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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

by

Mr James HAMILTON (Substitute member, Ireland)

The Request

1. The Venice Commission has been asked for its opinion on the Articles of the Draft Constitution of the Republic of Serbia pertaining to the Judiciary. The draft Constitution was approved by the Government of the Republic of Serbia in June 2004.

2. The Articles relating to the judiciary proper are Articles 125-129. The Office of the Public Prosecutor is dealt with in Articles 130-133, and the High Judicial Council in Articles 133 and 134. Articles 136 and 137 relate to the Ombudsman.

General Comments

3. The draft does not attempt to provide a detailed framework for the judiciary and the prosecutor's office. It is a very brief document, setting out only the skeleton of the system. A number of very important matters are left to be provided for by organic law or even by ordinary law. According to Article 102, an organic law requires to be deiced by a majority of all deputies who are members of the People's Assembly, (special majority) whereas in ordinary law can be passed by a simple majority at a session attended by over half of the deputies. Among other matters requiring a special majority are the withdrawal of immunity from the Ombudsman, the election and dismissal of judges and public prosecutors, and the election of five justices of the constitution court.

4. An amendment to the Constitution, on the other hand, requires the support of two-thirds of the deputies (Article 180). It is not clear whether this is two-thirds of the total membership or those who vote. The amendment must be submitted by at least 50 deputies, the President, the Government and at least 150,000 voters (presumably any one of these four classes can propose an amendment, although the English text reads as though all four were required). If a majority of deputies or 150,000 votes request it a referendum must be held (Article 181). Where a referendum is held it is carried only if a majority support it and a majority actually vote (Articles 105 and 181). This is a very conservative device which in practice will make it quite difficult to secure amendments to the Constitution.

5. Because of these differences in the manner of amending the Constitution and amending or enacting an organic law the distinction between the two is very significant.

Article 125: The Judiciary

6. Article 125 provides for the independent of judges who are subordinated only to the law and the Constitution. There is a ban on the creation of courts martial, temporary or extraordinary courts.

7. With the exception of the Supreme Court, provided for in Article 129, and the Constitutional Court, which is defined as an independent and autonomous court organ (see Articles 170-178), all other courts of law are to be provided for by organic law, which is to specify the jurisdiction and competence of courts. It might be added that while the existence of the Supreme Court is to be constitutionally established, the Constitution says little about it (see Article 129). It may be questioned whether it is wise to leave quite so much to organic law (or even ordinary law). Indeed the fact that the prohibition on transferring judges from one court to another against their will has to be qualified to make a provision governing the situation where a judge's court is abolished indicates the difficulties of leaving too much to be determined by law rather than the constitution itself.

Article 126 and 127: Permanence, Appointment and Immunity of Judges

8. Article 126 provides for an initial five-year term, and to an unspecified period of time after that. Judges and presidents are to be elected by the People's Assembly, on the nomination of the High Judicial Council, except for the President of the Supreme Court who is elected on the proposal of the President after obtaining the opinion of the Supreme Court. Presumably this opinion must be favourable although the Article does not say so.

9. It would appear that at the end of the initial term a judge might simply not be made permanent, even though he performed satisfactorily, either because the High Judicial Council did not nominate him or because the People's Assembly declined to elect him. This is unsatisfactory and potentially allows the legislature to interfere with and even control the judiciary.

10. The writer has concerns about the desirability of probationary period for judges. Those concerns centre on the undesirability of judges being under pressure to decide cases in any particular way. If such a procedure is to be in place it seems to the writer that a refusal to confirm the judge in office should be made according to the same criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

11. The appointment of temporary or probationary judges is a very difficult area. A decision of the Appeal Court of the High Court of Justiciary of Scotland (*Starr v Ruxton*, [2000] H.R.L.R 191; see also *Millar v Dickson* [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability, to say the least, of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent. The draft Serbian provision would seem to be open to similar objections as was the Scottish law; the fact that it is the legislature rather than the executive which could decide not to make a permanent appointment is equally open to objection in principle.

12. The European Commission on Human Rights, in Application No. 28899/95, *Stieringer v Germany*, 25 November 1996, found that there was no violation of Article 6(1) of the Convention where a criminal trial in Germany was held before three judges, two of whom were probationary, and two lay assessors. Prior to completion of their probationary period the probationary judges were liable to removal by the judicial authorities, subject to a right to challenge their removal before a disciplinary court. Under German law their participation in the trial had to be justified by some imperative necessity; the German courts had found such necessity to exist. The Commission held that there was no breach of Article 6(1). In that case, the executive had no role in the removal process which was subject to judicial control. However, such a safeguard is absent in the case of the draft Serbian Constitution.

13. The difficulties in principle with systems of evaluation of temporary judges are clear. In the words of the European Charter on the statute for judges, adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) at para.3.3;
"Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".

14. Principle 12 of the UN Basic Principles on the Independence of the Judiciary (adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) states: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

15. On the face of it, this principle seems to discount the possibility of probationary periods of appointment for judges, unless 'appointment' itself was interpreted broadly so as to encompass a probationary period (it might be argued though that the latter would strain the ordinary meaning of the word 'appointment').

