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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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Introduction

1. These provisions seek to establish judicial independence (Articles 125 – 130) and an independent public prosecutorial service (Articles 131 – 135). Judicial independence is a fundamental tenet of democracy and the rule of law and a necessary ingredient of a fair trial. An independent judiciary ensures that governments and administrations may be held to account and that duly enacted laws are enforced. An independent prosecution service ensures that duly enacted laws are enforced without political or personal bias.

2. In respect of the independence of the judiciary, there are a number of international and Council of Europe instruments which specify the basic mechanisms required to achieve proper standards of independence. I shall draw from them in the comments which follow. They are effectively summarised in *Opinion No 1 (2001) of the Consultative Council of the Committee of Ministers of the Council of Europe on Standards concerning the Independence of the Judiciary and the Irremovability of Judges.* See in particular, *Recommendation No.R (94) 12 On the Independence, Efficiency and Role of Judges and the Relevance of its Standards and any other International Standards to Current Problems in these Fields.*

Article 125

3. This Article seeks to establish (a) judicial independence (b) in which judges shall be 'subordinated to the Constitution and Law only'. (c) It requires courts to be 'established and abolished' by an 'organic law'. (d) It also outlaws court-martials and temporary or extraordinary courts.

4. This Article must be viewed in the context of Article 3, which provides that the rule of law shall be the 'supreme value' of the Constitution, and encompasses in the rule of law the separation of powers, an independent judiciary and 'government's compliance with the Constitution and Law'. In the light of Article 3, two aspects of Article 25 might be questioned:

5. First, since, under Article 3, government must 'comply' with the Constitution and the Law, it is misleading to state that judges should be 'subordinated' to the Constitution and the Law. Judges <u>apply</u> the Constitution and the Law, derive their power <u>from</u> the constitution, but are by no means required to subordinate themselves to any law that does not comply with the constitution (or indeed or apply a law that does not comply with the constitution). It would be clearer simply to provide that the judges are <u>accountable</u> to the constitution alone (and, *ex hypothesi*, not accountable to the other branches of government).

6. Secondly, since Article 3 (and, by implication, other fundamental rights in the constitution) requires for its implementation that courts of law are established, it seems misleading to state that courts of law may be 'abolished' by an organic law. I would prefer the Article to provide that an organic law shall provide for the 'establishment, organisation, function and hierarchy (subject to Article 29 which sets out the superiority of the Supreme Court of Serbia) of courts of law' (or words to that effect). Such a formulation would surely imply that some courts may be discontinued, so long as access to justice and the rule of law (under Article 3) is maintained.

Article 126

7. This Article deals with the permanence and non-removability of judges (even where the court to which the judge is initially assigned has been abolished). The following aspect of this Article require comment:

8. The Article provides that a judge is initially appointed to a five year term and thereafter for an 'unspecified period'. European practice is generally to make full-time judicial appointments until a specific retiring age. However, many civil law systems make appointments for a probationary period, and in some countries appointments are for a limited period (eg 12 years in the German Federal Constitutional Court).

9. In respect of the five year term, it is unclear whether that term is seen as (a) a probationary period, or (b) the term after which re-appointment is normally expected, or (c) the term after which a re-appointment may be made in exceptional cases alone. Such ambiguity should be removed and in any event it is important that it be made clear that any re-appointment (or failure to reappoint) be made objectively and on merit without taking political considerations into account.

10. In respect of the 'unspecified' tenure of the appointment, that appears misleading as it implies the possibility of a life appointment. It should be made clear that the appointment is 'permanent' (rather than 'unspecified') subject to Article 128 (which provides for resignation and mandatory retirement at 67 or after 40 years tenure- I take it that the 40 years includes the first five years temporary appointment).

Article 127

11. This Article provides for the appointment of judges, their immunity and the question of declaration of interest.

12. In respect of appointments, judges and presidents of courts shall be 'elected by the People's Assembly, at the proposal of the High Judicial Council'. The President of the Supreme Court of Serbia shall be 'elected' (presumably by the People's Assembly, although it is not specifically stated) at the proposal of the President of the Republic, 'who has obtained the opinion of the general sitting of the Supreme Court of Serbia'.

13. The first point to note about the appointment of the judges and presidents of courts (excluding, for the moment, the appointment of the President of the Supreme Court), is that the Article does not make it clear whether the People's Assembly may overrule the proposal of the High Judicial Council. This raises the question of the extent to which the appointment of judges should be open to political approval. Practice in democracies differs in that respect. On the one hand, it is generally agreed that judicial appointments should be based on objective merit. On the other hand, since the scope of the government's powers is determined by means of judicial review, the legitimacy of the process of review may be enhanced by some degree of political oversight of the appointment of the judges who carry it out.

14. In respect of the appointment of the President of the Supreme Court, the above lack of clarity is doubled: it is unclear whether the President of the Republic's proposal may be overruled by the Assembly, and it also unclear whether the President may overrule the 'opinion' of the Supreme Court as to whom its President should be.

