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(VENICE COMMISSION)

DRAFT OPINION ON THE DRAFT LAWS ON JUDGES AND ON THE ORGANISATION OF COURTS OF THE REPUBLIC OF SERBIA

On the basis of comments by

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1. By letter dated 23 January 2008, the Strategy Implementation Secretariat of the Ministry of Justice of the Republic of Serbia requested an opinion on the draft Law on Judges (CDL(2008)014) and the draft Law on the Organisation of Courts of the Republic of Serbia (CDL(2008)015).

2. The present opinion is prepared jointly with the Directorate for Legal Co-operation of the Directorate General of Human Rights and Legal Affairs of the Council of Europe on the basis of comments by Mr Pierre Cornu, Mr James Hamilton, Mr Jean-Jacques Heintz and Mr Guido Neppi Modona, who were invited to act as rapporteurs. Their comments figure in documents CDL(2008)019, 020, 022 and 021, respectively.

3. On 21 February 2008, Mr Pierre Cornu, Mr James Hamilton, Mr Jean-Jacques Heintz and Mr Guido Neppi Modona accompanied by Ms Tanja Gerwien and Ms Ana Rusu from the Secretariat, visited Belgrade, where they met with representatives of the Ministry of Justice, the Working Group for drafting laws related to the organisation of the judiciary and the Judges Association of Serbia. This meeting settled a number of outstanding questions by the rapporteurs regarding the draft laws.

4. This opinion was adopted at the … Plenary Session of the Venice Commission (Venice, …).

I. INTRODUCTION

5. The draft laws on Judges and on the Organisation of Courts are a part of a package of judiciary laws prepared in the context of the Serbian National Judicial Reform Strategy. This Strategy was adopted by the National Assembly of the Republic of Serbia in May 2006 to reform the Serbian justice system, which is widely perceived by the Serbian public as being corrupt.

6. For both draft laws, reference will be made to the Constitution of the Republic of Serbia, which was adopted by the National Assembly on 30 September 2006 as well as the Constitutional Law on Implementation of the Constitution of the Republic of Serbia, which was adopted by the National Assembly on 10 November 2006. This applies in particular to the draft Law on Judges, as a number of provisions relating to judges are already regulated in the Constitution.

II. DRAFT LAW ON JUDGES

A. General remarks – the constitutional context

7. The key provision to note is Article 7 of the Constitutional Law on Implementation of the Constitution of the Republic of Serbia (10 November 2006). This Article provides that the election of the President of the Supreme Court of Cassation and the first election of the judges of the Supreme Court of Cassation shall take place no later than 90 days from the date of the constitution of the High Judicial Council, and that judges and presidents of other courts shall be elected no later than one year from the date of the constitution of the High Judicial Council. There is no guarantee in this system that any existing judges will be re-elected or appointed.

8. The Constitution of the Republic of Serbia regulates the principles that are the guarantees of the independence of judges. These are:

- the principle of the stability of judges (Article 146),

- the immunity of judges (Article 151),
- the principle of incompatibilities (Article 152),
- the principle of establishing courts only on the basis of the law (Article 143),
- a ban on the creation of provisional courts, martial courts and special courts (Article 143), and
- the role of the High Judicial Council (Art. 153-155).

With respect to the election of judges, Article 147 retains the principle that judges are elected by the National Assembly.

9. In its Opinion on the Constitution of Serbia (Opinion No.405/2006, CDL-AD(2007)004 adopted at the 70th Plenary Session, 17-18 March 2007) the Venice Commission was critical of these arrangements (see in particular paragraphs 71-74). Firstly, the Venice Commission pointed out that the need for a re-appointment process with respect to all judges and prosecutors was not at all obvious. Secondly, the Venice Commission pointed out that such a process would be acceptable only if there were sufficient guarantees for its fairness, that this required in particular a procedure based on clear and transparent criteria, that only past behaviour incompatible with the role of an independent judge may be a reason for not re-appointing a judge, that the procedure had to be fair, be carried out by an independent and impartial body, ensure a fair hearing for all concerned, and that there must be the possibility for an appeal to an independent court.

10. However, the provisions contained in the present draft Law do not provide for any such procedures. The draft Law simply sets out procedures for the election of judges. Existing judges who wish to be appointed, it seems, will have to apply in the same manner as any other candidate and will receive no special consideration, much less the procedures identified as necessary by the Venice Commission. There is in fact no "reappointment" procedure as such. The draft Law on Judges thereby compounds the problems created by the Constitutional Law on the Implementation of the Constitution.

11. It is important to mention however, that at the meeting in Belgrade, the Ministry of Justice explained that the reappointment procedure would be included in the final version of this draft Law.

12. Despite these problems in relation to the political appointment of judges and the lack of protection of the position of serving judges, it is important to underline that the draft Law contains many good provisions.

B. Chapter One – Principles

Articles 1 to 10

13. The fundamental principles listed and detailed under this heading are: independence, tenure and non-transferability, participation in taking decisions of significance for the work of courts, right to advanced professional education and training, election and termination of office and number of judges and lay judges. Not all of these aspects fall generally under the concept of *"general principles*". For example, it is surprising to find in Article 10 the number of judges of the Supreme Court of Cassation. This has very little to do with "principles".

