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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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**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. The Constitutional Court Law is an executive act in relation to 2006 Constitution of Serbia (art. 175 of the Constitution). The constitutional regulation is quite detailed. The Constitution situates the Constitutional Court within the political system (art. 166), regulates its scope of competence (art. 167-170), the manner of electing judges (art. 172), the termination of mandates (art. 174) and judicial immunity (art. 173).

The Constitution of Serbia has been evaluated by the Venice Commission (CDL-AD(2007)004). The part of the Constitution devoted to the Constitutional Court received a generally positive evaluation. 'This Part seems generally positive. The Constitution provides for a strong Constitutional Court with a balanced composition.' The solutions pertaining to the termination of judges' terms evoked some doubts, particularly the role of parliament in that regard.

2. The law under analysis, as an executive act to the Constitution, states in Art 1 that the subject of its regulation is the organisation of the Constitutional Court, the procedure before the Constitutional Court and the legal effect of its decisions. The law is therefore in the main devoted to matters of the Constitutional Court's internal organisation and procedural issues. It does not replicate regulations stemming from the political system and pertaining to the Court's place in the overall state structure or the manner in which judges are elected, since those regulations are already contained in the Constitution, albeit executive laws often do so anyway.

3. Part I of the Law comprises the Introductory Provisions.

This part does not evoke any reservations in terms of merit. Some formulations, however, do raise doubts, as they are insufficiently precise and can lead to some misunderstandings. For instance:

Art. 2 states that 'the Constitutional Court decides on questions from its jurisdiction determined by the Constitution of the Republic of Serbia and transacts other business determined by the Constitution and by law.' The formulation contained in the latter part of the above statement, namely the phrase 'transacts other business', could be used if the first part had enumerated the CC's competence in detail, as in art. 167 of the Constitution. However, in view of the very general definition of the CC's activities as set forth in the first part of article 2, the second part of the statement is unclear and would appear to be redundant. The term 'jurisdiction' as used in this article in a general manner, encompasses the totality of the CC's activities. 'Jurisdiction' in fact is the title of art. 167 of the Constitution in which the CC's various responsibilities are listed and the words 'other duties' are added at the end, which is a normal legislative technique when specific duties are being listed. In a situation, where the CC's duties are being defined in a general manner, as is the case in article 2 of the Law , the introduction of a concept such as 'other business' is unwarranted. I believe, however, that the advisability of enumerating the CC's duties in a more detailed way in art.2 of the Law might be worth considering, since compared to the Constitution it is too laconic and imprecise.
In my opinion, therefore, art. 2 should be changed.

4. Art. 4 states that proceedings before the CC are to be conducted in the Serbian language and Cyrillic script. As regards the use of other languages, the law refers to the law which regulates the use of those languages and scripts. I have reservations as to such a solution. I believe the Law under discussion should contain the direct and unambivalently guaranteed right to use another language in proceedings before the CC. This is an act of particular significance and it does not seem sufficient to simply refer to a law on the use of other languages. As a civil right, it should be clearly stipulated in the law. In detailed matters (procedures), reference can be made to the law regulating the use of other languages.

5. Part II. Election, Appointment and termination of office of Constitutional Court judges

One may get the impression that this part of the law is too general. For instance lack of the provisions on the guarantees of independence of judges. It appears that it was the lawmaker's intention not to repeat the regulations set forth in the Constitution. This manner of drafting a law however creates the impression of an incomplete legal act. In many of its solutions it is considerably more laconic than the constitution.

Thus, for example, art. 9 defines only the number of CC judges, referring to the manner of election or appointment set down in the Constitution. It is my opinion, however, that the Law should regulate the required criteria for becoming a CC judge in a more detailed fashion. In that respect, art. 172 of the Constitution uses the term 'prominent lawyers'. It would seem that the executive act should clearly specify these criteria.

6. Art. 11 and 12. In both cases doubts are evoked by the National Assembly's role in deciding the expiration of a CC judge's mandate. Such a solution is nevertheless in accordance with Serbia's Constitution. In this situation it suffices to cite the reservations voiced by the Venice Commission in its opinion on the Constitution of Serbia (CDL-AD(2007)004). It was clearly stated: '*It seems questionable to give to the National Assembly the right to decide on the termination of office of Constitutional Court justices, even if only for the reasons set forth in Section 2. Section 3 uses the term "decide on the termination of a justice's tenure of office". According to Article 99 the National Assembly "appoints and dismisses" judges of the Constitutional Court. Presumably this dismissal refers only to the termination of office under Article 174. Otherwise it would be a clear violation of judicial independence." The meaning of the terms "as well as on appointment for election of a justice of the Constitutional Court" in Section 3 is unclear, at least in the English translation. It is imperative that these sections be amended and clarified so as to ensure judicial independence.'*

These remarks by the Commission seem to have been taken into account to a certain extent Arts. 11 and 12 more clearly specify the cases in which a request is sent to the National Assembly. They are: a) a request for termination of office before the expiry of the term to which judge has been elected or appointed, b) when a judge has fulfilled requirements for mandatory retirement.

