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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

SERBIA

URGENT OPINION

**ON THE REVISED DRAFT CONSTITUTIONAL AMENDMENTS
ON THE JUDICIARY**

**Issued on 24 November 2021 pursuant to Article 14a
of the Venice Commission's Rules of Procedure**

On the basis of comments by

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I. Introduction

1. At its 128th Plenary Session, the Venice Commission, at the request of Mr Ivica Dačić, Speaker of the National Assembly of Serbia, and of the Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, adopted an opinion on the draft constitutional amendments on the judiciary and on the draft constitutional law for the implementation of the constitutional amendments (CDL-AD(2021)032, hereinafter “the October opinion”).

2. By letter of 26 October 2021, the Speaker of the National Assembly of Serbia requested an urgent opinion of the Venice Commission on the revised constitutional amendments on the judiciary (CDL-REF(2021)085, hereinafter: “the revised draft constitutional amendments”).

3. On 1 November 2021, the Commission’s Bureau authorised the preparation of this urgent opinion, the reason for the urgency being the parliamentary calendar for the adoption of the amendments.

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

5. Due to the health situation and the time constraint, the rapporteurs could not travel to Belgrade. Instead, on 10 November 2021, a delegation of the Commission composed of Messrs. Kuijer, Pere Vilanova and Scholsem, accompanied by Ms Granata-Menghini, Secretary of the Commission, and Mr Dürr, Deputy Secretary, had online meetings with the Speaker; the Chair of Parliamentary Committee for Constitutional Affairs and chairperson of the Working group, National Assembly, and with the Minister of Justice. The Commission is grateful to the Ministry of Justice for the excellent organisation of these meetings. On 12 November 2021, the rapporteurs received a letter from the People’s Party, summarising their position on the revised constitutional amendments.

6. This opinion was prepared in reliance on the English translation of the revised draft constitutional amendments. The translation may not accurately reflect the original version on all points.

7. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings*, it was issued on 24 November 2021, pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions (CDL-AD(2018)019).

II. Analysis

A. Scope of the urgent opinion

8. The Serbian authorities have revised the draft constitutional amendments on the judiciary in the light of the Venice Commission’s opinion on the previous version of these amendments, adopted on 15-16 October 2021. They have submitted the revised amendments to the Commission for its opinion, prior to proceeding with their adoption. The Venice Commission wishes to express its appreciation for this constructive form of co-operation and considers that its involvement in all the phases of the preparation of the constitutional amendments is conducive to fruitful and meaningful exchanges.

9. The Serbian authorities have further expressed their intention to involve the Venice Commission in the preparation of the legislation implementing the constitutional amendments, and the Commission declares its readiness to assist, and expresses its gratitude for the trust which is placed in it.

10. As this urgent opinion is a follow-up to the previous opinion, it will focus on the recommendations made in the latter and examine to what extent they have been followed.

B. The Commission's previous recommendations

1. The process of preparation of the constitutional amendments

11. In its previous opinion, the Venice Commission welcomed the initiative of the Serbian authorities to amend the 2006 Constitution in order to bring it into line with European and international standards, albeit only in respect of the judiciary. The Commission considered the process of public consultations for the draft amendments as being sufficiently inclusive and transparent; it stressed nonetheless that in the context of the current Serbian political landscape it is important for the Serbian authorities to actively seek the participation and involvement of the opposition. In this context it should be noted that the Venice Commission is pleased to learn from Mr Dačić, Speaker of the National Assembly, that a meeting with numerous representatives of the non-parliamentary opposition took place on 22 October 2021.

12. The Commission reiterates the importance of inclusive consultations of the opposition, the stakeholders and civil society, and of the transparency of the process, notably in view of the constitutional referendum which will need to be organised and which should be preceded by an objective campaign of information to the public and of appropriate public and private media coverage: the Commission refers in this context to its recent urgent opinion on the revised draft law on the referendum and the people's initiative (CDL-PI(2021)018).

2. The Commission's previous recommendations

13. In its previous opinion, the Venice Commission welcomed, 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, the fact 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 Commission deemed that the relevant amendments are in line with European standards and address previous recommendations, including those of the Venice Commission. The Commission wishes to reiterate its positive appreciation of these changes and encourages the Serbian parliament to adopt them.

a. 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 that is meant to be an exception will become the rule and allow 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;*

14. The background for this key recommendation is the current political situation, where the National Assembly is dominated by a single political party. The Speaker of the National Assembly has informed the Commission that the Serbian authorities have reconsidered the composition of the HJC but have decided not to alter it.

