ДРУШТВО СУДИЈА СРБИЈЕ | JUDGES' ASSOCIATION OF SERBIA

Belgrade, 8 March 2018 No. 13/18

Comments on
the *Working Draft of Amendments to the Constitution of the Republic of Serbia, with Statements of Justification (referencing opinions of the Venice Commission)*
insofar it pertains to the judiciary

I Introduction

Any constitutional reform requires a particularly pressing need within society for altering constitutional provisions governing particular issues, most crucially the functional and territorial organisation of government. It was not professional associations of judges and prosecutors that called for amendments to provisions of the Constitution of Serbia ('the Constitution') that regulate the judiciary: rather, it was the Government itself that identified the need to modify the Constitution in this regard as early as 2013, in the National Judicial Reform Strategy. The stated aim of this effort was to enhance judicial independence by eliminating *the influence of the legislative and executive power on the appointment and dismissal of judges and court presidents, public prosecutors and deputy public prosecutors, and appointed members of the High Judicial Council and the State Prosecutorial Council*.

The current Constitution envisages that a motion to amend it may be made by a 'petitioner with standing' (at least one-third of all Members of Parliament; the President of the Republic; the Government; or 150,000 registered voters); a two-thirds majority in the National Assembly is required to adopt proposed constitutional changes and draft and consider any enactment amending the Constitution. In contravention of this procedure, in mid-2017, the Ministry of Justice ('the Ministry') began what it termed 'consultations' with professional associations of judges and prosecutors and other civil society organisations, which it invited to submit their views regarding possible constitutional arrangements. The publication of the Working Draft of Amendments to the Constitution of the Republic of Serbia[1] ('Draft Amendments') in late January of 2018 re-ignited debate about changes to the Constitution's provisions governing the judiciary.

Any constitutional reform interferes with the established legal order; changes to the Constitution call for formidable procedural effort; and amendment of constitutional

[1]Available online from the Serbian Ministry of Justice [in Serbian]; accessed on 4 February 2018.

provisions defining the nature and extent of government also require public approval in a referendum. It is, therefore, pertinent to ask whether strengthening judicial independence requires changes to the Constitution at this time to, or whether this goal could more easily be achieved by only enacting appropriate legislation. The Judges' Association of Serbia has consistently demonstrated that current constitutional provisions were capable of yielding better results provided that robust laws are adopted. Independence is not gained solely by being proclaimed in the Constitution. This is evidenced by the fact that only 52% of judges in Serbia consider themselves independent, although their permanence of tenure is guaranteed by the Constitution.[2] Judges are convinced that greater independence could also be ensured under the existing constitutional framework provided there was the political will to do so. Legislation governing the status of judges and operation of courts intrudes upon the independence of judges and courts more than is permitted in the Constitution. Court presidents are given excessively broad powers, even benefiting from a separate set of retirement rules (they are able to remain in post until their term of office as court presidents expires, even after attaining retirement age). The Minister of Justice has been given responsibility for enacting the Court Rules of Procedure (a key document regulating the judiciary), determining criteria that govern staff numbers, and deciding on the procedure for admission of judicial assistants. Of particular concern is the ability of the executive to nominate representatives to the Board of Directors of the Judicial Academy and exert direct, institutional, and actual influence on the Academy. Addressing these issues and enhancing judicial independence need not wait for amendments to the Constitution. For instance, instead of the Minister of Justice being in control of the Court Rules of Procedure, the President of the Supreme Court of Cassation could be made responsible for their enactment, following consultations with all of the Court's judges. In addition, the duties currently performed by court presidents could be entrusted to a collective body composed of the court's president and a number of judges delegated by their peers at the same court, etc. *Experience has, however, shown that in many countries even the best institutional arrangements will not work without the good will of those responsible for implementing and executing them. As such, the implementation of existing standards is therefore at least as important as the identification of new standards needed.*[3]

If the Constitution is to be amended, this effort ought to be approached anew, systemically and thoroughly, based on clear and publicly stated objectives, and in compliance with the Constitution itself.

Since the Republic of Serbia has made the strategic commitment to joining the European Union and has consequently taken on a multitude of obligations and set time limits for taking the appropriate action, this document will deal with accession to the European Union and the Venice Commission to the extent necessary and in proportion to the Ministry's references to these issues.

[2] *Strengthening Judicial Integrity and Independence in Serbia*, Društvo sudija Srbije, Beograd 2017, p. 91.

[3] Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, Study No. 494/2008 of 16 March 2010, Paragraph 10.

II Comments on the Introductory Remarks of the Draft Amendments

The Draft Amendments were published by the Serbian Ministry of Justice ('the Ministry') on 22 January 2018 on its web site. The Introductory Remarks of this document claim that the Ministry developed the amendments in accordance with commitments undertaken by the Republic of Serbia through the adoption of the Action Plan for the Chapter 23, as well as that '*[…] during the drafting process, the Ministry was guided primarily by standards defined by the Venice Commission in its opinions and other relevant documents as well as written proposals received within a consultative process conducted by the Ministry in cooperation with the Office for Cooperation with Civil Society conducted in the period May-November 2017. The working text is defined with the preliminary assistance of the CoE expert Mr. James Hamilton.*' The Ministry also states that *'[i]n order to facilitate understanding of the proposed solutions, an overview of some of the most important positions of the Venice Commission in relation to subject matter (together with the precise references) has been provided beneath the text of the amendments (or thematic related groups of amendments) that bring significant and substantive changes in relation to the current Constitution.*'

We will here clarify a number of claims advanced by the Ministry: 1) that it developed the amendments in accordance with commitments undertaken by Serbia in the Chapter 23 Action Plan; 2) that the Venice Commission of the Council of Europe (CoE) sets European standards; 3) that in drafting the amendments the Ministry was guided by the written proposals received as part of a consultative process conducted by the Ministry in co-operation with the Office for Co-operation with Civil Society from July to November 2017; and 4) that the amendments were drafted in collaboration with CoE Expert James Hamilton; and 5) that the Draft Amendments constituted the starting point for public debate on amending the Constitution of the Republic Serbia, planned for February and March 2018, after which the amendments were to be submitted to the Venice Commission for comments.

1. The assertion that the Draft Amendments comply with Serbia's commitments under the Chapter 23 Action Plan is correct insofar the government has undertaken to amend the Constitution. Commitments to this effect were undertaken by both Parliament, with the adoption of the National Judicial Reform Strategy[4] ('the National Strategy') and Government, which enacted the Action Plan to Implement the National Judicial Reform Strategy[5] and the Chapter 23 Action Plan.[6] In each of these documents the authorities linked

[4] National Judicial Reform Strategy, 2013-2018, *Official Gazette of the Republic of Serbia*, No. 57/13 of 3 July 2013. Professional associations of judges and prosecutors left the Drafting Group [Serbian] tasked with developing the Strategy, since their demands to establish responsibility for breaches of law in the re-appointment of judges and prosecutors and subsequent review of this process. Another demand ignored by the authorities was to call elections for judge and prosecutor members of the High Judicial Council and State Prosecutorial Council.

[5] Action Plan to Implement the National Judicial Reform Strategy, 2013-2018, *Official Gazette of the Republic of Serbia*, Nos. 71/13 and 55/14; Conclusion Endorsing the Revised Action Plan to Implement the National

reform of the judiciary with European integration, which is why *attention ought to be paid to European Union (EU) law – the acquis communautaire – and CoE recommendations and standards* that call for the participation of all relevant stakeholders, including professional associations of judges and prosecutors, as well as the civil society, in this reform. These guidelines also mandate *removing the responsibility of Parliament for appointing court presidents, judges, prosecutors and deputy prosecutors, and members of the High Judicial Council (HJC) and State Prosecutorial Council (SPC)* and *altering the make-up of the HJC and the SPC to exclude representatives of the legislative and executive power*; as well as *envisaging attendance of the Judicial Academy as a precondition for initial appointment as judge or prosecutor.*

However, the arrangements contained in the Draft Amendments in effect completely re-organise the judiciary. They significantly exceed the scope of changes planned in the documents cited above, including the Chapter 23 Action Plan. In addition, in implementing these provisions the state is not complying with the commitment it undertook to de-politicise the judiciary and strengthen its independence. This will be dealt with in greater detail below in the section devoted to the content of the proposed amendments.

2. In response to the assertion that the Draft Amendments comply with 'standards defined by the Venice Commission', one ought to be clear as to what the Venice Commission is and how it operates. The Venice Commission is an advisory body of the Council of Europe,[7] and all 47 member states of the CoE are represented on it. Each member state has one representative and one or two deputy representatives on the Venice Commission. These are usually high-ranking judges, sitting or former judges of constitutional courts, or law professors; nonetheless, some states (six at present) are represented by political appointees,[8] mainly cabinet ministers. Serbia is the only country represented on the Venice Commission by an Assistant Minister. The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure the dissemination and consolidation of a common constitutional heritage. It goes without saying that this support is primarily intended for countries generally and euphemistically termed 'countries in transition' or 'emerging democracies'.

Judicial Reform Strategy, 2013-2018, *Official Gazette of the Republic of Serbia*, No. 106/16 of 29 December 2016.

[6] The European Opinion positively evaluated the final draft of the Chapter 23 Action Plan on 25 September 2015. The Action Plan was enacted by the post-election caretaker government on 27 April 2016. The Action Plan was never published in the *Official Gazette.*

[7] The European Commission for Democracy through Law, better known as the Venice Commission, was established in 1990 by 18 member states of the Council of Europe; it now numbers 61 nations. Plenary sessions of the Commission, held three to four times per year (in March, June, October, and December) are also attended by representatives of the European Commission and the OSCE.

[8] Kyrgyzstan is represented by a member of parliament, whilst Moldova, Montenegro, Romania, and Tunisia are represented by cabinet ministers. Since mid-2017, the Commission's member for Serbia has been Čedomir Backović, Assistant Minister of Justice; his deputy is Dr Vladan Petrov, a professor of constitutional law.

It is not the primary task of the Venice Commission to set European standards, contrary to the claim made in the Introductory Remarks. Rather, the Commission, when (as a rule) asked to do so by a member state, gives its opinion on the extent to which that state's constitution (or major systemic law) is aligned with European (or international) legal standards, given the experiences of other nations and the comprehensive nature of legal standards contained in documents enacted by other bodies of the CoE, EU, and United Nations (UN). Key European standards for the judiciary are set out in individual rulings of the European Court of Human Rights (ECtHR), recommendations of the CoE Committee of Ministers, the highest 'binding' form of the CoE's so-called soft legislation, and in particular Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities. Another key document of the CoE is the 1998 European Charter on the statute for judges. Finally, standards are also set out in the opinions of dedicated CoE advisory bodies, such as the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), especially the CCJE's Opinion No 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges. European standards[9] applicable to the judiciary are contained in a number of documents released by several EU bodies (in particular the European Network of Councils for the Judiciary), as well as in UN enactments (Basic Principles on the Independence of the Judiciary, 1985; Bangalore Principles of Judicial Conduct, 2006).

Nevertheless, in the Draft Amendments the Ministry invokes only documents of the Venice Commission, in particular its March 2007 report Judicial Appointments CDL-AD (2007)028,[10] and in doing so creates the misleading impression that judicial standards are set out exclusively or primarily by the Venice Commission. The Ministry ignores the fact that in its 2007 report the Venice Commission mostly refers to standards defined by the entities cited above in their documents referenced herein. The Ministry also seems to disregard the fact that the Venice Commission produced its 2007 report as a contribution to deliberations of the CCJE that led to the adoption of its Opinion No. 10, as stated in the report's opening

[9] In addition to the European Convention for the Protection of Human Rights and Fundamental Freedoms and case law of the ECtHR, the European Union also takes into account Recommendation of the Committee of Ministers of the Council of Europe CM/REC(2010)12, Judges: independence, efficiency and responsibilities; the Magna Carta of Judges; a number of opinions of the CCJE and the CCPE; reports of the Venice Commission on judicial appointments (2007) and judicial independence (2010) that constitute compilations of European standards; the European Charter on the statute for judges; the Basic Principles on the Independence of the Judiciary; the Bangalore Principles of Judicial Conduct; and a number of documents released by the European Network of Councils for the Judiciary:

- *European Network of Councils for the Judiciary (ENCJ), Development of minimum judicial standards I – V (appointment, evaluation, independence, disciplinary proceedings etc.)*
  - encj.eu/images/stories/pdf/workinggroups/encj_distillation_report_2004_2017.pdf
  - encj.eu/images/stories/pdf/workinggroups/encj_report_project_team_minimum_standards.pdf
  - encj.eu/images/stories/pdf/GA/Dublin/final_report_standards_ii.pdf
  - encj.eu/images/stories/pdf/workinggroups/final_report_encj_project_minimum_standards_iii_corrected_july_2014.pdf
  - encj.eu/images/stories/pdf/workinggroups/encj_report_standards_iv_allocation_of_cases_2014.pdf

[10] This opinion is available on the web site of the Venice Commission in both Serbian (venice.coe.int/webforms/documents/?pdf=CDL-JD(2007)001rev-srb) and English (venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e).

sentence. For one to properly interpret European standards, one ought also to understand how they were developed and how they are likely to evolve. In that regard, it should be borne in mind that the CCJE prepared its Opinion No. 10 (2007), on the Council for the Judiciary at the service of society,[11] throughout 2007 and adopted it in November of that year, so only after the Venice Commission released its report on judicial appointments. In its Opinion No. 10, the CCJE explains that in 2007 '*the Committee of Ministers of the Council of Europe entrusted the Consultative Council of European Judges (CCJE) with the task of adopting an Opinion on the structure and role of the High council for the judiciary or another equivalent independent body as an essential element in a state governed by the rule of law to achieve a balance between the legislature, the executive and the judiciary*' (Paragraph 1). Nevertheless, although in developing the Opinion the CCJE considered and reviewed the Venice Commission's March 2007 report on judicial appointments,[12] Opinion No. 10 contains features (standards) that differ from the views of this report on a number of important matters (such as the composition of councils for the judiciary). These features (standards) are what is actually relevant; the divergences in opinion between the CCJE and the Venice Commission ought to be reviewed carefully and understood properly.

