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COMMENTS ON THE CONSTITUTION OF SERBIA (Parts V, 7-9, VI and VIII)

by
Ms Hanna SUCHOCKA (Member, Poland)

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The Venice Commission gave its opinion on the chapter on the Judiciary in the Constitution of 2004, (DCL-AD(2005)023). After adoption of the new Constitution in 2006 the Venice Commission has been asked to make an opinion about the new Constitution.

Courts

1. The main point of interest of my comments on the constitutional provisions on the courts, is the problem of guarantees of the independence of courts and judges. The principle of independence of judges is crucial for the functioning of the judiciary. „The judiciary occupies a unique position in a democratic society. Meaningful independence (and public perception of that independence) is essential to the judiciary's legitimacy as a guarantor of rights and freedoms. If courts are not seen as independent and impartial, citizens will not turn to them to resolve their problems, but may seek recourse through political or extralegal means."[1]

"In order to establish whether a body can be considered "independent", regard must be given, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence".[2]

2. It should be noted positively that Venice Commission opinion (DCL-AD(2005)023) has been taken into consideration in the process of preparing the new provisions on the courts.

3. The principle of independence of courts and independence of judges.

The Constitution regulates in a "classical" way, as well the independence(autonomy) of courts as the independence of judges. Art. 142 in the framework of the general principle concerning the judiciary states that courts shall be separated and independent in their work and perform their duties in accordance with the Constitution and Law, while Art. 149 regulates the independence of judges saying that a judge shall be independent and responsible only to the Constitution and the Law. This regulation is in conformity with the European standards.

The Constitution regulates also the principles being the guarantees to the independence of judges. There are as follow:

- The principle of the stability of judges, (Art. 146),
- The immunity of judges (Article 151),
- The principle of incompatibilities (Article 152),
- The principle of establishing courts only on the basis of the law, (Article 143),
- A ban on the creation of provisional courts, martial courts and special courts (Article 143),
- The role of the HJC (Art. 153-155).

4. The principle of the stability of judges (Art. 146),

The principle of stability of judges is expressed in the new Constitution in a more precise way than in the previous Constitution dated from 2004. Art. 146 states that a judge shall have a permanent tenure. This should be understood as appointment until retirement. Despite a general rule "a permanent tenure of office", the Constitution has maintained the previous principle to elect judges for the first time for the post for a 3 year term. The positive solution is

[1] Monitoring the EU Accession Process: Judicial Independence, Open Society Institute, Budapest 2001, p. 17.
[2] Bryan v. UK, ECHR Judgment of 22 Nov. 1995 (No.44/1994/491/573), A335-a, para. 37.

however that the previous term of 5 years has been shortened to 3 years. It is in line with the Venice Commission's suggestions that "a reduction of the excessive five years period would alleviate the problem of "temporary judges" (CDL-AD(2005)023 p.14).

That solution (kind of probationary period), however, always evokes criticism because, one argues, it 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 do not formulate my opinion in such categorical manner. As I wrote in my previous comments on the Constitution of Serbia, proposing such a solution in the constitution, can indicate 'sui generis' a quest for a method of appointing the best persons to the office of judge. The period is meant to facilitate the evaluation of his/her practical ability to perform the duties of a judge. [3]

To the "temporary judges" must be applied the same rules for the appointment, evaluation and promotion to higher judicial position as for permanent judges. The same guarantees as for permanent judges to rule out the prospect of anyone exerting influence on a nomination should also be created. The decisive role in determining whether a judge should receive a permanent appointment should be played by HJC. In addition, this solution has been proposed in the Serbian Constitution. This solution is in line with the comments of the Venice Commission that: "the High Judicial Council should be entrusted with taking status decisions on probationary judges so as to ensure that the decisions are based solely on merit and not influenced by undue political considerations."

5. Appointment. The problem of the appointment of judges raises some concerns, especially regarding the role of parliament. There are some new provisions diminishing the role of the National Assembly in the process of appointment of judges, but one can however have an impression that the role of parliament is still too large in the process of the nomination of judges.

Art. 147 p.3 introduces the substantive change to the previous Constitution, which empowered Parliament to make nominations of judges for both limited and unlimited periods of time. The Constitution now limits the right of parliament to elect on proposal of HJC, as a judge the person, who is elected to the post of judge for the first time. What concerns the nomination to the post of permanent judges is a right of HJC. The right to elect judges for the first time means that the role of parliament is still very important in the area of nomination for the post of judge since HJC may elect judges for permanent tenure only from among the judges just elected for a limited period by the National Assembly.

