Strasbourg, 28 February 2008

CDL(2008)020*

Opinion no. 464 / 2008

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAWS ON THE HIGH COURT (JUDICIAL) COUNCIL AND ON JUDGES OF THE REPUBLIC OF SERBIA

by

Mr James HAMILTON
(Substitute Member, Ireland)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The Venice Commission and the Constitutional Justice Division of the Council of Europe have been asked for a joint opinion on three draft laws concerning the judicial system in Serbia. These are the two referred to in the heading above and a draft law on the organization of courts. A meeting was held in Belgrade on 21 February 2008 with the Serbian Ministry of Justice, members of the Commission for implementing the National Judicial Reform Strategy and members of the Serbian judiciary to discuss the draft laws. I have been asked for written comments on the draft laws on the High Court Council and on Judges.

The Constitutional Framework

2. It is necessary first of all to refer to the Constitution of the Republic of Serbia, adopted by the National Assembly on 30 September 2006, as a number of key provisions, particularly in relation to the High Judicial Council, are already regulated in the Constitution.

3. In relation to judges, the key provision to note is the discontinuity between the existing judicial system and the judges to be appointed under the new Constitution. Article 7 of the Constitutional Law on Implementation of the Constitution of the Republic of Serbia of 10 November 2006 provides that election of the President of the Supreme Court of Cassation and the first election of the judges of the Supreme Court of Cassation shall take place no later than 90 days from the date of the constitution of the High Judicial Council, and that judges and presidents of other courts shall be elected no later than one year from the date of the constitution of the High Judicial Council. There is no guarantee in this system that any existing judges will be re-elected or appointed.

4. In its opinion on the Constitution of Serbia (CDL-AD(2007)004 adopted at the 70th Plenary Session, 17-18 March 2007) the Venice Commission was critical of these arrangements (see in particular paragraphs 71-74). Firstly, the Commission pointed out that the need for a re-appointment process with respect to all judges and prosecutors was not at all obvious. Secondly, the Commission pointed out that such a process would be acceptable only if there were sufficient guarantees for its fairness, that this required in particular a procedure based on clear and transparent criteria, that only past behaviour incompatible with the role of an independent judge may be a reason for not re-appointing a judge, that the procedure had to be fair, be carried out by an independent and impartial body, ensure a fair hearing for all concerned, and that there must be the possibility for an appeal to an independent court.

5. However, the provisions contained in the present draft law do not provide for any such procedures. The draft law simply sets out procedures for the election of judges. Existing judges who wish to be appointed will have to apply in the same manner as any other candidate and will receive no special consideration, much less the procedures identified as necessary by the Commission. There is in fact no “reappointment” procedure as such. The draft law on Judges thereby compounds the problems created by the constitutional provision.

6. With regard to the High Judicial Council, Article 153 of the Constitution of Serbia provides for its status, constitution and election. It is defined as an independent and autonomous body which is to provide for and guarantee the independence and autonomy of courts and judges. It is to have 11 members consisting of three *ex-officio* members, the President of the Supreme Court of Cassation, the minister responsible for justice and the president of the authorized committee of the National Assembly, as well as 8 electoral members elected by the National Assembly, in accordance with the law. Of these 8 electoral

members 6 are to be judges holding the post of permanent judge, of which one is to be from the territory of autonomous provinces, and two are to be respected and prominent lawyers who have at least 15 years of professional experience, of which one shall be a solicitor and the other a professor at a law faculty. The tenure of office of members is to be five years, except for the members appointed *ex-officio*.

7. The High Judicial Council is to appoint and dismiss judges. It is to propose to the National Assembly the election of judges in the first election to the post of judge, propose to the National Assembly the election of the President of the Supreme Court of Cassation as well as presidents of the courts, in accordance with the Constitution and the law, participate in the proceedings of terminating the tenure of office of the president of the Supreme Court of Cassation and presidents of courts, in the manner stipulated by the Constitution and the law, and perform other duties specified by the law.

