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(VENICE COMMISSION)

COMMENTS ON THE PROVISIONS ON THE JUDICIARY IN THE DRAFT CONSTITUTION OF THE REPUBLIC OF SERBIA

by

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A. CHAPTER 4 (Basic Provisions)

Article 126: Article 126 provides that a judge "shall be initially appointed to a five-year term, and for an unspecified period of time after that". While temporary appointments of judges, in principle, call into question their independence and impartiality, such a measure is acceptable in systems in which young and comparatively inexperienced lawyers can enter the judicial career. In such a system probationary appointments can be a way to ensure the ability and qualification of permanent judges. Nevertheless, such probationary appointments should be subject to procedural safeguards, established by (preferably organic) legislation, in order to ensure the best possible independence and impartiality also of probationary judges. In Germany, for example, the Law on Judges provides that probationary judges, after two years of service, can only be dismissed if they are demonstrably not qualified to be a judge (subject to judicial review) or if they have committed disciplinary infractions. After five years, a probationary judge must be appointed to a permanent position. In the proposed Serbian system it would seem to be appropriate if the High Judicial Council would be entrusted with taking status decisions on probationary judges so as to ensure that no undue political considerations influence the decision on their permanent appointment (see Article 128 of the Draft Constitution and No. 3.3. of the European Charter on the Statute for Judges and Explanatory Memorandum (DAJ/DOC (98) 23).

Article 127: Article 127 would give judges the same immunity as deputies. It is very doubtful whether there is a need for such a wide immunity for judges. In its Opinion on the Reform of the Judiciary in Bulgaria (CDL-INF (1999)005e) the Venice Commission stated that *"while no doubt immunity could be justified if it were necessary to prevent judges or prosecutors from interference from vexatious proceedings it ought not to operate to place judges and prosecutors above the law."* The parliamentarian immunity emerged as a safeguard against the monarchic executive. It protects the functioning of the parliament by preventing political prosecution of deputies. Immunity is an exception to the democratic principle of equality before the law. Thus it can only be justified as far as it is necessary to exclude interference with the workings of the court. Therefore, if any, there should only be a limited functional immunity for judges from arrest, detention and other criminal proceedings that interfere with the workings of the court. Their immunity should not, however, extend to a general exclusion of criminal investigation. A wider immunity cannot be justified with the argument that it is necessary for the reputation of judges since clarification of facts by court procedure is a better and faster way to save a deserved reputation.

Article 128: Article 128 (3) provides that a judge shall be accountable for a violation of the duties of a judge "and reputation of judicial authorities". The part of the sentence dealing with the "reputation of judicial authorities" should be deleted because it is imprecise and prone to abuse. In most cases in which a judge is seen to have violated "the reputation of judicial authorities" he will have violated a specific a duty of a judge. As far as he or she violates no specific duty of a judge it will be difficult to show that the violation was sufficiently "foreseeable" in the sense of the European Convention of Human Rights.

Article 128 (5) states that the People's Assembly shall decide on the termination of office of judges and presidents of courts. It is not clear what this provision is intended to mean. If it means that the People's Assembly has the power to terminate, in an individual case, the office of one or more judges then the provision would be in clear contradiction with the principle of separation of powers and of the immovability of judges as expressed in Article 126 of the Draft. If, on the other hand, the provision means that Parliament determines the general conditions under which the office of a judge is terminated (e.g. after grave disciplinary infractions, as determined by the High Judicial Council or a Court) then the provision would be acceptable in principle. It would, however, also be partly superfluous, since the same is said in Article 128 (1)(2) of the

Draft ("The reasons for dismissal shall be defined by an organic law"). It is therefore suggested to make the meaning of the clause clear so as to avoid any possible misunderstandings.