Similar misgivings are raised by the election of the President of the Supreme Court of Cassation by the National Assembly (Art. 144) as well as presidents of courts (Art. 154says that HJC proposes to National Assembly the election of presidents of courts).

As I stated before, the appointment of court presidents should take place beyond the pale of current political rivalry.

[3] I would like to revoke what I wrote in my previous comments: 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.

I don't see also any reason for the rule that National Assembly shall adopt the decision on the term of office of President of the Supreme Court of Cassation (Art. 144 p.4).

I maintain my critical opinion towards such a solution. It has been repeatedly noted that the appointment of judges by parliament runs the risk of a kind of political tender. The nomination of judges is a classic presidential prerogative. Candidatures should be prepared by the HJC, the decision should be taken by the president and the president would not be allowed to nominate a candidate not included on the list submitted by the HJC. The decision on election of judges should be also seen as one of the important instruments of separation of powers, to keep judiciary independent from political games but at the same time to avoid negative effects of corporatism within the judiciary. Entrusting the prerogatives to elect judges to parliament casts doubts on whether that would be possible.

6. The immunity of judges (Art. 151)

The Venice Commission was very critical towards the scope of immunity of judges saying that: "it is very doubtful whether there is a need for such a wide immunity for judges like that for deputies…there should be only a limited functional immunity for judges from arrest, detention and other criminal proceedings that interfere with the workings of the court."

The scope of immunity regulated in Art. 151, seems to be more limited in line with the VC opinion. A judge may not be held responsible for his/her expressed opinion or voting in the process of passing a court decision, except in the cases when he/she committed criminal offence by violating the Law. One has however doubts that functional immunity is too wide.

7. The principle of incompatibilities (Art. 152)

That Constitution like the previous one contains a very general rule concerning incompatibilities. There is however one important positive change. The Constitution regulates directly that the judge shall be prohibited from engaging in political actions. It can be seen as implementation of the Venice Commission's suggestion: "it might be considered whether to include in the text a prohibition of the membership of judges in political parties".

As it has been written in the report "Monitoring the EU, Judicial Independence:, It is common among candidate States-as among member states- that judges are not allowed to be members of political parties or to be engaged in political activities. Although the ban on party membership was introduced as a reaction to the communist past, the prohibition is still perceived asa genuine guarantee of independence".[4]

The solution in the new Serbian constitution can be positively welcome.

8. High Judicial Council

In all new democracies the Constitutions accord an important role to the HJC. The Serbian Constitution in Art. 153 describes the HJC as an independent and autonomous body which guarantees independence and autonomy of courts and judges. One can note one positive change in the wording of this provision in comparison with the2004 Constitution. HJC has not been described more as a judicial body. Judicial body can be only a court.

It would be also better, in my opinion, not to use the word independent as a description of HJC.I would like to repeat that HJC is an autonomous body but it should not be defined as an

[4] Monitoring the EU Accession Process: Judicial Independence, Open Society Institute, Budapest 2001, p. 38.

independent 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 structure of HJC is different than in the previous Constitution. Serbia has chosen the model with two completely separate bodies one for judges and one for prosecutors. It is one of the possible solutions existing in the European countries. The composition of HJC is very diversified. The members of the HJC are: President of the Supreme Court of Cassation, the Minister of Justice, president of the authorized commission of the National Assembly as members ex officio and 8 electoral members elected by National Assembly (among them 6 judges, Art. 153). A more broadly based Council gives it more balanced authority. So for that reason in my opinion this solution, that members are not only judges, is rather a positive one. There are however some ambiguities.

The process of election of members to HJC raises some doubts. The National Assembly is involved too strongly in the process of selection of members of HJC. Out of 11 members, parliament decides on 9 members. Taking into account that HJC decides on the election of judges for permanent office, the whole process of selection of judges is de facto strongly rooted in parliament. (see the comments on the role of parliament in the election of judges, p. 5 above).

It is also very doubtful whether for members of HJC there is a need for such wide immunity as for judges (Art. 153 p. 7).

