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**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES
(CCJE)**

Opinion of the CCJE Bureau

**following a request by the Judges' Association of Serbia
to assess the compatibility with European standards of the newly
proposed amendments to the Constitution of the Republic of Serbia
which will affect the organisation of judicial power**

INTRODUCTION

The Judges Association of Serbia (hereafter JAS), in its letter of 16 April 2018 addressed to the President of the Council of Europe's Consultative Council of European Judges (hereafter CCJE), requested that the CCJE assess the compatibility with European standards of the proposed amendments to the Constitution of the Republic of Serbia which would affect the organisation of judicial power (hereafter April 2018 Amendments).

Following examination of the above-mentioned amendments in light of the Council of Europe's standards and, in particular, the adopted Opinions of the CCJE on the matters relevant to the issues raised by JAS, the CCJE Bureau delivered its Opinion¹ on the subject requested by the JAS.

In the meantime, after analysing the Venice Commission Opinion on the draft amendments to the constitutional provisions on the judiciary in Serbia², the Ministry of Justice of the Republic of Serbia announced, on 15 October 2018, a new version of the Amendments to the Constitution of the Republic of Serbia (hereafter October 2018 Amendments).

In its letter of 29 October 2018, the JAC requested that the CCJE reassess the compatibility with European standards of these newly proposed amendments and issue a follow-up opinion on them.

After examining the draft of these newly proposed amendments and focusing in particular on the amendments reproduced below in each section in italics followed by an analysis, the Bureau of the CCJE has delivered the following Opinion.

Executive Summary and Recommendations

I. The October 2018 Amendments did not remove the shortcomings underlined in the CCJE Bureau's Opinion CCJE-BU(2018)4, as stated below, or did not substantially remove them, for the following reasons:

1. The provision on the election of the non-judicial members of the HJC (Amendment XIV 4) by parliament, i.e. their election by the five-member commission, does not safeguard the independence of those *members of the HCJ*. Instead, it enables the possibility that they are elected *according to the preference and undue influence of any dominant political party or parties*. The non-judicial members of the HJC should be elected by the Bar Association, law faculties, **and equally from both government and opposition benches in the Parliament**. Active politicians should be excluded from becoming members of the HJC. Provisions regulating the five-member commission should be deleted.
2. The provision providing that a judge shall take *into account case law* is problematic and should not be included in the Constitution in the absence of a procedure for harmonisation. A method to ensure the uniform application of the law should be

¹ Document CCJE-BU(2018)4 of 4 May 2018.

² CDL-AD(2018)011 adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

facilitated by changing Amendment XI, para 2 as follows: *The Supreme Court shall ensure a uniform application of the law by the courts through its case law.*

3. The manner in which the grounds for dismissal of judges are formulated violates the principle of judicial permanency and is potentially very dangerous for judicial independence. Grounds for dismissal, including incompetence, should be further regulated by law, and should require strong and clear implementing primary legislation, both to set out the specific misconduct that may result in a dismissal, and the procedure to be followed in cases of possible dismissal. The essential elements of this procedure should be included in the Constitution (Amendment VIII, 3).
4. The aim of the HJC should be not only to guarantee but also to ensure the independence of courts and judges. Its competence should include budgetary competences for the functioning of the judicial system, as well the selection and recruitment of judicial assistants and should not be defined as *numerus clausus* (Amendment XIII).
5. The HJC should be composed of an odd number of members – eleven members - the majority of which – six members - should be judges. The possibility for judges, if they so choose, to be represented by a court president should be provided for (Amendment XIV).
6. The president of the HJC should be a judge (Amendment XVI).
7. The provision on the dissolution of the HJC in the event that it does not render a decision should be deleted (Amendment XVII).

II. There are solutions provided by the October 2018 Amendments that had not been in the previously proposed amendments, for which the CCJE Bureau provided its Opinion. These solutions, in return, significantly change the earlier provisions.

