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

**SERBIA**

**OPINION**  
**ON THE DRAFT AMENDMENTS**  
**TO THE CONSTITUTIONAL PROVISIONS**  
**ON THE JUDICIARY**

**Adopted by the Venice Commission**  
**at its 115<sup>th</sup> Plenary Session**  
**(Venice, 22-23 June 2018)**

**on the basis of comments by**

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**Ms Grainne McMorrough (Substitute member, Ireland)**  
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## I. Introduction

1. In a letter dated 13 April 2018, Ms Nela Kurubović, Minister of Justice of Serbia, made a request for an opinion by the Venice Commission on the draft Amendments to the constitutional provisions on the judiciary (CDL-REF(2018)015, hereinafter, the “draft Amendments”).

2. In November 2017, the Ministry of Justice of Serbia (hereinafter, the “Ministry of Justice”) had asked the Venice Commission for assistance in drafting constitutional amendments pertaining to the judiciary. The Venice Commission appointed Mr James Hamilton, a former member of the Venice Commission,<sup>1</sup> to travel to Belgrade, Serbia and to attend meetings with the Ministry of Justice and other stakeholders with a view to providing assistance to the Ministry of Justice in drafting a constitutional amendment proposal on the judiciary, in line with previous Venice Commission opinions, and to report back to the Venice Commission.

3. Mr Hamilton travelled to Belgrade twice (November 2017 and January 2018) and submitted his report to the Ministry of Justice in January 2018. On 22 January 2018, the Ministry of Justice published a working draft of amendments to the Constitution. Mr Hamilton informed the Venice Commission about his report and visits to Belgrade during its 114<sup>th</sup> Plenary Session in Venice, Italy on 16-17 March 2018.

4. The terms of Mr Hamilton’s engagement were not to act as a representative of the Venice Commission, but to assist the Serbian authorities by informing them about previous relevant opinions of the Venice Commission. Mr Hamilton did not co-draft provisions, but provided advice on a previously drafted concept paper prepared by the Ministry of Justice.

5. For the present draft opinion, the Venice Commission invited Mr Johan Hirschfeldt (Sweden), Ms Grainne McMorrough (Ireland), Mr Jørgen Steen Sørensen (Denmark), Ms Hanna Suchocka (Poland) and Mr András Varga (Hungary) to act as rapporteurs.

6. On 10-11 May 2018, a delegation of the Venice Commission, composed of Ms Grainne McMorrough, Mr Jørgen Steen Sørensen, Ms Hanne Suchocka and Mr András Varga accompanied by Mr Thomas Markert and Ms Tanja Gerwien from the Secretariat, visited Belgrade and met with (in chronological order): Mr A. Vucic, President of Serbia; the Head of the Delegation of the EU to Serbia; the Prime Minister; the Minister of Justice; the Minister of European Integration; Committees of the National Assembly<sup>2</sup>; the President of the Supreme Court of Cassation, the Chair of the High Judicial Council (HJC); the HJC; representatives of IOs and members of the diplomatic community; the President of the Constitutional Court; the Republic Public Prosecutor, the Chair of the State Prosecutorial Council (SPC); the SPC; the Judicial Academy; Associations<sup>3</sup> and NGOs<sup>4</sup>.

7. The draft Amendments were prepared by the Ministry of Justice, following the adoption of the National Action Plan for Chapter 23 of the accession negotiations by Serbia with the European Commission, opened in July 2016, with the aim of depoliticising the judiciary and to strengthen its independence. The draft Amendments were adopted by the Government of Serbia prior to being submitted to the Venice Commission for the present opinion. The Venice

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<sup>1</sup> Under the Horizontal Facility Programme for the Western Balkans and Turkey funded by the European Union and the Council of Europe and implemented by the Council of Europe.

<sup>2</sup> Committee on the Judiciary, Public Administration and Local Self-Government; Committee on Constitutional and Legislative Issues and Committee on Human and Minority Rights and Gender Equality.

<sup>3</sup> Judges’ Association of Serbia; Association of Prosecutors of Serbia; Association of Judicial and Prosecutorial Assistants; Association of Judicial Associates.

<sup>4</sup> Judicial Research Centre; Lawyers’ Committee for Human Rights (YUCOM); Belgrade Centre for Human Rights; Rule of Law Academic Network (ROLAN) and the Serbian Network of Jurists.

Commission was informed that the formal amendment process will be initiated by the National Assembly of Serbia after the adoption of the present opinion by the Venice Commission.

8. The Venice Commission was concerned to learn – from the numerous reports and comments that it had received and from its delegation’s visit to Belgrade – that the important process of amending the Constitution of Serbia of 2006 in its sections pertaining to the judiciary in order to bring it into line with European standards, began with a public consultation process marred by an acrimonious environment. Nevertheless these consultations led to substantial – and positive – amendments to the draft. The Venice Commission would like to underline that this acrimonious environment is counter-productive for a process, the aim of which is to bring all relevant actors together in order to achieve a common goal, which is to bring Serbia’s judiciary into line with European standards. It therefore encourages the Serbian authorities to spare no efforts in creating a constructive and positive environment around the public consultations to be held when the National Assembly will examine the draft amendments, in the interests of the country’s entire process of judicial reform – a process that also involves the important alignment of secondary legislation on the judiciary with the amendments, all of which is to be achieved within a very short period of time.

9. The present draft opinion was prepared on the basis of contributions by the rapporteurs and on the basis of an unofficial translation of the draft Amendments. Inaccuracies may occur in this opinion as a result of incorrect translations.

10. This opinion was adopted by the Venice Commission at its 115<sup>th</sup> Plenary Session (Venice, 22-23 June 2018), after having been discussed at the Sub-Commission on the Judiciary (21 June 2018) and following an exchange of views with Ms Nela Kuburović, Minister of Justice of Serbia.

## II. General Remarks

11. The Venice Commission acknowledges the sincere efforts of the Serbian Government in pursuit of its aspirations to develop and evolve as a modern democracy for the benefit of all the Serbian people and in prioritising the need to meet the highest standards of compliance with international best practice and the rule of law. In order for a democratic state to function properly, it is essential that it has to have an independent, fair and impartial judiciary that is trusted by the people. To achieve this end, it is crucial that the judiciary be committed to upholding the rule of law and be free from political pressure or bias. The judiciary must also be seen to be efficient and accountable for the expeditious use of court time and resources and in the delivery of timely, quality judgments in order that a body of high standard reasoned case law and jurisprudence can be built up. It is thus imperative that the judiciary provide justice within a reasonable period of time – as justice delayed is justice denied.

