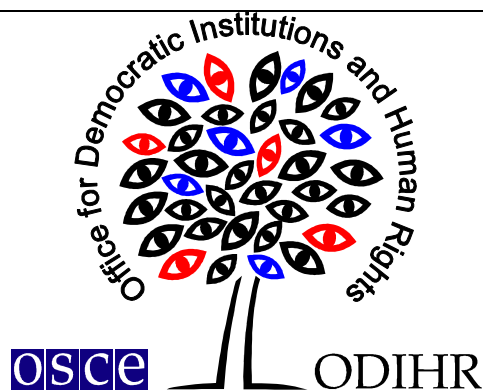


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# **LAW DRAFTING AND LEGISLATIVE PROCESS IN THE REPUBLIC OF SERBIA AN ASSESSMENT**

**December 2011**

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# 1. INTRODUCTION

## 1.1 Background

In November 2008, within the framework of its activities aimed at supporting legal reforms in the Republic of Serbia, the OSCE Mission to Serbia expressed an interest in receiving from the OSCE/ODIHR a preliminary assessment of the legal framework regulating the Serbian legislative process. Although some international agencies have made previous efforts to compile and analyse information on the legislative process in Serbia, they approached the issue from a number of different thematic angles. Thus, there remained the need for a comprehensive assessment. In response to this request, a preliminary assessment was undertaken in the summer of 2009, and the OSCE/ODHIR published the Preliminary Report on the Legislative Process in the Republic of Serbia in October 2009 (hereinafter “the Preliminary Report”)<sup>1</sup>.

In February 2010, the Preliminary Report was officially presented to key Serbian stakeholders at a roundtable held in Belgrade. The report was welcomed and raised lively discussions on some of its findings among participants of said roundtable, who represented the Government, the National Assembly and civil society of Serbia.

After some time, in a letter dated March 2011, the Legislative Committee of the National Assembly of the Republic of Serbia supported by the Speaker of the National Assembly of Serbia addressed the OSCE Mission to Serbia with an official request for the OSCE/ODIHR to conduct a comprehensive assessment of the legislative process.

This comprehensive assessment of the legislative process (hereinafter the “Assessment”) has been conducted in close coordination with the Legislative Committee of the National Assembly of Serbia and the OSCE Mission to Serbia. There are three main aspects to this Assessment:

1. the assessment covers the entirety of the legislative process by which legislation is prepared, drafted, discussed, adopted, published, communicated, and evaluated;
2. the assessment describes the system both as prescribed by the existing legal framework and in practice;
3. the assessment provides a sufficiently detailed account in order to support credible recommendations for reform tailored to the particular needs of Serbia.

This Assessment is based on the legislation governing the lawmaking and regulatory management system in the Republic of Serbia as well as information collected through interviews with senior officials from the Government and the National Assembly as well as with other relevant interlocutors during a country visit by an OSCE/ODIHR Assessment

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<sup>1</sup>See “Preliminary Report on the Legislative Process in the Republic of Serbia”(OSCE/ODIHR, Warsaw, 2009) Legis Paper – Nr: 121/2009. The Report is also available at [www.legislationonline.org](http://www.legislationonline.org).



Team to the Republic of Serbia (hereinafter “Assessment Team”). The Assessment Team was comprised of two OSCE/ODIHR staff members, two international experts, one national consultant and staff members of the Democratisation Department of the OSCE Mission to Serbia. The country visit took place on 23-25 May 2011.

## **1.2 Scope of the Assessment**

This Assessment seeks to build on the initial analysis contained in the Preliminary Assessment Report. It is aimed at collecting, synthesizing and analysing information in order to provide an accurate account of the legislative process in the Republic of Serbia, together with an analysis thereof, leading to credible recommendations for legislative reforms so as to improve the effectiveness, efficiency and transparency of the lawmaking process.

Information for the present assessment was collected, as mentioned above, through field interviews with pre-identified interlocutors,<sup>2</sup> as well as by compiling relevant domestic legislation and regulations. The field interviews were preceded by questionnaires<sup>3</sup> sent out to said interlocutors in order to provide a better overview of the purpose and scope of the visit and to allow time for preparation. The interviews aimed at gathering information on the procedures and practices in place, as well as on the international assistance efforts in related areas.<sup>4</sup>

The information gathered through field interviews and the collection of domestic laws and regulations was then analysed in light of generally accepted democratic lawmaking standards. There are two types of standards which are relevant to the current assessment: “system standards”, i.e. the standards expected of lawmaking systems, and “standards for regulatory instruments”, i.e. the standards expected of individual legislative instruments.

Additionally, in preparing the Assessment, the provisions of the Constitution and legislation examined in the Preliminary Report have been reconsidered, and further legislation and official publications have been analysed. As the analysis has been based on unofficial English translations of the Constitution, legislation and other related documents, the OSCE/ODIHR wishes to note the possibility of misinterpretation that may have arisen in the analysis as a result of the use of such translations. A select list of the legislation and other documents which, together with the Constitution, have been assessed or re-assessed in the preparation of the Assessment is contained in Annex 2.

## **2. EXECUTIVE SUMMARY**

This Assessment is a comprehensive study of both the formal procedures and the actual practices whereby legislation is prepared, drafted, adopted, published, communicated and evaluated in the Republic of Serbia. It identifies a number of existing concerns and risks as

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<sup>2</sup> For the full list of interlocutors, see Annex 1 to this Assessment.

<sup>3</sup> The questionnaires are included in Annex 3 to this Assessment.

<sup>4</sup> An overview of international assistance is included in Annex 5 to this Assessment.

well as target outcomes to be achieved for the lawmaking system to function efficiently, yield legislation of an appropriate quality and match generally accepted international standards on democratic lawmaking.

As a result of the assessment, the following concerns have been identified:

- There appears to be a tendency to develop legislation without sufficient prior development of the policy which should be expressed in a particular law. Lawmaking often appears as a substitute for policy making, and thus would greatly benefit from and enhanced understanding of policy development stages. While policy development is co-ordinated within the Government's Annual Programme of Action, that Programme is largely composed of the annual programmes of action of individual Ministries. Thus, in effect, co-ordination at the Government level frequently takes place after the individual Ministries have formulated a policy and often after they have drafted legislation to implement it.
- Insufficient stakeholder consultations pose a challenge throughout the legislative process. There is a lack of consultation at the pre-legislative stage. Consultation within affected interests and the public at large has a vital part to play in improving the quality of legislation, but such consultation is not practiced as a matter of routine.
- Access to draft legislation seems to be questionable at some stages. In principle, draft laws are accessible at the stage of their submission to parliament. The executive branch publicises some drafts in order to get external feedback before these drafts are officially finalised; however, according to a number of interlocutors, this appears to reflect a more formalistic rather than pragmatic approach.
- Although providing impact assessment – an important and valuable tool in both policy development and drafting legislation to implement policy - is mandated by law, conducting impact assessment on both policy and its implementing legislation appears in practice to lack some consistency.
- There seems to be a lack of specialist drafting resources, coupled with a lack of familiarity with modern legislative and drafting techniques. The lack of specialist drafting resources no doubt accounts in part for much criticism of the drafting of legislation encountered during the assessment visit. Besides, the rate of new laws being adopted by the National Assembly appears to be very high. This places disproportionately high pressure on both the National Assembly and all those involved in the legislative process, which in the end may undermine the quality of legislative drafting.
- The task of enacting domestic legislation to implement and transpose EU legislation is both complex and fast-moving. Despite Government co-ordination of this task, the function of preparing necessary domestic legislation is largely devolved to individual Ministries. As a consequence, the procedures may not fully address the quality of subordinate legislation, which is often crucial for the implementation and transposition of EU law; it would appear that insufficient attention is being paid to the financial and administrative implications of the legislation and there appears to be no proactive mechanism within the Government to suggest priorities while legislating.

- There appears to be lack of official consolidated versions of laws that have been heavily amended.

The Assessment identifies a number of strategies that could be adopted with a view to overcoming those challenges and improving the quality of legislation:

- A.** The Rules of Procedure of the Government are recommended to be reviewed and co-ordinated to ensure that they address more satisfactorily the over-arching general objectives of the Government rather than the objectives of individual Ministries.
- B.** There is a need to delineate in a clearer and more precise way the policy development and drafting of legislation to implement developed policy.
- C.** Impact assessments of both policy and its implementing legislation need to become compulsory in all but the most exceptional and specified circumstances;
- D.** Policy strategy papers for consultation need to be publicised before policy is finalised and all bills shall be accessible for civil society consultation, except in exceptional and specified circumstances.
- E.** Consideration needs to be given to introducing a comprehensive and consistent procedure for civil society consultation on Government bills, while the National Assembly is recommended to consider introducing procedures for committees to take written and oral evidence.
- F.** Co-ordination between the Government and the National Assembly needs to be increased. Legislative programming and planning should be introduced at the level of the National Assembly as well.
- G.** It is advisable to bring more clarity to the legislative process in the National Assembly by considering the introduction of a single National Assembly committee report on each submitted bill and the facilitation of tabling amendments to a bill after it has been debated in principle.
- H.** There is a need to re-assess and clarify the urgent legislative procedure which seems currently to be used in numerous cases; the abbreviated legislative procedure also needs to be clarified and grounds on which it may be proposed need to be specified.
- I.** It is recommended to review the time limits on speeches in debates in principle on bills with a view to ensuring an essential balance in the interest of achieving better quality legislation.
- J.** The provisions of the Constitution and the Rules of Procedure of the National Assembly pertaining to the promulgation of laws are recommended to be reviewed in order to eliminate existing ambiguities.
- K.** It is recommended that the National Assembly prepares significant financial provisions to increase the size of the National Assembly Service in order to gain all essential support in its legislative functions.

- L. Access to legislation needs to be improved. There is a need for the prompt publication of bills as well as consolidated revised laws on a regular basis.
- M. Government is recommended to review whether its existing EU compliance procedures encompass and appropriately address all legal aspects, such as, for instance, evaluation of existing domestic legislation in terms of its compliance / non-compliance with EU legislation and whether completely new legislation needs to be adopted or amendments to current laws would be sufficient. Further, in case new or significantly amended domestic legislation is required, the question of how this should be done in manner most beneficial for the state should be reviewed - legally, economically, administratively and socially – while fully satisfying implementation or transposition requirements.
- N. The National Assembly is recommended to review its appropriate and manageable functions in respect of Government action in relation to the EU and of bills bringing domestic law into compliance with EU law, both now and in once EU membership has been obtained.

### **3. CONSTITUTIONAL FRAMEWORK<sup>5</sup>**

#### **3.1 General Principles**

As the supreme legal instrument of the Republic of Serbia<sup>6</sup>, the Constitution of Serbia provides, in a number of respects, the framework for the legislative process.

Article 1 of the Constitution characterises the Republic of Serbia as a state “based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values”. In turn, Article 3 of the Constitution provides that the rule of law is “a fundamental prerequisite for the Constitution” which is to “be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities”. The government of the state is expressed as founded on the “division”, rather than a more absolute separation, of legislative, executive and judicial powers; where the relationship between them is “based on balance and mutual control”, although the judiciary is expressly declared to be independent (Article 4 of the Constitution).

#### **3.2 Human, Minority and Economic Rights and Freedoms: General Implications for Legislative Competence**

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<sup>5</sup>It is not the standard Serbian drafting style actually to number paragraphs within Articles of legal instruments (although reference is commonly made to them by numerical order); however, in order to assist the reader the sequential number of a paragraph to which reference is made in this Assessment is included in parentheses after the number of the Article; thus: *Article 123(5)*.

<sup>6</sup>See the Constitution, Article 194 par 2

### ***3.2.1 Introduction***

The Constitution contains and guarantees an extensive and modern range of human rights (Articles 23-74); rights of minorities (Article 75-81); and economic rights furthering a market economy, together with associated administrative provisions (Articles 82-96). As it is indicated in Article 18 par 2 of the Constitution, in many instances these provisions reflect customary rules of international law and, in particular, treaty obligations.

### ***3.2.2 Applicable Fundamental Principles***

Articles 18 – 22 of the Constitution contain over-arching fundamental principles that apply to human and minority rights, which are directly enforceable under the Constitution (Article 18 par 1).

Article 18 par 2 of the Constitution prescribes that the manner of the exercise of the rights can be prescribed by law but only where (a) the Constitution expressly provides for this or (b) it is necessary to do so, given the nature of the right. In any event, a law prescribing the exercise of a constitutionally guaranteed right cannot “under any circumstances” affect the substance of the right. Article 18 par 3 expressly provides that provisions on these rights are to be interpreted (presumably in executive and administrative as well as judicial decisions) “to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation”<sup>7</sup>.

Article 20 par 1 of the Constitution provides that the rights may also be restricted by law, but (a) only where the Constitution permits such a restriction, (b) only for the purpose for which the Constitution allows the restriction, (c) to the extent necessary to achieve that purpose in a democratic society, and (d) without encroaching on the substance of the rights. However, as Article 20 par 3 states, when restricting rights “all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, [the] pertinence of restriction, [the] nature and extent of restriction, [the] relation of restriction and its purpose and [the] possibility to achieve the purpose of the restriction with less restrictive means”.

There are two further general provisions which are noteworthy.

The first is a prohibition against discrimination (Article 21). This provides that all are equal with respect to the Constitution and before the law; all have the right to equal legal protection, without discrimination; and that, with the exception of measures designed to achieve positive discrimination, direct and indirect discrimination on any grounds (particularly those specified) is prohibited.

The second is a right to both domestic judicial protection and also to the protection of international institutions in enforcing human and minority rights (Article 22). The former protection is available to all and applies where there has been a breach or denial of human or

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<sup>7</sup>It is not clear, at least in translation, whether this interpretation requirement is limited to the constitutional provisions relating to human and minority rights or whether it also extends to provisions of laws prescribing the manner in which the rights may be exercised.

minority rights, and it includes the right to have the consequences of such breach (or presumably denial, although this not specified) rectified. The scope of the latter protection appears (at least in translation) to be more limited in that it is only available to “citizens” and only extends to a “right to address international institutions...to protect [these]...rights” (presumably in the sense of using any available procedure of the institutions for the purpose).

### ***3.2.3 Extending the Scope of the Fundamental Principles***

The “fundamental principles” contained in Articles 18-20 and 22 of the Constitution appear to extend solely to the human and minority rights and freedoms which follow in the succeeding articles. Certainly, this would be the best view, based on the following commonly recognised principles of interpretation.

First, the structure of the Constitution supports such a conclusion. The principles are contained in Chapter 1 (headed “Fundamental Principles”) of Part Two<sup>8</sup> of the Constitution, titled “Human and Minority Rights and Freedoms”; the remaining two chapters are headed, respectively, “Human Rights and Freedoms” and “Rights of Persons Belonging to National Minorities”.

Secondly, of the five Articles within Chapter 1, four refer expressly and exclusively to human and minority rights. The exception is Article 21, which is free-standing, in the sense that it does not expressly refer to any other Articles of the Constitution.

If this construction is correct – that the Articles in Chapter 1 of Part Two, other than Article 21, apply exclusively to the human and minority rights contained in Part Two – consideration might be given to whether it would be appropriate to extend their application.

Certainly, an argument could be made to extend them to some of the economic rights and principles contained in Part Three. For instance, it may be argued that the principles within Articles 18, 20 and 22 might be applied to the Articles providing for freedom of entrepreneurship (Article 83), status of the market (Article 84), property rights of foreigners (Article 85), equality of types of assets (Article 86), land (Article 88) and aspects of state assets (Article 87 pars 2 and 3).

### ***3.2.4 Derogation in a Proclaimed State of Emergency or State of War***

“When the survival of the state or its citizens is threatened by a public danger”, Article 200 par 1 of the Constitution empowers the National Assembly to proclaim a state of emergency<sup>9</sup>; and the proclamation allows the National Assembly, subject to Article 202, to provide for the

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<sup>8</sup> The available English translation of the Constitution variously terms these larger divisions of the Constitution as “Section” or “Part”; “Part” is the more common translation, being used in eight out of the ten of the divisions.

<sup>9</sup> Also, as envisaged in Article 200 par 2, the proclamation is effective for a maximum of 90 days, but may be extended for a further maximum period (or periods?) of 90 days.

derogation from human and minority rights guaranteed in the Constitution (Article 200 par 4)<sup>10</sup>.

Where the National Assembly is not able to convene, a proclamation of a state of emergency may be made jointly by the President of the Republic, the President of the National Assembly and the Prime Minister (Article 200 par 5)<sup>11</sup>. That proclamation is subject to the same constitutional constraints as one made by the National Assembly, and additionally must be verified by the National Assembly within 48 hours of its making (Article 200 par 8). Where the proclamation is made under this procedure, the Government by decree, co-signed by the President of the Republic (Article 200 par 6)<sup>12</sup>, may also provide for the derogation from human and minority rights, again subject to Article 202 and also to verification by the National Assembly within 48 hours of its making (Article 200 par 9)<sup>13</sup>.

Article 201 of the Constitution empowers the National Assembly to proclaim a state of war and this may also include, subject to Article 202, derogation from human and minority rights. Where the National Assembly is unable to convene, the proclamation may be made jointly by the President of the Republic, the President of the National Assembly and the Prime Minister; and, in doing so, they too may adopt measures for derogating from human and minority rights, which are subject to verification by the National Assembly when it is in a position to convene<sup>14</sup>.

As indicated, the derogation from human and minority rights in situations where states of emergency or war have been proclaimed is subject to Article 202 of the Constitution<sup>15</sup>. Article 202 par 3 states that the measures providing for such derogation cease to have effect once the state of emergency or state of war has ended.

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<sup>10</sup>*Id.*, Article 200 par 4; Article 200 par 7 provides that such measures taken by Government decree are effective for a maximum period of 90 days, but are renewable.

<sup>11</sup>Also, Article 40 par 1 of the Law on Government empowers the Government to propose to the President of the Republic that a state of emergency, and related measures, be introduced.

<sup>12</sup>It may be noted that this procedure, unlike the proclamation, does not require the involvement of the President of the National Assembly and the reason for this is not apparent; cf. Article 201 par 4, considered below, where the involvement of the President of the National Assembly is required for the parallel procedure where there is a proclamation of a state of war.

<sup>13</sup>The last sentence of this provision reads: “[i]n other respects, the measures providing for derogation shall cease to be effective 24 hours *from* to the beginning of the first session of the National Assembly held after the proclamation of the state of emergency” [emphasis added], and this would appear to leave a lacuna in the process.

<sup>14</sup>See also Article 40 par 2 of the Law on Government, which permits the Government to propose to the President of the Republic during a state of war, that acts be passed “on issues from the competence of the National Assembly”. This phrase is somewhat obscure in translation, but if it were to mean that the competence of the National Assembly may be limited, that limitation could conceivably affect the time when the National Assembly would be in a position to verify the measures derogating from human and minority rights.

<sup>15</sup>It may be noted that labour or services undertaken by virtue of measures prescribed during a state of emergency or a state of war do not fall within “forced labour” under Article 26 of the Constitution, which prohibits such labour.

Even within such periods of the state of emergency, Article 202 limits this capacity to derogate from the rights in various ways.

First, Article 202 par 1 of the Constitution provides that the derogation is only permitted “to the extent deemed necessary”. It may be noted that there is no indication what authority or authorities shall make this determination. It is not clear, for instance, whether it is just a matter for the authority that adopts the measure of derogation or whether it also provides the Constitutional Court with a juridical basis for reviewing the constitutional competence of the authority to adopt the measure.

Secondly, under Article 202 par 2 of the Constitution, measures providing for derogation “shall not bring about differences based on race, sex, language, religion, national affiliation or social origin”. It may be noted that this list includes only some of the grounds on which discrimination is prohibited under Article 21 of the Constitution. Excluding some of these prohibited grounds in the context of derogating from the rights during a state of emergency or a state of war may be justifiable as long as the discrimination is proportionate (for instance, the exclusion of “political or other opinion”). However, the reasons for excluding other prohibited grounds of discrimination contained in Article 21 are not easily justifiable and may be considered disproportionate; for instance, the exclusion of “age” or “mental or physical disability” from the relevant paragraph of Article 202.

Thirdly, Article 202 par 4 states that measures derogating from human and minority rights may not include derogations from certain specified rights. Where there is derogation, the derogation is, as noted, limited “to the extent deemed necessary” and, in any case it should, in compliance with treaty obligations, be proportionate to the circumstances.

The list of human and minority rights from which derogation is not permitted does itself raise some policy issues. The same list applies both to proclamations of a state of emergency and of a state of war. It may be argued that as a state of emergency may, for instance, arise from a natural disaster, the appropriateness of providing the same capacity to derogate from these rights in a state of emergency as in a state of war may be open to question. Thus, it can be suggested that consideration might be given to revisiting the terms of Articles 200 – 202, particularly Article 202 par 4 of the Constitution.

### **3.3 Constitutional Provisions with Specific Implications for Legislative Competence**

Often reflecting treaty obligations, individual rights and freedoms contained in the Constitution may be subject to legislation (a) to regulate the manner in which they may be exercised, or (b) to restrict them to the extent necessary to achieve specific purposes. As noted, legislation enacted for these two purposes is subject to provisions in Articles 18 and 20. There are, however, other ways in which provisions on rights and freedoms, and other provisions within the Constitution, may impact on legislative competence.

There may be a prohibition on legislating on certain matters. Article 4 (“right to life”), for instance, provides that “there shall be no death penalty in the Republic of Serbia” and that “cloning of human beings shall be prohibited”. Article 38 (“right to citizenship”) provides that “acquiring and terminating citizenship of the Republic of Serbia shall be regulated by the law”, but also provides, for example, that “a citizen of the Republic of Serbia may not be expelled or deprived of citizenship or the right to change it”.



There may be a direct obligation to legislate generally on a subject, or to include specific provisions in legislation on a subject, or both. For instance, Article 50 (“freedom of the media”) provides for the freedom to establish newspapers and for the establishment of television and radio stations, but also specifically provides that “the law shall regulate the exercise of right to correct false, incomplete or inaccurately imparted information resulting in violation of rights or interests of any person, and the right to react to communicated information”. Article 62 declares that “marriage, marital and family relations shall be regulated by the law”, but also specifically provides, for instance, that “contracting, duration or dissolution of marriage shall be based on the equality of man and woman”. Article 64 (“rights of the child”) provides that “rights of the child and their protection shall be regulated by the law”, but also specifically requires that “a child born out of wedlock shall have the same rights as a child born in wedlock”. Examples of such obligations are also found outside the context of human and minority rights, namely: “the law shall stipulate the deadlines within which the Budget must be adopted, as well as [the] method of temporary funding” (Article 92), and “the Law on the Government shall be enacted” (Article 135).

Commonly, a provision will create an indirect obligation to legislate. Thus, for example, Article 51 provides that “everyone shall have the right to access information kept by state bodies and organisations with delegated public powers, in accordance with the law”. Article 91 provides that “[r]esources which are used for the purpose of funding competences of the Republic of Serbia, autonomous provinces and local self-government units shall be provided from taxes and other revenues, stipulated by the law”.

On occasion, provisions may include a certain discretion to legislate or to legislate in a particular manner. Thus, Article 88 of the Constitution (“Land”) states that “[t]he Law may restrict the models of utilisation and management, that is stipulate terms of utilisation and management, in order to eliminate the danger of causing damage to environment or prevent violation of rights and legally based interests of other persons”.

