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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SERBIA

by

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INTRODUCTION

On 2 July 2007, the Ministry of Justice of the Republic of Serbia asked the Venice Commission to provide an assessment of the draft Law on the Constitutional Court of the Republic of Serbia.

Ms Suchocka and Messrs Grabenwarter and Jowell, members of the Commission, were designated as rapporteurs. Their comments (CDL(2007)067, 065 and 066 respectively) were sent to the Ministry of Justice in late July, were discussed at a conference in Belgrade on 12 September and subsequently endorsed by the Venice Commission at its 72nd plenary session (Venice, 19-20 October 2007).

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COMMENTS BY Mr GRABENWARTER

I. Introduction and General Remarks

1. The draft Law on the Constitutional Court is composed of 111 articles divided into eight chapters. It addresses almost all relevant questions of a modern law of this type.

2. Chapter one (introductory provisions) is followed by a chapter on election, appointment and termination of office of Constitutional Court judges and a chapter on the organisation of the Court. Chapter IV on the various proceedings before the Constitutional Court is by far the most voluminous chapter of the law. Chapter V deals with the effects of Constitutional Court acts, chapter VI to VIII consist of only a small number of Articles on the enforcement of Constitutional Court acts, the relationship to the National Assembly, "punitive" provisions and transitional and concluding provisions.

3. At the outset it has to be mentioned, that the text suffers obviously some language problems so it may be that some of the critical remarks are due to a problem of translation.

4. A second general point is the systematic structure of the law. A proposal for improvement concerns the principle of public proceedings which is dealt with in Article 3 under general provisions and in Article 76 in the main chapter with reference to public hearings.

5. A new systematic approach may also contribute to reduction of the length of the law.

II. Remarks on provisions in Chapter I (Introductory Provisions)

6. According to Article 3 the work of the Constitutional Court is public. This wording may lead to misunderstandings although paras. 2 to 5 explain the programmatic para. 1. However, it might be requested that also deliberations must be public which is the case in proceedings before the Swiss Federal Court, for the rest of Europe, however, this is unusual. Moreover the provision should be harmonised with Article 75 (if not merged). Para. 2 could be adopted to the wording of Article 6 para. 1 of the European Convention on Human Rights (ECHR) although only a part of the proceedings will be subject to this provision.

7. According to Article 7 matters of procedure before the Constitutional Court not regulated by this Law are subject to the application of provisions of other appropriate procedural laws; matters of procedure not regulated by this Law or provisions of other procedural laws shall be determined in each individual case by the Constitutional Court. This technique of dynamic reference to other laws with an unfettered discretion of the Constitutional Court is hardly compatible with standards of legal certainty under the rule of law. A more appropriate way is to provide for an *analogous* application of the code of civil procedure in general and for an analogous application of the code of criminal procedure in the proceedings directed against the President of the Republic. This solution is followed in the Austrian system and 80 years of practice show that *analogous* application leaves enough space for the Constitutional Court to adapt the provisions of various codes of procedure to Constitutional Court proceedings.

III. Remarks on provisions in Chapter II (ELECTION, APPOINTMENT AND TERMINATION OF OFFICE OF CONSTITUTIONAL COURT JUDGES)

8. Article 10: The term of office is not as long as in other countries, there are however Countries with shorter terms (e.g. Liechtenstein). It corresponds with the term of office in the European Court of Human Rights after Protocol No. 14. It is therefore sufficient in view of the requirement of independence. The other guarantees of independence are duly respected bearing in mind that a number of provisions are already included in the Constitution.

IV. Remarks on provisions in Chapter III (ORGANISATION OF THE CONSTITUTIONAL COURT)

9. The Court shall consist of 15 judges. This is an average size of a Constitutional Court (Germany 16, Austria 14). However, for reasons of efficiency a system of chambers with 7 to 8 judges and/or committees with 3 to 5 judges seems advisable. There should be explicit provisions for this purpose in the Law itself (and not in the Rules of Procedure). The regulation of this question in the Rules of Procedures according to Article 80 does not seem adequate in terms of rule of law standards.

