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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE TWO DRAFT LAWS AMENDING LAW NO. 47/1992 ON THE ORGANISATION AND FUNCTIONING OF THE CONSTITUTIONAL COURT OF ROMANIA

Adopted by the Commission
at its 66th plenary session
(Venice, 17-18 March 2006)

on the basis of comments by

Mr J. CARDOSO DA COSTA (Member, Portugal)
Mr J. MAZAK (Member, Slovakia)
Mr P. PACZOLAY (Member, Hungary)

1. By message of 22 December 2005 from the Secretary General of the Constitutional Court of Romania, the President of the Constitutional Court transmitted to the Venice Commission a request for an opinion on two draft laws amending Law no. 47/1992 on the Organisation and Functioning of the Constitutional Court of Romania (CDL(2006)007 and 008), which concern the application of the Code of Civil Procedure on issues of incompatibility, abstention and challenging of judges to the Constitutional Court as well as the conditions of admissibility of a candidate as member of the Constitutional Court.

2. The Commission appointed Messrs Cardoso da Costa, Mazak and Paczolay as rapporteurs on this issue. Their comments are available as documents CDL(2006)009, 012 and 016 respectively.

3. The present opinion has been adopted by the Commission at its 66th Plenary Session in Venice on 17-18 March 2006.

A. Draft Law 1 relating to the application of the Code of Civil Procedure to the Constitutional Court (CDL(2006)007)

4. The current text of Article 55 reads: "Once legally vested with a case, the Court shall proceed to reviewing the constitutionality; provisions of the Code of Civil Procedure related to the suspension, interruption or premature termination of the proceedings, or to the challenge of Judges shall not be applicable."

4. The draft amendment would delete the clause "or to the challenge of Judges" should be deleted. As a consequence, the Code of Civil Procedure would be applicable to the challenging of judges of the Constitutional Court.

5. Concerning the challenging of a judge a distinction between different types of procedures before constitutional courts seems necessary. The possibility of challenging a judge is appropriate when there is the possibility of personal relations between the judge and the applicant, especially in cases of individual complaint. In the absence of an individual complaint in Romania, concrete control (preliminary requests by ordinary courts) seems to be the type of jurisdiction where such rules could be relevant. A member of the family of a judge could be party to the proceedings before a requesting court. However, here, the applicant is a court and not a party concerned, even though a party may suggest to the ordinary court to make a preliminary request. The ordinary court does not and cannot decide in the concrete case before it until the Constitutional Court replies to the abstract question on the compatibility of a given law or regulation with the Constitution. Still, there could be an interest by the judge even behind the abstract question.

6. Further, as the Court has jurisdiction over the election and impeachment of the President of the Republic, it seems possible that a candidate for the presidency or the President is a family member of a judge.

7. On the other hand, it must be ensured that the Constitutional Court as guarantor of the Constitution remains functioning as a democratic institution. The possibility of excluding judges must not result in the inability of the Court to take a decision. The provisions of the Code of Civil Procedure are certainly appropriate in the context of the general jurisdiction where there are always other judges available to step in for a judge who has withdrawn. This is not the case

for the Constitutional Court. If rules for challenging of a judge were deemed necessary in Romania they would have to apply specifically to the Constitutional Court and exclude the possibility *non liquet* applying the fundamental principle of the Constitutional Court as a guarantor of the supremacy of the Constitution.

8. The draft amended article 51.1 which provides that the two thirds presence quorum be waived if judges are withdrawn intends to address this problem but it is not sufficient. It does not cover the situation when all judges would have to be withdrawn and endangers the legitimacy of the Court if the number of judges remaining were to fall too low below the two thirds quorum.

9. In order to avoid these problems, a two stage solution might be to introduce a second lower quorum of half of the judges if necessary due to the withdrawal of several judges. If ever - what is hopefully unlikely – the number of remaining judges were to fall even below that quorum, all judges should participate in the proceedings but this fact should be transparently set out in the judgement together with explicit declarations by the judges concerned that they make every effort to avoid their personal interest having an effect on their legal opinion.