### **3.4 The Hierarchy of Legal Norms**

#### **3.4.1 Introduction**

The Constitution provides a hierarchy of legal norms and this has the consequence that it regulates legislative competence within each category of hierarchy. According to Article 194 pars 3 and 4, the legal norms to which the Constitution refers are the Constitution itself, treaties ratified by the state, “generally accepted rules of international law” (taken to mean, and so subsequently described in this Assessment, as “customary international law”), “laws and other general acts enacted in the Republic”(referred to in this Assessment as “primary legislation”) and a range of subsidiary and subordinate legislation – amongst them “by-laws of the Republic”, “general acts of organisations with delegated public powers” and “general acts of autonomous provinces and local self-government”<sup>16</sup> (referred to generically in this Assessment as “subordinate legislation”).

Article 197 of the Constitution provides that legislative competence is also regulated by a general prohibition, with some qualifications, on legislation having retrospective effect

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<sup>16</sup>*Id.*, Article 195 (which makes reference to all of these categories of instruments)

### **3.4.2 The Constitution**

Article 194 par 2 of the Constitution, as previously indicated, is declared to be “the supreme legal act of the Republic of Serbia”. Either expressly or by implication, all other legal norms are thus treated as legally inferior, although the manner in which this is done raises some issues.

### **3.4.3 International Law**

In Article 194 par 4, treaties and customary international law are declared to be “part of the legal system of the Republic”, based on which it may be assumed that treaties do not require to be incorporated into domestic law.

The same paragraph also states that “ratified international treaties may not be in noncompliance with the Constitution”. However, there is no indication of the legal consequences of a treaty or one of its provisions being found not to comply with the Constitution. For instance: does a treaty which is not compliant with the Constitution not acquire domestic legal effect?; or, if only some articles of a treaty are found not to comply with the Constitution, but the treaty is otherwise compliant, may the compliant part of the treaty be considered part of domestic law? The practice reportedly shows that in such cases, the National Assembly will not ratify such convention; even in the event of a ratification, the Constitutional Court will declare such treaty unconstitutional.

Also, there is no express statement in the Constitution that rules of customary international law must comply with the Constitution, or of the legal consequences where they do not. It is assumed that, by implication, customary international law is to be treated as having the same hierarchical relationship with the Constitution as is expressly provided for in respect of treaties, and thus carries the same indicated degree of legal uncertainty.

It may be added here that consideration will also need to be given to amendments of the Constitution prior to Serbia becoming a member state of the European Union, to address analogous issues raised by the direct effect of EU law and decisions of the European Court which will then be binding on the Republic of Serbia.

### **3.4.4 Primary Legislation**

Article 194 par 3 of the Constitution requires primary legislation to be “in compliance with the Constitution” while Article 194 par 5 provides that it should also “not be in noncompliance” with treaties and customary international law. Again, there is no express constitutional provision on the legal consequences of primary legislation not being compliant, and this raises similar issues to those of treaties not being compliant with the Constitution, although Article 167 of the Constitution highlights that the Constitutional Court is competent, *inter alia*, to examine the compliance of ratified international treaties with the Constitution.

### ***3.4.5 Subordinate Legislation***

Article 195 pars 1 and 2 of the Constitution require subordinate legislation to be in compliance with the Law (which is taken to mean that it should be in compliance with competent primary legislation). Article 195 par 3 states the same, in the case of decisions and legislation enacted by autonomous provinces and local self-government units, including “their statutes”<sup>17</sup>.

### ***3.4.6 Prohibition of Retroactive Effect***

Article 197 par 1 of the Constitution provides that primary legislation “may not have retroactive effect”. There is one general and one specific qualification to this prohibition.

Article 197 par 2 of the Constitution declares that “exceptionally, only some of the law provisions may have a retroactive effect, if so required by general public interest as established in the procedure of adopting the Law”. The relevant procedure as outlined in Articles 151 and 160 par of the Rules of Procedure of the National Assembly will be considered in Section 3, but the terms in which this qualification is drafted (at least in translation) seem to have the consequence of providing that, while individual provisions of a law may have retrospective effect, a law in its entirety may not be retrospective.

Article 197 par 3 also provides that “a provision of the Penal Code may have a retroactive effect only if it shall be more favourable for the perpetrator”. The use of “perpetrator” here may be an inadequacy of translation, for otherwise (i) a person convicted of an offence would benefit from the qualification by not being subject to a retroactive increase in the severity of sanction attached to the commission of the offence but (ii) a person charged with a retrospective offence would not benefit from this qualification. It may be assumed that such a provision must also be subject to the previously mentioned general qualification and the procedure to which it refers.

The lacunae which have been identified in the constitutional provisions relating to the hierarchy of norms and to the prohibition of retroactivity suggest that it may be considered advisable, when appropriate, to revisit the provisions.

## **4. REVIEW OF THE PRIMARY LEGISLATIVE PROCESS**

### **4.1 Introduction**

In this Section each of the successive stages in the standard process of enacting primary legislation<sup>18</sup>, from the preparation of the legislative proposal to the entry into force of the law, is described and examined. At the end of the Section three procedurally exceptional processes are also considered.

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<sup>17</sup>The “statute” is the “supreme legal act” of an autonomous province, as provided in Article 185 par 1 of the Constitution, and of a municipality [See Article 191 par 1 of the Constitution].

<sup>18</sup> This Assessment does not encompass a review of the legislative process of subordinate legislation.

## 4.2 Proposals for Legislation

### 4.2.1 *The Competence to Propose Legislation*

According to Article 107 of the Constitution, the right of legislative initiative is split between the deputies of the National Assembly, the Government and the assemblies of autonomous provinces, with a further opportunity for legislation to be initiated by popular demand, providing that at least 30 000 voters support it; further, for matters within their institutional competence, laws may be initiated by the Civic Defender<sup>19</sup> and the National Bank of Serbia<sup>20</sup>. With further regard to individual legislative initiative, Article 107 par 1 of the Constitution clearly states that each deputy of the National Assembly has the right to initiate legislation in the National Assembly.

Most primary legislation is proposed by the Government. Thus, according to “Analysis of the Impact of the Legislative Procedure in the National Assembly of the Republic of Serbia on the Laws Proposed by the Government, with Special View on Legislative Committee”, 97,81 % of all bills were initiated by the Government, 1,92% and 0,92% of bills were initiated respectively by the National Assembly and the National Bank of Serbia. In May 2007 – June 2008, four laws were proposed by deputies of the National Assembly (Law on Amendments of the Law on State Audit Institution (122 deputies); Law on the Changes of the Law on Free Access to Information (122 deputies); Law on the Changes and Amendments of the Law on the Civic Defender (122 deputies); and Law on Ministries (128 deputies)). In October 2009 – July 2010, deputies proposed two laws (Law on the Changes to the Law on State Audit Institution (7 deputies); and Law on National Assembly (128 deputies)).<sup>21</sup> There has been reportedly only one legislative initiative from the electorate, for legislation to amend the Constitution to reduce the numbers of deputies in the National Assembly, which was not enacted).

Furthermore, as reported, since 2008 no proposals for primary legislation in the National Assembly have been submitted by the National Assembly of the Autonomous Province of Vojvodina, although it is believed that its power of legislative initiative had been exercised before that. However, it was said that the Vojvodina Assembly actively participates in the legislative process within the National Assembly by, for instance, attending public hearings on bills before the National Assembly of Serbia; and, on occasion it may also formally debate

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<sup>19</sup> The Civic Defender is an independent state body and amongst its functions are the protection of the rights of citizens and monitoring public administrative and other bodies (but not the work of the National Assembly, the President of the Republic, the Government or the courts of the offices of the Public Prosecutor); the Civic Defender is elected and maybe dismissed by the National Assembly, to which he is responsible. For the constitutional status of the Civic Defender see, the Constitution, Article 138; and see, also, the Law on the Civil Defender, Off. Gaz No.: 79/2005 (as amended).

<sup>20</sup> The National Bank of Serbia has right to initiate the laws from their scope of work. In practice National Bank initiated only the Law on National Bank of Serbia. The last initiative was the Law on changes and amendments of the Law on the National Bank of Serbia (Off. Gaz. No. 44/10)

<sup>21</sup> See “Analysis of the Impact of the Legislative Procedure in the National Assembly of the Republic of Serbia on the Laws Proposed by the Government, with Special View on Legislative Committee” by Oliver Nikolic, October-November 2010 (officially presented in spring 2011)

bills which are before the National Assembly, although of course its deliberations on the legislation would not be binding on the National Assembly.

The National Bank of Serbia proposed a Law amending the Law on the National Bank of Serbia which was enacted on the basis of this proposal. The National Bank has suggested several other laws, but they eventually proceeded on the basis that the Government itself should become the formal proposer.<sup>22</sup> The Bank maintains a department which, amongst other related functions, advises on its legislative proposals.

The Civic Defender has, in the period 2007-2010, exercised his right of legislative initiative to propose amendments to some seven pieces of legislation, many of which were enacted.<sup>23</sup>

#### ***4.2.2 Proposals for Legislation from the Government***

According to Articles 76 and 77 of the Rules of Procedure of the Government (hereinafter, “Government Rules”), the flow of legislative proposals from the Government should be viewed in the context of the Annual Programme of Action which sets the priorities of Government, including legislation which it intends to submit to the National Assembly. Articles 78 and 79 of the Government Rules provide that an evaluation of the success of the Annual Programme for the previous year, and also activity undertaken outside the Programme, shall be contained in the Government Report which is submitted annually to the National Assembly.<sup>24</sup>

The usual practice within a Ministry is for a working group to be established to address a project in the Ministry’s annual plan, but often without a precise mandate. The working group commonly has amongst its members experts in the relevant field. The experts may include some of those who will be regulated by any legislation which is drafted to implement the bill when adopted. Those drafting any such legislation may well not be specialists in legislative drafting.

#### ***4.2.3 Internal Government Requirements for the Initial Submission of a Proposal for Legislation***

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<sup>22</sup> For example: the Law on Amendments to the Law on Banks; the Law on Bank Sector Stability; the Law on Amendments to the Law on the Bankruptcy of Banks and Insurance Companies. The Bank also proposed the Law on Mortgages, as a partial response to the global financial crisis, although aside from managing technical responses to that crisis, the proposal might otherwise have been considered to be on a matter not within its constitutional and statutory competence.

<sup>23</sup> The Law on the Organization of the Security Services; the Law on Protection of Personal Data; the Law on Data Secrecy; the Law on the Foundations of Education and Training Systems; the Law on Amendments to the Criminal Code; the Law on Amendments to the Law on Free Access to Public Information; the Law on the National Assembly and the Law on Electronic Communications.

<sup>24</sup> The Government Report is linked procedurally to the submission of the annual budget by the Government to the National Assembly (also, see Article 36 of the Law on Government).

A proposal for a law to draft is submitted to the Government's General Secretariat by a Ministry, or other state administrative bodies<sup>25</sup>. Articles 37 par 1 and 38 par 1 of the Government Rules require the submission of such a proposal in the form of a bill and the draft must be accompanied by a range of associated material.

The principal associated document is a "rationale" for the proposed legislation, which must address its constitutional basis and other juridical and related procedural issues, and contain an evaluation and cost-benefit analysis of the proposal.

Article 39 of the Government Rules provides that the "rationale" must include the following:

- 1) a constitutional basis for the adoption of the bill;
- 2) reasons for the adoption of the bill and, more specifically, the problems to be solved by the act, the objectives to be met by the bill, possibilities that have been considered to solve the problem without the adoption of the bill and the answer to the question of why the adoption of the bill is the best way to solve the problem;
- 3) the explanation of basic legal institutes and individual solutions;
- 4) the estimate of financial resources necessary for the implementation of the act;
- 5) the general interest for which retroactivity has been suggested, if the proposed bill includes retroactive provisions;
- 6) reasons for the adoption of the bill as a matter of urgency, if this has been suggested;
- 7) reasons for the stipulation that the act should come into force before the eight-day deadline running from the publication of the law in the Official Gazette of the Republic of Serbia, if applicable;
- 8) a review of the provisions of the act in force that is being amended, (which is prepared by crossing out the part of the text that is being amended, and inserting the new text in capital letters)".

In addition, the proposed legislation must be accompanied by other analyses and declarations. Thus, Article 40 pars 2 and 3 of the Government Rules envisage that the submitting Ministry must either provide an impact analysis of the proposed legislation or explain why it is not necessary to provide it. This analysis is required to address the following questions:

"Whom the law will affect most and how?

- Will the costs of its implementation affect the citizens of Serbia and its economy (small and medium-sized enterprises in particular)?

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<sup>25</sup> For the definition of "state administrative bodies", see Article 1 par 2 of the Law on State Administration *Off. Gazette no. 79/05, 101/07 and 95/2010*. Also, for variations in the standard procedure for submitting proposals for legislation, but not considered in detail here, see Articles 35 par 1 and 36 par 2 of the Government Rules.

- Are the positive effects of the law such as to justify the costs it will create?
- Will the law support the creation of new economic subjects on the market and boost competition?
- Were the interested parties given an opportunity to state their opinion on the law?
- What measures will be taken during the implementation of the law to materialise its intent and purposes?”

Article 40 par 4 of the Government Rules also requires the submitting Ministry to provide a list of other legislation required to implement the proposed legislation, with deadlines for the enactment of such legislation<sup>26</sup>, while Article 40 par 1 states that in addition, the submitting Ministry is required to provide a statement of compliance and a table of compliance with EU law.<sup>27</sup>

Finally, in accordance with Article 47 of the Government Rules, the submitting Ministry is required, in preparing its proposal, to seek opinions on the proposed legislation from a variety of sources<sup>28</sup>. These opinions must be delivered in writing within working ten days of their being requested, which is extended to twenty working days in respect of proposed systemic legislation; if no opinion is received within these time limits, it is assumed that there are no objections to the proposed legislation.

Opinions must be sought from:

- (i) the Legislation Secretariat - an organ of the executive with responsibilities that include ensuring the compliance of legal provisions with higher legal norms, their compatibility with other laws, and their drafting quality (Article 46 par 1 of the Government Rules);
- (ii) the European Integration Office - an organ of the executive with responsibilities to further the alignment of domestic legislation and EU law (Article 46 par 1 of the Government Rules);
- (iii) the Council for Regulatory Reform<sup>29</sup>, on whether an impact analysis is needed and, if provided, on its adequacy;

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<sup>26</sup>This would presumably be primarily subordinate (secondary) legislation.

<sup>27</sup>These issues are considered in more detail in Section 9, *The European Dimension*.

<sup>28</sup> Where proposed legislation is substantially altered, beyond responding to observations in an initial opinion, the submitting ministry must seek a further opinion.

<sup>29</sup>See “*How to Improve the Legislative Process in Serbia and Bosnia and Herzegovina*” by Slavica Penev, Rainer Geiger, Dobrosav Milovanović, published in 2006 (<http://www.ecinst.org.rs/storage/files/Strategije%20i%20studije/Kako%20unaprediti%20zakonodavni%20proces%20u%20Srbiji%20i%20BiH.pdf>), p.34, which states this is required by virtue of a Government decision (unreferenced); the same page also provides some background to the establishment of the Council in 2003 and its general role in supporting regulatory impact assessments within the Government. The Council was further reformed in 2011.

- (iv) other ministries and state administrative bodies, where their responsibilities extend to the subject matter of the proposed legislation (Article 46 par 3 of the Government Rules);
- (v) the Ministry of Foreign Affairs - where the proposed legislation pertains to relations between Serbia and foreign states (Article 46 par 2 of the Government Rules)<sup>30</sup>;
- (vi) the Ministry of Justice - where the proposed legislation would prescribe offences or affect the jurisdiction of the courts;
- (vii) the Public Prosecutor's Office (where the proposed legislation would affect state property rights and interests or would create state contractual liability).

However, it is important to note that these opinions are technical opinions and the bodies giving them do not have a general contextual focus of whether the proposed legislation as drafted will effectively achieve its intended objectives. That issue remains one for the promoting Ministry.

According to Article 48 of the Government Rules, the Ministry must then submit to the Secretary General of the Government the draft legislative proposal (as amended in response to the opinions received) and all the required associated material, together with written comments on any failure to accept any aspects of the opinions, if applicable, and a report on any public consultation on the proposed legislation undertaken by that stage.<sup>31</sup>

#### ***4.2.4 Procedure Following the Initial Submission of a Proposal for Legislation***

Upon receipt of the proposal for legislation, the Secretary General is under a duty to determine whether the proposal and the accompanying documentation complies with the Government Rules, as indicated in Article 50 pars 1 and 2 and, if so, will pass both on to one of the four<sup>32</sup> Government committees which, within the substantive areas of its terms of reference, is competent to consider it. These committees are the Committee on Legal Systems and State Bodies, the Foreign Affairs Committee, the Economy and Finance Committee, and the Public Services Committee.

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<sup>30</sup> The same provision requires the opinions, to the extent indicated in the text, of the Ministry of Justice and the Public Prosecutor's Office.

<sup>31</sup> Public consultation may take place once the proposed legislation is before the competent Government committee [see above par 3.2.10]

<sup>32</sup> These committees are the Committee on Legal Systems and State Bodies, [Articles 25-26 of the Government Rules, Official Gazette RS no. 100/05- basic text, 51/06- as amended ], the Foreign Affairs Committee [Articles 25, 27 of the Government Rules, Official Gazette RS no. 100/05- basic text, 51/06- as amended], the Economy and Finance Committee [Articles 25, 28 of the Government Rules, Official Gazette RS no. 100/05- basic text, 51/06- as amended] and the Public Services Committee [Articles 25, 29 of the Government Rules, Official Gazette RS no. 100/05- basic text, 51/06- as amended].



According to Article 51 par 1 of the Government Rules, the competent committee is normally required to consider the proposal at its next session following receipt of the proposal<sup>33</sup>. The committee has been given two principal tasks. First, where a public consultation on the proposed legislation is required but has not yet taken place, the committee must settle the terms of the consultation to be undertaken by the submitting Ministry and a timetable for such consultation (Article 41 pars 1 and 2 of the Government Rules). According to Article 41 par 1 of the Government Rules, civil consultation is required where the proposed legislation “can change significantly the way in which a matter has been addressed legally or governs a matter of particular public interest”<sup>34</sup>. Article 42 of the Government Rules provides that where it is determined that public consultation is not required, the draft proposed legislation and the associated material must be made publicly available no later than when the committee issues its conclusion on whether the Government should proceed with the legislative proposal.

Secondly, Article 51 par 2 of the Government Rules envisages that the committee must seek to reconcile the bill with the opinions received on it that have not been accepted by the submitting Ministry, and any proposed amendments from its own members. Following this, the committee is required to report to the Government whether or not it recommends the adoption of the legislative proposal, and indicate any remaining outstanding issues (Article 51 pars 3 and 4 of the Government Rules). The committee is also required to appoint a *rapporteur* to attend the formal weekly Government session (Articles 5, 7 and 52-63 of the Government Rules)<sup>35</sup> at which its report is considered, as provided in Article 51 par 5 of the Government Rules.

In accordance with Article 54 par 1 of the Government Rules, the committee report, together with the bill and associated documents, is then to be placed on the agenda of a Government session.

According to Article 60 of the Government Rules, members of the Government, the Secretary General, and the Director of the Legislation Secretariat attend each Government session, while others may attend to discuss particular agenda items. Consequently, the Minister of the Ministry submitting the legislative proposal<sup>36</sup>, and also presumably the *rapporteur* appointed by the Government committee that reported on it, would be present at the Government session considering it.

Discussion is initiated by a brief presentation of the proposal by its proponent<sup>37</sup>, and is also informed by any formally presented opinion of the Director of the Legislation Secretariat that the proposed legislation, or elements of it, is unconstitutional or conflicts with other legislation (Article 61). A decision is reached based on whether the conclusions on the

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<sup>33</sup> The Speaker may, however, decide otherwise.

<sup>34</sup> See also the Law on State Administration, Article 77

<sup>35</sup> These articles deal with the status and working of Government sessions.

<sup>36</sup> If the proposal is submitted by a state administrative authority other than a Ministry, a representative of the authority would also have a right to attend to present the proposal (see Article 57 par 1 of the Government Rules).

<sup>37</sup> Either at the invitation of the Prime Minister or at the request of the proponent.

proposed legislation reached by the Government committee have been accepted or rejected<sup>38</sup>, and this may include further amendments to the proposed legislation (Article 58 par 2). As provided in Articles 64-65 of the Government Rules, any revised text of the proposed legislation required as a result of the decisions reached at the Government session is then prepared by the submitting Ministry, in collaboration with the Legislation Secretariat and the General Secretariat.

Thereafter, according to the Government Rules, draft laws prepared by the relevant ministries are submitted to various other administrative bodies to obtain their opinion (inter-ministerial consultation). This procedure should guarantee that all relevant knowledge and interests within the administration can be considered in the decision-shaping process preceding the governmental decision. However, the deadlines for delivering opinions seem to be very short and the quality of bills very much depends on the proper functioning of the inter-ministerial consultation process.

#### **4.3 Submission of a Bill to the National Assembly**

According to Article 151 par 1 of the Rules of Procedure of the National Assembly, a proposal for legislation is required to be submitted to the National Assembly in the form of a bill and with an explanatory note. The explanatory note must contain: (i) the constitutional or other legal basis for the bill, (ii) reasons for enacting it, (iii) an explanation of its principal contents, (iv) an estimate of the cost of implementing it and the source of the funds for this, (v) where there are retroactive provisions in it, reasons requiring the retroactivity, (vi) if enactment by urgent procedure is proposed, the reasons for proposing that procedure, (vii) if it is proposed that the legislation should come into effect earlier than eight days before publication in the *Official Gazette*, the reasons for the proposal and (vi) if the bill is amending earlier legislation, a list of the amended provision presented with the repealed text crossed out and the proposed amended text inserted in capital letters (Article 151 par 2 of the Rules of Procedure of the National Assembly). The rationale may also contain a regulatory impact analysis with an indication of whether interested parties have been consulted (Article 151 par 3).

In addition, based on Article 151 par 4, the proponent must include a Statement of Compliance of the Bill with the EU *acquis* and the related Table of Compliance. This requirement is considered in detail in Section 9, *The European Union Dimension*.

The Speaker of the National Assembly decides whether the proposal has been submitted in accordance with the Rules of Procedure of the Assembly, and if the Speaker determines that it has not, he informs the proposer of this incompatibility within three days of receiving the proposal (Article 153 par 1). The proposer may, within 15 days, resubmit it in amended form; or, if the proposer disagrees with the Speaker's determination, he or she may seek in writing a ruling from the Assembly, which is voted upon at the next available sitting without debate (Article 152 par 2); the proposer is however entitled to a 5 minute presentation to argue his or her case. If the proposer takes neither of these courses, the bill is considered as withdrawn (Article 153 par 3).

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<sup>38</sup> Consideration of the proposed legislation at the Government session may be adjourned by the Prime Minister to reconcile views, and to allow the submitting Ministry to amend the proposed legislation (see Articles 57 par 3 and 58 par 4 of the Government Rules).

#### 4.4 Referral of a Bill for Consideration

As stipulated in Article 152 par 1 of the Rules of Procedure of the National Assembly, where a submitted bill satisfies the Rules of Procedure, the Speaker of the National Assembly is required to forward it “immediately on receiving it” to all the deputies, the “competent” Assembly committee, the Government (in cases where it has not proposed the bill) and, where the law would regulate matters within their competence, also to the Civic Defender and the National Bank of Serbia (Article 152 par 2).

As provided by Articles 46-47 of the Rules of Procedure of the National Assembly, the National Assembly now has 19 standing committees, together with a special standing working body, the Committee on the Rights of the Child; the National Assembly also has the capacity to establish *ad hoc* committees (of deputies), and *ad hoc* commissions (which may also include external experts) for specific investigative purposes, but these bodies have no powers to require information to be provided or witnesses to attend. The majority of these committees have in their terms of reference the capacity to consider bills within their substantive fields of competence. Clearly, the competences of the committees may overlap with regard to a particular bill.