The wide-ranging and significant Report on the Independence of the Judicial System, Part I: The Independence of Judges,[13] CDL-AD(2010)004, was adopted by the Venice Commission on 13 March 2010. The Commission here again references documents that contain standards for the judiciary[14] (Paragraphs 12 to 19). In this report, the Venice Commission cites the

[11] Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society. A translation into Serbian is available on the web site of the Judges' Association of Serbia at sudije.rs/index.php/medjunarodni-akti/savet-evrope.html.

[12] Paragraph 7 of the CCJE Opinion No. 10 states: '*When preparing this Opinion, the CCJE examined and duly took into account in particular:*

- *the acquis of the Council of Europe and in particular Recommendation No.R(94)12 of the Committee of Ministers to member States on the independence, efficiency and role of judges, the European Charter on the Statute for Judges of 1998 as well as Opinions No. 1, 2, 3, 4, 6 and 7 of the CCJE;*
- *the report on "Judicial Appointments" adopted in March 2007 by the Venice Commission during its 70th Plenary Session, as a contribution to the work of the CCJE;*
- *the replies by 40 delegations to a questionnaire concerning the Council for the Judiciary adopted by the CCJE during its 7th plenary meeting (8-10 November 2006);*
- *the reports prepared by the specialists of the CCJE, Ms Martine VALDES-BOULOUQUE (France) on the current situation in the Council of Europe member States where there is a High Council for the Judiciary or another equivalent independent body and Lord Justice THOMAS (United Kingdom) on the current situation in states where such a body does not exist;*
- *the contributions of participants in the 3rd European Conference of Judges on the theme of "Which Council for justice?", organised by the Council of Europe in co-operation with the European Network of Councils for the Judiciary (ENCJ), the Italian High Council for the Judiciary and the Ministry of Justice (Rome, 26-27 March 2007).*'

[13] The Judges' Association has commissioned a translation of this report into Serbian, which may be found at sudije.rs/index.php/medjunarodni-akti/savet-evrope.html.

[14] The first paragraph of this report explains how it was brought about and what the Commission's task was: '*By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission to give an opinion on "European standards as regards the independence of the judicial system". The Committee is "interested both in a presentation of the*

CCJE's Opinion No. 1 as the most important set of standards, and states that its contribution follows the structure of the CCJE document. As the Commission goes on to say that Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges is 'currently under review' and expresses hope 'that the present report will be useful in the context of this review' (Paragraph 14), it is clear that the Venice Commission developed both its 2010 and 2007 reports for a particular purpose: to contribute to the adoption of the revised Recommendation (94)12 and Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities. And yet in its Draft Amendments the Serbian Ministry never cites the CCJE Opinion No. 1, Recommendation (2010)12, or the 2010 report of the Venice Commission.

The 2007 report, as has already been established, was prepared for a particular purpose. In addition to it, in its justification of the Draft Amendments, the Ministry references a number of additional opinions of the Venice Commission on legislation of Georgia (CDL-AD(2014)031)[15], Armenia (CDL-AD(2017)019)[16], Albania (by referencing CDL-INF(1998)009 pertaining to Albania in Footnotes 10, 12 and 20 of Paragraphs 25, 29 and 34 of the 2007 CDL-JD(2007)001), [17] and three opinions in connection with Montenegro (CDL-AD(2007)047,[18] CDL-AD(2011)010,[19] and CDL-AD(2012)24).[20] Interestingly, the Ministry did not reference any of the opinions adopted by the Venice Commission on numerous occasions in connection with Serbian legislation governing the judiciary, not least its Opinion No. 405/2006 of 19 March 2007 on the Constitution of Serbia (CDL-AD(2007)004), as well as Opinions No. 464/2007 of 19 March 2007 on the Draft Law on the High Judicial Council (CDL-AD(2008)006) and the Draft Laws on Judges and on the Organisation of Courts (CDL-AD(2008)007), No. 709/2012 of 11 March 2013 on Draft Amendments to Laws on the Judiciary (CDL-AD(2013)005) and the Draft Amendments to the Law on the Public Prosecution (CDL-AD(2013)006), No. 776/14 of 13 October 2014 on the Draft Amendments to the Law on the High Judicial Council (CDL-AD(2014)028), and No. 777/14 of 13 October 2014 on the Draft Amendments to the Law on the State Prosecutorial Council (CDL-AD(2014)029).

Although the Ministry references European standards, it ignores the fact that European (or indeed international) legal standards are nothing other than rules of logical and rational behaviour arrived at through long-standing democratic practice, and that they are the shared

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existing acquis and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe"'.

[15] Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts of Georgia, adopted on 11 October 2014.

[16] Opinion on the Draft Judicial Code of Armenia adopted by the Venice Commission on 7 October 2017.

[17] Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009.

[18] Opinion on the Constitution of Montenegro of 20 December 2007.

[19] Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro adopted by the Venice Commission on 17 June 2011.

[20] Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro adopted on 17 December 2012.

legal heritage of all democratic nations. These rules are applicable in every state wishing to improve its judiciary, on condition that the state in question truly has the political will to improve judicial independence and the rule of law. At any rate, these standards are not some miraculous patterns that only need to be copied for one to achieve all of one's declared objectives. Every country that endeavours to apply the body of law developed by democratic countries, Serbian included, should first and foremost look out for its traditions and its abilities, and, using these as its starting points and mindful of the essence of the standards in question, create its own rules of good conduct and so put into effect international standards and make them applicable and successful for its own purposes. Therefore, European (or international) standards are not idols whose very names must be worshipped by 'emerging democracies'; these nations should also avoid blindly trusting anyone who cites these norms to justify the validity his own proposals. If one is aware of the numerous relevant documents adopted by the multitude of bodies of the CoE and the EU that comprehensively enumerate and develop judicial standards pertaining to various issues, one will understand why it is not acceptable to have the Ministry reference only some sentences, taken out of context, found in only some documents of the Venice Commission. Moreover, this approach begs the question of why the Ministry has done so and what ultimate intention lies behind this approach.

The claim put forth by the Ministry, that when developing the Draft Amendments it was guided primarily by standards defined by the Venice Commission in its extensive body of opinions, serves to purposely diminish, or even abuse, the purpose, content, and importance of international and European standards for the judiciary; this also constitutes a methodologically unsound approach to justifying some of the provisions proposed. The impression that is being conveyed is that it is only these provisions that comply with the standards, although the standards are in actual fact designed to allow individual countries, with their separate legal traditions and different levels of readiness and ability to change, to establish their own legislation that fits their social and historical environment.

Besides, merely referencing observations made in documents of the Venice Commission does not imply justification of the proposed changes. On the contrary: it means only that the Venice Commission has concluded that one particular feature of the law of one particular country could be in alignment with European standards, in the context of all other requirements and given the legal system in force in that country. It goes without saying that this does not mean that the feature in question is the only one that complies with the standards, nor is this a guarantee that this feature could be acceptable or workable in any other legal system, given its overall characteristics and specificities, as well as the fact that it is by no means certain that an arrangement which works in one country must be functional in another. Finally, the opinion of the Venice Commission that one arrangement in one country accords with European standards does not mean that this arrangement is best, nor does it preclude there being other solutions for the same problem that would also accord with the standards, perhaps even more so. Different arrangements for the same issue (such as, for instance, initial training for judges) are equally successful in various European countries, and, as such, one ought to tread very carefully when choosing any solution.

During the public debates held so far, the Serbian Government has repeatedly underlined the importance that it will attach to the opinion of the Venice Commission (VC); so, it seems appropriate to analyse the position of the VC on the topics at issue. As it is well known, the VC, whose full name is "European Commission for Democracy through Law", is the Councils of Europe (CoE's) advisory body on constitutional matters. It provides legal advice to its member states, specifically to help those who intend to *"bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law."*[21] The **members of the VC***" are university professors of public and international law, supreme and constitutional court judges, members of national parliaments and a number of civil servants. They* ***are designated*** *for four years* ***by the member states, but act in their individual capacity.****"*[22] Clearly, the opinion of the VC, authoritative as it might be, is not the opinion of the CoE and it has a mere consultative value. The position of the VC on the composition of a Judicial Council (JC) can be summarized as follows:

1. in order to eliminate any doubt of corporatism, the system should strike a balance between judicial independence/self-administration and accountability of the judiciary;
2. for the same reason, disciplinary procedures against judges should be carried out effectively and without any undue peer restraint;
3. the desired goal could be achieved through a JC with a balanced composition between its judicial and non-judicial members;
4. in this regard, there is no compulsory standard model;
5. since the administrative activities of the judiciary should be monitored by the other state branches of power, most statutes foresee the involvement in the JC of the legislative and the executive;
6. obviously, the judiciary must be answerable for its actions through a fair legal procedure;
7. there is general consensus that "*the* ***main purpose*** *of the very existence"* of a JC is the *"****protection of the independence of judges by insulating them from undue pressures from other powers of the State*** *in matters such as the selection and appointment of judges and the exercise of disciplinary functions"*;
8. consequently, the judiciary itself should elect *"****a substantial element or a majority of the members****"* of the JC; however, *in order to provide for democratic legitimacy of the council*, those members should be balanced by *"****other members elected by Parliament among persons with appropriate legal qualification****"*;
9. an *overwhelming supremacy* of the judicial component *may raise concerns related to the risks of "corporatist management"*;
10. since the JC should be insulated from politics, active members of parliament should not be part of it;
11. where legislative bodies are entitled to elect part of the members of JCs among legal professionals, which happens frequently, a qualified majority should be required; in

[21] http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN
[22] Ibid.

this way, a governmental majority would be obliged to find a compromise with the opposition, which would favour a balanced and professional composition of the JC;

12. in order to avoid inappropriate interference by the Government, the MoJ should not participate in all the JC's decisions, for example it should be excluded from those relating to disciplinary measures;
13. it is crucial that the chair of the JC be exercised by an impartial person who is not close to party politics; more specifically, in semi/presidential systems a balanced solution could be that the *chair of the council be elected by the council itself from among its non-judicial members.*[23]

Now, an attentive contemplation of the remarks above leads to the identification of two crucial and potentially controversial topics: a) the concept of a balanced composition of the JC, and b) the risks of an "overwhelming supremacy" of the judicial component of the JC. Regarding the first topic, the VC's position differs substantially from the CoE's one. The latter is clear: systems where at least half plus one of the members of the JC ***are not judges elected by their peers*** or, in other words, where ***judges elected by their peers*** are in minority, do not comply with the standard, which requires, as a minimum, an equal number of judicial and non-judicial members. On the contrary, the VC seems to accept a composition where members elected by judges are just *"**a substantial element or a majority**"* of the JC. This clearly means that a composition with judges in minority is perfectly acceptable, provided that this minority be a "substantial element" of the council. The second topic reveals an incredible ambiguity. For the VC, an "overwhelming supremacy" of the judicial component of the JC would open the door to the risk of "corporatist management" of the judiciary. The concept of "overwhelming supremacy", especially when referred to a body that can deliberate only by majority vote (be it simple or qualified), is far from being clear and is available to support any opinion. For example, bearing in mind that the VC holds that the judiciary should elect *"**a substantial element or a majority of the members**"*, would a composition of six judges against four non-judicial members be acceptable? Would such a composition represent an unacceptable "overwhelming supremacy" of the judicial members? In the opinion on draft amendments to the constitutional provisions relating to the judiciary of Montenegro, the VC took a clear stand. According to the amendments, the Montenegrin JC is composed by ten members: four judges elected by their peers, four "renowned lawyers" elected by the Parliament and the State President, and two members by right (the President of the Supreme Court and the Minister of Justice). So, in the end there are an equal number of judicial and non-judicial members. In case of a tie, like in the Serbian amendments, the tenure of all members of JC ceases to exist.

It seems crystal clear that the VC's idea of a "balanced composition" of the JC is that of a configuration where the judicial component should be in a potentially systematic situation of being overvoted. In spite of its acknowledging that "*the **main purpose** of the very existence"* of a JC is the *"**protection of the independence of judges by insulating them from undue pressures from other powers of the State**"*, the VC suggests to achieve the balance between independence and accountability of the judiciary through a body in which judges cannot

[23] Report adopted by the Venice Commission at its 70th Plenary Session, 16-17 March 2007 CDL-AD(2007)028.

decide ever. The necessity emphasized by the CoE and accepted also by the VC, to have a judicial component in the JC shows that this presence is crucial to guarantee the independence of the judiciary. The idea to reach a balanced solution not by opening the JC to the presence of lay members, thus avoiding a cast of judges, but putting the judicial component in situation in which it cannot decide on any issue leads to the paradox of attaching more importance to a misunderstood concept of "balance" than to the "primary value", that is the independence of the judiciary. **The result is a puzzling rule: "there can be balance in the system only if those, whose independence should be guaranteed, agree with political representatives in the body established to guarantee their independence!** The observation regarding the qualified majority required in the parliament for the election of the lay members, does not change anything as it neglects the fact that the existence of a compromise between the Government parliamentary majority and the opposition might perhaps avoid undue influence from a certain political party or coalition, certainly not from the "political power" as a whole, which in the experience of many countries often has a convergent interest in limiting or affecting the functioning of an independent judiciary.

In conclusion, based on the arguments illustrated so far, the amendments regarding the composition and, above all, functioning of the Serbian HJC are far from ensuring that the council will carry out its main task, i.e. guaranteeing the independence of the judiciary, without any undue political interference. The viewpoint of the VC on the issue, in spite of the undisputed general authoritativeness of this institution, lacks solid grounds and is absolutely not persuasive. **While seeking for a balanced solution, the Venice Commission ends up with a totally unbalanced and paradoxical one.** The proposed amendments being apparently in line with the opinion of the VC are affected by the same decisive flaws.

Anyhow, the 'attractiveness' or workability of a particular arrangement in any state must not in and of themselves be the decisive factors in choosing that arrangement for Serbia. Our legal tradition, financing options, and capacities of the would-be reformers should all inform this choice. The guiding principle in selecting a particular arrangement should be its suitability for implementation, and this depends on the extent, number, cost, and duration of the measures required, number and capacity of the stakeholders, and whether the solution lends itself to gradual and harmonised introduction.