V. Remarks on provisions in Chapter IV (PROCEDURES BEFORE THE CONSTITUTIONAL COURT)

10. Articles 29 to 33 deal with the participants in proceedings. Article 29 contains a very detailed list of participants (sometimes only with reference to a specific type of proceedings (e.g. No 5 - "religious communities about whose prohibition of activity it is being decided"). The value of this list - quite unusual from a comparative perspective - appears questionable for two reasons. First, the term "participant" is not limiting rights in the proceedings like it is the case with the term of "parties to proceedings". Second, No 13 contains a general clause while according the capacity of "participant" to 13) "other persons, in accordance with the law". Moreover, the last sentence gives discretion to the Constitutional Court to extend the number of participants to "other persons summoned by the Constitutional Court". They "may also participate in proceedings before the Constitutional Court." It is suggested to draft a more consistent, shorter and more general provision on parties in proceedings, which may very well leave some discretion to the Constitutional Court.

11. The type of participant described with "authorised propounder" appears unusual. There may arise a problem with the principle of equality if state organs or entities enjoy a privileged position in proceedings. It seems that the entities described in Article 29 No 1 ("state authorities, authorities of the autonomous provinces and local self-government entities, national deputies, in procedures for assessing constitutionality and legality") have the right to intervene in proceedings (Article 31) irrespective of the fact whether they are involved in the proceedings. Here again it could be more clear to involve public authorities in case where they have enacted a law, taken a decision etc which is subject to Constitutional Court proceedings. They then should be treated as "normal parties". This technique could also strengthen the judicial character of the proceedings vis-à-vis the political character of many questions to be decided by a Constitutional Court.

12. Article 33: The time limit of 15 days is very short. It should be made clear that this minimum time limit may be exceeded. The usual time limit in comparable proceedings in Austria is 8 weeks, to be reduced in case of the need of speedy proceedings.

13. According to Article 35 "all persons are entitled to request insight into case files and to be permitted to copy documents, in accordance with the law regulating freedom of access to information of public importance. Insight into case files and copying documentation will not be allowed where there are reasons to exclude the public and in other cases, in accordance with the law." This technique may lead to a certain burden for the Constitutional Court. Usually access to documents is restricted to parties in the proceedings. However, much depends on the provisions in the law regulating freedom of access to information of public importance. The words "and in other cases, in accordance with the law" are rather general and do not allow a concluding assessment.

14. The provisions on the initiation and conduct of proceedings break new ground, at least from the perspective of the German-Austrian Tradition which is followed in Spain, Hungary and

Poland. First of all, it is quite unusual that a Constitutional Court initiates proceedings *ex officio*: According to Article 39 procedures for assessing the constitutionality or legality of general acts may be initiated by the Constitutional Court itself, on the basis of a decision taken by a two-thirds majority of the votes of all its judges.

15. Moreover, the draft uses different terms for the initial act of the "authorised propounder" which could mean "application", if there is an inaccuracy in translation: Article 40 states that "procedures for assessing the constitutionality or legality of general acts include: the name of the general act ....". According to Article 41 a procedure is deemed to be initiated on the date of the submittal of the proposal. The legal quality of this proposal is not quite clear: Is it a mere suggestion or is it a formal request. The latter would be quite common in European Constitutional Court systems und is known as "abstract control of norms" *(abstrakte Normenkontrolle).* However there is at least one provision in the draft which hints in the direction of the first alternative. Article 42 para. 3 reads as follows: "Where the Constitutional Court finds no grounds to initiate a procedure in connection with an initiative, it will not accept the initiative." It is obvious that the Constitutional Court shall have unfettered judicial discretion to accept a "proposal". Against this background it is not the usual model of abstract control of norms which is envisaged here. Article 43 gives the same impression.

16. Furthermore, the technique of intertwining Constitutional Court proceedings with the legislative procedure established in Articles 44 and 46 seems interesting. However, it is difficult to see the advantages of such proceedings.

