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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SERBIA

OPINION

ON THREE DRAFT LAWS IMPLEMENTING THE CONSTITUTIONAL AMENDEMENTS ON THE JUDICIARY

Adopted by the Venice Commission
at its 132nd Plenary session
(Venice, 21-22 October 2022)

On the basis of comments by

Ms Regina KIENER (Member, Switzerland)
Mr Martin KUIJER (Substitute Member, the Netherlands)
Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Mr Kaarlo TUORI (Honorary President of the Venice Commission)

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I. Introduction

1. By letter of 12 September 2022, the Serbian Minister of Justice Ms Maja Popović requested an opinion of the Venice Commission on a legislative package composed of five draft Laws aimed at implementing the recent constitutional amendments.

2. The present Opinion deals with the three draft Laws related to the judiciary: the draft Law on the Organisation of the Courts, the draft Law on Judges, and the draft Law on the High Judicial Council (see CDL-REF(2022)040, CDL-REF(2022)041 and CDL-REF(2022)042 accordingly). The two draft laws related to the prosecution service, the draft Law on the Public Prosecution Service and the draft Law on the High Prosecutorial Council, will be the object of a separate opinion.

3. Ms Regina Kiener (member, Switzerland), Mr Martin Kuijer (substitute member, the Netherlands), Mr Jean-Claude Scholsem (substitute member, Belgium) and Mr Kaarlo Tuori (Honorary President, Finland) acted as rapporteurs for this opinion. On 29 and 30 September 2022 the rapporteurs assisted by Mr G. Dikov from the Secretariat, had online meetings with the Minster of Justice, with members of the National Assembly, with judges, with members of the High Judicial Council, with legal experts and with some representatives of civil society. The Commission is grateful to the Ministry of Justice for the excellent organisation of these online meetings.

4. This opinion was prepared in reliance on the English translation of the three draft Laws. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 29 and 30 September 2022, as well as the written comments to the draft opinion submitted to the Venice Commission by the Ministry of Justice on 17 October 2022. The draft opinion was examined at the meeting of the Sub-Commission on 20 October 2022. Following an exchange of views with Minister Popović, it was adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022).

II. Background and the procedure for the adoption of the draft laws

6. Since 2007 the Venice Commission has issued several opinions on the organisation of the Serbian judiciary.[1] The comprehensive judicial reform culminated in the draft constitutional amendments, which have been analysed in the two opinions of the Venice Commission issued in 2021.[2] The constitutional amendments were adopted at a referendum in January 2022 and promulgated by the National Assembly in February 2022 (see CDL-REF(2021)085).

[1] Venice Commission, CDL-AD(2007)004, Opinion on the Constitution of Serbia, CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, CDL-AD(2009)022, Opinion on Rules of Procedure on Criteria and Standards for the Evaluation of the Qualification, CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia Competence and Worthiness of Candidates for Bearers of Public Prosecutor's Function of Serbia, CDL-AD(2011)015, 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(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, CDL-AD(2014)029, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, CDL-AD(2018)011, Serbia - Opinion on the draft amendments to the constitutional provisions on the judiciary.

[2] Venice Commission, CDL-AD(2021)032, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, and CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary.

7. In March and April 2022, the Ministry of Justice consulted the main stakeholders - representatives of the High Judicial Council (HJC, or "the Council"), the High Prosecutorial Council (the HPC), the President of the Supreme Court of Cassation, the Prosecutor General, representatives of professional associations of judges and public prosecutors, lawyers and the academia. In April 2022, two working groups of mixed composition were established. In July 2022 the two working groups had online consultations with the rapporteurs of the Venice Commission. In September 2022 the two working groups finalised the texts of the five draft laws and published them on the Ministry's website.[3] On 12 September 2022, the Minister of Justice requested an opinion of the Venice Commission on these five draft laws.

8. As understood by the rapporteurs, the members of the working groups from the ranks of practicing lawyers, from the academia and from civil society were selected by the Ministry. The Bar as an institution was not formally involved in the preparation of the legislative package. Furthermore, during the online meetings some political parties complained that they have only received the draft Laws towards the end of September, which impacted their possibility to prepare their contributions.

9. The Commission is mindful of this criticism. However, the drafting process until September was primarily an *internal* process for which the responsibility rests with the Ministry. The composition of the working groups ensured a sufficiently inclusive process. A considerable effort was required to develop those draft Laws in a relatively short timeframe. The voluminous legislative package has been published only on 12 September, which explains that some of the interlocutors did not have sufficient time to study it before meeting the rapporteurs.

10. Given the cardinal nature of the reform package, the Venice Commission encourages the Serbian authorities to continue in the same spirit of inclusiveness and transparency. Sufficient time should be allocated for proper public consultations in the coming months: input from relevant institutions and other stakeholders should be collected and analysed before a parliamentary vote on the bills.

11. The three draft Laws are voluminous and cover a vast range of issues, both important and less important for the proper functioning of the judiciary and for ensuring judicial independence. Due to the time constraints, the Venice Commission will limit itself to addressing some key issues. If the Opinion remains silent on other elements of the three draft Laws, this is not to say that the Venice Commission agrees with them nor that it will not raise them at a later stage.

III. Analysis

A. General overview of the current judicial reform

12. As stressed in the November 2021 opinion on the constitutional reform in Serbia, the recent constitutional amendments have the potential to bring about significant positive change in the Serbian judiciary.[4] The Venice Commission observes that the Serbian authorities invested considerable effort in preparing the legislative package: the draft Laws are generally well-structured, clearly written, and cover all essential points which need to be covered. However, the Venice Commission wishes to underline that a successful judicial reform does not only depend on these legislative amendments: in order to secure an independent and future-oriented judiciary

[3] It should be noted however that the draft Laws examined in this opinion are not exactly the same as the drafts on which the working group agreed. The final responsibility for the draft laws rests with the Minister of Justice who will also be politically responsible for defending the drafts in parliament and securing a political majority to have the bills passed.

[4] Venice Commission, CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, para.46

of good reputation, it is crucial that a solid legal framework should be accompanied by the non-legislative measures described below.

13. As explained to the rapporteurs, Serbia has already numerous vacant posts in the judiciary, and numerous more senior judges will retire imminently. This problem is exacerbated by a lack of interest in a judicial career amongst law school graduates. This "generation gap" may be difficult to fill, and this may become the endemic problem of the Serbian judiciary for the years to come, even if the draft Laws succeed in increasing the independence of the judges and the efficiency of judicial governance.

14. Attracting young judges to the system may require allocating sufficient budgetary means to the judiciary to solve the problem of relatively modest judicial salaries, as well as regulating judicial salaries and pensions in the law itself in order to ensure their appropriate level and regular indexation. This problem was underlined by many interlocutors during the online meetings.