It is especially unacceptable to abandon a number of Serbia's home-grown arrangements that are eminently congruent with both European standards and the Serbian legal tradition, as well as to reduce the extent of current safeguards of judicial independence. All Constitutions of the modern Serbian state, from the 19th century onwards, have prohibited any influence on judges. For instance, the 1835 *Sretenje* Constitution stated that '*in rendering his judgment a judge shall not depend on anyone in Serbia save the Law of Serbia; no greater or lesser authority of Serbia shall have any right to deter him from doing so, or command him to render judgment otherwise than as set forth by laws*' (Article 80). Even the Ottoman Sultan's 1838 *hatt-i sharif*, an edict promulgated for a Serbia that was still a vassal principality of the Ottoman Empire, stated that '*no officer of the Principality, whether he be civil or military, senior or junior, may interfere with the operations of the aforementioned three courts, but may only be summoned to execute their judgments*' (Article 44). As early as 1349, the Code

of Emperor Dušan stipulated that '*all judges should pass judgment justly, as ordained in the code, and should not pass judgment in fear of my Imperial authority*' (Article 172); it is highly worrying to see the Draft Amendments turn the clock back on centuries of tradition to omit Article 149.2 of the current Constitution of Serbia, which prohibits any influence on a judge in the exercise of their office.

3. No arguments are provided for the Ministry's assertion that in developing the amendments it relied on '*written proposals received within a consultative process conducted by the Ministry in cooperation with the Office for Cooperation with Civil Society conducted in the period May-November 2017*'. This claim is untrue and is made by the Ministry to lend legitimacy to efforts undertaken to date to amend the Constitution.

To give the reader some context about how the constitutional amendments were developed, as mandated by the National Strategy (especially given the Ministry's insistence on the continuity of this process), it may be useful to briefly describe this effort. On 25 August 2013 the Government created the Commission to Implement the National Strategy,[24] which, on 19 November 2013, appointed an 11-member Working Party to prepare an assessment of the constitutional framework. This working group included four professors of constitutional law.[25] The Working Party was tasked with analysing constitutional arrangements with a view to remove Parliament's authority for appointing court presidents, judges, prosecutors, and deputy prosecutors; alter the make-up of the HJC and SPC to exclude representatives of the legislative and executive; and make attendance of the Judicial Academy a mandatory precondition for initial judicial appointment. The Working Party fulfilled its mandate by completing its Legal Assessment of the Constitutional Framework Concerning the Judiciary by September 2014. The sole divergent position concerned the Judicial Academy: here the Working Party backed the view assumed on 2 April 2014 by the Working Group to Reform and Develop the Judicial Academy, namely that attendance of the Academy could be made a requirement for initial judicial and prosecutorial appointment in due course and only after comprehensive changes to the concept of the Judicial Academy, which by that time ought not to be governed by the Constitution. The Legal Assessment was presented on 29 November 2016 by its Chairman, the President of the Supreme Court of Cassation at a meeting with all

[24] The Commission to Implement the National Strategy is a semi-permanent working party of the Serbian Government tasked under the National Strategy with operational implementation of the Strategy and the Action Plan. It is made up of 15 members (plus 15 deputies) who represent all institutions relevant for reforming the judiciary: the Ministry, Prosecution Service, Supreme Court of Cassation, High Judicial Council, State Prosecutorial Council, Parliamentary Justice, Public Administration, and Local Government Committee, professional associations of judges and prosecutors, Serbian Bar Association, Judicial Academy, law schools, Ministry of Finance, chambers of enforcement officers, notaries public, and mediators, European Integration Office, and Office for Co-operation with the Civil Society.

[25] The Working Party consisted of Dragomir Milojević, President of the Supreme Court of Cassation and HJC; Danilo Nikolić, at the time State Secretary at the Ministry of Justice; Snežana Andrejević, at the time judge of the Supreme Court of Cassation; Đorđe Ostojić, Deputy Public Prosecutor of the Republic; Branko Stamenković, at the time member of the SPC; Radovan Lazić, Chairman of the Board of the Prosecutors' Association of Serbia; Dragana Boljević, judge of the Belgrade Court of Appeal and President of the Judges' Association of Serbia; Zoran Jevrić, lawyer, at the time Vice-President of the Serbian Bar Association; and law professors Dr Vladan Petrov, Associated Professor and Vice-Dean of the Law School of Belgrade; Dr Darko Simović, Professor at the Criminal Police Academy of Belgrade; Dr Irena Pejić, Professor of the Law School of Niš; and Dr Slobodan Orlović, Associate Professor of the Law School of Novi Sad.

court presidents, having first solicited the opinions of all four appellate courts and all national-level courts. The meeting resolved that the entire judiciary accepted all findings of the Assessment save for limited exceptions (including with regard to the Minister's membership on judiciary councils). It was therefore only logical that the Assessment should become the official platform for debate on constitutional amendments (after additional fine-tuning, as had been envisaged in the National Strategy). Nevertheless, the Ministry utterly ignored the Assessment and kept it hidden from public view.

Instead, in May 2017 the Ministry invited professional associations and civil society organisations to provide comments and suggestions for constitutional amendments concerning the judiciary.[26] The Ministry itself, however, neither articulated nor presented its starting points for constitutional amendment. By 30 June 2017 the invitation had been accepted by 16 organisations, including the Judges' Association [Serbian]. The inputs submitted by these associations revealed that their views about the constitutional position of the judiciary were essentially similar to those adopted by the Working Party of the Commission to Implement the National Strategy.

A set of views that dramatically diverged from the opinions of other participants, and that could jeopardise judicial independence, akin to the positions previously voiced by the Ministry of Justice, was presented by the newly-created Rule of Law Academic Network, or

[26] Only entities that had submitted written inputs were invited to the 'consultation' on 21 July 2017; they were notified they had five minutes to present their views, that there would be no exchange of arguments between the participants, and that the meeting would be the last of this kind. This was judged as unacceptable and so the Ministry was compelled to organise an additional five roundtables from September to mid-November 2017, which, in spite of the Ministry's declarations, did not however constitute true public consultation. Disregarding the reasons for embarking on constitutional reform, for each of these meetings the Ministry chose to discuss issues unrelated to the Constitution and with no connection to strengthening judicial independence. The participants were never allowed to exchange ideas and views. The roundtables also often involved quite open disparagement of not only the attendees, but also of judges and prosecutors in general. On 17 October 2017, the Judges' Association complained to the Minister over statements made by the Ministry's officers to the effect that judicial discretion would be the first principle to be abolished in the constitutional amendments, that judges were seeking to transform the judiciary into a 'limited liability company' or a 'private business' that intends to make decisions about people's fates according to its 'whims', that judicial independence was a fetishised ideological myth, that the level of independence enjoyed by judges in Serbia, and especially that sought for judges in Serbia, was unheard of anywhere else in the world, and that judges' and prosecutors' proposals were ridiculous. Unfortunately, no response was forthcoming from the Minister: instead, her assistant, one of those who had made the statements, answered by claiming that the Judges' Association was opposed to a transparent exchange of arguments.
Faced with this obvious intention to legitimise the shift of political influence from one set of constitutional provisions to another, with avoidance of debate, and above all with attempts to deflect public attention from judicial independence, the primary issue at hand, on 30 November 2017 the Judges' Association of Serbia, Prosecutors' Association of Serbia, Centre for Judicial Research, Association of Judicial and Prosecutorial Assistants of Serbia, Association of Judicial Associates of Serbia, Lawyers' Committee for Human Rights (YUCOM), Belgrade Centre for Human Rights, and the Belgrade Bar Association notified the Ministry of their decision to withdraw from the process. At the same time, these associations called on the Ministry to do what the other participants in the consultations had already done before submitting the proposed amendments to the Venice Commission: to present its proposals for constitutional amendments to the public and, by doing so, permit true and wide-ranging debate between government authorities and society at large, thus conferring legitimacy on the constitution-making process. The associations indicated they would be ready to take part in debate on those terms.

Rolan [Serbian].[27] The 'network' advocated, amongst other things, relaxing the principle of non-transferability of judges, making case law a source of law, enshrining the Judicial Academy in the Constitution and making attendance a mandatory requirement for judicial appointments, and overhauling the HJC and SPC by removing the president of the supreme court from their membership, making a lay person the President of the Council, reducing overall membership from 11 to 10 and that of judges and prosecutors from 7 to 5, giving the casting vote to the President, and narrowing the Council's remit.

It is apparent that the Draft Amendments presented to the public by the Ministry on 22 January 2018 reflects arrangements put forward by this 'network', which are completely the opposite of what was proposed by all other stakeholders, including the Working Party of the Commission to Implement the National Strategy, judges' and prosecutors' professional associations, and actual non-governmental organisations involved in safeguarding human rights and issues of the judiciary. Key judicial institutions shared the views of the professional associations: the Supreme Court of Cassation came out with its Assessment [Serbian] on 12 February 2018; the HJC published its Opionion and Suggestions; the SPC released its Opinion on 19 February 2018; numerous courts have demanded that the Draft Amendments be withdrawn, a request also voiced by 15 reputable professors of constitutional law, theory of the state and legal theory, and law of the organisation of the judiciary, at a public hearing [Serbian] that took place on 20 February 2018.[28] Therefore, all the relevant stakeholders, both in the judiciary and in academia, presented proposals for constitutional amendments in mutual agreement: these would remove political interference in the judiciary and promote judicial independence and prosecutorial autonomy, in accord with Serbia's legal traditions, needs, and abilities, on the one hand, and international legal standards, on the other. Yet not only did the Ministry withhold its reasons for rejecting the nearly unanimous

[27] According to information available at the time on the Ministry of Justice web site, the Rolan was made up of the Institute for Criminological and Sociological Research, the Serbian Association for Legal Theory and Practice, Judicial Academy Alumni Club, and the Europius Civic Association (registered on 29 March 2017, according to the Associations Register maintained by the Business Registers Agency). The statutory representative of the association, Milica Kolaković-Bojović [Serbian] is a member of Serbian Association for Legal Theory and Practice and works for the Institute for Criminological and Sociological Research. In addition, she served on the Drafting Group for the National Judicial Reform Strategy, 2013-2018; co-ordinated the development of the associated Action Plan insofar as it concerned the efficiency of the judiciary; and also served as member and technical co-ordinator of drafting groups for amendments to the Law on the High Judicial Council and the Law on the State Prosecutorial Council (2013-2014). Since 2013, she has been active in EU accession negotiations: from 2014 to 2016 she co-ordinated the development of the Chapter 23 Action Plan, and from 2015 to 2017 she chaired the Council for Implementation of the Chapter 23 Action Plan.

[28] As a means of contributing to debate on the Working Draft of Amendments to the Constitution of Serbia, the Judges' Association of Serbia and Prosecutors' Association of Serbia organised the public hearing with the participation of 15 reputable academics, Professor Dr Ratko Marković, Professor Dr Irena Pejić, Professor Dr Darko Simović, Professor Dr Olivera Vučić, Professor Dr Dragan Stojanović, Professor Dr Marijana Pajvančić, Professor Dr Jasminka Hasanbegović, Dr Bosa Nenadić, Professor Dr Tanasije Marinković, Professor Dr Vesna Rakić-Vodinelić, Professor Dr Radmila Vasić, Professor Dr Zoran Ivošević, Professor Dr Marko Stanković, Professor Dr Violeta Beširević, and Professor Dr Kosta Čavoški of the Serbian Academy. All of the attendees differed in age, professional backgrounds, and political orientation, but shared their commitment to the theory and practice of law. All agreed that the amendments were deficient to such an extent that any efforts to improve them were doomed to failure, and that an entirely new text should be developed in compliance with constitutional procedure. An unedited video recording of the event can be found on the Judges' Association web site; written contributions of all 15 academics will be made available in a special publication.

proposals of the community of experts, but it never even mentioned them. Furthermore, the Minister's claims that she had 'yet to see' an opinion disputing the proposed arrangements, as well as that the Draft Amendments would not be withdrawn, show that she has failed to consult the materials submitted in the course of 2017, in particular the submission of the Judges' Association that commented on the features now put forward in the Draft Amendments, and, ultimately, reactions to the Draft Amendments themselves. The Ministry's assertion that it relied on written submissions received during the public consultation is therefore untrue.

4. The Ministry's claim that '[t]he working text is defined with the preliminary assistance of the CoE expert Mr. James Hamilton', as well as statements made by the Ministry's officers as to the proposals having been endorsed by the Venice Commission, mislead the public about the role of the expert in question and the Venice Commission in the process. At any rate, such pronouncements seem to be an attempt to lend credibility to the proposed arrangements in the absence of true argumentation.

5. Given the circumstances outlined above, and in view of the fact that as little as one month was allowed for the so-called public consultation, the Ministry's contention that the Draft Amendments *constituted the starting point for public debate on amending the Constitution of the Republic Serbia, planned for February and March 2018, after which the amendments were to be submitted to the Venice Commission for comments*. The Ministry's officers stated that only comments provided in writing that contained specific proposals to alter the Draft Amendments would be admitted if made no later than 8 March 2018, after the end of the consultation period (5 March 2018), the only appropriate conclusion is that the consultations were nothing more than a rubber-stamping procedure.

Even though the roundtables, which began on 5 February 2018, were presented as the continuation of the so-called 'consultation process' of 2017, the Draft Amendments do not contain justification for the Ministry's choice of arrangements put forward and its reluctance to take into account the arguments of professional associations and civil society organisations, made both orally and in writing during the 2017 'consultations', which indicated that the amendments would further politicise the judiciary and make it dependent on political influence. Finally, the Ministry never even referenced the 2014 Legal Assessment, whose conclusions and suggestions underlie the proposals referred to above that accord with the legal order, tradition, and capabilities of Serbia, as well as with European standards.