14. Article 2 on the Tenure and Non-transferability of Judges should, for instance, mention international institutions among places where a judge could work temporarily, be it international courts or other organisations Serbia is a member of. Article 3 makes reference to the code of ethics to be issued by the High Judicial Council. This is a very important document and might be controversial, as is the case in some countries, especially if it is not confirmed or ratified by a law. All judges should, through their association(s) be consulted in order to facilitate adhering to such a code of ethics.

Article 5
15. This Article provides for the lifting of immunity of judges, except in relation to acts committed in performance of their judicial function. This is a very welcome provision.

Article 7
16. The second paragraph of Article 7 seems vague or unclear, as no reference is made to the way judges may *"undertake measures to protect and preserve their independence and autonomy".* How far can they go with this concept? Does it mean that they can only act through an association? Some clarification would be welcome.

Article 8
17. Similarly, Article 8 on the participation in making decisions of significance for the work of courts needs further detail. What is the mechanism of consultation and to what extent may judges impart their views on these aspects? Does it make reference to Article 41 paragraph 1 of the draft Law on Organisation of Courts, which seems to limit the competence of the "*session of all judges*"?

Article 9
18. This provision states, in a very ambitious manner, the principle of a "right" to advanced professional education and training. Yet, there is a contradiction between two concepts, namely the fact that the judges have a right and duty to be trained, and paragraph 3 which says that training is voluntary (unless certain conditions make it mandatory). It would help to make training on a regular basis mandatory (for example at least once every two years) so that no judge can shirk continuous education.

19. Article 9 is also in line with Paragraph 4.4 of the European Charter on the Statute for Judges, which states that *"The statute guarantees to judges the maintenance and broadening of their knowledge, technical as well as social and cultural, needed to perform their duties, through regular access to training which the State pays for…".*

C. Chapter Two – Status of a Judge

Permanence of judgeship

20. Chapter Two seems to be the central part of the draft Law, as it sets out in detail the various aspects of the status of judges, namely: permanence of judgeship (with an exception for persons elected for the first time, where the mandate is limited to three years), the non-transferability of judges (principle of irremovability), mutual independence of judges, relationship of judgeship to other functions, engagements and activities, performance evaluation and financial status.

Article 11
21. This Article on the concept of the permanence of judges reduces the period of a first appointment from five to three years and this is to be welcomed.

22. There is no conclusive reason to criticise the three years' probation period, based on international standards, as a certain number of fairly described criteria have been set out (see notably Articles 51 to 53 below, also Article 32 and Article 34 on the performance evaluation of judges). The fact that a person's qualifications etc. are checked to ensure that he or she really meets all requirements before appointing him or her to a permanent position as a judge raises no questions. There are alternative systems in other Member states of the Council of Europe (e.g. France, the Netherlands) where a long and intensive training period exists combined with a certain number of performance evaluation mechanisms.

Article 12

23. Under this Article, a judge working in a court that will be abolished is allowed to continue to work in a court of the same or of approximately the same type and instance. It is important that the judge not be appointed to a lesser position following the abolition of a court.

24. The words “or approximately” in the second paragraph should therefore be deleted. Courts simply are or are not of the same rank.

Suspension of judgeship

Article 16

25. The principle of a possible suspension is undisputable for obvious reasons. However, the fundamental right to a fair and transparent procedure should not be limited, unless there are serious reasons (that shall be duly stated in writing) to make an urgent decision. It seems that no special procedure is foreseen, other than the right for the judge to file a complaint afterwards, under Article 16.

Non-transferability of a judge

Article 17

26. The concept of the non-transferability of a judge set out in this Article is most welcome and the exceptions to the principle are rightly restricted and described in a precise manner and provide for serious guarantees.

Article 19

27. This provision on the assignment of a judge to another court is positive, well-drafted and in the interest of a well-functioning justice system.

Article 20

28. This Article on the assignment of a judge to another State body or institution seems to be very restrictive. A judge may only be assigned to work at the High Judicial Council, the Ministry of Justice and the institution competent for judicial training. There is no reason to prevent a judge from working – subject to certain conditions – in another ministry or in international organisations. In such cases, they would be seconded to the ministry or organisation or request a leave of absence. As in most European judicial systems, judges should be entitled to return to their previous position once their assignment has ended.

Mutual independence of judges

Articles 21 to 28

29. These Articles deal in a very detailed manner with the concept of mutual independence of judges and are very progressive. Yet, it should be mentioned that the practical consequences of this principle might be better placed in the law on judicial organisation or even in the codes of procedure (civil and criminal). This concerns, in particular, Articles 22 to 27.

30. The concept and its implementation are fully compliant with the recommendations by the Council of Europe and the CEPEJ (European Commission for the Efficiency of Justice).

Article 22

31. This Article on the Immutability of Annual Workload is very interesting as it provides for a mechanism that exists in a formal way only in a limited number of European countries (e.g. the Netherlands where norms are defined nationwide by the Council for the Judiciary “Hooge Raad”, and where each court decides its annual workload upon deliberation).

32. However, how will this mechanism be implemented in practice? How will the decisions be made? What will happen if there is an unforeseen increase in the number of cases? This should be clarified.

Article 27

33. This Article on the Notification of Duration of Proceeding is very detailed, but well-drafted. It intends to contribute to the acceleration of the judicial process. However, it is difficult to implement in practice, unless the judge has the power to accelerate the procedure and issue orders (based on the code of civil procedure) without infringing the principles of neutrality and impartiality.

