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(VENICE COMMISSION)

DRAFT CONSTITUTIONAL AMENDMENTS CONCERNING THE REFORM OF THE JUDICIAL SYSTEM IN "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

Comments by

Ms Hanna SUCHOCKA (Member, Poland)

I. General remarks

The draft being submitted incorporates a number of changes in relation to Macedonia's 1991 Constitution. The changes pertain to the judiciary and prosecutor's office. The justification for those changes was to need to create what legislators perceived as more effective guarantees of the judiciary's impartiality and independence, as well as new solutions for the State Prosecutor's Office.

The problem of creating the most effective guarantees of independence as well as the greatest effectiveness of the judiciary is a problem common to all post-communist states. Also common is the quest for the best and most effective model of the prosecutor's office — one devoid of political influence. Solutions defining the position of the prosecutor's organ differ quite markedly in the individual states. The reason, which has been frequently stressed, is the lack of a single model of prosecutor's office that would comply with what are generally referred to as European standards. Democratic standards are reflected by a prosecutor's office independent of the executive authorities and constituting a magistrature together with the judiciary. But also regarded as democratic is a prosecutor's office forming part of the executive (as in the Czech Republic and Poland), but free of political directives and influence and only institutionally linked to the executive through the person of the justice minister.

Efforts at finding the best model have been particularly evident in states that have newly emerged following the collapse of communism, ie states that until the early 1990s had been part of another state, generally of the federal type (states of the former Soviet Union and the former Socialist Republic of Yugoslavia). Such is the situation in the case of Macedonia.

Macedonia adopted its first constitution in 1991 after achieving independence. The current proposals contain a number of changes in relation to the constitution's provisions.

In analysing the submitted amendments, a general observation of a legislative nature arises. The proposed amendments are excessively detailed for an act of constitutional rank. They envisage imparting constitutional rank to a number of regulations that could have more effectively been consigned to an ordinary law. Including such detailed solutions in a constitution is always detrimental to the essence of a country's basic law which is the constitution. Rather than stabilising and serving as a durable foundation for polity solutions it necessitates frequent changes, thereby diminishing the significance of the constitution itself as a cornerstone of the entire legal order stabilising the system of legal sources.

It would therefore appear purposeful to reassess the proposed amendments from that point of view, namely to consider which detailed solutions could be transferred to ordinary legislation without adversely affecting institutional solutions. That is a purely formal observation, however to ensure the transparency of the solutions it appears justified to signal it at the very outset.

II. Detailed remarks

1. Basic misgivings are evoked by amendment XX, in particular — passage 2 of that amendment. It is meant to replace the current paragraph 1, article 13 of the constitution. The way passage 2 of that amendment is formulated runs counter to the general principle known as the right to judgement, a situation confirmed in the justification attached to that amendment. The solution proposed by that amendment in a certain sense goes 'against the current' of solutions accepted in a democratic state of law, where everyone has the right to demand that an independent court of law should examine and rule on issues. Even if the decision in the first instance is taken by an organ other than a court (on the basis of law, of course), every individual must have the guaranteed right to plea his case before a court. And it is the constitution that should rule out the possibility of removing specific categories of

cases from court jurisdiction. For that reason I believe that amendment should not be adopted, and the regulation contained in the present constitution's paragraph 1, article 13 should be retained.

Amendment XXI, imposing as it does the obligation of resolving cases without undue delay, is correct. However, it should be modified to apply only to proceedings taking place in court as per the remarks pertaining to amendment XX.