These new provisions are as follows:

1. Solution as stipulated in Amendment IV enables extra-judicial control of judicial decisions;
2. October 2018 Amendment VII – *Conditions for the election of judges* - enable political influence over the initial appointment of judges by prescribing conditions for the selection of judges for the first time.
3. Provisions regulating the non-transferability of judges, as one of the guarantees for their independence, are insufficiently defined.

Explanatory Note

1. As regards the election and the termination of the term of office of the members of High Judicial Council (HJC)

1. A

October 2018 AMENDMENT II 1 3: *The National Assembly shall elect five members of the High Judicial Council, four members of the High Prosecutorial Council and elect the Supreme Public Prosecutor of Serbia and decide on the termination of his or her term of office.*

October 2018 AMENDMENT III 3: *The National Assembly shall elect five members of the High Judicial Council and four members of the High Prosecutorial Council by means of a two-thirds majority vote of all deputies and elect the Supreme Public Prosecutor of Serbia and decide on the termination of his or her term of office by means of a three-fifths majority vote of all deputies.*

October 2018 AMENDMENT XIV 4: *If the National Assembly does not elect all the five members within the stipulated deadline, the remaining members, upon the expiry of the next ten days, shall be elected from among the candidates who meet the criteria for election, by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, by majority vote.*

The current Constitution foresees that HJC has eleven members, of which six are judges elected by their peers (the seventh judge – HJC member - is the President of the Supreme Court of Cassation as *ex officio* member).

The April 2018 Amendments envisaged a reduction to ten members: five members being judges selected by their peers and other five members being “prominent lawyers” selected by Parliament with a 3/5 majority in the first round and a 5/9 majority in the second round. If still not elected, the latter was to be elected by a commission composed of the President of National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman, by majority vote (three votes).

The October 2018 Amendments envisaged a 2/3 majority for the first round and removed the second round requiring a 5/9 majority. If the National Assembly does not elect all five members in the first round, the remaining members shall be elected by the above-mentioned five-member commission, from among the candidates who meet the criteria for election.

The approach taken of providing for an increased majority in the national assembly vote is only to be welcomed as it reduces the chance that candidates will be elected by one political grouping within parliament. As it was already stated in the CCJE’s earlier Opinion, “*it is important that members of the HCJ are not elected according to the preference of any one dominant political party or parties*”³.

³ Document CCJE-BU(2018)4 of 4 May 2018, section 1.

However, unfortunately, the model of the Commission has been maintained in the latest amendments.

This raises the prospect that when the requisite parliamentary majority is not forthcoming that the appointments process will become the preserve of the five members of the Commission. The difficulty with this is that currently four out of five members of the commission (with the exception of the President of the Constitutional Court) are elected by simple majority vote of the National Assembly (126). Even after a change to the Constitution, three (the President of the National Assembly, the Supreme Public Prosecutor and the Ombudsman) out of five members would be subject to such election. Moreover, the Supreme Public Prosecutor would/could be elected by the same commission and the President of the Supreme Court by the HJC. This means that the "majority" of the day could continue to have indirect control over the appointments process.

1. B

October 2018 AMENDMENT XV 3: *Before the expiry of the period to which he or she is elected, the term of office of a member of the High Judicial Council shall cease upon personal request, or if he or she is convicted of a criminal offense to a prison sentence; the term of office of a member who is a judge shall cease in case of the termination of judicial office; and the term of office of a member who is not a judge shall also cease in case of permanent loss of ability to exercise the function of a member of the High Judicial Council.*

October 2018 AMENDMENT XV 4: *The decision on termination of the term of office of a member of the High Judicial Council shall be made by the High Judicial Council. An appeal against the decision is allowed to the Constitutional Court, which excludes the right to a constitutional appeal⁴.*

October 2018 AMENDMENT XVII 2: *The term of office of the members of the High Judicial Council shall cease in the case that the High Judicial Council does not make a decision within 60 days from the day of the first attempt to make it, on the issues of: the proposal of budgetary funds; the adoption of regulations within its jurisdiction; the proposals relating to the election or termination of office of judges and presidents of courts and in other matters prescribed by law. This cessation of the term of office shall be determined by the President of the National Assembly. An appeal against the decision of the President of the National Assembly shall be allowed to the Constitutional Court, which excludes the right to a constitutional appeal.*

In addition to the reasons for dismissal, Amendment XVII 2 provides that the mandate of the HJC members is to cease in the event of the HJC's failure to come to a decision within 60 days. The observation stated in the third paragraph of the CCJE Bureau's Opinion CCJE-BU(2018)4, point 5, that "an even number of members is clearly inappropriate for a body, which will inevitably have difficulties adopting decisions in case of differences in opinion" remains valid.

