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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON

DRAFT AMENDMENTS TO LAWS ON THE JUDICIARY

OF SERBIA

Adopted by the Venice Commission
at its 94th Plenary Session
(Venice, 8-9 March 2013)

on the basis of comments by

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I. Introduction

1. On 3 January 2013, the Venice Commission received a request for an opinion by Mr Nikola Selaković, Minister for Justice and Public Administration of Serbia, on the draft amendments to the Law on judges, to the Law on the organisation of courts and to the Law on the public prosecution. The present opinion is solely on the draft amendments to the laws on judges and on the organisation of courts.

2. The Venice Commission has invited Mr Johan Hirschfeldt and Mr Konstantin Vardzelashvili to act as rapporteurs for this opinion.

3. On 31 January - 1 February 2013, Mr Johan Hirschfeldt and Mr Nicolae Esanu[1], accompanied by Mr Thomas Markert, Ms Tanja Gerwien from the Secretariat of the Venice Commission and Ms Nadia Cuk from the Council of Europe's office in Belgrade, visited Belgrade for meetings with the relevant stakeholders. They met with representatives of the Ministry of Justice and Public Administration, the working groups on the draft amendments to the Law on judges, on the draft amendments to the Law on the organisation of courts and on the draft amendments to the Law on the public prosecution, the Judges' Association of Serbia, the Prosecutors' Association of Serbia, the Committee on the Judiciary, Public Administration and Local Self-Government and a representative of the Committee on European Integration of the National Assembly of the Republic of Serbia.

4. This opinion is based on the translation into English of the draft amendments to the Law on judges (CDL-REF(2013)005) and the draft amendments to the Law on the organisation of courts (CDL-REF(2013)006). A number of modifications to the English translation of these texts have been made by the Secretariat of the Venice Commission following the above-mentioned visit to Belgrade on the basis of information received from the working groups on the draft amendments to these laws. The modifications in the texts of the draft amendments have footnotes, for easy reference.

5. This opinion was discussed at the Sub-Commission on the Judiciary on 7 March 2013 and has been adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).

II. General remarks

6. In 2008, within the context of the National Judicial Reform Strategy of Serbia that was adopted by the Serbian National Assembly in 2006, the Venice Commission was requested, among others, to provide an opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia[2], which was adopted by the Venice Commission's Plenary Session in March 2008. These laws were then adopted by the National Assembly in December of that year.

7. In 2009, the Serbian authorities introduced a reappointment procedure for all existing judges (and prosecutors) in the country, which ended in December of that year, with the newly appointed judges (and prosecutors) taking office in January 2010.

8. This reappointment procedure raised concern with, *inter alia*, the Venice Commission and the European Commission (EC), stating that the decisions by the High Judicial Council not to

[1] See the Opinion on the draft amendments to the Law on the Public Prosecution of Serbia, CDL-AD(2013)006.
[2] Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

reappoint all judges (and the State Prosecutorial Council not to reappoint all prosecutors) without providing reasoned decisions were tantamount to dismissals.[3]

9. The decisions that dismissed nearly all the judges (and prosecutors) were appealable to the Constitutional Court of Serbia. The judgments rendered on the cases brought before this Court pointed to the shortcomings in the procedure, which led to the need to reinstate all judges (and prosecutors) that had been laid off. In the meantime, new judges (and prosecutors) had been appointed and took office in January 2013, along with those who were reinstated.

10. In Belgrade, the Ministry of Justice and Public Administration informed the Venice Commission's delegation that it considered the now overall number of judges (and prosecutors) - combining those that were newly appointed with those that were reinstated - to correspond to the general need for these professions in the country.

11. During the preparation for the above-mentioned visit, the delegation found that the draft amendments to the Law on judges and to the Law on the organisation of courts are, on the whole, rather positive. At the meetings in Belgrade, it became clear that they are a part of the on-going reform process, but that they do not seem to cover all the important aspects of the reform of the judiciary that need to be addressed in the present situation in Serbia.

12. In this context, with the sudden and unforeseen reinstatement of all judges (and prosecutors) into the system, it would be important for the Ministry of Justice and Public Administration of Serbia to take stock of the situation in the country. To this end, the Venice Commission would like to encourage the Ministry of Justice and Public Administration to take an active role in developing a clear concept on what the courts network of Serbia should look like. The Venice Commission's delegation was informed during its visit to Belgrade that this was currently being done. It is also important that the number of judges needed in each court across the country be looked into and this has, to date, not been done according to the information received in Belgrade.

13. Once such a concept for the courts network and the number of judges per court across the country has been dealt with, the next step should be to deal with the allocation of judges to the various courts across the country, where they are needed.

14. In this respect, the possibility of transferring judges must be approached carefully. It is of the utmost importance that their constitutional rights not be breached in this process.

15. In the current situation in Serbia, special measures may be needed and it seems normal and justified for the Ministry of Justice and Public Administration to get involved actively. This is also due to the fact that this situation cannot be handled by the High Judicial Council on its own, due to the problems resulting from the unsuccessful reappointment procedure.

16. It is also important that the entire reform process be measured and well prepared in order to achieve the right balance between speed and quality required in order for this reform process to be successful. As has been seen in the past, it is counterproductive to sacrifice quality for speed in adopting the necessary reforms, as they will need to be revisited in the future.

[3] See paragraph 9, Interim Opinion on the draft decisions of the High Judicial Council and of the State Prosecutorial Council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia, CDL-AD(2011)015.

III. Draft amendments to the Law on judges

Article 6 - Liability

17. The aim of this Article is to provide compensation mechanisms for damage caused by a judicial decision where damage was inflicted by a judge either intentionally/wilfully or with extreme/gross negligence.

18. The issue of the personal liability of judges was raised by the Committee of Ministers in its Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities:

> "66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.
> 67. Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation."[4]

19. While imposing civil liability on a judge is a possibility, the grounds for the compensation of damage should be considered with great caution, as this may have a negative impact on the work of the judiciary as a whole. It could limit the discretion of an individual judge to interpret and apply the law. For this reason, in a case for compensation of damages against a judge, draft Article 6 must be applied with great care and restrictively.