12. Judicial independence, to function properly, must be accompanied by judicial integrity. A judge’s integrity can only be evaluated by a vigilant, functional, fit for purpose and fair system of accountability. This necessarily involves the observance of the separation of the three branches of power – the judiciary, the executive and the legislature. Each branch must carry out its work, yet still be a part of a system of checks and balances to ensure that none of these branches gain too much unchecked power. In this context, it is important, as stated in the Venice Commission’s Rule of Law Checklist, that: “*The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation*”<sup>5</sup> – but it is also crucial that this be understood as not excluding any interaction with the other branches of power.

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<sup>5</sup> Rule of Law Checklist (CDL-AD(2016)007), paragraph 74.

13. This important interaction between the three branches of power was clearly explained by the Consultative Council of European Judges (CCJE) in its Opinion no. 18 (2015): *“In a democratic society it is the responsibility of the legislature to design the legal framework in which and by which society lives. The executive power is responsible for the administration of society (in so far as state agents have to carry it out) in accordance with the legal framework established by the legislature. The judiciary’s function is to adjudicate between members of society and the state and between members of society themselves. Frequently the judiciary is also called upon to adjudicate on the relationship between two or even all three powers of the state. All this must be done according to the rule of law.”*<sup>6</sup> And **“Whilst all three powers share responsibility for ensuring that there is a proper separation between them, neither that principle nor that of judicial independence should preclude dialogue between the powers of the state. Rather, there is a fundamental need for respectful discourse between them all that takes into account both the necessary separation as well as the necessary interdependence between the powers. It remains vital, however, that the judiciary remains free from inappropriate connections with and undue influence by the other powers of the state [emphasis added].”**<sup>7</sup> This means that, in checking a judge’s integrity, the system governing accountability must be free from the executive’s interference or it will undermine the separation of powers and in turn prevent a democratic state from functioning properly.

14. Although this is outside the scope of the draft Amendments examined in the present opinion, the Venice Commission finds it important to draw attention to Article 4 of the current Constitution of Serbia, which states that the *“Government system shall be based on the division of power into legislative, executive and judiciary.”* This is a general rule. It then goes into more detail: *“Relation between three branches of power shall be based on balance and mutual control.”* It is indeed important that the whole system, including the judiciary, be balanced. However, the wording *“mutual control”* raises concern. The word *control* could give rise to misgivings in interpretations regarding the role of the other powers, especially the executive power towards courts and lead to “political” control over the judiciary. For this reason, it would be better to delete the wording *“mutual control”* from the text of any future constitution and to replace it with the wording *“shall be based on checks and balances”*.

15. The Serbian authorities made it clear, in the meetings with the Venice Commission’s delegation during its visit to Belgrade, that they were fully committed to having a functioning judiciary within a functioning democratic state and were ready to tackle any outstanding issues to achieve this goal. In the analysis below, the Venice Commission will deal with those draft Amendments and address both the positive aspects of the draft measures and also those amendments that might create obstacles for achieving this goal.

### III. Analysis

#### A. General comments

16. The Venice Commission has adopted a dozen opinions for Serbia relating to the judiciary<sup>8</sup> between 2005 and 2014, analysing the country’s Constitution and subsequent legislation, as

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[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

<sup>6</sup> The CCJE’s Opinion no.18 (2015) on “The position of the judiciary and its relation with the other powers of state in a modern democracy” <https://rm.coe.int/16807481a1>

<sup>7</sup> Ibid.

<sup>8</sup> Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia (CDL-AD(2005)023); Opinion on the Constitution of Serbia (CDL-AD(2007)004); Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia (CDL-AD(2008)006); Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia (CDL-AD(2008)007); Opinion on Rules of Procedure on Criteria and Standards for the Evaluation of the Qualification, Competence and Worthiness of Candidates for Bearers of Public Prosecutor’s Function of Serbia (CDL-AD(2009)022); Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia (CDL-AD(2009)023); Interim opinion on the draft decisions of

have other international bodies, including GRECO<sup>9</sup> and the CCJE.<sup>10</sup> Of the dozen opinions adopted for Serbia by the Venice Commission, the most relevant opinion for these draft Amendments is the Opinion on the Constitution of Serbia, adopted by the Venice Commission at its 70<sup>th</sup> Plenary Session in March 2007.<sup>11</sup>

17. The draft Amendments have strived to overcome what the Venice Commission had identified in its previous opinions as being one of the main problems with the process of the reform of the judiciary in Serbia, notably the prominent role given to the National Assembly by the Constitution with respect to judicial appointments.

18. In general, the draft Amendments contain a number of important and welcome principles that are fundamental in any democratic state. Certain draft Amendments require specific comments. However, we consider, with respect, that there are certain matters that should be dealt with by secondary legislation or bye-laws, but which are currently included in the draft Amendments and that there are also a number of other matters, which should find their place in the Constitution, but for which reference is made to secondary legislation or bye-laws. This will also be addressed below.

### **Amendment I Competences (of the National Assembly) and Amendment II (Method of decision-making in the National Assembly)**

19. These Amendments list the competences of the National Assembly, including with respect to the election of members of the High Judicial Council (HJC) and the High Prosecutorial Council (HPC), the Supreme Public Prosecutor of Serbia and public prosecutors and define the majorities required. The issues arising with respect to these elections will be addressed below. These Amendments will have to be amended in accordance with the recommendations provided below.

#### **B. Courts**

##### **1. Amendment III (Judiciary principles)**

20. It is important to set out that the administration of justice shall be carried out by independent courts. This has been spelled out. There are, however, a few provisions that are less clear, are missing from or, on the contrary, should not be included in the Constitution.

21. In its fourth paragraph, this draft Amendment refers to the review of court decisions, which may only be carried out by *“legally authorised courts in the proceedings prescribed by law.”* This provision intends to guarantee the independence of courts against outside interferences in the work of courts. For the Venice Commission, it is evident that the Constitutional Court is one of the legally authorised courts in the meaning of this paragraph. To this effect, the suggestion is made to alter the text by stating the following: *“legally authorised courts, including the Constitutional Court, in the proceedings prescribed by law.”*

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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); Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia (CDL-AD(2011)050cor); Opinion on Draft amendments to Laws on the Judiciary of Serbia (CDL-AD(2013)005); Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia (CDL-AD(2013)006); Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia (CDL-AD(2014)028); Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia (CDL-AD(2014)029).

<sup>9</sup> Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors.