⁴ This amendment met the observation, stated in the CCJE Bureau's Opinion CCJE-BU(2018)4, as regards providing reasons for the HJC members' dismissal. Also, it is the HJC that decides on a dismissal which may then be appealed to the Constitutional Court.

This is all the more so, as the Council may be under pressure to reach decisions by any means in order to avoid dismissal in accordance with the terms of the Constitution. The actions of five members of the HJC can also bring its term to an end by deliberately engineering the dismissal of the Council.

It is the Opinion of the CCJE Bureau that such a proposal, embodied in the Constitution, is not appropriate and brings systematic uncertainty to the judiciary. This is something to be avoided because the role of the Constitution is to bring legal certainty to the political system and especially the judiciary⁵.

2. As regards judicial independence

2. A

October 2018 AMENDMENT VI Independence of judges: *A judge shall be independent and shall rule in accordance with the Constitution, ratified international treaties, laws and other general acts, taking into account the case law.*

Any influence on a judge while performing judicial function is prohibited.

October 2018 AMENDMENT XI The Supreme Court of Serbia: *The Supreme Court of Serbia shall be the highest court in the Republic of Serbia.*

The Supreme Court of Serbia shall ensure uniform application of the law by the courts through the case law.

October 2018 AMENDMENT IV/4: *A court decision may only be reviewed by legally authorized court in the proceedings prescribed by law, and by the Constitutional court in the proceedings upon constitutional appeal.*

October 2018 AMENDMENT VII Conditions for election of judges: *A citizen of the Republic of Serbia who fulfils the general conditions for work in state bodies, who is a law school graduate with a Bar exam, has a working experience required for a particular court and is competent, qualified and creditable of judicial office, can be elected as a judge.*

A person who is elected as a judge for the first time may be elected only if he or she has completed training at the Judicial Academy.

Conditions for the election and the term of office of lay judges shall be regulated by law.

2.B.

The proposed revised solutions do not remove risks to the independence of judges as stated in the CCJE Bureau's Opinion CCJE-BU(2018)4.

The wording: "*The method to ensure uniform application of laws by the courts shall be regulated by law*" was replaced by a less clear formulation, as a part of the first sentence in Amendment VI: "*.....taking into account the case law*".

⁵ See more under point 5.

Such a provision enables the matter to be regulated by law. “Case law“ is still a misleading reference as it still poses the same problem as to the mechanism by which uniformity is to be achieved. According to European standards, consistency needs to be pursued through decisions of higher courts. Those decisions, however, do not “harmonise” conflicting case law per se (as conflicting decisions will still exist and be valid) but rather provide orientation for the direction of future case law. The CCJE Bureau remains of the opinion that it would be best to delete the whole part of this sentence, as advised in the CCJE Bureau’s Opinion CCJE-BU(2018)4.

A similar problem exists in respect of Amendment XI 2 (Supreme Court of Serbia): *the Supreme Court of Serbia shall ensure the uniform application of the law by the courts*. This proposal allows for the possible introduction of a “mechanism” for unification of cases at a later stage. It is therefore of utmost importance that the recommendation of the CCJE Bureau is followed either by deleted paragraph 2 of the Amendment XI, or by formulating it as follows: “The Supreme Court shall ensure a uniform application of the law by the courts through its case law”⁶.

The solution stipulated in Amendment IV 4 enables extra-judicial control of judicial decisions, bearing in mind the fact that the Constitutional Court is not a judicial body. This provision creates a possibility for the Constitutional Court to act as a judicial body by not differentiating between revisions of a judicial decision by a competent court (as a judicial body) and that of the Constitutional Court.