9. Disciplinary responsibility

The new Constitution does not contain any provisions on the disciplinary responsibility of judges. This solution involves a lot of concern and questions. Is there a disciplinary responsibility of judges at whole?, what is the scope of this responsibility?, what is the role of HJC?. All the questions are not answered in the light of the new Constitution. This solution, in my opinion, is going against the suggestions of the Venice Commission. The lack of basic constitutional regulations in this concrete situation, can create a real threat to the independence of judges.

10. Termination of a judge's tenure of office.(Art. 148),

The provisions on the termination of a judge's office are of a very general nature. The detailed regulation is sent to an ordinary law. Even the conditions when the judge can be relieved of duty are regulated by law. The positive solution in this Constitution is the provision which gives the judge the right of appeal within the Constitutional Court against the decision of HJC on the termination of a judge's tenure of office. The right to go to court against such a decisions seems to be one of the important guarantees of independence of a judge.

Public Prosecutor's Office

11. The role of the Public Prosecutor's office is described in the new art. 156 in the same way as in the previous Constitution. Prosecutor shall be an independent state body which shall prosecute the perpetrators of criminal offences and other punishable actions and take measures in order to protect constitutionality and legality. For that reason the comments of the Venice Commission are fully valid (CDL-AD(2005)023 p. 24). The role of a prosecutor to protect constitutionality and legality seems to be in contradiction with the role of the Constitutional Court. Art. 166 of the Constitution states clearly that the Constitutional Court shall protect constitutionality and legality.

I would like to repeat that the function of prosecutor to protect constitutionality and legality is a clear remnant of the thinking that once surrounded the prosecutor's office under the previous political system. In the new system there is no 'raison d'être' for this role of prosecutor's office.

12. One can suppose that the new Constitution introduces the new organizational principles of the prosecutor's office. The regulation however is not very clear. There is no regulation on the hierarchical subordination which is a rather common principle of the organization of the prosecutors office in different countries. Contrary, art. 156 regulates the rule of independence of prosecutors in the same way as independence of judges, which in my opinion is not the best solutions. Prosecutor should be autonomous but not independent in the identical sense as judge. The Serbian Constitution creates a very strong rule of independence of prosecutor's office from the government. The regulation of the prosecutor's office is symmetrical to the regulation of judges what concerns independence, immunity, incompatibility and termination of office. Creating a separate State Prosecutor's Council Serbia has not followed the way to create close links between prosecutor's office and the judiciary what one could supposed was the case in the previous Constitution. I have also a doubts, taking into account the different role of judges and prosecutors, whether the Prosecutor's Council should be so strongly modeled, (being a kind of repetition) on the Council of Judges.

13. The new Constitution establishes very strong links between prosecutors and National Assembly. The National Assembly elects not only Republic Public Prosecutor but also Public Prosecutors and deputy public prosecutors. The prosecutors shall also account for the work to the National Assembly. The new regulation is very ambiguous. In this situation all remarks made by the Venice Commission (p. 25-27) are valid. In my opinion it would be better if the prosecutor's system were more linked to the courts. The system of such a great independence of prosecutor's office will always revoke fears of rebuilding the old system of very strong 'prokuratura' as separate pillar in the state structure playing not only its role in criminal cases, but also being involved in a kind of political game.

The Constitutional Court

14. The status, role and competencies of the Constitutional Court ,in general, are regulated in the new Constitution in the same way as in previous Constitution. The general role of the Constitutional Court is regulated by Art. 166 (as previously Art. 170) which describes the Constitutional Court as an autonomous and independent state body which shall protect constitutionality and legality as well as human and minority rights and freedoms. This is a generally accepted definition of the Constitutional Court role.

15. Competencies of the Constitutional Court are regulated by Art. 167. The scope of the competencies does not involve doubts. Constitutional Court decides on: 1.conformity between constitution, international treaty, laws and other general acts on a different level, 2. on the conflict of competencies between different organs, 3. on the ban of political parties, trade union and civic associations. In comparison to the previous Constitution there are some changes that concerns the power of Constitutional Court. Art. 167 empowers the Constitutional Court with the new rights: 1.to decide on "compliance of ratified international treaties with the Constitution" and 2.to decide on the ban of political parties, trade unions and civic organizations.