<sup>10</sup> Opinion of the CCJE Bureau of 4 May 2018 (CCJE-BU(2018)4) following a request by the Judges' Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of the Republic of Serbia which will affect the organisation of judicial power (<https://rm.coe.int/opinion-of-the-bureau-of-the-ccje-on-serbia-of-4-may-2018/16807d51ab>).

<sup>11</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e).

22. In the sixth paragraph, the draft Amendment refers to how the court shall sit, which is a technical matter that should be dealt with by secondary legislation, not the Constitution.

23. The seventh paragraph refers, amongst others, to judicial assistants. They are not lay judges and their status, role and remit remain unclear. The circumstances and parameters of their participation, if any, in court proceedings warrants precise definition. This could be more appropriately dealt with in secondary legislation.

24. An aspect that has been omitted altogether in the draft Amendments, and which is important for the independence of the judiciary, is its budget. Although international texts do not provide for the budgetary autonomy of the judiciary, there is a strong case in favour of taking the views of the judiciary into account when preparing the budget.<sup>12</sup> This might be added under this Amendment. Consideration might usefully be given to the idea that the judiciary exercising control and being accountable for their own budget could impact positively on better use of court time and resources, thereby delivering a better judicial public service to the Serbian people.

## **2. Amendment V (Independence of judges)**

25. This Amendment is an important provision. It addresses the principle of the independence of the judiciary, which is a fundamental principle and might be better placed in Amendment III, as well as the principle of legal certainty. Both are important for the administration of justice in a state based on the rule of law.

26. The first paragraph provides that “*A judge shall be independent and shall perform his/her duties in accordance with the Constitution, ratified international treaties, laws and other general acts*”. The subordination of ordinary judges to the Constitution (not only to the law) was a new regulation in many European states and was widely discussed among constitutional lawyers and judges of constitutional courts. Despite all the controversies around this solution, its main positive goal is the requirement that even an ordinary judge, not only a constitutional judge, should see the act on which s/he adjudicates within the context of the constitution, as a structural and axiological keystone in the system of law.

27. The end of the first paragraph refers to: “*other general acts*”. The general acts of the executive, in the light of this formulation, are a direct source of law, and judges should be subordinated not only to the Constitution, ratified international treaties and laws, but also to general acts of the executive body. This is, in and of itself, not a problem if the wording “*other general acts*” refers solely to secondary legislation, such as regulations issued by the executive as authorised by law.

28. Paragraph three of this Amendment states that “*The method to ensure uniform application of laws by the courts shall be regulated by law.*” The Commission is conscious that there is concern in Serbia regarding a lack of legal certainty due to inconsistent case law. This may have many reasons, not only a lack of effort by the judges to ensure that their decisions take the existing case law into account. Nevertheless, under these circumstances it seems legitimate for the Constitution to provide a clear signal of the importance of ensuring consistency in the case law. While welcoming the intention behind this paragraph, the Commission is concerned about its wording and by the intentions of the phrase “*method to ensure...*”. Does it refer to a special procedure or a special body? Useful mechanisms and models to establish a body of reasoned case law should be explored and consideration should be given to new ways of encouraging the application of precedent, *all of which should be the*

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<sup>12</sup> See Report on the independence of the judicial system part I: the independence of judges (CDL-AD(2010)004), paragraph 54; the Rule of Law Checklist (CDL-AD(2016)007), E.1 a) x.

*task of the judiciary.* This will result in more consistency in cases and engender greater public trust in the judicial system and more optimism that it will provide litigants with real remedies before the Serbian Courts.

29. Careful consideration must be given as to how a uniform application of the law is to be guaranteed. This is a difficult question, as it touches upon the *internal* independence of judges. The Venice Commission, in its Report on the independence of the judiciary (paragraphs 71-72) states the following: “*Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an “internal” aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts.*” Moreover, the future development in the case law should not be hampered by unduly rigid rules.

30. Many countries have grappled with this difficulty. The uniform application of the law and the harmonisation of case law are guaranteed in different ways, depending on the type of legal system of the country concerned. In common law countries this is done, to a great extent, by the rule of precedent. This means, for instance, that in the United Kingdom, decisions rendered by the Supreme Court and the Court of Appeal become precedents that all courts must follow in future cases. In continental or civil law systems, legislation is the primary source of law and judges will have a more limited authority to interpret it. In both systems, however, if the legislature is not satisfied with the interpretation of the law by the courts, it can change the law to that effect.

31. Also, it should be noted that the European Court of Human Rights (ECtHR) has held that conflicting court decisions or judgments are an inherent trait of any judicial system “*which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction.*”<sup>13</sup> Conflicting decisions rendered at last instance, according to the ECtHR, are in breach of the fair-trial requirement when several conditions come together, which are: profound and long-standing differences in the application of the case law of the domestic courts; where there is no domestic law that provides for mechanisms and remedies such as an appeal or review capable of overcoming these inconsistencies or, if there are such mechanisms, they have neither been accessible nor effective.<sup>14</sup>

32. With respect to the principle of legal certainty and consistency in judicial decisions, the ECtHR has found that the enunciated principles outlined above in addressing the issue of ameliorating inconsistency “*guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts.*”<sup>15</sup> However, it went on to state that if there were persistent conflicting decisions, this could create “*a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law.*”<sup>16</sup>

33. The CCJE, in its Opinion no. 20 (2017), has stated that “*Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries.*” Hence, taking case law into consideration when rendering decisions is useful and important. In addition, the CCJE has clearly stated in this Opinion no. 20 that: “*...while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision. It should explicitly follow from the reasoning that the judge knew that the settled*

<sup>13</sup> See European Court of Human Rights Judgment in the Case of Cupara v. Serbia <http://hudoc.echr.coe.int/eng?i=001-164672>.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.



*case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated.”<sup>17</sup>*

34. According to European standards, it is important that consistency in the case law be achieved through the decisions of higher courts establishing a coherent and consistent jurisprudence and not through a higher court issuing general directives or instructions to lower courts.<sup>18</sup> As the Venice Commission has stated in its previous opinion, “[T]he 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.”<sup>19</sup>

35. In any case, the sharing of case law by national courts is important and the methods of doing so may vary, but cooperation between courts in this process is key and very effective if a suitable mechanism exists that enables it. Although not mentioned in the draft Amendments, the delegation of the Venice Commission, which visited Belgrade, discovered that there was talk about the creation of a “certification commission” which would look into the harmonisation of case law, the composition of which was unclear. The Venice Commission has strong reservations with respect to any body outside the judiciary assuming such tasks. However, the Venice Commission is of the opinion that case law sharing by, for instance, case law departments in last instance courts (which can also be established in lower courts) would be the better choice.