According to Article 48 par 1, some committees have a broader role with respect to legislation. The Committee for Constitutional and Legislative Issues is required to “consider Bills (...) from the aspect of conformity with the Constitution and the legal system and justification for their adoption”. The same range of proposed legislation must be considered by the European Integration Committee “from the aspect of their conformity with the EU *acquis* and Council of Europe legislation” (Article 64 par 1), and by the Human and Minority Rights and Gender Equality Committee “from the aspect of the advancement and achievement of gender equality” (Article 52 par 1).

There thus appears to be a likelihood that a number of committees are responsible to report on the same bill. In practice, the committee with the most direct responsibility for the subject matter of the bill will be the lead reporting committee, but there may be reports from other committees with less direct responsibility for the subject matter.<sup>39</sup> In addition, the Constitutional and Legislative Affairs Committee will report on the constitutionality of a bill, whether it is consistent with the primary legislation that it aims to amend (with less emphasis on its compatibility with other cognate legislation) and on the quality of drafting; and the Committee on Finance, State Budget and Control of Public Spending will report on the economic implications of the bill.

However, unlike the Government Rules with respect to Government committees, no formal procedure has been identified in the Rules of Procedure of the National Assembly for its standing committees to meet jointly or to prepare joint reports. Nevertheless, Article 44 par 3 of the Rules of Procedure of the National Assembly does require committees to “engage in mutual co-operation”; according to Article 44 par 4, they may hold joint sittings to discuss matters of common interest. Article 70 par 1 also requires the Chairperson of a committee to “harmonise the work of the committee with other committees”. This issue may also be somewhat alleviated by the capacity of deputies who are not members of a committee to attend and participate, but not vote, in the committee sittings, as envisaged by Article 74 par

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<sup>39</sup> This may become more frequent as the scope of individual bills becomes wider, especially since it is not uncommon for a bill to amend multiple acts.

1. Generally, co-ordination within the National Assembly may be further facilitated by the establishment of a Collegium<sup>40</sup> under Article 34 of the Rules of Procedure of the National Assembly.

In accordance with Article 74 par 2, when a committee is considering a bill, the proposer or an authorised representative must be invited to attend. Article 74 par 3 also vests Government representatives with the right to take part in committee sittings<sup>41</sup>. Article 74 pars 4 and 5 of the Rules of Procedure of the National Assembly provide authorised representatives of state bodies with a similar possibility where issues within their responsibilities are under discussion; and also, but by invitation, experts. Under Article 75, the committee is required to proceed by first discussing the bill in principle and then its Articles in detail, with a particular focus on any amendments which have been submitted. The committee members, the proposer of the bill, Government representatives (where the bill has not been proposed by the Government) and other deputies attending the sitting may participate in the discussion; this right is not specifically extended to authorised representatives of state bodies or to experts in attendance. The committee may also request ministries and other state agencies to provide relevant information (Article 74 par 6), although there is no express capacity for it to call and examine witnesses. In addition, committees may hold public hearings on bills (Articles 83-84).<sup>42</sup>

Article 156 par 3 of the Rules of Procedure of the National Assembly provides that the committee considering the bill must draft a report on the basis of its proceedings. The committee is required to appoint a *rapporteur*, who is entitled to present the report at the sitting of the National Assembly.

The line committees report (and, in the circumstances indicated, the Government gives its opinion)<sup>43</sup> to the National Assembly on whether or not they accept the bill in principle and, if they do, whether they propose modifications to it, which must be presented as amendments to the report. The focus of the report and opinion is on whether the bill should be accepted in principle and whether it is compatible with the Constitution and with basic legal principles, namely whether it is non-discriminatory and consistent with fundamental human rights; evidence received suggested that there is rather less emphasis on whether it is consistent with cognate primary and secondary legislation, except with regard to such legislation as is being directly amended by the bill.

According to Article 155 par 4 of the Rules of Procedure of the National Assembly, these reports must normally be submitted not less than five days prior to the date of the opening of

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<sup>40</sup> "The Collegium of the National Assembly (hereinafter the Collegium) is a body of the National Assembly which calls for the Speaker of the National Assembly to coordinate the work and perform consultations regarding the work of the National Assembly." ( Article 26 of the Law on the National Assembly).

<sup>41</sup>The Government may designate, from its employees or appointees, those who prepared the bill or have other expertise relating to it, representatives to take part in the work of National Assembly committees (also see Article 70 par 2 of the Government Rules).

<sup>42</sup>This is considered further in Section 6, *Civil Society Consultation*.

<sup>43</sup> If a report or opinion is not received, the bill is considered by the National Assembly without them (Article 155 par 5). According to Article 72 par 1 of the Government Rules, the Government opinion is prepared by the appropriate Ministry or special organization, in collaboration with the Legislation Secretariat.

the sitting of the National Assembly at which the bill is to be considered. A bill submitted in compliance with the Rules of Procedure may be placed on the agenda of an Assembly sitting not less than 15 days from the date of its submission (Article 154).

This reporting system has the considerable merit of providing deputies with considered critiques of the bill in advance of it being debated in principle in a plenary session of the National Assembly. However, some consideration may be given to examining whether the procedure could be further enhanced to ensure a more focused debate.

There is some likelihood that reports submitted on the bill may vary in their views and have a different emphasis. Such plurality of views may deepen the subsequent Assembly debate on the bill in principle but may also be something of an inconvenience for deputies seeking to absorb information speedily. Consideration may therefore be given to exploring ways of allowing the Government to present, perhaps in a procedurally privileged manner, its views to an Assembly committee rather than reporting separately. Similarly, there may follow an exploration of procedural means of allowing Assembly committees with a broad remit to present their views to the committee that has the substance of the bill most centrally in its terms of reference, again rather than reporting separately.

#### **4.5 Debate on a Bill in Principle**

As envisaged by Article 157 pars 1 and 2 of the Rules of Procedure of the National Assembly, the National Assembly first holds a plenary debate on the principles of a bill; if the bill relates to other proposed primary legislation, the debate may be a joint debate in principle on several bills. Usually the proposed agenda for a sitting is submitted by the Speaker of the National Assembly at least 7 days before the sitting (Article 86).

Next to the deputies, Government ministers and the Secretary of the Legislation Secretariat are entitled to attend the debate, as are others invited to do so by the Speaker. Where a bill is proposed by one of the categories of proposers that is otherwise not entitled to attend National Assembly sittings, an authorised representative of the proposer is entitled to attend the debate (Article 89).

The order and timing of speeches during the debate are regulated by Articles 96-98 of the Rules of Procedure of the National Assembly. The proposer of the bill speaks on request and that presentation is not subject to a time limit; the *rapporteur* of a committee reporting on the bill is entitled to speak once for up to five minutes; the heads, or their representative, of Parliamentary Groups<sup>44</sup> are permitted 20 minute speeches (and they may divide the allocation into two ten minute opening and closing presentations). Other deputies, as provided in Article 94 par 1, may speak on request, and are chosen alternately between those supporting and opposing the bill, their speeches are time-limited (the aggregate period for Parliamentary Groups in a debate in principle on a bill is set at 5 hours, but this may be extended by vote of the National Assembly); their participation is largely determined by membership of Parliamentary Groups (Article 96 pars 3 and 4). In addition, the Prime Minister and

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<sup>44</sup> Parliamentary Groups are formally constituted in the National Assembly in the week following a general election, there must be at least 5 deputies to form a Group and they are commonly comprised of deputies from individual political parties.

Government Ministers may speak on request without a time limit; the Secretary of the Legislation Secretariat has the same right, but only in respect of a Government-sponsored bill drafted by the Legislation Secretariat (Article 96 par 2).

In addition to this standard procedure for the regular procedure (as opposed to the urgent procedure, considered later in this Section) for the consideration of bills, there is also an abbreviated procedure where the indicated total time allocated to speakers is reduced to 50%, as indicated in Articles 94 par 2 and 99<sup>45</sup>.

Article 157 par 5 of the Rules of Procedure of the National Assembly states that following a vote on the bill in principle and the closure of the debate, there must be an interval of at least twenty-four hours before the next plenary stage of the bill that is the detailed consideration of its provisions.

#### **4.6 Submission and Consideration of Amendments**

The time limits for submitting amendments are to a large extent regulated by plenary stages of consideration of the bill, but are somewhat disengaged from the timetable regulating the initial reports on the bill by the Assembly committees and, where required, by the Government<sup>46</sup>.

As provided by Articles 161 par 2 and 162 par 1, individual deputies may submit amendments in writing or electronically, with a rationale, to the Speaker of the National Assembly from the date the bill is submitted to the Assembly to *three* days prior to the date of the sitting in which the debate in principle on the bill is on the agenda. The rationale should contain, *inter alia*, an explanation of the amendment, its intended purpose and “if necessary” its financial implications. If a National Assembly sitting is called within a shorter time limit than envisaged in the Rules of Procedure, the deadline for submitting amendments is the beginning of the Assembly debate in principle on the bill. Deputies are limited to submitting only one amendment to an Article of a bill (Article 161 par 4). The Speaker refers competently submitted amendments to the proposer of the bill, to all deputies, to the competent committee and the Government (Article 163 par 1). Under Article 48 par 6, the Committee on Constitutional and Legislative Issues is tasked with determining which amendments are identical in content, and whether this has procedural consequences<sup>47</sup>. As provided in Article 164 pars 1 and 2, both the competent committee and the proposer of the bill inform the Assembly, before the sitting at which they are to be considered, of which of the amendments they propose should be accepted and which rejected. As indicated below, this has procedural consequences at the Assembly debate in detail on the bill. The Government, where it has not proposed the bill, may also give an opinion to the Assembly on the submitted amendments.

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<sup>45</sup> This is considered further at par 4.11.1.

<sup>46</sup> It is necessary to note that the Assessment Team did not obtain comprehensive statistics on the volume of amendments.

<sup>47</sup> Procedural consequences can be found in Article 158 pars 5 and 6 of the Rules of Procedure of the National Assembly.

As indicated previously, Assembly committees and the Government in their reports on a bill are required to present any proposed modification of the Bill as amendments to it. These reports, as a rule, have to be submitted *five* days prior to the date of the National Assembly sitting at which the bill is to be debated in principle (Article 155 par 4). A consequence of this variation in the deadlines for submitting amendments is that individual deputies may consider any amendments proposed in the reports and submit amendments in response to them, at the same time the competent committee and the Government may not have all the amendments submitted by individual deputies before them when preparing their reports.

#### **4.7 Debate on the Bill in Detail**

As indicated in Article 157 par 5 of the Rules of Procedure of the National Assembly, the sitting of the National Assembly at which detailed consideration is given to a bill, and proposed amendments to it, must take place at least twenty-four hours after the bill is agreed on in principle.<sup>48</sup> This debate is procedurally focused in a number of ways.

It is constrained in its substantive consideration.

First, the debate is limited to a systematic consideration of those Articles to which amendments have been submitted and to amendments proposing the inclusion of new Articles, as regulated by Article 158 par 1 of the Rules of Procedure of the National Assembly.

Secondly, Article 164 par 3 of the Rules of Procedure of the National Assembly indicates that no debate or vote shall take place on amendments which have been accepted by both the proposer of the bill and the competent committee; they simply become an integral part of the bill.

Two matters may be noted here. The procedure in itself does not specifically provide for situations where the endorsing parties accept the general tenor of an amendment to an existing Article or, of an amendment which proposes a new Article, but consider that there should be further amendment to the amendment. Also, the effect of the combined support for an amendment of the proposer of the bill and the competent Committee could be seen as a substitute for the constitutional role of the National Assembly to enact legislation. This is because such combined endorsements effectively deny deputies the opportunity at this stage to indicate their concerns over the amendment by rejecting it; it is not inconceivable that this could be a significant number of deputies, or even a majority of them.

The debate, which is subject to general and specific time restraints (as stipulated by Article 158 ), proceeds by consideration of and voting, where required, on amendments to Articles in the sequential order of the Articles in the bill (Article 166 par 1).<sup>49</sup> According to Article 160 par 4 of the Rules of Procedure of the National Assembly, if an Article seems to have

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<sup>48</sup> The vote is taken on the Voting Day, which is determined by the Speaker, which may or may not be immediately after the debate in principle: Article 87 par 5 of the Rules of Procedure of the National Assembly.

<sup>49</sup> There does not appear to be a specific provision addressing where new Articles submitted as amendments should appear in the Bill.

retroactive application, the National Assembly must rule on whether there is sufficient reason for such retroactivity when voting on the Article. This is in compliance with Article 197 of the Constitution. No specific procedure has been identified which would allow such an Article to be amended at this stage to remove its retroactive effect. Nor has a specific procedure been identified which allows a vote to be taken on the retroactivity of an “endorsed” amendment which would not be considered in the debate. Article 166 par 2 of the Rules of Procedure of the National Assembly also provides that where there is more than one amendment to an Article, the Assembly considers and votes first on any amendment proposing the deletion of the Article, and then on amendments proposing amendment of the text.

There are procedures which can be adopted during the course of the debate, and immediately thereafter, to address the legal and technical consequences of amendments which have been adopted.

First, Article 165 par 1 of the Rules of Procedure of the National Assembly provides that written consequential amendments may be submitted by the proposer, the competent committee or the Government in the course of the debate.

Secondly, Article 165 par 2 of the Rules of Procedure of the National Assembly states that where multiple amendments have been made to a bill and their harmonisation is a more complicated and time-consuming exercise, the National Assembly may delay voting on the bill as a whole and request the Committee on Constitutional and Legislative Issues and the competent committee, to undertake the harmonisation; the harmonised amendment is then subjected to a vote. It is noted that there is no direct formal involvement of the Government in this harmonisation procedure.

#### **4.8 Vote on Bills as a Whole**

When the National Assembly has completed its detailed consideration of the bill and voted on the proposed amendments before it, the Assembly must then vote on the bill as a whole, in accordance with Article 160 par 3 of the Rules of Procedure of the National Assembly.<sup>50</sup> There is no requirement for a period to elapse between these two parliamentary stages although, as indicated in the previous paragraph, a vote on the bill as whole may be delayed to allow for harmonisation of the amendments which have been adopted.

After the Assembly has voted on the bill as a whole, the Speaker of the Assembly is required “immediately following the date of the adoption of the law, and not later than within two days” of the vote to transmit the bill to the President of the Republic for the President to promulgate it (Article 264 par 1 of the Rules of Procedure of the National Assembly).<sup>51</sup>

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<sup>50</sup> There is no indication in this provision whether this is simply a vote or whether debate is permitted, although its terms (in translation) suggest the former.

<sup>51</sup> This provision (in translation) refers to the period as running from “the adoption of the bill”; it is assumed this refers to the affirmative vote on the bill as a whole.



#### 4.9 Promulgation of the Law

The procedure for the promulgation of laws is provided in Article 113 of the Constitution<sup>52</sup>, and is considered in the succeeding paragraphs.

The procedure may be affected by decisions of the Constitutional Court which has jurisdiction to determine compliance of laws with the Constitution, as provided in Article 167 par 1 of the Constitution. In the period May 2007- July 2010 the Constitutional Court declared unconstitutional certain provisions of three laws adopted by National Assembly<sup>53</sup>. Article 168 par of the Constitution regulates that the general constitutional regime is that where the Court determines that a law is not in compliance with the Constitution, the law ceases to have effect on the day of the publication of the judgment in the Official Gazette. The relevant Articles of the Constitution do not reveal whether the Constitutional Court may strike down individual Articles of a law as unconstitutional while maintaining the constitutionality and effectiveness of the remaining Articles.

According to Article 169 par 1 and 2 of the Constitution, there is, as well, a procedure for seeking a determination of the constitutionality of a bill which has been adopted but not yet promulgated. At the request of at least one third of the deputies of the National Assembly, the Constitutional Court is under a duty to determine the constitutionality of such legislation within seven days of receiving the request. The Constitutional Court must continue its deliberations in response to the request even if the bill is promulgated as a law before it has reached its decision.

If the Court rules that the bill is unconstitutional prior to its promulgation, that decision comes into force on the day of promulgation (Article 169 par 3 of the Constitution); if it rules that the bill is unconstitutional after it has been promulgated, then the general constitutional regime would apply as provided in Article 168 of the Constitution: the law which is not in compliance with the Constitution or the Law shall cease to be effective on the day of publication of the Constitutional Court decision in the official journal.

Article 113 par 1 of the Constitution states that the promulgation procedure itself requires the President of the Republic, within 15 days of the adoption of a bill by the National Assembly, to either (i) issue a decree promulgating the bill or (ii) return it to the National Assembly for reconsideration, with a written explanation.<sup>54</sup>

According to Article 264 par 2 of the Rules of Procedure of the National Assembly, where the bill is returned to the National Assembly for reconsideration, its procedural rules require

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<sup>52</sup>In addition to this Article and related Articles of the Rules of Procedure of the National Assembly considered here, the Speaker of the National Assembly also assumes for up to three months the powers of the President of the Republic (which would include the power to promulgate laws), where the President is prevented from performing his or her duties or the President's term of office ends before end of the elected term (Article 120 of the Constitution).

<sup>53</sup> See "Analysis of the Impact of the Legislative Procedure in the National Assembly of the Republic of Serbia on the Laws Proposed by the Government, with Special View on Legislative Committee", p. 43.

<sup>54</sup> In exercising this function the President is advised by a Council of Advisors.

the Speaker to “immediately communicate” this fact and the President’s rationale to the deputies, and to include the bill on the agenda of the first subsequent sitting of the Assembly.

Article 113 par 2 of the Constitution provides that “if the National Assembly decides to vote again on the law, which has been returned for reconsideration by the President of the Republic, the law shall be adopted by the majority vote from the total number of deputies”.<sup>55</sup> Article 264 par 4 of the Rules of Procedure of the National Assembly states that the Speaker shall submit a bill adopted a second time to the President of the Republic for promulgation. Article 113 par 3 of the Constitution imposes an absolute requirement on the President to promulgate the bill which has been the subject of this second vote of the Assembly.

As a default position, Article 113 par 4 of the Constitution also provides that: “if the President of the Republic fails to issue a decree on the promulgation of the law within the deadline stipulated by the Constitution, the decree shall be issued by the Speaker of the National Assembly”<sup>56</sup>.

The circumstances in which the President of the Republic returns a Bill to the National Assembly for further reconsideration are likely to be sensitive and it is therefore particularly important that the relevant procedure is quite clear and also effective. Aside from the frailties already suggested, certain aspects of the procedure could be clarified to avoid potential ambiguity (although it is possible that any perceived ambiguity is merely a consequence of translation). For instance, where a bill is returned to the President following a second vote in the Assembly, it is not made explicit whether the President has a further 15 days in which to promulgate the bill or whether this must be done immediately. This is of importance because the capacity of the Speaker of the National Assembly to promulgate the law depends on the failure of the President to act.<sup>57</sup> It may also be argued that the procedure has limited utility in that neither the Constitution nor the Assembly Rules of Procedure explicitly provide a procedure for amending the bill in response to the concerns of the President, if that were the preferred option of the Assembly; the procedure as it stands only provides for the National Assembly to reaffirm the text of the bill as initially adopted.

#### **4.10 Publication and Coming into Force of the Law**

Unhindered access to legislation is one of the basic conditions for the functioning of a rule of law-based society. The main way to achieve this goal is the publication of official texts of laws and other regulations<sup>58</sup>. Full availability of legislation should be ensured as otherwise, without knowing what the law says, it is impossible to act in accordance with the law.

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<sup>55</sup> See also Article 264 par 3 of the Rules of Procedure of the National Assembly.

<sup>56</sup> Also see Article 265 of the Rules of Procedure of the National Assembly.

<sup>57</sup> Although this may be readily assumed, there would be value in Article 113 of the Constitution providing explicitly that the President may only exercise once the power to return the bill to the National Assembly for reconsideration, and that this power cannot be exercised following a second vote on the bill in the Assembly supported by an absolute majority.

<sup>58</sup> Access to legislation is indicated in the OSCE commitment in the Document of the Copenhagen Meeting on the Human Dimension of the OSCE of 29 June 1990. Paragraph 5.8 of this Document provides that “legislation,

Under Article 196 pars 1 and 2 of the Constitution, the publication of laws is a constitutional requirement; all general legal acts must be published in the Official Gazette before they come into force. Article 247 of the Rules of Procedure of the National Assembly states that the publication of laws lies within the responsibility of the Secretary of the National Assembly.

Article 196 par 4 of the Constitution also provides that “laws and other general acts shall come into force no earlier than on the eighth day from the day of publication and may come into force earlier only if there are particularly justified grounds for that, specified at the time of their adoption”. This provision is reflected in Article 39 of the Government Rules and is procedurally envisaged in the Rules of Procedure of the National Assembly (e.g. Article 151).

However, the mere publication of laws in a chronological order does not guarantee optimal access to legislation. It is therefore important to publish also consolidated versions of all legislation.

#### **4.11 Special Legislative Processes**

Four other legislative procedures may be considered which differ to a greater or lesser degree from the standard procedure for the adoption of primary legislation. There are other procedures which have legal and legislative implications, but are not particularly distinctive; for example, the procedure for ratifying treaties (see the Rules of Procedure of the National Assembly, Articles 169-70).

##### ***4.11.1 Urgent Procedure and Abbreviated Procedure***

###### *Urgent Procedure*

According to Article 167 par 1 of the Rules of Procedure of the National Assembly, a bill may be considered under an accelerated urgent procedure. However, these Rules of Procedure do not outline this procedure in specific detail.<sup>59</sup>

As provided by Article 167 par 2 of the Rules of Procedure of the National Assembly, such procedure is only available for bills regulating matters arising “under unforeseeable circumstances, where the non-adoption of such a law by urgent procedure could cause detrimental consequences for human lives and health, the country’s security and the work of institutions and organisations, as well as for the purpose of fulfilment of international obligations and harmonisation of legislation with the European Union *acquis*”. To initiate the procedure, the proposer of the bill must specify the reasons for adopting the urgent procedure (Article 167 par 3). The bill is sent by the Speaker to deputies and to the Government (if it is not the proposer) immediately following its receipt, as stipulated by Article 168 par 5.

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adopted at the end of a public procedure, and regulations will be published, that being condition for their applicability. Those texts will be accessible to everyone”.

<sup>59</sup> This matter and its implications are considered further in Section 7, *The Parliamentary Legislative Process*.

Article 168 par 1 of the Rules of Procedure of the National Assembly reads that a bill proposed for urgent procedure may be placed on the agenda of an Assembly sitting if it has been submitted no later than 24 hours before the scheduled start of the sitting; thus the bill becomes an item on the agenda which would normally have been circulated seven days prior to the sitting (Article 86 pars 1 and 3). During the sitting, the Assembly votes on motions for the adoption of an urgent procedure for bills as the first item in establishing the agenda, and subsequently on the established agenda as whole, without there being a debate at either stage (Article 93 pars 1 and 3).

In some cases the notice period for proposals to consider a bill under an urgent procedure is shorter. Article 168 par 2 of the Rules of Procedure of the National Assembly provides that bills which regulate defence and security issues may be submitted two hours before the scheduled start of the sitting; bills proposed by the Government may be submitted during the sitting, provided the sitting is being attended by a minimum of 126 deputies.

Debate on the bill may proceed in the absence of reports from the competent Assembly committees or from the Government: Article 155 par 5 of the Rules of Procedure of the National Assembly provides that if no committee reports or Government opinions have been submitted, bills shall be considered without them. Amendments to the bill may be submitted up to the start of the debate on the bill (Article 161 par 3). Finally, under Article 113 par 1 of the Constitution, the President of the Republic has only seven days (and not fifteen as in the standard legislative process) from the date of the adoption of a bill passed under the urgent procedure to issue a decree of promulgation, or return the bill to the Assembly for reconsideration. The competence of the Constitutional Court to determine the constitutionality of a law both before and after promulgation is not affected by the urgent procedure.