The Ministry had decided to organise public consultation about the Draft Amendments in the form of four roundtables in four Serbian cities[29] in the space of one month (from 5 February to 5 March 2018). The first two events, in Kragujevac in Novi Sad, already demonstrated there would be no change in the approach used for the preceding consultations. The participants remained unknown; persons brought into contact with the judiciary by

[29] The roundtables were to be held in Kragujevac (5 February 2018), Novi Sad (19 February), Niš (26 February), and Belgrade (5 March), but no detailed agenda had been published by as late as 4 February.

unfortunate series of events were allowed to speak and re-iterate their unfavourable experiences; there was no debate; and the Ministry's officers in attendance did not feel compelled to explain who proposed the amendments and why, although the arrangements drew criticism from judges, prosecutors, the Supreme Court of Cassation, HJC, SPC, and judges' and prosecutors' associations. Moreover, Čedomir Backović, Assistant Minister of Justice and member of the Venice Commission, who had previously disparaged and insulted the participants in the debate in his public and media appearances, expressed his amazement at the fact that some of those present were able to remain judges and prosecutors. He also openly threatened the President of the Judges' Association of Serbia and other judges during a televised interview on 15 February 2018, when he said 'I would be glad to do harm to you and those like you'. These circumstances forced the professional and other associations to again withdraw from the consultations, as explained in their joint statement [Serbian].

Professional associations of judges and prosecutors are aware that constitution-makers will be responsible for determining the organisation of the government, after having gained public endorsement for doing so in a referendum. Nevertheless, true legitimacy can only be ensured by an open exchange of professional arguments, especially in view of the government's invitation to professional associations, courts, prosecutors, and other bodies of the judiciary to participate in this process. The Government's power to alter the Constitution is not being disputed. What is being disputed, however, are its attempts to portray efforts to amend the Constitution as the result of the Government 'listening to the people' in a lightning-fast, one-month 'public consultation'. As the past 'consultation process', and the current roundtables in this 'public consultation', are all nothing but a sham that has no connection with either democracy or professional, properly argued debate, it is clear that no consultation has ever taken place. The Government's claims to that effect have to be backed up by appropriate action.

III Comments on the proposed arrangements

In its Report on the Independence of the Judicial System (CDL-AD (2010)004) of 16 March 2010, the Venice Commission, the sole authority referenced by the Ministry, lists the standards that '*should be respected by states in order to ensure internal and external judicial independence', with the following standard cited first: 'The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability*' (para. 82).

1. Missing features

1.1 Systematic regulation of the relationship between the three branches of government

Certain officers of the executive power and other politicians, as well as a number of associations with close ties to the government, have in recent years claimed that government in Serbia was subject to no checks and balances, and that the principles of separation of powers and judicial independence, enshrined in Article 4 of the Constitution, were the *greatest challenge to establishing such checks and balances*. Overcoming this limitation, it has been claimed, would require placing constraints upon the judiciary that lacked any democratic legitimacy. Another view that was presented was that Serbia, an EU candidate country, was empowered to choose for itself any of the arrangements employed by the various European states in the absence of a common European *acquis* governing the judiciary.[30] It follows that the governing coalition believes too much attention has been given to the independence of the judiciary, which is insufficiently responsible and responsive, unpredictable (given the inconsistency in its decision-making), and devoid of legitimacy (as it was unelected and constituted a closed profession).

The issue of the legitimacy of governmental authority, which is gained by winning an election, on the one hand, and the separation of powers and independence of the judiciary, which must be professional, on the other, is nevertheless only a theoretical one. In common-law countries this problem may be somewhat more pronounced, as there in making decisions judges enter to some extent into the remit of the legislature. In civil law jurisdictions, such as Serbia, no constitution has ever prevented or hindered the legislative or executive power from adopting a law or regulation or taking any other action from its remit pertaining to the judiciary ('permitted influence'). On the contrary, on multiple occasions the Serbian Constitutional Court has even declared unconstitutional laws and other enactments applicable to the judiciary enacted by the legislative and the executive power, but not the judiciary itself. On the other hand, if the legislative and executive were denied the ability to exert any undue influence on the judiciary, Article 149.2 of the Constitution has achieved its purpose.

It is true that Article 4.3 of the Constitution, which stipulates that the government is based on 'balance and mutual control' is at odds with the principles of the separation of power (para. 2) and the independence of the judiciary (para. 4), as well as Article 145, which states that court decisions are obligatory for all and may not be subject to extra-judicial control (para. 3) but may only be reviewed by an authorised court in a legal proceeding prescribed by law (para. 4). However, the relationship between the branches of government, as defined in Article 4(3) cited above, is applicable to a presidential system, rather than the parliamentary one applied in Serbia. If this principle is to be enshrined in

[30] The untenability of this approach has already been demonstrated in the section on European standards above (pages 5 to 9).

the constitution at all, it should read: 'The relationship between the legislative and the executive branches of government shall be based on balance and mutual control'.[31] Moreover, even the Venice Commission's 2007 report on judicial appointments, so frequently cited by the Ministry, admits that '*[t]o the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model'* (para. 17).

The arrangements put forward in the Draft Amendments seem, by contrast, designed to bring the judiciary, which is 'excessively' independent, uncontrollable, and 'mutinous', back under the 'legitimate democratic' control of political authority. This is the only explanation for the absence from the Draft Amendments of the current constitutional provisions whereby court rulings are binding on all and may not be subject to extra-judicial control (145.3) and influence on judges in the exercise of their judicial function is prohibited (149.2).

1.2 Substance of Judicial Power

Neither the current Constitution nor the proposed amendments define the substance of the judicial power. This is a highly topical issue as over the past two decades judicial powers, and, consequently, the ability to make decisions concerning rights, have continuously and systematically been removed from the courts[32] and awarded to entities with no guarantees of independence[33] (Business Registers Agency, National Land Survey Agency, notaries public, enforcement officers, the prosecution service), although such independence is a

[31] Ratko Marković *Устав Републике Србије – критички преглед* [*Constitution of the Republic of Serbia: A critical assessment*], ИПД Јустинијан д.о.о, 2006, pp. 15-16; *Правна анализа уставног оквира о правосуђу у Републици Србији,* Радна група за израду анализе уставног оквира Комисије за реформу правосуђа, pp. 5-6, 33, available online at mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php [in Serbian], accessed on 18 February 2018.

[32] A number of claims were advanced in justification of this, including the need to improve efficiency and reduce caseload and delays by relieving courts of duties not typically within their purview. And yet no analysis was ever performed of which of these duties were untypical for courts (or where exactly the border ran between the judiciary and other branches of government); how many judges were assigned to these duties; and what would the costs and benefits be for the government and the public of removing the powers in question from courts. Statistics for 2014, for instance, reveal that 197 enforcement officers completed 167,000 enforcement cases (involving collection of monetary claims, the simplest and easiest procedure to complete); enforcement officers, unlike courts, are able to access information held by the National Pension and Disability Insurance Fund and make use of personal identification numbers of members of the public, which makes it substantially easier to find debtors and use their assets to settle a claim. Over the same period of time, just slightly fewer enforcement judges (195) completed 326,000 enforcement cases, nearly twice as many as enforcement officers did. And in doing so the judges handled all types of enforcement, including cases that were highly complex (child custody, sale of real property, etc.) and time-consuming as they required numerous actions in several stages.

[33] These include the authority to maintain records of title to real estate and business registers; compile, certify, and issue public instruments regarding legal transactions, declarations, and facts underlying title, and certify private instruments and legal transactions and deal with matters of probate (although notaries public act in probate matters pursuant to court rulings, the judges are nevertheless expected to grant probate); enforcement (except for shared sale of immovable and movable property, issues related to family law, and reinstatement of employees).

necessary precondition for a fair trial in any proceedings. The status and organisation of some of these entities (such as enforcement officers and notaries public) is under the direct influence of the Ministry of Justice, an executive authority, which determines their numbers, seats, areas of jurisdiction, and fees; appoints and dismisses them; designs their licensing examinations; appoints their examination boards; supervises both them and their respective self-regulators; and serves as the appellate body in disciplinary proceedings. Therefore, proceedings pursued by these persons within their remits (although not 'trials') lack all the features required for a fair trial under Article 32 of the Constitution of Serbia and Article 6 of the European Convention on Human Rights (independence, impartiality, and publicity). This matter is also important for the delimitation of the powers of courts, which exercise judicial powers, and the Constitutional Court, which, according to the Constitution of Serbia, does not exercise judicial power.

The Constitution is eminently clear as who are the holders and what is the substance of the legislative and executive powers. Parliament is the legislative authority (Article 98), whereas the Government is the executive (Article 122). The Constitution defines the substances of these authorities by stipulating the competences of their powers: those of the Government are set out in Article 123, and those of Parliament in Article 99. The latter is now proposed to be amended by Amendment I, which would see the removal of Parliament's responsibility for initial judicial appointments and appointment of members of the HJC and court presidents (decision-making arrangements, currently regulated by Article 105 of the Constitution, are to be altered by Amendment II that envisages a special qualified majority of three-fifths of all MPs, or five-ninths for appointment of HJC members, as will be discussed in more detail below).

The Constitution does define the judicial power, by stipulating that '*[j]udicial power in the Republic of Serbia shall belong to courts of general and special jurisdiction'* (Article 143.1); this, however, is proposed to be changed by Amendment III, which defines courts as 'state authorities'.[34] Nonetheless, neither the Constitution nor the amendments define the substance of the judiciary, as neither prescribe or otherwise define the jurisdiction of judicial authorities (the courts). Moreover, the Constitution does not elucidate the relationship between courts and the Constitutional Court, although practice has here revealed a number of issues to be particularly sensitive for the status of the judiciary: these include deciding upon judges' appeals against the HJC's dismissal rulings, the need to clearly distinguish between the competences of courts and the Constitutional Court in human rights cases involving constitutional complaints,[35] and ruling in conflicts of jurisdiction.[36]

[34] Paragraph 1 of Amendment III, *Courts*, states: 'Judicial power shall belong to courts as autonomous and independent state bodies'.

[35] For a detailed discussion, see Stojanović D., *Уставно-судско испитивање судских одлука* [*Constitutional-Legal Review of Court Rulings*], Зборник радова Правног факултета у Нишу, [Collecion of works of the Law Faculty in Niš] 74/2016, pp. 35-53.

[36] 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.' (UN Basic Principles on the Independence of the Judiciary, para. 3); 'Only judges themselves should decide on their own

1.3 Financial safeguards of independence

In countries that require the principles of the separation of powers and judicial independence to be further strengthened, it is both necessary and advantageous to guarantee the independence of judges and courts in the constitution and provide as comprehensive a definition as possible, as also enjoined by international standards.[37] In this regard, the Constitution must also contain financial safeguards of independence, both for the judiciary as a whole (in the form of a judicial budget)[38] and for individual judges,[39] by stipulating that each judge is entitled to a salary or pension compatible with the dignity and responsibility of judicial office, that the salary or pension must not be reduced, and that the pension must be reasonably proportional to the judge's final salary.

1.4 Freedom of expression and association of judges

Serbian Constitutions have to date not guaranteed freedom of expression and association to judges,[40] although these flow from the Universal Declaration of Human Rights and the European Convention on Human Rights (Articles 1 and 14), the only differences being that

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competence in individual cases as defined by law' (Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, chap. I, para. 10).

[37] Basic Principles on the Independence of the Judiciary (para. 1); European Charter on the statute for judges (para. 1.2), Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (para. 14); reports of the Venice Commission on Judicial Appointments (2007) (para. 5) and Independence of Judges (2010) (para. 22); Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities (chap. I, para. 7).

[38] Basic Principles on the Independence of the Judiciary (para. 7); European Charter on the statute for judges (para 1.6); Opinion No. 2 (2001) of the CCJE on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights (paras. 5, 10 and 14); report of the Venice Commission on the Independence of Judges (2010) (paras. 52 and 53); Recommendation CM/REC(2010)12 to member states on judges (para. 33); and the Magna Carta of Judges (para. 7).

[39] European Charter on the statute for judges (paras. 6.1-6.4); Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (para. 62); report of the Venice Commission on the Independence of Judges (2010) (paras. 46, 51); Recommendation CM/REC(2010)12 to member states on judges (para. 54); and the Magna Carta of Judges (para. 7).

[40] Documents other than the Basic Principles on the Independence of the Judiciary also recognise the entitlement of judges to these freedoms. These include the European Charter on the statute for judges (paras. 1.7, 1.8, and 4.2); CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (paras. 27, 28, 29, 39, 40, and 47 to 50); Recommendation CM/REC(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities (para. 60), CCJE Opinion No. 7 (2005) on justice and society (paras. 34, 52, and 55); the Magna Carta of judges (para. 12); Opinion No 806/2015 Report on the Freedom of Expression of Judges, CDL-AD(2015)018 wherein the Venice Commission, replying to a question by Honduras, assessed the legal framework governing the freedom of expression of judges in Council of Europe member states, in particular Sweden, Germany, and Austria; and a number of judgments of the European Court of Human Rights, particularly *Baka v. Hungary [GC]* – 20261/12**,** Judgment of 23.6.2016.

the particular duties and responsibilities entrusted to judges and the need to ensure the impartiality and independence of the judiciary are seen as legitimate justification for imposing limits on the freedom of expression, assembly, and association of judges, including on their political engagement.

And yet judges are citizens too, and so, as cited in the Basic Principles on the Independence of the Judiciary, they too must enjoy '*freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary*' (para. 8) and may '*form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence*' (para. 9). In the judgment of Baka v. Hungary, the European Court of Human Rights held that the applicant (a past President of the Hungarian Supreme Court) was not only entitled, but also bound by duty to express opinion about matters concerning the judiciary, which are a question of public interest, solely from a professional point of view. The Court found that the premature termination of the applicant's mandate discouraged other judges and court presidents from participating in public debate.

Moreover, the problems faced by Serbian judges in establishing a professional organisation and the experiences and achievements of Judges' Association of Serbia (and the Prosecutors' Association of Serbia) over the past twenty years have revealed that such professional associations were both watchdogs and correctives for undemocratic and illegal actions by government authorities. These organisations' efforts to preserve and strengthen the rule of law have safeguarded the constitutional order in alleviating (at least in part) the disastrous consequences of the so-called 2009 reform of the judiciary and have reinforced the need for strong guarantees to be put into place for freedom of expression and association of judges and prosecutors by enshrining these principles in the Constitution.