Amendment VII - Conditions for election of judges - enables political influence over the initial appointment of judges by prescribing conditions for the selection of first-time judges. One of the conditions for first-time appointments is to have completed training at the Judicial Academy. This enables the Academy to, in practice, pre-select future judges, who will then be only formally appointed by the HJC. This solution raises concern since it seems that the status of the Judicial Academy does not guarantee its independence (the majority of members of its bodies are not judges: 9 judges and prosecutors and 11 non-judicial members). The October 2018 Amendment XXXI on the Judicial Academy (it did not exist in the previous version) provides that the Academy is an autonomous institution that trains judges, public prosecutors, and deputy public prosecutors and that its composition should reflect the composition of the HJC and the High Prosecutorial Council.

Having in mind the above, the CCJE Bureau is of the opinion that the governing and control of the process for selecting judicial candidates to take part in the Academy’s training programmes should be the purview of HJC. This would sufficiently preserve the principle that judges should be appointed following a competitive procedure based on merit and by a body that meets the requirements of the Council of Europe’s standards⁷.

⁶ EU Screening Report for Serbia states that consistency of jurisprudence should be improved through judicial means (simplification of jurisdiction, possibilities of appeal and electronic access to database), page 27.

⁷ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, para 46: “The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers”.

3. Dismissal from the office

3. A

October 2018 AMENDMENT VIII Permanent Tenure of Judicial Office: *Tenure of judicial office shall be permanent and shall last from the moment of the election until the retirement.*

Prior to the retirement, a judge's tenure of office shall cease at personal request, in case of permanent loss of ability to exercise judicial function, in case of termination of citizenship of the Republic of Serbia or in a case of dismissal.

A judge shall be dismissed if he/she is convicted of a criminal offense to at least six months of imprisonment or if it is determined in the disciplinary proceedings that he/she has committed a serious disciplinary offense which, pursuant to assessment of the High Judicial Council, seriously damages the reputation of judicial office or public confidence in the courts.

A judge may also be dismissed due to incompetence if, in a significant number of cases, he or she clearly does not meet the benchmarks of satisfactory performance prescribed by law and evaluated by the High Judicial Council.

A judge and a president of the court shall have the right to lodge an appeal with the Constitutional Court against the decision of the High Judicial Council on cessation of judicial tenure, which shall exclude the right to lodge a Constitutional appeal.

3. B

In terms of a "criminal offence", a criminal conviction results in an automatic dismissal which is difficult to understand and justify. Suffice it to say that even a suspended sentence for a traffic accident (something that could happen to anybody) would lead inevitably to a judge's dismissal. It would be better to add wording such as : conviction for a criminal offense *committed with criminal intent or for a criminal offence which makes a judge unsuitable to continue in office.* Any such steps should of course be subject to the proper procedure.

The minimum requirement would be that the grounds for dismissal should be stated in the Constitution. The Constitution should further mention that the procedure for establishing existence of these grounds should be regulated by the law⁸.

5. As regards the High Judicial Council

5. A

October 2018 AMENDMENT XIII High Judicial Council and Jurisdiction of the High Judicial Council: *The High Judicial Council is an autonomous and independent state body that guarantees the autonomy and independence of the courts and judges, court presidents and lay judges, by deciding on the issues of the status of judges, presidents of courts and lay judges determined by the Constitution and the law.*

The High Judicial Council shall elect and dismiss the President of the Supreme Court of Serbia and the presidents of other courts; elect judges and lay judges and decide on the

⁸ See European Court of Human Rights (ECtHR) Oleksandr Volkov v. Ukraine, Application no. 21722/11, FINAL 27/05/2013, para 185.

cessation of their tenure; collect statistical data relevant to the work of judges; evaluate the performance of judges, presidents of courts and judicial assistants; decide on the transfer and temporary relocation of judges; appoint and dismiss the members of the disciplinary bodies; determine the necessary number of judges and lay judges; propose the budgetary funds for the work of the High Judicial Council and the work of courts in matters within its competence pursuant to the law and autonomously dispose of these funds, and shall decide on other issues related to the status of judges, presidents of courts and lay judges provided by law.