#### *Abbreviated Procedure*

As envisaged by Article 93 par 1 of the Rules of Procedure of the National Assembly, the Assembly may adopt an abbreviated procedure for certain bills. This abbreviated procedure may be applied to bills being considered under either the standard procedure or the urgent procedure (Article 94 par 2).

Article 99 of the Rules of Procedure of the National Assembly provides that “in the abbreviated procedure the total time for the debate shall amount to 50% of the time allocated for speakers” in debates on principle under the standard procedure.

#### ***4.11.2 Amendment of the Constitution***

Article 204 of the Constitution provides that it “shall not be amended” during a state of emergency or a state of war. Subject to that restriction, there is a special procedure for amending the Constitution, also detailed in Articles 142-149 of the Rules of Procedure of National Assembly.

As ruled in Article 203 par 1, the proposal to amend the Constitution may be submitted to the National Assembly by:

- (i) a minimum of one third of the deputies of the National Assembly,
- (ii) the President of the Republic,
- (iii) the Government or
- (iv) a minimum of 150,000 of the voters.

According to Article 203 par 3 of the Constitution, in order to proceed, the proposal must be approved by a vote of the National Assembly, and must be supported by two-thirds of the total number of deputies. If the proposal is not approved, the proposed amendments cannot be considered again for a period of twelve months (Article 203 par 4).<sup>60</sup> If the proposal is approved, a bill to amend the Constitution is drafted for consideration by the National Assembly (Article 203 par 5).<sup>61</sup>

As provided by Articles 203 par 6 and 205 of the Constitution, a bill to amend the Constitution must also be adopted at each stage by a two-thirds majority of the total number of deputies. It is unclear whether this requisite majority must be achieved at each stage of the consideration of the bill, including adopting any amendments to it, or whether it is, for instance, only required when the bill is adopted as a whole.

Once the bill has completed its progress in the National Assembly, the Assembly may decide that it should be endorsed by public referendum (Article 203 par 6 of the Constitution). It is unclear (at least in translation) whether a National Assembly decision to put the bill to a public referendum also requires the support of two-thirds of the total number of deputies. However, under Article 203 par 8, the National Assembly is required to put the bill to a public referendum where it amends the Preamble to the Constitution, principles of the Constitution, human and minority rights and freedoms, the provisions relating to the proclamation of a state of emergency or a state of war, the power to derogate from human and minority rights and freedoms during either a state of emergency or a state of war, or the procedure to amend the Constitution. Where there is a public referendum on the bill it must take place no later than sixty days from the date when the bill is passed by the National Assembly, and the bill is approved at the referendum if a majority of those voting in the referendum vote in favour of it.

Finally, Article 203 pars 9 and 10 of the Constitution declares that once the bill has been passed by the National Assembly, or once it has been approved by referendum where one is called, it shall be promulgated by the National Assembly and shall come into force on promulgation. These provisions provide both a distinct procedure from the standard constitutional procedure for promulgation of primary legislation (by the President of the Republic, under Article 113 of the Constitution) and also from the standard constitutional rules for the coming into force of primary legislation following promulgation (after eight days, or earlier only if there are justified grounds for this, specified at the time of passing the bill, under Article 196 par 4).

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<sup>60</sup> Presumably this period runs from the date of the unsuccessful vote, rather than from the date of submission of the proposal, but this is not specified.

<sup>61</sup> This provision is silent on which body is responsible for drafting the bill.

#### ***4.11.3 Adoption of an Authentic Interpretation of Laws***

According to Article 194 par 1 of the Rules of Procedure of the National Assembly, any of the bodies or persons that constitutionally have a general or limited competence to submit proposals for primary legislation may propose the adoption of an “authentic interpretation of a law”<sup>62</sup>.

As determined by Article 48 of the Rules of Procedure of the National Assembly, the proposal to draft “an authentic interpretation” is considered by the Committee on Constitutional and Legislative Issues. Where it considers the proposal justified, it prepares a draft of the authentic interpretation and forwards it to the proposer and the National Assembly; where it considers it unjustified, it simply informs the proposer and the National Assembly of its determination (Article 194 pars 2 and 3).

Article 194 pars 4 and 5 of the Rules of Procedure of the National Assembly provide that the National Assembly then votes on the reported findings of the Committee and if the Assembly does not accept the Committee’s finding that an authentic interpretation is unjustified, it orders the Committee to prepare the authentic interpretation. Where as a result of this procedure a draft authentic interpretation of a law comes before the National Assembly, it is then considered by the same procedure as applies to a proposal for primary legislation (Article 195).

## **5. THE DEVELOPMENT OF LEGISLATIVE POLICY**

### **5.1 Introduction**

It is a truism of the preparation of legislation that determining exactly and in detail what is to be achieved by the legislation is the most difficult and important, and often the most time-consuming, aspect of the process. It is an initial task, and one that is often subject to continuing refinement as it proceeds.

Once it has been determined what has to be achieved, the next aspect of the process is to decide how this can best be achieved, and to what extent legislation is necessary to achieve it.

Then there follows the drafting process, and the more carefully the earlier two stages have been conducted, the easier the drafting will be.

The development of legislative policy within the Serbian legislative process is viewed from this perspective.

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<sup>62</sup> Evidence was received that on occasion, an “authentic interpretation of a law” is adopted by the National Assembly immediately after the Law itself has been enacted; if this is correct, it is not clear why the bill should not have been amended to remove this ambiguity before it was finally enacted.

## **5.2 Policy Development within the Government**

### ***5.2.1 Policy Development Prior to Legislative Initiatives***

Much of the evidence which was taken in preparation of this Assessment related to policy development within the context of the preparation of legislation. However, as is clear from the subsequent analysis in this Sub-section, not all policy developed within Government necessarily requires legislation to implement it.

The impression formed from the evidence received was that Government policy development may not in practice be conducted following a comprehensive policy plan in the way that specific areas of policy, such as economic policy, are conducted. Indeed, the information collected suggested that much policy planning and consideration of the scope of any necessary implementing legislation is in effect decentralised within the Government, and largely determined in the individual Ministries with limited co-ordination. A reflection of this may be that in practice, despite the Annual Programme of Action which includes legislation that the Government intends to submit to the National Assembly, the Government legislative programme appears not to be as well managed as it might. Evidence received suggested that bills initiated within the Government are not infrequently received by the Government Legislative Secretariat for review later than they should be. And Government bills subsequently submitted to the National Assembly may appear before this body somewhat unexpectedly and at rather short notice despite the preparation of an Annual Work Plan of the National Assembly (Article 28 of the Rules of Procedure of the National Assembly), which is of course to a significant degree itself based on the Government Annual Work Plan.

Policy development as such appears to be treated as a process largely within Government. Evidence received indicates, for instance, that public consultation is not the norm at the policy making stage; although on occasion a Ministry may develop a strategy paper which becomes the subject of public discussion.

There are initiatives within Government which may strengthen the policy development process. For instance, the Human Resources Service of the Government, and international organisations<sup>63</sup>, are conducting training on public policy making, although this is as yet on a relatively modest scale<sup>64</sup>.

### ***5.2.2 Legislative Initiatives and Public Policy***

The procedural rules which apply to a ministry, or other state administrative body, when submitting a legislative proposal to central government, lays strong emphasis on the process of policy development.

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<sup>63</sup> The World Bank and Sigma have both conducted public policy training.

<sup>64</sup> In 2010, the Human Resources Service held training on the development of public policy for 23 trainees, and on the analysis of public policy for 14 trainees.

The “rationale” which must accompany the bill has to include: “reasons for the adoption of the act and, more specifically, the problems to be solved by the act, the objectives to be met by the act, possibilities that have been considered already to solve the problem without the adoption of the act and the answer to the question why the adoption of the act is the best way to solve the problem”. This in itself neatly encapsulates the main essentials of policy development. In addition the “rationale” must provide an estimate of the cost of implementing the legislation, which is further reinforced in some of the questions that must be addressed in the regulatory impact assessment also accompanying the legislative proposal; these are set out earlier in the Assessment. These requirements appear to be institutionally well-supported. So, for instance, the Council for Regulatory Reform is charged to assist the Government in the preparation of impact assessments<sup>65</sup>; the Ministry of Finance reviews the budgetary impact of a bill, and its approval is required before the Government may proceed with the bill.<sup>66</sup>

Before the legislative proposal is adopted by the Government this documentation, as well as the bill, are reviewed for various purposes by the Government General Secretariat, one of the four Government committees and finally in a Government session.

Substantive compliance with these procedures should ensure that the bill is the product of a systematic and thorough policy development.

### **5.3 Policy Development outside Government**

As indicated earlier in the Assessment, the explanatory note required when a bill is submitted to the National Assembly is somewhat less rigorous in its detailed requirements than the documentation that ministries are required to provide to central Government. Next to the Government complying with its own procedures, this then sets the effective standard of policy development that has to be demonstrated by those who have the capacity to propose legislation, including deputies and the public.

It falls to the Speaker of the National Assembly to determine whether a legislative proposal complies with the Rules of Procedure of the National Assembly for its submission. However, such a decision taken by a presiding officer is likely to be taken more on procedural rather than substantive grounds.

Subsequent Assembly consideration of the legislative proposal then focuses on the bill itself and, unless the bill were rejected in principle, any inadequacies in the policy development of the proposal would then manifest themselves as textual inadequacies to which remedial

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<sup>65</sup> In addition to the impact assessments prepared by promoting ministries, the Government European Integration Office has also played a significant role in impact assessment, using a Manual on Regulatory Impact Assessment, modeled on the parallel OECD manual.

<sup>66</sup> Within in the Ministry of Finance, the Budget Unit determines whether the bill is within the envisaged budget, the Fiscal Unit assesses whether expenditure associated with the bill is generally acceptable; and the bill is also considered by the Treasury Department, the State Audit Unit and the Public Enterprise Unit. A consensus of views within the Ministry is reached, and its written opinion is sent to the promoting Ministry and attached to the bill as it proceeds to central Government consideration.



amendments may be submitted. This effectively places an institutional burden on the National Assembly and, to some extent, on the Government.

It is true that neither an individual deputy nor the public is likely to have at their disposal the resources of the Government to undertake policy development. Nevertheless, consideration should arguably be given to shifting the burden onto the proposer to a degree, by strengthening the requirement to demonstrate that there has been sufficient policy development as a condition for and prior to submitting a legislative proposal to the Assembly.

## **6. CIVIL SOCIETY CONSULTATION**

### **6.1 Introduction**

In developed democracies, there is an increasing emphasis, during the legislative process, on consultation with civil society. This arises not only from recognition of the value of such participative democracy, but also from an appreciation that it improves the quality and effectiveness (implementation) of legislation.

There is equal recognition that, while such consultation is valuable at each stage of the legislative process, consultation at the stage of policy formation and prior to a draft legislative text being prepared and received for parliamentary consideration is a particularly effective time for the consultation. The formation of policy that determines the legislation needs to be inclusive and transparent; this is crucial for consequent good lawmaking. It is institutionally easier to take account of the product of consultation at this stage, before there is a firm internal consensus on policy. There is thus a premium on early consultation.

However, it is in the nature of the legislative process that the full implications of a legislative initiative do not become apparent until policy is translated into a legislative text and amendments to it are proposed, so consultation continues to be of real value throughout the legislative process. Properly organised consultation processes help to spot – sometimes unintended – shortages and to prevent the adoption of ineffective or redundant laws.

Finally, in this regard, consultation not is not only of value in primary legislation, it also has a value in subordinate (secondary) legislation. Subordinate legislation tends to be more technical and detailed, and commonly it is not, or to a small extent, exposed to the public and political nature of parliamentary scrutiny and is largely the product of purely internal government development. It is worth observing that civil society consultation on such subordinate (secondary) legislation is of particular value. Evidence received suggested that there was normally no civil society consultation on subordinate (secondary) legislation; if this is a correct assessment, the matter could usefully be addressed by the Government.

Recognising the potential benefits of public consultation, the competent authorities may devise policies on consultation, which address such issues as the timing of consultation, structure and duration of the consultation process, its transparency, accessibility and so on. When considering consultation with civil society, the question arises of what is meant by “civil society” in this context. In developed democracies, where expertise outside the organs of the state may well have a broad and politically vibrant institutional structure, commonly well-funded, together with a well-informed electorate, this question may take the form of determining the breadth of consultation that is appropriate in particular circumstances.

Should, in basic terms, a particular consultation be with the public at large or with specialists, or both, or with one informing the other?

In emerging democracies, there may be additional questions. For instance, and again in basic terms, should consultation focus on indigenous independent expertise, indigenous expertise which is to a greater or lesser extent externally funded, or on the domestic presence of international NGOs, particularly those which are recognisably apolitical, or should there be no such distinctions drawn in the consultation process?

Then there is the matter of the nature of the consultation. In essence, this reduces itself to the question: to what extent shall the consultation be a dialogue? And, however willing the organs of the state are to consult civil society, the answer to that question may be circumscribed by available resources.

There are various aspects to the above questions.

Some are operational. Shall consultation admit formal written submissions, formal oral submissions (perhaps based on already recognised expertise, or on the quality of prior written submissions) or consultative meetings of varying degrees of informality, or some or all of these?

Other questions are more functional. To what extent is civil society to be directly involved in the process, as advisers at policy development meetings say, or on drafting teams?

Some questions are matters of courtesy and promotion. To what extent is there to be an institutional response to those who participate in the consultation process? Are written submissions to be simply acknowledged, or should the acknowledgment indicate whether the views expressed have been accepted or rejected, and should this include reasons for such decision?

What is certainly true is that responding to those who participate in a consultation will encourage them to participate in future consultations and thus strengthen the consultation process and participative democracy.

Finally, there is the more mundane, but significant, matter of access for civil society to the more public stages of the legislative process. To what extent is there, for example, the possibility for them to attend sittings of parliamentary committees and parliamentary plenary sittings? If considerations of space constrain attendance, to what degree is this ameliorated by broadcasting proceedings?

All these considerations inform the analysis below of the nature and degree of civil society consultation in the Serbian legislative process.

## **6.2 The Pre-parliamentary Dimension**

The Government of Serbia has an institutional commitment to transparency in respect of its policies and administration.

So, while, as one would expect, Government sessions, under Article 96 of the Government Rules, are secret and “as a rule” closed to the press and the public, there is a general

commitment in Article 93 of the Government Rules that “the work of the Government shall be public”. Article 94 pars 2 and 3 of the Government Rules require the Prime Minister and ministers to inform the public on the Government decisions made within their spheres of competence, and certain other officials may also do so with consent of ministers; the Government Media Office has a responsibility “for the openness of government business”; the internet, as well as press conferences and press releases, are specifically mentioned in Article 93 par 2 of the Government Rules of Procedure.

This is underpinned by general legal duties. In this context, Article 9 pars 1 and 2 of the Law on Government require the work of the Government be public, also by enabling “public insight into its work, according to the law governing free access to information of public importance and the Government Rules of Procedure”. Further, Article 76 par 1 of the Law on State Administration requires ministries, and other state administrative authorities, “to inform the public about their work through means of public information or through other relevant means”.

However, what has been described in the above paragraph to this point is mainly a commendable commitment to providing information, rather than undertaking civil society consultation, although Article 93 par 3 of the Government Rules provides for the Government’s response to raised questions, initiatives and complaints.

As far as the development of policy prior to actually drafting any required implementing legislation is concerned, it appears, as indicated in the previous Section, there is little civil society consultation<sup>67</sup>. The general Government commitment to providing information may well involve the public presentation of the proposed implementation of policies, but does not appear to involve procedures for civil society consultation. As indicated earlier in the Report, it is also the case that a Ministry, when preparing a bill for submission to central government, will normally be expected to prepare a regulatory impact analysis of it, and one of the questions which it is required to address is “were interested parties given an opportunity to state their opinion on the law?” However, this appears to be satisfied by civil society consultation on the bill itself. At the same time, it is not clear to what extent posing the question is limited to eliciting responses or whether this also involves engaging with at least some of those that respond.

To the extent that there is indeed a limited focus on civil society consultation at the pre-drafting policy formation stage, this should be seen as a weakness in the legislative process and some consideration might be given to means of ameliorating such weakness.

However, at the stage when the bill has been prepared there is certainly a clear public consultation procedure.

As mentioned earlier in the Assessment, there is a requirement to consult where the proposed legislation “can change significantly the way in which a matter has been addressed legally or governs a matter of particular public interest” (Article 41 par 1 of the Law on the Government Rules). If consultation is required under this test and the Ministry has not

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<sup>67</sup> Sometimes the use of outside experts by Ministries in working groups developing policy and preparing implementing legislation was presented as a form of public consultation but this use of outside resources, however valuable, cannot truly be characterized as “consultation”.

undertaken it, the relevant central government will supervise such consultation by settling the terms and timetable for it to take place.

However, the test seems to be very strictly construed. During the interview the Government Legislative Secretariat estimated that public consultation took place on some 15-20% of Government bills; but there are no centralised statistics on the number of consultations held. It may be noted that evidence received indicated that normally there is no public consultation on subordinate legislation.

Where there is public consultation, the evidence received implied that a period of 30-45 days is allocated for the purpose. It was noted that this public consultation may take a variety of forms. In some cases, it may be that relevant parties are invited to comment on the bill via its placement on the website of the promoting Ministry; no evidence was received on whether there was a regulated and consistent procedure of providing public information on the comments received from such an initiative, or whether responses were made directly to individuals who submitted comments on the website. Another form of public consultation is for the Government or promoting Ministry to arrange “roundtables” on the bill; no evidence was received on whether attendance at such roundtables was advertised and generally open to interested parties or whether attendance was by invitation only; nor was clear evidence received on how the discussion at such roundtables was organised and recorded, and to whom such records were made available, either by request or automatically to all attendees<sup>68</sup>. Finally, evidence was received that public consultation may sometimes occur by questionnaire; no evidence was received as to whom the questionnaires were made available to, how the results of the questionnaires were recorded and evaluated, or the extent to which the results of any such evaluation was made publicly available.

Where public consultation is not required, it may be noted that there is still a requirement to make the bill and associated material publicly available from the time the central government committee concludes that the Government should proceed with the proposal (Article 42 of the Government Rules).

It does not appear from the Government Rules of Procedure and the evidence received that there are standardised detailed procedures for conducting civil society consultation on bills and on how to provide feedback on such consultation. Such procedures exist in a significant number of jurisdictions<sup>69</sup> and if the presumption is correct that the Government in Serbia does not presently have such standardised procedures, consideration may well be given to developing them as a measure to encourage consistency and efficiency in the process.

Finally, brief mention may be made in this regard of the other bodies that have the capacity to propose legislation. It is assumed that the National Bank of Serbia is either bound by the Government consultation procedures or would largely replicate them. The Civic Defender, by the nature of the office, could no doubt be expected to consult publicly. Proposals emanating from the public would by virtue of the process involve public consultation, although it may

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<sup>68</sup> Evidence appears to suggest that there is no standardized routine procedure for such consultation and no comprehensive report was made of roundtable consultations, although some notes on the consultation are made available to the participants.

<sup>69</sup> It can be found in the Netherlands, Sweden, Switzerland and UK, for instance.

not be particularly structured. The situation where deputies propose legislation will be considered in succeeding paragraphs.

### 6.3 The Parliamentary Dimension

Parliaments are by their nature more publicly accessible institutions than governments, and consequently might be considered to require less elaborate formal procedures for ensuring the dissemination of information. Nevertheless, although Article 254 of the Rules of Procedure of the National Assembly envisages sitting *in camera*, it also specifically provides that by default, sittings of the Assembly and its committees are held in public. Articles 256 and 257 also provide for the media to be facilitated<sup>70</sup>, and this includes making bills available to them<sup>71</sup>. Again it may be observed that these provisions largely facilitate providing information to the public, directly and indirectly, rather than consultation as such.

It would appear that there is no formal National Assembly requirement for there to be public consultation on bills submitted to the Assembly. However, there will have been, as noted, such consultation on appropriate bills proposed by the Government, which form the bulk of bills submitted.

Bills must be submitted to the National Assembly with an explanatory note. However, Article 151 par 3 implies that the procedural rules do not expressly require the explanatory note to declare whether or not there has been public consultation on the bill; it requires an indication of public consultation as an element of impact assessment, but providing impact assessment is itself discretionary. So, for proposers of legislation other than the Government, which requires consultation in its internal procedures, there is no direct procedural requirement for such consultation.

Once a bill is submitted it is considered by Assembly committees. According to Articles 83 and 84 of the Rules of Procedure of the National Assembly, the Assembly committees may hold public hearings on bills. Evidence received indicated that committees “often organise them” and that “the number of public hearings is increasing”, but that the public hearings are quite often focussed on the broad principles of the bill rather than on details of its provisions. However, no evidence was received on the extent to which this was regulated or the number of such committee public hearings held, although the Assessment Team received information on specific public hearings<sup>72</sup>.

These reports by Assembly committees (and, where appropriate, by the Government) may propose amendments, and also consider amendments submitted by deputies (with an

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<sup>70</sup> Article 51 par 1 of the Constitution provides for a right to information, expressed such that “everyone shall have the right to be informed accurately, fully and timely about issues of public importance”, which the media are required to respect.

<sup>71</sup> It may be noted that there is no specific reference in Article 257 to making amendments available, and there is no specific provision here or elsewhere in the Rules of Procedure on making bills or amendments available to the public, for payment or otherwise.

<sup>72</sup> For instance, evidence was received that an Assembly committee public hearing was held on the draft Law on Financing Political Activities, which was attended by the Prime Minister.

explanatory note). The deputies may still submit amendments for two days following the deadline for the reports, and these are subsequently considered by the committees and the Government. Following the debate in principle, the Assembly consideration of the bill in detail may take place within twenty-four hours; and in the period between the debates the appropriate Assembly committees may submit further amendments.

It should be recognised that any legislative process may be somewhat at the mercy of late amendments over which there has been a paucity of institutional consideration and little or no public consultation. And it is also true that the Serbian legislative process accommodates specialist examination, including the use of external specialists, and allows for breaks in the legislative process to consider amendments. Nevertheless, this framework does not provide many opportunities for consultation over amendments outside the National Assembly and the Government. By way of illustration, Articles 71 and 72 of the Government Rules on preparing and commenting on amendments do not envisage anything other than internal collaboration in these processes.

These considerations obviously apply, with more force, to the urgent procedure for enacting legislation.

Given that amendments may include new Articles, and any amendment may substantially alter a bill, this may be reasonably viewed as a further weakness and it is suggested that consideration be given to this point and that it be adequately addressed.

## **7. THE PARLIAMENTARY LEGISLATIVE PROCESS**

### **7.1 Introduction**

The primary legislative process has been reviewed in some detail in Section 4 of this Assessment. The intention here is to offer some broader observations, and procedural proposals which are drawn from that review and may be considered.

### **7.2 Urgent Procedure**

The urgent procedure for enacting legislation is outlined in subsection 4.11.1 of this Assessment.

In cases of real urgency, parliamentary procedure must allow for legislation to be enacted rapidly, but evidence received suggests that this severely truncated process for enacting legislation is being used extensively<sup>73</sup>, particularly with regard to the enactment of bills to implement and transpose EU law. This is a matter of concern as a process of limited

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<sup>73</sup> During the interviews, various estimates of how frequently the urgent procedure is used were provided by the interlocutors; one suggestion was that it is applied to 25% of bills before the National Assembly and others suggested indicated a higher percentage. The National Assembly on occasion reportedly refuses to accept proposals that the urgent procedure be used applied.

parliamentary scrutiny of bills may not only often be the precursor to poor legislation, but also undermines the democratic process.

This situation is not improved by the fact that the rules of procedure which apply to the urgent procedure are less than clear and comprehensive. There would, therefore, be merit in giving further consideration to these provisions to clarify procedural uncertainties.