20. Draft Article 6 also states that the required *mens rea* for a judge is not only intent, but also gross negligence. According to this provision, the basis for personal liability of a judge is a judgment by the Constitutional Court of Serbia, the European Court of Human Rights, other international court or organisation of which the Republic of Serbia is a member, establishing that a human rights violation occurred during a court hearing and/or that the judgment was based on such a violation. The next step is the "final court decision, or settlement before the court or other competent authority", which has paid damages to the aggrieved party. The final logical step is that "When the Republic of Serbia... has paid damages, it can demand from the judge remuneration of the paid amount, if the damage was caused with intention or extreme negligence." Draft Article 6 places a number of obligations on the Public Attorney and the High Judicial Council (HJC) on the initiation of a claim for damages against a judge. The Article should, however, clearly set out which institution may make a claim for damages in court against the judge and that the issue of guilt has to be determined in judicial proceedings in a fair trial with a right to appeal.

21. As stated in Article 22 of the Law, "A judge is free in holding his/her views, determination of facts and application of law in all matters under his/her deliberation" and is "not required to justify to anyone, even other judges and/or the president of the court, his/her understanding of the law and the facts found...". These are the basic guarantees that ensure the independence of an individual judge to decide cases impartially, in accordance with his/her conscience and interpretation of the facts, and in accordance with the prevailing rules of the law.

22. Draft Article 6 is also vague with respect to the term "international organisation", which seems too broad. It is not uncommon for violations of the rights and freedoms guaranteed by the European Convention on Human Rights and/or the national Constitution to occur

[4] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, https://wcd.coe.int/ViewDoc.jsp?id=1707137

as a result of the application and/or interpretation of the law. It is also not unusual for the European Court of Human Rights, international organisations, constitutional courts or other national courts to reach different conclusions in defining the scope and content of a right (including procedural rights) or of a legal provision. International organisations (or quasi-judicial bodies) may also set different standards with regard to certain rights. Should the judge be liable if s/he "wilfully" did not follow the standards established by any of these international organisations? The argument could be made that where the international case-law is well-established, the judge should be expected to follow it. However, the fact that a judge has wilfully chosen not to follow the established standards should not in itself become a ground for personal liability. In such situations, as well as for the issues of liability, the conditions already mentioned in paragraphs 17-21 above should be taken into account. Finally, it is of great importance that issues pertaining to the personal liability of judges be determined by national courts, but this should only be allowed on the basis of criteria and procedures that are clearly defined by the law.

23. In addition, there are differences in terminology (at least in the English version): paragraph 2 sets out that a judge will be liable if damage is "caused with intention or extreme negligence", whereas paragraph 3 sets out "wilfully or by gross negligence". This should be harmonised.

Article 7 - Right to association

24. This provision sets out that "To protect their interests and preserve their independence and autonomy, judges shall have the right to associate." This Article has not been changed in the draft.

25. It is interesting to note that Article 7 provides a weaker protection for the right to association than the provision in the draft amendments to the Law on the public prosecution, which reads "Public prosecutors, deputy prosecutors, prosecutor assistants and apprentices have right to associate in professional, trade union and other associations to protect their interests and take measures to maintain independency in work of public prosecutor's offices. The right of professional association also assumes participation in activities of professional associations during the working time if that does not disturb the process of work of public prosecutor's office."[5] There seems to be no legitimate reason for this difference between the two sets of laws. Article 7 of the Law on judges might therefore be changed in line with the draft on prosecutors.

26. However, draft Article 8 (see below) might give the single judge and professional associations of judges the right to participate in taking decisions of significance for the work of courts and the allocation of funds for the operation of the courts. In this way, Article 8 might provide substance to the important principle behind Article 7.

Article 8 - Participation in taking decisions of significance for the work of courts

27. Article 8 sets out that "a judge and professional associations of judges are entitled to take part in taking decisions of significance for the work of courts and for determination and allocation of funds for the operation of the courts". The reference to the specific issue of allocation of funds creates the impression that this provision implies the involvement of judges – not only during preparatory discussions, but also in their final decision-making – in policy decisions and/or organisational issues. Although the CCJE's Magna Carta of Judges refers to the importance of the judiciary to "... be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation),"[6] Article 8's reference to an individual judge makes it unclear as to how and in what form individual judges will be

[5] See Article 53 of the draft amendments to the Law on the public prosecution (CDL-REF(2013)004).
[6] CCJE (2010)3 Final https://wcd.coe.int/ViewDoc.jsp?id=1707925&site=C%D0%9E%D0%95.

"taking part in taking decisions". The term "decision of significance" should also be clarified. Such participation in the decision-making power is usually carried out, on behalf of the judiciary, by a judicial council (which would need to be reformed in Serbia). Professional associations should, of course, be able to present their views to the judicial council.

28. The Venice Commission has already expressed its view on this issue in an earlier opinion, it stated in particular that: "...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*"?"[7]

29. However, if the idea behind this provision is to allow the participation of individual judges or their associations before decisions on court-management issues of importance are made by the court president, this should be welcomed.

Article 10 - Election and termination of office and number of judges and lay judges

30. Article 10 provides that the HJC "reviews every three years the required number of judges and lay judges for every court" as well as before the expiry of the three-year period "at its own initiative or at the proposal of a president of the court, president of a directly superior court, President of the Supreme Court of Cassation and the Minister responsible for the judiciary".

31. In a letter from the Judges' Association of Serbia (JAS) regarding the Working Draft of the Law Amending the Law on Judges, the JAS mentioned that there were huge discrepancies between the caseloads of the courts and the judges across the country. It therefore seems that the aim of this draft amendment is to provide greater flexibility in the process of reallocating the number of judges across the country (the previous wording of this paragraph referred to a five-year period). This should clearly not be understood as a mandatory requirement for the actual implementation of such reallocations every three years.

32. This was confirmed during the meetings in Belgrade attended by the Venice Commission's delegation, where it was clarified that this provision does not mean that a reallocation would take place every three years, but that it provides for the possibility of doing so, if there was a need for it.

33. In the long run, however, the possibility of carrying out a general review of all courts and positions of judges at such short intervals (three years) seems questionable. In addition, Article 150 of the Constitution[8] on non-transferability of judges must be taken into account, with its exceptions in paragraph 2, when looking at the possible impact of Article 10. It is important that a court system, in the long run, be consistent and not subject to constant change, otherwise judges will feel insecure in their positions and this will adversely affect their independence.

