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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAWS ON THE HIGH COURT (JUDICIAL) COUNCIL AND ON JUDGES OF THE REPUBLIC OF SERBIA

by

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1. – I have been asked by the Council of Europe, which is preparing a Joint Opinion with the Venice Commission on three draft laws concerning the Serbian Judicial System, to provide an opinion on the draft Laws on the High Court (Judicial) Council and on Judges, and to take part in a preparatory meeting held in Belgrade on 21 February 2008.

2. - I will only deal with three main issues, which have significant effects on the institutional and political framework of the judiciary and its relations with the executive and legislative powers. The issues are (1) the composition and election of the "elective" members of the High Court (Judicial) Council; (2) the electoral procedure for the appointment of judges and (3) the re-election of the "elective" members of the High Court (Judicial) Council and all judges provided for by Articles 6 and 7 of the Constitutional Law on the Implementation of the Constitution, adopted by the National Assembly on 10 November 2006. The respective provisions are in fact fundamental in order to ascertain the guarantees of independence and autonomy of the courts and judges from political power.

3. – First, we have to take into account that the key provisions of the above-mentioned issues are already provided for in the Serbian Constitution, adopted on 30 September 2006. Therefore, the guarantees of independence of the judiciary, in some cases, can only be achieved by amending the Constitution itself.

I

High Court (Judicial) Council: composition and election

4. – As regards the composition of the High Court (Judicial) Council, Article 153 of the Constitution provides that it has eleven members: three are *ex officio* members (President of the Supreme Court of Cassation, Minister of Justice, President of the Parliamentary Committee for the Judiciary); eight members are elected by the National Assembly, of whom six are judges, two are prominent lawyers with at least 15 years professional experience (one is an attorney-at-law and the other is a university professor of law).

5. - With regard to the independence from political power, it is easy to understand that problems arise not from the composition of the body (seven out of the eleven members of the Council belong to the judiciary, and two are lay members selected from among prominent attorneys-at-law and law professors), but from the fact that these nine members are all appointed by the National Assembly, without providing a qualified majority. If you consider that two out of the three *ex officio* members (the Minister of Justice and the President of the Parliamentary Committee for the Judiciary) are direct exponents of the political power, according to the Constitution the whole Council is under the control of the ruling parties, since the President of the Supreme Court of Cassation is also elected by the National Assembly.

6. – As for the competencies, Article 154 of the Constitution gives the Council all powers concerning the legal status of the judges (transfer, promotion, disciplinary measures, etc.), among them to "propose to the National Assembly the election of judges in the first election to the post of judge", and the election of the President of the Court of Cassation and the presidents of other courts.

7. - As concerns the presidency of the Council, Article 7 of the draft Law on High Court (Judicial) Council provides two alternatives: (1) to entrust the President of the Court of Cassation with the presidency of the Council and to give the members of the Council the power to elect the deputy President from among the judge members, (2) or to give the Council itself the power to elect the President and deputy President from among the judge members. Since the President of the Court of Cassation is an *ex officio* member of the Council, the possibility of electing a judge other than from the highest level of the judiciary to be the Council's President, seems to be unreasonable.

8. - With regard to the procedure for the election of "elective" members of the Council, the constitutional provision, which entrusts the National Assembly with the power to elect the six judge members, has been interpreted by the draft Law in such a way as to give judges the power to select, in advance and on their own, their representatives in the Council. Article 19 provides that the six members from the ranks of judges are elected from the different instances of the judiciary, and Article 21 provides that the elected members have the role of "authorised nominators", so that the Council is the "authorised nominator" for the six judge members, and is compelled to propose to the National Assembly the candidates directly elected by the judges. The same procedure is provided for the two other elected members: the "authorised nominator" for the elected member from the ranks of attorneys-at-law is the Serbian Bar Association and for the elected member from the ranks of law professors is the joint session of the deans of the Serbian faculties of law.

9. – As for the six members of the Council elected from the ranks of judges, Article 19 of the draft Law does not secure a balanced representation of all judges. It provides that one member is elected from among judges of the Court of Cassation, one from the Commercial Courts, one from the Administrative Courts, one from – all together - the Appellate Courts, the Organised Crime Court, War Crime Court, one from the First-instance Courts of general jurisdiction and one from the Misdemeanour Courts. As pointed out by the Judges' Association of Serbia in its comments dated 26 December 2007, despite the fact that the highest court of the Republic of Serbia should have 33 judges, the Administrative Courts 40, the Appellate Courts 221, and the municipal and district courts together nearly 1600 judges, the draft Law provides that all these courts have the same number of representatives in the Council. The JAS suggests, in order to have a more balanced representation of all judges in the Council, to select the elected members following the criteria of the degree (first-instance and second-instance) and type of courts (courts of general and special jurisdiction), and to adopt a procedure of indirect election. Both recommendations seem worthy and should be taken into consideration.

