

<sup>47</sup> Venice Commission, [CDL-AD\(2014\)042](#), Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, paragraph 38.

<sup>48</sup> Venice Commission, [CDL-AD\(2015\)005](#), Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, paragraph 131.



88. In addition, it is unclear why there is a difference between the HJC and the HPC with respect to the inclusion of an *ex officio* member.

89. In this respect, GRECO also recommended under Recommendation viii. to “(i) *changing the composition of the State Prosecutorial Council (SPC), in particular by excluding the National Assembly from the election of its members, providing that a substantial proportion of its members are prosecutors elected by their peers and by abolishing the ex officio membership of representatives of the executive and legislative powers; ...*”<sup>49</sup>

## 2. Overall assessment

90. Unlike judges, prosecutors are often organised in a hierarchical system (as is the case in Serbia). There is a risk that, as members of a prosecutorial council, prosecutors would vote as a block, following instructions (formal or informal) from their superiors. A prosecutorial council that lacks a strong and truly independent component will not be an efficient check on the powers of senior prosecutors.<sup>50</sup> Equally, the Venice Commission has always stressed that a prosecutorial council should not be dominated by political appointees.<sup>51</sup>

91. In the Serbian proposals, a majority in the HPC will either be the Supreme Public Prosecutor or act under the hierarchical control of the Supreme Public Prosecutor. Equally, six out of 11 members of the HPC would be political appointees: four would be elected by the National Assembly, the Supreme Public Prosecutor is elected by the National Assembly, and the Minister of Justice is a political figure.

92. Therefore, even though the various components of the HPC do not appear to be problematic in light of European standards, the overall composition of the HPC does raise concern. Ideally, the solution would be to abolish the two *ex officio* members of the HPC and have six public prosecutors elected by their peers and five prominent lawyers elected by the National Assembly. A further recommendation would be that the members elected by the National Assembly not have any present or future hierarchical (or *de facto*) subordination links to the Supreme Public Prosecutor and represent other legal professions.

93. Comments made with regard to the HJC apply *mutatis mutandis* to the draft Amendments concerning the HPC.

## F. Constitutional Court

94. There seem to be no real substantive changes with regard to the Constitutional Court (draft Amendment XXIX) in comparison to the previous Constitution.

95. Serbia has opted for a model that exists in a number of European States, especially among the young democracies, where the President, the legislator and the judiciary participate in the composition of the Constitutional Court.

96. With regard to those members of the Constitutional Court who are appointed by the National Assembly, it is regrettable that this opportunity for constitutional revision has not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly, and (b) an adequate

<sup>49</sup> <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a07e4d>

<sup>50</sup> Venice Commission, [CDL-AD\(2020\)035](#), Bulgaria - Urgent Interim Opinion on the draft new Constitution, paragraph 47.

<sup>51</sup> See, for example, Venice Commission, [CDL-AD\(2015\)039](#), Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, paragraphs 33, 35 and 36.



anti-deadlock mechanism. The Venice Commission has previously indicated that a qualified majority should be required in all rounds of voting<sup>52</sup>. Similarly, the Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of state institutions.<sup>53</sup> From a comparative perspective, the Venice Commission recommends the introduction of a qualified majority for the election of the candidates for the position of Constitutional Court judges together with appropriate anti-deadlock mechanisms.<sup>54</sup>

### **G. Judicial Academy**

97. The Judicial Academy was initially foreseen as being the institution that would provide a “point of entry” into the Serbian judiciary. It was therefore to be given a preeminent role to protect the appointment process from undue influence (see also GRECO’s fourth evaluation round<sup>55</sup>) but has been excluded from the draft Amendments. The latter no longer stipulate that entry into the judiciary is conditional on completion of the Judicial Academy, nor do the draft Amendments provide for a constitutional basis for the Judicial Academy.

98. Consideration should be given to regulate the functioning of the Judicial Academy in an ordinary law, should this not be the case.

### **H. Draft Constitutional Law for the implementation of Amendments I to XXIX to the Constitution of the Republic of Serbia**

99. The draft Constitutional Law for the implementation of the Amendments consists of 11 Articles.

100. It provides for the alignment of the relevant laws and of institutions with the draft Amendments, once these enter into force, notably, that the relevant laws (Law on Judges, on the Organisation of Courts, on Public Prosecutors’ Office, on the HJC, on State Prosecutorial Council) will be aligned with the draft Amendments within a year of their entry into force. It sets out that the membership of HJC and the HPC will be aligned with the draft Amendments within 60 days of the entry into force of the draft Amendments. The presidents of both institutions will then be elected 15 days from the day of the election of the members. This is to be welcomed.

101. The draft also provides that the current members of the HJC and the HPC who were elected among judges (HJC) and elected among deputy public prosecutors (HPC) will continue their functions until the expiration of their term of office. This will contribute to the Venice Commission’s recommendation to introduce a staggered election process in these institutions to avoid that all expertise is lost in one go after the members’ five-year term ends.

102. The draft also sets out that the judges and the staff of the Supreme Court of Cassation will retain their functions as will the deputies of the Republic Public Prosecutor and the prosecutorial staff. The introduction of some stability is to be welcomed.

103. It is also to be welcomed that judges and deputy public prosecutors will retain their permanent tenure and that judges and deputy public prosecutors who were elected for a term of three years will obtain permanent tenure. This stability is to be welcomed.