34. Furthermore, based on the well-known situation of judicial activities throughout Europe, it is unlikely that the notification set up by this Article will actually be able to contribute to an acceleration of cases. On the contrary, it might very well be that the time spent on reporting to the president of the court could be more usefully applied to drafting decisions rather than wasted on these kinds of unnecessary administrative tasks.

35. Judges might also be given the power to initiate Alternative Dispute Resolution mechanisms, such as mediation or conciliation, either handled by themselves (subject to adequate training) or, preferably, by a specialised organisation.

Relationship of judgeship to other functions, engagements and activities

Article 29

36. This Article states the principle of incompatibility of the judges' position with a certain number of activities. These include membership of political party, paid public or private work, compensated legal services or advice and other activities which – according to decisions to be taken by the High Judicial Council – are assessed as being contrary to the dignity and independence of a judge. Research and professional activities outside working hours do not require any prior authorisation.

37. Due to the restrictions set by paragraphs 1 to 3, it is unclear what type of "professional activity" may still be carried out by judges. Paragraph 5 sets out a number of activities a judge could carry out, but seems to be in contradiction with another paragraph of the same Article.

38. The last paragraph of the same Article is unjustifiably restrictive, as there is no reason for a judge not to be allowed to publish articles with a private owned publishing company, subject to the other restrictions imposed in the first six paragraphs.

39. This Article should be redrafted in order to avoid any misunderstandings.

Article 30

40. This Article on the Duty to Notify and Filing of Charges is ambiguous as *"(a) judge is required to notify the High Court (Judicial) Council in writing of any engagement or work that may be deemed incompatible with judgeship"*. This means that – in applying the principle of basic prudence - judges will almost always notify their engagement or work, just because they will not know in advance what the position of the High Judicial Council will be.

Performance evaluation of judges (Articles 31 to 35)

41. Article 31 clearly sets out the general principle of the regular evaluation of all judges and court presidents (with the exception of the President of the Supreme Court of Cassation). It involves all aspects of a judge's work and represents the basis for election,

mandatory training of judges, allocation to pay grades, dismissal and instituting disciplinary proceedings. It is to be conducted on the basis of publicised, objective and individual criteria and standards which are to be set out by the High Judicial Council.

42. According to Article 32, the bodies that are competent to carry out performance evaluation are departmental boards and the Commission of the High Judicial Council for Performance Evaluation of Judges. Departmental boards are to comprise the President of the Department and two judges elected by secret ballot at the session of the Department.

43. Article 33 provides that the court presidents and judges of the Supreme Court of Cassation are evaluated by the Commission of the High Judicial Council.

44. Article 34 states that performance is to be evaluated annually except in relation to judges elected for the first time, in which case it is to be evaluated every six months.

45. According to Article 35, ratings are “fails to meet requirements”, “satisfactory”, “good”, “very good” and “excellent”. Failing to meet requirements is grounds for removal from Office. A judge and/or the court president can object to the rating to the High Judicial Council or the Commission of the High Judicial Council.

46. The procedure set out in these Articles is transparent, fair and based on predetermined and, as far as possible, objective criteria. One may indeed question the principle of a performance evaluation for judges, however, similar systems exist in most European countries. It contributes to the improvement of the quality of the judicial service and guarantees the professionalism of judges.

47. It is important that an efficient performance evaluation system be based on a clear definition of the goals to be achieved. Therefore, a clear procedure including interviews and exchange of documents should be carefully set up with the assistance of human resource management experts.

Financial status of judges (Articles 36 to 43)

48. The main characteristics of the judges’ remuneration are the following: the salary (which is supposed to be commensurate to the position of the judge, to his or her seniority, experience and responsibilities), which is determined pursuant to a base salary. Judges are classified into five pay categories which correspond to grades. Each grade is divided into two levels (except the fifth grade) which are expressed in coefficients. This is a very classical remuneration mechanism for civil servants and judicial staff.

49. However, there are two aspects of the financial status that might be questioned. One is the fact that the base for calculation and payment of salaries of judges is determined by the government (Article 36). This may put into question the principle of independence of the judiciary, although there is very little room (if at all) for differentiation or discrimination. There is no reason not to entrust this task to the High Judicial Council, which is done by a number of countries where it has been transferred to similar institutions. The second aspect is the classification of judges depending on the court to which they were appointed (Article 37). This is open to criticism as there is no reason to differentiate between the workload, professional experience and scope of competence, between judges from magistrates courts and municipal courts or between commercial, district courts and the high magistrates court and the Appellate, High Commercial and the Administrative Courts.

50. Therefore, the five categories could very well be reduced to three. This would have the advantage of showing to both the judges and the public at large that justice is rendered by equally qualified judges of all courts and levels. Well-performing judges should have the

opportunity to work at a court of any level without having to suffer any negative financial consequences.

51. According to Article 39, the five categories are crucial to the salary perceived, since one moves to a higher salary level if twice classified “excellent”, whereas one moves to the lower salary level if twice rated only “satisfactory” or “good”. These ratings are entered into the judge’s and court president’s personal file. However, it is not clear who exactly does the actual evaluation. The decision-making power lies with the departmental boards in most cases, and in the case of presidents of courts and members of the Supreme Court of Cassation, with the High Judicial Council. But on what basis are departmental boards or the High Judicial Council to arrive at a conclusion? This should be clarified.