36. The Venice Commission therefore recommends deleting the third paragraph. If, however, it is felt that a reference to the need to ensure proper harmonisation of case law should be included in the Constitution and if the reference to the role of the Supreme Court in Amendment X is not considered sufficient, then the first paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law.

### **3. Amendment VI (Conditions for election of judges)**

37. In order for the administration of justice to function properly and effectively, much will depend on the quality of its judges, its prosecutors and all staff that is involved in the process. However, it will rely most on the quality of its judges and there is a strong correlation between judicial training/continued training and the efficiency of the judiciary.

38. This Amendment is very general and the only specific aspect is the condition set out in the second paragraph, that a judge may only be elected for the first time if s/he has completed “legally stipulated training in a judicial training institution”. All other conditions are left to be regulated by law. In principle, the general conditions for the election of judges should either be regulated at the constitutional level, and can then include the obligation for judicial training, or otherwise be entirely left to secondary legislation.

39. The Venice Commission delegation, which visited Belgrade, was informed that the institution mentioned in the second paragraph refers to the Judicial Academy of Serbia, as there is no other judicial training institution in Serbia. It was also informed that this provision is

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<sup>17</sup> Opinion no. 20 (2017) on the Role of courts with respect to the uniform application of the law, in paragraph 32.

<sup>18</sup> Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, paragraph 23: “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.”.

<sup>19</sup> Opinion on Draft amendments to Laws on the Judiciary of Serbia (CDL-AD(2013)005), paragraph 105.

meant to remedy a constitutional problem created by a decision rendered by the Constitutional Court of Serbia in February 2014, deeming such an arrangement unconstitutional under the current Constitution.

40. Two main objections were raised with respect to including an indirect reference to the Judicial Academy in the Constitution: the independence of this institution is not guaranteed by the Constitution and the practical experience of the judicial assistants, who are traditionally working in the court system with the expectation that this may open, for at least some of them, the possibility to become judges, is not taken into account. The Venice Commission delegation that went to Belgrade had received an unofficial translation into English of the “Law on Judicial Academy” (Official Gazette of the RS, no. 104/2009), and of the “Law amending and supplementing the Law on the Judicial Academy”. The scope of the first Law is, according to its Article 1, to “...establish the Judicial Academy (hereinafter referred to as: the Academy) and regulate its status, activity, governing and financing bodies, as well as the initial and continuous training of judges, public prosecutors and their deputies (hereinafter referred to as: prosecutors), the training of judicial and prosecutorial assistants and trainees and that of judicial and prosecutorial staff.” Article 3 on the status of this Academy states: “The founder of the Academy shall be the Republic of Serbia. [...] The internal organisation and activities performed by the Academy shall be regulated by the Law on public services unless otherwise stipulated by this law. The Ministry in charge of judiciary shall supervise the legality of work of the Academy.” In addition, under Article 7, this Academy has a steering committee:

*“The Steering Committee shall be a body managing the Academy and it shall be made up of nine members.*

*Members of the Steering Committee shall be: four members appointed by the High Judicial Council from the ranks of judges, two of whom are appointed at a proposal of the Association of Judges; two members appointed by the State Prosecutors’ Council from the ranks of prosecutors, one of whom is appointed at the proposal of the Association of Prosecutors; and three members appointed by the Government, one of whom is the state secretary in the Ministry responsible for judiciary, in charge of professional advancement of those employed in judiciary and one is from among the employees of the Academy.*

*Members of the High Judicial Council and State Prosecutors’ Council cannot be members of the Steering Committee.*

*The term of office of members of the Steering Committee shall be four years and they can be re-elected.*

*Members and the Chairman of the Steering Committee shall be entitled to remuneration for their work amounting to 30% of the basic salary of a basic court judge.”*

41. As regards the judicial assistants and associates, the Constitutional Law states the following in Article 1: “The Law on the Judicial Academy (“Official Gazette of RS” No. 104/09, 32/14 - CC and 106/15) shall be aligned with Amendments I to XXIX to the Constitution of the Republic of Serbia within 90 days from the entry into force of Amendments I to XXIX on the Constitution of the Republic of Serbia, in a manner that the forms of training shall depend on the length of the working experience and the jobs within the legal profession performed by the trainee.” This will facilitate taking into account the practical experience of the judicial assistants and associates, but having regard to their large number – approximately 2000 for a body of around 2700 active judges in Serbia – it will not enable many of them to become judges.

42. Having a national judicial academy is welcome and not unusual by any means, for instance, France has the *École Nationale de la Magistrature*, and this is to be supported. Hence, the Academy’s role as a sole gatekeeper to the judiciary seems well founded with the aspiration and commitment to strengthen the calibre and professionalism of judicial and prosecutorial training, but it would be advisable to protect the Academy from possible undue influence by providing it with a firm status within the Constitution.

43. The Venice Commission finds, in general, that Amendment VI should be rewritten to regulate more clearly the conditions needed to become a judge. As it stands, the content is not coherent with the title.

#### 4. Amendment VII (Permanent Tenure of Office)

44. This Amendment deals with the stability of the judiciary. The probationary period no longer exists, which is to be welcomed. The Venice Commission always supported the abolition of this practice *“Probationary periods by definition raise difficulties for judicial independence but if they are to apply they should not be longer than is needed to assess a judge’s suitability. (...)The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.”*<sup>20</sup>

45. This Amendment also deals with the dismissal of judges, which is an important component of the independence of judges, because it has a direct effect on their tenure of office. In this respect, Recommendation CM/Rec (2010)12 of the Committee of Ministers *“on judges: independence, efficiency and responsibilities”* states that: *“50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.”*

46. The appointment and the dismissal of judges should be regulated in the Constitution<sup>21</sup> – which is the case, to some extent, with this Amendment. The first paragraph refers to the appointment of judges and to their life tenure, which is clearly spelled out and should be welcomed. The second paragraph then generally sets out situations in which tenure may end before a judge’s retirement. With respect to dismissal, the grounds should be laid down in the Constitution and the competent court should be set out, as well as the right of appeal of the judge concerned.<sup>22</sup> The right to an appeal and the competent court have been provided for in this Amendment. The third paragraph of this Amendment provides for four reasons for a judge’s dismissal: 1) being sentenced to at least six months’ imprisonment; 2) committing a crime that makes the person unworthy of judgeship; 3) performing judicial functions incompetently, and 4) having committed a serious disciplinary offence.

47. The first reason raises no apparent issue. In the second, the wording *“a crime that makes the person unworthy of judgeship”* is vague and would benefit from more precise wording by setting out clearly what kind of criminal offence is being referred to.