The present difficulties largely stem from the fact that the relevant procedural rules do not contain their own provisions on when (at which stages) to consider the bill in the National Assembly, nor do they apply the standard legislative procedure to the bill other than where a different procedure is specified.

It is not completely clear whether a bill has to be submitted with the proposal that the urgent procedure shall apply; thus, whether the vote may be taken in the National Assembly on the basis of the proposal in the absence of the bill or whether the vote must await the bill is not regulated in a transparent manner, though the impression the Assessment Team got is that the vote shall await the bill. The procedural rule requiring the Speaker to circulate the bill does not require its direct circulation within the competent Assembly committees.

The Rules of Procedure of the National Assembly do not specify the structure of the debate in principle on the bill, for example who may speak, in what order and for what time; nor is there an indication when the procedure permits debate in detail on the bill, or whether this step may, on occasion, be dispensed with. This is all the more important as Article 94 par 2 of the Rules of Procedure of the National Assembly apply the abbreviated process to the urgent procedure as well as to the standard legislative procedure. A plausible interpretation of the Rules of Procedure of the National Assembly would suggest that the lack of reference to these matters implies that the rules of debate for bills considered under regular procedure will generally apply, but nevertheless it would be more desirable to specify that they apply. This is done, for example, in the procedure, considered later, to adopt authentic interpretation of a law.

Similarly, no specific direct provision deals with the successive stages of consideration of the bill in detail and of a vote on the bill as a whole. In that respect, it may be noted that the procedural rules outlined in Article 161 par 3 allow amendments to be submitted only “before the beginning of the debate in principle...”, whereas in the circumstances governing the use of the urgent procedure it may be considered judicious to provide for submission of amendments and their harmonisation at a later stage.

Finally, no procedural provision outlines the manner in which the Speaker of the National Assembly submits a bill, as passed by the Assembly under the urgent procedure, to the President of the Republic for promulgation. This is a matter of some significance for, as noted, the Constitution gives the President less time to promulgate a bill passed under the urgent procedure than to promulgate one adopted under the normal legislative process.

### **7.3 Abbreviated Procedure**

It may be proposed that bills before the National Assembly should be subject to an abbreviated procedure. The Assembly determines this, without debate, when it determines the agenda for a sitting, as stipulated by Article 93 par 1 of the Rules of Procedure of the

National Assembly. Article 99 provides that “[i]n the abbreviated procedure the total time for debate shall amount to 50% of the time allocated for speakers referred to in Articles 96 and 97...”. These Articles allocate time for speakers during debates in principle on bills.

Otherwise, apart from giving the European Integration Committee competence to issue a preliminary opinion on the justification for using the abbreviated procedure outlined in Article 64 par 1<sup>74</sup>, the Rules of Procedure of the National Assembly do not appear to regulate this procedure. They do not specifically indicate who is empowered to propose such procedure, nor is there a reference to grounds which would justify its use and there is also no indication whether such procedure is applied by extension to the subsequent debate in detail on a bill once it has been applied to the procedure when the bill is debated in principle.

Given that the application of the abbreviated procedure reduces the time and capacity of the National Assembly to debate a bill, these are matters which would be worth revisiting.

#### **7.4 Debates in Principle: Time Limits**

Articles 96 and 97 of the Rules of Procedure of the National Assembly do not limit the time of some of the persons entitled to speak during a debate in principle on a bill, but do limit the entitlement of others. Those whose contributions are not limited in time are: (i) the proposer of the bill, who will most commonly be a Government deputy; (ii) the Prime Minister (which may be considered a matter of courtesy) and other Government Ministers and (iii) the Head of the Government Legislative Secretariat, where the bill is promoted by the Government. Those whose contributions are limited in time are: (i) the heads of, and deputies of parliamentary groups, (normally limited in aggregate to five hours); (ii) up to three deputies who are not members of parliamentary groups (5 minutes each); the *rapporteur* of the competent committee which has reported on the bill to the Assembly (five minutes).

Two things appear particularly striking to the outside observer. First, the Government contributions, unlike others, are not limited in time. Secondly, contributions which are most likely to offer detailed technical analysis, as opposed to political assessment, of the bill are those of the Head of the Government Legislative Secretariat (not time limited) and of the National Assembly committee *rapporteur* (limited to 5 minutes). In consequence, parliamentary scrutiny of a both political and in particular technical nature within the National Assembly debate appears to weigh heavily in favour of the Government. The consequence of this may be a limitation of the parliamentary role in the legislative process. In consequence, these time limits are worthy of being revisited.

#### **7.5 Procedural Focus**

Parliamentary debate and decision-making are at their most effective when they are substantive.

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<sup>74</sup> Given the terms of reference of that Committee the opinions would only extend to bills implementing or transposing EU law.



The debate on a bill in principle is preceded by one or more Assembly committee reports on the bill; and sometimes a Government report on the bill as well. There would be some merit in strengthening the procedure by which the report on the bill is undertaken by a “lead” Assembly committee, with the Government (whose representatives participate in Assembly committees) and other Assembly committees (whose members can also participate) contributing their views. This need not prejudice those views, as there is a capacity (which could be extended) for members of a committee to express their alternative or dissenting views included in an Assembly committee report. For reasons suggested in the next paragraph, this report could be limited to consideration of the bill in principle, but could propose modifications without presenting them as amendments. An advantage of such an approach would be that deputies then debating the bill in principle would have a single report to consider, which focuses on arguments for and against the bill in principle.

Consideration might usefully be given to exploring such procedural arrangements.

Debate on the bill in detail may take place no earlier than twenty-four hours after the debate in principle, although of course it may also take place later. Consideration may be given to extending the minimum period between the two debates. Apart from facilitating consultation on the amendments, and ensuring more institutional consideration of them, this would also serve to bring more focus to the debate.

At present, deputies are required to submit amendments prior to the debate in principle. Where Assembly committees (and sometimes the Government) consider draft legislation should be modified they must present the modifications as amendments in their reports. Again this is prior to the debate in principle, although the committees do have the capacity to submit amendments after that. However, the general position is that the bulk of amendments must be submitted before the deputies and the Government have had the benefit of views that may be expressed during the debate in principle.

If a longer minimum period between the two debates were considered appropriate this could create the opportunity for deputies to be allowed to submit amendments after the first debate. The proposed “lead” Assembly committee, again with participation from the Government and other committees, perhaps particularly the Committee on Constitutional and Legislative Affairs, could then report a second time on proposed amendments.

## **8. LEGISLATIVE DRAFTING**

### **8.1 Introduction**

Legislative drafting is a crucial element in an effective legislative process, but one for which commonly parliamentarians are particularly dependent on the skills of others.

The importance of enhancing the quality of legislative drafting is clearly institutionally recognised within the Republic of Serbia, as it is stated to be a principal concern of the Legislative Committee within the National Assembly and of the Legislation Secretariat within Government. Significantly, in 2010 the National Assembly adopted the Unified

Drafting Methodology Rules<sup>75</sup> to be applied to legislation, as well as other general acts enacted by the National Assembly<sup>76</sup>. At the outset, it can be said that there has been an evident improvement in the drafting of Serbian legislation in recent years<sup>77</sup> but more may be done. And, as in all jurisdictions, achieving good legislative drafting requires continuing attention to monitoring standards and to comparative assessment of techniques being developed elsewhere.

Good legislative drafting is the ability to identify the legal objectives and meet them fully by expressing the necessary legal rights and obligations in an accurate clear manner, while also ensuring that the draft complies with superior norms, and that it effectively and consistently relates to existing legal norms.

However, there is a tendency in emerging democracies (and indeed in established ones where there are time pressures) to sacrifice the ideal in favour of a draft that is merely legally effective, and that may be sufficient to satisfy the instructing authorities.

Legal effectiveness is, of course, the essential. However, if the legislative text is merely effective but falls short of the standards of good drafting there may well be long-term and peripheral consequences.

First, legislation which is not clearly, or accurately expressed tends to undermine, or at the very least inhibit, democratic development.

Secondly, if legislation is not properly set in the context of existing norms or if it fails to be set in a manner which makes the context readily accessible to the user, the corpus of national legislation becomes over time increasingly chaotic and consequently increasingly difficult to use.

Thirdly, legislation which, although legally effective, is not well drafted wastes public and private sector resources in endeavouring to explain or establish its implications, and ultimately in resolving its application by litigation.

Finally, the quality of legislative drafting may be viewed as presenting to the outside world a demonstration of the professional and administrative competence of the state, not uncommonly with some significant economic consequences.

These are all matters which inform the following observations on:

- (i) the volume of legislation and drafting resources

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<sup>75</sup>*Off. Gaz.* No.: 21/2010

<sup>76</sup>*Id.* Articles 1, 2(1)

<sup>77</sup> For for instance, compare two acts which regulate important democratic processes: (i) the Law on Public Assembly, originally enacted in 1992, which has no titles to its Articles, rather scattered and unstructured definitions, and rather repetitive provisions some of which do not fully address the practicalities of the issues they address (e.g. Article 2 which prohibits public assembly in the vicinity of the Parliament “immediately before and during sessions” but not immediately *after* sessions; Article 12 which imposes a time frame for the issue of a notice which appears impractical in the context of the situation addressed in the Article) and (ii) the Law on Financing Political Activities, enacted in 2011, which does not appear to have such drafting weaknesses.

- (ii) the Unified Drafting Methodology Rules directly, and
- (iii) specific aspects of drafting, using selected examples from Serbian legislation and the Unified Drafting Methodology Rules by way of illustration.

## 8.2 The Volume of Drafting and Drafting Resources

Evidence received indicated that in the period 2008-2010 more than 600 laws and some 10,000 amendments<sup>78</sup> were enacted. In the period May 2007- July 2010, the Constitutional Court declared unconstitutional certain provisions of three laws adopted by National Assembly<sup>79</sup>.

Evidence received also suggests that those directly engaged in drafting Government legislation – the bulk of legislation – are severely under-resourced<sup>80</sup>. For example, the Assessment Team was told that no more than 5 lawyers were employed directly for drafting purposes in the Ministry of Justice. To compensate for this lack of resources, evidence suggested that the drafting of Government legislation was either out-sourced or experts were brought in to assist the drafting process.

On the other hand, the evidence implied that centralised departments of Government tasked with reviewing bills before submitting them to the National Assembly, although under pressure, were rather better resourced. For instance, the Assessment Team was told that there were 25 employees of the Legislative Secretariat dealing with the drafting of bills and that 10 such persons were employed in the Legal Department of the European Integration Office.

No doubt the present volume of primary legislation is in part a consequence of the application of Serbia to be a member state of the EU. Even so, if the evidence received on the volume of primary legislation and on the numbers of lawyers employed directly to draft it is a fair reflection of the situation, this leads to a situation which is both undesirable and probably unsustainable in the long-term. It is undesirable because it will be difficult to develop and maintain a consistent drafting style if a significant portion of legislative drafting is outsourced. A situation is also undesirable and likely to be unsustainable if drafters are severely and constantly overworked. One reflection of this may be that evidence received states that there was a high turnover of staff in this area.

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<sup>78</sup> Of of the amendments adopted, 36% were proposed by deputies (of which approximately 50% were proposed by opposition deputies) and 14.61% by Assembly committees. An analysis of the impact of the legislative procedure in the National Assembly of the Republic of Serbia on the laws proposed by the Government, with special view on Legislative Committee prepared by Dr. Oliver Nikolić suggests a more pronounced majority of adopted amendments submitted by deputies in the period May 2007-July 2010: 77.43% by deputies (55.8% by opposition deputies), 17.42% by Assembly committees, 4.6% by the Government, and 0.55% by the Civic Defender.

<sup>79</sup> See “Analysis of the impact of the legislative procedure in the National Assembly of the Republic of Serbia on the laws proposed by the Government, with special view on Legislative Committee”, 2010, p. 43

<sup>80</sup> The law on Determining the Maximum Number of Employees in State Administration *Off. Gaz. No.: 104/2009* may be a factor in this.

Two matters might be considered to address this situation.

First, the possibility of adjusting over time the balance of lawyers engaged in the initial drafting of bills and those engaged in reviewing the bills. If lawyers engaged in initial drafting were under less pressure it is likely that the task of reviewing would be less onerous and require fewer resources.

Secondly, more effort could be put into training legislative drafters. Evidence received indicated that in 2010 the Government Human Resources Service provided two two-day training courses on the methodology of legislative drafting attended by 33 trainees.<sup>81</sup> It is not known what the content of these courses was or who provided the training. However, with the recent adoption of the Unified Drafting Methodology Rules, the time would be ripe to offer courses based on the content of the Rules, conducted by experienced Government drafters or specialised trainers from Serbia or elsewhere, which offer not only lectures but also graduated to assess practical drafting exercises based on existing, and perhaps also draft, Serbian legislation.

It may also be noted that evidence received indicated that no universities in Serbia provide courses on legislative drafting.

### **8.3 The Unified Drafting Methodology Rules**

The adoption of the Unified Drafting Methodology Rules (hereafter, “the Drafting Rules”) in 2010 will contribute greatly to the drafting process, by ensuring the methodological consistency of legislation. It is assumed that the Drafting Rules will be reviewed regularly; the following matters could be addressed in such a review.

#### **8.3.1 The EU Dimension**

The Drafting Rules pay little attention to the drafting issues which arise from harmonising domestic legislation with the *acquis communautaire*, a matter of some contemporary and continuing importance for the Republic of Serbia.

Two questions which could usefully be addressed in the Drafting Rules are worthy of mention.

First, whether a law, or an individual provision within a law, should state *ex facie* the EU law or European Court decision which it is implementing or transposing. Adopting this style of drafting would notify courts and users on the implementation or transposition of such laws/decisions. This may be important as, in case of inconsistencies between EU laws and domestic Serbian laws implementing or transposing them, domestic courts will generally be under an EU legal obligation to apply EU law in preference to Serbian law. Similarly, an individual affected by a domestic Serbian law that is inconsistent with EU law may have an enforceable remedy in EU law.

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<sup>81</sup> There may, of course, be other training undertaken in individual ministries.

Secondly, it is also questionable whether there should be a consistent policy concerning the transposition of EU directives: it is not clear whether this should be undertaken entirely in the Serbian legislative drafting style or whether the transposition should adopt as far as possible the text of the EU directive (the “copy out” technique). The “copy out” technique would go some way to ensure that Serbia is not in breach of its EU legal obligations. On the other hand, adopting the EU drafting style in this context may somewhat undermine the objective to achieve a consistent drafting style which is thought suitable for Serbia.

There are, of course, other issues to be raised in this context, but it is not feasible within the scope of this Assessment to address them comprehensively.

### ***8.3.2 Encouraging Direct Legislative Language***

Essentially, legislation is a series of commands authorised by the state, and commands are most easily presented and understood if they are formulated in direct language. This is reflected in Article 34, but not elsewhere in the Drafting Rules; nor is this reflected more generally in the applied drafting style.

Thus, Article 51 of the Drafting Rules suggests the following style where a complete Article is amended: “[i]n Law xxx, article 1 is amended to read: ‘Article 1 [*new text*]’”. This may be achieved more directly by stating as follows: “[i]n Law xxx for article 1 substitute: ‘Article 1 [*new text*]’”. Similarly, Article 53 suggests the following style where new Articles are added: “[i]n Law xxx, after article 5 articles 5a-5c are added to read: ‘Article 5a [*text*], Article 5b [*text*], Article 5c [*text*]’ ”. This may be stated more directly in the following manner: In Law xxx, after article 5 insert: ‘Article 5a [*text*], Article 5b [*text*], Article 5c [*text*]’ ”.

Two further random examples are offered from other pieces of substantive legislation where more direct language may have enhanced the drafting of provisions. The Law on Amicable Resolution of Labour Disputes, in its Article 18 describes the activities which must be the subject of the statutory resolution procedure. These activities would perhaps have been better drafted as a list, rather than being presented discursively in pars 2 and 3 of the Article. The Law on Free [Economic] Zones specifies the required contents of the management plan to be submitted by the zone management company to the Free Zones Administration (Article 10 par 3); this might also have been done more directly and effectively in a list, as was done in the subsequent Article 11 setting out the required contents of the annual report to be submitted by the zone management company.

### ***8.3.3 Avoiding Imprecise Legislative Language***

Legislation should express rights and obligations as accurately and precisely as is feasible. Again this ideal is reflected in Article 34. However, other parts of the Drafting Rules could sometimes do more to encourage accuracy and precision and to discourage the otiose as regards the substance and recommended styles of drafting..

Article 38 of the Drafting Rules provides for the exceptional use of abbreviated forms. While this in itself may be acceptable in appropriate cases, the use of some of the abbreviated forms suggested there would create unnecessary uncertainty in the legislative text. For instance,

using “etc” or “et. al.” would, by their unspecified breadth, create such uncertainty. A generic word or phrase would be a preferable drafting style to a legislative list followed by such abbreviations.

Article 44 of the Drafting Rules provides: “when powers of a government authority are determined in a law, names of such authorities should not be listed but should be defined generally (e.g. ‘government authority with competence for...’).” If this rule is generally applied there may well be circumstances where the law will be uncertain as to whether a particular authority has competence to act; and, in any event, the style is unhelpful to the user, who is left to determine exactly where the competence lies within government.

Again, in Article 48 of the Drafting Rules addressing amendment styles, one that is suggested is “in articles 1, 4, 8 the words ‘public press and media’ *in appropriate cases* are replaced with the words ‘public media’...”. This suggested style somewhat undermines the clarity in textual amendment, for it does not specify which are the appropriate cases in the legislative text (or indeed appropriate applications of a provision) that the textual amendment is applicable to. The effect of the provision would be clearer and more precise if these were directly specified.

Finally, as an example of a situation where the Drafting Rules do not sufficiently discourage otiose language, Article 36 par 4 quite rightly recommends that words such as “previous” and “next” in identifying provisions should be avoided. However, Article 36 par 1 recommends as styles the use of the term “referred to in article 1 hereof” (for references to a provision in an article<sup>82</sup>) and “referred to in paragraph 1 of this article” (for references to a provision in a specific paragraph of that same article). Unless there is a danger of confusion with other provisions, “hereof” is otiose in the first example and “of this article” is otiose in the second.

### 8.3.4 Numbering Paragraphs

The Drafting Rules do not provide for the numbering of paragraphs, and this is also not a general practice of Serbian drafting style (in contrast to other elements of the legislation, such as including items within articles). Yet, although not directly numbered, the Serbian drafting style refers to paragraphs by their numerical order; so, for example, “by way of derogation to paragraph 3 of this article....”<sup>83</sup>.

Most jurisdictions do number paragraphs within articles, as it is found to be helpful both in referring to specific provisions in amendments and in cross-references. Generally, as it reduces the textual complexity of legislation, it is also of assistance to the user of legislation.

This may be illustrated by reference to Article 54 of the Drafting Rules themselves. The first paragraph provides the style for inserting a new paragraph after an existing one as “in article 2, paragraph 3 is added to follow paragraph 2, and reads:...”. If paragraphs were numbered this could be more succinctly expressed as “After Article 2(2) insert “(2a) [*text of the provision*]”. This would indeed generally follow the style provided for with regard to the

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<sup>82</sup> It may be noted that, following the Drafting Rules, this style has been used in, e.g., the Law on Financing Political Activities, Articles 9 par 3 and 17, adding to the complexity of an already complex piece of legislation.

<sup>83</sup> See the Drafting Rules, Article 24

insertion of new articles (Article 53 of the Drafting Rules), and could in this context also be expressed in the same more succinct way.

### **8.3.5 Renumbering Provisions**

Article 54 of the Drafting Rules provides for the renumbering of paragraphs when new paragraphs are inserted but not for the renumbering of articles when new articles are inserted (Article 53); if articles are inserted between, e.g., Article 5 and Article 6, they are numbered “5a”, “5b” and so on.

It is considered good international practice to follow the Serbian style in numbering articles, and not to renumber provisions where there are either new provisions inserted or existing provisions repealed. The reason for this is to avoid confusion and additional work for the drafter. If provisions are renumbered, cross-references to the renumbered provisions also need to be altered, and overlooking such amendments to cross-reference leads to confusion. Also, renumbering complicates reading earlier court judgments and similar material which have made reference to a provision by its original number.

### **8.3.6 Bullet Points**

The Drafting Rules provide for the use of bullet points in sub-items of legislative text (Articles 25 par 2 and 29).

It is considered good international practice to not use bullet points in legislation. Again, legislative text attached to bullet points is difficult to identify if it requires cross-referencing, is amended or repealed, or if further legislative text has to be inserted within a text which is bullet-pointed. It is therefore desirable to use additional identifiers for such text (e.g. “Article 1 (1) (i) (a)”) to identify an article, paragraph, item and sub-item respectively.

### **8.3.7 Appendices<sup>84</sup>**

Article 18 of the Drafting Rules suggests that the use of appendices should be limited to legislative content which cannot be expressed in a normative manner. This is an unduly restrictive use of appendices by international standards. In many jurisdictions they are used for detailed procedural rules (which for a variety of reasons it may be considered inappropriate to enact in subordinate legislation). They are also not infrequently used to list (in tabular form or otherwise) repeals, minor and consequential amendments, transitional and transitory provisions, and detailed rules for bodies established by the legislation. With respect to the latter use of appendices, it is noted that the 2002 Law on Broadcasting provides for the Council of the Broadcasting Agency (Articles 22 and following) and for the Managing Board of the Agency (Articles 87-90); these are the type of provisions which in many jurisdictions may well have been placed in appendices to the Act.

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<sup>84</sup> In some jurisdictions these are referred to as annexes or schedules.

The underlying rationale for such use of appendices is that detailed provisions, which it is considered appropriate to include in primary legislation, can be included in such a way that they do not detract from presenting the fundamentals of the legislation.

### **8.3.8 Gender Neutral Drafting**

Article 43 of the Drafting Rules states that “expressions in laws use the male gender, unless otherwise required by circumstances”. This is perhaps surprising given recent initiatives in Serbia related to enhancing gender equality.<sup>85</sup>

The rule departs from general international practice; most jurisdictions now require legislation to be drafted in a gender neutral manner, and others usually seek to avoid a gender specific style.

The rationale for relevant international practice is that legislation should be seen to demonstrate that it almost invariably applies without distinction by gender. Furthermore, it is relatively simple in most cases to prepare a gender neutral legislative text.

### **8.3.9 Drafting: “an Art as well as a Science”**

Finally, few rules of drafting style are in practice absolute, and to create an accurate and clear provision it may sometimes be necessary to depart from an otherwise commonly adopted drafting practice. For this reason, it is wise to be cautious about expressing drafting rules in absolute terms.

One example from the Drafting Rules may illustrate this observation. Article 47 par 2 of the Drafting Rules provides that “if more than half of the articles of a law are amended, it is necessary to pass a new law”. Such a mathematical approach should perhaps merely be used as a guideline. For instance, a few substantive amendments to a law may require many minor consequential amendments to other articles which nevertheless do not merit a complete re-enactment of the law; on the other hand, the fundamental amendment of one or two articles may make it politically and professionally desirable to re-enact the legislation.

## **8.4 Analytical Awareness**

“Analytical awareness” is used here to describe a primary skill which needs to be developed by the drafter of legislation. This is an ability to analyse the scope of the provisions required and ensure that all aspects of this requirement, but no more, have been appropriately addressed in the legislation as drafted. This is something which may not be readily addressed by norms; while it may be described, it is not easily conveyed in a drafting style manual either. It is a skill developed by training and predominantly by practice. However, analytical

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<sup>85</sup> E.g. see the Law on Gender Equality, and the Government’s adoption, in August 2010, of an Action Plan for the Implementation of the National Strategy to Improve the Position of Women and Gender.



awareness is enhanced by careful analysis of what is required by legislation to implement a policy as it is developed, and ensuring that this is fully conveyed to those that draft the implementing legislation.