2. Changes affecting the judiciary

As a motto evaluating the changes to Macedonia's Constitution pertaining to the judiciary, one might cite the words written many decades ago by a British constitutional expert: 'Constitutional states do not nowadays greatly differ in the ultimate rights secured to citizens though the judicial "department". They all ensure the impartiality of the judge by placing him above fluctuations of party feeling and giving him security of tenure without making it impossible to remove him for crime or corruption.' That formulation encapsulates the very essence of the problem, ie the placement of the judicial authority within the state's political system. 'Constitutional' states, those currently described as democratic state of law, are by their very essence obliged to accept a certain permanent catalogue of basic principles governing the way the judiciary is organised. To these belong: the principle of independent courts of law; the principle of independent and impartial judges; the principle of judges eschewing political involvement; the principle of permanence of a judge's tenure; disciplinary liability of a corrupt or law-breaking judge and the possibility of his forfeiting his post. Those are the general principles that go to form the generally binding standards of the judicial authority. The effectiveness and capacity to implement those principles hinges on an entire system of guarantees regulated by the laws of individual states. The scope and type of those guarantees depend to a large extent on the legal tradition and culture of a given state. In the case of states emerging after the collapse of the Soviet empire, the negative experience connected with the political entanglement of judges in the previous period has had a basic significance to the adoption of concrete solutions. Each state must in effect build from the ground up a system of guarantees safeguarding the independence of judicial authority and the judicative independence of judges.

The draft amendments to Macedonia's Constitution currently under analysis are another example of precisely such pursuits. Macedonia's 1991 Constitution contained basic key principles pertaining to the judiciary. According to their authors, the present amendments have been formulated as a result of the ineffectiveness of existing solutions intended to ensure the impartiality and political neutrality of the judicial authority. A number of the proposed solutions are correct, whilst many of them raise misgivings.

The solution contained in amendment XXVI to initially appoint judges to a three-year term and only later to to grant them indefinite tenure appears justified. That amendment merits support.

In the catalogue of proposed changes, key changes pertain to the State Judicial Council (SJC). Bodies of that type have become rather common institutions in all the post-communist states. One gets the impression that the creation of those councils was seen as a 'remedy' to all the ills of the judicial system. Therefore, in different states one can observe efforts to expand their scope of activities and see how the Judicial Councils have been taking over prerogatives of other state organs. They initially were to take over tasks carried out by the executive authority, particularly the justice minister.

It should be noted, however, that the composition of those Councils and their scope of

competence differs greatly from one country to the next. In that area it would be difficult to find a single model one could define as the sole model reflecting the standards of a democratic state of law.

The institution of a Supreme Judicial Council was introduced into Macedonia's 1991 constitution. That constitution did not directly define the purpose for which the Council was set up (unlike the Polish constitution, for instance, which states directly that it stands guard over the independence of courts and judges). But the Council's prerogatives, as set forth in article 105, allow one to presume that such had been the purpose for which the Council in Macedonia was established. Article 105 of Macedonia's currently binding constitution also grants the Council the right to rule on the disciplinary responsibility of judges — a rather unique right.

The submitted draft amendments envisage increasing the size of the Council, changing its composition and expanding its prerogatives. They also call for elevating to constitutional rank certain regulations governing the Judicial Council that had hitherto been contained in ordinary legislative acts.

It would seem that the introduction of such detailed constitutional regulations pertaining to the State Judicial Council should be reconsidered. For instance, new proposals are being added to those already submitted (see amendment XXVIII). In my opinion, a law would be a more proper location for some of the substance contained in supplemented amendment XXVIII. I therefore believe a preferable solution is found in the amendment itself with the addition of p. 8 defining the Council's term in office. But there is no need to constitutionalise the regulations proposed in p. 9 and further points of amendment to amendment XXVIII.

The Council itself was already strongly emplaced by the constitution of 1991. At present, a further strengthening of its position is envisaged. The Council's membership is to be enlarged from seven to 15. Also being proposed is a change of name which does not seem to be incidental. Instead of the Supreme Judicial Council it will now be called the State Judicial Council. The actual composition of the SJC is to change completely. Up until now, members of the Council were selected from amongst distinguished lawyers by the Assembly. According to the constitution, they need not be judges. In the light of the draft amendments under discussion, a more diversified composition is now planned. Above all, the amended constitution will clearly states that judges, elected from amongst all the judges, are to account for eight of the members. By virtue of their high office, automatic membership is accorded to the President of the Supreme Court and the Minister of Justice. Three members are to be elected by the Assembly and two Council members are to be appointed by the President. Such a diversified composition is also encountered in other countries. That amendment would also appear justified.