B. CHAPTER 5 (Office of the Public Prosecutor)

1. General Comments

There is no common European standard with respect to the office of the public prosecutor. In some states (such as Austria, Belgium, the Czech Republic, Denmark, France, Germany, Poland, Turkey, and the UK) prosecutors, being formally part of the executive, are more or less dependent on the political branches of government, while in others (such as Estonia, Finland, Hungary, Ireland, Norway Slovakia, Sweden, Italy and Portugal) they are more independent, them being part of the judiciary (see European Committee on Crime Problems (CDPC), Synthesis of Replies to a Questionnaire on the Status and role of Public Prosecution PC-PR (97) 1 REV 5). There are also other distinctions between the different national models, such as with respect to the extent of the duty or the discretionary power whether to prosecute. Any system, however, should take into consideration the Recommendation (2000)19 of the Committee of Ministers which provides that nature and scope of the independence of prosecutors should be established by law. This should safeguard against the undermining of the independence but also ensure that the prosecutor's office does not become so powerful as to be a threat to the democratic system.

It appears that the Draft has opted for a model which leans strongly towards independence. The Office of the Public Prosecutor is conceived as an "independent state body" (Article 130 (1)) and Public Prosecutors, like judges, are immovable after a probationary period of five years (Article 131 (2)). The Head of the Office is (only) appointed to a six year term (Article 131 (1)(2), but "at the proposal of the High Judicial Council" (Article 132 (1)). This last provision suggests that the appointment to the Head of the Office is still conceived as a regular career move and not as a political appointment. Only the Supreme Public Prosecutor of Serbia is a political appointment, as he is nominated by the President of the Republic after "having obtained" the presumably *non*-binding "opinion of the High Judicial Council" (Article 132 (1)(2)). But also the Supreme Public Prosecutor of Serbia benefits from a six year appointment period during which he or she is, in principle, immovable.

This proposed system has its advantages and disadvantages. The advantage is the relatively strong insulation of the Office of the Public Prosecutor from political influence. This may be good for cases of ordinary crime in which those who hold political power might want to protect "friends" or "clients" from prosecution. This arrangement may, however, also become dysfunctional, for example if the public prosecutor himself misbehaves or when he addresses crimes whose prosecution raises issues which also concern the responsibility of the government, in particular in foreign affairs.

The prosecution of certain terrorist and other international crimes requires a certain scope of discretion. It is here that the prosecutorial independence and the power of the executive to shape foreign policy can come into conflict. Full independence of the prosecutor could lead to a situation in which a state body which is not accountable to any democratically elected institution could determine matters of foreign affairs. Regardless of whether this is to be regarded as positive or negative in a particular case it must be recognized that the lack of accountability to a democratically elected institution also shields these decisions from the influence of public opinion. It may therefore be advisable to make at least the prosecution of certain grave crimes, those concerning exterior security and international crimes, in some way open to the influence of

the government. One possible way would be the creation of a special prosecutor for such crimes, whose appointment and termination of office can be influenced more strongly by the executive.

In Germany, for example, these concerns are accomodated by a combination of different rules. The most important point is that the (Office of the) Supreme Federal Prosecutor (*Generalbundesanwalt*) is only competent to deal with a very limited number of grave crimes which typically concern the security of the German state as a whole (in particular crimes against the peace and the constitutional order, treason, and international crimes). While the Generalbundesanwalt is, in principle, independent (i.e. not subject to instructions by the government) and enjoys a life-time appointment, he is at the same time a political appointee in the sense that the government can discharge him from his obligations at any time and send him into retirement. The purpose of this limitation of his independence is to ensure that "while fulfilling his duties he remains in conformity with the pertinent basic views of the government with respect to criminal policy" (sect. 31 of the Federal Framework Law on Public Officials – Beamtenrechtsrahmengesetz (BRRG); unofficial translation). This is to ensure that these views of the government "are integrated into and applied where the applicable rules of criminal procedure allow the exercise of discretion in prosecutorial matters" ("hat der Generalbundesanwalt darauf Bedacht zu nehmen, daß die grundlegenden staatsschutzspezifischen kriminalpolitischen Ansichten der Regierung im Rahmen der strafprozessualen Vorgaben und Handlungsspielräume in die Strafverfolgungstätigkeit einfließen und umgesetzt werden" (see: www.generalbundesanwalt.de).

This German model of the *Generalbundesanwalt* must be seen in its proper context before any conclusions can be drawn from it for other countries.