[7] Paragraph 17, Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

[8] Article 150 – Non-transferability of judge
A judge shall have the right to perform his/her judicial function in the court to which he/she was elected, and may be relocated or transferred to another court only on his/her own consent.
In case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may exceptionally, without his/her consent, be permanently relocated or transferred to another court, in accordance with the Law.

34. Furthermore, there currently is a more urgent need to reorganise the courts network, and following that, a review of the staffing of courts with judges should be considered. Article 10 and its amendments do not, as such, address this acute problem, but could be useful for the transitional period after the reform of the judiciary.

Articles 18-19 - Non-transferability of judges (Concept and Transfer)

35. Article 18 states that "A judge shall have the right to permanently perform his/her office in the court to which he/she is elected, except in cases provided by this law." The aim of this amendment seems to be to allow the transfer of a judge to other state institutions or international bodies as well as providing the legal ground for the transfer of a judge to another court on the basis of the reorganisation or restructuring of the court system.

36. In draft paragraph 3 of Article 19, the wording "actual jurisdiction" seems to refer to "the jurisdiction in substance" or in other words changes in the judicial tasks of the court.

37. Another proposed change to Article 19 now opens the possibility of transferring a judge to a lower court, as long as this does not have a negative impact on his/her base salary. Another proposed change in this Law, Article 37, paragraph 2 on Base salary, correctly reflects this important principle.

38. These amendments must respect the conditions under Article 150 of the Constitution.

Article 25 - Derogation

39. This Article provides more case management flexibility, derogating from the random allocation of cases, which may be justified and sometimes even necessary. It is important that the procedure for the allocation of cases not become a tool to influence a certain outcome. The judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam*, but according to objective and transparent criteria.

40. However, this should not exclude the possibility of assigning particular types of cases to specialised judges or panels of judges in appropriate cases. Case-allocation systems should be designed in such a way as to take into account the workload of the individual judge as well as the complexity of the case assigned to him/her.

41. In this regard, the Venice Commission recommends that: "In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria. [....] It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges will sit on that case. The criteria for taking such decisions by the court president or presidium should be defined, however, in advance. Ideally, this allocation should be subject to review".[9]

42. Cases should not be transferred from a judge without good reason and this is covered by the last paragraph of Article 25. This paragraph states that cases may be transferred from a judge due to reasons of: "his/her prolonged absence [....], or if efficient operation of court is

[9] Paragraph 80, Report on the Independence of the Judicial System Part I: the independence of judges, CDL-AD(2010)004.

endangered, or if he/she was issued a final disciplinary sanction due to a disciplinary offence for unjustified procrastination, and other situations provided by the law." Some specific reasons for the transfer of the case to another judge, which are listed in this paragraph, would qualify as valid reasons, however, formulations such as "efficient operation of the court" and "other situations provided by the law" are clearly too broad and vague.

43. The caseload may be reduced if a judge is dealing with other issues or is overloaded. This is covered by separate laws (which the Venice Commission did not see) and the decision may be appealed.

44. In this respect, Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, recommends that "A case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary"[10].

Article 28 - Notification of duration of proceeding

45. In paragraphs 33-35 of the Venice Commission's Opinion (2008) on the draft laws on judges and the organisation of courts of the Republic of Serbia[11], the contents of Article 28 were commented and accepted. The former version of the Article is now deemed not to be efficient (no explanation was provided during the Venice Commission delegation's visit to Belgrade). The new version places the final responsibility on the presidents of courts. As there are electronic records, it should be relatively straightforward to formulate.

46. Paragraph 1 states that the "president of the court is required to notify the president of the court of every first-instance proceedings that has not been concluded within two years and then to continue with notifications about further course of the proceedings every six months". This requires clarification or is most likely a mistake in the translation and should probably read "the judge" rather than the President of the Court (as was the case in the version prior to the amendment) is required to notify the President of the Court (in which s/he is a member) with regard to the delays.

47. Paragraph 2 of the same Article sets out that "The president of the court is required to notify the president of the immediately superior court of every first-instance proceedings that has not been concluded within two years, as well as of reasons for such occurrences, upon obtained notification from the trial judge". Where there is an electronic case management system, the reporting process to the president of the superior court might be relatively easy and straightforward to carry out. However, unless the president of the superior court has the power and the resources to accelerate the procedure and issue orders without infringing the principles of neutrality and impartiality, such reporting makes little sense and may even be counterproductive.

48. In situations where the decision on the case is unjustly delayed, other remedies should be provided by law, including the application to the HJC and/or, as recommended in the previous opinion of the Venice Commission, that "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".[12]

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[10] Paragraph 9, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, https://wcd.coe.int/ViewDoc.jsp?id=1707137

[11] See Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

[12] Ibid., Paragraph 35.

49. It is also important to ensure that the hierarchical judicial organisation does not undermine the individual independence of judges. In this regard, Recommendation CM/Rec(2010)12 provides that: "Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law."[13]

Article 29 - Right of a Judge to Complaint

50. Paragraph 3 of this Article states that the HJC should rule on the complaint lodged by a judge within 15 days and notifies him/her about the decision. This provision rules out the possibility of an oral hearing. In certain cases, however, the right to address the HJC in person should be ensured.

Article 30 - Relationship of other functions, engagements and actions with judgeship

51. According to paragraph 1 "a judge may not hold office in bodies enacting or enforcing legislation, public offices, and autonomous province and local units of local authorities. A judge may not be a member of a political party or act politically in some other manner, engage in any paid public or private work, nor extend legal services or legal advice for compensation". This wording therefore rules out the possibility for a judge to be assigned in whatever capacity to another "state authority" or public institution (such as ministries of justice or the interior), which may be "enforcing legislation".