48. The third reason poses a real problem as *“performing judicial functions incompetently”* is not precise and can cover a variety of situations, notably, it could apply to a judge who has made a mistake. As the Venice Commission has stated in the past: *“[...] [P]eriodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse.”*<sup>23</sup> Incompetence is difficult to assess and any judge could be accused of having acted incompetently in specific cases. Therefore, this third reason needs to be set out in more precise wording, to exclude possible

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<sup>20</sup> Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in “the former Yugoslav Republic of Macedonia” (CDL-AD(2005)038), paragraph 30.

<sup>21</sup> Opinion on the Constitution of Finland (CDL-AD(2008)010), paragraphs 112-113; Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia (CDL-AD(2005)003), paragraph 105.

<sup>22</sup> Ibid. See also the European Charter on the statute for judges (1998), paragraph 5.1.

<sup>23</sup> Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania) (CDL(1995)074rev), p.4

liability for mistakes, decisions in specific cases, and similar instances giving rise to potential abuse.

49. The fourth reason needs to provide detail on what these serious disciplinary offences are. It is important that there is an appropriate scale of sanctions for disciplinary offences and that they are applied in accordance with the principle of proportionality.<sup>24</sup> Care should be taken that only failures performed intentionally or with gross negligence should give rise to this most severe sanction.<sup>25</sup> As stated by the Venice Commission *“Disciplinary proceedings should generally be initiated in case of professional misconduct that is gross and inexcusable, bringing the judiciary in disrepute.”*<sup>26</sup>

50. In this respect, the Venice Commission has said in previous opinions, that *“For the [...] reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned.”*<sup>27</sup> The latter is provided in the fourth paragraph, which gives the judge (and president of the court) a right of appeal to the Constitutional Court against decisions of the High Judicial Council (HJC) on the cessation of judicial function. This is an important guarantee of the independence of the judiciary, and is to be welcomed.

### **5. Amendment VIII (Non-transferability of Judge)**

51. The Venice Commission has consistently supported the principle that transfers against the will of a judge may be permissible only in exceptional cases.<sup>28</sup> Hence, transfer due to an organisational reform (or lawful alteration of the court system) or otherwise limited by precise conditions, against the will of the judge may be acceptable. In this Amendment, the wording *“in case of revocation of the court or the substantial part of the jurisdiction of the court”* needs more detail in order to narrow the situations down in a clear manner i.e. revocation of a court means the closure of the entire court and its transfer to another location or a transfer of jurisdiction from one court to another etc.

52. It is also important to ensure that the same level of remuneration and an equivalent or similar position is guaranteed to the judge to be transferred and needs to be stipulated in this provision.<sup>29</sup> A general strengthening of the wording of this Amendment is therefore recommended.

### **6. Amendment IX (Immunity and incompatibility)**

53. This Amendment sets out that judges and lay judges are covered by functional immunity, which is to be welcomed.

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<sup>24</sup> See Case of Oleksandr Volkov v. Ukraine, application no. 21722/11, 27 May 2013 (final judgment), paragraphs 182-185; see also the European Charter on the statute for judges (1998), paragraph 5.1; Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia (CDL-AD(2005)003), paragraph 105; Opinion on the draft amendments to the Constitution of Kyrgyzstan (CDL-AD(2002)033), paragraph 11.

<sup>25</sup> Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova (CDL-AD(2014)006), paragraphs 19 and 35.

<sup>26</sup> Ibid., paragraph 35.

<sup>27</sup> Opinion on the Constitution of Finland (CDL-AD(2008)010), paragraph 113; Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR (CDL-AD(2005)003), paragraph 105.

<sup>28</sup> Report on the independence of the judicial system part I: the independence of judges (CDL-AD(2010)004), paragraph 43.

<sup>29</sup> See, for example, Opinion on the draft laws on courts and on rights and duties of judges and on the judicial council of Montenegro (CDL-AD(2014)038), paragraph 58.

54. The third paragraph of this Amendment prohibits judges and court presidents from engaging in political actions. This is by no means an unusual provision and most countries provide for some kind of restriction on the political activity of judges in their constitutions (or in laws or codes of conduct). It is the type of activity that is prohibited which differs from one country to the next – some countries have rules that ban the holding of more than one mandate (e.g. being a judge as well as a member of parliament or government),<sup>30</sup> some prohibit all political activity<sup>31</sup> or the membership in a political party<sup>32</sup> and so on. The Venice Commission has said that “...judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges”.<sup>33</sup> However, the Venice Commission would like to suggest that “political action” be more clearly defined or replaced by introducing a prohibition of membership in a political party.

## **7. Amendment X (The Supreme Court of Serbia)**

55. The Amendment describes the Supreme Court of Serbia as the highest court in Serbia. The only role of this Court that is regulated on the constitutional level is to ensure the uniform application of the law by the courts. It does not, however, indicate how this is to be done.

56. In light of what was said above for Amendment V, the Venice Commission would like to suggest that the following (italicised and bold) wording be added to the second paragraph of this Amendment: “The Supreme Court of Serbia shall ensure uniform application of the law by the courts ***through its case law.***”

## **8. Amendment XIII (Composition of the High Judicial Council)**

57. In countries which have them, the structure of judicial councils tends to vary from one country to the next. Serbia has chosen the model with two entirely separate bodies: one for judges and one for prosecutors (see Amendment XXV, below). This is one of the possibilities that exist for judicial councils in Europe.

58. As regards the establishment and the composition of a judicial council, the Venice Commission’s view is as follows: “*While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.*”<sup>34</sup> It also stated that, in the composition of this body “*A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.*”<sup>35</sup>

59. Amendment XIII proposes that the HJC be composed of ten members: five judges elected by their peers and five prominent lawyers elected by the National Assembly. The reason given for such a solution was to ensure that there would be no judicial corporatism. Having an even

<sup>30</sup> For example in the Andorra, Denmark, Croatia, Czech Republic, Estonia, France.

<sup>31</sup> For example in Albania, Armenia, Azerbaijan, Belarus.

<sup>32</sup> The Austrian Code of Conduct made by judges for judges also advises against party membership.

<sup>33</sup> [Report on the Independence of the Judicial System Part I: The Independence of Judges, paragraph 62.](#)

<sup>34</sup> Report on the independence of the judicial system part I: the independence of judges (CDL-AD(2010)004), paragraph 32; the Rule of Law Checklist (CDL-AD(2016)007), E 1 a) viii, paragraph 81.