1.5 Constitutional Law to implement the amendments

Legal drafting logic, as well as experiences with the 2009 re-appointment of judges as mandated by the 2006 Constitutional Law to Implement the Constitution, mandate that the Constitutional Law be debated alongside the Constitution. Furthermore, the text of the Draft Amendments (ahead of Amendment I) states that '*Amendments I through XXIV are an integral part of the Constitution of the Republic of Serbia, which shall enter into force on the day of promulgation by the National Assembly*' (para. 1) and that '[a] Constitutional Act shall be passed to implement the Amendments I through XXIV of the Constitution' (para. 2). Doubtlessly, the true impact of the constitutional amendments can be ascertained only with reference to the content of the constitutional law intended to facilitate their implementation, but the Ministry has failed to make this piece of legislation available for public consultation.

2. Specific Provisions

The Working Draft includes 24 draft amendments, corresponding to the number of Articles of the Constitution on the judiciary – notably 14 articles on courts (Articles 142-155 of Chapter 7 Courts) and 10 articles on public prosecution services (Articles 156-165 of Chapter 8 Public Prosecution Services). The draft amendments are to replace the provisions of the following articles of the Constitution: Article 99 (Draft Amendment I), Article 105 (Amendment II), and all Articles in Chapters 7 and 8 of the Constitution, from Article 142 (to be replaced by Draft Amendment III) to Article 165 (Draft Amendment XXIV is to replace Article 163 and Articles 164 and 165 of the Constitution are to be deleted). Due to technical reasons, only some of the draft amendments will be commented in this text.

Draft Amendment II[41] **-** ***Decision-Making by the National Assembly*****:**

The Ministry provides the following statements of justification of this amendment, which introduces a special qualified (three-fifths and unusual nine-fifths) majority of all deputies for the adoption of decisions on the election of the High Judicial Council, High Prosecutorial Council and the Supreme Public Prosecutor: *EXPLANATION OF THE REVISED JURISDICTION FOR THE APPOINTMENT OF JUDGES AND COURT PRESIDENTS The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. Judicial Appointments CDL-AD (2007)028, para. 25*[42].

This statement of justification clearly does not regard the content of the draft amendment. It might pertain to Draft Amendment I amending Article 99, which deprives the Assembly of the power to elect first-time judges to probationary three-year tenure, court presidents and the High Judicial Council (and deputy public prosecutors, public prosecutors and State Prosecutorial Council members).

The qualified majority by which the NA will elect HJC members needs to be borne in mind with respect to this Draft Amendment – it requires a three-fifths majority (150 deputies) and, *in the event they are not all elected in this manner, the remaining members shall be elected within the following ten days by a five-ninths majority* (138,9 deputies) *by which they shall also be dismissed.* The unusual five-ninths majority, which almost corresponds to the number of deputies the ruling majority has in the Assembly (104 deputies of the ruling SNS party + 42 deputies from the parties members of the ruling coalition), stands out.

There is no doubt that a qualified majority is preferable in order to establish an important institution, or in order to elect public officials of such high importance. Such qualified majority would mean the inclusion of the opposition and therefore ensure the element of

[41] The Ministry did not provide statements of justification for every draft amendment.
[42] Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e

social consensus and stability. However, in case such a majority is not provided, the Draft resorts to a solution in which the HJC membership is practically elected by the ruling majority. Special attention should be drawn here to Article 5(4) of the Constitution, under which political parties may not exercise power directly or subject it to their control.

Draft Amendment III *7. Courts – Principles on Courts*

No statement of justification is provided for this Draft Amendment, which is to replace Article 142 of the Constitution entitled Judiciary Principles. Paragraph 1 of the Draft Amendment, under which [*J*]*udicial power shall be vested in courts as autonomous and independent state authorities,* is actually an amendment of paragraph 1 of Article 143 of the Constitution, which reads: *Judicial power in the Republic of Serbia shall be vested in courts of general and special jurisdiction*. Judicial power will thus be "lost" by the definition of courts as state authorities. The draft provision does not mention the types of courts (of general and special jurisdiction) either.

The deletion of paragraph 5 of Article 142, under which *[T]he law may also lay down that only judges may adjudicate in specific courts and specific matters,* is also interesting in view of the fact that the Constitution in this Chapter lays down guidelines for regulating the judiciary. Paragraph 5 was based on the legislator's intention to introduce the specialisation requirement to improve the quality and efficiency of court proceedings. Although its omission does not amount to a prohibition of the requirement that solely judges are to rule on specific matters, it allows for the establishment of another trend – the "plebeisation" of the courts because it introduces the possibility of lay judges participating in the work of appeals chambers of higher, appellate courts and in chambers of courts with special jurisdiction (commercial, administrative courts) and even of the highest court. The participation of eminent laymen – lay judges – in the adjudication of specific matters before first-instance courts is welcome, because they are part of the people in whose name the judgments are delivered, i.e. part of the community with specific values, which the courts also bear in mind when ruling on matters, which contributes to the understanding of how the court system functions and to confidence in the judiciary. However, the involvement of lay judges in the adjudication of matters requiring particular knowledge of law may also lead to the imposition of an unnecessary burden on the course of the court proceedings and even to the risk of pressures on the judges (to recall, the Working Draft omits the prohibition of influence on judges, now laid down in Article 149(2) of the Constitution). Lay judges are not prohibited from pursuing political activities or being members of political parties. If the tenures of lay judges are perceived as a way to "find a livelihood" for political sympathisers, which has already happened before, in exchange for which they would also perform the special role of "watchdogs" of judges, their participation in trials, particularly when they are in the majority in the trial chambers, may amount to undue influence on judges and perhaps even result in the rendering of court decisions "outside the court".

Draft Amendment IV – *Independence, Permanent Tenure and Non-Transferability of Judges*

This Draft Amendment is entitled Independence, Permanent Tenure and Non-Transferability of Judges. It is unclear why the Ministry offered only an explanation for the abolition of the "probationary" tenure and in such detail, as if that were the most controversial provision in the draft amendment. On the contrary, it is the least controversial one, wherefore the Ministry unnecessarily quoted the Venice Commission's 2007 Judicial Appointments Report again, particularly in view of the fact that the Commission precisely expressed its view on this issue in its Opinion on the Constitution of Serbia[43] of 18 March 2007.

Draft Amendment IV comprises seven paragraphs, each of which warrants attention. The text below will focus only on some of them. Nonetheless, the Ministry needs to explain (and this Draft Amendment is not accompanied by a statement of justification) why it omitted the provision in Article 149(2) of the Constitution prohibiting influence on judges.

1. *Judges shall be independent and perform their duties in accordance with the Constitution, ratified international treaties, the law and other general enactments. Consistency of case-law shall be regulated by the law.*

As opposed to the valid articles of the Constitution, notably Article 142(2), under which *[C]ourts shall be autonomous and independent in their work and perform their duties in accordance with the Constitution, the law and other general enactments, when so stipulated by the law, generally accepted rules of international law and ratified international treaties,* and the somewhat differently (more narrowly) defined sources of law under Article 145(2) of the Constitution, under which *[C]ourt decisions shall be based on the Constitution, the law, ratified international treaties and regulations adopted in accordance with the law,* paragraph 1 of Draft Amendment IV sets out the sources of law applied by judges.

The sources of law listed in paragraph 1 of Draft Amendment IV do not include generally accepted rules of international law or ratified international treaties, although they are an integral part of Serbia's legal order, as laid down in Articles 16(2) and 194(4) of the Constitution. If this provision is adopted, the constitutional provisions on sources of law forming an integral part of Serbia's legal order will be mutually inconsistent since the draft amendments do not include changes of the text of Articles 16(2) and 194(4).

The omission of the provision in Article 145(3) of the Constitution, under which [*C*]*ourt decisions shall be binding on everyone and may not be subject to extrajudicial control,* coupled with the second sentence of paragraph 1 of Draft Amendment IV, under which [*C*]*onsistency of case-law shall be regulated by the law,* will enable the introduction of a "Certification Commission", envisaged by the 2013-2018 Action Plan for the Implementation

[43] CDL-AD(2007)004, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e

of the National Judicial Reform Strategy (Strategic Guidelines 2.7.1.-2.7.4),[44] or a similar body (the Chapter 23 Action Plan does not mention a Certification Commission but its Recommendation 1.3.9 refers to the need to improve the consistency of the case-law by various means)[45]. Namely, after laying down that judges shall be independent and adjudicate in accordance with the Constitution, ratified international treaties, the law and other general enactments, paragraph 1 sets out that *"[C]onsistency of case-law shall be regulated by the law."* It is unclear why the amendment includes these norms when it is entitled *Independence, Permanent and Non-Transferability of Judges* unless case-law is set as a restriction of judicial independence.

As far as the provision regarding the Certification Commission is concerned, it needs to be noted that the establishment of a Certification Commission would amount to the establishment of a quasi court, a court above courts, on which the executive would have crucial influence by electing its associate members (lawyers and law professors). The "judges" of this "court above courts" would not be held responsible for the court decisions (responsibility for the judgments would remain with the judges who handed them down and signed them), but they would nevertheless have huge and unacceptable power over the judges – they would issue orders to judges and instruct them how to adjudicate, which would stifle all free judicial opinion. Furthermore, the imposition of the binding character of the case-law in another manner, including by a constitutional provision defining it as a source of law, would undermine the judges' internal independence and increase their inertia (a trait not only inherent to judges in Serbia), reduce trials to stereotype, discourage judges from rendering decisions based on their free opinion, lethally affect the fairness of trials and further impinge on public confidence in the judiciary, without which there can be no rule of law. The Venice Commission elaborates in detail the effects undermining the judiciary's internal independence by the introduction of case-law as a source of law in the Constitution in its Report on the Independence of the Judicial System, Part I: the Independence of Judges[46]: *68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less*

[44] Published in the Official Gazette of the Republic of Serbia 71/13, 55/14 and 106/16. Available at: https://www.mpravde.gov.rs/files/NSRJ_2013%20to%202018_Action%20Plan_Eng%202.1.pdf

[45] The Certification Commission is to comprise representatives of the Case-Law Departments of the Appeals Courts and the Supreme Court of Cassation, who are to work full-time on the "certification of judgments" with the support of "experts in the relevant legal areas and associates to act as *amicus curiae* – experts in various legal areas, representatives of lawyers and law professors". The Commission is to be tasked with identifying court decisions that represent best practices in specific types of disputes and ensure that other decisions in such cases are rendered in accordance with "established case-law", that is, to ensure that court decisions which, in the opinion of the Certification Commission, deviate from the case-law, do not leave the courts, and thus ensure consistent adjudication. Furthermore, there have been suggestions that judges, whose decisions are found to be deviating from the case-law and who do not want to change their views, are subject to disciplinary penalties. The establishment of a Certification Commission would amount to the establishment of a quasi court, a court above courts, on which the executive would have crucial influence by electing its associate members (lawyers and law professors). The "judges" of this "court above courts" would not be held responsible for the court decisions (responsibility for the judgments would remain with the judges who handed them down and signed them), but they would nevertheless have huge and unacceptable power over the judges – they would issue orders to judges and instruct them how to adjudicate, which would stifle all free judicial opinion (Ministry representatives have for months now been saying that they will abolish free judicial opinion).

[46] *CDL-AD(2010)004* of 16 March 2010, available at https://rm.coe.int/1680700a63.

important. 73. [t]he issue of internal independence arises not only between judges of the lower and of the higher courts but also between the president or presidium of a court and the other judges of the same court as well as among its judges. In paragraphs 71 and 72 of its Report, the Venice Commission 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. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection for judicial independence, both "internal" and "external", can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence*." (CDL(2007)003 at 61). 72. To sum up, ***the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity***.

The proposer's reference to the Venice Commission's Opinion on the Draft Judicial Code of Armenia[47] on the important role of the supreme court in ensuring case-law consistency when ruling on specific cases, with emphasis on the right of lower courts to deviate from the case-law of the supreme court in specific cases and its view that the supreme court may not act as the "legislator" is absolutely unnecessary since the Venice Commission has over the past 15 years given three consistent opinions on the consistent application of the law in Serbia[48]. Furthermore, the CoE Consultative Council of European Judges (CCJE) expressed an essentially identical, albeit more comprehensive, view on this issue in its Opinion no.

[47] Opinion *CDL-AD(2017)019* adopted on 7 October 2017, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)019-e.

[48] In their opinion of 24 June 2002, experts *Natalie Fricero*, a Nice Law School Professorm and *Giacomo Oberto*, a Turin judge, said they were strongly opposed to such a system of imposed interpretation. In its Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia (Opinion no. 464 / 2007 of 19 March 2008), the Venice Commission stated: "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." (paragraph 109)

In paragraphs 103-108 of its Opinion on Draft Amendments to the Laws on the Judiciary of the Republic of Serbia (Opinion No. 202/2012 of 11 March 2013, *CDL-AD(2013)005*), the Venice Commission commented amendment of Article 31 of the Law on the Organisation of Courts under which the Supreme Court of Cassation shall *give opinions on draft laws and other regulations governing issues of relevance for the judicial branch.* It said it had been *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. 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.*

20(2017) on the Role of Courts with Respect to the Uniform Application of the Law[49], in which it, inter alia, underlined: the importance of argumentation set out in court decisions; the primary role of the supreme court and the important role of appeals courts in addressing inconsistent case-law, means for ensuring consistent and uniform case-law and development of law by ruling on court cases before them; that although legal interpretations, views, opinions, binding instructions, et al, may have a positive impact on uniformity of the case-law and legal certainty, they raise concerns from the viewpoint of the proper role of judiciary in the system of separation of state powers; that, under the civil law system, inferior courts may depart from settled case-law of hierarchically superior courts provided they set out their arguments for doing so; that a judge acting in a good faith, who consciously departs from the settled case-law and provides reasons for doing so, should not be discouraged from triggering a change in the case-law and that such departure from the case-law should not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary; and that all three branches of government have an obligation to foster coherent legal rules and coherent application of these rules[50]. This issue is also addressed in other European documents on standards, including Recommendation CM/REC (2010)12 (paragraphs 5, 22 and 23), albeit in a totally different way than the one planned by the Ministry; the former warn that free judicial opinion should not be restricted.