15. Another general problem, which cannot be solved by the legislative amendments alone, is the strictly hierarchical organisation of the judiciary, with a strong notion of supervision, hierarchy between higher courts and lower courts, and multiple forms of evaluations and controls. Such a model can be found in certain European jurisdictions. Each particular mechanism of evaluation or control, taken in isolation, is not necessarily objectionable. However, the cumulative effect of all those mechanisms could affect the attractiveness of the judicial profession for young judges.

16. In the following sections the Venice Commission will make certain specific suggestions on how to make this system less burdensome and bureaucratic, but those legislative amendments should be accompanied by a change in the legal culture within the judiciary. Judicial independence also entails a certain amount of freedom and discretion, and novelties in case law are a way to better and perfect the law.

B. The draft Law on the Organisation of the Courts[5]

1. The role of the Ministry of Justice in the court administration

17. Under the proposed draft law, the tasks of the Ministry of Justice (hereinafter – the Ministry) in the governance of the judiciary have been generally reduced, or at least demarcated with the tasks of the HJC. This is positive. Many interlocutors argued that the draft Law provides for much needed clarity. However, under the draft Law the Ministry would keep some important powers, and the line between administrative and substantive management of court processes would not always be visible.

18. Article 73 defines the "Judicial Administration Tasks" which are divided between the HJC and the Ministry. Some of the Ministry's tasks are well described and relate to the maintenance of buildings, equipment and IT systems, security of the courts etc., which is not problematic. Other tasks are shared between the Ministry and the HJC. The most problematic competencies of the Ministry in this area are as follows.

19. First, the Ministry issues the Courts' Rules of Procedure (see Article 76), following an "opinion" (and not the consent) of the HJC. It appears that the Ministry can disregard the opinion of the HJC. As the Rules of Procedure (see Article 76) cover some areas which are at the core of the judicial activity, this division of responsibilities should be reconsidered. In their written comments, the Ministry of Justice proposed a model of joint adoption of the Rules of Procedure (by the Ministry and by the HJC), which might be an acceptable solution.

[5] In each section the "draft Law" refers to the specific draft Law this section examines, unless stipulated otherwise specifically.

20. Second, under the draft Law both the Ministry and the HJC are "responsible for the supervision of the implementation of the Courts' Rules of Procedure", in their respective fields. Most notably, the Ministry and the HJC will be overseeing the handling of cases within statutory time limits and actions taken on "complaints and petitions". The role of the Ministry in these two areas is not entirely clear. The Ministry of Justice in their written comments explained that "supervision by the Ministry of Justice refers exclusively to administrative and technical issues", but that should be stated more explicitly in the draft Law. The draft Law should also specify more clearly what happens if the two bodies – the Ministry and the HJC – do not agree on a particular aspect which falls under their joint supervision. Moreover, the Ministry should not be involved in the consideration of "complaints" (on this see more below, in the sub-section examining the disciplinary proceedings under the draft Law on judges, paras 59 set seq.).

21. Some other competencies of the Ministry in the sphere of judicial governance also give rise to concern. For example, the competence to give "consent to the rulebook on the internal organisation and systematisation of jobs in the court" (as mentioned in Article 73) and the competence to approve the number of court staff (as laid down in Article 59) affect the autonomy of courts, especially in managing their human resources and defining their organigramme. It is only natural that the ultimate decision on the allocation of (limited) budgetary resources to the court system rests with the Parliament (adopting the consolidated State budget on the proposal of the Government). The HJC may participate in this process by making a proposal for the budget of the judiciary to the Government. As to the use of those resources (i.e. whether there is a need to have more judges or more supporting court staff, more IT, etc.), this should in principle be left to the judiciary itself, either through the HJC or through the court presidents. The Venice Commission invites the drafters to review those provisions in order to enhance the budgetary autonomy of the courts.

22. The Ministry of Justice in their written comments explained that traditionally in Serbia the status of the staff of the courts and prosecution offices had been governed by the general rules on the civil service and such personnel was therefore managed by Ministry. It is now envisaged to change the status of the staff of the courts by adopting a separate law, as a part of a judicial reform strategy program. The Venice Commission supports this change, because it would allow the courts to have some influence on the organisation of work of the "non-judicial" personnel.

23. One of the competencies of the Ministry defined in Article 73 is to "appoint and dismiss court experts and interpreters". It is not uncommon in Europe for the Ministry to be entrusted with the task of ensuring the quality of those professionals, but the *choice* of the experts and interpreters in specific court cases should obviously be a matter for the judges themselves. Indeed, the judges' freedom of choice is not unlimited. Experts and interpreters are paid from the funds allocated for this purpose in the budget of the judiciary. Judges should only pick experts possessing relevant qualifications, but, within these limits, the choice of the expert should belong to the judge. The Ministry in their written comments explained that the manner in which the experts and interpreters are appointed is dealt with in the relevant procedural codes. In the opinion of the Venice Commission, this could be specified in the draft Law.

24. Under Article 73, last paragraph, acts of judicial administration which "threaten the independence of judges" can be "annulled in administrative dispute". It is understood that a review by an administrative court is available against certain decisions of the HJC and the Ministry related to judicial administration under Article 73. However, it is unclear whether the judges or presidents of the courts concerned may trigger such review and whether such review would be available in situations of shared responsibility between the Ministry and the HJC. Furthermore, it is necessary to explain which acts are subject to appeal before the administrative courts and which can be appealed before the Constitutional Court (as per. Articles 17, 74 and 83 para 3 of the draft Law on Judges – see below). The Ministry of Justice in their written comments explained that this provision of the draft Law will be deleted.

2. Internal structure of the courts and the role of the court presidents

25. Under Article 22 of the draft Law on Judges (analysed below) the judge cannot be required to explain his or her decisions to anyone, including the presidents of the court. Likewise, it should be noted that court presidents have no discretion in the assignment of specific cases: cases are distributed amongst judges randomly (see Article 7 of the draft Law of the Organisation of the Courts and Article 24 of the Law on Judges). These aspects are positive.

26. At the same time, the Commission is struck by the very broad competences of court presidents. According to Article 53, court presidents manage the court administration. The description of "court administration" in Article 52 of the draft Law on Organisation of the Courts shows how broad the powers of court presidents in the Serbian judiciary are in practice. Article 52 read together with Article 53 gives the impression that the court presidents are responsible for the performance of all sorts of tasks, some of which relate directly to the process of handling of cases (distribution of the workload amongst the departments, interacting with court bailiffs, ensuring proper functioning of the legal aid system, etc.), whereas others are of a more administrative nature (ensuring the proper functioning of the IT system, management of the courthouses, etc.). Article 73, analysed above, also describes the "judicial administration tasks" which are performed by the Ministry. Some of these tasks (see paragraph 4) seem to overlap with the tasks of the court presidents. It is necessary to delimit more clearly the role of the court presidents and the role of the Ministry respectively in the daily management of the court business, in order to avoid ambiguity and overlapping or conflicting competencies. Furthermore, the scope of certain powers of the court presidents should be explained better. In particular, it concerns Article 36 which gives the president of the court a power to "determine the schedule of court activities". If this includes the power to define the criteria of allocating cases or categories of cases, this should be explained in the draft Law and some limits to this power should be introduced, in order not to nullify the positive effect of the general rule of random distribution of cases (see paragraph 24 above).