16. The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice (UN DOC.E/CN.4/Subs.2/1985/18/Add.6 Annex 6) states:
"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".

17. Two solutions to this problem are possible. The preferable one in the writer's view is to appoint judges permanently at the start. Alternatively, a procedure might be found which would make the judge permanent after the probationary period provided the conditions were not met which would justify removal from office, whether due to misbehaviour or his being unfit. In such a case the decision should rest with a body such as the Supreme Judicial Council with an appeal to the highest judicial organ.

18. Article 127 also provides that judges shall enjoy the same immunity as deputies. The latter provides that a deputy is not to be called to account in criminal proceedings for an opinion expressed or a vote cast in the Assembly or its committees. Presumably applying this *mutatis mutandis* to the case of a judge means that the judge's immunity relates to judicial decisions or things said in court. It seems to the writer that a judge (and indeed a deputy) may also require immunity from civil process arising from the exercise of official functions. The bringing of civil proceedings could have a chilling effect on a judge.

19. The provision on the deputy's immunity also goes on to prohibit detention, or any criminal proceedings, without the approval of the People's Assembly, except where a deputy is caught in the act for an offence carrying a penalty of more than five years. (In the case of a judge for the Assembly is substituted the Supreme Judicial Council). It is difficult to see why either the deputy or the judge should enjoy immunity in respect of acts not arising from the performance of official duty.

Article 128: Discipline and Dismissal of Judges

20. This Article provides that a judge's term of office terminates at his request, on meeting the conditions for retirement, and by dismissal. Retirement age is 67 or after 40 years of service. Presumably it should state "whichever first occurs". The age of retirement cannot be changed so as to affect the individual judge.

21. The provisions as to discipline and dismissal are vague and unclear. The judge is obliged to "account for a violation of the duties of a judge". The High Judicial Council is responsible for first-instance disciplinary decisions. A special court organ is to act on appeal. This "special court organ" is not defined. The grounds for disciplinary action are not defined, nor are the possible punishments. It is not clear whether these may be prescribed by law or are to be entirely at the will of the High Judicial Council. Finally, the People's Assembly is to decide on termination of a judge's office. By what criteria and on what grounds? Is the decision to follow a finding by the High Judicial Council and the "special court organ", or does the provision relating to dismissal stand alone? If the former, is the Assembly bound by the Council's findings or decision in any respects? May these questions be determined by law (or organic law)? Has the judge a right to be heard and to representation? It seems to the writer these matters need to be clarified and are sufficiently important to be set out in the Constitution.

Article 129: The Supreme Court

22. As already noted, this provision says very little about the Supreme Court, other than to establish it and require its headquarters to be in Belgrade. The Court is to "ensure the uniform implementation of laws by courts". Does this mean it is to have an appellate jurisdiction from all other courts, or a power to review their decisions? Is it to have an original jurisdiction? What is its relationship to the Constitutional Court? How many members is it to have? Presumably all such issues are to be determined by law, and with the exception of jurisdiction, competence and proceedings before courts (see Articles 102 and 125) it would seem an ordinary law would suffice. It seems to the writer that these issues should be regulated in the Constitution.

Articles 130-132: The Public Prosecutor

23. Articles 130 to 132 deal with the office of the public prosecutor. The office is defined as an independent state body. Its functions are to prosecute the perpetrators of criminal and other penal offences. It is also to apply legal remedies in order to protect constitutionality and legality. The constitution is silent on what exactly is meant by this latter provision. It would appear from the fact that the constitution, in Article 136 to 137, establishes a position of Ombudsman as a state authority to monitor the work of state administration and respect for human and minority rights that it is not intended that the prosecutors office should have these functions. However, the reference to the office of the public prosecutor applying legal remedies in order to protect constitutionality and legality, if it is to remain, ought to be clarified to make it clear that the decision on such matters rests with the courts and that the prosecutor's function is no more than to bring such issues before the court for determination. Is the prosecutor to exercise these functions conterminously with the Ombudsman?

24. The prosecutor's office is established as a hierarchical system. Higher offices are superior to lower ones and the Supreme Public Prosecution Service is the highest ranking prosecutor's office with primacy over other offices of public prosecutors. Such other offices are to be established and abolished by organic law.

25. Public prosecutors are to be appointed initially for a term of five years, after which they can be appointed for an unspecified period. They are to be appointed by the People's Assembly on the proposal of the High Judicial Council. In the case of the Supreme Public Prosecutor, however, nomination is by the President of the Republic, having obtained the opinion of the High Judicial Council. Presumably this opinion must be favourable, although the text does not say so. Appointment is for a six-year term. It is not clear whether this may be renewed or whether one term only is permissible. Again this is a matter which needs to be clarified.