In both cases guarantees have also been created in the event of parliament's 'inactivity'. The mandate expires with the force of law at the times specified in the law.

7. Art. 13 envisages the possibility of removing judges from office "if they violate the prohibition of conflicts of interest, suffer permanent loss of ability to perform the duty of a Constitutional Court judge, or are convicted to serve a custodial sentence or of a punishable offence rendering them unfit to serve as a Constitutional Court judge." The situations listed in the article are concordant with generally binding standards pertaining to relieving a judge of his duty. An important guarantee of a judge's independence is par. 2 which states that the CC determines the terms deciding a judge's removal, although other organs may also put forward an initiative to commence such proceedings. The law, however, does contain certain shortcomings. Apart from the article dealing with the removal of judges, the law lacks a regulation pertaining to disciplinary proceedings. It therefore provides no answers to a number of questions that arise: can a CC judge be disciplined, what are the criteria of his responsibility, how are disciplinary proceedings to be conducted and what disciplinary penalties are possible?

8. Art. 18. The solution ensuring representation of the autonomous province in the CC deserves a positive evaluation.

9. Part III. Organisation of the Constitutional Court

Art. 21 reaffirms the constitutional principle that the President of the CC is elected to a three-year term from amongst the CC judges. The law also states that the CC president may not be re-elected — something about which the Constitution is silent. The president's term in office, especially in view of his scope of duties as set forth in art. 22, seems extremely brief. This however is a constitutional norm, and the law must be concordant with the Constitution and may not introduce any new terms. In view of such a short term in office, one should perhaps reconsider the advisability of the re-election ban. In my view, a ban on re-election would be justified where long terms in office are concerned. In this particular case, however, when the president's term runs for only three years, I do not regard such a categorical ban as justified, the more so, since the Constitution contains no such restriction. This unduly weakens the position of the CC president compared with that of the Registrar, who as per art. 24, is elected to a five-year term and may be re-elected.

Art. 25. Doubts arise over whether an adviser should have the clearly formalised status of an official and the stability in office ensured by a five-year appointment with the option of reappointment.

10. IV Procedures before the Constitutional Court

This is a basic part of the law, since it regulates general procedures as well as those pertaining to proceedings in various matters within the CC's jurisdiction.

Art. 29 classifies the participants of various types of proceedings before the CC, merely referring to them as participants without specifying their scope and manner of participation. The sphere of subjects involved in cases dealing with constitutionality and legality is defined very broadly and in very general terms (p. 1-3). The general term 'state authorities' is used. Such a version might be acceptable on the condition that the participating subjects were specified in the provisions devoted to concrete proceedings before the CC. Successive points define the participants of specific proceedings before the CC. In this regard, however, certain doubts, at least of an editorial nature, arise, particularly in reference to p. 5) and 8). P. 5) pertains to 'religious communities about whose prohibition of activity it is being decided.' Authorisation of religious communities to participate in proceedings affecting them is wholly justified and evokes no misgivings. But p. 8) repeats that statement, combining religious communities with other subjects in the formulation 'the Government, Republican Public Prosecutor and authority in charge of registering political parties, trade union organisations, citizens' associations or religious communities, in procedures for the prohibition of the activity of political parties, trade union organisations, citizens' associations or religious communities…' Such a formulation does not make it entirely clear whether a religious community's right to participate in proceedings pertains only to matters mentioned in p. 5 or whether they may also take part in other cases, for instance 'in procedures for the prohibition of the activity of political parties'. And, conversely, are the organs mentioned in that point able to participate 'in procedures for the prohibition of the activity of religious communities', as the editing of p. 8) might suggest. I do not believe that to be the rationale behind this provision. In my opinion, as far as religious communities are concerned, p. 5) would suffice. The term 'religious communities' should be deleted from point 8) to avoid the emergence of interpretational doubts

11. Part c). 'Initiation and conduct of procedure' is devoted to specific proceedings before the CC.

P. 1 regulates 'the procedure for assessing the constitutionality or legality of general acts.'

Once again, doubts and reservations arise in connection with the general way this law regulates matters. Already its title 'general acts' is a rather vague formulation. Since art. 2 of the law does not specify the CC's scope of jurisdiction, one should refer to the Constitution, whose art. 167 defines several areas in which the CC may rule on constitutionality and legality: '1. Compliance of laws and other general acts with the Constitution, generally accepted rules of international law and ratified international treaties; 2. Compliance of ratified international treaties with the Constitution; 3. Compliance of other general acts with the Law; 4. Compliance of the Statute and general acts of autonomous provinces and local self-government units with the Constitution and the Law.'