8. In its Opinion on the Constitution of Serbia (Opinion No. 405/2006, CDL-AD(2007)004) adopted on 17-18 March 2007 the Venice Commission was critical of these arrangements. It described the composition of the High Judicial Council as flawed. It stated that at first sight the composition seemed pluralistic but that this appearance was deceptive. "All these members are elected, directly or indirectly, by the National Assembly. The six judges are not to be elected by their peers but by the National Assembly, the lawyer not by the Bar Association but by the National Assembly, the professor not by the law faculty but by the National Assembly. The judicial appointment process is thus doubly under the control of the National Assembly: the proposals are made by the High Judicial Council elected by the National Assembly and the decisions are then made by the National Assembly itself. This seems a recipe for politicisation of the judiciary and therefore the provisions should be substantially amended."

9. The draft law has made an attempt to address this problem by providing a procedure whereby the National Assembly would in respect of each vacancy be presented with one name only of a person elected by the authorized nominators (i.e. the judges or the lawyers' association or faculties). The Assembly would be entitled to reject the candidate in which case another election would take place. It remains to be seen whether this ingenious solution will pass constitutional muster.

10. My comments in relation to both these laws have to be seen in the light of the fundamental criticisms of the constitutional provisions referred to above. It is clear that there can be no fully satisfactory resolution of the problems created by those provisions short of an amendment of the Constitution itself.

Draft High Court Council Act

11. The draft is described as a "High Court Council Act". I have, however, used the term "High Judicial Council" which is the term used in the English version of the Constitution. At one point in the draft, however, the term "High Court Council" is used to describe the new Council whereas the term "High Judicial Council" is used to mean the Council previously in existence. (See Article 65 and 66).

12. The draft law spells out in more detail the exact composition of the Council. The Constitution provided for six elected judges without specifying from which courts they would be drawn. Article 19 of the draft law provides that one is to be from the Supreme Court of Cassation, one from the Commercial Courts, one from the Administrative Courts, one from the Appellate Courts, the Organized Crime Court and the War Crimes Court, one from the First Instance Courts of General Jurisdiction (Municipal and District Courts) and one from the Misdemeanour Courts. The Judges Association of Serbia have pointed out that the Supreme Court of Cassation should have 33 judges, the Commercial Courts around 240

judges, the Administrative Court 40, the Appellate Courts 221, and the Municipal and District Courts together nearly 1,600 judges. It could therefore be argued that the courts in which most of the judges sit will be underrepresented by comparison with the higher courts.

13. However, a different system is envisaged for the first election of the Council. Article 67, which appears in the transitional provisions, proposes that in the first election there would be one member from the Supreme Court of Serbia, one from the Commercial Courts, two from District Courts and two from the Municipal Courts. One of the District Court and one of the Municipal Court representatives are to be from the territory of autonomous provinces. It is not clear to me how this selection of representatives from the autonomous provinces is to be effected in practice, since the population of the autonomous provinces is quite a small part of the population of Serbia as a whole. It seems also that this provision would allow for no representation for the Administrative Courts, the Appellate Courts or the Misdemeanour Courts.

14. A memorandum from the Judges Association of Serbia makes some interesting points about the difficulties caused by the fact that most judges will know only the other judges working in their own district or region. As a result they propose a system of indirect election since otherwise they see elections as inevitably being dominated by judges based in Belgrade. This argument put by the Association of Judges seems to me to have merit, though the solution to the problem is not immediately obvious.

