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(VENICE COMMISSION)

COMMENTS ON THE PROVISIONS ON THE JUDICIARY IN THE DRAFT CONSTITUTION OF THE REPUBLIC OF SERBIA

by

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1. The subject of this opinion are the regulations of the draft constitution of Serbia (CDL(2005)053) contained in Chapter 4, the Judiciary, Chapter 5, the Office of the Public Prosecutor, and Chapter 6, the High Judicial Council.

The submitted amendments constitute yet another attempt to introduce into Serbia's judicial system the best guarantees of independent judges and the efficient functioning of the Judiciary. At the same time, this is yet another attempt to find the best emplacement for the public prosecutor's office within Serbia's political system.

2. The submitted draft contains the following principles regulating the Judiciary:
- The principle of the independence of judges, ie that judges are subordinated only to the constitution and law (Article 125),
- The principle of establishing and abolishing courts only on the basis of the law, and the law of a specific type at that – an organic law (Article 125),
- A ban on the creation of temporary and extraordinary courts including military courts (Article 125),
- The principle of the stability (permanence) of judges, guaranteed by appointing him/her (following an initial five-year period) to an indefinite term and by prohibiting his/her reassignment (transfer) to other courts against his/her will (except when a given court is subject to be abolished) (Article 126),
- The immunity of judges patterned on parliamentary immunity (Article 127),
- The principle of incompatibilitas (Article 127)
- The disciplinary responsibility of judges (Article 128).

The above-mentioned principles belong to the classic catalogue of principles determining the position of law courts and judges in a democratic state of law. Their inclusion in the constitutional draft should be assessed positively. Of course, detailed regulations and concrete solutions are always left to the state authorities. For that reason, divergent regulations of particular questions in individual states cannot be evaluated negatively as long as they stay within the bounds of accepted European standards.

In spite of the generally favourable assessment of the proposed solutions contained in the draft, certain proposals of detailed regulations may raise doubts and misgivings.

3. Permanence and Immovability of Judges (Article 126).

Article 126 envisages the principle of initially appointing judges to five-year terms and afterwards granting them indefinite tenure. Proposing such a solution in the constitutional draft, (and this is not an isolated example -the constitutional draft of the Former Yugoslav Republic of Macedonia contains a similar proposal), can indicate "sui generis" quest for a method of appointing the best persons to the office of judge. This 5 years period is seen as a kind of probationary period for a judge. The period is meant to facilitate the evaluation of his/her practical ability to perform the duties of a judge. That solution, however, always evokes criticism because, one argues, is going against the general principle of the ban of removal of judges. The critics point out that it may restrict a judge's impartial adjudication, since he may issue rulings or verdicts with a view to his future permanent nomination. Personally I have some doubts but I do not formulate my opinion in such categorical manner. The Polish system includes the institution of assessor. This is an old Polish tradition, not one introduced during the communist period. An assessor is not formally appointed to a judgeship but performs judicial functions, adjudicates in conditions of full independence and is entitled to the same guarantees of independence as a judge. When his term of assessorship has elapsed, he is either appointed to a judgeship or terminates his court activity. All the opinions in this matter are prepared by judges

(college of the courts) and HJC. The functioning of assessors, including their impartiality, has not been negatively rated by judges' associations or the Judiciary Council. Hence, despite numerous reforms of judicial law, this institution has been retained.

When a Judicial Council exists and is armed with extensive prerogatives governing the promotion and appointment of judges, guarantees can be created to rule out the prospect of anyone exerting influence on a nomination. The same process must be applied that is used to evaluate judges and promote them to higher judicial positions. The decisive role in determining whether a judge should receive a permanent appointment should be played by a body of judges. For instance, a court college may nominate candidates for consideration by a general assembly of court judges. The general assembly then forward their candidates to the Judiciary Council. The Judiciary Council in turn votes to recommend candidates to the body who make the final decision. (That body, however, should not be parliament.) A judge nominated to a limited term in office is entitled to immunity and all guarantees of independence and stability to the end of this period. Such a procedure avoids the threat that arises whenever rulings or verdicts are handed down by a judge with a temporary appointment to accommodate a 'certain someone'. Nevertheless, a five-year trial period would seem excessively long and should be cut back to max. two years.

4. The manner of appointing judges and court presidents proposed in the submitted draft raises basic misgivings. In the light of Article 127, judges are appointed by the People's Assembly (parliament) on the basis of recommendations submitted by the High Judicial Council (HJC). It has been repeatedly noted that the appointment of judges by parliament runs to risk of a kind of political tender. (I has been clearly showed by the last elections of judges and presidents of the courts in Serbia). The nomination of judges is a classic presidential prerogative. Candidatures should be prepared by the HJC, and the president would not be allowed to nominate a candidate not included on the list submitted by the HJC.