15. In my view these matters should be clarified, and clarified in the direction that leans heavily in the direction of an objective, merits-based appointments system, as recommended eg by the Opinion cited in paragraph 2 above. The Assembly should not easily be able to overrule the nomination of the High Judicial Council. One way to balance 'objective' standards with political legitimacy has recently been devised in the United Kingdom, where a new judicial appointments commission will nominate judges for appointment to the equivalent of the Minister of Justice. The Minister is expected normally to accept the nomination, but in exceptional cases he may ask the Commission to reconsider its nomination, or he may reject the nomination, but only with full and open reasons. Since the Minister is under a specific duty to respect the independence of the judiciary and the rule of law, however, those reasons could not include overtly political considerations.

16. In respect of the immunity of judges, the detail is postponed to be decided by the High Judicial Council, which should of course ensure that the extent of the immunity is compatible with standards of access to justice.

17. The standards of conflict of interest are also postponed to an organic law, but I would prefer the formulation with the words underlined:
"An organic law shall specify functions, activities or private interests that are incompatible, or have the appearance of being incompatible with an independent judicial function."

Article 128

18. This Article deals with the termination of a judge's term of office (by request, retirement or dismissal); the accountability of judges, and judicial discipline.

19. In respect of termination of a judge's term of office, I have already dealt with the date of retirement (para. 10 above). In respect of a judge's dismissal, the Article provides that a judge may be dismissed for reasons 'defined by an organic law'. It should be made clear that such a law must conform to Article 3 of the Constitution, namely, that such a law should respect judicial independence and the rule of law and therefore not permit dismissal for political considerations.

20. In respect of judicial accountability, the Article provides that 'a judge shall account for a violation of the duties of a judge and reputation of judicial authorities'. I am concerned that the phrase 'reputation of judicial authorities' could be assessed by reference to the popular response to a judicial decision. Such an interpretation would violate judicial independence and I suggest therefore that the phrase be excluded.

21. The Article provides that the High Judicial Council should make the decision on judicial discipline, with a special court acting on appeal. It then goes on to provide that the termination of office (of both judges and presidents of courts) shall be 'decided' by the People's Assembly. If the word 'decided' connotes a discretionary power, this procedure would violate judicial independence. Even if the Assembly formally appoints judges and presidents of courts (and see my view on that in paragraphs 13-15 above), it should have no power to exercise its discretion to dismiss them, as this would give the appearance of permitting judges to be dismissed on political grounds, contrary to the principles of judicial independence and the rule of law.

The Public prosecutor

Introduction

22. Practice as to the role of the public prosecutor differs in Europe. In some countries, the public prosecutor is insulated from any political influence, in a way that is analogous to the judicial role. In other countries, however, the public prosecutor is more connected to the political process and may take into account political factors in his decisions. The notion of 'political' in this sense does not permit the public prosecutor to institute prosecutions, or refrain from instituting prosecutions, for reasons of party political bias. However, it permits him to take into account the social consequences of prosecution (eg, would prosecution be counterproductive by creating martyrs).

23. In the UK, for example, the Attorney General is a member of Parliament, but acts in a quasi-judicial manner. The Attorney General is accountable to Parliament, and has responsibility himself for the prosecution of certain sensitive matters (such as the crime of incitement to racial hatred). Most crimes are however prosecuted by an independent Director of Public Prosecution, who presides over a body of officials known as the Crown Prosecution Service.

Article 130

24. This Article provides that the Office of Public Prosecutor shall be an independent state body to prosecute criminal and other penal offences. I am not sure whether it should also "apply legal remedies", as this function is not normally within a prosecutor's functions.

25. The Article continues to set up a hierarchy of prosecutorial offices. I do not think that it is necessary for a constitution to state something so obvious as: 'higher offices . . . shall be superior to lower ones'.

Articles 131 and 132

26. These Articles establish the office of head public prosecutor for a 6 year term, but others for a 5 year term initially, and appointed roughly in the same way as judges and with similar immunity.

27. I have dealt above (paragraph 7-17) with some of the problems with the formulation in respect of judges on those matters, and they apply *mutatis mutandis* in the context of the public prosecutor as well. In particular, it should be made clear that the Assembly does not have power to overrule the nominations for appointment by the High Judicial Council for political considerations alone.

High Judicial Council

Articles 133-135

28. Articles 133 -35 establish such a Council. We know from the previous paragraphs that the primary purpose of the Council is to nominate the appointments of judges and prosecutors. However, it would seem advisable to set out these and any other purposes (such as judicial discipline) in this section as well. Some of the purposes of the High Judicial Council are set out in the **Law on the High Judicial Council**, however, it

would seem logical for those purposes to be set out in these Articles of the Constitution as well.

29. Similarly, these Articles should set out the criteria for appointment of the High Judicial Council. UK experience may not be relevant here, but, as an example, under the new UK law establishing a Judicial Appointments Commission, it is made clear that the prime criterion for judicial appointment is objective merit but, subject to being satisfied on that matter, account may be taken of the need for diversity (so that the judiciary may reflect – but not represent – the composition of society eg, women and minority groups, to a greater extent than at present).

30. The High Judicial Council is composed of 11 members: 4 judges, 4 public prosecutors, 1 lawyer and 2 law professors. Such a composition ensures legal expertise but lawyers may not always be the best people to assess other judicial qualities such as compassion, ability to communicate with litigants, etc. Many countries with judicial appointment commissions which seek to achieve these broader qualities in their judges have an element of lay representation on their commissions.