15. A considerable part of the draft law is taken up with the procedure for holding elections. In order to become a candidate a judge requires the nomination of 10 judges (Article 22). According to Article 21, the final election to the Council is by the National Assembly at the nomination of the authorized nominators. The High Judicial Council itself is the authorized nominator for elected Council Members from the ranks of judges. The Council is obliged to propose to the National Assembly the candidates that are directly elected by the judges according to the Act. The nomination procedure whereby candidates obtain a nomination from 10 judges has already been described. According to Article 31, the Election Commission (which is a sub-commission of the High Judicial Council) determines the final list of candidates who are voted upon. Article 31 does not, however, clarify how this is to be done. Does the Commission have some choice in the matter or must every person who has 10 nominators appear on the ballot paper? It seems that what happens then is that each elector can vote only for one candidate by circling the number before his name. Article 41 provides that “the Council shall issue a decision on nomination of candidates for the Council based on the record of election results”. The ballot is to be held again if the two or more leading candidates receive an equal number of votes. Article 43 provides that the Council are to submit their final decision on nomination of candidates from among judges to the National Assembly.

16. It was clarified at the meeting in Belgrade that the intention is that the Council are to nominate only one candidate for each vacancy, being the candidate with the most votes, although this does not seem to me to be very clearly expressed in the text. This represents an ingenious attempt to get around the risk of politicisation as a result of an election by the National Assembly which the Venice Commission criticized in its 2007 opinion. It remains to be seen whether the draft law will be held to be compatible with Article 153 of the Serbian Constitution. The provision, of course, if enacted, will create a substantial risk of constitutional conflict between the judiciary and parliament in the event of the National Assembly rejecting a candidate and the judiciary electing that person a second time.

17. In relation to elections by judges of the Municipal and District Courts, an election which allows a person to be a candidate with only 10 nominators could potentially throw up a very large number of candidates and it would be possible for somebody to obtain a the largest number of votes without in fact having a particularly large percentage of the total

vote. Consideration might be given to providing for election by means of a transferable vote in which voters would rank the candidates in order of preference, and at the count the lowest candidates would be successively eliminated and their votes transferred to the next available preference until one candidate had a majority of the votes still in play. Such a system would also be less likely to throw up an equality between the two highest candidates when the transfer process was complete.

18. There are a number of other matters which are not very clear from the draft. Article 10 provides that the emoluments of members of the Council are to be one-third of the emoluments of a judge of the Supreme Court of Cassation. It is not clear from the draft whether membership of the Council is a full-time or a part-time occupation. I understand from clarification give at the meeting in Belgrade that the position will be full-time (apart from the *ex officio* members) and the emolument paid in addition to the judicial salary but I could not find this in the text.

19. Article 12 sets out the competence of the Council. The functions are extremely important ones, including the election of judges, taking decisions on the dismissal of judges, the disciplining of judges, the selection of a disciplinary board, decisions on legal remedies in disciplinary proceedings, defining standards of behaviour for judges, allocating the court budget, determining the general framework for the internal organisation and work of courts, and appointing lay judges. None of this is dealt with in any detail in the draft which apart from stating what these functions are in Article 12 says nothing more about them. The bulk of the draft is concerned with the election of the members of the Council. A number of these matters are dealt with in the Draft Law on Judges. However, some of the provisions appear quite obscure. For example, it is quite clear that the evaluation of judges is of crucial importance for the continuation of judges in office, and yet it is not at all clear how exactly that this function is to be carried out. This is a matter I return to in looking at the law on judges.

20. An open question is whether the Council should be chaired by the president of the Supreme Court of Cassation or should elect its own chairman. I think the latter would give a greater independence to the Council. The President will, in any event, have numerous other duties and would have less time to devote to Council duties than would one of the full-time members.

Draft Law on Judges

21. The Draft Law on Judges has to be seen in the constitutional context already referred to. It is impossible to overlook the fact that there will, after the coming into force of this law, be no independent evaluation of existing judges who will have to apply for appointment as judges in the same manner as any other candidate with no guarantee that they will be appointed if they are suitable. This is an absolutely fundamental problem although as already pointed out it is one created by the constitutional provisions rather than the law itself.

22. Chapter Three deals with the election of a judge. Applications have to be submitted to the High Judicial Council which “shall obtain information and opinions about the qualification, competence and moral character of a candidate” (Article 50). It is not clear from the Article whether the applicant is entitled to see this material or to challenge it if he or she does not agree with it.