52. It is within the discretion of the national authorities to restrict the judge's right in providing legal services or performing other functions in a public institution, however, this may conflict with Articles 2, 18 and 41. In particular, Article 2 states in its fourth paragraph that "A judge may be **assigned**, with his/her consent, to work in another government authority or institution, pursuant to this Law". Article 41 in its first paragraph also refers to the possibility of a transfer or assignment to "the Ministry competent for the judiciary, institution, or international organisation is entitled to a base salary of a judge of the court and/or the Ministry in charge of the judiciary, institution, or an international organisation to which he/she is transferred and/or assigned, if more favourable". Apart from that, membership in international (judicial or quasi-judicial) organisations or legal associations may imply provision of legal advice.

53. During its meetings in Belgrade, the Venice Commission's delegation was told that "professional bodies" (penultimate paragraph of Article 30) refers to commissions, the judicial academy or working groups in the academy. While the expression "professional bodies" was not meant to refer to organisations of judges, the wording should probably be replaced by "other competent bodies".

54. However, these provisions on judges and prosecutors and their activities in their associations should be harmonised (see comments on Article 7, above).

55. The Venice Commission recommends that Article 30 be reworded. The Bangalore Principles of Judicial Conduct contain useful recommendations in this regard:

"4.11 Subject to the proper performance of judicial duties, a judge may:
4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;
4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

[13] Paragraph 23, Recommendation CM/Rec(2010)12, https://wcd.coe.int/ViewDoc.jsp?id=1707137

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge;

or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practise law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges."[14]

Articles 32 and 33 - Performance evaluation of judges and Bodies competent for evaluation

56. According to Article 32 **"**Performance evaluation involves all aspects of a judge's work and/or work of a president of the court, and represents the basis for the election, mandatory training of judges, and dismissal." Article 33 adds that "performance of judges and court presidents is evaluated by commissions of the High Judiciary Council. The commissions are composed of three members, where the judges of higher instance are evaluating judges and court presidents of lower instance."

57. The meaning of the term "all aspects of judge work" should be clarified. Does it also apply to the evaluation of administrative functions that may be assigned to him/her? Or may the judge be evaluated on how s/he decided certain cases? This is important to define, as the evaluation may result in the dismissal of the judge.

58. The system of evaluation should not be perceived as a mechanism of subordination of lower court judges to superior court judges. In certain cases this may also lead to a conflict of interest, for instance in cases where a judge of a lower court is evaluated by an upper instance judge who overruled decisions of the judge under evaluation.

59. A specific problem in this context is the evaluation of judges appointed for a three-year probationary period. In its Report on Judicial Appointments, the Venice Commission has dealt with this issue:

> "42. The main idea is to exclude the factors that could challenge the impartiality of judges: 'despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value'."[15]

60. The standards of the evaluation as well as procedure should be clearly formulated.

Article 36 - Rates

61. This Article states that "Ratings that pertain to the evaluation of judges are: "performs a judicial function with extreme success", "successfully performs a judicial function", "meet requirements", and "fails to meet requirements". Ratings that pertain to evaluation of president of the courts are: "performs the function of the president of the court with extreme success", "successfully performs the function of the president of the

[14] http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.
[15] Paragraph 42, Report on Judicial Appointments, CDL-AD(2007)028.

court", "performs the function of the president of the court in satisfying manner, and "performs the function of the president of the court unsuccessfully"."

62. According to Article 62 (on reasons for dismissal) of the same Law, a judge may be dismissed on the basis of his/her incompetence. While Article 63 (specifically on incompetence performance of function) also states that a judge is considered to be incompetent if his/her evaluation is "dissatisfactory". In order to avoid misunderstandings, it is crucial to establish clear and precise criteria as well as to define the time-frame for such evaluations. It should be noted that among evaluation grades (performance rates), as defined by Article 36, there is no "dissatisfactory" evaluation, which according to Article 63 may become the reason for the dismissal.

63. The dismissal of a judge should only be possible on the basis of sound and clearly defined grounds, similar to those provided in Article 62.[16]

Article 50 - Nomination of Judges to be Elected for the First Time

64. Paragraph 4 of this Article states that "The High Judicial Council shall propose to the National Assembly one or more candidates for each judge's position. The High Judicial Council is in obligation, when proposing candidates for election of judge of magistrate or basic court, to propose a candidate who has completed the initial training in the judicial academy, in accordance with the special law."

65. It seems that the aim of this amendment is to ensure that only those candidates who accomplished the judicial trainings are proposed to the Assembly, but it also provides the National Assembly with the opportunity to choose the candidates. Concern is raised with respect to the degree of the National Assembly's involvement in the process of the election of judges. In its previous opinion, the Venice Commission has raised concern regarding the criteria the National Assembly will use to exercise a choice between candidates.[17] The National Assembly should not be involved in the appointment of judges. Articles 99, 147 and 154 of the Constitution should therefore be amended.

Article 59 - Retirement Age

66. This Article sets the retirement age for judges at 65 years or 40 years of official service. As an exception, at the request of the president of the court, the HJC may approve an extension of two years, with the consent of the judge.

67. An amendment to this Article provides that "the request from paragraph 2 of this Article is submitted by the president of immediately higher court for the president of the court....". It seems that the aim of this provision is to introduce a mechanism for lodging a request with the HJC on behalf of the presidents of the courts.

Article 64 - Power to Initiate and Initiating of Dismissal Procedure

68. Paragraphs 1 and 2 contradict one another. Paragraph 1 says that "Anyone may launch an initiative for the dismissal of a judge", while paragraph 2 says that the HJC is authorised to "institute the dismissal procedure of a judge" *ex officio* or upon proposal received from the president of the court, the president of the immediately superior court,

[16] Article 62: "A judge is dismissed if convicted for an offence carrying imprisonment sentence of at least six months or for a punishable act that demonstrates that he/she is unfit for the judicial function, in case of incompetence or due to a serious disciplinary offence."

[17] Paragraphs 57-60, Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

the president of the supreme court of cassation, the minister in charge of the judiciary, the bodies responsible for performance evaluation and the disciplinary commission. The wording of these two paragraphs should be harmonised. It would be dangerous to give every person the right to initiate proceedings for the dismissal of a judge. A complaints mechanism for individuals should exist for cases where the judge has misbehaved, but such a complaint should not directly result in initiating dismissal proceedings of the judge.

Article 72 - Term of office (for presidents of courts)

69. The amendment to Article 72 provides that the president of the court is elected for a four-year term and may be re-elected just once. This change does not prevent a court president from being elected president to another court.