27. In any event, under the draft Law, court presidents have considerable powers in matters related to the organisation of the work of their courts. Considering these extensive powers, it is to be welcomed that the appointment of court presidents will be the exclusive competence of the autonomous HJC. It is also essential that court presidents receive the necessary managerial training to assist them when commencing with their new responsibilities.

28. Under Article 55 of the draft Law, court presidents are organised in a hierarchical manner, with higher courts presidents overseeing the performance of the lower ones. It is unclear what the "supervision" of a president of a higher court in respect of a lower court president exactly entails. The draft Law does not enumerate or describe the exact nature of these supervisory powers.[6] The Ministry of Justice, in their written comments, explained that "the president of the immediately superior court can supervise the work of the lower instance court only in connection with the court administration tasks", but the definition of these tasks in Article 52 is so broad and all-encompassing that this supervision may basically cover every aspect of the activities of the lower court. Such hierarchical structure may be potentially dangerous for the internal judicial independence, if these supervisory powers are abused to influence decisions in individual cases (cf. "application of regulations" in para 2). Any supervision related to the substance or procedural correctness of decisions rendered by the judges in the process of adjudication of cases should be achieved by the ordinary mechanism of appeals, not with reference to the broadly defined

[6] But see Article 87 of the draft Law on judges which provides, in para. 1 point 20, that "unjustified failure of the president of the court to act in accordance with the measures adopted during the supervision" is seen as a disciplinary breach, even though it is unclear, from the draft Law on the Organisation of the Courts, which "measures" a higher court president may prescribe and on which grounds.

president's power to "supervise". The scope of Article 55 of the draft Law should be clarified accordingly.

3. Other issues

29. Article 8 prohibits any "undue influence" on the judges. It is necessary to explain this concept better. The concept seems to lump together in a problematic way influence by other branches of government,[7] the media and civil society as well as private citizens. "Undue influence" should not cover legitimate behaviour of the parties (like court pleadings, appeals, etc. for example) or discussions within the judicial panels, as well as the legitimate exercise of the freedom of speech (like interviews which may be given by the parties' representatives, public discussions about the case and even criticism of the judicial decisions). Part of the task of the media as public watchdogs is to critically cover judicial proceedings. The Venice Commission recalls in this respect that "with regard to the media criticism targeting judges, the [European Court of Human Rights], while stressing the need for an adequate balance between the public interest in the fair administration of justice and freedom of expression […], has underlined that, as all other public institutions, courts are not immune to criticism and scrutiny […],"[8] (with further references to the Court's judgment *Sunday Times (No.1) v United Kingdom*,[9] and *Worm v. Austria*).[10] A distinction therefore needs to be made between the legitimate criticism related to the professional activities of judges, i.e. the reasoning in a judgment, with its wider limits, and defamatory and unfounded accusations against individual judges or insults, leakages of non-public "court information" to the media, etc.[11] In addition to drawing this distinction in the law itself, explanatory memorandum may give further details on the concept of "undue influence".

30. Article 10 of the draft Law provides for a complaints mechanism, but it is unclear to whom such complaints could be submitted, by whom (for example, whether it can be lodged by the prosecutor or by an expert participating in the case) and with what consequence. The Ministry of Justice in their comments explained that this general "right to complain" is derived from the constitutional right to petition, but the draft Law should explain more specifically which procedural forms such a right may take and in particular what is the relationship is between, on the one hand, such a complaints mechanism, and, on the other hand, the regular avenues of appeal and disciplinary proceedings.

31. Article 11 para. 3 of the draft Law stipulates that courts provide "the bodies of the Republic of Serbia" with documents and files. The remit of this provision is unclear, and, in any event, the applicability of this provision should not extend to documents and files pertaining to pending court cases. Neither should a court be obliged to hand over all documents in a court file pertaining to a closed case to executive authorities. The Ministry of Justice explained, in their written comments, that "there are special laws that prescribe to which authorities and in which procedures the case files are to be submitted", but this may be also explained – with reference to the specific legislation – in the text of the draft Law under examination.

32. Article 26 regulates joint sessions of the courts at the appellate level which are entrusted with the task of "harmonization of case-law" (see the last sentence of this Article). Indeed, appellate

[7] Thus, the Committee of Ministers of the Council of Europe recommended that "members of the legislative and executive power should also avoid criticism that would undermine judicial independence and/or public confidence in the judiciary as well as actions which may call into question their willingness to abide by judges decision" (Recommendation CM/Rec(2010)12, paragraph 18). In the context of Serbia the European Commission noted in its enlargement reports that "government officials, including some at the highest level, as well as members of Parliament, continue to comment publicly on ongoing investigations or court proceedings, as well as on the work of individual prosecutors and judges" (see page 22 of SRB report 2022, available here: https://neighbourhood-enlargement.ec.europa.eu/serbia-report-2022_en).

[8] Venice Commission, CDL-AD(2013)038, Opinion on the Legislation on Defamation in Italy, para. 21

[9] ECtHR, application no. 6538/74, Judgment of 26 April 1979, § 65

[10] ECtHR, application no. 22714/93, Judgment of 29 August 1997, § 50

[11] Venice Commission, CDL-AD(2013)038, cited above, para. 22

courts may notify the Supreme Court on shortcomings in the legislation they all experience. As explained by the Ministry of Justice in their written comments, such joint sessions should not entail decisions which hamper judicial independence. The competence to ensure the uniform application of the law is restricted to the Supreme Court, as per Article 32.

33. As a general remark, the Venice Commission notes that the imperative of "ensuring uniformity" permeates the text of both the draft Law on the Organisation of the Courts and the draft Law on Judges. In the light of the general observations in paragraph 15 above, the provisions related to the evaluation of the work of the judge (see Article 36 of the Law on Judges) should clearly stipulate that the reasonable (and reasoned) exercise of judicial discretion in interpreting evidence, statutory law and case-law of the higher courts should not give rise to any liability or penalty, and that possible diverging interpretations should not impede the judge's career, even when the judgment is subsequently overturned on appeal. Even though coherent interpretation of the law by the courts is essential for every legal order based on the Rule of Law, there should be sufficient space for originality and dissenting judgments.

34. Articles 71 and 75 of the draft Law stipulate the contents of the personal files of respectively court staff and judges that are kept by the courts. The storage of certain data is quite common in other jurisdictions and can also be explained from an anti-corruption angle. It is welcome that judges have the right to review their personal files and the right to complain to the HJC about its content, but this right should also be extended to the court staff, and Article 71 should be amended accordingly.

