Strasbourg, 26 July 2007 **CDL(2007)065***

Opinion no. 445/2007 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT LAW

ON THE CONSTITUTIONAL COURT

OF THE REPUBLIC OF SERBIA

Comments by

Mr Christoph GRABENWARTER (Member, Austria)

**This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. Introduction and General Remarks

The draft Law on the Constitutional Court is composed of 111 articles divided into eight chapters. It addresses almost all relevant questions of a modern law of this type.

Chapter one (introductory provisions) is followed by a chapter on election, appointment and termination of office of constitutional court judges and a chapter on the organisation of the Court. Chapter IV on the various proceedings before the Constitutional Court is by far the most voluminous chapter of the law. Chapter V deals with the effects of Constitutional Court acts, chapter VI to VIII consist of only a small number of Articles on the enforcement of Constitutional Court acts, the relationship with the National Assembly, "punitive" provisions and transitional and concluding provisions.

At the outset it has to be mentioned, that the text suffers obviously some language problems so it may be that some of the critical remarks are due to a problem of translation.

A second general point is the systematic structure of the law. A proposal for improvement concerns the principle of public proceedings which is dealt with in Article 3 under general provisions and in Article 76 in the main chapter with reference to public hearings.

A new systematic approach may also contribute to reduction of the length of the law.

2. Remarks on provisions in Chapter I (Introductory Provisions)

According to Article 3 the work of the Constitutional Court is public. This wording may lead to misunderstandings although paras. 2 to 5 explain the programmatic para. 1. However, it might be requested that also deliberations must be public which is the case in proceedings before the Swiss Federal Court, for the rest of Europe, however, this is unusual. Moreover the provision should be harmonised with Article 75 (if not merged). Para. 2 could be adopted to the wording of Article 6 para. 1 of the European Convention on Human Rights (ECHR) although only a part of the proceedings will be subject to this provision.

According to Article 7 matters of procedure before the Constitutional Court not regulated by this Law are subject to the application of provisions of other appropriate procedural laws; matters of procedure not regulated by this Law or provisions of other procedural laws shall be determined in each individual case by the Constitutional Court. This technique of dynamic reference to other laws with an unfettered discretion of the Constitutional Court is hardly compatible with standards of legal certainty under the rule of law. A more appropriate way is to provide for an *analogous* application of the code of civil procedure in general and for an analogous application of the code of criminal procedure in the proceedings directed against the President of the Republic. This solution is followed in the Austrian system and 80 years of practice show that *analogous* application leaves enough space for the Constitutional Court to adapt the provisions of the to Codes of procedure to Constitutional Court proceedings.

3. Remarks on provisions in Chapter II (ELECTION, APPOINTMENT AND TERMINATION OF OFFICE OF CONSTITUTIONAL COURT JUDGES)

Article 10: The term of office of is not so long as in other countries, there are however Countries with shorter terms (e.g. Liechtenstein). It corresponds with the term of office in the European Court of Human Rights after Protocol No. 14. It is therefore sufficient in view of the requirement of independence. The other guarantees of independence are duly respected bearing in mind that a number of provisions are already included in the Constitution.

4. Remarks on provisions in Chapter III (ORGANISATION OF THE CONSTITUTIONAL COURT)

The Court shall consist of 15 judges. This is an average size of a Constitutional Court (Germany 16, Austria 14). However, for reasons of efficiency a system of chambers with 7 to 8 judges and/or committees with 3 to 5 judges seems advisable. There should be explicit provisions for this purpose in the Law itself (and not in the Rules of Procedure). The regulation of this question in the Rules of Procedures according to Article 80 does not seem adequate in terms of rule of law standards.

5. Remarks on provisions in Chapter IV (PROCEDURES BEFORE THE CONSTITUTIONAL COURT)

Articles 29 to 33 deal with the participants in proceedings. Article 29 contains a very detailed list of participants (sometimes only with reference to a specific type of proceedings (e.g. No 5 - "religious communities about whose prohibition of activity it is being decided"). The value of this list - quite unusual from a comparative perspective - appears questionable for two reasons. First, the term "participant" is not limiting rights in the proceedings like it is case with the term of "parties to proceedings". Second, No 13 contains a general clause while according the capacity of "participant" to 13) "other persons, in accordance with the law". Moreover, the last sentence gives discretion to the Constitutional Court to extend the number of participants to "other persons summoned by the Constitutional Court". They "may also participate in proceedings before the Constitutional Court." It is suggested to draft a more consistent, shorter and more general provision on parties in proceedings, which may very well leave some discretion to the Constitutional Court.