70. This Article should also be analysed together with Articles 70 and 71 of this Law, which combined state that the National Assembly elects the president of the court out of "one or more candidates" nominated by the HJC.[18]

71. The election procedure of the courts' presidents is exposed to the risk of politicisation, it may be used as a tool for political influence over judges. The National Assembly should not be involved in the election of the court presidents. Articles 99 and 154 of the Constitution should be amended accordingly. As long as the Constitution of Serbia authorises the National Assembly to appoint the president of the courts, the risk of politicisation may, at least, be diminished by limiting such appointment to one non-renewable term.

Article 79 - President of the Supreme Court of Cassation

72. The amendment to paragraph 5 of Article 79 provides that the General Session or Competent Board of the National Assembly shall submit proposals "to initiate the dismissal proceedings for the President of the Supreme Court of Cassation".

73. The composition of this board is not clear, nor is it clear how its members are elected or appointed. According to paragraph 4 of Article 144 of the Constitution of Serbia, the decision to end the term of office of the President of the Supreme Court of Cassation is adopted by the National Assembly, in accordance with the law. In the case of a dismissal, this decision can be made only on the proposal of the HJC.

74. However, this Law does not clarify what the grounds for termination of office are and how, if at all, they differ from the grounds for dismissal. The final paragraph of the same Article only states that the decision on the termination of office of the President of the Supreme Court of Cassation caused by "other reasons" is made by the National Assembly. Presumably, the only ground for termination is when s/he makes a request to end his/her term of office.

Article 81 - Requirements for appointment and duration of office (for lay judges)

75. Draft paragraph 2 of Article 81 states that "a lay judge cannot be a member of political party or person involved in public political activities." To have such a prohibition for lay judges is unusual, especially if it is not their full-time occupation and therefore seems over restrictive.

76. The Venice Commission's delegation was told during the meetings in Belgrade that the reason for this amendment was to bring the provision into line with Article 6 of the European

[18] See paragraph 70, Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

Convention on Human Rights. Such a prohibition is, however, not as such required by the principle of the right to a fair trial.[19]

Article 90 - Types of disciplinary offences

77. In paragraph 2, the concept of a severe disciplinary offence is redefined and restricted by the insertion of the words "due to negligent work of a judge". According to common European standards, the requirement should be that of "gross negligence". During the meetings in Belgrade, the Venice Commission delegation was told that this is what was meant in the draft. It is important that this requirement be fulfilled.

Article 91 - Disciplinary sanctions

78. During the meetings in Belgrade, the Venice Commission's delegation was presented with a new wording of the Article, as follows (the new wording is in bold):

> "Disciplinary sanctions are as follows: public reprimand **and reprimand**, salary reduction of up to 50 % for a period not exceeding one year, prohibition of advancement for a period of up to three years.
> A disciplinary sanction is imposed in proportion to the gravity of the offence.
> A **reprimand and** public reprimand may be issued only in the case of a judge's first disciplinary offence."

79. What is now inserted is only a new milder sanction: reprimand (this sanction, however, as the mildest one, should be placed first in the text: reprimand, public reprimand, salary reduction …). In addition, although the range of proposed disciplinary sanctions is quite comprehensive, this provision should structure the relevant norms in a more thorough and clear manner.

80. This Article may also create problems in the light of Article 98, which states that a decision of the HCJ is final. This Article should be modified and an appeal to a court should be introduced.[20]

IV. Draft amendments to the Law on the organisation of courts

Article 6 - Prohibition of influence on courts

81. Article 6 follows the principle that courts must be protected from all external influence. It seems that the Venice Commission's recommendation in its previous opinion[21] to revise this Article in order to avoid an apparent conflict with Article 10 of the European Convention on Human Rights has been heeded to a certain extent. However, a number of concerns raised with regard to the previous version of this Article remain valid.

82. A prohibition of a general nature on the use of the media with the aim of preventing it from influencing the court is questionable, as it is too broad and may lead to a breach of the right to freedom of expression. The text of the proposed amendment may result in limiting the editorial independence of the media as well as the freedom of expression of individuals during the course of public debates and discussions over activities of the court or the issues in front of it.

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[19] Pabla Ky v. Finland, Application no. 47221/99, Judgment of 22 June 2004 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61829; but see also Holm v. Sweden, Application no. 14191/88, Judgment of 25 November 1993.

[20] See paragraph 43, Report on the Independence of the Judicial System: Part I – The Independence of Judges, CDL-AD(2010)004.

[21] See paragraph 92, Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

83. Opinion no. 7 (2005) of the CCJE on "justice and society" states that: "Media professionals are entirely free to decide what stories should be brought to the public's attention and how they are to be treated. There should be no attempt to prevent the media from criticising the organisation or the functioning of the justice system".[22] It is therefore advisable to clarify the content of this very broad and ambiguous provision. It is also important to find a balance between the freedom of expression and the need to ensure that courts make their decisions free from external influence.

84. It is also not clear in this provision, whether the prohibition applies to the parties and if this is the case, the scope of the prohibition should be separated from the legitimate exercise of the right of defence in the courtroom and beyond. As part of the right of defence, individuals and their defenders may communicate with the media, voice their opinions about proceedings and proclaim their innocence or disputed rights not only in court, but also before the public. It is a normal and rightful exercise, which should not be prohibited or punished.

85. Moreover, it is unclear what kind of behaviour is prohibited in practical terms, whether it is similar to contempt of court regulations, aimed at guaranteeing the rights of defendants (such as the presumption of innocence) or the protection of jurors from influence.

86. It should also be clarified if prohibition of "indecent public appearance" refers to the courts proceedings, the premises of the court or whether it is a prohibition of a more general nature. The Law should provide clear guidance with respect to the expression which may be considered unlawful. The discretion of authorities is wider in restricting freedom of expression in the course of court proceedings or within the court premises. It is also common for Rules of the Court to establish dress code standards or behavioural conduct within the court premises. Expression may also be limited within close vicinity of the court, if it clearly disturbs the proper functioning of the court.