One example of less than complete analytical awareness, considered under sub-section 4.10, is Article 113 of the Constitution which addresses the procedure for the promulgation of legislation. The President of the Republic has the a duty to promulgate legislation within 15 days or return it to the National Assembly for reconsideration. If the National Assembly reaffirms the legislation by an appropriate second vote<sup>86</sup>, the President is under the duty to promulgate it. However, it is not explicit whether the President is obliged to exercise this duty within 15 days as well. This ambiguity has a further consequence, for if the President fails to promulgate the legislation “within the deadline stipulated by the Constitution”, the Chairman of the National Assembly is empowered to do so. It is likely that as one deadline has been stipulated, it would be considered to apply to both situations. However, if this had to be judicially determined this would lead to delays and possibly, at least temporary, uncertainty over when or if legislation has come into force. This could be avoided by drafting with more analytical awareness.

Other examples from laws are found in the Law on National Assembly, which are discussed in sub-section 5.4.1.

## **8.5 Structuring Norms within Legislation**

### ***8.5.1 General Structure***

One, perhaps obvious approach which tends to simplify the structure of legislation is if the drafter tries to see the legislation as a whole and not simply as a series of separately expressed norms. Viewing the legislation as a whole can often allow the drafter to avoid unnecessary repetition. The Drafting Rules provide an example for such practice. They state that a piece of legislation and each element of it, from each Part to each Article, should have a title and that the title should be brief and reflect the content of the Part or Article. This could have been captured in one Article, but it is in fact repeated in several Articles<sup>87</sup>.

More specifically, the general manner in which normative provisions are presented may significantly affect the clarity with which the law is expressed, and similarly affect how user-friendly the legislation is. The most effective structure for presenting normative provisions may vary with the subject and purpose of the legislation, but a structure tends to be most effective if it presents the regulated process in a procedurally logical manner rather than presenting it as a series of segmented functional norms. The Drafting Rules, reflecting contemporary Serbian drafting style, could be seen as placing an emphasis on a segmented approach and it may be worthwhile to keep this under critical review.

For instance, the Drafting Rules require rights and obligations to be presented before related procedural provisions and to be followed by penal provisions (Article 9). This may increase

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<sup>86</sup> 126 MP's vote from total of 250 MP's vote.

<sup>87</sup> See Articles 4 and 20-24 of the Drafting Rules.

the complexity of the structure of the legislation. Take the 2005 Law on the Prevention of Money Laundering as an example: it lists certain categories of legal and natural persons with reporting obligations in Article 4 and then specifies what they must report in Article 5. In Article 6, it lists some of the data which must be supplied to the regulator by reference to Article 34, while further obligations of the relevant persons are found in Articles 5 par 7-11.. In other succeeding provisions, the regulator, namely the Administration for the Prevention of Money Laundering, is established and its powers and duties are designated (Articles 12-26), before the level of fines for breaching specific obligations is regulated in Article 37. The legislation could have had a less complex structure, and would be considered more user-friendly, if Article 34 had been placed closer to Article 6, and if the provision specifying each obligation had indicated that the breach of each obligation made the perpetrator liable to a fine as prescribed by Article 37.

#### ***8.5.2 Specification of Enforcement Procedures and Sanctions for Breach of Statutory Prohibitions***

Some absolute statutory prohibitions were found in the legislation examined, which did not appear to be related to specified enforcement procedures or sanctions in the event of a breach of the prohibition.

For instance, the Law on Public Roads, Article 32, provides that “a national road class I shall not cross a railway line at the same level”, but does not appear to list any specified enforcement procedures or sanctions should such a road really cross a railway line.

#### ***8.5.3 Specification of the Administrative Arrangements to Exercise Statutory Powers***

Although this may be ameliorated by the implementation of the adopted Drafting Rules, the procedures and instruments by which statutory bodies may make administrative arrangements to exercise their statutory powers is found to be rather rudimentary in some of the legislation examined.

The Law on Wine provides examples of this in Articles 52 par 3 and 5 par 2, as does the Law on Free [Economic] Zones (Articles 4 par 1 and 7) and the Law on the Prevention of Money Laundering (Article 13).

#### ***8.5.4 Relating Provisions***

Ambiguity in legislation can arise when provisions are not effectively related to one another. Provisions of the Constitution may illustrate this.

Unclearities may arise between paragraphs of the same Article. Thus, Article 197 of the Constitution largely prohibits legislation from having retroactive effect. There is a general procedural qualification to this and also a specific substantive one. However, the two qualifications appear independently in separate paragraphs of the Article without any indication of how they relate to each other. The consequence is a potential ambiguity over whether or not the specific qualification is subject to the general procedural qualification.

Such ambivalence may also arise between different Articles. Examples of this are ambiguities created by failing to link, respectively, the urgent procedure for enacting legislation and the procedure for enacting legislation to amend the Constitution with the standard legislative procedure.

More generally, a vague referential drafting style may also be the source of uncertainty or ambiguity in the law, or simply unnecessary inconvenience for the user. Two examples taken from the Law on Insurance may illustrate this point.

Article 20 of this law states:

“Insurance companies, insurance brokerage companies, insurance agencies, and agencies providing other insurance services are subject to the law regulating the legal status of companies, unless certain issues are regulated differently by this law.

Physical persons engaged in insurance agency activities are subject to the law which regulates the legal status of contractors, unless certain issues are regulated differently by this law”.

This provision, while legally effective, leaves the user to determine (i) whether issues are regulated differently in the Law on Insurance from the way they are regulated in the law regulating the legal status of companies and (ii) whether issues are regulated differently in the Law on Insurance from the way they are regulated in the law which regulates the legal status of contractors. Those determinations may be complex and uncertain. It would have been preferable for the drafter to indicate explicitly the extent to which the extraneous legislation does or does not apply in the Law on Insurance.

Article 11 states:

“A special law specifies and regulates compulsory traffic insurance”.

It may be noted that this provision simply makes a statement; it does not express a legal norm. In any event, it is unhelpful to the user because it does not formally identify the law to which it refers.

Relating legislative provisions more effectively and precisely also reduces the burden of those who subsequently consolidate or codify an area of law.<sup>88</sup>

## 8.6 Definitions

Definitions of words and phrases may in various ways assist in clarifying the legislative text. The Drafting Rules address the drafting of definitions in general terms (Articles 7, 34, 35), but offer little detail on the various uses of definitions and the style of their drafting, nor do the *Rules* provide for consistency in the use of definitions.

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<sup>88</sup> So, for instance, the present programme within the Ministry of Justice on drafting draft systematic laws; and the Government plan to repeal approximately one third of unnecessary or outdated legislation would not be necessary.

### ***8.6.1 Uses of Definitions***

Definitions have a variety of uses in legislative drafting beyond simply clarifying one meaning from a choice of possible meanings; not all of these uses appear to be deployed in Serbian legislation.

For instance, a definition may be used for labelling a term to avoid repeatedly describing it in full in the legislation (e.g. “ ‘[t]he Regulations’ mean the XYZ Regulations 2009”; “ ‘[s]tate enterprise’ means an enterprise established under Part III of this Law”).

Definitions may be used to extend or narrow a generally accepted meaning for the purposes of the legislation (e.g. “ ‘company’ means a company incorporated outside the European Union”; “ ‘horse’ includes donkey and mule”; “ ‘[p]rohibited munition’ does not include a mine”).

Or it may be used as a means to regulate the construction of the legislation, either directly or by reference to other legislation (e.g. “X when used in this legislation shall be construed as meaning X-Y and X+Z”; “X shall be construed as having the same meaning as in the ABC Act”).

### ***8.6.2 Drafting Definitions***

It is very helpful to the user of legislation if consistent simple language is used in presenting the application of definitions, and the definitions are presented in alphabetical order. So for example:

“In this Act, unless the context otherwise requires:

‘A’ means ‘X’;

‘B’ includes ‘Y’;

‘C’ includes ‘Z’ but not ‘ZD’”.

Definitions broadly fall into two categories; they are either closed definitions or open definitions. Similarly, it is helpful to the user if simple consistent language is used to convey this. In English, this is often done by using “means” to convey a closed definition and “includes” to convey an open definition (or, as in the definition of “C” above, an open definition with exclusions). So, for example:

“ ‘horticultural produce’ means vegetables, fruits, flowers or plants”

[meaning that “horticultural produce” means any or all of these things]

“ ‘horticultural produce’ includes vegetables and fruits”

[meaning that “horticultural produce” always means vegetables and fruits, but may in context also mean, say, flowers and plants]

Definitions which are drafted with multiple specific meanings are unhelpful if they also include an open category. They are better drafted in generic terms, or omitted for definitional purposes. So, for instance, the Law of the Republic of Serbia on Insurance, Article 9, lists five classes of life insurance, ending with “other classes of life insurance”; and in Article 10 lists nineteen classes of non-life insurance, ending with “other classes of non-life insurance”. As definitions, these lists serve no useful drafting purpose; and, for definitional as opposed to other drafting purposes, could have been omitted.

Definitions are commonly “labels” to clarify or simply the legislative text. It is therefore important that the “label” is readily accessible to the user. One drafting style, commonly used in Serbian legislation<sup>89</sup> and which appears to have the approval of Article 37 par 1 of the Drafting Rules could be avoided to increase this accessibility. This is: “ ‘ABC’ means ‘XYZ’ (hereinafter ‘AB’). The definition would be much more accessible to the user if it were drafted: “ ‘AB’ means ‘XYZ’ ”.

More generally, when making definitions accessible to the user, there should be consistency with regard to whether definitions should be grouped together in one Article or all identified in one Article, or placed where they first apply in the legislation. Grouping the definitions together represents good practice. It is acceptable to include a definition in an Article if it only applies to that Article (although even then it is helpful to identify it in a definitions Article, e.g. “ ‘A’ is defined in Article 76”). However, if the definition in one Article applies to a number of subsequent Articles, the reader of Article 107 may not be alert to the fact that a word used there is defined in Article 102<sup>90</sup>. Serbian drafting practice does not appear to be consistent in this regard. For instance, the Law on State Administration has no single definitions Article, but has definitions within individual Articles and the Law of the Republic of Serbia on Wine has a definitions Article, and definitions in other Articles which are not referred to in the definitions Article.

## 8.7 Consequential Effects

One feature of drafting laws in an increasingly complex body of legislation is ensuring that consequential effects of a bill on existing legislation are adequately addressed by repeals and amendments. To effectively manage the stock of legislation, all consequential amendments and repeals should be included in each bill and not enacted subsequently.

The explanatory note required to be included in a bill proposal submitted to the National Assembly has to include “an overview of any amendments to existing legislation” contained in the bill.

The “rationale” that must accompany a legislative proposal when it is submitted by a Ministry to central government has a more detailed specification: “a review of the provisions of the act in force that are being amended, (which is prepared by crossing out the part of the

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<sup>89</sup> E.g., Article 5 par 7 of the Law on Wine; Article 2 par 1 of the Law on Free [Economic] Zones); Articles 2, 3, 7, 16 and 24 of the Law on Amicable Resolution of Labour Disputes; Article 5 par 2 of the Law on the Prevention of Money Laundering.

<sup>90</sup> E.g. the Law on Financing Political Activities where the Anti-Corruption Agency is abbreviated to “Agency” in Article 27 par 5 and used in abbreviated form subsequently.

text that is being amended, and writing the new text in capital letters)”. However, such a review assumes that a bill is directly and partially replacing a single piece of legislation. Increasingly, it will be found that a bill will have consequential effects on other legislation, even where it is addressing a new issue not addressed by existing legislation.

## **8.8 Drafting for the User**

Legislation is a tool and should, as far as practicable, be drafted in a manner which makes it as convenient as possible for the user. Numbering paragraphs has already been considered in this context.

Another useful aid for the user, adopted in many jurisdictions, is to provide a contents page (which is not formally enacted) to make it easier to find provisions.<sup>91</sup> A contents page may also assist the drafter as it provides an indication of whether the structure of the bill is systematic and, indeed on occasion, whether it is comprehensive.

A contents page does not presently appear to be commonly used in Serbia (except in its codes), but it may well be considered.

# **9. THE EUROPEAN UNION DIMENSION**

## **9.1 Introduction**

One of the more demanding legal tasks facing member states of the European Union is ensuring timely, accurate and efficient implementation and transposition of EU legislation in domestic law. For applicant states, the task is even more demanding: there is a large volume of already enacted EU legislation to be implemented and transposed within a relatively short period, existing domestic primary and secondary legislation must be examined to ensure its compliance with EU law, and EU legislation enacted during the application period also needs to be addressed. In addition, the applicant state must establish that administrative structures and financial resources are in place to ensure that not only implemented and transposed legislation, but also future directly applicable EU law can be properly applied. This raises immediate issues for parliament and Government and also post-EU membership issues for those institutions and the courts.

For the applicant state, there are always the dangers that these issues will be addressed in a piecemeal manner, while meeting the continuing demands of implementation and transposition, and that these considerable demands will not allow for sufficient and detailed consideration of how implementation and transposition will affect the content and drafting style of the legislation of the applicant state as a whole.

In practical terms, experience suggests that implementation and transposition of EU legislation raises a range of jurisprudential questions.

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<sup>91</sup> In some jurisdictions, an index to each piece of legislation is also provided; again it is not part of the enacted text.

First, in implementation and transposition, each member and applicant state must consider: (i) does existing domestic legislation already satisfy EU law, without amendment?; (ii) would it be sufficient to make minor amendments to existing legislation to ensure such compliance?; (iii) is the focus of EU legislation so different from existing domestic legislation that new domestic legislation is required?; (iv) is new domestic legislation required because there is no parallel domestic legislation? For most of these questions, there are also sub-questions: (i) are amendments required not only for principal primary legislation, but also for subordinate legislation made under the authority of the principal legislation?; (ii) are amendments required not only for the principal primary legislation, but are consequential amendments to other primary legislation and its associated subordinate legislation also necessary?

Secondly, if new or significantly amended domestic legislation is required, there is the further jurisprudential (and often political) question of how this should be done in a manner that is most beneficial for the state - legally, economically, administratively and socially – while fully satisfying implementation or transposition requirements.

It is obvious that addressing these questions requires not only careful and detailed analysis of the EU legislation and existing and proposed domestic legislation, but also wider policy issues.

These matters inform this Section of the Report in the following Sub-sections.

## **9.2 Initial Developments**

### ***9.2.1 Action Plans for the Alignment of Domestic and EU Legislation***

In anticipation of an application for accession to the EU, an Action Plan for alignment was adopted in July 2003, which was updated annually by further Action Plans until 2007. These Plans were prepared on the basis of the submission of legislative plans of Ministries and other state bodies to central government. In consequence, they were focused on planned individual pieces of domestic legislation which would implement or transpose EU legislation<sup>92</sup>, rather than on a central prioritisation of specific EU legislation which required implementation or transposition. Nothing within the Action Plan arrangement allowed any agency of central government to recommend any specific legislation to implement or transpose particular EU legislation.

### ***9.2.2 Procedural Reinforcement***

To reinforce the implementation of the Action Plans, the Government Rules of Procedure from 2004 introduced two new potentially significant requirements.

First, the proposer of a bill was now required to submit to the Government General Secretariat along with the draft a “Statement of Compliance” that the proposed law was

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<sup>92</sup>Article 20 of the Law on Ministries requires the Ministries to “ensure the alignment of legislation with European Union Law”.

consistent with EU legislation or that EU legislation did not affect the proposed law. Article 151 of the Rules of Procedure of the National Assembly places a similar obligation on the proposer of a bill when submitting it to the National Assembly or, in the alternative, a statement should be presenting stating that it was not possible to harmonise the bill with EU law.<sup>93</sup> However, the “Statement of Compliance” only had to declare that the proposed law was aligned with EU legislation under one of three broad categories:

- (i) fully compliant;
- (ii) partially compliant or
- (iii) not compliant with EU legislation.

Secondly, the proposer of legislation was now required to obtain an opinion on the alignment of the proposed legislation with EU law from (as it was subsequently named) the European Integration Office. The effectiveness of this procedure has been somewhat undermined by the Office often having to give an opinion at rather short notice and without having seen earlier drafts of the legislation prior to its opinion being formally sought.

### **9.3 Procedural Responses to the Stabilisation and Association Agreement and the Interim Agreement on Trade and Related Matters**

#### ***9.3.1 The Agreements***

In September 2008, the Republic of Serbia ratified the Stabilisation and Association Agreement (hereinafter, “the SSA”) with the European Communities and its member states<sup>94</sup>. The country also ratified the Interim Agreement on Trade and Related Matters (hereinafter, “the IA”) with the European Community<sup>95</sup>.

The SAA, *inter alia*, in its Article 72 requires Serbia to seek to ensure gradual alignment of its existing and future domestic legislation with EU legislation over a transitional six-year period, in accordance with a specified agreed and monitored programme, and to ensure that this domestic legislation is applied and enforced.

Article 38 of the IA, *inter alia*, broadly requires Serbia, over transitional periods of varying length, to apply EU law on competition policy and state aids, and on intellectual, industrial and commercial property rights, with the necessary implementing domestic legislation.

#### ***9.3.2 Procedural Responses***

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<sup>93</sup> The “Statement of Compliance” procedure was drawn from initial UK practice and, more specifically from Croatian practice. It may be noted that until 2009, the “Statement of Compliance” was only required for primary legislation, but after that it was also required for subordinate legislation.

<sup>94</sup> Off. Gaz. No.: 83/08

<sup>95</sup> *Ib.*



There were two significant procedural responses to the obligations under the two Agreements.

First, in anticipation of the Agreements and after public and wide internal government consultation, a National Programme for Integration of Serbia in the process of co-ordinating domestic legislation with the *acquis communautaire* (hereinafter the “NPI”) was prepared and adopted in October 2008; it is subject to annual audits to accommodate recent EU legislation, and the European Integration Office is required to issue quarterly and annual reports on its implementation.

The NPI was modelled on the national programme for the adoption of the *acquis communautaire* which is required by the EU of all applicant states and thus has a more effective structure than its predecessors. It is a detailed plan for the adoption of domestic legislation to implement and transpose EU legislation, with priorities and timetables, and specifies the Ministries and other authorities responsible for preparing the various proposed laws. It was envisaged that the NPI would include on a continually revised basis the administrative capacity to apply the legislation once enacted, but there has been some slippage in respect of this. It also addresses the political and economic criteria established by the EU for the accession of Serbia. Weaknesses in the NPI remain however, in that it does not contain a review of the financial implications of applying the legislation and that it does not fully address the important policy issues identified in the questions set out in the introduction to this Section. The NPI envisaged the completion of domestic implementation and transposition of EU legislation within its ambit by the end of 2012, but it seems highly likely that this deadline will need to be extended by one or two years.

Secondly, a “Table of Compliance” became a requirement for drafting primary and subordinate domestic legislation at the time of submission of the legislation to central Government; this too anticipates requirements that are placed on applicant states by the EU in the course of the accession process. The Table of Compliance provides a detailed, provision by provision, indication of EU legislation and the provisions of the domestic legislation which implement or transpose them, and also a similarly detailed indication of the domestic legislation and the provisions of EU legislation which they implement or transpose. The requirement to submit the “Table of Compliance” became mandatory for proposed domestic primary and subordinate legislation from, respectively, June and July 2010; it also became mandatory to obtain an opinion from the European Integration Office on the Table of Compliance before submission of the proposed draft legislation to central government.

One current omission in the “Table of Compliance” is a satisfactory analysis of other domestic legislation in the area of law of the proposed implementing legislation. The consequence is that the stock of Serbian legislation may still continue to contain unidentified provisions which are inconsistent with EU legislation or the proposed domestic legislation drafted to implement it<sup>96</sup>. Of further concern is the fact that subordinate legislation passed in order to implement primary legislation may not be enacted for a considerable period after the primary legislation is enacted, and thus the “Table of Compliance” may present an over-optimistic picture of the progress and adequacy of implementation.

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<sup>96</sup>See the Serbia 2010 Progress Report, which (par 4.1.5), for instance, draws attention to provisions implementing the Law on Competition Protection being undermined by an Act on Mandatory Car Insurance.

## 9.4 The Government Organisational Framework

A Co-ordinating Body for the EU accession process was established in 2007<sup>97</sup>, under the chairmanship of the Prime Minister, and has an infrastructure which oversaw for example the allocation of jurisdiction to Ministries and other state bodies tasked with implementing specified areas of EU law<sup>98</sup>. In addition, a European Integration Council, also chaired by the Prime Minister, draws on the expertise and views of members who are civil society representatives.

At a functional level much of the direct supervision of the structures described in this section is the responsibility of European Integration Office<sup>99</sup> which was first established in 2004<sup>100</sup>, and its status and present functions are set out in the Law on the Establishment of the European Integration Office<sup>101</sup>. The Office has a wide range of functions, arguably too wide a range, which include “encouraging and monitoring” the alignment of Serbian legislation with EU legislation and providing “assistance to Ministries and other state bodies” in ensuring this alignment. However, as observed, it does not have a formal proactive function to recommend the enactment of specific legislation to implement and transpose EU legislation. In addition, the General Secretariat and the Legislation Secretariat have supervisory functions over bills implementing and transposing EU law as they have with all draft Government-promoted legislation.<sup>102</sup>

## 9.5 The Parliamentary Dimension

This Section of the Assessment has thus far focussed on the Government procedures which have been established to respond legislatively to the demands of Serbia’s progress towards membership of the EU. It has to be said that this is indeed an initial and primary responsibility of the Government, but there is a disturbing lack of detailed and effective scrutiny by the National Assembly of how the Government is undertaking the task of implementation and transposition.

There appear to be a number of reasons for this.

First, one of the grounds which justify a request to apply the urgent procedure for the enactment of legislation, in which parliamentary scrutiny is substantially reduced, is that the

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<sup>97</sup>Off. Gaz. Nos.: 95/07, 5/10

<sup>98</sup> For instance, this task was undertaken by subgroups of the Expert Group of the Coordinating Body.

<sup>99</sup> The Office, in establishing its supervisory systems, has benefited from developing a liaison with a parallel institution in the Republic of Slovenia.

<sup>100</sup> Its precursors were the European Integration Unit, established within the then Ministry of International Economic Relations in 2002 and the Department of European Integration established in the same Ministry in 2003; the present Office was initially designated as the EU Accession Office

<sup>101</sup>Off. Gaz. Nos.: 126/07, 117/08, 42/10 and 48/10; see also the National Development Strategy 2008-2011.

<sup>102</sup> It may also be noted that the Government Human Resources Service provides some training courses on preparing the Table of Compliance and on harmonising domestic legislation with EU law generally; two two-day courses were held in 2010, attended by 23 trainees.

purpose of the bill is to harmonise legislation with the *acquis communautaire*. The urgent procedure appears to be widely used for such implementing and transposing legislation, and much of the parliamentary focus is at present on that legislation rather than on other legislation.

The rationale for the extensive use of the urgent parliamentary procedure for bills implementing and transposing EU legislation is questionable. As we have seen, this legislation, although quite voluminous, is prepared and submitted to the National Assembly as a result of long-term planning. The extensive use of the urgent procedure is likely to have deleterious effects on the quality of legislation as a result of limited parliamentary scrutiny. It may be noted that the (European Commission) *Serbia 2010 Progress Report* concurs with this assessment; it observed of the National Assembly that “the quality of legislative output has been affected by the practice of lawmaking by urgent procedure”<sup>103</sup>.