26. The rules governing the termination of the term in office of judges are to apply also to public prosecutors. The comments earlier made about those rules therefore apply also to the public prosecutors. There is no reference to disciplinary procedures and it is not clear whether it is intended that the High Judicial Council is responsible for these or whether the Supreme Public Prosecutor has responsibility for disciplining other prosecutors. The public prosecutor can be transferred against his or her will to another office of the same or approximately the same status, only after the office has been closed by the decision of the High Judicial Council. While this is a parallel provision to that applying in the case of judges whose courts are abolished, it seems to contradict the provision which says that offices of public prosecutors are to be established and abolished by an organic law. The public prosecutor can be assigned temporarily to another office against his or her will by a decision of the Supreme Public Prosecutor. It is not clear how this is intended to operate. How temporary is temporary? A "temporary" transfer for a lengthy period might be tantamount to a permanent transfer. The provisions relating to conflict of interest and immunity of judges are to apply also to the public prosecutor. Again, the comments already made in relation to these questions are applicable.

Articles 133-135: The High Judicial Council

27. Articles 133 to 135 deal with the High Judicial Council. This is defined as an independent and autonomous judicial body which is to decide on the position of judges and public prosecutors and is to consist of four judges elected by the judges themselves, four public prosecutors elected by the public prosecutors, one lawyer appointed by the Bar Association, and two law professors. The law professors are to be appointed by the President of the Republic, and while this provision is rather complex it seems that one of them must be selected from four candidates to be nominated jointly by the Deans of the law schools in Serbia. Appointment to the High Judicial Council is for a five-year term and a person cannot be re-appointed. Members of the High Judicial Council are to enjoy the same immunity as a judge and again the same comments that were made earlier about this are applicable. It is the Constitutional Court which has the function of waiving immunity of members of the High Judicial Council. Again, the provisions relating to conflict of interests for judges are to apply also to members of the High Judicial Council. The function of terminating the office of a member of the council is to be exercised by the Constitutional Court but the reasons which may justify such termination are to be specified in an organic law.

28. I am doubtful about the wisdom of having the same body deal with both the judges and the prosecutors. However, Article 135 provides that a decision of the High Judicial Council pertains solely to judges included in the council, public prosecutors are to be excluded from its composition. Similarly, if a decision of the council pertains solely to prosecutors included in the council, judges are to be excluded. This provision seems somewhat obscure. I assume it does not refer only to decisions concerning individual

judges or prosecutors on the council but is intended to refer to judges or prosecutors who are represented by the council. If this is the case then the intention seems to be that where the council is deciding on matters which are relevant to the judges, the prosecutors do not take part and *vice versa*, but where they decide on a matter relating both to prosecutors and to judges then everyone takes part. This seems to be a rather complex provision and one wonders whether it would not be simpler to establish two separate councils, one to deal with matters pertaining to the judges and the other to deal with matters pertaining to the prosecutors. It seems to the writer important that both the judges and the prosecutors should not only be independent of other institutions in the State, the Executive and the Legislature, but should also be independent of each other. It would be undesirable for the prosecutor to have influence over matters concerning the judiciary and equally undesirable that the judiciary should exercise control over the prosecutors office.

29. If there were two separate bodies it would be possible to provide that they could meet jointly in relation to issues that were of concern to the judges and the prosecutors. An even more complex provision in the existing draft says that if a decision of the council pertaining to an issue concerning judges and prosecutors alike, a judge and a prosecutor are to be excluded by lot and the Minister for Justice and a prominent legal expert elected by the Assembly are to joint the council. The thinking behind this provision seems somewhat obscure and it is hard to understand why one judge and one prosecutor should be excluded in such a case although it is possible to see why the Minister for Justice might need to be present. If the Minister is to attend such meetings it may not be desirable that he should have a vote or have any powers other than to address the meeting and to take part in the discussions.

The Ombudsman

30. Articles 136 and 137 deal with the Ombudsman. Again, these provisions are relatively terse. The Ombudsman's functions are to monitor the work of the state administration the exercise of powers and the Republic of Serbia has transferred, and respect for human and minority rights guaranteed by the Constitution. The Ombudsman is authorized to initiate proceedings for a review of the constitutionality and legality of the law or other general enactment governing a matter that falls within the Ombudsman jurisdiction, to file a constitutional complaint and perform other activities specified by the Constitution and organic law. The term is a six-year term and the Ombudsman is selected by the people's assembly on the proposal of the President. He or she is to enjoy the same immunity as a deputy and the people's assembly are to decide on withdrawal of the immunity. Again, the same comments about immunity apply as in the case of judges. The organization, the election, termination of the term in office and position of the Ombudsman are to specified by an organic law. It would seem desirable that at least the grounds on which an Ombudsman's office should be terminated should be set form in the Constitution itself.

General Comments

31. Overall I would regard the draft as providing a useful basis for discussion but as raising a large number of matters which I think need to be clarified in the text. The draft seems to me to err on the side of leaving too many important matters to be determined by organic law, or even by ordinary law, and in certain important aspects leaves open the possibility of undue interference by the legislature with the work of the judges, the prosecutors office and the Ombudsman.