The type of participant described with "authorised propounder" appears unusual. There may arise a problem with the principle of equality if state organs ore entities enjoy a privileged position in proceedings. It seems that the entities described in Article 29 No 1 ("state authorities, authorities of the autonomous provinces and local self-government entities, national deputies, in procedures for assessing constitutionality and legality") have the right to intervene in proceedings (Article 31) irrespective of the fact whether they are involved in the proceedings. Here again it could be more clear to involve public authorities in case where they have enacted a law, taken a decision etc which is subject to Constitutional Court proceedings. They then should be treated as "normal parties". This technique could also strengthen the judicial character of the proceedings vis-à-vis the political character of many questions to be decided by a Constitutional Court.

Article 33: The time limit of 15 days is very short. It should be made clear that this minimum time limit may be exceeded. The usual time limit in comparable proceedings in Austria is 8 weeks, to be reduced in case of the need of speedy proceedings.

According to Article 35 "all persons are entitled to request insight into case files and to be permitted to copy documents, in accordance with the law regulating freedom of access to information of public importance. Insight into case files and copying documentation will not be allowed where there are reasons to exclude the public and in other cases, in accordance with the law." This technique may lead to a certain burden for the Constitutional Court. Usually access to documents is restricted to parties in the proceedings. However, much depends on the provisions in the law regulating freedom of access to information of public importance. The words "and in other cases, in accordance with the law" are rather general and do not allow a concluding assessment.

The provisions on the initiation and conduct of proceedings break new ground, at least from the perspective of the German-Austrian Tradition which is followed in Spain, Hungary an Poland. First of all, it is quite unusual that a Constitutional Court initiates proceedings *ex officio*: According to Article 39 procedures for assessing the constitutionality or legality of general acts may be initiated by the Constitutional Court itself, on the basis of a decision taken by a two-thirds majority of the votes of all its judges.

Moreover, the draft uses different terms for the initial act of the "authorised propounder" which could mean "application", if there is an inaccuracy in translation: Article 40 states that "procedures for assessing the constitutionality or legality of general acts include: the name of the general act ....". According to Article 41 a procedure is deemed initiated on the date of the submittal of the proposal. The legal quality of this proposal is not quite clear: Is it a mere suggestion or is it a formal request. The latter would be quite common in European Constitutional Court systems und is known as "abstract control of norms" *(abstrakte Normenkontrolle).* However there is at least one provision in the draft which hints in the direction of the first alternative. Article 42 para. 3 reads as follows: "Where the Constitutional Court finds no grounds to initiate a procedure in connection with an initiative, it will not accept the initiative." It is obvious that the Constitutional Court shall have unfettered judicial discretion to accept a "proposal". Against this background it is not the usual model of abstract control of norms which is envisaged here. Article 43 gives the same impression.

Furthermore, the technique of intertwining Constitutional Court proceedings with the legislative procedure established in Articles 44 and 46 seems interesting. However, it is difficult to see the advantages of such proceedings.

The rule on suspensive effect in Article 45 enables the Court to suspend the enforcement of an individual act or action taken on the basis of the general act whose constitutionality or legality are being assessed, where that enforcement could cause "irreversible detrimental consequences". This last element seems rather strict in comparison with other Constitutional Court systems. According to Article 32 para. 1 of the German Law on the Constitutional Court and to Article 85 para. 2 of the Austrian Law on the Constitutional Court provide for interim measures or suspensive effect also in cases of weighty disadvantages or other important grounds in the public interest guided by the principle of proportionality.

The provisions on **proceedings resolving conflicts of jurisdiction** (Articles 48 to 51) do not make a difference between positive conflicts (two or more authorities act in the same issue, only one is competent) and negative conflicts of competence (two or more authorities deny there competence, but one of them is competent). Therefore the wording in Article 48 para. 2 remains general: "Requests for resolving conflicts of jurisdiction referred to in § 1 of this Article are submitted by one or both of the conflicting authorities, as well as the person in connection with whose right the conflict of jurisdiction appeared." The words "in connection with whose rights do not give a clear guideline (Does it mean "party to proceedings"?). The Austrian Law on the Constitutional Court dedicates 11 Articles to this type of proceedings. It is suggested to include a provision enabling the Court to quash decisions of authorities having acted without competence.