52. The generous disposition of Article 43, which foresees an increased salary up to 100% for judges adjudicating criminal cases in organised crime and war crime cases, might be interpreted as an attempt to offer an excessive privilege to certain judges and, consequently, to reduce the perception the public has of their independence. This should be revised.

D. Chapter Three – Election of a Judge

53. Article 143 of the Constitution stipulates that *“On proposal of the High Judicial Council, the National Assembly shall elect as a judge the person who is elected to the post of judge for the first time. Tenure of office of a judge who was elected to the post of judge shall last three years. In accordance with the Law, the High Judicial Council shall elect judges to the posts of permanent judges, in that or other court. In addition, the High Judicial Council shall decide on election of judges who hold the post of permanent judges to other or higher court.”*

54. Chapter Three of this draft Law describes the requirements for applying for a position as judge, the selection and election procedures of judges and the taking of an oath and office. However, under this Chapter, the critical issue of the reappointment/election of already appointed judges, remains. This needs to be solved in a way that avoids any serious harm to the functioning of the judicial institution.

Article 47

55. This Article on Other Requirements for Election refers, in its last paragraph, to the Law regulating the training institute, which the Venice Commission and the Directorate for Legal Co-operation have not received. Nevertheless, one could very well imagine that, as in a number of countries, the training institution is involved in the qualification assessment of candidate judges. However, one aspect is unclear, namely the question of whether a person can apply to two or more positions or if the application is limited to one position. In the current draft Law, multiple applications are possible. This should be clarified.

Article 50

56. Under this Article, applications have to be submitted to the High Judicial Council, which *“shall obtain information and opinions about the qualification, competence and moral character of a candidate”.* It is not clear from this provision whether the applicant is entitled to see this material or to challenge it if he or she does not agree with it.

Articles 51 to 53

57. Article 51 provides that the High Judicial Council proposes to the National Assembly two candidates for each judge’s position. According to Article 52, the National Assembly elects first time judges from among the two candidates proposed by the Council for each judge’s position. Article 53 provides that after the three years’ probationary period, judges

are appointed by the Council to a permanent position. If the first term of office of three years is deemed to be unsatisfactory, the Council does not appoint the judge to a permanent position; the judge can appeal against this decision in front of the Constitutional Court.

58. Articles 51 and 52 represent a serious politicisation of the office of a judge and raise the following questions: on what basis is the National Assembly to exercise a choice between two candidates who may both be suited for office? Are they to take into account their political opinions or background?

59. There is nothing in the Constitution to require such a two-candidate rule, which significantly worsens the position of the existing judiciary and represents a further and grave threat to the independence of the judiciary.

60. It would be preferable if the High Judicial Council were to put forward only one candidate for each vacant position. This would go some way to resolve the problem created by the constitutional provision for election of judges in the National Assembly. In the case of existing judges the Council ought to be required to put their names forward unless they have behaved in a manner incompatible with the role of an independent judge or can be shown to be incompetent. Appropriate safeguards for the rights of judges so accused should be set out.

61. In some way, the draft Law followed the suggestions of the Venice Commission's Opinion No. 405/2006, since the Council is now given real power in the selection procedure of the candidates proposed to the National Assembly. However, the final appointment remains in the hands of the parliamentary majority.

E. Chapter Four – Termination Procedure

Article 65

62. According to this Article "anyone" may launch an initiative for the dismissal of a judge. However, according to paragraph 2 of the same Article the dismissal procedure may be initiated by the president of the court, the president of the directly higher court, the President of the Supreme Court of Cassation, the Minister of Justice, the bodies responsible for performance evaluation or the disciplinary commission. There seems to be a contradiction between these two paragraphs.

Article 66

63. This Article provides that proceedings for dismissal are made by the High Judicial Council in closed session. The Council is entitled to request necessary information from competent bodies and organisations and must give a reasoned decision. The judge is entitled to be notified and made aware of the content of the case supporting documentation and to provide explanations and to be represented or appear in person, and can appeal the decision in front of the constitutional court.

64. It should not be open to just "anyone" to initiate the removal of a judge.

Article 67

65. This Article provides that a judge has the right to be notified about the reasons for the initiation of dismissal proceedings against him or her. Paragraph 2 could specify if the concerned judge is the only person entitled to present a statement or if an attorney or any other representative might do so as well.

F. Chapter Five – President of the Court

66. In order to determine whether the election of presidents of courts is done in a fair way, as it seems upon first reading of this Chapter, much will depend on the way the "clear" managerial and organisational skills will be assessed. The assistance of psychologists and/or sociologists might be useful here and such assistance could be introduced into the procedure.

Article 71
67. This Article provides that the Council propose two candidates to the National Assembly, after taking into account the opinions of the session of all judges of the court, whose president is being elected. It is very progressive in comparison to the selection procedure in other European countries, where consultation of the judges of the court is rare. Although the opinion of the session of all judges is not binding, nor does it need to be reasoned, it certainly constitutes a very relevant argument leading the Council to consider that a candidate is not suitable for the job.

Article 72
68. This Article entrusts the National Assembly with the power to elect, without a qualified majority, one of the two candidates proposed by the Council.

69. As with the election of first time judges, the appointment procedure of the courts' presidents is also exposed to the risk of politicisation. The only way to avoid such a risk would be to give the Council the power to propose only one candidate (as is the case for the nomination of the elected members of the High Judicial Council) and to entrust the National Assembly with only a veto power.