C. The draft Law on Judges

1. General provisions

35. The introductory part of the draft Law on Judges contains several declaratory provisions, such as the duty of the judge to "preserve confidence" in his or her independence and impartiality and adhere to the Code of Ethics (see Article 4). It is not clear whether these obligations are always supported by sanctions and if so, what sanctions.

36. Article 5 guarantees adequate salaries for the judges but includes no guarantees for the realisation of this principle. As explained to the rapporteurs during the online meetings, judicial salaries in Serbia are quite modest. Chapter II.6 of the draft Law includes very complicated and detailed provisions on the salary of judges. Ultimately, however, the level of salaries is left to depend on the annual budget, the law on judges offering no guarantees, except for an explanation of different coefficients applied depending on the level and seniority of judges and other factors. The Venice Commission reiterates the importance of appropriate salaries from the point of view of both the attractiveness of the judicial career and the prevention of corruption. Different techniques may be used in the law to guarantee the stability and appropriate level of the judicial salaries (like the benchmarking the level of salaries to the average salary in the country, or to the salaries in the executive or legislative branches, for example).

2. Judicial appointments

37. Section III of the draft Law (Articles 48 et seq.) deals with the appointment of judges and defines the eligibility criteria for becoming a judge. European and international standards demand that judicial appointments be based on objective, transparent and non-discriminatory selection criteria, which can relate to formal requirements (nationality, minimum age, qualifications, professional experience, et cetera), and to professional and human skills, which are more difficult to define exhaustively. Overall, the draft Law meets those standards. Some of the terms used by the draft Law – such as "worthiness" – may appear quite broad. However, the legislator tried to elaborate upon this notion in Article 50, and, in any event, merit is measured with reference to such elements as character, judgment, accessibility, communication skills, efficiency to produce

judgements, etc. These criteria rarely lend themselves to a precise definition. In addition, the rapporteurs were informed that "worthiness" is a common notion in Serbian law.[12] In such circumstance, the use of this criterion for the purpose of appointing a judge may be tolerated, provided that the body which decides on the appointment is sufficiently independent, impartial and its members have sufficient professional and personal experience to assess the "worthiness" of a candidate.

38. The appointing body in respect of professional judges is the HJC (Article 59). The composition of the HJC will be analysed below, in the section on the draft Law on the HJC, but, in the overall, it can be trusted in assessing the "worthiness" of candidates to the judicial positions.

39. Certain rules regarding the appointment procedure deserve praise. Thus, Article 52 contains a welcome provision that when selecting judges account must be taken of an "appropriate representation of members of national minorities and knowledge of professional legal terminology in the language of the national minority that is in official use in the court".

40. It is also welcome that a judicial remedy is provided for against a decision on the election to a judicial function (Article 60). In exercising its appellate review, the court should act with deference to the HJC[13] and primarily check whether the appointment procedure has been followed, formal eligibility criteria respected, etc. As to more subjective elements (like, again, the "worthiness" of the candidate), the appellate body should respect the discretion of the HJC to which the Constitution explicitly entrusted the power to select judges.

41. Article 88 of the draft Law regulates the appointment procedure of lay judges. It states that the HJC appoint lay judges at the proposal of the Minister. This provision is objectionable: in the Serbian system lay judges participate in the adjudication together with the professional ones, and the Venice Commission does not see any reason why their appointment should not follow the same procedure (with some modifications related to their professional competencies) as the one for the appointment of professional judges.

3. Incompatibilities

42. Article 31 of the draft Law enumerates which functions are incompatible with the judicial office. The overall thrust of the provision is in line with similar provisions in other jurisdictions. 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.[14] However, this provision can be further improved.

43. Thus, the draft Law should exclude *any possibility* that a judge may hold any function in the executive. The words "if a law doesn't prescribe otherwise" in Article 31 imply that the judge may be at the same time working in another public job, which is, as a rule, inadmissible.

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[12] Thus, the notion of "worthiness" appears in the draft Law on the Hight Judicial Council, Article 44: "Worthiness implies moral qualities that the member of the Council should possess and conduct in accordance with those qualities. Moral qualities are: honesty, conscience, fairness, dignity, perseverance and exemplary behaviour, and behaviour in accordance with those characteristics implies safeguarding the reputation of the Council and the judiciary in the exercise of the function and beyond it, awareness of social responsibility, maintaining independence, impartiality, integrity and dignity in performing the function and beyond it, and taking care about preserving confidence in the work and the authority of the Council and the judiciary in public."

[13] See Venice Commission, CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, para. 151, and, before that, Venice Commission CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 92. In the Armenian opinion this was said in the context of the disciplinary proceedings against judges, but the same approach is applicable *a fortiori* in the area of judicial appointments.

[14] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 62.

44. The prohibition for the judge to "act politically in some other manner" is too broad because it could extend to attending public lectures or other meetings on political affairs, or indeed to the act of voting itself. Only holding a political function or having a membership in a political party may be defined as incompatible with the judge's position. Indeed, certain manifest forms of strong political engagement may be seen as problematic when assessing the "worthiness" of a judicial candidate. As explained in the Venice Commission's report on the freedom of expression of judges, there is no single model of regulating the political activities of the judges.[15] Likewise, such strong political engagement could be a breach of the general "duty of restraint" and may lead to the imposition of a disciplinary liability. However, such behaviour should not be construed as an incompatibility requirement. The same remark is applicable to the draft Law on the High Judicial Council which, in Article 15 para. 2 prohibits members of the HJC to "act politically". Even if an exhaustive and precise legal definition of the prohibited political activities may be hard to achieve, it should be defined more narrowly in the draft Law and may further be developed in the Codes of Ethics.

45. The draft Law also contains an "umbrella clause" which is used in paragraph 2 and prohibits judges to have other, even unpaid, functions which can be contrary to the dignity, reputation and independence of a judge. Again, this formula may appear too broad. On the other hand, the draft Law entrusts the determination of such activities to the Ethics Committee of the HJC (see also Article 15 in the Law on the High Judicial Council). Probably, it would be wise to entrust the Ethics Committee not only with the task of developing general rules on the incompatibility, but also to play an advisory role for the judges who hesitate whether or not they can take up a particular function outside of the judiciary.[16]

46. Finally, the Venice Commission notes that the list of incompatibilities in Article 91 concerning lay judges is very meagre and vaguely formulated, in comparison with Article 31 (concerning professional judges). The Venice Commission understands that lay judges are not employed full time, so it is natural that they can have other day jobs. However, some occupations are always incompatible with a judicial function, be it a function of a lay judge or a professional judge (for example, being a public prosecutor or a law enforcement official excludes being a lay judge). Article 91 could be expanded to mention such clear-cut cases of incompatibility for lay judges. The Ministry of Justice in their written comments explained that under Article 94 provisions of the draft Law relating to judges apply also to lay judges, but it is unclear whether they are applied in their entirety or only *mutatis mutandis*, given the fact that lay judges are not employed full time, as it is understood.