- First, it is important to note that, in practice, the power of the government to discharge the *Generalbundesanwalt* has been exercised only once, in 1993. This case had to do with the mishandled arrest of a terrorist suspect during which the suspect was shot. *Generalbundesanwalt* von Stahl was held responsible for the mishandling, but the Federal Minister of the Interior also stepped down in this connection. The German Federation of Judges lobbies in favour of making the office of the *Generalbundesanwalt* a career appointment but they have not alleged specific cases of efforts of the government to exercise undue political influence on the *Generalbundesanwalt*.
- Second, as a general rule, the component states (*Länder*) exercise the prosecutorial function in Germany. In twelve of the sixteen German *Länder*, the Heads of the highest prosecutorial offices (*Generalstaatsanwälte*) are not political appointments and subject to immediate discharge, but lifetime appointments.
- Third, the independence of all Prosecutor's offices, including that of the *Generalbundesanwalt*, is ensured by Federal legislation which provides for a duty, as a general rule, to prosecute *all* violations of criminal law (subject to certain exceptions for petty crimes, and crimes which typically involve foreign policy implications).
- Fourth, even in those cases in which the law gives the prosecutor discretion as to whether he should prosecute, it is possible that his exercise of this discretion is subject to judicial review. This is because there is a legal procedure for victims of crimes to force the Prosecutor to initiate and pursue investigations.
- Fifth, the personal independence of prosecutors is ensured by a far-reaching right of every prosecutor to object if he or she thinks that a particular course of action would violate the law, and ultimately the right not to follow an illegal instruction – thereby forcing the higher prosecutor to assign the file to another prosecutor.

While the German system may not be easily transposed to a non-federal system, it does seem to contain one aspect which the Serbian authorities might find worthwile to consider. Perhaps it would be appropriate to establish the Office of a *Supreme Public Prosecutor of Serbia for Special Matters* (in addition to the Office of the *Supreme Public Prosecutor of Serbia*) and to provide that this *Supreme Public Prosecutor for Special Matters* be institutionally more respon-

sive to governmental concerns where the nature of the crimes in question are a sufficient justification for such a departure from the principle of independence. These crimes should be limited to grave crimes which are typically of national or international concern. In addition, the Serbian legislator may want to consider introducing a procedure of judicial review of decisions of prosecutors *not* to prosecute. Such a procedure should be a sufficient safeguard against abuses of the independent position of a prosecutor.

Should the Serbian authorities consider to modify the draft in this sense, they should take into consideration the requirements that are laid down in the Recommendation of the Committee of Ministers (Recommendation Rec (2000)19). No. 13 of this Recommendation provides:

Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:
a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;
b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:
- *to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;*
- *duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels;*
- *to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;*

e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

2. SPECIFIC COMMENTS

Art. 130: According to Article 130, the Office of the Public Prosecutor shall have two functions: to put on trial the perpetrators of criminal and other penal offences and "to apply legal remedies in order to protect constitutionality and legality". It is not entirely clear what is meant by the second function. It is questionable whether the repressive and the protective function of the state should be represented by the same authority. There should at least be a reference to a law that would specify these remedies (since the scope of the authority of prosecutors should be clearly determined, see above).

Art. 131: Article 131 (2) deals with the appointment to term in office of the public prosecutor. It should therefore be placed after Article 132 (1) since this article is dealing with the "appointment" of prosecutors.

Article 131 (3) is designed to ensure the personal independence of public prosecutors by providing for their internal immovability. Given the fact that the offices of the Public Prosecution are hierarchically structured, independence for prosecutors is less important than for judges. Therefore, the question whether a prosecutor can be transferred against his or her will may not be the

most relevant, and even become an obstacle to legitimate considerations of rotation. It seems to be more pertinent whether a subordinate prosecutor must comply with instructions which – in his or her opinion – transgress the law, or to violate a duty of a prosecutor to prosecute or not to prosecute in a specific case. Such questions can be, and currently are, covered by the Serbian Law on Public Prosecutor`s Office, but still they seem to be more important than the question of the transfer of a prosecutor.

Article 131 (5) concerns the immunity of prosecutors. It raises the same considerations as with respect to judges (see above no. ___) Because of the principle of equality of all persons before the law the immunity should be limited to direct interference of the work as prosecutor.

D. CHAPTER 6

The provisions concerning the High Judicial Council in the Draft seem to ensure that the Council becomes an independent and autonomous body within the judiciary. Its members are appointed in a way that seems to ensure their independence and their competence.