Under the heading of 'general acts', this part of the law encompasses proceedings of this type. In that respect it is less precise than the Constitution. With some reluctance, one may agree that to a large extent the verification of constitutionality with respect to various types of general acts may be similar. However, in view of the generality with which the participants of proceedings have been indicated, it would seem that at this point the participants should be clearly defined, depending on the types of legal acts whose constitutionality or legality are being verified. Particular misgivings are evoked by the fact that the present version of the law lacks any regulations pertaining to proceedings pertaining to such a crucial matter as 'compliance of ratified international treaties with the Constitution.' This is an extremely delicate issue. The Venice Commission's Opinion (CDL-AD(2007)004) drew attention to this which stated: '*If Article 16.3 in conjunction with Article 167.2 enables the Constitutional Court to deprive ratified international treaties of their internal legal force when they do not comply with the Constitution, then the Serbian State, in order not to violate its international obligations deriving from ratified treaties, would either have to amend the Constitution – which will not always be possible in view of the complex procedure provided for in Article 203 – or denounce the treaty or withdraw from it, if the possibility to do so is provided for in the treaty itself or is in compliance with article 56 of the Vienna Convention on the Law of Treaties.*

As the international liability of the Serbian State might be at stake, it would be preferable by far to try avoiding these situations by providing for an a priori verification of the compliance of a treaty with the Constitution, before the treaty is ratified. The procedure for the "assessment of the constitutionality of the law prior to its coming into force", provided for in article 169 of the Constitution, could therefore be expanded to the assessment of the constitutionality of treaties prior to their ratification.'

The law under analysis remains silent about the CC's responsibility to evaluate treaties. Only art. 82.3) states that the CC issues decisions determining that a ratified international agreement is not in compliance with the Constitution.

This issue requires a more specific regulation. It produces consequences of both an internal and international nature. Apart from the basic problem referred to by the Commission, in the light of the present legislative proposals a number of procedural questions arise such as, for example:

Who may participate in such proceedings and what does the term state authorities mean in this case? What may be the subject of such an evaluation by the CC: the substance of an act, the authority to issue it or the behaviour of the issuing procedures? The law provides no answers to any of those questions. This manner of regulating proceedings ruling on the compliance of international treaties with the Constitution is of an excessively framework nature. I believe this part of the law should be thoroughly re-edited and supplemented.

12. P.2. Procedures of resolving conflicts of jurisdiction

Art. 48 states that 'the CC resolves conflicts of jurisdiction between the state and other authorities in the case referred to in Art. 167 **§§ 2.1** through 2.4 of the Constitution.' The way the law is formulated raises certain doubts, but perhaps it is merely a matter of linguistic style. But doubts certainly do arise out of the generality of the legislative regulation. The lawmaker is again attempting to cover diverse situations with a single formulation. The above-cited art. 167 par.2 of the Constitution envisages different situations in which conflicts of jurisdiction may emerge. In my opinion they cannot be reduced to one general formulation the way art. 48 does when it refers to a 'conflict...between state and other authorities.' That may be a conflict between various state organs, ie 'within the state'. But it may also involve a conflict between 'provincial bodies and bodies of local self-government units.' The concept contained in the law does not encompass all those inter-relations.

In this regard, the article should be made more specific and detailed. Its current version is far too general.

13. Art. 56 defining 'procedures of deciding on prohibition of the activity of political parties, trade union organisations, citizens' associations or religious communities' in my opinion is likewise too general. It fails to clarify the doubts that arose during the analysis of art. 29 pertaining to participants of proceedings. Above all, it does not define procedures. Essentially, this article is little more than a repetition of p, 8) of art. 56. It requires elaboration as to what criteria and documents the CC requires to determine who is authorised to represent a political party, trade union or religious community before the CC. I believe this article needs to be developed.

14. The law hereby being analysed contains no provisions which are executive provisions in relation to art. 169 of the Constitution, ie preliminary constitutional review. This is an extremely important right of the CC, particularly in reference to international treaties. The lack of the appropriate regulation is one of the law's basic flaws. Only in art. 82. 2), where CC decisions are discussed, does the law state that the CC issues decisions determining that a law is not in compliance with the constitution if it has been adopted, but not promulgated by a decree. That is an inadequate legislative regulation. The law should be supplemented to include procedural conduct in the preliminary constitutional review.

15. Art. 87. Serious misgivings are raised by par. 2 which states '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*. The result of the decision of the Constitutional Court, declaring nonconformity between the Constitution and an international treaty, involves an effect not only at internal but also at the international level. In such a situation the international treaty should be renounced, in accordance with the Vienna Convention.

As I wrote in my opinion on the Serbian Constitution. "It must however be 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 the Constitution) could be used as a political weapon to cancel the international agreement by the decision of a state organ. For that reason. It is very important to equip the law with a system of guarantees which would help avoid this danger." Unfortunately, the law on the CC lacks such guarantees.

16. Summing up, it should be stated that the law contains a number of procedural and technical provisions concordant with the generally accepted principles of conduct in proceedings before the CC. In many other places, however, it is imprecise and overly general, if not vague, giving rise to doubts and reservations. It therefore needs to be re-edited and significantly supplemented.