Caution should be exercised to avoid hasty conclusion that the identified and undisputed case-law inconsistencies can be addressed by a seemingly simple shift to an entirely different (common law) system or by another seemingly easy solution. Incorrect and rash solutions cause damage that cannot be remedied even by best adjudication and that take decades to rectify. The proposed provisions are not only in contravention of Serbia's legal system and tradition[51], but will also undermine the judges' internal independence. There have already been situations in practice of disciplinary proceedings being instituted against judges who did not want to change their decisions, because they disagreed with the views of their peers who thought they should. This led to a debate within the courts and the phenomenon was cited in official documents, as a threat to judicial independence[52].

[49] Available at: https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3

[50] More on the problems regarding the courts' (in)consistent application of the law in their decisions, differences between the common and civil law systems, and, in that regard, various causes of the inconsistent application of the law, many of which are outside the judiciary, and the European Court of Human Rights' views on the issue (in its judgment in the case of *Vučković and Others v. Serbia* (App. No. 17153/11 of 28 August 2012) in the JAS text "Comments on the Proposed Concepts and Concept Proposals for Amendments to the Constitution of the Republic Of Serbia" of 25 August 2017, pp. 20-30, available at: http://www.sudije.rs/index.php/en/aktuelnosti/constitution/250-judges-association-of-serbia-comments-on-the-proposed-constitutional-amendments.html.

[51] Modern Serbian statehood was established in the 19th century. Serbia adopted its first Constitution in 1835 (when only nine states in Europe had a written constitution) and its Civil Code adopted in 1844 was the third civil code to be adopted in Europe, after the French and Austrian ones.

[52] 2013 Annual Report by the Protector of Citizens of the Republic of Serbia, p. 3, and the European Commission's 2014 Serbia Progress Report, p. 70.

2. *Only individuals who completed special training in a judicial training institution established by the law may be appointed judge in a court with exclusively first-instance jurisdiction under the law.*

One of the obligations Serbia assumed under the Chapter 23 Action Plan with respect to amending the constitutional provisions on the judiciary, with a view to ensuring (strengthening) its independence, and in regard to Venice Commission's recommendations[53] is to ensure *that the system for the recruitment, selection, appointment, transfer and termination of judicial officials be independent of political influence and that entry in the judiciary be based on merit-based objective criteria, fair in selection procedures, open to all suitably qualified candidates and transparent in terms of public scrutiny*. (1.1.1.1.).

Competence is prerequisite for the performance of judicial office and, in addition to judicial integrity, is one of the main criteria for becoming a judge. *The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality*.[54] It goes without saying that judges recruited into the Serbian judiciary must possess competence and integrity. This issue is directly linked to the initial training of law graduates, which is a way, a means, to facilitate to the forming of judges who are *capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness*[55].

There is no uniform system of training for judges and prosecutors in European countries[56]. Various training methods and systems are equally functional and applicable, depending on the tradition and economic strength of each and every state. In any case, [A]n independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office[57], and such training must be delivered by eminent and acknowledged lecturers and in an adequate interactive manner. Back in 2001, the JAS established the Judicial Centre in cooperation with the Serbian Government. Neither the then nor the valid Constitutions have created any obstacles to the existence or work either of the Judicial Centre or the Judicial Academy, wherefore the question now arises why the Ministry insists on including a judicial training institution in the Constitution, especially since the

[53] Venice Commission's Opinion no. 405/2006 on the Constitution of the Republic of Serbia of 19 March 2-17, *CDL-AD(2007)004*.
[54] CCJE Opinion no. 17(2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, paragraph 1, available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=2256555&Site=COE&direct=true.
[55] CCJE Opinion no. 10(2007) on the Council for the Judiciary at the service of society, paragraph 68, available at: https://rm.coe.int/168074779b.
[56] More on the competences and training of judges and prosecutors, their purpose, practices in various European states, Serbia's experiences in this area, shortcomings, consequences and suggestions in the JAS' document Comments on the Proposed Concepts and Concept Proposals for Amendments to the Constitution of the Republic Of Serbia of 25 August 2017, pp. 30-37, available at: http://www.sudije.rs/index.php/en/aktuelnosti/constitution/250-judges-association-of-serbia-comments-on-the-proposed-constitutional-amendments.html.
[57] Recommendation CM/Rec(2010)12 of the CoE Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 57.

Judicial Academy is not independent of either the executive or the legislature[58]. The Justice Ministry thus apparently aims to preclude the repetition of the situation when the Constitutional Court (in its decision of 6 February 2014[59]) declared unconstitutional the provisions of the Judicial Academy Law restricting the constitutionally defined jurisdiction of judicial councils to elect judges and deputy public prosecutors (only from among the ranks of candidates selected by another entity) and violating the principle of equality of all citizens in the same legal situation by *concepts according to which individuals who have not completed initial training at the Judicial Academy are by that fact essentially eliminated from the list of candidates for first-time judges in specific types of courts and first-time deputy public prosecutors in specific types of public prosecution services, especially in view of the fact that the Academy graduates primarily discharge the duties of judicial or prosecutorial assistants during their initial training, just like judicial and prosecutorial assistants, who are not the "beneficiaries" of such training.*[60] This view was also taken by the Supreme Court of Cassation in its Analysis of the Draft Constitutional Amendments of 12 February 2018, as well as the Working Group that drafted the Legal Analysis of the Constitutional Framework on the Judiciary. In paragraph 6 of the Introduction to its Legal Analysis, the Group specified: *As per the introduction of the completion of the Judicial Academy as a mandatory eligibility requirement for first-term judges and public prosecutors, this Working Group supports the position taken by the Working Group for Judicial Academy Reform and Development, that the Judicial Academy should not become a constitutional category. The introduction of the completion of the Judicial Academy as a mandatory eligibility requirement for first-term judges and public prosecutors may be set as a strategic goal that will be feasible after a thorough reform of the concept of the Judicial Academy.*

Politicians in Serbia, aided by the all-too-conventional practices of the Brussels administration and their insufficient understanding of the domestic circumstances, persist with particular zeal in their intent to make the still feeble Academy the only or at least the dominant system for recruiting judicial officials from among recent law graduates. Such zeal seems to justify concerns that the Academy might become a hidden, yet effective channel of political influence on the courts, which the government wants to establish, because it will have to give up the right to elect judges and deputy public prosecutors after the constitutional reforms. In this manner, by selecting the future Academy students in an insufficiently controlled and transparent procedure, the government will in advance influence the recruitment of judges.

7. *Judges may not be transferred to other courts without their consent, except in the event of the reorganisation of the court system pursuant to a decision by the High Judicial Council.*

[58] CCJE Opinion no. 4 (2003) on Appropriate Initial and In-Service Training for Judges at National and European Levels, paragraph 13, available at: https://www.inj.md/sites/default/files/CCJE%282003%29OPI4_en.pdf.

[59] Constitutional Court Decision on the unconstitutionality of paragraphs 8, 9 and 11 of Article 40 of the Judicial Academy Law (Official Gazette of the Republic of Serbia 104/2009), published in the Official Gazette of the Republic of Serbia 32/2014 of 20 March 2014.

[60] *Ibid.*

Another obligation Serbia assumed under the Chapter 23 Action Plan with respect to the amendment of the constitutional provisions on the judiciary and with a view to ensuring its independence regards ensuring that the system of transferring judicial officials is independent of political influence. This has not been a problem in reality to date. Namely, Article 150 of the valid Constitution guarantees the non-transferability of judges. Under this Article, judges shall be entitled to exercise their office in the court they had been elected to and may be transferred or reassigned to another court only with their consent (paragraph 1). Paragraph 2 of that Article lays down that judges may exceptionally be permanently transferred or reassigned to other courts in accordance with the law and without their consent in the event of the abolition of the court they had been elected to or the revocation of the substantial part of the jurisdiction of that court.

However, paragraph 7 of Draft Amendment IV abolishes non-transferability, one of the safeguards of judicial independence[61]. The non-transferability guarantee has been omitted and the exception (transfers without the judges' consent) has become the rule. This gives rise to particular concern in view of the fact that the Draft Amendment "introduces" a vague and as yet legally unknown expression "reorganisation of the court system". Contrary to the obligation to ensure that transfer of judicial officials is independent of political influence, the ruling majority will be able to transfer judges against their will to other courts, of any kind, degree or jurisdiction, in case of the "reorganisation" of the court system (because it will have the votes of five members of the HJC it elects and the casting vote of the HJC Chairperson). In addition to the already listed negative effects, this will pave the way for punishing politically "disobedient" judges and prosecutors.

In its Opinion No. 17(2014), the CCJE has said that *judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice*[62] (paragraph 5), *such as a lack of financial resources*[63], *problems concerning the initial and in-service training of judges*[64] *and the unsatisfactory elements regarding the organisation of the judiciary and also the possible civil and criminal liability of judges*[65].

The problem of inequitable caseloads of courts and judges has indisputably reflected on lack of access to justice within a reasonable time because it takes the courts and judges shorter or longer periods of time to rule on the cases, depending on their caseloads. Access to justice within a reasonable time requires that trials, including enforcement of court decisions, be completed within a reasonable, as well as optimal and foreseeable time. The problem of inequitable caseloads of courts and judges is the consequence of the inadequate court

[61] More on the inequitable caseloads of courts and judges, as one of the three main problems in Serbia's judiciary, alongside insufficient independence and training, in the JAS text "Comments on the Proposed Concepts and Concept Proposals for Amendments to the Constitution of the Republic Of Serbia" of 25 August 2017, pp. 4, 8, 9 and 13-20, available at: http://www.sudije.rs/index.php/en/aktuelnosti/constitution/250-judges-association-of-serbia-comments-on-the-proposed-constitutional-amendments.html.

[62] CCJE Magna Carta of Judges (2010), paragraphs 3 and 4.

[63] CCJE Opinion no. 2(2001), paragraph 2.

[64] CCJE Opinion no. 4(2003), paragraphs 4, 8, 14 and 23-37.

[65] CCJE Opinion no. 3(2002), paragraph 51.

network, inadequate jurisdiction of the courts, and lack of judges sitting on courts in some towns.

It needs to be borne in mind that the allocation of judges depends on the High Judicial Council whereas the network of courts and their jurisdiction are governed by the law, and hence the responsibility of the legislative and executive authorities. This is why European standards entail specific state obligations in that respect. Under Council of Ministers Recommendation Rec 2010(12) on judges: independence, efficiency and responsibilities, [*T*]*he authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality* (paragraph 32); *Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently* (paragraph 33); *A sufficient number of judges and appropriately qualified support staff should be allocated to the courts* (paragraph 35).

Insistence on the fulfilment of the efficiency requirement at all costs, including the weakening of the non-transferability principle, an element of judicial independence, is not based on a comprehensive analysis of the reasons for the courts' backlogs and the judges' inequitable caseloads. This is why it has led to the unacceptable conclusion that, due to the provisions in Article 150, *the Serbian Constitution includes a much more rigid approach to the transferability of judges than the EU standards, which has produced consequences at several levels, the most important of which is the impossibility of significantly improving the court network by judicial mobility and thus improving access to justice, although precisely the latter must be the priority*[66]. This is how ROLAN commented the provision that found its way in the Working Draft and JAS quotes it here in the attempt to understand why the proposer opted for this solution but failed to provide a proper statement of justification of the Draft Amendment. Easier and more frequent transfers of judges would undermine the efficiency of the court system and cause effects contrary to those adduced to justify the weakening of the guarantees of independence – the trials would last longer because the transferred judges would need time to familiarise themselves with the cases, the statutes of limitations in criminal cases would expire and the court system would become more expensive (because all the housing and travelling costs of the transferred judges would have to be covered). It is therefore clear that easier transfers of judges against their will cannot make up for the deficiencies in the work of the legislative and executive authorities, which are charged with defining the court network and the jurisdiction of the courts.

Without any intention of neglecting the role and responsibilities of the judges, it nevertheless has to be pointed out that the reform process primarily depends on the direction set in the Constitution and the adequate and applicable laws governing the court network, jurisdiction of courts and procedural rules, which are adopted in accordance with them (and these laws

[66] Document outlining the amendments proposed by the Rule of Law Academic Network (ROLAN), page 27.

are not adopted by the judiciary, but by the legislature, which votes in legislation submitted by the executive government). The *ad hoc* judicial transfer measure, which this provision of the Draft Amenment turns into a rule for (mis)managing the court system, cannot, in the long term, improve the judiciary, notably the efficiency of the system and access to justice. It will, however, definitely result in lowering the level of judicial independence guarantees, provide for the possibility of further undermining judicial independence and thus of the citizens' right to a fair trial.

High Judicial Council: Draft Amendments VIII – Jurisdiction**; IX –** Composition; **XI –** Chairperson**; XII –** Work and Decision-Making

Eleven of the 24 draft amendments regard the judiciary; as many as six of them regard the High Judicial Council. They will be analysed together because that is the only way to gain insight in their effects. Section 1.1 of the Chapter 23 Action Plan on judicial independence (page 29) clearly states that the Republic of Serbia shall ensure the following in response to the EU's recommendations in the Screening Report: *The strengthening of the role of the High Judicial Council and State Prosecutorial Council in terms of the management of the judiciary, as well as the supervision and control of the judiciary; that they will have at least 50% of their members, selected by their peers, from amongst the ranks of judges and public prosecutors and representing different levels of jurisdiction (the role of the National Assembly is solely declaratory).* The JAS disagrees with this commitment, since it considers that it reduces the attained degree of independence and of the right to a fair trial (more below)

As per Draft Amendment VIII, the title of which leads to the conclusion that it regards the jurisdiction of the HJC, it is unclear why the Ministry gave the following title to its statement of justification: *Statement of justification of the Revised Jurisdiction for the Appointment of Judges and Court Presidents* or why it mentions judicial appointments and promotion and disciplinary measures against judges in its statement of justification. As elsewhere, the Ministry referred to the Venice Commission, notably its 2007 Report on judicial appointments[67], as the only source of standards governing this issue.

Draft Amendment VIII significantly limits the HJC's jurisdiction, which is "concealed" by the list of some of its competences that definitely should not be mentioned in the Constitution (e.g. collection of statistical data). Particular concern is caused by the fact that the HJC will no longer be charged with guaranteeing the independence of judges, but only with guaranteeing the independence of courts. The CCJE discussed the connection between the judicial council's composition and competences in its Opinion no. 10(2007) (paragraphs 44-47)[68]. Namely, if the Council has broad competences, especially if it manages the court

[67] *Judicial Appointments CDL-AD (2007)028*, paragraph 25.