Secondly, relevant committees of the National Assembly appear to be inadequately staffed to perform their functions. Evidence received from the Committee on Constitutional and Legislative Issues was that it needed more experts in its staff, particularly on EU-related matters, as the candidacy of Serbia for EU membership progresses. Evidence from the European Integration Committee was that it did not have sufficient staff to analyse the bill before it in depth. As a consequence, it is reduced to merely considering the political implications of the implementing legislation and its broad effect. This Committee is thus effectively leaving the detailed review process of the legislation, including the feasibility of its subsequent administration, almost exclusively to the Government. However, this is a situation which may be ameliorated by expanding the resources of the National Assembly research centre.

Thirdly, an argument may be advanced that this division of responsibilities, however constitutionally unsatisfactory, is an inevitable consequence of the volume of implementing and transposing legislation that must be enacted in a relatively short timeframe. The weakness of such an argument is that the process of enacting implementing and transposing EU law is not one which ceases on accession; it is also a continuing feature of membership of the EU. The appropriate roles of the Government and the National Assembly in this particular legislative process is a question which needs to be addressed not only for the period up to accession but also for the long-term. The current scrutiny role of the National Assembly would appear to be unacceptably peripheral by the standards of many EU member states.

## 9.6 Some Conclusions

The Republic of Serbia applied for membership of the EU on 22 December 2009 and the European Commission agreed to recommend it as a candidate state for EU membership on 12 October 2011<sup>104</sup>. This therefore seems an appropriate time for Serbia to review its

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<sup>103</sup> See EC Serbia 2010 Progress Report, par 2.1

<sup>104</sup> Recently, it became known that this recommendation was not approved by the EU Council on 9 December 2011 and that the EU will probably grant Serbia EU candidate status in March 2012 provided it steps up talks with Kosovo, while Montenegro's membership talks will start in June 2012 pending a crackdown on corruption and crime (see <http://euobserver.com/15/114558>).

arrangements for completing the implementation and transposition of EU legislation through domestic legislation. It is likewise a good time to review arrangements for reviewing the legislation, for addressing the economic implications and administrative arrangements for applying the legislation, but also to address other issues which will arise once Serbia becomes an EU member state. Some of the matters which may usefully be addressed are listed here.

First, it would appear that the present procedures within the Government and the National Assembly do not address, or do not fully address, several of the jurisprudential questions raised in the introduction to this Section of the Assessment. As examples of this, the procedures do not systematically address whether domestic legislation in the field of specific EU legislation, other than the implementing domestic legislation itself, is consistent/inconsistent with EU and implementing legislation; neither do the procedures appear to address whether the manner and substance of domestic implementation of EU legislation is the most beneficial for Serbia. Some have suggested that these matters may need a degree of institutional reform in addition to procedural adjustment.<sup>105</sup>

Secondly, the present limited role of the National Assembly in scrutinising proposed implementing and transposing legislation could well be enhanced with a view to generally improving the quality and effectiveness of that legislation.

Thirdly, it may be argued that the procedures with respect to subordinate (secondary) legislation implementing and transposing EU legislation should be made more robust, particularly as the general experience of EU member states is that subordinate (secondary) legislation is a more common mode of implementation and transposition than primary legislation.

Fourthly, existing procedures do not appear in practice to sufficiently address either the economic implications of implementing and transposing EU legislation or the administrative capacity to apply and enforce that legislation. Ways of improving these matters could usefully be re-examined and addressed. Apart from other considerations, a failure to apply and enforce implementing legislation could, on accession, leave the state open to enforcement actions by the European Commission and financial liability in successful legal actions taken against the state and state agencies by the Commission and by legal and natural persons.

Finally, there are matters which could it may be worthwhile to examine in detail now, although they will largely arise on and after accession. One example of this is the systematic training of judges at all levels in EU law, as all Serbian courts and tribunals may potentially be required to apply it. In particular, there should be training in such aspects of EU law as the jurisdiction of the European Court, the relationships between EU law and domestic law, and the interpretation of EU law. Consideration may be given to preparing training courses in EU law within the Judicial Academy.

## **10. CONCLUSIONS AND RECOMMENDATIONS**

### **10.1 The Constitution and Legislative Competence**

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<sup>105</sup> See, for instance, the views of Vladimir Todorčić and Nikola Jovanović in their recent book, *Mind the Gap*, published in 2011 (<http://www.cnp.rs/resources/files/eng.pdf>).

The Constitution of the Republic of Serbia as the supreme legal instrument of the State regulates both the legislative competence of the National Assembly and the Government, and also the legislative process.

The Constitution regulates legislative competence in a number of significant respects (which are analysed in detail in Section 3) in that it:

- (i) provides for a hierarchy of legal norms and specifies the manner in which legally inferior norms must be compatible with those that are legally superior;
- (ii) variously prohibits or requires (directly or indirectly) legislation on specified matters, or provides discretion to legislate on them;
- (iii) prohibits, with some qualifications, legislation to be of retroactive effect;
- (iv) with respect to its range of directly enforceable human and minority rights, provides that legislation may be enacted to prescribe the manner in which these rights may be exercised, but only where this is necessary given the nature of the right, and also provides that legislation may be enacted to restrict the rights, but only in the manner and to the extent specified in the Constitution;
- (v) allows derogation from many of its human and minority rights where there has been a proclamation of either a state of emergency or a state of war; and
- (vi) contains a range of institutional and individual economic rights to which the legislative limitations and restrictions on human and minority rights do not appear to apply, although no legislation may be competently enacted which is in conflict with provisions of the Constitution.

The following recommendations relate to some of these constitutional provisions which are considered to contain ambiguities or omissions. It is recognised that in responding to them it may be considered best to await a time when a more extensive revision of the Constitution is in contemplation and that, in many instances, the recommendations would require not only an amendment of the Constitution but also a public referendum on the adoption of the amendment.

### ***Recommendations***

1. The National Assembly and the Government consider whether there would be merit in extending the fundamental principles in Articles 18 and 20 of the Constitution, (relating to the capacity to legislate on human and minority rights) to certain economic rights laid down in Part 3 of the Constitution.
2. The National Assembly and the Government examine Articles 194 (hierarchy of norms), 197 (prohibition of retrospective effect of legislation), and 200 – 202 (states of emergency and of war) of the Constitution, with a view to amending these provisions to address issues identified in the Assessment.

## **10.2 Development of Legislative Policy**

The development of policy within Government and the drafting of Government legislation to implement policy are considered in Sub-sections 4.2.2-4.2.4, 4.3 (with respect to the impact of the *National Assembly Rules of Procedure* on this) and Section 5.

It would seem from evidence received that the development of Government policy is not as well managed as it could be. While policy development is co-ordinated within the Government's Annual Programme of Action, that Programme is largely composed of the annual programmes of action of individual Ministries. Thus, in effect, co-ordination at central Government level frequently takes place after the individual Ministries have formulated a policy and often after they have drafted legislation to implement it.

Policy development and the drafting of legislation to implement formulated policy commonly takes place within the working groups of a Ministry, with variable consultation with other Ministries and other state agencies, despite procedures requiring it. Evidence received suggests that these two different tasks may not be sufficiently delineated within this working group structure, and this may contribute to legislation being drafted with insufficient analytical focus and with insufficient attention being paid to its statutory and practical impact on existing cognate legislation, particularly where such legislation has been promoted elsewhere in Government. These matters are further explored in the consideration of legislative drafting. One means of achieving the suggested delineation may be for the Government to require central government approval of a Ministerial policy before the Ministry drafts the legislation to implement it.

An important and valuable tool in both policy development and drafting legislation to implement policy is impact assessment. Although both the Government and National Assembly Rules of Procedure provide for this, some evidence received suggests that conducting impact assessment on both policy and its implementing legislation is in practice rather inconsistent. If this is a correct assessment<sup>106</sup>, one contributing factor may well be that impact assessment is to some degree discretionary within the procedural rules. Thus, a Ministry submitting a bill to central Government must provide an impact assessment or explain why it is not necessary to provide it<sup>107</sup>, and in the rationale to be provided with a bill submitted to the National Assembly, an impact assessment is expressed as a discretionary component (unlike an account of policy development itself).

### ***Recommendations***

3. The Government is recommended to examine its procedures to ensure that the development of policy and drafting of implementing legislation within Ministries is co-ordinated to a degree which addresses more satisfactorily its contemporary over-arching general objectives.
4. The Government is recommended to explore procedural means to delineate more clearly within Ministries, and their working parties, policy development from drafting the legislation to implementing developed policy.

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<sup>106</sup> It may be noted that the assessment in the evidence received is shared by the EU in its 2010 Serbia Progress Report, par 2.1, which observes with respect to the Government that "the quality of the legislation...continued to be affected by inadequate impact assessment".

<sup>107</sup> Although it may still be compelled to conduct such impact assessment by the central Government.

5. The Government and the National Assembly are recommended to examine procedural means of ensuring that conducting impact assessments of both policy and its implementing legislation is compulsory in all but the most exceptional specified circumstances.

### **10.3 Civil Society Consultation**

Civil Society consultation is considered in Section 6.

Consulting civil society in the lawmaking process is internationally recognised good practice, and indeed an indispensable element in developing policy and also in the preparation of legislation.

To be effective, civil society consultation should be an interactive process, although this has time and cost implications that have to be built into the process. Simply providing information to the public, or involving those outside Government in developing policy or drafting legislation, is not considered to be civil society consultation, although it was sometimes presented as such in evidence received.

International experience strongly suggests that civil society consultation on government policy, or on alternative policies under government consideration, extends the policy development process somewhat but greatly enhances the policy eventually adopted. This is, after all, no more than the recognition that no government has a monopoly of knowledge and experience. However, evidence received suggests that policy development is a rather hermetic process within the Government. There would, it is suggested, be real value in Ministries publishing quite detailed policy strategy papers, outlining a policy or policy options, and seeking the views of civil society before finalising its policy.

Government procedure requires civil society consultation on Government bills where the bill “can change significantly the way in which a matter has been addressed legally or governs a matter of public interest” and the National Assembly procedure indicates that the extent of public consultation is a discretionary element of the “rationale” submitted with a bill.

However, the Government procedural test appears to be applied strictly in that evidence received suggests that only a small percentage of Government bills are put out to civil society consultation. In addition to that, the Government does not appear to follow a comprehensive systematic procedure for such consultation, and a variety of processes are used by Ministries in conducting civil society consultation, with a variable interactive element. It would be valuable for the civil society consultation process in Government to be both more systematised and more extensively used.

Although the nature of parliaments is such that they are more accessible to the public than most state institutions, civil society consultation also has a part to play in their activities. National Assembly committees have the capacity to hold public hearings. The evidence received is that they are now being held with greater frequency, but that they often consist in general discussions on the broad principles of the bill, rather than on its individual provisions. The National Assembly might consider whether there is merit in promoting procedures by which its committees publicly invite written evidence and take oral recorded evidence by

invitation related to bills before them. In this way, the committees would receive more structured public responses to assist in their deliberations.

In addition to this, but more difficult to achieve, the National Assembly might usefully reassess its procedures to examine whether the enactment process could be extended to permit civil society consultation on significant amendments to a bill. Amendments may substantially alter a bill and responses to a consultative process on a bill as submitted may be rendered somewhat nugatory by proposed substantial amendments to it during the parliamentary process.

### ***Recommendations***

6. The Government is recommended to consider introducing a systematic procedure by which Ministries publish policy strategy papers for civil society consultation before policies are finalised within Ministries.
7. The National Assembly and the Government are recommended to examine their procedural rules to ensure that there is civil society consultation on all bills, except in exceptional specified circumstances.
8. The Government is recommended to consider introducing procedures which ensure a comprehensive and consistent process for civil society consultation on Government bills.
9. The National Assembly is recommended to consider introducing procedures for its committees to take written and oral evidence on bills, and if possible on significant amendments to bills, to facilitate more structured civil society consultation.

## **10.4 The Parliamentary Legislative Process**

The Parliamentary legislative process is reviewed in Section 4 and further considered in Section 7.

The National Assembly adopts the very practical procedure of a bill being first considered by committees (and by the Government where it has not promoted the bill) so that their reports can inform the Assembly prior to the bill being debated in principle in plenary session. However, the procedure retains the possibility that this information flows to deputies in a somewhat diffuse manner. It is suggested in the Assessment that this may be addressed by introducing amendments to the procedure by which deputies would receive a single committee report on the bill instead of receiving several different reports on it.

As in most parliaments, the National Assembly follows a plenary debate of a bill in principle with a debate on detailed provisions of the bill. The logic of this is that the general informs the particular. However, under the National Assembly procedure this is somewhat undermined by the requirement that, in the main, amendments have to be submitted and also reported on by the competent committee and the Government prior to the first plenary debate on the principles of the bill, and thus before deputies and the Government have heard arguments on the principles. It is suggested that the procedure be somewhat adjusted to address this.



It is necessary that parliamentary procedures allow for bills of greater political and legal importance to be afforded more time for scrutiny and debate than those of lesser importance, and also to accommodate bills required to meet urgent circumstances. Nevertheless, it should be recognised that extensively resorting to such procedures has not only the potential to undermine the democratic process but also commonly has the more immediate consequence of admitting the enactment of legislation of poorer quality.

The National Assembly Rules of Procedure contain such procedures which result in a significant truncation of parliamentary time for scrutiny and debate; they are also procedures which are insufficiently detailed in these Rules.

The first of these is the urgent procedure. It is suggested that the National Assembly, in consultation with the Government, explore how the extensive use of the urgent procedure, which has been widely criticised both in evidence received and elsewhere, may be reduced. One example of how this may be achieved is with respect to legislation implementing and transposing EU law. EU law, like all law, contains legislation of differing political and legal importance. However, the Rules of Procedure of the National Assembly provide that all bills harmonising domestic law with the *acquis communautaire* may be enacted by the accelerated urgent procedure. Although it is formally for the National Assembly to decide whether a bill is enacted by the urgent procedure, it would be helpful if these Rules of Procedure would specify that the use of the urgent procedure in this respect is limited to legislation providing for the routine harmonisation of matters of lesser importance. In addition, it is suggested that the National Assembly review its Rules of Procedure to clarify the urgent procedure for the adoption of legislation in detail.

The second urgent procedure is the abbreviated procedure. The grounds for justifying the use of this procedure are not specified in the Rules of Procedure of the National Assembly; again here the Rules do not specify with sufficient clarity how the procedure operates. It is suggested that the National Assembly review its Rules of Procedure to address these matters.

Aside from exceptional and necessary truncated legislative procedures, all parliaments need procedural rules to regulate parliamentary time in the ordinary process of enactment of legislation. The National Assembly does this, in part, by regulating the time of speeches both in debate on a bill in principle and in debate on detailed provisions. The provisions in the Rules of Procedure of the National Assembly which provide for this may be thought by some to somewhat favour the Government over other bodies, and to favour political over technical evaluation. There is, of course, a certain inevitability to this in parliamentary proceedings, but it is suggested that the National Assembly may consider revising its Rules with a view to adjusting these perceived imbalances in the interests of both reinforcing democracy and also achieving better quality legislation.

Another aspect of the legislative process is the promulgation of laws. The Assessment, at Sub-section 4.9, draws attention to ambiguities in the provisions of the Constitution with respect to this procedure, and also in the related Rules of Procedure of the National Assembly. Promulgation is usually a formal procedure addressing technical matters, but in some circumstances it may become politically contentious. Consequently, it is highly desirable that the procedure not be ambiguous in its operation. For that reason, it is suggested that the National Assembly and the Government review the relevant Articles of the Constitution identified in the Assessment, and that the National Assembly review the identified related provisions of its Rules of Procedure of the National Assembly.

Finally, all parliamentarians rely heavily on parliamentary staff in performing their legislative functions both in committees and in plenary debate. Consistent evidence received indicates that the National Assembly Service is understaffed, in particular with respect to the central parliamentary research centre and to Assembly committees. As a consequence of the Law on the National Assembly, Part XV, this is a matter now in the hands of the Assembly and this body should address it.

### ***Recommendations***

10. The National Assembly, in consultation with the Government, is recommended to consider revising the Rules of Procedure of the National Assembly to appoint a single Assembly committee to report on a bill prior to the debate on the bill in principle, in a manner such as that explored in the Assessment.
11. The National Assembly, in consultation with the Government, is recommended to consider revising its Rules of Procedure to facilitate tabling amendments to a bill after the bill has been debated in principle, in a manner such as that explored in the Assessment.
12. The National Assembly, in consultation with the Government, is recommended to seriously address and debate means by which there may be less frequent resort to the urgent procedure for the enactment of bills.
13. The National Assembly is recommended to review its Rules of Procedure to specify with greater clarity the urgent procedure for the enactment of bills.
14. The National Assembly is recommended to review its Rules of Procedure to specify with greater clarity the abbreviated procedure for the enactment of bills, and to specify the grounds based on which it may be proposed that this procedure be applied.
15. The National Assembly is recommended to review its Rules of Procedure with respect to the time limits on contributions to debates on a bill in principle.
16. The Government and the National Assembly are recommended to review the Articles of the Constitution regulating the promulgation of enacted legislation, with a view to addressing the ambiguities identified in the Assessment; also the National Assembly should review the provisions of its Rules of Procedure relating to the promulgation of legislation, with a view to addressing ambiguities identified in the Assessment.
17. The National Assembly should make significant financial provisions for increasing the size of the National Assembly Service, in particular to enhance the central parliamentary research centre and increase the staff of Assembly committees.

### **10.5 Legislative Drafting**

Legislative drafting is considered in Section 8.

Good quality legislative drafting underpins any legal system; it has obvious administrative and financial benefits, and it also eases the burden on the legislature responsible for scrutinising and enacting it.

Evidence received suggests that legislative drafting capacity is under-resourced, particularly in Ministries and it is suggested, without making this a recommendation, that the Government address this at the earliest economically feasible opportunity. Evidence received also suggests that the drafting capacity would benefit from further systematic training, possibly in a manner outlined in the Assessment.

The implementation of the adopted Drafting Rules in 2010 should improve the technical quality of drafting. However, there are weaknesses and omissions in the Drafting Rules identified in the Assessment which could usefully be addressed by the Government and the National Assembly. There are further aspects of drafting identified in the Assessment, in some cases going beyond the merely technical, which could also be usefully addressed. Some of these, such as analytical awareness (which could be strengthened by improved policy development procedures), while taking full account of consequential effects on cognate legislation and those related to keeping the stock of legislation consistent and up to date, have advantages beyond good quality drafting of individual bills.

### ***Recommendations***

18. The Government is recommended to provide for comprehensive and systematic training in legislative drafting, based in part on the Unified Drafting Methodology Rules, and review the manner of training as suggested in the Assessment.
19. The Government and the National Assembly are recommended to review the Unified Drafting Methodology Rules with reference to their analysis in the Assessment; and consider for adoption the other drafting issues raised in the Assessment.

## **10.6 The European Dimension**

The task of enacting domestic legislation to implement and transpose the existing *acquis communautaire* is both complex and fast-moving. It is suggested that this is an appropriate time for central Government to consider whether the existing Government procedures encompass all the jurisprudential questions posed in Sub-section 9.1 of the Assessment, and whether they are all being asked and appropriately addressed.

Within Government, the task of enacting the necessary implementing legislation is centrally co-ordinated, with much of the technical day-to-day supervision falling to the European Integration Office. However, despite central Government co-ordination, as in other areas discussed in the Assessment, the function of preparing the necessary domestic legislation is still largely devolved to individual Ministries. A number of important consequences flow from this. First, the procedures may not fully address the quality of subordinate legislation, even though based on the experience of many member states, much of the implementation and transposition of EU law is done by subordinate rather than primary legislation. Secondly, it would appear that not sufficient attention is being paid to the financial and administrative implications of the legislation. Thirdly, the legislation may not fully address cognate

legislation which is the responsibility of another Ministry or state agency. Fourthly, there appears to be no proactive mechanism within central Government to suggest priorities. It is suggested that when reviewing relevant procedures, the Government address these matters.

Clearly the political and legal implications of the process of domestic implementation and transposition of EU law are not merely a matter for the Government; these are matters in which the National Assembly should also play a significant role. Evidence received suggests that the National Assembly is experiencing difficulty in undertaking this role. Some of this difficulty arises from matters already discussed, such as the urgent procedure almost invariably adopted for implementing and transposing primary legislation, and the inadequate staffing of the European Integration Committee which has resulted in the Committee undertaking its scrutiny of the legislation at a very basic level.

However, the National Assembly should review its role in this area with an eye to the future. Domestic implementation and transposition will continue as a routine matter after Serbia joins the EU, although not with the volume of legislation which the Assembly is facing now and in the immediate future. Both implementation and transposition will continue to raise important questions, for instance: is the manner of implementation and transposition adopted by the Government the most beneficial for Serbia? The European Integration Committee should be positioned and resourced to report on these broader questions, as well as narrower technical ones.

Finally, there are other post-EU membership issues related to, but separate from, the legislative process which should also be considered at this point. One raised in Sub-section 9.6 of the Assessment is the training of judges at all levels in EU law.

### ***Recommendations***

20. Government centrally is recommended to review whether its existing EU compliance procedures encompass all the jurisprudential questions posed in Sub-section 9.1 of the Assessment, and whether they are all being asked and appropriately addressed.
21. Government is recommended to review the identified consequences of much of the implementation of its EU compliance being devolved to individual Ministries.
22. The National Assembly is recommended to review its appropriate and manageable functions in respect of Government action in relation to the EU and of bills bringing domestic law into compliance with EU law, both now and in the post-membership of the EU period.
23. The Government is recommended to introduce a plan for training the judiciary in EU law.