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<sup>52</sup> Venice Commission, [CDL-AD\(2011\)040](#), Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 24.

<sup>53</sup> Venice Commission, [CDL-AD\(2013\)028](#), Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paragraph 6.

<sup>54</sup> Cf. Venice Commission, [CDL-AD\(2017\)001](#), Slovak Republic - Opinion on questions relating to the appointment of Judges of the Constitutional Court, paragraphs 58-59.

<sup>55</sup> <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a07e4d>, paragraph 34.

104. The only issue of concern is Article 10 regarding the President of the Supreme Court of Cassation, who will retain this position until the expiry of his/her term. While this is not objectionable as such, the Commission observes that this President would be eligible to be elected to this post again – which is not in line with draft Amendment XI, which sets out that “*The same person cannot be elected more than once as a President of the Supreme Court*”. Considering that the Supreme Court will be the continuation of the Supreme Court of Cassation, the Venice Commission recommends that this Article be reconsidered in the light of draft Amendment XI.

## V. Conclusions

105. The initiative of the Serbian authorities to amend the 2006 Constitution in order to bring it into in line with European and international standards – albeit only on the part of the judiciary – is to be welcomed.

106. Given the limited scope of the draft Amendments, the present opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the functioning of democratic institutions in Serbia. It also does not deal with judicial reform as such but focuses on the draft Amendments.

107. The process of public consultations for these draft Amendments could be characterised as being sufficiently inclusive and transparent.

108. In the context of the current Serbian political landscape – with a one-party majority in the National Assembly and the absence of the parliamentary opposition – there is a strong need to adopt an inclusive approach that should aim to reach as broad a legitimacy for the constitutional reform as possible among all institutional actors and all political forces in Serbia. It is therefore important for the Serbian authorities to actively seek the participation and involvement of the opposition. This also means that the opposition must take responsibility and contribute to the process.

109. With respect to the draft Amendments, the Venice Commission welcomes, *inter alia*, the introduction of the principle of non-transferability of judges, functional immunity for judges and prosecutors, the removal of the probationary period for judges and prosecutors, that the High Judicial Council will no longer be dissolved if it does not render a decision within 30 days and, most importantly, the removal of the competence from the National Assembly to elect court presidents, the Republic Public Prosecutor and public prosecutors and to decide on the termination of their office as well as to elect judges and the deputy public prosecutors. The relevant amendments are in line with European standards and address previous recommendations, including of the Venice Commission.

110. There is, however, still room for improvement. The Venice Commission makes the following key recommendations:

- the election by high quorums needed in the National Assembly for the election of prominent lawyers to the HJC (five members) and to the HPC (four members) may lead to deadlocks in the future. There is a danger that the anti-deadlock mechanism meant to be an exception becomes the rule and allows politicized appointments. In order to encourage consensus and move away from the anti-deadlock mechanism of a five-member commission – the composition of the latter should be reconsidered;
- regarding the two alternative suggestions for the composition of the HJC (both have 11 members, which is to be welcomed): the first alternative is clearly preferable with a majority of members being judges appointed by their peers; the second alternative would reduce the number of judges to five and include the President of the Supreme Court. This

would mean that less than half of the members would be judges elected by their peers, which is not in line with European standards;

- while the two-thirds majority requirement in the parliamentary vote is welcome and should be kept, eligibility criteria designed to reduce the risk of politicisation should be added, due in particular to the current political situation;
- the possibility should be provided for the HJC to nominate just one candidate for the post of Supreme Public Prosecutor to the National Assembly for validation/confirmation in order to depoliticise the appointment process as much as possible;
- in the composition of the HPC, there are now less prosecutors than in the past – this is not to be recommended;
- there is a difference between the HJC and the HPC with respect to the inclusion of *ex officio* members – ideally, the two positions of *ex officio* members of the HPC should be abolished and there should be six public prosecutors elected by their peers; the members elected by the National Assembly should also not have any present or future hierarchical (or *de facto*) subordination links to the Supreme Public Prosecutor and represent other legal professions.

111. Other recommendations include:

- the eligibility criteria for judicial office should be included at the constitutional level;
- consideration should be given to adding a detailed legislative text stipulating the various judicial incompatibilities;
- consideration should be given to include the budgetary autonomy of the HJC and the HPC at the constitutional level;
- the working methods of both the HJC and the HPC should appear in an ordinary law and not at the constitutional level.

112. With respect to the time constraints that are partly due to the planned dissolution of the current National Assembly in view of holding early elections in the spring of 2022 (and the next round of EU accession negotiations) – the Venice Commission reiterates that it is not its role to solve these time constraints. However, the Venice Commission refers to its Urgent Opinion for Serbia on the draft Law on the Referendum and the People's Initiative ([CDL-PI\(2021\)015](#)), where it made a number of important recommendations designed to improve that Law. To the extent that this Law will be applicable to the constitutional referendum which will be organised after the adoption of the draft Amendments, it is crucial for the Serbian authorities to amend the Law on the Referendum in line with the Venice Commission's recommendations by way of priority.

113. For the judicial reform to succeed in bringing the Serbian judiciary in line with European and international standards, organic laws will need to be reformed that regulate very essential details such as eligibility criteria for judicial office and invest in practice. The current constitutional reform is a necessary and important first step in the process, but does not constitute the completion of this process.

114. The Venice Commission remains at the disposal of the Serbian authorities for any assistance it may provide in the constitutional reform process.