Generally speaking I have no reservation to that "enlargement" of the power of the Constitutional Court. There was also in Poland in the constitution-making process very strong pressure to provide the Constitutional Court with power to decide on the conformity of the international treaties with the Constitution. In the system of sources of law with the supreme position of the Constitution, ratified international treaties being a part of legal system of the state, can be controlled by Constitutional Court. And this is a case in Serbia, because Art. 194

of the Serbian Constitution states that “the Constitution shall be the supreme legal act of the Republic of Serbia.”

The result of the decision of the Constitutional Court, declaring non-conformity between Constitution and international treaty, involves effect not only on internal but also on international level. In such a situation, international treaty should be renounced.

It must be however taken into consideration that in a concrete political situation this provision (allowing for the Constitutional Court to decide on the conformity of ratified international treaties with Constitution) could be used as political weapon to cancel by the decision of a state organ, the international agreement. For that reason, it is very important to create in the law the system of guarantees which help to avoid this danger.

16. In Art. 167 there are some repetitions. Point 5 states that Constitutional Court shall perform other duties stipulated by the Constitution and Law. The same very general rule (one can have an impression that it is too general) is repeated at the end of Art. 167.

Art.170. It is not clear against which acts a constitutional appeal may be lodged. In the previous Constitution it was stated clearly that against individual acts. Now it must be clarified.

17. The very balanced way of election of judges to the Constitutional Court seems as a very positive solution (Art. 172).Taking this into account I don’t see any reasons for the right of the National Assembly to decide on the termination of justice’s tenure off office.(Art. 174).

Constitutionality and Legality

18. Art. 194 regulates the hierarchy between domestic and international legal acts. The new Constitution repeats as it was a case before that “ratified international treaties (…) shall be part of the legal system and may not be in noncompliance with the Constitution”. At the same time, however, the Constitution does not repeat directly the provision, that “ratified international treaties are placed immediately after the Constitution and shall have primacy over all laws and other general enactment passed in the Republic in Serbia”. One can suppose that it is only change of wording because the same article 194 states that “Laws and other general acts may not be in noncompliance with the ratified international treaty”, what should be interpreted in the only way that ratified international treaties have primacy over the law in the case when it is impossible to achieve the concordance between ratified international treaty and the law by way of interpretation. This rule was rather generally accepted in all new post-communist countries. (see also p.15)

19. Art. 200-201 contain the provisions on state of emergency and state of war. The regulations on the state of war does not involve doubts. The state of war on the territory of given country is, as a rule, proclaimed as a consequence of the war, i.e. as a consequence of situation existing on international level.

The situation with the state of emergency is more differentiated. The general Constitutional Law knows different kind of a state of emergency. The state of emergency or better the extraordinary measures can be introduced in several situations:1. In the case of external threats to the State, acts of armed aggression against the territory, 2. When an obligation of common defence against aggression arises by virtue of international agreement, 3. In the case of threats to the constitutional order of the State, to security of the citizens or public order,4. In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster.

One can suppose that the Serbian Constitution regulates that situation which is pointed above in p. 3.Since Art. 200 regulates that the state of emergency shall be proclaimed “when the survival of the state or its citizens is threatened by a public danger”. The conditions under which the state of emergency could be proclaimed are described in very general way, (what is the case also in other constitutions, see for example the Polish Constitution 1997). For that reason I don’t have any strong reservation to such a regulation. Perhaps for a better clarification it would be worthy to add at the end of the Art.200 p.1 the sentence: “if ordinary constitutional measures are inadequate”.

20. Art. 202 regulates the derogation from human and minority rights in the state of emergency and war. The general rule as such that: 1. derogations from human and minority rights should be permitted only to extent deemed necessary, 2. derogation based on race, sex, language, religion, national affiliation or social origin is prohibited, meet the common European standards. There are however some reservations in detailed regulations. The scope of derogations seems to be wider than in the previous Constitution. In the current regulation one can see some inconsistencies, for example in the light of Art. 202 p.2, there no reason not to include in Art. 202 p.4 among the rights they may not be derogated Art. 44 on churches and religious communities. One can have doubts why for example Art. 33, 65 are not included to the list in Art. 202 p. 4. It would be also better to keep the differentiation between state of war and state of emergency what concerns the regulations on the derogation of rights. The situation in both cases are different and for that reason also scope of derogation should be differentiated as it was the case in previous Constitution.