## **Annex 1**

### **List of Interviewees**

#### The National Assembly

1. **Vlatko Ratković**, Chairman of the Legislative Committee, the National Assembly
2. **Radoje Cerović**, Secretary of the Legislative Committee, the National Assembly
3. **Srdan Miković**, Member of the Legislative Committee, the National Assembly
4. **Mirjana Radaković**, Assistant Secretary General, the National Assembly
5. **Novica Kulic**, Head of the Legislative and Legal Affairs Department, the National Assembly
6. **Biljana Hasanovic-Korac**, MP, the National Assembly
7. **Veljko Odalović**, Secretary General, the National Assembly
8. **Mladen Mladenović**, Deputy General Secretary, the National Assembly
9. **Nenad Konstantinović**, Chairman of the Administrative Committee, the National Assembly
10. **Laszlo Varga**, Chairman of the European Integration Committee, the National Assembly
11. **Alexandar Djordjević**, Secretary of the European Integration Committee, the National Assembly
12. **Branka Ljiljak**, Member of the Finance Committee, the National Assembly
13. **Mihailo Puric**, Member of the Finance Committee, the National Assembly

#### The Assembly of the Autonomous Province of Vojvodina

14. **Branimir Mitrovic**, Vice President, the Assembly of Autonomous Province of Vojvodina
15. **Milorad Gasić**, Secretary of the Assembly of Autonomous Province of Vojvodina

#### The Government

16. **Tamara Stojcević**, Secretary General, the Government

17. **Sasa Marković**, Assistant Secretary General, General Secretariat of the Government
18. **Vojkan Simic**, Assistant Minister of Justice
19. **Dusan Nikezic**, State Secretary, the Ministry of Finance
20. **Djordje Vukotić**, Head of the Legal Team, the Regulatory Review Unit within the Government
21. **Marko Urosević**, Legal Consultant, the Regulatory Review Unit within the Government

#### The Office of the President

22. **Rubela Radojčić**, Deputy Secretary General, Office of the President
23. **Biljana Milosavljević**, Legal Advisor to the Secretary General, Office of the President

#### The Constitutional Court

24. **Vesna Ilic-Prelić**, Justice, the Constitutional Court
25. **Ljubica Pavlović**, Counsellor for International Cooperation, the Constitutional Court

#### The National Bank

26. **Majo Benderac**, Advisor, Legal Affairs Department, the National Bank of Serbia
27. **Svetlana Milic**, Advisor, Legal Affairs Department, the National Bank of Serbia
28. **Kristina Obradovic**, Legal Department, Compliance Division, the National Bank of Serbia

#### The Office of the Civil Defender

29. **Sasa Jankovic**, Civil Defender, the Office of the Civil Defender
30. **Jasminka Jakovljevic**, Secretary General, the Office of the Civil Defender
31. **Robert Sepi**, Assistant to Secretary General, the Office of the Civil Defender
32. **Mina Rolovic**, Chief of Cabinet, the Office of the Civil Defender

#### The European Integration Office

33. **Srdjan Majstorovic**, Deputy Director, the European Integration Office

#### The International Organisations

- 34. **Dragana Curcija**, Project Manager, GIZ Serbia
- 35. **Vesna Kostic**, External Affairs Officer, the World Bank
- 36. **Jelena Manić**, Programme Manager, Good Governance, UNDP Serbia
- 37. **Thomas Gnocchi**, First Secretary, Head of the Political Section, Delegation of the EU to the Republic of Serbia
- 38. **David Raymond Lewis**, Resident Legal Advisor, Chief, Criminal Justice Reform Program, US Department of Justice
- 39. **Aleksandra Tekijaski**, Task Manager, Separation of Powers Programme, East-West Management Institute

#### The Non-Governmental Organisations

- 40. **Ivan Knezević**, Deputy Secretary General, European Movement
- 41. **Irena Cerović**, Programme Coordinator, Belgrade Fund for Political Excellence
- 42. **Dubravka Velat**, Programme Director, Civic Initiatives
- 43. **Vladimir Todoric**, Director, New Policy Centre
- 44. **Nikola Jovanovic**, Editor in Chief, New Policy Centre

## **Annex 2**

### **Select List of Legislation and Other Related Material Examined**

#### ***(i) Constitution and Legislation of the Republic of Serbia***

Constitution of the Republic of Serbia *Off. Gaz. No.:98/06*

Law on Amicable Resolution of Labour Disputes *Off. Gaz. No.:125/04* and subsequent amendments in *Off. Gaz. No.: 104/09*

Law on Broadcasting *Off. Gaz. No. 42/02* and subsequent amendments (last - 41/09)

Law on Financing Political Activities *Off. Gaz. No.: 43/11*

Law on Free [Economic] Zones *Off. Gaz. No.: 62/06*

Law on Insurance (*Off. Gaz. Nos.: 55/04; 70/04*) (and subsequent amendments - 70/04, 61/05, 85/05, 101/07, 63/09 i 107/0 )

Law on National Assembly (*Off. Gaz.No.: 9/10*)

Law on the Prevention of Money Laundering (*Off. Gaz. No.: 107/05*)

Law on Public Assembly *Off. Gaz. Nos.: 51/92, 53/93, 67/93, 17/99, 33/99, 48/94, 29/01, 101/05* [FRY *Off. Gaz. No: 21/01*]

Law on Public Roads *Off. Gaz. No.:101/05*

Law on State Administration *Off.Gaz. No.:79/05, 101/07 and 95/2010*

Law on Wine *Off. Gaz. No: 41/09*

#### ***(ii) Rules, Strategies and Reports***

Rules of Procedure of the National Assembly (adopted 28 July 2010) *Off. Gaz. No.: 52/10*

Government Rules of the Republic of Serbia (No. 020-04-26/2006-01)

Unified Drafting Methodology Rules (adopted by the Assembly and applicable from 1 July 2010) *Off. Gaz. No.: 21/10*

Regulatory Reform Strategy of the Republic of Serbia for the period 2008 – 2011

European Integration Office *Report on the (amended) NPI: January-March 2010*



***(iii) EU Material***

[European Commission Staff Working Document] *Serbia 2010 Progress Report SEC(2010) 1330*

***(iv) Other Material***

Slavica Penev (ed), *How to Improve the Legislative Process in Serbia and Bosnia and Herzegovina* (OECD Investment Compact for S.E. Europe and the Economics Institute, Belgrade: 2006)

Vladimir Todorić and Nikola Jovanović, *Mind the Gap* (Centar za novu politiku, Belgrade: 2011)

## **Annex 3**

### **Questionnaires on Legislative Process**

#### **General Questions on Legislative Process – Government**

1. Does line ministry have its own specialist unit of law drafters? If not, who undertakes law drafting? If it is the Ministry legal officers, do their job descriptions mention this task? Is experience with drafting an asset for applicants to these positions?
2. Have line ministries or the Legislative Secretariat of the Government outsourced consultants for law drafting projects? If so, where did they mostly come from? (e.g. international consultants/donor agencies, academia, NGOs) Whose budget has borne the costs?
3. Is it common for more than one law drafter to be involved in the drafting of particular legislation? Does a law drafter engaged on primary legislation work as a member of a team of ministry officers that includes policymakers? Does a law drafter engaged on primary legislation involved in elaborating corresponding subordinate [secondary] legislation?
4. How is the quality of law drafting monitored?
5. Who undertakes the drafting of secondary legislation? Is it the same staff who draft primary legislation?
6. How are annual legislative plans drawn? Who coordinates the submission of ministry inputs to the cabinet of ministers/prime minister? How such coordination is arranged?
7. How are decisions to initiate a new legislative project taken? Does this happen at the ministry level or at the Cabinet level? Is such a decision preceded by a “policy paper”, especially when the law drafting concerns complicated issues related to the strategic priorities of the Cabinet or when a certain subject area is being regulated for the first time?
8. How does the government collectively determine its priorities with respect to the proposed new legislative projects?
9. Are timetables set for the preparation of each draft (or otherwise known as a “law proposal”)? Who and how monitors them?

10. Does each draft, before it is introduced to the Parliament, have to undergo approval by the Government?
11. Is the compliance of policy proposals or policy options with the requirements of the Constitution verified during the policymaking stages? If so, how?
12. Is the compliance of policy proposals or policy options with the requirements of the extant law as well as treaty obligations verified during the policymaking stages? If so, how? Is only the primary legislation approximated with the EU law or the secondary legislation as well? In your view, is there room for improvement? If so, what should be done?
13. Is the compliance with relevant legal principles such as certainty, proportionality and applicable procedural requirements verified? If yes, by whom?
14. Is a check carried out whether new legislation is required at all, as the matter may already be dealt with under the existing law or through an alternative instrument (e.g. administrative action, public awareness raising, etc.)? In what instances a decision may be taken that the issue in question can be addressed by an alternative instrument? How is the decision taken? What factors are taken into consideration?
15. Are outside advisers used in the policymaking? If so, in what instances?
16. Do you think stakeholder consultation can be employed in policymaking? If yes, how?
17. Are policymaking and law drafting undertaken as distinct exercises? Are they undertaken by different units or the same team? If by different units, at what stage does the law drafter step in? How is the policy communicated to the drafter?
18. How is the process of law drafting carried out? What are the usual steps that the law drafter follows? In your view, is there room for improvement? If so, what should be done?
19. How is the compliance of draft legislation with the requirements of the Constitution verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?
20. How is the compliance of draft legislation with the requirements of the extant law verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?

21. How is the cost assessment done? Does the assessment focus solely on the impact on the budget of the State or the impact on other governmental authorities' (e.g. local governments, autonomous units) budgets is assessed as well? Are these authorities made part of the consultations? In your view, is there room for improvement? If so, what should be done?
22. Does it happen that a team of officers from more than 1 ministry drafts a particular law? How is the process coordinated? Who and how monitors the progress of law drafting?
23. Are stakeholders consulted in the law drafting process? If so, in what instances?
24. Under what circumstances the Government asks for and receives feedback on policymaking? On legal drafting? How is consultation organized? Is it structured and / or institutionalised? What are the current in informing, consulting and engaging citizens in policy-making? In your view, is there room for improvement? If so, what should be done?
25. When do the law drafter's responsibilities in connection with a draft end? Is the law drafter responsible for proofreading the overall version of the draft? What formal steps have to be followed when secondary legislation is being made? Do these differ according to the type of secondary legislation?
26. Who decides that secondary legislation has to be prepared for the purpose of giving effect to particular primary legislation? Do any matters require the collective consent of the government before this is undertaken? Is the legal basis for the adoption of secondary legislation precisely determined in the primary draft laws? Is development of the secondary legislation part of the explanatory memo of the draft laws?
27. Is secondary legislation ever prepared in the course of the same drafting process as the primary legislation with which it is concerned?
28. Who undertakes the policymaking with respect to secondary legislation? Are they the same unit that developed the policy for primary legislation?
29. How the inter-ministerial coordination is organized? How effective, efficient and efficacious this coordination is? In your view, is there room for improvement? If so, what should be done?
30. To what extent can the original law drafters be involved in drafting amendments put forward in the Parliament?

31. What does a rapporteur presentation at the committee discussion of the draft typically consist of? Who is normally nominated to present the draft? Is it one of the actual drafters?
32. Do officials of the drafting ministry follow the progress of the draft in the Parliament? How is it done?
33. If the Government concludes that a draft currently being considered by the Parliament needs to be altered, can the drafting ministry itself draft the necessary amendments and put them before the Parliament? If so, how is this arranged?
34. Which body maintains the central registry of legislation? Is the central registry computerized?
35. Is there a unified national electronic legal register in place? Does it contain only primary legislation, or the secondary legislation as well? To what extent is it accessible to the staff? To the citizens? Does it contain drafts?
36. Does a line ministry have ready access to all legislation that is likely to concern it? Do the staff who undertake law drafting in a line ministry have access to a full set of legislation? To consolidated legislation?
37. Are there any groups eligible to receive free copies of legislation (e.g. judges, bar associations, etc.)?

### **Questions on Legislative Process – Parliament [National Assembly]**

1. How are the parliamentary legislative agendas compiled?
2. How are the committee session agendas prepared? Are they communicated to external actors? Who can be present at the sessions? How is the information from the Executive branch communicated to the parliamentary committees? How is it regulated? In your view, is there room for improvement? If so, what should be done?
3. How is the process of law drafting carried out? What are the usual steps that the law drafter follows? Is there any Research Unit within the Parliament in support for the Committees, MPs or their staff dealing with legal drafting? What other independent sources of information are at the disposal of the Parliament? In your view, is there room for improvement? If so, what should be done?

4. How is the compliance of draft legislation with the requirements of the Constitution verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?
5. How is the compliance of draft legislation with the requirements of the extant law verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?
6. How is the cost assessment done? Does the assessment focus solely on the impact on the central State budget or the impact on other governmental authorities' (e.g. local governments, autonomous units) budgets is assessed as well? Are these authorities made part of the consultations? In your view, is there room for improvement? If so, what should be done?
7. How is it ensured that when required regulatory impact assessment is carried out during the legal drafting? Is the Council for Regulatory Reform consulted over the legal drafts initiated by MPs?
8. How is the compliance of draft legislation with the requirements of the country's international commitments verified during the laws drafting stages? In your view, is there room for improvement? If so, what should be done?
9. When do the law drafter's responsibilities in connection with a draft end? Is the law drafter responsible for proofreading all version of the draft?
10. Who drafts amendments put forward in the Parliament? To what extent can the original law drafters be involved?
11. What does a presentation at the committee discussion of the draft typically consist of? Who is normally nominated to present the draft? Is it one of the actual drafters?
12. Do official of the drafting ministry follow the progress of the draft in the Parliament? How is it done?
13. If the Government concludes that a draft currently being considered by the Parliament needs to be altered, can the drafting ministry itself draft the necessary amendments and put them before the Parliament? If so, how is this arranged?

14. In what instances does the Parliament take evidence from officials, experts or members of public when considering a draft? How often does this happen?
15. Are stakeholders consulted in the law drafting process? If so, in what instances? How is consultation organized? In your view, is there room for improvement? If so, what should be done?
16. How do the Committees exercise their function to scrutinise and investigate whether the executive or its authorised agencies have acted properly in the implementation of public policies and programmes? In your view, is there room for improvement? If so, what should be done?
17. What are the major functions of the Standing Parliamentary Committees? Ad-Hoc Parliamentary Committees? How are they organised? What is their role in the legal drafting procedures? In your view, is there room for improvement? If so, what should be done?
18. What functions do Parliamentary Committees play in the law making process? What are the common challenges faced by Parliamentary Committees in the law making process?

## Annex 4

### The Basis for OSCE ODIHR's Lawmaking Reform Assistance Activities

In those countries that undergo a comprehensive process of political and economical transformation, efforts to improve the quality and the effectiveness of their legislation have been assisted in a sporadic and fragmentary manner with a variety of understandings of the notions involved, and a wide typology of activities associated with these notions. Little work was done in terms of methods for supporting these efforts, whilst considerable resources have been devoted to the building or strengthening of institutions involved in law-making. The most comprehensive attempt to take stock of law drafting practices in selected countries and to point out crucial issues to be considered when creating or reviewing regulations on law drafting was conducted under the SIGMA programme<sup>108</sup>, a joint initiative of the European Union and the Organization for Economic Co-operation and Development<sup>109</sup>. Created in 1992 with a focus on EU candidate countries<sup>110</sup>, this programme has provided support to decision-makers and public administrations in their efforts to modernize “public governance systems.” Within this overall framework, a project aimed at helping the countries to improve their law drafting methodology and techniques was launched in 1996<sup>111</sup>.

For long, the primary focus of the OSCE ODIHR's assistance was on providing *ad hoc* legal advice on individual pieces of legislation, when the process of their drafting and consideration was ongoing. While doing so, the ODIHR recurrently noted that some of the shortcomings identified in the texts found their cause in the manner in which the legislative process was managed or regulated. Therefore, specific recommendations related to procedural matters, including mechanisms for making the process more transparent and more inclusive or for monitoring the implementation of legislation, have been made to the legislators with varying degree of success. Experience has shown that the most effective laws are the result of a legislative process, which is managed in its entirety, operates on the basis of a set of comprehensive, uniform and coherent rules, and allows for consultations with those to be affected by the legislation or responsible for its proper enforcement. There was an obvious need to look beyond individual pieces of legislation and interview those involved in the process with a view to getting an overall picture of a particular country's entire legislative process, including the structure and interaction of the institutions involved. In this endeavour, particular attention was to be given to the concept of ‘legislative transparency’, which is specifically referred to in two key OSCE documents<sup>112</sup>, and to take into consideration recommendations or special

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<sup>108</sup> SIGMA – Support for Improvement in Governance and Management in Central and Eastern Europe.

<sup>109</sup> For more information on this programme, refer to:  
[https://www.oecd.org/pages/0,2966,en\\_33638100\\_33638151\\_1\\_1\\_1\\_1\\_1,00.html](https://www.oecd.org/pages/0,2966,en_33638100_33638151_1_1_1_1_1,00.html) (last visited 14 December 2011)

<sup>110</sup> Ten of the countries with which SIGMA has been working on law drafting and regulatory management issues since 1996 are now EU Member States. Since 2001 the Programme has been assisting countries of the Western Balkans in building their public institutions and systems in the framework of the Stabilisation and Association Process (SAP) agreed with the EU.

<sup>111</sup> SIGMA Paper No 18, *Law Drafting and Regulatory Management in Central and Eastern Europe* (1997) - OECD.

<sup>112</sup> “Among those elements of justice that are essential to the full expression of the inherent dignity and of the equal and inalienable rights of human beings are (...) legislation, adopted at the end of a public procedure, and



interests manifested in discussions that took place in OSCE Human Dimension Implementation Meetings in 2002, 2003 and 2004 as well as at the 2004 Human Dimension Seminar on Democratic Governance. Among these recommendations, it is worth recalling the following<sup>113</sup>:

- a. Access to laws and legislative documents, including primary and secondary legislation, court rulings, draft laws and legislative agendas, should be ensured.
- b. Legislative proceedings should be open to the public.
- c. Legislative transparency should be fostered at all levels of governance, including local self-governance.
- d. Public consultation should be an indispensable element of legislative process. Both legislatures and the executive branch should encourage public consultation.
- e. Parliamentary proceedings, including committees meetings, should be open to the public.
- f. Minutes and records should be entirely available to the public. Reading rooms and internet could be used to this end.
- g. The ODIHR's legislative assistance work should pay greater attention to the underlying attitudes and factors that affect the way laws are prepared and drafted and should place more emphasis on promoting citizen participation in the political process besides elections.
- h. The OSCE's work with legislatures should be expanded. An inventory of standards related to structures, procedures and practices of democratic parliaments should be developed.
- i. To promote strengthening of democratic practices within parliaments of the participating States, the OSCE should assist with the development of rules of procedure and legal frameworks.
- j. The ODIHR should provide assistance to participating States with regard to law drafting in a decentralized state structure, with focus on specifics of enforceability issues at the local level.

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*regulations that will be published, that being the conditions of their applicability. Those texts will be accessible to everyone;*" (paragraph 5.8, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990). "*Legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (paragraph 18.1, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 1991).

<sup>113</sup> These recommendations are extracted from the original documents.

## **Annex 5**

### **International Assistance to Legislative Strengthening and Regulatory Reform**

#### OSCE Mission to Serbia

The OSCE Mission to Serbia is engaged in several aspects of the legal reform in Serbia, including assistance to legislative reform efforts in specific thematic areas, providing expert opinions on draft legislation, reviewing legislative acts and monitoring their implementation. One of the focus areas of the legislative reform is the parliamentary system and strengthening of its role and capacity in the country. The Parliamentary Support Programme of the OSCE Mission to Serbia supports the work of the major parliamentary committees with the aim of strengthening their role as centers of expertise and oversight of the National Assembly. It also supports projects aimed at professional development of the staff of the National Assembly in areas such as human resources, research, harmonization of legislation and helps increase transparency of the activities of the National Assembly and increase its outreach to the civil sector and the media as well as exchange of experience with other parliaments in the region..

The Mission also assisted the National Assembly in developing the Unified Drafting Methodology Rules in 2009, through providing expert opinions and facilitating the meetings of the Working Group composed of the staff of the National Assembly, the Government and the Office of the President. The document was finally adopted in March 2010 by the Legislative Committee of the National Assembly. In November 2011, the Mission also supported the Legislative Committee in organizing a public hearing on this document.

The Mission supports the Serbian counterparts through providing national and international expertise of draft legislation, conducted upon official request by a relevant state institution or on an ad hoc basis. It also provides experts to the working groups preparing the legislation, organizes study tours and supports expert and public discussions on certain draft laws.

#### Council of Europe

Council of Europe Office in Belgrade completed an EU-funded project “Joint Initiative to Support Parliamentary Institutions” aimed at strengthening the administrative capacity of the National Assembly and bring it into better line with European standards. Within the framework of this project, in 2006 a comparative analysis of the Rules of Procedure of the National Assembly was produced by a CoE expert. In the course of the project, European expertise was shared with the committees aimed at improving performance of the MPs and the staff of the National Assembly, particularly in relation to the requirement of the Stabilisation and Association Process. Seminars were conducted in order to raise awareness of the MPs as regards their rights and obligations as well as study tours to the parliaments of those countries that recently underwent the transition to democracy were organized in order to encourage first-hand exchange of experience. .

### East-West Management Institute

The East-West Management Institute (EWMI) is a not-for-profit organization based in New York with extensive experience in promoting judicial reform in the region, with the past and current legal reform projects in Serbia, Albania, Bosnia, Bulgaria, and Romania. At present, with funding from the United States Agency for International Development (USAID), it is implementing a five-year Separation of Powers Program (SPP) in Serbia. The project aims at assisting Serbia in moving closer to EU accession by strengthening the division of powers among Serbia's three branches of government. Three major tasks of the project include supporting parliamentary reform, increasing capacity of the judiciary through allocating, acquiring and managing its own budgetary resources, and improving the administration of justice.

The EWMI supports the parliamentary reform in Serbia through building of the capacity of the National Assembly in managing its budget and resources as well as improving its deliberative and oversight functions. Assistance to the staff of the National Assembly has also been provided through training in strategic planning, budgeting, and improving transparency and outreach to the public.

Additionally, in cooperation with the High Court Council, the EWMI works over increasing the capacity of the judiciary to manage its budgetary resources through the use of strategic planning and needs based budgeting as well as supporting a more independent budget process and greater judicial branch control over funding of the judiciary. The assessment of Serbian budgeting practices has been issued and currently a package of regulations and job descriptions to be used in hiring and managing the staff of the High Court Council is being prepared. Moreover, the EWMI is assisting the judiciary in developing training programs for new court administrators on the effective management of judicial institutions, and introducing a weighted case management system.

### GIZ

The GIZ (“Gesellschaft für Internationale Zusammenarbeit”) has been operating in Serbia since 2001 providing a continuous platform for the transfer and exchange of the German, European and regional experience in the country. In 2011 the GIZ in Serbia launched a bilateral Legal Reform Project (2011-2018) aimed at supporting Serbia's accession to the EU through rendering assistance in improving its legal and institutional framework for enhanced rule of law and sustainable economic growth. The project focuses on improving the overall legislative process, ensuring proper implementation of the enacted laws by the administration and the judiciary, and raising awareness of and popularization of certain legal provisions, mainly in the field of the civil and commercial law.

In June 2011, the first phase of the project was launched by initiating analysis of the legislative process conducted in a working group with the local partners from the authorities, civil society and business with a specific focus on the existing everyday practice and the shortcomings in the legislative process. The analysis is expected to be ready in March 2011.

The second phase of the project will focus on actual implementation of laws enacted as a result of ongoing reforms. This phase is intended to initiate efforts aimed at enhancing the quality of the application of laws within the administration and the judiciary. Civil and commercial laws will be in the spotlight since they are considered to have a significant impact on the development and growth of the market economy. The project intends also to undertake capacity building and sharing of experiences through supporting public discussions, expert opinions and workshops.

The project aims to increase overall public trust in the legal system through raising public awareness of the reformed civil and commercial legislation.

#### Good Governance Project of the UNDP

The Good Governance Programme of the UNDP is aimed at strengthening democratic governance through improved transparency and accountability in the government, legislature, judiciary and independent institutions. UNDP supports activities aimed at strengthening corruption containment, prevention and public awareness, which also includes a component of stronger oversight, improved compliance with asset and income disclosure, and the reduction of systemic risk, which derives from weak capacity. Strengthening civil society engagement in advocacy, policy-making and monitoring is also a part of the programme.

One of the projects supported through the Good Governance Programme is aimed at strengthening the accountability of the National Assembly of Serbia in order to promote public trust in this institution. This is done through strengthening the capacity of the National Assembly to be accountable to the citizens of Serbia, be able to address the demands of the transition period and to fulfill its oversight functions over the executive branch in a more effective and efficient way. The project also aims at engaging civil society in public deliberation and debate on matters of public policy.

#### World Bank

Serbia has been a World Bank member as an independent country since 2006. To date, the World Bank has provided financing for 39 projects in various sectors. Amongst others, with contributions from development partners, the World Bank administers and executes a Multi-Donor Trust Fund for Justice Sector Support, which is envisaged as an instrument for coordination between the Ministry of Justice, the judiciary and the prosecutor's office, the EC, development partners and civil society. The said fund is designed to enable the Serbian authorities to update the National Judicial Reform Strategy, develop a properly resourced

plan for the implementation of this strategy, strengthen the institutional capacity of the Ministry of Justice and the judiciary to implement, coordinate, monitor and evaluate judicial reforms, report progress on judicial reforms and make the whole process transparent and inclusive.

Other international organisations active in the field are:

The Delegation of the EU to the Republic of Serbia

<http://www.europa.rs/en.html>

NDI

<http://www.ndi.org/serbia>

USAID Separation of Powers Program Office

<http://serbia.usaid.gov/usaids-programs/sectors/strengthening-democratic-structures/separation-of-powers-project.656.html>

USAID

<http://serbia.usaid.gov/home.4.html>

US Department of Justice / OPDAT

<http://www.justice.gov/criminal/opdat/>