15. The authorities argue that as this anti-deadlock commission should act as a substitute for the competence of the National Assembly, it should be composed of the highest public officials with constitutional legitimacy. Furthermore, the commission is composed of prominent

lawyers, together with the Speaker of the National Assembly, who is an institutional figure in addition to representing parliament.

16. The Venice Commission acknowledges the members' explicit requirements of high competence in the legal field and finds that it is positive that the "prominent lawyers" in the HJC should be appointed by key figures in the Serbian judiciary, such as the President of the Constitutional Court, the President of the Supreme Court and the Supreme Public Prosecutor. It has no objection to the participation of the Ombudsman either; the participation of the Speaker of the National Assembly appears equally understandable, given the fact that the anti-deadlock mechanism supersedes a power of the National Assembly.

17. However, as four out of the five members of this commission are currently elected by the National Assembly (and not all with a qualified majority), for the Commission it is not impossible that the proposed antideadlock mechanism might "lead to politicized appointments", at least until such time as these constitutional amendments enter into force and produce their effects (for example, the President of the Supreme Court will no longer be elected by parliament, and the Prosecutor General will be elected with a qualified majority and will enjoy other guarantees of independence - see para 33 of the October opinion) and the composition of parliament will be more pluralistic.

18. The Commission acknowledges that there is no prescriptive or detailed standard as to the composition of such an antideadlock mechanism, and therefore cannot conclude that the proposed mechanism is not in line with international standards and must be changed.

19. Nonetheless, the Commission encourages the Serbian authorities to explore the possibilities for an alternative antideadlock mechanism which may alleviate the concern that it may not be, or may be perceived not to be, politically neutral.

- *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 fewer than half of the members would be judges elected by their peers, which is not recommended;*

20. The original proposal entailed that the HJC would be composed of 11 members: six judges elected by their peers and five "prominent lawyers elected by the National Assembly". This proposal was welcomed as it meets international parameters and was preferred over the alternative proposal suggested in the draft (only five instead of six judges elected by their peers, the President of the Supreme Court and five prominent lawyers elected by the National Assembly).

21. The revised constitutional amendments (Amendment XIII, Article 151 of the Constitution) introduce a third modality: six judges elected by their peers, the President of the Supreme Court and four prominent lawyers elected by the National Assembly.

22. This new proposal also 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 respect for pluralism inside the judiciary".

23. It follows that the first key recommendation formulated by the Venice Commission in its previous opinion has been adequately met.

- *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.*

24. The proposed constitutional amendments (Amendment XIII, Article 151 §§ 4 and 8; Amendment XXV; Article 163, §§ 5 and 9) stipulate that a candidate must be a prominent lawyer with at least ten years of experience in legal practice. In addition, the provision stipulates that one may not be a member of a political party. Additional eligibility criteria might be “defined by the law” (Article 151 § 9 and Article 163 § 10).

25. The Venice Commission, provided that adequate ineligibility criteria aimed at depoliticization of the candidates are introduced in the relevant organic law as a matter of urgency after the adoption of the constitutional amendments – and prior to the election of the new High Judicial Council and of the new High Prosecutorial Council – considers that its recommendation above may be considered to have been met in substance.¹

- *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.*

26. Revised Article 158, paragraph 2, now reads: “The High Prosecutorial Council shall propose one candidate for the Supreme Public prosecutor to the National Assembly”. The Commission’s key recommendation in this respect has therefore been implemented.

- *in the composition of the HPC, there are now fewer 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.*

27. 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 number of prosecutors elected by their peers will therefore be lower than at the moment.

28. In the October opinion, the Commission noted that the proposed composition meets the relevant standards. However, it explained that the overall composition of the HPC raised concerns: a majority in the HPC will act under the hierarchical control of the Supreme Public Prosecutor, who will also sit on the HPC. Equally, six out of 11 members of the HPC will be political appointees: four would be elected by the National Assembly, the Supreme Public Prosecutor is elected by the National Assembly (even if by qualified majority), and the Minister of Justice is a political figure. Removing the ex officio members would address this concern.

29. However, the composition of the HPC has not been revised in the final version of the draft constitutional amendments: the ex officio members remain and there will thus be only five prosecutors elected by their peers, out of 11 members.

¹ The Venice Commission accepted the establishment of these criteria at the level of legislation in Montenegro (CDL-AD(2021)030, §§ 29-31).