The present Amendment shall amend the heading of Article 151 and supersede Article 151 of the Constitution of the Republic of Serbia.

October 2018 AMENDMENT XIV Composition of the High Judicial Council: *The High Judicial Council shall be composed of ten members: five judges elected by the judges and five prominent lawyers elected by the National Assembly. A prominent lawyer shall be a law school graduate who has at least ten years of relevant working experience as defined by law and who demonstrated professional work and enjoys good personal reputation.*

The National Assembly shall elect five members of the High Judicial Council upon the proposal of the competent committee of the National Assembly after having conducted a public competition, by a two-thirds majority vote of all deputies, within 20 days of receipt of the proposal.

The competent committee of the National Assembly shall propose twice as many candidates as the number of members elected.

If the National Assembly does not elect all the five members within the stipulated deadline, the remaining members, upon the expiry of the next ten days, shall be elected from among the candidates who meet the criteria for election, by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court of Serbia, the Supreme Public Prosecutor of Serbia and the Ombudsman, by majority vote.

The principle of equal representation of courts shall be taken into account in the process of election of judges as members of the High Judicial Council.

Presidents of courts may not be elected in the High Judicial Council.

October 2018 AMENDMENT XVI President and vice president of the High Judicial Council: *The High Judicial Council shall have a president and a vice president.*

The president of the High Judicial Council shall be elected from among members of the High Judicial Council who are judges and the vice president from among members who are not judges, for the period of five years.

The present Amendment shall amend the heading of Article 154 and supersede Article 154 of the Constitution of the Republic of Serbia.

October 2018 AMENDMENT XVII Work and Decision-making of the High Judicial Council: *The High Judicial Council shall make decisions by the votes of at least six members of the High Judicial Council.*

The term of office of the members of the High Judicial Council shall cease in the case that the High Judicial Council does not make a decision within 60 days from the day of the first attempt to make it, on the issues of: the proposal of budgetary funds; the adoption of regulations within its jurisdiction; the proposals relating to the election or termination of office of judges and presidents of courts and in other matters prescribed by law. This cessation of the term of office shall be determined by the President of the National Assembly. An appeal against the decision of the President of the National Assembly shall be allowed to the Constitutional Court, which excludes the right to a constitutional appeal.

The High Judicial Council shall publicly announce and explain its decisions, and make the decisions on the election and cessation of the term of office of judges, presidents of courts, and lay judges, decisions on the transfer and temporary relocation of judges, and decisions on the appointment and dismissal of members of disciplinary bodies on the basis of the criteria determined in accordance with the law and in a legally prescribed procedure.

The present Amendment amends the heading of Article 151 and supersedes Article 151 of the Constitution of the Republic of Serbia: "...may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status."

5. B

As regards to the HJC's jurisdiction, its competences and composition⁹:

Prospective members of the Council for the Judiciary, whether judges or non-judges, should not be active politicians, members of parliament, of the executive or of the administration. This means that neither the Head of State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary. Amendment XIV has no such prohibition clause.

Even though Amendment XIII – Jurisdiction of the High Judicial Council – includes within the competence of the HJC decisions on the (temporary) relocation of judges, it does not define the conditions for such relocation, its duration or the legal remedy against such a decision (unlike the current Constitution – para 150(1) which does not provide for such a possibility without the judge's consent).

The amendment significantly **limits the HJC's scope of mandate**, which is "concealed" by raising to constitutional rank certain competences that definitely should not be mentioned in

⁹ Twenty-two countries have in place judicial councils which are members of the European Network of the Councils of the Judiciary (ENCJ). Representatives of the executive and/or legislative power are members of the councils only in Croatia (2 out of 11), France (2 out of 22), Italy (1 out of 15), Latvia (2 out of 15), Malta (1 out of 10) and Romania (1 out of 19). Judges are minority only in the councils in Denmark, France and Portugal. Judges make up half of the councils in Belgium (22 out of 44) and Slovakia (9 out of 18). In half of the countries (11), judges are in the majority, either by having the majority of votes in councils with an even number of members (Malta, Netherlands) or being a real majority (Bulgaria, Croatia, Ireland, Italy, Latvia, Romania, Slovenia, Spain). The Council of England and Wales is composed of 29 members out of which 28 are judges. In six countries and territories, councils are composed only of judges - in Greece, Cyprus, Lithuania, Hungary, Northern Ireland and Scotland.