10. - At first glance, the rules provided for in the draft Law for the election of the "elective" members of the Council seem very tortuous and complicated, but this is probably the only way to entrust the judiciary, despite the wording of Article 153 of the Constitution, with the direct power to elect its representatives in the Council. As a consequence, it is reasonable to implement them in the sense that the National Assembly has only a veto power to the proposals of the "authorised nominators".

11. - However, we must be aware that the proposed system creates the risk of paralysis or long delays in the functioning of the Council. If the National Assembly were to systematically not follow the nomination of the "authorised nominators", it will be necessary to continue in the election of new representatives from among the ranks of judges, attorneys-at-law and law professors. Or, perhaps, it could be provided that the National Assembly be given the power to elect the representatives of judges, attorneys-at-law and law professors, who have had the highest number of votes after the "authorised nominators".

12. - All that said, it is welcome that the draft Law has taken into account some remarks of the 19 March 2007 Venice Commission Opinion on the Constitution of Serbia (Opinion no. 405/2006, CDL-AD(2007)004), with particular regard to the election of the eight non *ex officio* members. The judiciary itself, the Bar Association and the Faculties of Law should be given the power to elect their representatives and the National Assembly should only have the power to make a subsequent veto.

13. - Due to the electoral system of the Council that is provided for in this draft Law, we can say that the National Assembly is no longer given the exclusive power to control judicial appointments, since there are now eight out of the eleven members of the High Court (Judicial) Council, which is entrusted with the power to make proposals for the appointment of judges, are no longer elected by the National Assembly. In general, it seems that the independence of

individual judges is further guaranteed under this system, since all the decisions on their legal status, transfers, promotions, disciplinary measures, etc., will be made by an independent body and no longer under the political control of the majority of the National Assembly.

14. - In this context, the presence within the Council of the Minister of Justice and the President of the Parliamentary Committee for judicial affairs guarantees the necessary links between the judiciary and the executive and legislative powers, avoiding the risk of a corporative and autocratic management of the judiciary.

15. – The issue of the re-election of the "elective" members of the Council within 90 days from the moment the draft Law on the High Court (Judicial) Council enters into force, as provided for in Article 6 of the Constitutional Law on Implementation of the Constitution, will be examined at the end of these comments, together with the re-election of all judges, provided for in Article 7 of the above-mentioned Law.

II

Judges' appointment procedures

16. - Despite the criticism made in the above-mentioned Opinion of the Venice Commission, the current Article 147 of the Constitution maintains the rule that judges are elected by the National Assembly. It provides that, on proposal of the High Court (Judicial) Council, judges are elected by the National Assembly to the post of judge for the first time, and that after three years the Council shall appoint them as permanent judges.

17. - The draft Law on Judges, dealing with the appointment procedure of judges (Articles 48-53), provides that the Council proposes to the National Assembly two candidates for each judge's position related to judges who must be elected for the first time. The procedure is a second degree selection, since the Council selects candidates from among Serbian citizens who meet the requirements for employment in state bodies, who are law school graduates, have passed the bar exam and deserve the judgeship (Article 44), who have experience in legal professions for different periods (from two to twelve years) according to the various courts within the judiciary for whom the judge's position is published in the Official Gazette of Serbia (Article 46), and who have specific theoretical and practical legal knowledge necessary for performing judicial functions, and moral characteristics such as honesty, fairness, dignity, independence, impartiality, etc. (Article 47).

18. - The Council conducts interviews with the candidates and then proposes to the National Assembly two candidates for each judge's position. The non-selected candidates can appeal to the Constitutional Court (Article 51) against such a decision.

19. – According to Article 52 of the draft Law on Judges, the National Assembly elects first time judges from among the two candidates proposed by the Council for each judge's position, without providing any qualified majority, since it would not be allowed by Article 105 of the Constitution. After the three years of probationary period, judges are appointed by the Council to a permanent position. If the first term of office of three years is deemed to be unsatisfactory, the Council does not appoint the judges to a permanent position; the judge can appeal against this decision in front of the Constitutional Court (Articles 52-53).