Article 80
70. This Article provides for the election of the President of the Supreme Court of Cassation from among the judges of that court, upon the recommendation of the High Judicial Council and following the opinion of the general session of that court and the relevant committee of the National Assembly. This is a rather cumbersome provision. It is not clear what happens if the recommendations and opinions of these three bodies are not in agreement with each other. It is also not clear whether the National Assembly is free to reject the recommendation of the Council.

71. However, it is remarkably progressive and democratic with respect to the limits that it sets to the term of office of the President of the Supreme Court of Cassation. The term is five non-renewable years and the election follows the opinion of the general assembly of that court.

G. Chapter Six – Special Provisions on Lay Judges

Article 82
72. Chapter 6 deals with lay judges. At the meeting in Belgrade, the function of lay judges was clarified. They were introduced after the Second World War to sit with professional judges in most cases and act as a type of watchdog of the judiciary.

73. According to Article 82 *"the things considered when appointing a lay judge are sex, age, profession and social status, knowledge, competence, and affinities for specific type of matter".* It is not clear why sex, age, or social status should be qualifying criteria for appointment as a lay judge. These should not be factors except to the extent it may be desirable to ensure a balance.

74. This Article is also very vague when stating that the applicant has to be "worthy" of the function of a lay judge.

Article 83

75. According to this Article the appointment of lay judges is to be made by the High Judicial Council upon the proposal of the Minister of Justice, who must first obtain the opinion from the court to which the lay judge is to be appointed. It is not clear what happens if the opinion is unfavourable. Can ministers still propose the appointment? Is the High Judicial Council obliged to accept the Minister's proposal?

H. Chapter Seven – Disciplinary Accountability

Article 91

76. This Article defines in an almost too precise and restrictive manner, disciplinary offences and severe disciplinary offences. A considerable number of the disciplinary offences defined here relate essentially to work performance rather than to any question of ethics or misbehaviour. For example, disciplinary offences include "*unjustifiable delays in drafting of decisions*", "*unjustifiable failure to schedule a hearing*", "*frequent tardiness for hearings*", "*apparently incorrect treatment of the participants to the proceedings and the court staff", "unjustified prolonging of the proceedings*".

77. A number of judicial systems (e.g. France) do not define disciplinary offences in such a detailed manner. It is left to the authority of the relevant disciplinary institution to define it through its case-law. Such a system brings about a certain amount of legal uncertainty, but on the other hand it allows the judges' peers to assess the behaviour of their colleagues in the light of the social perception of judicial duty. However, the procedure meets the usual standards of fairness.

Article 94

78. This Article lists the various disciplinary bodies, including the "Disciplinary Prosecutor", yet, there is no indication as to who this Prosecutor is or which organ appoints him or her. This is important and needs to be clarified as he or she would appear to be a rather powerful figure as he or she can initiate disciplinary proceedings and reject disciplinary charges as ill-founded under Article 96 of this draft Law.

Article 95

79. There seems to be a mistake in the formulation of Article 95 paragraph 3: *"Disciplinary proceedings are urgent and closed to the public, unless the judge charged does not request that the proceedings be open to the public."* The words "does not" should probably be deleted to read *"unless the judge charged requests that the proceedings be open to the public"*.

Decisions of the Disciplinary Commission (Article 98) and Decisions of the High Court Council (Article 99)

80. Articles 98 and 99 provide for an appeal from the disciplinary commission to the High Judicial Council, but there does not appear to be any appeal to a court of law. This is an omission which should be rectified.

81. The idea of performance evaluation as such is welcome. However, it needs to be handled carefully if it is not to be a tool to undermine the independence of the individual judges. The performance expected of the judge and how and by whom this performance is to be measured should be spelled out very clearly.

III. DRAFT LAW ON THE ORGANISATION OF COURTS

A. General remarks

82. The draft Law on the Organisation of Courts is a well-drafted text and covers, in principle, the areas that need to be covered by such a law. It does not contain any provisions that are contrary to European standards.

83. However, several suggestions for improvement are nonetheless made.

B. Chapter One – Principles

84. This Chapter is of an introductory nature and lists a certain number of very general, but nevertheless fundamental principles. These include judicial power vested with the courts, establishment and suppression of courts only by law, independence of the judiciary (separation of powers), judicial competence and the principle of unlawful refusal to act.

85. It also stresses other principles taken from international instruments. For instance, the prohibition of exercising influence on courts and public hearings. Here, one may regret that even more important norms such as the right to a fair trial and, more generally, principles deriving from Article 6 of the European Convention on Human Rights are not mentioned.

Article 1 – Judicial Power
86. In this Article, the concept of *"generally accepted rules of international law and ratified international agreements"* could be clarified by referring to international instruments and to their supremacy on national laws and regulations in the case of a conflict between them.

Article 2 – Establishing of Courts
87. The legality of the organisation of the judiciary and the prohibition of setting up temporary courts are settled by this Article. It states that temporary courts and other types of exceptional courts may not be established. This provision is very welcome and is the reproduction of Article 143 of the Constitution.

Article 5 - Appointment of a sitting judge
88. This Article provides useful guarantees with respect to the allocation of cases to judges of a same jurisdiction. How the selection of judges is to be implemented from a practical point of view is explained in the second paragraph. But the rules of repartition i.e. how cases are distributed among departments or benches of a court, need to be described in a regulation.