4. Disciplinary violations and civil liability

47. The Consultative Council of European Judges has stated that it does not believe that it is possible to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings.[17] Such codification of misconduct should be done at the national level. In many European countries the grounds for the disciplinary liability of judges are defined in rather general terms.[18] As an exception, in Italy the law provides an all-inclusive list of thirty-seven different disciplinary violations concerning the behaviour of judges both in and outside their office.

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[15] Venice Commission, CDL-AD(2015)018, Report on the Freedom of expression of Judges, para 82.
[16] Venice Commission, CDL-AD(2016)013, Republic of Kazakhstan - Opinion on the Draft Code of Judicial Ethic, para. 44
[17] CCJE-GT (2002) 7, p. 32.
[18] "Judicial Independence in Transition", Seibert-Fohr, Anja (ed.); [Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht], Beiträge zum Ausländischen Öffentlichen Recht und Völkerrecht; vol. 233, Berlin, 2012.

48. 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 *Oleksandr Volkov v. Ukraine* judgment of the European Court of Human Rights (the ECtHR).[19] However, the ECtHR's reasoning in this judgment implies that the vagueness of certain legislative provisions may be compensated by the guidelines and practice establishing a consistent and restrictive interpretation of these notions (which was not the case in the Ukrainian legislation at the time).

49. Article 97 of the draft Law uses both techniques: it lists some very specific examples (for example, the unjustified non-attendance of mandatory training programmes) along with some rather vague notions (for example the "severe damage to the dignity of the court"). To a certain degree it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility. This was previously recognised by the Venice Commission.[20] As noted above, 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 autonomy and expertise.

50. However, the overall tenor of Article 97 is worrisome. The list of disciplinary offences is too broad, some of them are overlapping and should be reconsidered (compare points 3, 5, 6, 7 and 8, for example). There appears to be a disproportionate focus on disciplining the judge for various delays in the court proceedings. Whether a judge is able to conduct judicial proceedings (or certain procedural acts) in a timely fashion is often dependent on his/her overall workload, the adequacy of support staff and/or IT facilities, the procedural behaviour of the parties to the proceedings, etc. So, the degree of the judge's fault in non-respecting various procedural delays should be established against the background of the means which this judge disposes.

51. In order to accommodate this concern, the Serbian legislation has frequently opted for the inclusion of the word "unjustifiable". This is welcome but it should further be stressed that the application of these disciplinary offences should be conducted with great caution. An individual judge should not become the victim of structural deficiencies (including ones of a budgetary nature) within the judiciary, and the draft Law should explicitly state that.

52. Article 97 introduces a concept of a "repeated disciplinary offence" which is considered as a severe breach and may entail dismissal (see article 97 para. 3 and article 69). The concepts of "severe" and "repeated" offences should be developed further. The gravity of the disciplinary offences listed in Article 97 varies greatly. It would not always be proportionate to dismiss a judge if he/she has been disciplined twice for minor offences, or if these two less serious offences have been committed with a long interval.

53. There are two safety valves in the draft Law: (i) the principle of proportionality is explicitly guaranteed in Article 98, para. 2, and (ii) if the HJC believes that the behaviour of the judge "seriously damages the reputation or the public's trust in the judiciary" it may (and not "must") trigger the dismissal proceedings (Article 99). So, even a repeated offence may not necessarily lead to the dismissal unless the HJC establishes that it has caused a "serious damage". The Venice Commission also notes that the draft Law provides for an appropriate scale of sanctions for disciplinary offences (see Article 98), which is an additional guarantee against a disproportionate use of the provisions on the disciplinary liability. These qualifications contained in the draft Law may be sufficient, provided that the courts are well used to the practical application of the test of proportionality, and there is a sufficient body of well-reasoned case-law on the application of the disciplinary sanctions.

[19] ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013
[20] See, for example, Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, paragraph 108

54. Finally, Article 97 provides that a major violation of the Code of Ethics constitutes a disciplinary offence (Article 97 para. 1 (22)). As follows from Article 4 of the draft Law, the Code of Ethics is adopted by the HJC. However, the draft Laws are silent on the content of such a Code, which basically entitles the HJC to regulate in this Code any aspect of the judges' life and behaviour. In the opinion of the Venice Commission, if the Code of Ethics is to be used as a legal authority for imposing a disciplinary liability, some basic principles of the ethical behaviour should be described in the law itself, while the Code of Ethics may develop them in more detail.[21]

55. Article 81 introduces additional reasons for the dismissal of a court president. While it is welcome that the law provides for procedural safeguards in Article 83, some of the additional grounds mentioned in Article 81 are too broad. Thus, "violation of the principle of independence of judges", and "major violation of obligations set out by provisions governing the court administration" could be developed further in the law.

56. Article 81 of the draft Law also provides that court presidents can be dismissed for the "incompetency", which is established if a president receives a negative performance evaluation. First of all, there is a tension between Article 81 and Article 40 which does not mention that a negative performance evaluation may eventually lead to the dismissal of a judge or a president of the court. Second, the very notion of "incompetency" should never refer to contestable but not manifestly unreasonable interpretations of the law and facts made by the judge in adjudicating cases – such interpretation of "incompetency" may effectively prevent any fresh and unorthodox interpretations of the law. The draft Law should explain in more detail what sort of "incompetency" could leave to the dismissal of a court president, which entails the president's demotion to a position of an ordinary judge.

57. It is unclear whether the milder sanctions set out in Article 98 apply to court presidents as well. It would be illogical to provide a range of sanctions for ordinary judges and only the dismissal as a sanction for court presidents. The Ministry of Justice explained in their written comments that the sanction of dismissal only entails the demotion of the court president to the rank of an ordinary judge, and only in relation to a serious failure of the court president to perform *managerial* tasks. The milder sanctions are also applicable to the court presidents, according to the Ministry of Justice.

58. In addition to the disciplinary liability, the draft Law establishes a liability for damage caused by the judge "through unlawful and improper work" (Article 7). As stated by the Venice Commission previously, "only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability".[22] It is positive that Article 7 specifies that the State may recover damages from the judge only for "intentional" causing of such damage. It is understood that in cases of negligent behaviour, or where damages are due to the general malfunctioning of the system, no such individual civil liability arises, but that also might be stated more clearly in the draft Law.

5. Disciplinary and dismissal proceedings

59. Article 101 stipulates that *any* person may file a disciplinary complaint against a judge to a disciplinary prosecutor, which may then bring the case before the disciplinary commission composed of judges appointed by the HJC (emphasis added). It is not clear whether the disciplinary prosecutor has any discretion in dismissing clearly unmeritorious complaints filed for political or personal reasons – such a possibility might be provided by the draft Law.

[21] See Venice Commission, CDL-AD(2015)007, Join opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, para. 50; see also CDL-AD(2016)013, Republic of Kazakhstan - Opinion on the Draft Code of Judicial Ethic, paras. 26 et seq.
[22] Venice Commission, CDL-AD(2017)002, para. 53.