<sup>35</sup> Report on judicial appointments (CDL-AD(2007)008), paragraph 27.

number of members in the HJC is less usual than having an odd number, which is the current trend in many European states – there are only a few that have an even number of members in their judicial councils.<sup>36</sup> There are European standards on the issue of the composition of a judicial council, notably Recommendation CM/Rec(2010)12 states in its paragraph 27 that: *“Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.”* No reference could be found on whether there should be an even or an odd number of members in such a council. In any case, where decisions are adopted by at least six members (see Amendment XVI), whether there is an even or an odd number of members will not make a difference.

60. The criteria for the members of the HJC are included in this Amendment. As regards members elected by the National Assembly, the criteria raise the question as to why only those who have passed the Bar exam fall within the category of “prominent lawyers”. This would exclude law professors, for instance, and the additional need for having had *“...at least ten years of working experience in the field of law falling within the competence of the High Judicial Council”* is very vague and unclear as to its purpose.

61. The main problem with respect to this Amendment is, however, that the non-judicial members of the HJC are all elected in the same manner by the National Assembly: in the first round, they can be elected by a 3/5<sup>th</sup> majority. This majority, which is lower than the 2/3<sup>rd</sup> majority provided for in the initial draft, already provides for – depending on the electoral system for the National Assembly and the election results – only a weak protection against the election of all non-judicial members by the majority of the day. This provision, in any case, has little meaning in practice, since the second round provides that a 5/9<sup>th</sup> majority may elect all these members and there is no incentive for the majority in the National Assembly to avoid a second round of voting. 5/9<sup>th</sup> is a low threshold and it seems likely that a government will often dispose of such a majority. While the Venice Commission has no inherent objection to the anti-deadlock mechanism provided in this Amendment should the 5/9<sup>th</sup> majority not be reached – i.e. *“the remaining members shall be elected ... by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman”* – the Venice Commission considers that, in reality, it is unlikely to ever be triggered. Therefore, the 5/9<sup>th</sup> majority proposal should be removed. In order to be a mechanism suitable to ensure pluralism within the HJC, the choice of the five-member commission should not be limited to candidates proposed by a parliamentary committee.

62. In summary, this provision creates the possibility that half of the members of the HJC – including, according to Amendment XV, the President – will be a coherent and like-minded group in line with the wishes of the current government. This is very problematic and other solutions should be explored. Different options exist in this respect. One would be to provide for a proportional electoral system that ensures the minority in the Assembly will also be able to elect members. Another option would be to give to outside bodies, not under government control, such as the Bar or the law faculties the possibility to appoint members. A third option would be to increase the number of judicial members to be elected by their peers. A fourth option would be to increase the majority requirement and to enable the five-member commission to choose from among the candidates who originally applied with the National Assembly for the membership in the HJC. It will be up to the Serbian authorities, based on the conditions in and experience of the country, to choose the most suitable option.

63. It would also be possible to include *ex-officio* members in the HJC, such as the Minister of Justice or the President of the Supreme Court. This can be useful to facilitate dialogue

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<sup>36</sup> Those with an even number of members include Armenia, Belgium, Denmark, Italy, Netherlands, (Scotland), Slovakia, Spain.

among the various actors in the system. However, care must be taken that including *ex officio* members does not increase the risk of domination of the HJC by the political majority. If the Minister of Justice were to be included as an *ex-officio* member, he or she should not have the right to vote or participate in the decision-making process if it is a decision concerning the transfer of judges and disciplinary measures against judges.<sup>37</sup>

64. To sum up, in its current form, this Amendment is not suitable to ensure pluralism within the HJC and other solutions must be found.

#### **9. Amendment XIV (Term of Office of Members of the High Judicial Council) and Amendment XV (President of the High Judicial Council)**

65. Under these Amendments, the mandate for members and of the President of the HJC is of five years without the possibility for re-election. This is a relatively short mandate, although a change in the position of the President every five years is to be welcomed. However, it would be unfortunate if all the members were to change at the same time every five years, including the President. The Venice Commission therefore suggests that a system of gradation in the turnover of the membership of the HJC be introduced.

66. According to the second paragraph of Amendment XV, the President of the HJC is to be elected among the lay members. It is true that the Venice Commission has stated that *“the chair of the council could be elected by the council itself from among the non judicial members of the council.”*<sup>38</sup> However, this recommendation by the Commission is primarily aimed at situations where judges elected by their peers have the majority in a council and is not applicable if it increases the risk of domination of the HJC by the current majority in parliament.

67. Under the third paragraph of Amendment XIV, the term of office of a HJC member shall cease *“for reasons prescribed by the Constitution and law and in the procedure prescribed by law.”* This provision appears to apply to all members of the HJC. The draft Amendments, however, contain no criteria for dismissal and so appear to leave this entirely to secondary legislation, which is a problem.

68. In addition, under Amendment I, in the third paragraph (National Assembly’s election rights) and in the penultimate paragraph of Amendment II, the members of the HJC elected by the National Assembly may be dismissed by the Assembly by a 5/9<sup>th</sup> majority regardless of the majority with which they were elected. This should be revised, the majority required for dismissal should be higher, or at least equal to, the majority required for election. It is important that criteria for dismissal (and procedures) be laid down in the Constitution and not just left to legislation.

#### **10. Amendment XVI (Work and Decision-making of the High Judicial Council)**

69. This Amendment deals with the decision-making process of the HJC. It raises several issues, all of which are contained in the third paragraph leading to the dissolution of the HJC.

70. According to the third paragraph, if the HJC does not make a decision within 30 days, the term of office of all the members of the HJC shall cease. This raises the question, notably, of what is to be considered a decision? This may sound obvious, but what happens in a situation in which none of the applicants for a position as a judge is found to be qualified – does this

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<sup>37</sup> See for example, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine (CDL-AD(2010)003); Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania (CDL-INF(1998)009); Report on Judicial Appointments by the Venice Commission (CDL-AD(2007)028); Interim Opinion on Constitutional Reforms in the Republic of Armenia (CDL-AD(2004)044); Opinion on the reform of the judiciary in Bulgaria (CDL-INF(1999)005).

<sup>38</sup> Report on judicial appointments (CDL-AD(2007)008), paragraph 35.

qualify as a decision to reject all candidates or is it a decision not made? It may be an issue of translation, but it is important that this be clear.