89. On a European level, efforts are being made for the implementation of a system of allocation of cases that protects the parties against arbitrariness and guarantees that predetermined rules are applied in this area.

Article 6 – Prohibition of Influence on Courts
90. This Article follows the principle that courts must be protected from all external influence. However, this provision prohibits the use of the media to influence the outcome of proceedings - which could, at least partially, breach the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights.

91. This provision might be revised. However, in doing so, a balance needs to be struck between the freedom of expression of the media, the right to information of the public and

the need to ensure that courts make their decisions free of external influence, including improper influence brought to bear through the media (see Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings and Opinion no. 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on "justice and society").

92. This Article is also silent on whether there are any sanctions against persons who try to exert undue influence on the proceedings. The Serbian criminal law may cover this, but if that is not the case, this gap in the law should be filled.

Article 8 – Right to Complaint

93. This provision covers the right to complain against the work of the court in cases where proceedings are considered dilatory, irregular or where decisions have been made under influence. The procedure is detailed in Article 56 (complaints procedure): it can be filed either with the court president or "through" the Ministry of Justice. The law remains unclear, however, as to the power of the president, the minister, the president of the higher court or the high court. In addition, there seems to be a risk of interference into judicial activities if, as it seems, the minister is entitled to take action. Clarification is needed here.

Article 9 – Legal Assistance

94. The provisions concerning legal assistance between courts and between courts and government authorities and organisations need to be more precisely defined, especially with respect to the context (preconditions) in which these provisions apply - otherwise, there is a risk of misuse of such provisions. The limits (for instance, privacy, state security) should be clearly drawn. One suggestion is to submit requests for "legal assistance" to a bench of judges from the same court or from a higher instance entrusted with the decision to authorise the transmission of files and/or of other information.

C. Chapter Two – External Organisation of Courts

Types of Courts (Articles 11 to 15)

95. The structure of the court system of Serbia, as described in Articles 11 to 15, is very common in European judicial systems. The system has a pyramidal structure with a Supreme Court of Cassation at the top.

Article 11 – Courts of the Republic of Serbia

96. The Republic of Serbia has chosen to have a single judicial power on the whole territory. Some European countries, based notably on the French example, decided to have two more or less separate judicial bodies, a so called two-tier system: one for general jurisdiction (civil, criminal, commercial, labour, social) and one specialised in administrative law (administrative courts and "*Conseil d'Etat*"). A "conflict court" needs to be set up in this system, as it is sometimes unclear whether a case pertains to one or the other body. From a historical point of view, this strict separation is based on the concept of separation of powers. However, the general tendency now is to eliminate or reduce the distinction between the two judicial systems and the choice made by the Republic of Serbia cannot be seriously criticised, as there is no reason to believe that the principle of separation of powers might be at stake.

Article 12 - Supreme Court of Cassation

97. This provision seems to indicate that the Supreme Court of Cassation has an overall jurisdiction on all lower courts (High Commercial Court, the High Magistrates Court, the Administrative Court, Appellate courts).

Article 14 – Municipal, District, Commercial and Magistrates Courts
98. This Article provides details on the territorial jurisdiction of the various courts. However, it does not say how the courts will be established when they are to cover several areas (municipalities). The type of legal instrument by which such courts are set up should be mentioned here.

Article 15 – Court of Directly Higher Instance
99. This Article explains how the various courts are linked together in the aforementioned pyramidal structure. This structure may lead to an exaggerated number of remedies in some cases and, consequently, to an abnormally long duration. For example, cases dealt with by a municipal court may be appealed to a district court and then to an appellate court, not to mention the Supreme Court of Cassation.

Territorial jurisdiction and permanency of court (Articles 16 to 21)

100. The aim of Articles 16 to 21 is to ensure that there is an easy access to justice. This is the reason for which court sessions may be held outside usual court premises subject to a specific law.

Article 17 – Venue of Court Activities
"Court activities are undertaken in the seat of the court and outside the seat – only when so set forth by law.

A municipal court may hold court days outside its seat."

101. This Article is drafted in a way that may lead to some confusion: does it mean that a municipal court may, on its own motion, hold court days outside its seat? Clarification is needed here.

Article 18 – Court Days
102. Legal advice provided by judges to citizens is an ancient tradition in Central and Eastern Europe, but it might be time to consider whether organising "Court Days" is worthwhile keeping. Serbian courts are already overloaded with work, just as is the case with the courts in many other European countries, they should not be further burdened.

Article 20 – When Court Activities are Undertaken
103. This Article states that *"Court activities are carried out throughout the year, every working day, and actions that do not tolerate postponement also during non-working days",* which is an excellent provision that exists in one form or another in almost all judicial systems. However, it is preferable to have the law – instead of the Court Rules – decide clearly what kind of actions can be taken on non-working days.

Article 21 – Compliance with Working Hours
104. This Article imposes on judges and staff the obligation to notify, within 24 hours, respectively the president or their superior on the reasons preventing them to work. This provision should be included in judges or staff regulations rather than in a law of a more general nature.

105. It seems that the Serbian judges are subject to a more or less fixed timetable. This solution also exists in other countries, notably in certain cantons of Switzerland. The introduction of working hours prevents judges from attending the court whenever suits them best. The question is really whether one should control the working hours or the advancement of the cases. Both can be done.