In the part concerning the procedure of deciding on electoral disputes there could also be a need for more provisions bearing in mind the importance and high political significance of such proceedings. A concrete point concerns Article 54 para. 2: In the case of a decision annulling the entire electoral procedure or parts thereof, the entire electoral procedure or parts thereof will be repeated within ten days of the serving of the decision of the Constitutional Court to the competent authority. This time limit does not seem realistic.

The Serbian system provides for “Constitutional complaints procedures” which has to be elcomed in the interest of a high level of human rights protection. Some suggestions concern technical details: According to Article 58 para. 1 constitutional complaints “may be uttered by all persons who believe that their human or minority rights and liberties guaranteed by the Constitution have been breached”. Usually the precondition of a complaint of this type is the “allegation” of a violation of a right (cf. Germany, Austria). The competence of “state and other authorities in charge of the overseeing and exercise of human and minority rights and liberties” to introduce constitutional complaints may be seen as step forward. For the sake of equality this competence should be restricted in situation where we have two individuals with conflicting human rights before us. In this case it seems more adequate if the state remains neutral. Moreover the quality of those organs must be precisely defined in law.

One important type of proceedings is missing: There should also be a type of summary proceedings before committees of a few judges dealing with complaints that have not enough prospects to succeed. There are two solutions which have proved their efficacy during three decades now: first, in the German way not to accept a complaint and second the Austrian way to decline jurisdiction. In any event such an instrument is necessary in order to uphold the efficient functioning of a Constitutional Court.

Article 59 paras. 2 and 3 allow restitution to a person who on justified grounds missed the time-limit for submitting a constitutional complaint if within 15 days (relative time limit) of the cessation of the reasons which caused the missing of the deadline that person submits a proposal for restitution and simultaneously submits a constitutional complaint. Restitution cannot be requested after the expiry of a period of three months from the date of missing the deadline (absolute time limit). The latter absolute time limit seems rather short. In Germany it amounts to one year.

The preconditions for suspension of implementation in Article 61 para. 2 seem rather strict. See the remarks to Article 45 above.

Under the head of “deliberation and determination” Article 75 provides for public hearings with possible restrictions and a general clause within the discretion of the Constitutional Court. Given the workload of modern Constitutional Court it is not realistic that it holds more than 20 to 30 hearings per year, especially where there is no chamber system. The law should reflect this reality.

Articles 79 an 80 refer to “Rules of Procedure”. It is not clear what is meant by “other forms of work”. The creation of a “sub-regime” of procedural law is not in line with rule of law standards. In any event it should be made clear how the “Rules of Procedure” are enacted and how they are published.

The provisions on decisions of the Court make reference to “conclusions”. The quality and binding effects of this type of acts of the Constitutional Court do not become clear from the short Article 85: “When it does not issue other acts, the Constitutional Court issues conclusions.”

6. Remarks on provisions in Chapter IV (LEGAL EFFECT OF CONSTITUTIONAL COURT ACTS)

The main provision on legal effect, Article 87 para. 1 shows, that the Serbian system follows the Austrian-Polish system with the effect of decisions *ex nunc.* Problems arise however with international agreements. According to Article 87 para. 2 when the Constitutional Court determines that a ratified international agreement is not in compliance with the Constitution, the

validity of the act on the ratification of the international agreement expires on the date of the publication of the Constitutional Court's decision in the *Official Gazette of the Republic of Serbia*. It must be clear that this cannot be the legal situation with respect to international treaty. Here, the Republic of Serbia will have to terminate a treaty in conformity with the Vienna Convention on the Law of Treaties and the respective provisions in the treaty itself. It is suggested that the Constitutional Court only decides that the treaty is not applicable in internal law any more (cf. Article 140a of the Austrian Federal Constitution).

7. Remarks on provisions in Chapter VI to IX

Article 105 provides for "punitive provisions" for certain cases of misconduct of parties in the Constitutional Court proceedings. Such disciplinary measures form a common feature of procedural law. However, one should bear in mind that such sanctions may - following the case law of the ECHR - be qualified as criminal charges within the meaning of Article 6 of the ECHR. In this case the procedural guarantees must be respected.