23. Under article 51, the High Judicial Council is to propose to the National Assembly two candidates for each judge’s position. This represents a serious politicisation of the office of judge. On what basis is the National Assembly to exercise a choice between two candidates who may both be suited for office? Are they to take into account their political

opinions or background? There is nothing in the Constitution to require such a two candidate rule.

24. Furthermore, the rule that two candidates for each vacancy have to be submitted to the National Assembly significantly worsens the position of the existing judiciary and represents a further and a grave threat to the independence of the judiciary. The constitutional provision is bad enough in failing to provide a mechanism to safeguard the continuance in office of judges who have behaved properly but this provision goes even further than the Constitution requires to weaken the position of existing judges. Even if the National Assembly behave properly and select the best candidate in every case (though how a parliamentary assembly is supposed to make such a judgment is unclear) serving judges who have always acted competently and conscientiously may nonetheless find themselves rejected in favour of more able candidates. It would not be in accordance with the principle of a society governed by the rule of law that serving judges could be dismissed in such a manner.

25. It was suggested at the meeting in Serbia that there are too many judges. This may be so but the way to deal with such a problem is through natural wastage or permitting early voluntary retirement, not by in effect dismissing judges who have not been shown to be incompetent or to have misbehaved.

26. It would be preferable if the High Judicial Council were to put forward only one candidate for each vacant position. This would go some way to resolve the problem created by the constitutional provision for election of judges in the National Assembly. In the case of existing judges the Council ought to be required to put their names forward unless they have behaved in a manner incompatible with the role of an independent judge or can be shown to be incompetent. Appropriate safeguards for the rights of judges so accused should be set out.

27. According to Article 65 of the Draft Law “anyone” may launch an initiative for the dismissal of a judge. However, according to paragraph 2 of the same Article the dismissal procedure may be initiated by the president of the court, the president of the directly higher court, the president of the Supreme Court of Cassation, the minister in charge of the judiciary, the bodies responsible for performance evaluation or the disciplinary commission. There seems to be a contradiction between these two provisions. According to Article 66 proceedings for dismissal are made by the High Judicial Council in closed session. The Council is entitled to request necessary information from competent bodies and organisations and must give a reasoned decision. The judge is entitled to be notified and made aware of the content of the case supporting documentation and to provide explanations and to be represented or appear in person, and has an appeal to the constitutional court from the decision. In my view it should not be open to “anyone” to initiate the removal of a judge.

28. Article 80 provides for the election of the president of the Supreme Court of Cassation from among the judges of that court, upon the recommendation of the High Judicial Council and following the opinion of the general session of that court and the relevant committee of the National Assembly. This is a rather cumbersome provision. It is not clear what happens if the recommendations and opinions of these three bodies are not in agreement with each other. It is also not clear whether the National Assembly are free to reject the recommendation of the Council.

29. Chapter 6 deals with lay judges. It is not clear what function lay judges have in the Serbian system. Presumably they sit with professional judges in certain types of case. According to Article 82 “the things considered when appointing a lay judge are sex, age, profession and social status, knowledge, competence, and affinities for specific type of

matter". It is not clear why sex, age, or social status should be qualifying criteria for appointment as a lay judge. In my opinion these should not be factors except to the extent it may be desirable to ensure a balance. According to Article 83 the appointment of lay judges is to be by the High Judicial Council upon the proposal of the minister in charge of the judiciary, who must first obtain the opinion from the court to which the lay judge is to be appointed. Again, it is not clear what happens if the opinion is unfavourable. Can ministers still propose the appointment? Is the High Judicial Council obliged to accept the Minister's proposal?

30. Under Article 12 if a court is abolished a judge continues to discharge his function in a court of the same type and same instance, or "approximately" the same rank. The judge should not be appointed to a lesser position following the abolition of a court.

31. Despite the fundamental defect in relation to the political appointment of judges and the failure to protect the position of serving judges, the law contains many good provisions. In particular, the reduction in the period of first appointment from five to three years is to be welcomed, as is the removal of immunity for judges except in relation to acts committed in performance of their judicial function (Article 5).