Similar misgivings are raised by the appointment of court presidents at all levels (with the exception of the president of the Supreme Court of Serbia) by parliament. The appointment of court presidents should take place beyond the pale of current political rivalry. Entrusting those prerogatives to parliament casts doubts on whether that would be possible.

Similarly unacceptable is paragraph 4 of Article 128, empowering the People's Assembly to decide the termination of the office of judge and court president. Such prerogatives should be accorded to the HJC instead.

5. Numerous doubts are raised by the lack of clear criteria as to what constitutes constitutional substance in the regulation of matters pertaining to the status of judges. An example is Article 128. Its paragraph 1 defines the conditions under which the office of judge can be terminated. He may resign at his own request or when he meets conditions for retirement. That is understandable, hence that regulation evokes no serious misgivings. But a judge's dismissal is also envisaged. That is an exceptionally serious limitation of the principle of a judge's immovability. The draft under analysis does not contain any detailed provisions and only states that the possibility of dismissal exists. The reasons of a judge's dismissal are to be found in organic law. Apart from the probationary period, ordinary judges have tenured irremovability until retirement. For that reason the causes for dismissal, should be part of the constitutional fabric.

It would seem proper, on the other hand, to create within the constitution a basis for enforcing the disciplinary responsibility of judges for violating their judicial duties or the good name of the judiciary (Article 128). Practice has shown that such a provision is more than justified in what are referred to as the 'new democracies'.

6. The next remark pertains to the principle of incompatibilitas. The constitution regulates that principle in a very general manner by stating: 'An organic law shall specify functions, activities or private interests incompatible with the post of judge.' Such a general formulation does not evoke reservations with one possible exception. I believe it would be advisable to directly include in the constitution a ban on membership of political parties. Such a ban is of particular importance in countries, under whose previous form of government a judge's membership of the communist party was the rule. One could hear voices in the discussion on the status of judges in Poland that ban on membership of political parties is going against the constitutional right to association. Contrary, prohibiting party membership is one of the basic guarantees of a judge's independence. For that reason the prohibition should became a norm of constitutional rank.

7. The constitutional draft accords an important role to the HJC (Articles 133-135). Councils of that type have become widespread in all the post-communist states reforming their judicial systems, although not all those countries have elevated them to constitutional rank.

The tasks of the HJC are broadly sketched in a manner typical of other states. Thus the HJC:

a. Submits to the People's Assembly the candidatures of judges and court presidents (Article 127),
b. Takes decisions pertaining to a judge's immunity (Article 127),
c. Decides a judge's transfer, against his will, to another court, when the court in which he is employed is liquidated (Article 126),
d. Constitutes an organ of the first instance decision in the disciplinary cases of judges (Article 128).

The HJC is defined as an independent and autonomous judicial body that shall decide on the position of judges and public prosecutors… (Article 133). I have always some doubts concerning the use of the words "independent judicial body" to describe the HJC. There is a difference between the independence of the courts and HJC. HJC is autonomous body but it should not be defined as an independent **judicial** body, as this attribute should be reserved for courts and judges. The purpose of the HJC, which itself is not a court, is to guarantee the independence of judicial organs.

The HJC's membership is variously determined in different countries. Article 133 defines the HJC's composition by stating that the HJC 'shall be composed of 11 members: four judges, four public prosecutors, one lawyer and two positive law professors.' It envisages no other organs as officially included in the HJC such as the president, justice minister, Supreme Court chief or members of parliament, as encountered in other states. As has been repeatedly stated, the composition of a Judicial Council is the prerogative of the authorities of a given state.

Both the councils that solely comprise judges as well as those enlarged to include other individuals remain within the bounds of European standards. I believe, however, that a more broadly based Council gives it more balanced authority. But rather than being an outright criticism, the foregoing remark simply suggests what would be advisable.

None too legible (perhaps due to the choice of phrasing) is Article 135 when it refers to the HJC's decision making. In its authors' view, this is to constitute a guarantee of the independent decisions taken by the Council in relations to its own members, judges and prosecutors. The article states that in certain situations the justice minister becomes an HJC member. For the sake of clarity, the article needs to be re-edited and made more precise before it can be unambivalently evaluated.