the Constitution (e.g. the collection of statistical data). Unlike the current Constitution, the HJC does not ensure, but only guarantees, the independence of courts and judges. The current Constitution (Article 154) lists a number of competencies of the HJC; however, such a list clearly is not a *numerus clausus*, because the final expression “*and perform other duties specified by the law*” provides the possibility, through primary legislation, for expanding the number and types of competences attributed to the HJC. A manifest example of this is represented by Article 70 of the Law on Courts’ Organisation, which expressly vests the HJC with the duty/power to determine *general guidelines on internal court organisation* or Article 13 of the Law on the HJC which vests numerous competences in the HJC.

On the contrary, the final clause of Amendment XIII is limited to other issues related to the status of judges, presidents of courts and lay judges provided by law. The inexorable consequence is that any legal provision that assigns to the HJC competences not included in the list and not related to the status of judges, presidents of courts and lay judges, should be considered unconstitutional.

With respect to the composition of the HJC, the starting point should address ensuring the independence of the process. It is of concern that half of the members of the HJC could very likely be a coherent and like-minded group in line with the wishes of the current government. This raises a number of issues outlined above about how non-judicial members are elected and how all members of the HJC can be dismissed from office.

Taking into account the actual composition of the HJC (five judges – five non-judges), a "deadlock" could easily be engineered by one side, in particular as six votes are needed for any decision. Against this risk, the dissolution of the HJC after sixty days of not arriving at a decision should not be possible, otherwise the HJC can hardly be seen as a protector of judicial independence. Therefore, the extension of the timeframe cannot be regarded as sufficient. Increasing the number of judicial members elected by their peers and putting in place an odd number of members would be the most promising solution, as it would have the greatest impact on increasing the independence of the judiciary. It is worth noting that “ensuring the independence” was the overall aim of the constitutional analysis/reform and the National Assembly has no role or a solely declaratory one in the selection process. It would furthermore be an option to have one of the non-judicial members be selected by the Bar Association and one by the law faculties, as this would also minimise the influence of the "Parliament majority" on the composition of the HJC.

Amendment XVI removed the provision that stipulated that the HJC president is to be elected from among members who are not judges, as proposed by the CCJE Bureau’s Opinion CCJE-BU(2018)4. It is a good solution to have the president selected from among the ranks of judges.

The amendment’s provision on that presidents of courts still cannot be members of the HJC has remained.

The CCJE Bureau’s observation regarding the number of HJC members remains, since the ten-member solution was kept in the October 2018 Amendments.

All observations regarding the cessation of all HJC members’ term of office still remain valid.

CCJE Bureau’s observations regarding the guarantees of the HJC members’ independence remain valid for these specific reasons:

1. The election of five members from among the ranks of prominent lawyers is entirely within the National Assembly's mandate, more specifically, within the mandate of the 5 member commission. The members' relation towards the parliament does not guarantee their independence (as explained under point 1 above).
2. This solution does not guarantee that the observation made by the CCJE Bureau's Opinion CCJE-BU(2018)4 will be followed regarding the appointment of "active politicians, members of parliament, the executive or the administration. This means that neither the Head of State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary".

Provisions regulating the non-transferability of judges, as one of the guarantees for their independence, are insufficiently defined. Amendment XIII – Jurisdiction of the HJC - provides for decisions on the (temporary) relocation of judges as one of the HJC's competences, but unlike provisions regulating permanent relocation (Amendment IX paras 2, 3, 4), it does not define the conditions for this relocation, its duration or the legal remedy against such a decision (unlike the current Constitution – para 150 (1) which does not enable such a possibility without a judge's consent).