D. Chapter Three – Jurisdiction of courts

Articles 22 to 31
106. Articles 22 to 31 establish the list of competences *ratione materiae* of the various courts. This raises the question of whether these are the only legal provisions dealing with this matter or whether other laws or codes (civil or criminal procedure notably) provide for a more detailed explanation. If there are no other legal texts, these provisions should be further elaborated in order to clarify the respective judicial competences. In this respect, the last sentence of Article 22 *"It may be provided by law that only certain municipal courts from the territory of the same district court act in particular legal matters"* is surprising and contrary to the general principles stated in Article 1, 4 and 14 of this draft Law. There is no obvious reason for such a derogation that might lead to abuses.

107. The role of the Supreme Court of Cassation is described in Articles 30 and 31. These Articles are very short and do not provide substantial indications as to the Supreme Court of Cassation's exact jurisdiction. The concept of *"extraordinary legal remedies"* is extremely vague and if not detailed further in this draft Law, may lead either to an excessive limitation of cases that can be submitted to the court, or to an overflow of cases, which is more likely, until the jurisprudence of the Supreme Court of Cassation provides clarification. It could, for example, be added that remedies are limited to cases of obvious misinterpretation or violation of the law, or miscarriage of justice.

108. Article 31 states that *"The Supreme Court of Cassation determines general legal views in order to ensure uniform application of law by courts*". It should be made clear that the Supreme Court of Cassation provides legal views only in the framework of a specific case; otherwise this would be in breach of the principle of the separation of powers, as a court cannot make any decision outside its jurisdiction. The same comment applies to the following sentence: *"reviews application of law and other regulations and the work of courts".*

Article 33 – Publishing of Decisions of the Supreme Court of Cassation
109. This Article provides that the interesting decisions be published in a special collection. It might be useful for the public to also have access to the courts' judgments on the internet.

E. Chapter Four – Internal organisation of courts

Article 34 – Annual Calendar of Tasks
110. The annual calendar of tasks, i.e. the court hearings' schedule, seems to be prepared in a very democratic manner. However, it should be more service-oriented and, for instance, foresee the consultation of the prosecutor's office as well as of the Bar Association, as they may have relevant suggestions.

Court department and session of all judges

Articles 35 to 41
111. Court departments and sessions of all judges are useful, as they are to provide coherent jurisprudence and consistent decisions. It should, however, be clarified if the system applies to the handling of individual cases (lawsuits) or if the sessions, for example the joint session of departments (Article 40) or the session of all judges (Article 41) are of a general nature and are supposed to make recommendations or binding decisions. If the latter applies, this might be considered contrary to the independence of judges.

Internal Organisation of the Supreme Court of Cassation

Articles 42 to 50
112. As regards the functioning of the Supreme Court of Cassation: it is unclear if sessions of departments (Article 43) or the general session (Article 44) may have a say in a specific case or if they issue opinions afterwards. To what extent are the opinions issued by these institutions binding for judges of the Supreme Court of Cassation and for judges of lower level courts?

Court administration (Articles 51 and 52) and Administrative-judicial panel (Articles 53 to 57)
113. The supervising tasks of the president of a court (Article 52) or even more, concerning the president of a higher court (Articles 55 and 56) could infringe judicial independence and interfere in judicial activities. A certain overall supervision is necessary, as malfunctioning in courts may occur, but here the role of the president is described in a very vague manner so that one may fear undue interference. For example, to state that *"The court president is required to demand legality, order and accuracy in the court, eliminate irregularities and procrastination in work"* could lead to such unacceptable situations. Although Article 74 seems to limit this power by providing a possibility of annulment of an act of judicial administration that interferes with the autonomy and independence of the court and judges, a clear limitation to the power of a court president and more specifically, to the power of a president of a higher level court, should be included.

F. Chapter Five – Court staff

Articles 58 to 71
114. These Articles do not call for specific comments other than the fact that in order to introduce modern managerial practices, the introduction of an institution such as a regular (for example twice a year) meeting of staff, by category or in general be introduced, so that they have an opportunity to express their views on the administrative functioning of the court.

115. The role and tasks of the court advisors (Articles 61 and 62) needs to be clarified in particular as to their authority over staff and the possibility and extent to which a court president may delegate administrative tasks.

G. Chapter Six – Judicial administration

Article 72 – Tasks Comprising Judicial Administration
116. The aim of this Article is to list the tasks and responsibilities with respect to judicial administration entrusted to the High Court Council and to the Ministry of Justice respectively. Regarding the latter, most of the tasks, which are of logistical nature, do not call for specific comments. However, the words *"developing the judicial system"* and *"oversight of action in cases within statutory timeframes and on complaints and grievances"* are vague and ambiguous and call for clarification or elaboration.

Article 75 – Personal Record
117. This Article should state that judges or court employees may have access to the data and a right to seek deletions of improper information or the addition of omitted relevant information.

H. Chapter Seven – Court security

Articles 80 to 84
118. Court security is an important issue in all judicial systems. As it may interfere with court activities, it should be specified that court guards act under the authority of the court president or, by delegation given by the president, or the judge in charge of court

administrative businesses. It is certainly advisable to create a specific “judicial police force” under the overall authority of the judicial power (i.e. the High Judicial Council).

