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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT LAW

ON THE CONSTITUTIONAL COURT

OF THE REPUBLIC OF SERBIA

Comments by

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1. This Law contains 111 sections, attempting at times to envision every possible permutation on each topic with which it deals. In general, it seems to me that the Law contains some unnecessary detail so that occasionally the principles behind it get submerged. However, the objective of the Law is positive to the extent that it attempts to provide:

- efficient working arrangements for the Court;
- fair access to the Court;
- reasonable and fair procedures for the appointment, dismissal or disciplining of judges, and
- an appropriate relationship between the Court and the National Assembly.

2. Particular criticisms of aspects of the Law are mentioned below, but I may have misunderstood the intent of some phrases due to questionable translation. Provisions on which I do not comment should be presumed satisfactory.

I. Introductory Provisions (Articles 1-8):

3. **Article 3** provides that the work of the Constitutional Court is "public" (subject to the exceptions in that Article). This Article must be read together with **Article 35** (access to all case-files) and **Article 75** (allowing discretion to the Court as to when public hearings are held).

4. While it is right that hearings of the Court should be open to the public, and that parties should have access to the proceedings of the other parties, it is rare that all of a court's documentation, records and indeed deliberations should be open to the public. In addition, confidential information should be protected.

5. **Articles 3, 7 and 8** provides that both a Law and Rules for the Procedure of the Constitutional Court will be established and that other procedural laws may be applied. It should be made clear here and in other sections where procedures are mentioned or required (as in the suspension or discipline of judges) that they should provide for the highest standards of procedural justice (in other words, be compatible with Article 6 of the ECHR). This applies also to **Articles 79, 89 and 135**.

II. Election, appointment and termination of office of Constitutional Court judges (Articles 9-20)

6. The bank of 15 judges appointed for terms of 9 years (**Article 9**) satisfies European standards, although some provision might be made, depending on the case-load, for dividing into separate chambers of 7, perhaps for certain types of case.

7. **Article 13** permits judges to be relieved of duty if they "violate the provision of conflicts of interest". Does this refer to the oath of office's reference to impartiality? (if so, that should be made clear).

8. **Article 14** permits Constitutional Court judges to be professors of law. While I can see the value of that, I wonder whether the burdens of a full-time professorship would not interfere as much with their work as any other full-time (and non-political) occupation.

9. As mentioned in para. 5 above, fair procedures for dismissal or suspension of a judge should be required.

III. Organisation of the Constitutional Court

10. This Part sensibly seeks to ensure the efficient running of the Court by means of the appointment of Registrars and Advisors. It also mentions, in **Article 27**, that "resources needed" for its work are provided from the Budget of the Republic "on the proposal of the Constitutional Court". Does this envisage that the National Assembly has no discretion to refuse or amend the Court's proposal? In most democracies budgetary allocation is a matter for the legislature, but in the UK, since 2005, the relevant Minister is under a statutory duty to provide "adequate" resources to the courts. Perhaps a similar provision could be included in the Law.

IV. Procedures before the Constitutional Court

11. **Article 29** provides a most comprehensive list of possible participants before the Court. It is in **Article 29(1)** that the "authorised propounder" is defined as including certain public bodies. Insofar as this provision seeks to privilege those bodies in litigation, or give them special access to the Constitutional Court, then I believe that this provision offends democratic standards, where public bodies and others should be accorded equality of treatment.

12. However, more generally, apart from giving certain state bodies exclusive access to challenge the constitutionality or legality of general acts (which, as I have said in the paragraph above, I do not think justified) I cannot see any reason for defining the myriad of possible participants in litigation in this way (and then ending in **Article 29(13)** with "other persons". If it is intended that everyone shall have access to the Constitutional Court, in the way of an *actio popularis*, then this should be said. If standing (*locus standi*) is intended to be more limited, then this could be defined by a suitable phrase such as: 'anyone who has a real/ substantial/ interest in the matter shall have access to the Court' (compare **Article 58**, providing that "all persons" who have a complaint about the infringement of human rights etc. may bring a complaint before the Court, and then simply amplifies this by referring to "natural or legal persons or . . .state and other authorities").

Again here, any principle is being lost in the detail.

If, however, the reason for the inclusion of this long list of bodies is to indicate who the defendants (rather than the claimants or plaintiffs) may be before the Court, then again, it might be simpler to employ a formula that simply refers to ' bodies performing public functions'.

13. **Article 39** permits the Constitutional Court or an "authorised propounder" to take the initiative to assess the constitutionality or legality of general Acts (in the case of the Constitutional Court, by a two thirds majority of all its judges). In the Anglo-Saxon tradition it is not for the courts to initiate challenges to either legislation or other decisions or acts of government. The courts may in some circumstances give advisory or hypothetical opinions, but only in response to a person who claims that the act or decision is (or will be) unlawful. We would also regard a *judicially*-initiated challenge to a bill (projet de lois) which is not yet enacted by the legislature, as an offence to the separation of powers.

14. Insofar as there may be a challenge to a disputed Act, **Article 44** is creative in that it permits a suspension of the Act to permit its rectification and **Article 45** permits its enforcement if 'irreversible detrimental consequences' would result.

15. **Article 47** is to be welcomed as it permits conformity with international law to be a standard in assessing the constitutionality of Acts.

16. **Articles 81** make a distinction between 'decisions', 'orders' and 'conclusions' of the Court. **Article 82** then sets out a list of 'decisions' and **Article 83** a list of 'orders'. Yet **Article 84** requires them both to contain an 'introductory part', an 'ordering part' and 'reasons'. If they are to be treated in the same way in those respects, what is the point of calling them different names?

V. Legal effects of Constitutional Court Acts

17. This Part satisfactorily sets out the various legal consequences of unconstitutional acts or decisions, including the remedy of compensation ("just satisfaction" under the ECHR) under **Articles 94, 97 and 98**.