60. Disciplinary proceedings conducted by the disciplinary prosecutors and commissions do not entail a possible sanction of dismissal. The dismissal of the judge may only be imposed by the HJC as per Article 99. The procedure for dismissal is separately provided by Articles 69 et seq.

61. As regards the *disciplinary* proceedings, the draft Law provides for all essential fair trial guarantees: the right to be informed and to become familiarised with the case and the accompanying documentation, the right to provide explanations and give evidence in person or through a proxy, the right to request opening of the proceedings to the public, the right to appeal against a decision of the disciplinary commission to the HJC, time-limits for initiating and conducting disciplinary proceedings, etc. – see Articles 101, 103, 104. The only remark in this respect is that the draft Law does not explicitly state that decisions by the disciplinary commission should be reasoned (cf. Article 71 concerning dismissal proceedings where this is guaranteed). This should be added to the text.

62. By contrast, procedural rules on the *dismissal* proceedings before the HJC are less developed. The Venice Commission considers that procedural guarantees in the dismissal proceedings must at least be equivalent to those in disciplinary proceedings, to correspond to the potentially more serious outcome of the former. The Venice Commission considers in particular that the deadlines for the dismissal proceedings are too short for a meaningful exercise of the right to be heard (see Article 71 which stipulates that the HJC should decide the case within 30 days).

63. Most importantly, there is a dangerous overlap between disciplinary proceedings (regulated by Articles 100 et seq.) and dismissal proceedings (regulated by Articles 69 et seq.). There is a risk that the same facts would give rise to two parallel proceedings: disciplinary proceedings examined by the disciplinary prosecutor and then by the disciplinary commission (with the HJC acting as an appellate instance), and dismissal proceedings triggered by the president of the court or by the HJC *proprio motu*, under Article 70. It is unclear whether the HJC, in its role of an appeal instance in the disciplinary proceedings, may start the dismissal proceedings and order the dismissal. It is questionable whether the HJC may be at the same time the body initiating dismissal proceeding and deciding on the outcome of the cases (see Article 99, last paragraph). Such confusion of functions should be excluded.

64. The Venice Commission understands that decisions of the HJC in disciplinary cases (where it acts as an appellate instance) are final (see Article 105 para 3), while the HJC decision to dismiss a judge may be appealed to the Constitutional Court (see Article 74). However, para. 3 of Article 105 is ambiguous since it mentions the possibility of an administrative appeal against decisions of the HJC rendered within disciplinary proceedings. This should be clarified. The same holds true for the relationship between disciplinary and dismissal proceedings on the one hand and the complaints which may be directed to the courts by virtue of Article 10 of the draft Law on the Organisation of the Courts.

65. Under the draft Law the dismissal of a court president is governed by special provisions. It is not clear which rules (those governing the *dismissal* of the judge or those governing the *disciplinary* proceedings) are applicable to court presidents. This should be clarified.

66. In sum, the Venice Commission invites the authorities to provide a clear procedural framework which would encompass the complaints mechanism, the procedure for imposing lesser disciplinary sanctions (disciplinary proceedings) and the procedure for deciding on the dismissal of a judge or the president of the court.

6. Evaluations

67. Chapter II.4 of the draft Law deals with the system of evaluation of judges which is conducted every five years by a committee of the HJC consisting of three "elected judges". The committee evaluates the work of the judges and presidents of the courts of a lower instance (Article 38). The Venice Commission notes that the evaluation committee consists only of judges. In order to bring an external perspective to the evaluation process the legislator might consider involving lay members in the work of this committee.

68. Article 36 describes the rules of evaluation, which should cover "all aspects of the work of the judge or the president of the court". This formula is too broad, as it may imply that the correctness of the judges' legal opinions and procedural decisions and other similar substantive aspects of their work would be evaluated. The Venice Commission reiterates that the "evaluation" of the interpretation of the law and facts of the cases before the judge is the task of the appellate judge, and not of an evaluation commission. In some legal orders, deliberately wrong or manifestly unreasonable interpretations of facts or law which may give rise to various forms of liability of judges. As explained by the Ministry of Justice in their written comments, the "substantive accuracy of decisions", i.e. the number of judgments overturned on appeal would not be used as a criteria for the evaluation of the judge's work.

69. The chapter on evaluations does not specify any sanction for a negative evaluation; however, it appears that a negative evaluation may affect the chances of promotion of the judge or require a compulsory training (see the last paragraph of Article 40). The effects of the evaluation of presidents of the courts are different: Article 81 of the draft Law provides that a president of the court may be dismissed for "incompetency" which is established on the basis of a negative performance evaluation. Article 40 does not mention that a negative performance evaluation may eventually lead to the dismissal of the president. These provisions should be harmonised. And the draft Law should make it clear that the "incompetency" should never refer to the reasonable exercise of judicial discretion by the judge in interpreting law and facts of the cases before him/her.

7. Age of retirement

70. Article 67 establishes the retirement age of 65 years for lower court judges and 67 for judges of the Supreme Court. Given that there is a real risk of a "generation gap" in the Serbian judiciary (see above), the Serbian legislator might want to consider making the provisions on retirement more flexible. That being said, as the Venice Commission stressed in an opinion on Poland, any extension of the retirement age should not be within the discretion of the executive, to avoid possible abuses.[23]

D. The draft Law on the High Judicial Council

1. Composition

71. Article 7 of the draft Law on the HJC stipulates following Article 151 of the Constitution that the Council will have 11 members: six judges elected by their peers, four prominent lawyers elected by the National Assembly (lay members) and the President of the Supreme Court as an *ex officio* member. This provision meets the requirement of Recommendation CM/Rec(2010)12 that "not less than half the members of [a judicial council] should be judges chosen by their peers".

[23] Venice Commission, CDL-AD(2017)031, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, para. 51.

a. Judicial members

72. The appointment process for the six judicial members of the HJC is described elaborately in Articles 25 et seq. The transparency and the detailed nature of the legal provisions was welcomed by various interlocutors with whom the rapporteurs spoke.