I. Chapter Eight – Funds for the work of courts

Articles 85 to 88

119. The "basic provision(s)" in this Chapter are welcome in principle, much will of course depend on their practical implementation. The issues concerning the judicial budget should be included in a separate set of rules and regulations that should be drafted in close co-operation with those concerned, bearing in mind both the requirements based on the principle of judicial independence and on the availability of financial means of the general budget.

J. Chapter Ten – Transitional and final provisions

120. It is clear that the transitional period will be difficult for both judges and court staff, but also and in particular for the parties involved in lawsuits. Therefore, all appropriate measures should be taken to manage this in the best way possible. Towards that end, a type of "transitional management" panel could, for instance, be set up to deal with all problems that may arise during that period in a rapid and efficient manner.

IV. CONCLUSION

121. The Constitution of Serbia endangered judicial independence and created a major risk of politicising the judiciary by providing for the election of judges and of the High Judicial Council in the National Assembly, and by creating a discontinuity between the existing judiciary and the new judiciary to be chosen, once the High Judicial Council is established.

Draft Law on Judges

122. Although the draft Law on Judges is, in general, in line with European standards, there are a number of provisions that give rise to concern and will need to be revised.

123. For instance, the draft Law contains a number of provisions that tend to weaken judicial independence. In certain cases, they increase the risk of politicising the judiciary by requiring that for the election of each judge, the National Assembly be presented with two candidates by the High Judicial Council and by failing to provide for an acceptable model for the continuance in office of serving judges against whom no incompetence or behaviour incompatible with the role of an independent judge is alleged.

124. In particular, the following provisions of the draft Law should be revised:

- Article 2 needs to be clarified with respect to the extent of a judge’s right to association;
- Article 8 should provide further details on what kind of a mechanism is used for the consultation of judges with respect to the work of courts and to what extent judges may impart their views;
- There is a contradiction in Article 9 paragraph 3 which needs to be clarified: training for judges is voluntary unless it is mandatory;
- Article 12 should be amended to provide that if a court is abolished, a judge will continue to work for a court of the same level/instance;
- Article 20 should provide that judges be allowed to work in a Ministry or organisation or request a leave of absence, subject to certain conditions;

- Articles 22-27 on the Immutability of Type of Work and Random Allocation of cases should be deleted from this draft Law and introduced into the law on judicial organisation or the code of civil or criminal procedure;
- Article 29 on the Relationship of Other Functions, Engagements and Actions with Judgeship should give judges more freedom and clarify which activities a judge is allowed to carry out;
- In Article 36, the task of calculating the salaries of judges should be entrusted to the High Judicial Council;
- In Article 37, the five pay grade categories for judges should be reduced to three, as there is no reason to differentiate between the workload, professional experience and scope of competence, between judges from magistrates courts and municipal courts or between commercial, district courts and the high magistrates court and the Appellate, High Commercial and the Administrative Courts;
- Article 39 should clarify who carries out the evaluation of judges with respect to the pay grade classification;
- Article 43 which generously provides for an increase in salary of up to 100% for judges working on criminal/organised crime and war crimes cases should be revised;
- Article 47 on Other Requirements for Election is unclear on whether a person can apply to two or more positions or if the application is limited to one position;
- Article 50 on obtaining Information and Opinion is unclear on whether an applicant is entitled to see this material and whether there is a possibility for him or her to challenge it;
- Article 51 stipulates that the High Judicial Council propose two candidates for each judge's position to the National Assembly. This represents a serious politisation of the office of a judge and should be revised. Articles 52 and 72 raise similar problems;
- Article 65 on initiating dismissal proceedings needs to be clarified with respect to who may bring such proceedings;
- In Articles 82 and 83 the criteria for the appointment of lay judges should be revised;
- In Article 94 the function of the Disciplinary Prosecutor needs to be defined;
- Articles 98 and 99 on decisions of the Disciplinary Commission and of the High Judicial Council should provide for an appeal to a court of law.

125. It was suggested at the meeting in Belgrade by the Serbian participants that there are too many judges in the current Serbian judiciary. This may be true, however the way to deal with such a problem is through ordinary retirement or by introducing early voluntary retirement, not by in effect dismissing judges who have not been shown to be incompetent or to have misbehaved.

126. Furthermore, during this meeting in Belgrade, the Ministry of Justice explained that the reappointment procedure will be included in the final provisions of this draft Law. The Venice Commission and the Directorate for Legal Co-operation are hopeful that their comments and suggestions will be taken into account in the drafting process.

Draft Law on the Organisation of Courts

127. In principle, the draft Law on the Organisation of Courts is in line with European standards. There are only a few changes that would further improve this draft Law, notably:

- Chapter One should also refer to the principles contained in Article 6 of the European Convention on Human Rights (right to a fair trial);
- Article 1 on Judicial Power should be clarified by referring to specific international instruments and their supremacy over national law in case of conflict between them;
- Article 6 should be reworded as it could breach freedom of expression, notably that of the press, which is not in line with Article 10 of the European Convention on Human Rights (freedom of expression);

- Article 9 concerning legal assistance needs to be clarified in order to prevent abuse of this system;
- Articles 52 to 56 under Court Administration may infringe judicial independence and need to be revised with respect to the supervising tasks of the president of a court;
- Article 75 should allow judges and court employees to have access to data and a right to seek the deletion of improper information or the addition of relevant information.

128. The Venice Commission and the Directorate of Legal Co-operation of the Council of Europe remain at the disposal of the Serbian authorities for any further assistance.

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