B. Draft Law 2 relating to conditions of admissibility of a candidate as member of the Constitutional Court (CDL(2006)008)

1. Exclusion of political party membership for candidates and their families

10. One of the most important requirements concerning the composition of constitutional courts is the guarantee of the independence of constitutional judges already during the process of their selection, nomination or election within the national parliaments. This approach does, however, not mean that the process of the selection of the constitutional court judges can or should be absolutely free from democratic political influences. This would be unrealistic and contradict basic concepts of constitutional justice.

11. According to the new Article 5.4[1] candidates for the position of a judge at the Constitutional Court shall not be or have been members of any political party, nor be relatives in the first degree or second degree, nor spouses, sons in law or daughters in law of persons who are or were during the last five years members of the leadership of political parties.

12. Such a restriction seems clearly excessive, especially as the provision deals not only with current party membership but even with membership during the last five years.

13. Two arguments can be made against such a restriction, relating to the right to participate in political life of the country and the right of access to public functions. These two rights would be endangered by the proposal. In addition, in a democratic country it is even desirable that the Constitutional Court is composed of persons who do not only have a legal qualification but also experience in the democratic life of a country.

14. The establishment of a specialised Constitutional Court as conceived by Kelsen and first applied in the Austrian Constitution of 1920, rests on the recognition that the annulment of acts of Parliament, which represents the sovereign people, is different in nature from the ordinary civil, criminal or administrative jurisdiction. The composition of specialised constitutional courts is different from that of the ordinary judiciary because the constitutional court needs added legitimacy (see the Venice Commission's study on the composition of

Constitutional Courts, Science and Technique of Democracy, no. 20). The closer this composition reflects the various currents of society the higher this legitimacy will be.

15. In order to prevent direct influence of political parties, it is not necessary to ask for complete political abstention. It should be sufficient that the members give up any party membership upon appointment or presentation of their candidature. Once the members are appointed, they act independently and in their individual capacity. They even have the famous 'duty of ingratitude' towards the body which appointed them and the principle of collegiality will help them to live up to these standards.

2. Criteria for candidates for the position of a constitutional court judge

16. The draft amended Article 5.5 would require 12 years of practice as a judge or a prosecutor for candidates as judges of the Constitutional Court. The intention of this provision is probably to increase the level of qualification of constitutional court judges and their impartiality.

17. However, as a consequence, probably only career judges or prosecutors would be able to become constitutional court judges. Again, this would go contrary to the logic of a specialised constitutional court, the composition of which is different from that of the ordinary judiciary.

18. Furthermore, this might contradict Article 146 of the Constitution, which states: "Judges of the Constitutional Court must be graduates in law, and enjoy high professional eminence and at least 18 years' experience in the legal field or academic professorial activity."

19. This Article of the Constitution provides for a wider range of experience for constitutional court judges than only that of judges and prosecutors but should include scholars or professors perhaps even lawyers who are experienced in the various fields of law (e.g. international law).

20. As is the case in several other countries, it is of course possible to reserve a certain number of Constitutional Court judges to be filled from the ordinary judiciary. A provision which practically turns this group into the unique pool of candidates is excessive though.

C. Conclusions

21. Both drafts have, in principle, the positive aim to strengthen the independence, impartiality and the court-like functioning of the Constitutional Court. The means used in the draft laws are however not appropriate for this goal.

22. Concerning the challenging of a judge, special provisions would be required rather than an application of the Code of Civil Procedure. On the one hand, they must clarify that the challenge is only applicable in procedures where an individual interest of a party is at stake and on the other hand, they must prevent the occurrence of *non liquet* situations in the Court.

23. The restriction of candidates who are or have been party members or whose family members belong or belonged to the leadership of political parties during the last five years is clearly excessive. The limitation of twelve years of practice as a judge or prosecutor excludes important groups of qualified persons and might even be unconstitutional.