71. As it stands, the third paragraph effectively means that, in case of a tied vote, there is no decision and a very concrete danger that the term of office of all members will cease. This could lead to hastened decision making or frequent dissolutions of the HJC. The HJC is an independent body, which also means that its individual members should be regarded as independent and should not be dismissed “*en masse*” on the grounds that one member has not acted responsibly in the decision-making process. Also, taking into account the composition of the HJC of five-five, the deadlock in the decision-making process could potentially be provoked by the politically-elected part of the HJC against the judges. In other words, this provision could have the potential of rendering the HJC inoperative. This categorical rule should therefore be reconsidered and the third paragraph deleted or at least the conditions for dissolution tightened.

### **C. Public Prosecutor’s Offices**

#### **1. Amendment XVIII (Status)**

72. Regulations on the prosecution service tend to diverge much more from one country to the next than do regulations on courts. European standards on courts are stricter, however, European standards with respect to the prosecution service are catching up. For instance, one common standard is that the prosecution service should be deprived of its extensive powers in the area of general supervision, which should be taken over by the courts (general courts of law, administrative courts and the constitutional court) as well as by the institution of the ombudsman.

73. The broad power of the prosecutor to protect human and citizens’ rights and freedoms, state and public interest raises doubts. This was often a concern raised by the Venice Commission.<sup>39</sup> A similar concern was raised in the Parliamentary Assembly’s Recommendation 1604(2003) on the Role of the public prosecutor’s office in a democratic society: “*as to non-penal law responsibilities, it is essential that any role for the prosecutors in the general protection of human rights does not give rise to any conflict of interests or act as a deterrent to individuals seeking state protection of their rights.*”

74. In this context, it seems to the Venice Commission that the role of the Public Prosecutor’s Office, as set out in Amendment XVIII, is too broad. The first paragraph of this Amendment provides that the Public Prosecutor’s Office is an autonomous state body, that will “*prosecute the perpetrators of criminal offences [...] and shall protect the constitutionality and legality, human rights and civil freedoms.*” Although the Public Prosecutor’s Office obviously always has to act in accordance with the Constitution and the law, the general protection of human rights is not an appropriate sphere of activity for the prosecutor’s office. This should be the task of an ombudsman and/or of a specific human rights body.<sup>40</sup> In addition, the protection of constitutionality in a state which has a Constitutional Court, such as Serbia, falls within the competence of that Court. The Venice Commission therefore suggests that the first paragraph be rephrased. Another possibility would be to replace it by the following wording: “*The law may grant other exceptional tasks for the protection of public interests to the Public Prosecutor’s Office.*”

75. The third paragraph of the Amendment, which states that any influence on the Public Prosecutor’s Office in an individual criminal prosecution case, is prohibited – should be

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<sup>39</sup> See Report on European standards as regards the independence of the judicial system: part II - the prosecution service (CDL-AD(2010)040), paragraphs 73, 77-83.

<sup>40</sup> See the Principles relating to the Status of National Institutions (The Paris Principles), General Assembly resolution 48/134 of 20 December 1993.



welcomed. This leads us to the distinction that should be made between the independence of judges and that of prosecutors:

*“30. Any ‘independence’ of the prosecutor’s office by its very essence differs in scope from that of judges. The main element of such “external” independence of the prosecutor’s office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.”<sup>41</sup>*

76. The Venice Commission delegation which visited Belgrade was informed that there is no internal independence granted to individual prosecutors in Serbia. Although there is, as such, no problem with this under European standards, as the “independence” of prosecutors by its very essence differs from that of judges – there are, however, a number of guarantees that apply to individual prosecutors that need to be heeded. In this context, the following should be noted:

*“31. The independence of the prosecution service as such has to be distinguished from any “internal independence” of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for noninterference from their hierarchical superior.*

*32. In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor’s activities. Non-interference means ensuring that the prosecutor’s activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process.”<sup>42</sup>*

## **2. Amendment XIX (Responsibility)**

77. The Venice Commission has stated in the past that *“In countries where the prosecutor general is elected by Parliament, it often also has the power to dismiss him or her. In such a case, a fair hearing is required. Even with such a safeguard, there is a risk of politicisation: “Not only is there a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature.” Consequently, **accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out.**”*

78. This Amendment sets out the responsibilities (accountability) of the prosecutors within a hierarchical prosecutorial system and with respect to the National Assembly. Both the Supreme Public Prosecutor and the public prosecutors, i.e. the heads of prosecutors’ offices, are responsible to Parliament (the public prosecutors in addition to their responsibility to the

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<sup>41</sup> Report on European standards as regards the independence of the judicial system: part II - the prosecution service (CDL-AD(2010)040), paragraph 30.

<sup>42</sup> Ibid., paragraphs 31-32.

Supreme Public Prosecutor). This reflects the fact that, according to Amendment XXV, they are elected and dismissed by the National Assembly. This arrangement is, however, acceptable only for the Supreme Public Prosecutor, who is responsible for the overall law-enforcement policy. Other prosecutors cannot be responsible to the National Assembly. This would contradict the third paragraph of Amendment XVIII, according to which any influence in an individual criminal prosecution case is prohibited (see above). Moreover, double responsibility may lead to no responsibility at all.

### **3. Amendment XX (Public Prosecutors and Deputy Public Prosecutors)**

79. This Amendment refers to a legal remedy against instructions from the public prosecutor that is available to deputy prosecutors, which is to be welcomed. However, is there a legal remedy for the public prosecutor against instructions from the Supreme Public Prosecutor? More precise wording, that also covers public prosecutors, would be welcome.<sup>43</sup>

### **4. Amendment XXI (Election of the Supreme Public Prosecutor of Serbia and Public Prosecutors)**

80. The first paragraph of this Amendment sets out that the National Assembly elects the Supreme Public Prosecutor to a five-year non-renewable term. A suggestion might be made that, since the term of office is not renewable, to prolong the mandate from five to e.g. eight years. The Venice Commission has repeatedly recommended that the general prosecutor be elected by a qualified majority. In this case, an anti-deadlock mechanism should be envisaged for the election of the general prosecutor.

81. The third paragraph states that the National Assembly elects public prosecutors on the proposal of the HPC. It follows from Amendment XXV below, that the National Assembly also dismisses the prosecutors on the proposal of the HPC. Prosecutors other than the Supreme Public Prosecutors should have no link to the National Assembly (see above). The third paragraph should be deleted as well as the reference to public prosecutors in paragraph 12 of Amendment II.

### **5. Amendment XXIII (Life Tenure of Deputy Public Prosecutors)**

82. The permanent tenure of deputy prosecutors is to be welcomed.

83. This Amendment, however, has the same shortcomings as Amendment VII above regarding judges, the grounds for dismissal need to be clearly set out and grounds such as "*incompetently performs function*" are too vague. In addition, rules on the cessation of the office of public prosecutors will have to be included, replacing the reference in paragraph 12 of Amendment II.