Such a composition gives the SJC a better balance of power, a principle extremely important to the division of authority. For that reason, this change should be rated positively. SJC members have been granted broad immunity, regulated in detail by the constitution. The scope of that immunity for Council members may evoke certain misgivings. Judges enjoy immunity, since that ensures their freedom to judicate, however I see no such needs as regards the SJC.

It is also being proposed that the principle of minority representation in the Council should be elevated to constitutional rank. The proper obligation is imposed upon all the entities electing Council members (the president, parliament and other electing bodies). That is a highly detailed solution. It appears to be a solution arising out of the situation of a specific

state that had experienced nationality tensions and conflicts. At the same time, it appears to reflect the experiences of the Yugoslav Federation, where ethnic parity had been absolutely binding on all state organs.

One may justifiably wonder, however, whether in this particular case a solution intended to guarantee minority rights will ultimately not come into collision with the Council's cornerstone principle of guaranteeing the independence of judges and law courts.

Proposed draft amendment XXIX envisages the substantial enlargement of the SJC's scope of competence. It calls for the SJC to assume prerogatives in relation to judges previously exercised by other organs. For instance, the Council is to gain the right to appoint judges (at present the task of parliament) as well as to dismiss them. It is to similarly have the right to elect and dismiss court presidents. The Council is to decide on a judge's immunity (hitherto the job of the Assembly) and to rule in disciplinary matters as it has thus far.

One can accept the justification that solutions eliminating all political influence on judicial appointments must be sought. Since the involvement of such a highly political body as parliament in the election of judges may always raise misgivings, the proposal that judges should not be elected by parliament would seem justified. But transferring all decisions regulating the situation of judges (amendment XXIX) to the SJC is too far-reaching a move. Also in this case, authority should be divided, but it should be clearly balanced as well. The SJC designed as per the draft amendments would grow into a kind of super-organ. The nature of some of the Council's prerogatives and the status (scope of immunity) granted to its members give it a position nearly comparable of that enjoyed by courts, but those institutions should be clearly differentiated. The Council is not a court of law but is supposed to guard their independence. What is more, granting the council such a position effectively makes it the only organ that is accountable to no-one but enjoys the sole right to decide on the totality of the situation of judges.

In my view, a preferable solution would be for the SJC to draw up proposals concerning judicial appointments whilst having some other organ, for instance the president, make the actual appointments. Judicial appointments, after all, rank amongst classic presidential prerogatives. The formulation could be proposed that the SJC is to submit its recommended judicial appointments to the President. The President's right to appoint judges should be restricted in such a way that he could appoint judges solely from amongst the candidates proposed by the SJC.

I believe that at present there already exists the solution that the SJC should not be the organ ruling on the disciplinary responsibility of judges. A court should be designated to function as a disciplinary court. The Council could appoint a disciplinary spokesman. The position held by the Council at present concentrates in its hands the prerogatives of both the executive and judicial authority, and that may jeopardise its role as a guarantor of the judiciary's independence. Those are not simply theoretical observations. They are backed by an analysis of the situation in different countries that have introduced the institution of a Judicial Council.

In countries where Judicial Councils have existed for some time, their actual functioning has at times been criticised, although their *raison d'être* as guardians of judicial independence has not been questioned. It is their tendency to evolve into 'new justice ministries' that causes misgivings. For instance, with regards to the broad scope of authority enjoyed by Hungary's Judicial Council, the European Union has expressed the following opinion: 'According to some critics, the operation of the Council is rather bureaucratic, resulting in the increase of the administrative burden of judges. Some argue that it is actually the Office

of the Council, composed of civil servants, which has the real power and not the Council itself. Many of the employees of the Office used to work at the competent department of the Ministry of Justice prior to the reform, and their mentality still reflects the old times, when courts were clearly subordinated to the bureaucracy of the Ministry.'