Article 8A, 8B and 8C - Protection of the right to trial in reasonable time; Decision made upon the request for protection of the right to trial in reasonable time; Appropriate implementation of the Law on non-contentious proceedings

87. These draft Articles should be studied together with Article 6 on liability and Article 28 on notification of duration of proceeding of the Law on judges (see comments on these Article, above). It seems that the aim of these Articles is to address the serious problem of dilatory or vexatious proceedings and thus protect the right to a fair trial. Such an aim should be welcomed.

88. The possibility to apply to a higher court with the request to remedy unjustified delay can be an effective tool for the protection of the right to a fair trial.[23] However, the reasons for the dilatory or vexatious proceedings could be many: inefficient and/or cumbersome regulations, increased caseload, lack of training or recourse, etc. Thus, in order to eliminate the problems, the reasons for such delays need to be analysed in order to be addressed correctly.

89. The basis for this set of provisions is the obligation of a member state, under Article 13 of the European Convention on Human Rights, to provide an effective remedy including, as a last resort, paying damages if a violation of the Convention occurs. Article 6 of the European Convention on Human Rights requires that court proceedings be carried out within

[22] See paragraph 33, Opinion no. 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on "justice and society", https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2005)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3

[23] See the Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings, CDL-AD(2006)036.

a reasonable period of time. The State must provide individuals with an effective remedy against the violation of this requirement. [24]

90. The starting point for a regulation should be to view financial compensation as one of several remedies. Financial compensation must thus not be the only remedy or the remedy to be considered first. It all depends on the circumstances of the specific case. The payment of an "indemnity" may not always be necessary and/or in some cases should not be the only available remedy. This means that, as far as possible, violations should primarily be redressed or remedied within the framework of the process in which they arise. For this to be possible, courts and administrative authorities must be aware of all the issues that concern the European Convention on Human Rights in both procedural and material terms. At the same time, individuals cannot remain passive in their contacts with courts and authorities.

91. It should be emphasised that the Contracting States have great freedom to choose how they fulfil their commitments in this regard. There are various alternatives for damage-regulation for violations of the European Convention on Human Rights, for example a reduction of a criminal sentence could be an effective remedy in certain cases.

92. The legislation of a state may also contain a number of proactive safeguards to ensure that judges handle cases without undue delay. For instance, there could be provisions giving a party the right to request the acceleration of the proceedings of a case in court. If a case has been unreasonably delayed, the case could be given priority in the court. Under such provisions the president of a court may have the responsibility to intervene in situations where there is a serious risk that a single case cannot be settled within a reasonable period of time. If a case or matter is not moved forward to a ruling within a reasonable period of time, the president of the court could be obliged to have another judge take over the case.

93. In both the draft amendments to the laws on judges and on the organisation of courts, the problem of delays in court proceedings within the administration of justice is dealt with. The draft amendments to Article 28 of the Law on judges contain a new procedure for the notification of the duration of proceedings (see above). The draft amendments of the Law on the organisation of courts have three new provisions, Article 8 A-8 C, which include elements such as the “pro-active safeguards” mentioned above. These elements of the draft are to be welcomed.

94. However, draft Article 8A – 8C also introduces a procedure where a request for and a decision on damages are interlinked with the concept of the acceleration of the case handling. The damages, or “the appropriate indemnity”, will be decided beforehand and a system with parallel processes is introduced accordingly.

95. This decision on damages will serve as a sort of penalty or fine, forcing the judge to deal with the case. This could put him/her under pressure, which in turn could endanger the principle of a fair trial. The principle of state liability followed by the liability of the judge under certain conditions set out in Article 6 of the Law on judges, could also increase this pressure. In following the management of and decision-making in a case, new and unforeseen facts or aspects may be brought into the case or otherwise change the conditions under which justice is or should be rendered in that case. It is therefore important to underline that it is the State that is responsible under the European Convention on Human Rights and not the individual judge.

96. It might be too early to introduce all the mechanisms of this new procedure (i.e. before the reform of the courts network and staffing of the courts have been dealt with). During the

[24] Case of Frydlender v. France, Application no. 30979/96, Judgment of 27 June 2001; http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58762

meetings in Belgrade, the Venice Commission's delegation was informed that there are currently 5000 pending cases in front of the Constitutional Court due to excessive length of proceedings, which will be sent back to the regular courts through the new procedure. There is therefore an urgent need to find an effective and well-balanced mechanism to deal with the problem. However, a more general and systematic review of the issue is recommended so as to establish a coherent strategy for all the different legislative measures that are needed.

Article 9 - Cooperation of Courts and Other Authorities

97. Paragraph 2 states that, in accordance with special regulations, courts may provide files and documents, or its copies, necessary to conduct proceedings, to government authorities, only when this does not impede judicial proceedings.

98. It is obvious that the court may be requested to provide documents to government authorities and it is rightly emphasised that such a request should not impede judicial proceedings. However, it is also important to ensure that these regulations do not limit a judge's authority to determine which files and documents should be provided and under what circumstances. The reference to "special regulations" should also be clarified.

99. The Venice Commission has recommended in the past - and it should be repeated here - that "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."[25]

Article 11, 23 to 30 (Types of Courts of the Republic of Serbia and their Jurisdiction)

100. Article 11 describes types of courts, Articles 23 to 31 describe the general competencies of the courts and Article 30 assigns the Supreme Court of Cassation the power to decide on conflict of jurisdiction between different courts.

101. The scope of jurisdiction of each of the courts is not sufficiently addressed by the amended provisions. If there are no detailed and substantial regulations on this question, then the potential for conflict between jurisdictions is high.

102. The Venice Commission has already expressed its view on Articles 30 and 31 in the past, stating that they are very short and do not provide substantial indications as to the Supreme Court of Cassation's exact jurisdiction[26]. The Venice Commission also recommended defining a vague provision, which empowers the Supreme Court of Cassation to decide on extraordinary legal remedies filed against decisions of courts of the Republic of Serbia. If these provisions are not clarified, they may lead either to an excessive limitation of cases that may 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."[27] This recommendation is still valid with regard to the current text of the Article.

[25] See paragraph 95, Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.
[26] Ibid., paragraph 108.
[27] Ibid.