### **6. Amendment XXIV (Immunity and incompatibility)**

84. The recommendations made for judges under Amendment IX, apply, *mutatis mutandis*, to the prosecutors.

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<sup>43</sup> See Opinion on the act on the public prosecutor's office as amended (CDL-AD(2017)028), paragraph 45 onwards.

## 7. Amendment XXVI (Composition of the High Prosecutorial Council)

85. High prosecutorial councils are becoming a common feature in individual states and although there are no European standards for introducing them,<sup>44</sup> the Venice Commission has always supported their introduction.

86. As regards their composition, the Venice Commission has addressed the difficulties encountered in this respect in the past: on the one hand, ensuring that such a council be composed of a significant number of prosecutors and, on the other, ensuring that it is not an instrument of pure self-government. In an opinion for Georgia, the Venice Commission had stated that:

*“It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine), and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. Notably, in one of its previous opinions the Venice Commission noted that “the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers [...] seems appropriate”. At the same time, the Venice Commission stressed that the prosecutorial council “cannot be an instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament”. If the proposed proportion of prosecutors vs. non-prosecutors within the Council is maintained, more safeguards are needed to ensure that the Prosecutorial Council is politically neutral. [...]”*

87. Under this Amendment, the HPC is composed of eleven members: four of whom are deputy public prosecutors elected by public prosecutors and deputy public prosecutors and five who are prominent lawyers elected by the National Assembly plus the Supreme Public Prosecutor of Serbia and the Minister of Justice. The Venice Commission has stated that: *“Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority.”*<sup>45</sup> This seems to be the case under Amendments II and XXVI. However, a problem arises with the anti-deadlock mechanism introduced here, which raises the same problems as the one proposed for the HJC under Amendment XIII, above, and should therefore be revised.

88. It is important that the HPC not be dominated by the current majority in the National Assembly so as to give it credibility and to gain public trust in the system. Having five out of 11 members elected by the National Assembly in addition to the Minister of Justice and the Supreme Public Prosecutor of Serbia – who is also elected by the National Assembly – gives rise to concern. As in the case of the HJC, a solution ensuring pluralism in the Council has to be found, and the issues raised for judges in the HJC apply to the prosecutors in the HPC, to the extent applicable.

89. In conclusion, the Venice Commission would like to reiterate that provisions on the judiciary and the administration of justice need to be guided by clear rules. Experience shows, however, that in many countries the best institutional rules will not work without the goodwill of those responsible for their implementation. Unclear or imprecise rules in a system in which such goodwill is lacking or too weak could lead to diminishing the role of the judiciary through political manipulation.

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<sup>44</sup> Report on European standards as regards the independence of the judicial system: part II – the prosecution service (CDL-AD(2010)040), paragraph 64.

<sup>45</sup> Ibid., paragraph 66.

#### IV. Conclusion

90. The Venice Commission welcomes the draft Amendments and acknowledges the efforts of the Serbian Government in pursuit of its aspirations to develop and evolve as a modern democracy for the benefit of all the Serbian people and in prioritising the need to meet the highest standards of compliance criteria with international best practice and the rule of law.

91. Nevertheless, there are a number of outstanding issues that should be addressed in this important process of amending the Constitution of Serbia.

92. The Venice Commission would therefore like to make the following main recommendations:

1) *Composition of the HJC and the role of the National Assembly:*

The election of non-judicial members of the HJC by the Assembly, introducing a first round (3/5<sup>th</sup> majority) and a second round, in the event that not all the candidates are elected (this time by a 5/9<sup>th</sup> majority) provides little incentive for the majority in the National Assembly to avoid a second round of voting. This creates the possibility that half of the members of the HJC will be a coherent and like-minded group in line with the wishes of the current government. This Amendment is therefore unlikely to be suitable to ensure pluralism within the HJC and the Venice Commission invites the Serbian authorities to find another solution.

2) *Composition of the HPC and the role of the National Assembly:*

As with the HJC, it is important that the HPC not be dominated by the current majority in the National Assembly so as to give it credibility and to gain public trust in the system. Therefore, having five out of 11 members elected by the National Assembly in addition to the Minister of Justice and the Supreme Public Prosecutor of Serbia – who is also elected by the National Assembly – gives rise to concern. As in the case of the HJC, a better solution to ensure pluralism in the Council should be found, and the issues raised for judges in the HJC apply to the prosecutors in the HPC, to the extent applicable.

3) *Dissolution of the HJC:*

If the HJC does not make a decision within 30 days the term of office of all its members shall cease. This could lead to hastened decision making or frequent dissolutions of the HJC. Taking into account the composition of the HJC of five-five, the deadlock in the decision-making process could potentially be provoked by the members of the HJC elected by the National Assembly part of the HJC against the judges or *vice versa*. This has the potential of rendering the HJC inoperative. This paragraph should be deleted or at least the conditions for dissolution tightened.

4) *Dismissal for incompetence:*

Disciplinary responsibility for judges and for prosecutors is not covered by the draft Amendments yet they set out very vague reasons for the dismissal of judges and of deputy public prosecutors. It is important that more detail be provided in the draft Amendments regarding disciplinary responsibility and dismissal. The use of vague terminology such as “incompetence” without further specification should be avoided and therefore taken out.

5) *Method to ensure the uniform application of laws:*

The Venice Commission recommends deleting the third paragraph of Amendment V, which states that “*The method to ensure uniform application of laws by the courts shall be regulated by law*”. If, however, it is felt that a reference to the need to ensure proper harmonisation of case law should be included in the Constitution and if the reference to the role of the Supreme Court in Amendment X is not considered sufficient, then the first

paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law.

6) *Public Prosecutors and Deputy Public Prosecutors*

The Supreme Public Prosecutor and the public prosecutors are elected by and responsible (accountable) to the National Assembly. While it is acceptable for the Supreme Public Prosecutor to be elected by the National Assembly and be accountable to it for the overall law-enforcement policy, other public prosecutors should have no direct link to the National Assembly. Amendments XIX and XXI should therefore be modified accordingly.

93. In addition, other provisions of the draft should be reviewed and amended as recommended in this opinion.

94. These draft Amendments provide a broad framework regarding the judiciary of Serbia. By their very nature, constitutional regulations should not be too detailed and the practical impact of the draft Amendments will depend, to a large extent, on the quality of the secondary legislation. The Venice Commission is ready to provide its expertise in the implementing legislation, if required.