8. In the draft, the HJC has been defined as an organ deciding the disciplinary responsibility of a judge in the first instance. That decision may be appealed to a court. In that respect, that solution is in accordance with European standards, because the final decision is taken by a court of law. Personally, I have always voiced reservations over granting the HJC such prerogatives. I believe the HJC should not be a decision-making organ in such cases, even in the first instance. That should be the purview of a court. If, however, that prerogative were to be entrusted to the HJC, the appropriate constitutional provision would require elaborations. Article 128 contains only the very general statement that 'a special court organ shall act upon an appeal'. That regulation should be made more precise by clearly specifying which court is to review such cases.

9. The office of the public prosecutor is defined by article 130 of the draft as 'an independent body to prosecute the perpetrators of criminal and other penal offences which shall also apply legal remedies in order to protect constitutionality and legality'. Such a definition of the prosecutor's tasks raises a number of questions. The prosecutor's role of 'prosecuting the perpetrators of criminal and other penal offences' evokes no doubts, since that is the traditional function of a prosecutory organ. Reservations arise, however, when the prosecutor's office is defined as an organ which 'applies legal remedies in order to protect constitutionality and legality'. That is a clear remnant of the thinking that once surrounded the prosecutor's office under the previous political system. That has repeated itself in many other states. Such a function of the prosecutor's office was very deeply entrenched in those states' former political systems. Despite the creation of such institutions as Constitutional Courts, whose task it is to guarantee constitutionality, that former function of the prosecutor's office keeps cropping up in constitutions and legislative acts. In that respect, I believe Article 130 should be appropriately re-edited, because it is the Constitutional Court, not the prosecutor, that protects constitutionality.

10. The draft constitution also regulates the basic organisational principles of the public prosecutor's office such as:

- The public prosecutor's office as an independent state body (article 130),
- The principle of hierarchical subordination ('Higher offices of the public prosecutor shall be superior to lower ones' – Article 130),
- A High Judiciary Council in common with judges (Article 133).

That means therefore that in the Serbian system of government the public prosecutor's office is not linked to the executive authority but constitutes a separate organ. The solution has also been adopted that prosecutors and judges comprise a common Judiciary Council. In the light of European standards, that solution (a common magistrature) does not evoke reservations, although it should be noted that this is not a widely encountered model. Its consequence should be strong links between public prosecutors and courts as well as a territorial structure of prosecutory organs paralleling the court structure. Prosecutors would thereby become the prosecutors of courts at individual levels. Such a solution, however, is not being proposed.

The public prosecutor's office is defined as a separate organ with its own strong hierarchical structure with the Prosecutor General, nominated by the President, at this head. At the same time, prosecutors and judges form part of a single Council. A common Council with judges is to guarantee a prosecutor's independence of political influence. There is no doubt that every effort to make the public prosecutor free of political pressure is correct and proper. Therefore the general direction of that solution cannot be criticised. It may, however, generate certain tension in the HJC's practical functioning owing to those two professions' different organisational principles (the total independence of judges and the hierarchical subordination of prosecutors) as well as the very strong tradition of separating those two legal occupations in all the post-communist states.

A consequence of the joint-council model is the acceptance of total symmetry in the way judges and prosecutors are appointed. Hence the previously formulated remarks formulated about the appointment of judges and the Assembly's role therein fully apply.

11. Article 131, however, envisages a somewhat different solution regulating the non-transferability of prosecutors compared to judges. Paragraph 3 accepts a symmetrical solution to that applying to judges. However, paragraph 4 allows that 'the Public Prosecutor can be assigned temporarily to another office against his/her will, upon a decision by the Supreme Public Prosecutor of Serbia. in accordance with Law'. Considering the different organisational principles governing the public prosecutor (hierarchical subordination as per Article 130, paragraph 2), that solution may be justified. But it should be hedged with guarantees to protect against political abuses, especially since in light of the draft constitution no opinion of the HJC is needed. The matter is simply decided by the Prosecutor General. The term 'temporarily' is itself imprecise. That evokes criticism and gives rise to fears of possible abuse. The HJC's non-involvement in that decision seems all the more unjustified, considering that its members include prosecutors together with judges.

12. Regulations pertaining to the disciplinary responsibility of prosecutors are lacking. Article 128, paragraph 4 clearly applies only to judges. The regulations pertaining to prosecutors and invoking the appropriate regulations pertaining to judges contain no mention of a prosecutor's disciplinary responsibility. I believe that paragraph 5 of Article 131 should be appropriately supplemented in such a way: "the constitutional provisions related to conflict of interest, immunity, **disciplinary responsibility** of judges shall apply on the Public Prosecutor.

13. In my opinion the proposed draft could be accepted after changing some provisions, that have been pointed above.