30. The authorities argue that the new provision that the Minister of Justice may not participate in disciplinary proceedings (new paragraph in Article 163) meets the Commission's recommendation.

31. The Venice Commission has so far been cautious in requiring the removal of the Minister of Justice from High Prosecutorial Councils (as explained in para. 87 of the October opinion), while the Group of States against corruption (GRECO) has taken a stricter position in this regard (see para. 89 of the October opinion). Regardless of the position of principle as to whether the participation of the Minister of Justice is to be considered as problematic of itself, with regard specifically to the Serbian High Prosecutorial Council the Commission has noted that the presence of the Minister of Justice and of the Supreme Prosecutor General on the HPC alters the balance between prosecutors elected by their peers and political nominees. For this reason, the Commission concluded that "ideally" the ex officio membership of the Minister of Justice and of the Supreme Prosecutor General should be abolished and replaced by two additional prosecutors elected by their peers.

32. However, the Venice Commission acknowledges that, if the ex officio membership of the Minister of Justice is maintained, it is indeed welcome to stipulate that the Minister may not vote in a procedure for determining disciplinary responsibility of a public prosecutor. The Commission welcomes this newly added paragraph to Article 163 of the Constitution. However, the Commission maintains that this is only a second-best option, and it would be preferable to remove the ex officio membership of the Minister of Justice, as well as that of the Supreme Public Prosecutor - from the HPC. This key recommendation has therefore been only partially met. The Commission reiterates its recommendation to replace the two ex-officio members of the HPC with two additional prosecutors elected by their peers.

b. Other recommendations

- *the eligibility criteria for judicial office should be included at the constitutional level.*

33. This recommendation regarding the appropriate level of the eligibility criteria for judicial office has not been followed. The Serbian constitutional legislator continues to prefer regulating the issue of eligibility criteria for judicial office at the legislative level, and not the constitutional level. This choice is not problematic as such, even if the constitutional level could have been appropriate as eligibility criteria are crucial for the composition of the judiciary and therefore its appearance of independence; the relevant laws should be designed accordingly, by way of priority.

- *consideration should be given to adding a detailed legislative text stipulating the various judicial incompatibilities.*

34. This recommendation related to the proposed removal, in the previous version of draft Article 148, of the prohibition for a judge to engage in political actions, replacing it with the formula "The law shall stipulate which functions, activities or private interests are incompatible with the judicial function, and function of a lay judge". In its October opinion, the Commission found that the removal of this prohibition would send "an unfortunate signal to society" and the formula used was overly broad (October opinion, paragraph 57).

35. In the revised constitutional amendments, the prohibition for a judge to engage in political actions has been reintroduced. The Commission understands that "political activity" is to be understood in the sense of taking part in party politics and not taking a [personal] position on issues of general interest (such as the independence of the judiciary). The Commission's recommendation is thus superseded.

- *consideration should be given to include the budgetary autonomy of the HJC and the HPC at the constitutional level.*

36. This recommendation regarding budgetary autonomy has not been followed. Even if inclusion at the constitutional level seems the preferable option with a view to strengthen the appearance of independence, a regulation at the legislative level would also be acceptable.

- *the working methods of both the HJC and the HPC should appear in an ordinary law and not at the constitutional level.*

37. This recommendation regarding the working methods of both HJC and HPC has been followed by changing the titles and content of draft Amendments XV and XXVII. As explained by the Speaker, all aspects of the working methods will be regulated in ordinary law. The Commission finds that this is an important matter which will require adequate attention.

c. Technical recommendations

- *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 (paragraph 20 of the October opinion).*

38. This recommendation has been followed.

- *The difference between an appeal to the Constitutional Court and a Constitutional appeal should be clarified unless this is a translation issue (paragraph 37 of the October opinion)*

39. The Venice Commission delegation was informed during the online meetings that the difference was clear under Serbian law. This recommendation has partly been followed, as the notion of “appeal” was replaced by “complaint”. If the difference between the two remedies is clear under Serbian law and all those affected by the provision understand the difference and its effects, this recommendation has been followed.

- *Concepts such as the “dignity of a judge” and “undermining the reputation of the court and judicial function” are excessively vague (para. 42 of the October opinion)*

40. This recommendation has not been followed. These concepts should be clarified at least at the level of the organic laws or by reference to a code of ethics with normative force

- *The meaning of the expression ‘a criminal offense of violation of law by a judge’ should be clarified, unless this is a translation issue (paragraph 47 of the October opinion).*

41. The Serbian authorities have clarified that reference is made to Article 360 of the Criminal Code which provides for the criminal offense titled “Violation of the Law by a Judge, Public Prosecutor and His Deputy”. There is therefore no unclarity under Serbian law.