[68] *Also there should be a close connection between the composition and the competences of the Council for the Judiciary. Namely, the composition should result from the tasks of the Council for the Judiciary. Certain functions of the Council for the Judiciary may require for example members of the legal professions, professors of law or even representatives of civil society*. (paragraph 45.).
Among Councils for the Judiciary, a distinction can also be made between Councils performing traditional functions (e.g. in the so-called "Southern European model" with competences for appointment of judges and

budget, it needs to have a mixed composition, in order to ensure the legitimacy of its work. However, if it has fewer competences, which practically boil down to the judges' status-related issues, there is no justification for changing its composition and reducing the number of its members from among judges (which is what Draft Amendment IX envisages: a reduction of members from among the ranks of judges from seven to five): *When there is a mixed composition in the Council for the Judiciary, the CCJE is of the opinion that some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel*.(paragraph 20).

The Draft Amendments change the number of members, the composition of the HJC and the way in which its members (Draft Amendment IX) and its Chairperson (Draft Amendment XI) are elected, as well its working and decision-making procedures (Draft Amendment XII). They therefore formally fulfil part of the obligations under the Chapter 23 Action Plan, because the judges will have 50% of the seats on the Council, which is the minimum Serbia committed to and much less than the judges have now. The HJC will now have 10 instead of 11 members; an even number of members is clearly inappropriate for a body, which will inevitably have problems adopting decisions in case of differences in opinion. As opposed to the current three *ex officio* members (the president of the highest court, the Justice Minister and the chair of the parliamentary committee for the judiciary) and eight elected members (one law professor, one lawyer and six judges), the Draft Amendment lays down that the HJC shall be composed of two, at first glance, equal groups of members – five judges, to be elected by their peers, and five "renowned law graduates", to be elected by the Assembly. The ruling political majority will be entitled to elect the five HJC members, who will boast the majority of votes and thus play a decisive role (their votes will also suffice to elect the HJC Chairperson), because, in the event the Assembly fails to elect the HJC members by a three-fifths majority, it shall elect them by a five-ninths majority of all deputies within 15 days (i.e. 139 deputies, precisely the number of deputies the ruling majority now commands in parliament). The formulation of Draft Amendment IX suffices to conclude that disparagement and mistrust of judges will be built in the foundations of Serbia's legal order, because the provision implies that judges are not "renowned law graduates", that only the HJC members elected by the Assembly are. The "renowned law graduates" will be elected in the following manner: they will themselves apply for the position, in response to a "public vacancy notice" published by the competent Assembly committee, which will review the applications and suggest to the Assembly which of the candidates to elect. It goes without saying that there is quite a good chance that none of the members of the parliamentary committee have a law degree or are capable of evaluating "the legal renown" of the self-nominated applicants and that such a lay body will be unable to genuinely assess which of them are "renowned law graduates"; it also goes without saying that the committee will definitely be capable of "receiving political signals" about which candidates are considered suitable by the ruling political echelons and uphold their candidacies. This provision does not even preclude the possibility of the Minister, provided s/he has a law degree, or any other law

evaluation of the judiciary) and Councils performing new functions (e.g. in the so-called "Northern European model" with competences for management and budget matters). The CCJE encourages attributing both traditional and new functions to the Council. (paragraph 46).

graduate working in the Minister, or, for that matter, a politician with a law degree, running for a seat on the HJC and being is elected to it, and thus becoming a "renowned law graduate".

The Ministry's references to the above-mentioned Venice Commission 2007 Report on judicial appointments and its 2011 Opinion on the Draft Amendments to the Constitution of Montenegro as well as on the Draft Amendments to the Law on Courts (hereinafter: Montenegro Opinion), or its 1998 Opinion on constitutional amendments in Albania in its statement of justification are not persuasive either. In its Montenegro Opinion, which the Ministry refers to on a number of occasions, and which was co-authored by Mr. Hamilton, who assisted the Ministry in drafting the Working Draft in his capacity of CoE expert, does not prohibit the Justice Minister from sitting on the HJC, but explicitly says the minister is not to have any voting rights in disciplinary and removal proceedings. Therefore, allowing the Justice Minister to take part in disciplinary and removal proceedings, which s/he is entitled to initiate (under paragraph 3 of Draft Amendment VIII) is directly in contravention of even the Venice Commission's Montenegro Opinion the Ministry is referring to, as well as a number of judgments of the European Court of Human Rights.

In paragraph 13 of its Montenegro Opinion, the Venice Commission states that *through granting the final decision on both appointment and dismissal to the Parliament and restricting the term to five years, the proposal still conveys the impression of political control.* Therefore, both in this Opinion and in its 2007 Opinion on Serbia's Constitution (*CDL-AD(2007)004*, paragraphs 70 and 106*)* the Venice Commission alerts to the risk that the election of HJC members by parliament may result in the politicisation of the judiciary and mistrust in judicial independence. In the Montenegro Opinion, the Venice Commission suggests that, should the provision on the election of Council members by the parliament remain, they be elected by a two-thirds majority. The proposer of the Draft Amendments did not take on board the Venice Commission's suggestion that the HJC members be elected by a two-thirds parliamentary majority (167 deputies) and thus gain greater democratic legitimacy. Rather, the proposer introduced an absolutely novel majority of five-ninths (139 deputies), whereby it lowered the threshold for electing HJC members and, thus, their legitimacy.

In its statement of justification of the Draft Amendment XI provision prohibiting the election of the HJC Chairperson from among the ranks of judges, to prevent the corporatisation of the judiciary, which the Ministry is strongly insisting on, the Ministry refers to paragraph 96 CDL-AD (2007)047 of the Venice Commission Montenegro Opinion[69] (not mentioning that it topic has been elaborated in para.14 of the Venice Commission Montenegro Opinion CDL-AD(2011)010[70]) in which the Venice Commission does, indeed, propose a composition in which there is a parity of members coming from the judiciary and from the rest of society. This pluralism in composition is mentioned also in the Venice Commission Opinions on

[69] Opinion CDL-AD (2007)047 of 19 March 2007, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)047-e 15.12.2007.
[70] Opinion CDL-AD(2011)010 of 17 June 2011, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)010-e

Montenegro CDL-AD(2012)024[71] and on Armenia CDL-AD(2017)019[72]. Nevertheless, other parts of that Opinion and other Venice Commission opinions also need to be borne in mind to gain a clear picture of the context in which the Commission expressed this view. For example, the Ministry disregarded paragraph 19 of that Opinion, which clearly suggests that although the HJC should be comprised of five judges and five lay members, the parliament should not elect all five lay members because that would result in political control over the judiciary, the avoidance of which is the very purpose of the Venice Commission's endeavours. The Venice Commission even recommends who should elect the five lay members of the HJC: two members could be renowned lawyers elected by a two-thirds majority in parliament - one would be nominated by the majority, one by the opposition; one renowned member of the legal profession could be appointed by the President; one renowned member of the legal profession could be proposed by the civil society (which would require a mechanism in which NGOs, academia and bar association could participate); and the Minister of Justice, who is an *ex officio* member with no voting rights in disciplinary and removal proceedings. In the view of the Venice Commission, only once these requirements are fulfilled can the Chairperson elected from among lay members. Beside this, in Opinion CDL-AD(2017)019 on Armenia (Para. 90), Venice Commission welcomes that the chairpersons of the SJC are elected by rotation from amongst judge members and lay members, for a term of two and half years (Article 81). None of these considerations are reflected in the Draft Amendments, with the exception of the provision that the HJC Chairperson may not be a judge. On the other hand, the CCJE states the following in its Opinion no. 10 on the Council for the Judiciary at the service of society*: It is necessary to ensure that the Chair of the Council for the Judiciary is held by an impartial person who is not close to political parties. Therefore, in parliamentary systems where the President/Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge* (paragraph 33).

All the cited reports and opinions, including the Venice Commission's 2010 Report on the Independence of the Judicial System,[73] include the view that the judicial council should have a pluralistic composition (judges and non-judges) *with a substantial part, if not the majority, of members being judges* (paragraph 32). This view definitely cannot be construed as meaning that judges may account for the minority in the HJC, i.e. that they may be outvoted by other HJC members, as envisaged by the Draft Amendments.

[71] Opinion CDL-AD(2012)024 on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro - 14-15 December 2012, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)024-e

[72] Opinion CDL-AD(2017)019 on the Draft Judicial Code - 6-7 October 2017, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)019-e

[73] *Study No. 494/2008* of 16 March 2010 (*CDL-AD(2010)004*) *Report on the Independence of the Judicial System Part I: the Independence of Judges*, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e

As per attaching particular importance to the 2007 Report on Judicial Appointments, it needs to be noted that the Venice Commission says in the very first sentence of its Report that it adopted it as a contribution to the elaboration of CCJE's Opinion no. 10 on the structure and role of judicial councils, adopted in November 2007. The Venice Commission further states in this Opinion that *although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common* (paragraph 33) and refers to the cases of France, Bulgaria, Romania and Turkey. (NB the case of France differs from the others, because the presence of the President, and the Justice Minister, in the Senate was undisputable when the President (Charles de Gaulle) was a representative of the nation rather than a political figure. Now, when this is no longer the case, the French are working on changing the composition of the Council, on which the Justice Minister will not sit any longer. The other countries listed by the Venice Commission recently established their Councils, rife with frictions and negative experiences caused by the Justice Ministers' participation in their work.) In any case, the Report explicitly says that *in order to insulate the judicial council from politics its members should not be active members of parliament* (paragraph 32).

A comprehensive, more recent and more important Venice Commission Report on the Independence of the Judicial System Part I: the Independence of Judges of March 2010 says inter alia, the following in paragraph 32: *To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. 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*. European standards, including on judicial councils, have been evolving and the 2010 Magna Carta of Judges states the following: *[T]he Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers.* (paragraph 13)

However, as far as judicial councils are concerned, the Venice Commission does not attach more relevance to any of its reports and opinions than to the above mentioned CoE Committee of Ministers Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities, the 2010 Magna Carta of Judges, or a number of CCJE Opinions, including Opinion No. 10(2007) on the Council for the Judiciary at the service of society[74]. The latter, adopted in November 2007, took account of the Venice Commission's 2007 Report[75] but included slightly different solutions. It is the most comprehensive and

[74] Translated into Serbian by the JAS.

[75] When preparing this Opinion, the CCJE examined and duly took into account in particular:

- the *acquis* of the Council of Europe and in particular Recommendation No.R(94)12 of the Committee of Ministers to member States on the independence, efficiency and role of judges, the

relevant set of European standards on judicial councils and includes a series of guidelines referring to other relevant documents and standards (on appointment, accountability, et al)[76] and defines the councils' general mission (to safeguard the independence of the judiciary and the rule of law), its composition (judges account for the majority), resources for its functioning (to ensure financing, personnel, technical expertise and legitimate decisions of the council), extensive powers in order to guarantee the independence and the efficiency of justice (in the selection, appointment and promotion of judges, evaluation of their performance, guidelines on ethical and disciplinary accountability of judges, training, budget of the judiciary, court management and administration, protection of the image of justice, possibility to provide opinions to other powers of state, co-operation activities with other bodies on national, European and international level), all this in the service of accountability and transparency in the judiciary.

With respect to the composition of the council, this Opinion lays down that *it shall be such as to guarantee its independence and to enable it to carry out its functions effectively*. (paragraph 15). This view is shared by the Venice Commission as well, which says that *the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State* (paragraph 27 *CDL-JD(2007)001*). *Even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice*. (CCJE Opinion No. 10(12), paragraph 19).

As opposed to the Draft Amendments, which do not set any requirements HJC members need to fulfil, the Venice Commission recommends in its Montenegro Opinion from 2011 that the lay members of the HJC be elected from among lawyers and law professors (paragraph 18). Other European standards also require specific qualities individuals elected to judicial councils should possess: *Members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence*. (paragraph 21, CCJE Opinion No. 10(2007)), whereas *the non-judge*

European Charter on the Statute for Judges of 1998 as well as Opinions No. 1, 2, 3, 4, 6 and 7 of the CCJE;

- the report on "Judicial Appointments" adopted in March 2007 by the Venice Commission during its 70th Plenary Session, as a contribution to the work of the CCJE;
- the replies by 40 delegations to a questionnaire concerning the Council for the Judiciary adopted by the CCJE during its 7th plenary meeting (8-10 November 2006);
- the reports prepared by the specialists of the CCJE, Ms Martine Valdes-Boulouque (France) on the current situation in the Council of Europe member States where there is a High Council for the Judiciary or another equivalent independent body and Lord Justice Thomas (United Kingdom) on the current situation in states where such a body does not exist;
- the contributions of participants in the 3rd European Conference of Judges on the theme of "Which Council for justice?", organised by the Council of Europe in co-operation with the European Network of Councils for the Judiciary (ENCJ), the Italian High Council for the Judiciary and the Ministry of Justice (Rome, 26-27 March 2007).

[76] This document is quoted as a document relevant to judicial councils also by the Working Group of the Judicial Reform Commission, which prepared the Legal Analysis of the Constitutional Framework on the Judiciary.

members may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status. (paragraph 22). In any case, *prospective members of the Council for the Judiciary, whether judges or non judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary.* (paragraph 23). "*… in other systems [where the President or Head of State does not have only formal powers], the chair should be elected by the Council itself and should be a judg*e." (paragraph 33). As per the way in which judicial council members are appointed, the CCJE states in its Opinion that [*I]n order to guarantee the independence of the authority responsible for the selection and career of judges, there should be rules ensuring that the judge members are selected by the judiciary* (paragraph 25) and that it *does not advocate systems that involve political authorities at any stage of the selection process* (paragraph 31).