Article 30 – 31- Jurisdiction of the Supreme Court of Cassation (trial jurisdiction and jurisdiction outside trial)

103. Article 31 reads as follows (with the proposed change in the draft in bold):

> "The Supreme Court of Cassation determines general legal views in order to ensure uniform application of law by courts; **gives opinions on draft laws and other regulations governing issues of relevance for the judicial branch**, reviews application of law and other regulations and the work of courts; appoints judges of the Constitutional Court, gives opinion on the candidate for the president of the Supreme Court of Cassation and exercises other competencies set forth by law."

104. During the meetings in Belgrade, the Venice Commission's delegation was told that this task was introduced in order to unify the case law, as there are many cases before the European Court of Human Rights on the equal access to justice. It was said that these legal opinions were only mandatory for the judges of the Supreme Court of Cassation (not for lower courts). In addition, it should be regarded as an interpretation of the law, not as an instruction.

105. Nevertheless, the Venice Commission has criticised this method, because it gives the Supreme Court of Cassation a general "rule-making" power, which can conflict with the separation of powers. The exchange of views between judges of different instances, which is provided for in the draft (the new paragraph 3 of Article 24) is as such good and could therefore be recommended. However, when it is combined with Article 31, it becomes less clear. The need to unify practice should in principle be solved by an appeals procedure that could be designed to also solve problems that usually, only or mostly, occur in different categories of small claims cases.

106. It is not clear whether the Supreme Court adopts general views outside the specific case or while exercising its competence as a court of cassation. In case of the former, this approach will conflict with the principle of the independence of the judiciary. The argument that "general legal views" are adopted with the aim of remedying the most common errors of the judicial system, which due to some reason do not end up at the level of the highest court, seems flawed. It also fails to explain why it is impossible to remedy such errors in appeal or cassation proceedings.

107. The *rationale* behind such an approach is also questionable in the light of the argument that such "general views" would prevent future applications to the European Court of Human Rights, which already faces a considerable number of cases related to the equal access to justice. If decisions of the lower courts and/or courts of appeal may end up in front of the European Court of Human Rights, then it may be reasonable to allow similar appeals to reach the Supreme Court of Cassation (or the Constitutional Court) thus allowing the Supreme Court of Cassation (or the Constitutional Court) to establish a precedent within the context of the specific case.

108. The Venice Commission's comments in its previous opinion are therefore still valid:

> "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".*"[28]

Article 45 - Adoption of General Legal Views

109. Similar problems as in the Articles above could be identified in Article 45. According to this provision, the general session of the Supreme Court of Cassation may be convened when there is an incoherence between panels from different departments, or if one department diverges from the general legal view or when a legal view cannot be adopted by a departmental session.

110. Abstract statements regarding the application of a law tend generally to be fallible, as it is difficult to foresee all the factual circumstances in which this law could be applied. The general session should only decide in concrete cases.

Article 55 - Complaints procedure

111. According to the draft, if the applicant misuses the right to complaint, the court president may reject it. In principle, the president of the court, or any other judge, may be authorised to deny a complaint on clearly established formal grounds, for instance in the case where an application fails to meet formal requirements established by law. However, decisions on merits of the request or whether the issue has already been decided should not be made exclusively by a president. The president of the court may be one among several judges making such decisions, but should not be the only one.

112. The JAS has commented on this draft and proposed that the Article in paragraph 1 be complemented by obliging the court president to also notify the judge, not only the complainant, of the admissibility of the complaint to allow him/her to provide comments on the complaint. This seems to be a reasonable proposal.

113. There are complaints that do not seem to concern the merits of the case or deal only with minor procedural deficiencies or just to include remarks of a minor nature, or are simply improper. Such complaints usually do not qualify for a full and thorough procedure. There should be a possibility for the court president to handle such complaints in a simplified procedure.

114. However, there is a need for the court president in such a procedure to be aware of the interests of the responsible judge (to defend his/her activities and behaviour, but also to protect the judge out of security reasons). The proposal made by the JAS might be considered.

115. The court president must also consider the risk that a rejection of a complaint under certain circumstances could be tantamount to a denial of justice. It is therefore essential that a complaint be sufficiently considered before it is rejected. This requirement should also be reflected in this provision.

Article 65 - Admission of a Judge's Trainee

116. According to paragraph 4, the procedure for the admission of judge's trainees is regulated by the act of the Minister for Justice. Providing greater autonomy to the judiciary might be considered with respect to the issues of appointment and the selection of trainees. The need for the involvement of an executive authority is not clear.

[28] Paragraph 109, Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

Article 70 - Tasks Comprising Judicial Administration

117. This Article defines the competences of the Ministry of Justice and Public Administration and the HJC (both acting as a judicial administration) with regard to the laws and other regulations related to the organisation of courts and their operation.

118. Some of the competences of the Ministry of Justice and Public Administration, as described in this Article, may give rise to questions. The competence to monitor "the work of courts" or collecting data "on performance of the courts" should at least be clarified, otherwise it may be compromising the independence of courts. The purpose and outcome of such a monitoring process, for instance to provide statistical data, should be explained.

119. It is also not clear why the Ministry of Justice and Public Administration should be in charge of "issuing approval for court rules on internal organisation" or "proposing of part of budget for expenses for court staff", etc. It should also be clarified how the "oversight of financial and material operations of courts and of the High Judicial Council" is conducted. Legislation should either avoid granting executive authorities the power to supervise or monitor operations of the judiciary, or at least provide unambiguous and clearly defined procedures for such an authority.

Articles 70, 83, 84 - (Proposing and Spending of Budget Fund, Supervision over Spending of Budgetary Funds)

120. Articles 70, 83 and 84 deal with the issues of drafting and allocating the court budget, splitting the competence to draft and manage different parts of the court budget between the HJC and the Ministry of Justice and Public Administration. In particular, the HJC is in charge of structuring the budgetary funds necessary for salaries and indemnities for judges and court staff and current expenses, except for expenses for court staff; while the Ministry of Justice and Public Administration is in charge of proposing and allocating part of the budget for expenses for court staff and for the maintenance of equipment and facilities, investments, projects and other programmes, oversight of financial and material operations of courts, etc.

121. Article 84 authorises the HJC, the Ministry of Justice and Public Administration, and the Ministry competent for finance to supervise the spending of budgetary funds allocated to the work of courts. It is not clear from the text of this Article what the scope of competence in supervising the spending is, notably whether all three institutions are equally authorised to supervise spending of all parts of the budget.

