Strasbourg, 12 February 2007

Restricted
CDL(2007)007
Engl. only

Opinion no. 405/2006

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE CONSTITUTION OF SERBIA (Part V, 1-6)

by

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1. As agreed, I shall concentrate my remarks on sections 98-141, but will also comment on some other sections insofar as they need to be considered together.

2. Article 99: The powers of the National Assembly are set out in this section.

3. In Part A (as I shall call it) of this Article the National Assembly is given the power to 'decide on war and peace and declare a state of war and emergency' (Art. 99 A (5)); the power to adopt defence strategy (Art. 99 A (9), and the power to grant amnesty for criminal offences (Art. 99 A (12)).

4. In relation to the power to declare a state of emergency, Article 99 A (5) is supplemented by Article 200. In relation to the power to declare a state of war, Article 99 A (5) is supplemented by Article 201. In both cases, under Article 202, derogations from human rights guaranteed by the Constitution are limited only to certain rights, and to the extent "necessary" – a term that could helpfully be expanded to include reference to the somewhat more specific test under the European Convention in respect of derogations under Article 14.

5. In relation to the power to grant amnesty (Article 99 A (12), it should be noted that a parallel power is given to the President of the Republic under Article 112 (7). This duality of power could cause confusion and should be clarified.

6. In most democracies, these powers are given to the executive, on the ground that a large legislature is not institutionally suited to deciding these matters. This is for two reasons: first, it is not always possible to share with all the members of a large legislature matters of national security; second (and this applies particularly to the power of amnesty), because these questions are not appropriate to be decided on the basis of popular will. On the other hand, conferring these powers on the legislature is more 'democratic', and a reversal of recent history, which has exercised these powers centrally.

7. Article 99 B (2) empowers the National Assembly "within its election rights" to appoint and dismiss the judges of the Constitutional Court. This provision must be read in conjunction with Part 6 of the Constitution (Article 166-175).

8. Article 172 sets out the method of election of Constitutional Court judges, and provides that of the 15 justices five shall be appointed by the National Assembly from ten proposed by the President of the Republic and that the President shall appoint five justices from ten proposed by the National Assembly. It should be assumed therefore that when Article 99 B (2) refers to the power of the National Assembly to appoint justices "within its election rights", that phrase does not permit the National Assembly to veto appointments made by the other parties with election rights (namely, the President, the judiciary and lawyers). However, that assumption seems to be rebutted by a sub-clause in Article 174, which deals with the termination of the tenure of the office of a justice of the Constitutional Court, but, in paragraph three provides that "The National Assembly shall decide on the termination of a justice's tenure of office ... **as well as on appointment for election of a justice of the Constitutional Court**" (emphasis added). For the avoidance of doubt, it should be made clear that the National Assembly cannot veto the nominees of other parties to the Constitutional Court. Cross-reference should be made to Part 6, and the above words should be deleted from Article 174.

9. The power to dismiss justices of the Constitutional Court is equally ambiguous. Although Article 74 seems to provide a closed set of criteria for the termination of the tenure of Constitutional Court justices, the term "dismissal" is not used. Article 99 B (2) should therefore again be clear that it is cross-referring to the limited grounds of termination of tenure of a justice's office as set out in Article 174.

10. If that is not the intention of Article 99 B (2), that would be a serious violation of the independence of the judiciary and be contrary to Article 166, which provides that, the Constitutional Court shall be "an autonomous and independent body".

11. Article 99 B (3) also empowers the National Assembly to appoint ("within its election rights") the President of the Supreme Court of Cassation, presidents of courts, the Republic Prosecutor and other public prosecutors, judges and deputy public prosecutors. No mention is made here of dismissal.

12. Here too, cross-reference should be made to the section on Courts (Articles 142–155). Article 144 provides that the President of the Supreme Court of Cassation shall be elected by the National Assembly upon the proposal of the High Judicial Council etc. It should be made clear that the National Assembly does not have a veto power under either Article 99 B (3) or Article 144.

13. In relation to the appointment of judges, Article 147 provides that the National Assembly shall elect a first-time judge "on the proposal of the High Judicial Council". Again, Article 99 B (3) should cross-refer to that Article (147), and also make clear that the National Assembly has no right to veto the proposals made by the High Judicial Council.

14. Article 99 B (5) empowers the National Assembly to appoint and dismiss the Civic Defender. Article 138 repeats that phrase, having provided that the Civic Defender shall be an "independent state body". If the Civic Defender is to be truly independent, it should therefore be made clear that the he should enjoy protection of his tenure similar to that enjoyed by the judiciary.

15. It might be useful to add to the duties of the National Assembly that they support the judiciary with adequate resources.

16. Article 100 provides for equality of gender representation and national minorities in the National Assembly. Does this intend that seats in the National Assembly should be distributed in proportion to the national gender distribution? Does the term 'national minorities' include all minorities? Should the term be more precisely defined?

17. Article 102 deals with the status of Deputies. Paragraph 2 states that "Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal [of] a political party upon which proposal he or she has been elected a deputy". It may be that the English translation of this provision is not accurate. If it is, however, it seems that its intent is to tie the deputy to the party position on all matters at all times. If that is so, it would be a serious violation of the freedom of a deputy to express his/her view on the merits of a proposal or action.

18. Article 103 provides for the immunity of deputies. Insofar as this protects the free expression of deputies for words uttered within the National Assembly and in its precincts, this is desirable. However, it is not clear whether the provision seeks to extend that immunity to some or all criminal acts. The paragraphs that follow are simply not clear in the English translation. If so, it would be a flagrant violation of the rule of law and the requirement of equal subjection to the law.

19. Article 119 states that the President shall enjoy the immunity of a deputy. In some countries the President is given full immunity while in office from the criminal and civil law. However, if the immunities of the deputies extend to that position (the possibility of which is considered in the above paragraph) then the same would apply here. This must be clarified. Reference also should be made to Article 134, which appropriately provides that the Prime Minister and members of the Government should not be held accountable for opinions

expressed at sittings of the Government and sessions of the National Assembly. Note (a) that this should refer to *legal* immunity, and (b) the title of this Article wrongly refers to the "Immunity of the President" (rather than Prime Minister and members of the Government).

Article 137 permits delegation of powers to autonomous provinces, local self-government units, and also to "enterprises, institutions, organisations and individuals" and other regulatory bodies. Care must be taken here in the delegation of what are essentially governmental functions to private bodies who may not be competent to exercise them (e.g. the power of judges), or who would not be accountable for their exercise (an issue that has arisen in some countries, for example, in respect of privatised prisons).