The Draft Amendments provide the National Assembly with the possibility of electing any law graduate to the Council, who will become a "renowned lawyer" by the very act of election to the Council. Furthermore, by providing the Council Chairperson, who may not be elected from among the ranks of judges, with the casting vote (i.e. two votes), the judges will become the minority in the Council. This is evident in paragraph 1 of Draft Amendment XII on decision making in the Council: The High Judicial Council shall adopt decisions by the votes of at least six of its members or the votes of at least five of its members, including the vote of the High Judicial Council Chairperson, at sessions attended by at least seven of its members. This means that the Council can adopt decisions with the votes of only five of the "political" members, provided the session is attended by at least two judges (even if they vote against those decisions); on the other hand, members from among the ranks of judges cannot adopt any decisions without the consent of at least one "political" member of the Council.

The Draft Amendments pervert the purpose of the existence of the HJC, which is to safeguard the independence of courts and judges[77]. It introduces a new channel of party influence on the judiciary, in contravention of Article 5(4) of the Constitution, which prohibits political parties from exercising power directly or subjecting it to their control. The draft amendments do not fulfil the commitment in the Chapter 23 Action Plan on the merely declaratory role of the National Assembly. On the contrary, the role of the Assembly, or, more precisely, the ruling majority, remains essential, because it is the one that will be electing half of the Council members, the very half that will have the majority of votes and thus a decisive role in the work of the Council.

[77] CCJE Opinion no. 10(2007) paragraphs 8-14.

IV Conclusion

Reasons for amending the Constitution

Serbia has undertaken to amend its Constitution in the National Judicial Reform Strategy with the aim of enhancing judicial independence by eliminating *the influence of the legislative and executive power on the appointment and dismissal of judges and court presidents, public prosecutors and deputy public prosecutors, and appointed members of the High Judicial Council (HJC) and the State Prosecutorial Council (SPC).* This same commitment to constitutional reform to secure judicial independence and accountability, in view of recommendations of the Venice Commission,[78] is also undertaken in Serbia's Chapter 23 Action Plan. Serbia has committed neither to increasing political influence nor reducing the extent of human rights attained (which is, at any rate, prohibited under Article 20.2 of the Constitution); in addition, the right to a free trial, guaranteed by the Constitution to each citizen of Serbia (Article 32), includes the requirement not to reduce safeguards for the independence of judges.

Events leading to and following the publication of Draft Amendments

Aware of the significance of any changes to Constitutional provisions governing the judiciary, the Judges' Association of Serbia responded to the Ministry's invitation and took part in the 'consultations' on amending the Constitution of Serbia that began in mid-2017. From the very outset, this process neglected the issue the debate ought to have focused on in the first place, namely, securing judicial independence. The procedure was not cast as a formal public consultation and did not actually allow opinions to be solicited: no legal text was up for discussion, judicial bodies and academia were not involved, and the debate was marred by disparaging comments made by representatives of the Ministry about a number of participants, judges' professional associations, and judges and prosecutors as a body. In light of these circumstances, on 30 November 2017 the Judges' Association of Serbia withdrew from the consultations and notified the Ministry of Justice and the Serbian and international public of its decision to do so.

The Judges' Association again responded to an invitation to discuss the Draft Amendments in February 2018, but the roundtables held in the cities of Kragujevac and Novi Sad followed exactly the same pattern as seen in earlier consultations. Moreover, in addition to his continuing derision and insults aimed at participants in this debate, Čedomir Backović, Assistant Minister of Justice and member of the Venice Commission, publicly expressed his puzzlement at the fact that some of them could even serve as judges or prosecutors. In a television appearance on 15 February 2018, Mr Backović openly threatened the President of

[78] This refers to recommendations made by the Venice Commission in its Opinion on the Constitution of Serbia, No. 405/2006, of 19 March 2007 (CDL-AD(2007)004).

the Judges' Association of Serbia and other members of the profession, saying 'I would be glad to harm you and those like you'. These events forced professional and other associations to again leave the process, as outlined in their public announcement.

The Chapter 23 Action Plan, adopted by the Government on 27 April 2016, has been breached on multiple occasions, quite apart from failures to adhere to its time limits: the 2014 Legal Assessment of the Constitutional Framework Concerning the Judiciary in Serbia has been ignored; amendments to the Constitution were not proposed in Parliament; and no working party to draft the amendments has been established. The authors of the 2018 Draft Amendments remain unknown to this day. As this text does not meet the two formal requirements envisaged under the Chapter 23 Action Plan, its submission to the Venice Commission would constitute another violation of the Constitution and Action Plan, even if the Venice Commission were to consent to even considering such a flawed proposal.

Legal drafting issues

In technical terms, the quality of the Draft Amendments is quite poor: the 24 proposed amendments are accompanied by little or nothing in the way of justification. Whilst some amendments include inappropriate or incomplete statements of justification, no rationale is provided for as many as ten of them. This ought particularly to be highlighted if one recalls that some of the amendments are in no way connected with recommendations made by the Venice Commission or commitments from the Chapter 23 Action Plan, such as changes to provisions governing non-transferability of judges or positions incompatible with judicial office, or the deletion of the ban on influencing judges in the exercise of their judicial office. Moreover, the explanatory notes are at odds with the Serbian Common Methodological Rules for Legislative Drafting, which mandate that any proposed piece of legislation must contain a statement of reasons for its enactment, including an assessment of the current situation, issues the regulation is designed to address, objectives to be achieved, and why legislation is the best option for resolving the problem in question. The statements of justification also omit any findings of a regulatory impact assessment (i.e. who is likely to be affected by the proposed changes, and how). This oversight is more than just a formal error: it actually prevents any meaningful discussion about the adequacy of the proposed amendments.

The systemically arranged relation of three branches of power (Article 4 of the Constitution) is still lacking, the substance of the judicial power is not defined, nor is the relation of courts and the Constitutional Court, material guarantees of the independence of the judicial system as a whole, as well as pertaining to judges themselves, nor there are guarantees for freedom of expression and professional gathering of judges.

Provisions detailing the key principles of the judiciary – permanence, non-transferability, incompatibility, and immunity – are poorly worded. The amendments do not follow the fundamental tenet of legislative drafting, whereby the expressions used must be clear,

precise, and definable (with the text needlessly using lay wording such as 'eminent jurist', 're-arrangement' of the legal system, 'private office', and 'first-instance court'). Given the appalling experiences the profession suffered during the 2009 re-appointment of all judges and prosecutors that contravened every established legal principle, the Draft Amendments are also greatly deficient in that they do fail to propose a Constitutional Bill to implement the Constitution, as only the totality of those provisions allows one to understand the exact scope of the changes sought. This omission is all the more glaring as, formally, a Constitutional Bill can only be introduced in the final phase of the amendment process, immediately before the new Constitution is about to be enacted. And, at this late stage, neither the public at large nor the expert community would be able to grasp the scope of the proposed changes in their entirety, which would preclude any transparent debate.

The reasons given for some amendments cite only one of the multiple opinions issued by the Venice Commission on Serbia's legislation (Judicial Appointments, CDL-AD (2007)028). The justifications also reference portions of the Commission's opinions on the legislation of Armenia, Georgia, Albania, and Montenegro: these observations are taken out of context and do not contain general views, but rather only comments regarding specific features proposed in particular social and historical situations faced by countries with vastly different legal traditions. The explanations made do not reveal why any given solution has been selected over other applicable alternatives, and whether the option chosen is indeed the best for regulating the Serbian judiciary. The Venice Commission is wrongly presented as a source – or even as *the* source – of standards about the judiciary and judicial independence, although the Commission is an advisory body primarily tasked with giving opinions as to the alignment of specific legislation enacted by individual states with a set of standards developed by many other entities, including the European Court of Human Rights, Consultative Councils of European Judges and Prosecutors, European Network of Councils of the Judiciary, etc.

Amendments contained in the Draft Amendments

In terms of their content, the amendments meet none of the three commitments undertaken in Item 1.1 of the Action Plan. At first glance, it would appear that in developing the Draft Amendments the Ministry has addressed its pledges. The proposals include the abolishment of the 'trial appointment' of judges to three-year terms, incorporate requirements for the dismissal of judges into the Constitution, allow the HJC to appoint and dismiss all judges and court presidents, and formally remove the Minister of Justice and the chair of the Parliamentary Judiciary Committee from the HJC. However, the changes would leave judges in the minority on the HJC, with five votes of the total of 11. The role of the Serbian Parliament in appointing members of judicial councils would be more than just procedural, as required in the Action Plan: Parliament would play a decisive part by selecting members able

to control the councils, either by means of presiding officers' casting votes or by simply being in the majority.

Other proposed amendments reinforce the impression that the ability of the legislative and executive branch to influence the judiciary has been shifted onto the governing political majority and the Judicial Academy. In addition, the HJC has been formally weakened and transformed into an instrument to be wielded by the Parliamentary majority of the day. Under the proposed model, the HJC would no longer be responsible for guaranteeing judicial independence and would become a mere puppet of the politicians, as evidenced by its composition (where actual judges would be in the minority) and its greatly circumscribed powers (as any decision could be made without the involvement of its judge members). The Judicial Academy will benefit from no guarantee of independence and will be faced with both formal and, to an even greater extent, informal influence of the Ministry.[79] Unlike in any other European nation, this institution will in fact have the power to vet candidates for appointment to courts with original jurisdiction by selecting students for its courses, who will then enter the profession by formally being appointed as judges by the HJC. Furthermore, this will prevent access to the judiciary for anyone other than graduates of the Academy, such as, for instance, judicial or prosecutorial assistants with appropriate training, or professors or legal practitioners.

The proposed amendments aim to curtail current constitutional guarantees of judicial independence (by omitting the ban on political influence on judges in the exercise of their office; authorising the Minister of Justice to bring disciplinary proceedings against judges and seek their dismissal; and introducing case law as a source of law). They also do away with the principle of non-transferability (by allowing judges to be transferred without their consent in the event of any 're-arrangement of the judicial system'), and define appointments or positions incompatible with judicial office broadly and vaguely (citing 'private' office, which raises the prospect of a ban on professional associations of judges) whilst allowing the schedule of incompatible positions to be easily amended by legislation.

The proposed introduction of 'case law' as a source of law, and its mandatory alignment with statutory law, would permit the imposition on judges of the requirement to base their rulings, against their freely-held convictions, on precedent set by, and according to the assessment of, a non-judicial authority. This is a retrograde arrangement that is not appropriate to the legal order of the Republic of Serbia or any other democratic nation.

Although the Draft Amendments aim to comprehensively revise Constitutional provisions governing the judiciary, they do not clearly regulate the relationship between the three branches of government to make it obvious that the system of checks and balances pertains to the legislative and executive, whilst the judiciary remains independent. Moreover, the

[79] Just how powerful this informal influence of the executive on the Judicial Academy is was revealed by a statement made by the Director of the Judicial Academy on 27 January 2018. Addressing a group of judges and lawyers attending a training event at the Academy, the Director claimed he was the head of a Government institution and that he had to do as the Government said. This assertion was subsequently reported in writing to the HJC by a judge who had taken part in the event.

amendments do not define the extent of the judicial system or stipulate substantive guarantees for the independence of judges and the judiciary, nor do they guarantee judges freedom of speech and association.

The Ministry also seems to have cherry-picked opinions of the Venice Commission in an attempt to justify the introduction of measures that would permit the judiciary to be controlled by the legislative and executive, whilst completely disregarding any of the Commission's views to the contrary. This fact, coupled with the concerns outlined above, seems to demonstrate that the Draft Amendments seek, unnecessarily, to replace the present organisation of the judiciary by a new concept that would diminish its current independence and enhance political influence over the justice system.

Recommendations of the Judges' Association of Serbia

Attached to this document of the Judges' Association of Serbia, as its integral part, there is a document: Key positions of professors. These positions were expressed on 20 February 2018 during *Public hearing of Professors* by: professor Ratko Marković PhD, professor Irena Pejić PhD, professor Darko Simović PhD, professor Olivera Vučić PhD, professor Dragag Stojanović PhD, professor Marijana Pajvančić PhD, professor Jasminka Hasanbegović PhD, Bosa Nenadić PhD, professor Tanasije Marinković PhD, professor Vesna Rakić-Vodinelić PhD, professor Radmila Vasić PhD, professor Zoran Ivošević PhD, professor Marko Stanković PhD, professor Violeta Beširević PhD, Serbian Academy of Sciences and Arts Member professor Kosta Čavoški PhD. The Judges' Association of Serbia expresses its consent with all the key professions contained in the document Key positions of professors.

Discussions have revealed that the document is opposed by both civic and professional organisations that have taken part in consultations to amend the Constitution, as well as by the highest judicial authorities and experts never even invited to the public events. Serious criticism has been levelled at the Draft Amendments, with their withdrawal sought by the High Judicial Council, State Prosecutorial Council, Supreme Court of Cassation, and all courts that have to date met to consider the issue. The same demands were also made by key experts in constitutional law, political and legal theory, and judicial organisation who gathered on 20 February 2018 at the *Public Hearing of Professors* organised by the Judges' Association of Serbia and the Prosecutors' Association of Serbia. Nevertheless, the Ministry has sought to downplay this disapproval, and has attempted to gloss over calls from key judicial institutions and renowned law professors for the amendments to be withdrawn.

The Judges' Association of Serbia stands by the recommendations made in its Starting Points for debate on constitutional amendments concerning the judiciary (30 June 2017) and the Observations on proposals and recommendations for amendments to the Constitution of Serbia (25 August 2017). To permit meaningful and wide-ranging debate on Constitutional

reform, a topic of exceptional importance for the Serbian public, the Judges' Association of Serbia recommends that the Government of Serbia

- Withdraws the Draft Amendments;
- Sets a longer and more appropriate time limit for public consultations; revisit the 2014 Legal Assessment of the Constitutional Framework Concerning the Judiciary and use the views voiced therein as starting points for constitutional reform;
- Considers comments submitted by all relevant stakeholders, including the Supreme Court of Cassation and all other courts, High Judicial Council, State Prosecutorial Council, academia and legal practitioners, professional associations of judges and prosecutors, and non-governmental organisations actives in civil rights and judicial issues, as minor alterations will inevitably diminish the current extent of judicial independence; and
- Prepares a new set of amendments and put them up for public consultation alongside a working draft of a proposed Constitutional Bill, without which it is impossible to envision the true scope of the proposed changes.