20. – With regard to the appointment of first time judges, the National Assembly is not only given a veto power, as for the elected members of the Council, but also the election power between the two candidates proposed by the Council. The system leads to a politicisation of the appointments, since the majority of the National Assembly is given the possibility to make appointments of first time judges based on political grounds, and not only on merit. It is especially difficult for the first time judges destined to the lower level courts, to see in the

parliamentary election a reason other than the need for maintaining political control of the judiciary.

21. - In some way, the draft Law followed the suggestions of the above-mentioned Venice Commission Opinion, since the Council is now given real power in the selection procedure of the candidates proposed to the National Assembly. However, the final appointment remains in the hands of the parliamentary majority. It would therefore be good if Article 52 could provide that a qualified majority, for instance two third, in order to involve in the appointments of the first time judges not only the ruling parties, but also a larger representation of political forces. But the solution, as we saw beforehand, is not allowed by the Constitution, which mentions in a peremptory way the cases of qualified majority.

22. - The same rules are provided for the appointments of the presidents of the courts. Article 71 of the draft Law on Judges provides that the Council propose two candidates to the National Assembly, after taking into account the opinions of the session of all judges of the court, whose president is being elected. Article 72 entrusts the National Assembly with the power to elect, without a qualified majority, one of the two candidates proposed by the Council.

23. – Likewise with the election of first time judges, the appointment procedure of the courts' presidents is also exposed to the risk of politicisation. The only way to avoid such a risk is to give the Council the power to propose only one candidate (as is the case for the nomination of the elected members of the High Court (Judicial) Council) and to entrust the National Assembly only with a veto power. When using the veto power, the National Assembly should be empowered to elect the candidate who has the second place in the Council selection. This solution might, of course, also be followed for the appointment of first time judges.

24. - According to Article 144 of the Constitution, a different system is provided for the election of the President of the Supreme Court of Cassation. Article 80 of the draft Law on Judges provides that the National Assembly elect the President from among the judges of the Court of Cassation, upon the recommendation of the Council and following the opinion of the general session of the Court and the Parliamentary Commission for the Judiciary. For the reasons expressed in dealing with the election of the presidents of other courts, it would be necessary, in order to assure impartiality and the independence from political power, also for the highest level of the judiciary, to give the National Assembly only a veto power on the proposal of the Council.

25. - Article 7 of the Constitutional Law on Implementation of the Constitution provides that judges and presidents of courts shall be reappointed by the National Assembly no later than one year from the constitution of the Council, while the term for the reappointment of the President and judges of the Supreme Court of Cassation is 90 days. We will deal with this issue in the last part of these comments.

III

The re-election procedure of judges and "elective" members of High Court (Judicial) Council

26. - Before concluding, it must be pointed out that the Constitutional Law on Implementation of the Constitution provides for, as we saw beforehand, the re-election of all judges and the eight "elective" members of the Council. The constitutionality of the provision is doubtful, since the re-election process does not have any constitutional or legal basis. In particular, the draft laws on the High Court (Judicial) Council and on Judges do not provide any specific guarantees for the reappointment procedure.

27. – First of all, we have to consider that Article 146 of the Constitution provides the guarantee of permanent tenure of office; according to Article 148, the decision on the termination of a judge's tenure of office is up to the High Court (Judicial) Council, and the "proceedings, grounds and reasons for termination of a judge's tenure of office shall be stipulated by law". Since Article 7 of the Constitutional Law on the Implementation of the Constitution does not provide anything on the re-election procedure, the only way to give a legal basis to the reappointment process is to implement the guarantees provided for by the Constitution and in the draft Law on Judges for dismissals of judges and for disciplinary proceedings, in the sense that a judge could not be reappointed only when there are disciplinary reasons or s/he has been convicted of a criminal offence.

28. – In general, the best guarantee in order to avoid a cleansing for political reasons would be, as it has been pointed out in the above-mentioned Opinion of the Venice Commission, to entrust an independent and impartial High Court (Judicial) Council with the reappointment process, without the intervention of the National Assembly. Furthermore, it would be necessary to provide that only past behaviour incompatible with the principles of independence and impartiality may be a reason for not reappointing a judge.

29. – As for the re-election process of the eight "elective" members of the Council, provided for in Article 6 of the above-mentioned Constitutional Law, a sufficient guarantee for the independence of that body from political power would be to implement the electoral procedure provided for in the draft Law on High Court (Judicial) Council, giving the National Assembly only a veto power on the judge members elected by the judiciary, the Bar Association, and the Faculties of Law.