- *Functional immunity should cover both immunity from civil lawsuit and criminal prosecution (paragraphs 48-54 of the October opinion).*

42. This suggestion has not been followed.

- *The word ‘independent’ should be favoured over ‘autonomous’ in regard to the judiciary” (paragraph 60 of the October opinion).*

43. This recommendation has been followed.

- *Article 142 last paragraph of the Constitution should also stipulate the general principle of the finality of court decisions (paragraph 61 of the October opinion).*

44. This recommendation has not been implemented, but it may be dealt with at the legislative level.

- *the impermissibility of the executive or the National Assembly to give instructions in individual cases to any public prosecutor should be clarified (para. 79 of the October opinion).*

45. In the Commission's view, this recommendation is sufficiently addressed in proposed Article 155, paragraph 3, of the Constitution, which provides that "any influence on the Public Prosecutor's Office and holders of public prosecution function in an individual criminal prosecution case is prohibited."

C. The implementation of the constitutional amendments

46. The Venice Commission wishes to stress that while the revised constitutional amendments, if adopted, have the potential to bring about significant positive change in the Serbian judiciary, much will depend on their implementation. The current constitutional reform is a necessary and important first step in the process but does not constitute the completion of this process.

47. The legislative changes necessary for the full implementation of the constitutional amendments should be prepared on an urgent basis, through a holistic reform of the relevant organic laws. The Serbian authorities have expressed their intention to consult the Venice Commission for the preparation of the implementing legislation; the Commission expresses its availability to assist in this process.

48. The People's party has argued that political will is required to shield the judiciary from political pressure and that such political will is currently missing. The Commission stresses that in addition to the legislative changes, a deep change in the political and legal culture prevailing in Serbia will be necessary for the effects of the constitutional amendments to become tangible.

D. The missed opportunity to reform the Constitutional Court

49. The revised text has failed to take into account the Commission's 'regret' that this opportunity for constitutional revision has not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly for the election of constitutional court judges, and (b) an adequate anti-deadlock mechanism (see para. 96). The Venice Commission wishes to reiterate the importance of such changes.

III. Conclusion

50. Constitutional amendments relating to the judiciary in Serbia were prepared in 2018 with the assistance of the Venice Commission, but were never adopted. The constitutional reform process was resumed in 2020, and the Speaker of the National Assembly sought again the assistance of the Venice Commission. The Commission issued an opinion on the first version of the draft amendments in October 2021. It welcomed, 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, the fact 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 Commission deemed the relevant

amendments in line with European standards and considered that these amendments address previous recommendations, including those of the Venice Commission.

51. The Commission also made several recommendations for improvement. The Commission has now been asked to prepare an urgent opinion on the revised draft constitutional amendments; it has therefore analysed to what extent the latter comply with its previous recommendations.

52. The Commission finds that most of its key recommendations from the October opinion have been met, most notably the recommendation on the composition of the High Judicial Council, which is to be welcomed. The recommendation related to the anti-deadlock mechanism for the election of the lay members of the High Judicial Council has not been followed and the one related to the composition of the High Prosecutorial Council has only partly been followed. Even though the solutions proposed in the revised draft amendments in respect of these two recommendations do not go against any international standards as such, the Commission wishes to insist once again on the need to reduce the risks of politicisation of the two Councils.

53. Most of the other recommendations have been followed. Some other recommendations have not, but there is scope to implement them through legislative changes. Indeed, while the revised constitutional amendments, if adopted, have the potential to bring about significant positive change in the Serbian judiciary, much will depend on their implementation. The current constitutional reform is a necessary and important first step in the process but does not constitute the completion of this process. The legislative changes necessary for the full implementation of the constitutional amendments should be prepared on an urgent basis, through a holistic reform of the relevant organic laws. The Venice Commission is ready to assist in this process. The Commission underlines in particular that the new High Judicial Council and the new High Prosecutorial Council should not be formed until the relevant organic laws are adopted setting out the necessary (in)eligibility requirements for the candidates to lay members.

54. As regards the process, the Commission reiterates the importance of inclusive consultations of the opposition, stakeholders and civil society, and of transparency, notably in view of the constitutional referendum which will need to be organised and which should be preceded by an objective campaign of information to the public and of appropriate public and private media coverage.

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