73. Article 26 of the draft Law stipulates that the judicial members of the HJC are elected from various types of courts: one from the Supreme Court, one from the appellate courts and the Administrative Court, one from the higher courts, one from commercial courts and the Commercial Appellate Court, one from basic courts, and one from misdemeanour courts and the Misdemeanour Appellate Court). This approach appears to be in line with the principle of broadest representation as enshrined in Article 151 of the Serbian Constitution. The composition of the judicial council involves all court levels in the court system, and not solely the top level of the judiciary. The Venice Commission recalls that in the opinion on Lebanon it recommended ensuring better representation of judges from the lower-level courts in the judicial council, in order to counterweight the elitist model of judicial governance.[24]

b. Lay members

74. The election of lay members is regulated in Articles 43 et seq. This process was already elaborately discussed in the Venice Commission's previous opinions on the constitutional amendments. The draft Law – in line with the constitutional amendments – contains certain key features: (1) a public call for candidates (Article 46), (2) shortlisting of the candidates by the Committee on the judiciary, (3) qualified majority voting in the National Assembly in order to reinforce depoliticisation (Article 50), and (4) having in place an adequate anti-deadlock mechanism to avoid stalemates (Article 51). [25]

75. Article 43 stipulates that a candidate must be a "prominent lawyer" with at least ten years of experience in the legal profession. What constitutes a "prominent lawyer" is elaborated in Article 44 of the draft Law.[26] Article 44 contains both formal criteria of eligibility (age, legal education diploma, etc.) and more subjective criteria (like "worthiness" for performing the function of a Council member). The meaning of "worthiness" is developed further in paragraph 2 of Article 44, with reference to (equally subjective) criteria of honesty, conscience, dignity etc.

76. As stressed above (paragraph 37), the concept of "worthiness" is rather vague, so it is important to ensure that the body which is to interpret and apply it is sufficiently independent and professional. Under the draft Law, it will be up to the parliamentary Committee on the judiciary to select eight candidates who are "worthy" to be presented to the National Assembly for the selection of four lay members.

77. As explained during the online meetings, the Committee on the judiciary is dominated by the ruling party and its decisions are taken by a simple majority of votes. Hence, there is a risk that all eight candidates will be selected along party lines. This may severely limit the freedom of choice of the National Assembly and result in creating a politically homogenous lay component in the Council, which may eventually lead to the blockages in the work of the HJC (see below, the discussion concerning decision-making majorities in the HJC).

[24] Venice Commission, CDL-AD(2022)020, Lebanon - Opinion on the draft law on the independence of judicial courts, para. 47
[25] Venice Commission, CDL-AD(2021)048, para. 16
[26] Venice Commission, CDL-AD(2021)032, para. 69

78. In order to increase political neutrality of the eight candidates – and ensure the "broadest possible representation" amongst lay members, as previously recommended by the Venice Commission[27] – several solutions may be proposed.

79. The first is to formulate the eligibility rules in such a manner as to reinforce the political neutrality of the candidates. This has been recommended in the November 2021 Opinion on the constitutional amendments.[28] Article 15 of the draft Law goes in this direction: it stipulates that the members of the HJC may not be members of political parties. However, it is unclear whether this condition applies to the *candidates* to the positions of the members who are not yet elected, or only requires the elected lay members of the HJC to terminate their membership in a political party.

80. A stronger solution may be required in this context. In a similar situation in Montenegro the legislator proposed that lay members of the Prosecutorial Council should not have been elected officials or members of the Government *in the past five years* prior to their elections and not to have been members of political parties with leading roles too. Spouses, partners and close relatives of the politicians were also ineligible. The Venice Commission commented positively on this proposal noting that "the new ineligibility criteria create some 'safety distance' between lay members and party politics, which could make the [Prosecutorial Council] more politically neutral".[29] Indeed, any such rule should be compatible with the constitutional framework, and it ultimately belongs to the Constitutional Court of Serbia to ascertain this. The Ministry of Justice in their comments argued that the introduction of such rigid (in)eligibility criteria might not necessarily reach the goal of excluding political affiliation of lay members and, at the same time, it might reduce noticeably the pool of potential candidates, while raising questions of constitutionality. This is a valid concern, and the Venice Commission agrees that the (in)eligibility criteria should be adapted to the national context.

81. Another solution explored in the opinion on Montenegro was the nomination of a certain number of lay members by civil society or, alternatively, some form of proportional voting which ensures that some of the lay members are elected with the votes of the opposition.[30] Thus, the legislator may consider reviewing the voting procedure in the Committee on the judiciary in order to ensure that the eight candidates proposed by the Committee are not politically homogenous. It belongs to the Serbian legislator to decide which of the solutions is more efficient and fits to the constitutional framework of the process of election of the lay members.

82. Another potential issue of concern in respect of the lay members is that the incompatibility requirements formulated in Articles 13 and 14 are quite strict and exclude any parallel employment with the exception of law professors who are entitled to keep their occupation at the university while working in the Council. Such a system makes it quite difficult to find candidates from amongst successful attorneys, who would have to abandon their cabinets and clients. The question arises whether the salary of a lay member in the Council is sufficient to compensate for such a loss of earnings. As it stands, this rule would likely discourage the most successful lawyers in the country from competing for those positions. On the other hand, as explained by the Ministry of Justice in their written comments, allowing practicing attorneys to sit on the HJC might lead, in the Serbian context, to corruption.

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[27] Venice Commission, CDL-AD(2021)032, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, para. 67: "After having conducted a public competition, ten candidates will be shortlisted by the responsible parliamentary committee taking into account the principle of 'broadest representation'".
[28] Ibid., para. 25
[29] Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service
[30] Venice Commission, CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, para. 39.

83. Participation of the members of the Council in drafting laws, even with the approval of the President (see the penultimate paragraph of Article 15), may force the members to be involved deciding political questions, which carries a certain risk of politicisation of the HJC.

2. Termination of office of the High Judicial Council members

84. Articles 54 and 56 describe reasons for the termination of office and refer to "unworthiness" as a ground for termination. In respect of *lay* members, the reference to 'unworthiness' may be considered as a logical corollary of the eligibility requirements listed in Article 44 although the Commission would argue that "unworthiness" relates much more to the *behaviour* of a Council member and not so much to incompatible *functions or private interests*. A *judicial* member's term of office should only be terminated if he/she is found guilty of a severe disciplinary offence.

85. In any event, the "worthiness" of a member is established at the moment of his or her election; the termination of the mandate should be justified by some specific behaviour, described in the law with sufficient precision and putting the judiciary or the Council in disrespect. The same observation applies to the possibility to terminate the mandate if a member "does not perform the function of a council member in accordance with the Constitution and the law". This is too vague to be used as a ground for dismissal.

86. The Venice Commission also recommends indicating explicitly that a member of the Council may be stripped of his or her mandate if he or she fails repeatedly to participate in the work of the Council without serious and objective reason (like serious illness etc.; on this point see more in the following section).

3. Quorum and majorities for the decision-making

87. The Council has a broad mandate (see Article 17 of the draft Law), including *inter alia* the power to elect judges and lay judges, appoint court presidents (including the president of the Supreme Court), decide on the permanent relocation, on temporary assignments and on the termination of office of judges, etc.[31]

88. The Council can take decisions if at least eight (out of 11) Council members are present during a session (Article 18, para 3). These decisions need to be reasoned (Article 20 para 4) and are subject to judicial review if they affect an individual (see for example Articles 41 and 57). Decisions are adopted "by a majority of votes of all members" (Article 20, para 1), i.e., by six votes. Certain decisions deemed to be of special importance require eight votes in favour of a particular decision: decision on the election of the (vice-)president of the Council, on the appointment and dismissal of court presidents (including the president of the Supreme Court), and on the dismissal of ordinary judges.