122. According to Article 70, the HJC itself is supervised by the Ministry of Justice and Public Administration. Thus, the HJC being itself a supervising authority in charge of oversight of financial and material operations of courts, falls under the supervision of the Ministry of Justice and Public Administration. This system of budget drafting looks a bit odd, as it designates two different institutions to draft and manage parts of the budget for the judiciary and adds a third one in the process of oversight. The budget of the courts should be prepared/drafted by the judiciary or, at least, in consultation and with the approval of the judicial institutions, on the basis of the availability of financial resources.

123. In the Report on the independence of the judicial system Part I: the independence of judges, Venice Commission recommends that:

> "It is the duty of the state to provide adequate financial resources for the judicial system. Even in times of crisis, the proper functioning and the independence of the Judiciary must

not be endangered. Courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria.
Decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council."[29]

124. It is therefore important that courts are not financed on the basis of discretionary decisions of official bodies, but in a stable way on the basis of objective and transparent criteria. It would be more practical to entrust one institution (preferably the HJC) with the competence to draft all parts of the budget for the system of the judiciary as a whole.

125. Additional guarantees may also be applied to ensure financial independence of the judiciary, such as the prohibition of reducing the budget of courts in comparison to the previous financial year or without the consent of the HJC, except in the case of a general reduction of the State Budget.

V. Conclusions

126. The draft amendments to the Law on judges and to the Law on the organisation of courts are, on the whole, positive but rather technical in nature and seem to be of limited importance in the current difficult situation the judiciary in Serbia finds itself in.

127. With the sudden and unforeseen reinstatement of all judges (and prosecutors) into the system, it would seem important for the Ministry of Justice and Public Administration of Serbia to take stock of the situation as a whole with respect to the judiciary in the country and to take an active role in developing a clear concept on what the courts network of Serbia should look like.

128. In this respect, the Venice Commission would like to reiterate that the possibility of transferring judges must be approached carefully. The judges' constitutional rights need to be upheld in this process.

129. Finally, it is important that the entire reform process be measured and well prepared in order to achieve the right balance between speed and quality required in order for this reform process to be successful.

130. As far as the draft amendments to the laws on judges and on the organisation of courts are concerned, there are a number of contradictions and unclear provisions in the texts, that should be revisited and clarified, but which may also be due to the translation.

131. *For the draft amendments to the Law on judges, the following elements were raised, inter alia:*

- the current wording of Article 6 on liability, engaging the personal liability of judges in certain cases, might not only limit judicial independence, but could also result in a violation of the right to a fair trial and should be revisited;
- Article 7 on the right to association seems to provide a weaker protection for the right to association than the provision in the draft amendments to the Law on the public prosecution[30] and might be aligned with the latter;

[29] Paragraph 53, Report on the independence of the judicial system Part I: the independence of judges, CDL-AD(2010)004.
[30] See CDL-REF(2013)004.

- Article 10 on the election and termination of office and number of judges and lay judges introduces the possibility of carrying out a general review of all courts and positions of judges at short intervals (every three years). As a short term solution in the current context in Serbia, such a provision may be useful, however in the long term it will adversely affect the independence of judges and will need to be revisited;
- Article 29 on the right of a judge to file a complaint rules out the possibility of an oral hearing – however, the right to address the HJC in person should be ensured;
- Articles 32 and 33 on the performance evaluation of judges and bodies competent for evaluation, the standards of the evaluation as well as the procedure should be clearly set out and the Law should also provide the procedure for the selection of judges to the evaluation committee;
- Article 36 on rates – it is essential that the dismissal of a judge only be possible on the basis of sound and clearly defined grounds;
- Article 50 on the nomination of judges to be elected for the first time, the Venice Commission had addressed this issue before by stating that the Constitution of Serbia did not require a two-candidate rule and that it would be preferable for the HJC to put forward only one candidate for each vacant position, which could help in resolving the problem created by the constitutional provision for the election of judges in the National Assembly; the Constitution should be amended to remove the role of the National Assembly in the appointment of judges;
- Article 72 on the term of office (for presidents of courts) opens the election procedure of the courts' presidents to the risk of politicisation, it may be used as a tool for political influence over judges, as the Law provides the possibility for the National Assembly to re-elect the president out of more than one candidate. The Constitution should be amended to remove the role of the National Assembly in the election of court presidents; as long as the Constitution authorises the National Assembly to appoint the president of the courts, the risk of politicisation may be diminished by limiting such appointment to one non-renewable term;
- Article 81 on the requirements for appointment and duration of office (for lay judges), which introduces an unusual prohibition on lay judges, especially if it is not their full-time occupation, preventing them from being a member of political party or person involved in public political activities, may be over restrictive.

132. *For the draft amendments to the Law on the organisation of courts, the following elements were raised, inter alia:*

- Article 6 on the prohibition of influence on courts - a prohibition of a general nature on the use of the media with the aim of influencing the court gives rise to concern, even with the amendments, it is still too broad and may lead to the breach of the right to freedom of expression;
- Article 8A, 8B and 8C deal with the protection of the right to trial within a reasonable period of time. Although the possibility of applying to a higher court to remedy an unjustified delay can be an effective tool for the protection of the right to a fair trial, the reasons for the dilatory or vexatious proceedings could be many and need to be analysed first before they can be addressed correctly. It is important for this mechanism to be effective, otherwise it will not be in line with Article 6 of the European Convention on Human Rights. It is also important to stress that it is the State that is responsible under the European Convention on Human Rights, not the individual judge;
- Articles 30-31 on the jurisdiction of the Supreme Court of Cassation (trial jurisdiction and jurisdiction outside trial) have been criticised by the Venice Commission in the past, because they give the court a general "rule-making" power, which can conflict with the separation of powers;
- Article 45 on the adoption of general legal views raised concern that abstract statements on the application of a law tend generally to be fallible, as it is difficult to foresee all the

factual circumstances in which this law could be applied. The general session should only decide concrete cases.

133. The Venice Commission is ready to further assist the Serbian authorities in the reform process of the judiciary, should they make a request for such assistance.