Those remarks and experiences should be taken into account when constitutional changes are being proposed.

3. Amendments affecting the Prosecutor's Office

Article 106 of the currently binding constitution defines the position of the prosecutor's office within the system of state organs as well as its functions. Submitted draft amendment XXX introduces no changes in that regard. Hence, the functions of the prosecutor's office remain unchanged ('to detect and prosecute the perpetrators of criminal and other penal offences defined by law and to perform other tasks defined by law'). Also unchanged is the position of the State Prosecutor's Office, defined as a single and independent state body. The state Prosecutor's Office already in 1991 was treated as a separate state organ. It has not become part of the executive, as has been the case in certain other states including Poland.

However, the draft amendments now being proposed envisage the creation of a State Prosecutor's Council (SPC). That constitutes a basic change, since the 1991 Constitution did not envisage such a body. This kind of Councils are appointed in different states, although they are not as common as Judicial Councils. The scope of constitutional regulation of the prosecutor's office is generally quite laconic. Those councils are rarely institutions of a constitutional nature but are rooted in legislative acts. Those councils differ in character. Whilst exhibiting certain features of self-governing bodies, as a rule they serve the Prosecutor General as an advisory organ. That hinges on that official's unique role as a public prosecutor and reflects the principle of hierarchical subordination binding within procuratorial structures. The scope of the prosecutor's independence remains open for discussion.

The solutions being proposed in these draft amendments are too far-reaching. They envisage the creation of a State Prosecutors' Council (SPC) entirely patterned on the Judicial Council model. The prerogatives of the SPC, its composition and manner of appointment have all been based on those of the Judicial Council. There can be no doubt that through such solutions the authors of those amendments have sought to achieve the most effective guarantees ensuring the political neutrality of the prosecutor's office. Nevertheless, I cannot help but wonder whether the authors have not gone too far in their quest. The entire burden of competence is being transferred to the SPC. It assumes the hitherto prerogatives of both the Prosecutor General as well as the Assembly. The SPC (amendment XXXII) takes all essential decisions regarding the appointment and dismissal of prosecutors, decides on their disciplinary responsibility and may strip prosecutors of their immunity (with the exception of the Prosecutor General). With regards to those matters, the Council not only formulates opinions but acts as a decision-making organ. I do not regard such a solution as proper. It is my belief that a SPC with such a scope of prerogatives is not rooted in any existing European standards.

The reservations I have expressed above as to the scope of competence enjoyed by the Judicial Council (SJC) also apply to these proposed solutions. The entire system of balance of power is disrupted. The SPC becomes the sole authority deciding the situation of prosecutors. It appoints prosecutors as well as deciding their immunity and disciplinary responsibility. I strongly believe, and I would like to repeat that, it is the court that should take decisions regarding disciplinary responsibility.

What concerns the appointments in my opinion the Council should draw up recommendations regarding appointments, but the actual nomination of prosecutors should be effected by another organ whose choice would be limited to the list of candidates proposed by the SPC.

In this situation, I believe that the proposed draft amendments to the constitution should be narrowed, and should not be accepted in their entirety. Amendment XXX may be introduced, although I personally believe that solution contained in article 106 of the constitution to be superior. As a constitutional act, amendment XXX is too detailed.

Since there exists the intention to introduce a SPC to Macedonia's constitutional system, draft amendment XXXII should be accepted along with reservations similar to those expressed with regards to the amendment pertaining to the Judicial Council.

But draft amendment XXXIII pertaining to the prerogatives of the SPC should not be accepted in its present form. There always exists the danger that a Council armed with such broad prerogatives could evolve into a super-"prosecution ministry", thereby becoming the antithesis of the purpose for which it was established.

To sum up, I believe this packet of draft amendments should be thoroughly re-analysed before it is enacted.