89. As explained to the rapporteurs, the rationale behind the special majority of eight votes is to avoid corporatism. Indeed, there is a risk that all decisions in the HJC might be taken only with the votes of the judicial members and that the lay members would not have their say. A heightened majority guarantees that for certain decisions the votes of both the judicial and lay members will be necessary. On the other hand, this high quorum and the super-majority raise the risk of blockages in the work of the HJC.

90. The delegation was informed by various interlocutors that more than 50% of the Serbian judges will retire in the next few years. The Council's task in respect of filling these vacancies will therefore be crucial in the years to come. A blockage of the Council's work (because of the rather

[31] Article 38 of the draft Law on Judges entrusts the function of evaluation to a committee composed of three judges elected by the HJC. Article 17 para. 1 (17) may be interpreted as implying that the HJC directly decides on the performance evaluations. These provisions should be coordinated.

high quorum for the Council to take decisions and the risk of the lay members acting as a block to obstruct the work of the Council) would thus be highly problematic for the continued functioning of the judiciary.

91. One way to combat such obstructive behaviour is to amend Article 54: the repeated absence of a member in the Council meetings without valid reasons should be a ground for the termination of his or her mandate, and this can be decided by a simple majority of members of the HJC. Indeed, the member who repeatedly failed to participate in the work of the Council should be given a reasonable opportunity to explain the reasons for his or her absence and this decision should be taken with all necessary procedural safeguards. The Ministry of Justice expressed readiness to address this issue by providing for a new ground for termination of the member's mandate in case of such unjustified absences.

92. It is also recommended to reduce the quorum requirement to 7 members present (which is not to say that the heightened majority for decision-making for certain most important decisions cannot be maintained in the draft Law). However, the significance of this recommendation is lessened if the Serbian legislator were (i) to adopt adequate measures to avoid a politically homogeneous lay component in the Council, and (ii) to introduce the possibility to terminate the mandate of a member of the Council if he/she fails to participate in the work of the Council without a serious and objective reason.

4. Budgetary autonomy of the High Judicial Council

93. The Venice Commission has previously recommended "to entrench the budgetary autonomy of the HJC and the HPC at the constitutional level".[32] This recommendation was not followed when adopting the constitutional amendments. Articles 3 and 4 of the draft law do contain a regulation on the Council's budget. The HJC itself prepares a proposal for the budget which it then submits to the Minister of Finance, followed by negotiations in the event of disagreement. If the negotiations fail, the Ministry of Finance shall retain the final say but shall need to give reasons for not accepting the proposal of the HJC. The budget is then discussed and adopted by the National Assembly. This is a welcome step towards greater budgetary autonomy of the Council.

IV. Conclusions

94. On 12 September 2022, the Serbian Minister of Justice, Ms Maja Popović, requested an opinion of the Venice Commission on five draft Laws aimed at implementing the recent constitutional amendments concerning the organisation of the judiciary and the prosecution service. The present opinion assesses the three draft Laws related to the judiciary: the draft Law on the Organisation of the Courts, the draft Law on Judges, and the draft Law on the High Judicial Council.

95. As previously stressed by the Venice Commission, the recent constitutional amendments have the potential to bring about significant positive change in the Serbian judiciary. The Venice Commission praises the Serbian authorities for the considerable effort they invested in the preparation of the legislative package implementing the constitutional amendments, and for the inclusiveness of the process of preparation of the legislative package. The draft laws are generally well-structured, clearly written, and cover all essential points which need to be covered. The Venice Commission encourages the Serbian authorities to continue in the same spirit of inclusiveness and transparency and ensure proper public consultations in the coming months before a parliamentary vote on the bills.

[32] Venice Commission, CDL-AD(2021)032, para. 111

96. On the substance, the Venice Commission observes that despite many positive changes, the Serbian judicial system is still characterised by a hierarchal spirit and multiple forms of evaluations and controls. Coupled with the problem of modest judicial salaries it may affect the attractiveness of the judicial profession for young judges. A change in the legal culture within the judiciary may be required to supplement positive changes brought by the ongoing legislative reform.

97. More specific recommendations to the Serbian legislator in respect of the three draft Laws are as follows:

The draft Law on the Organisation of the Courts

- the authorities should consider a joint adoption of the Rules of Procedure by the High Judicial Council and the Ministry of Justice; the power of the Ministry to issue "criteria for determining the number of court staff" and to give "consent to the rulebook on the internal organisation and systematisation of jobs in the court" should be restricted;
- the judicial administration tasks of the Ministry should be better delimited in order not to encroach on the autonomy of the courts and not to overlap with the tasks of court presidents, and the powers of court presidents should be described with more precision, especially as regards the distribution of the workload within their courts;
- the function of "supervision" of a president of a higher court in respect of a lower court president should be described in more detail and such supervision should be reduced to the minimum;
- the notion of "undue influence" should not cover legitimate behaviour of the participants of the court proceedings, as well as the legitimate exercise of the freedom of speech, including public criticism of judicial decisions;

The draft Law on Judges

- the Minister of Justice should not propose lay judges for appointment;
- the list of disciplinary offences is too broad, with a disproportionate focus on delays in court proceedings; the draft Law should explicitly say that individual judges should not be held responsible for structural deficiencies within the judiciary;
- the concepts of "severe" and "repeated" offences should be developed further, especially in order to exclude dismissal in cases of repeated minor offences;
- some basic principles of the ethical behaviour should be described in the law itself, while the Code of Ethics may develop them in more detail;
- in respect of court presidents, the draft Law should specify the notion of a "major violation of obligations set out by provisions governing the court administration" which may lead to the president's dismissal;
- there is a dangerous overlap between disciplinary proceedings and dismissal proceedings; it is necessary to avoid confusion as to the role played by the High Judicial Council in those proceedings;
- performance evaluations should not involve an assessment of the exercise of the judicial discretion in interpreting facts and the law;

The draft Law on the High Judicial Council

- the draft Law should ensure the broadest representation amongst lay members so to avoid a politically homogenous lay component in the High Judicial Council; that can be achieved for example by revising the process of nomination of candidates or the rules on voting for them in the parliamentary Committee for the judiciary;
- the draft Law should describe more precisely in which situations the mandate of a member of the High Judicial Council may be terminated; the draft Law could provide explicitly that the failure of a member to participate in the work of the High Judicial Council

without a serious and objective reason may result in the termination of his or her mandate, and such decisions are to be adopted by a simple majority;

- if the above two recommendations are addressed, the significance of the issue of the high quorum for taking decisions by the High Judicial Council is reduced; that being said, the heightened majority for taking some important decisions can be maintained.

98. The Venice Commission remains at the disposal of the Serbian authorities for further assistance in this matter.