32. I have some concerns in relation to performance evaluation. Part V of the Draft Law deals with performance evaluation. According to Article 31 it involves all aspects of the judges' work and represents the basis for election, mandatory training of judges, allocation to pay grades, dismissal and instituting disciplinary proceedings. It is to be conducted on the basis of publicized, objective and single criteria and standards which are to be set out by the High Judicial Council. According to Article 32 bodies competent for performance evaluation are departmental boards and the Commission of the High Judicial Council for Performance Evaluation of Judges. Departmental boards are to comprise the President of the Department and two judges elected by secret ballot at the session of the Department. In the case of the Court Presidents and Judges of the Supreme Court of Cassation it is the Commission of the High Judicial Council which evaluates performance (Article 33). Performance is to be evaluated annually except in relation to judges elected for the first time where it is to be evaluated every six months (Article 34). According to Article 35 ratings are "fails to meet requirements", "satisfactory", "good", "very good" and "excellent". Failing to meet requirements is grounds for removal from Office. A judge and or the court president can object to the rating to the High Judicial Council or the Commission of the High Judicial Council.

33. According to Article 39 these classifications are crucial to salary, since one moves to a higher salary level if twice classified "excellent" whereas one moves to the lower salary level if twice only rated "satisfactory" or "good". These ratings are entered in the judges and court president's personal file. However, it is not clear who exactly does the actual evaluation. The decision-making power lies with the departmental boards in most cases, and in the case of presidents of courts and members of the Supreme Court of Cassation, with the High Judicial Council. But on what basis are departmental boards or the High Judicial Council to arrive at conclusions?

34. Nor is it clear where this fits into the provisions relating to discipline, since according to Chapter 7 (which deals with disciplinary accountability) a considerable number of the disciplinary offences defined in Article 91 relate essentially to work performance rather than any question of ethics or misbehaviour. For example, disciplinary offences include "unjustifiable delays in drafting of decisions", "unjustifiable failure to schedule a hearing", "frequent tardiness for hearings", "apparently incorrect treatment of the participants to the proceedings and the court staff", "unjustified prolonging of the proceedings". According to Article 94 disciplinary bodies are the disciplinary prosecutor, deputy prosecutors and the disciplinary commission, which is established by the High Judicial Council. There is no other

mention of the disciplinary prosecutor who would appear to be a rather powerful figure if he can initiate disciplinary proceedings and reject disciplinary charges as ill-founded (Article 96). Under Articles 98 and 99 there is an appeal from the disciplinary commission to the High Judicial Council itself but there does not appear to be any appeal to a court of law. This is an omission which should be rectified.

35. I should add that I am not objecting to the idea of performance evaluation as such but it needs to be handled carefully if it is not to be a tool to undermine the independence of the individual judge, and it is necessary to be very clear about what exactly is the performance expected of the judge and how and by whom this performance is to be measured.

Conclusion

36. The Constitution of Serbia created a major threat to judicial independence and a major risk of politicising the judiciary by providing for the election of judges and of the High Judicial Council in the National Assembly, and by creating a discontinuity between the existing judiciary and the new judiciary to be chosen after the coming into force of the Constitution.

37. The draft law on the High Judicial Council attempts to resolve this problem by giving a powerful role in the election of the majority of the Council to the judges, albeit at the risk of creating a serious risk of a constitutional conflict between the National Assembly and the judiciary.

38. The draft law on the Judges, by contrast, despite many admirable provisions, weakens judicial independence and increases the risk of politicising the judiciary by requiring that for the election of each judge the National Assembly be presented with two candidates by the High Judicial Council as well as by failing to provide for an acceptable model for the continuance in office of serving judges against whom no incompetence or behaviour incompatible with the role of an independent judge is alleged. It would not be in accordance with the principle of a society based on the rule of law that serving judges could be dismissed in such a manner.