17. The rule on suspensive effect in Article 45 enables the Court to suspend the enforcement of an individual act or action taken on the basis of the general act whose constitutionality or legality is being assessed, where that enforcement could cause "irreversible detrimental consequences". This last element seems rather strict in comparison with other Constitutional Court systems. According to Article 32 para. 1 of the German Law on the Constitutional Court and to Article 85 para. 2 of the Austrian Law on the Constitutional Court provide for interim measures or suspensive effect also in cases of weighty disadvantages or other important grounds in the public interest guided by the principle of proportionality.

18. The provisions on **proceedings resolving conflicts of jurisdiction** (Articles 48 to 51) do not make a difference between positive conflicts (two or more authorities act in the same issue, only one is competent) and negative conflicts of competence (two or more authorities deny there competence, but one of them is competent). Therefore the wording in Article 48 para. 2 remains general: "Requests for resolving conflicts of jurisdiction referred to in § 1 of this Article are submitted by one or both of the conflicting authorities, as well as the person in connection with whose right the conflict of jurisdiction appeared." The words "in connection with whose rights" do not give a clear guideline (Does it mean "party to proceedings"?). The Austrian Law on the Constitutional Court dedicates 11 Articles to this type of proceedings. It is suggested to include a provision enabling the Court to quash decisions of authorities having acted without competence.

19. In the part concerning the procedure of deciding on electoral disputes there could also be a need for more provisions bearing in mind the importance and high political significance of such proceedings. A concrete point concerns Article 54 para. 2: In the case of a decision annulling the entire electoral procedure or parts thereof, the entire electoral procedure or parts thereof will be repeated within ten days of the serving of the decision of the Constitutional Court to the competent authority. This time limit does not seem realistic.

20. The Serbian system provides for "Constitutional complaints procedures" which has to be welcomed in the interest of a high level of human rights protection. Some suggestions concern technical details: According to Article 58 para. 1 constitutional complaints "may be uttered by all persons who believe that their human or minority rights and liberties guaranteed by the

Constitution have been breached". Usually the precondition of a complaint of this type is the "allegation" of a violation of a right (cf. Germany, Austria). The competence of "state and other authorities in charge of the overseeing and exercise of human and minority rights and liberties" to introduce constitutional complaints may be seen as step forward. For the sake of equality this competence should be restricted in situations where there are two individuals with conflicting human rights. In this case it seems more adequate if the state remains neutral. Moreover the quality of those organs must be precisely defined in law.

21. One important type of proceedings is missing: There should also be a type of summary proceedings before committees of a few judges dealing with complaints that have not enough prospects to succeed. There are two solutions which have proved their efficacy during three decades now: first, in the German way not to accept a complaint and second the Austrian way to decline jurisdiction. In any event such an instrument is necessary in order to uphold the efficient functioning of a Constitutional Court.

22. Article 59 paras. 2 and 3 allow restitution to a person who on justified grounds missed the time-limit for submitting a constitutional complaint if within 15 days (relative time limit) of the cessation of the reasons which caused the missing of the deadline that person submits a proposal for restitution and simultaneously submits a constitutional complaint. Restitution cannot be requested after the expiry of a period of three months from the date of missing the deadline (absolute time limit). The latter absolute time limit seems rather short. In Germany it amounts to one year.

23. The preconditions for suspension of implementation in Article 61 para. 2 seem rather strict. See the remarks to Article 45 above.

24. Under the head of "deliberation and determination" Article 75 provides for public hearings with possible restrictions and a general clause within the discretion of the Constitutional Court. Given the workload of modern Constitutional Courts it is not realistic that it holds more than 20 to 30 hearings per year, especially if there is no chamber system. The law should reflect this reality.

25. Articles 79 an 80 refer to "Rules of Procedure". It is not clear what is meant by "other forms of work". The creation of a "sub-regime" of procedural law is not in line with rule of law standards. In any event it should be made clear how the "Rules of Procedure" are enacted and how they are published.

26. The provisions on decisions of the Court make reference to "conclusions". The quality and binding effects of this type of acts of the Constitutional Court do not become clear from the short Article 85: "When it does not issue other acts, the Constitutional Court issues conclusions."

VI. Remarks on provisions in Chapter IV (LEGAL EFFECT OF CONSTITUTIONAL COURT ACTS)

27. The main provision on legal effect, Article 87 para. 1 shows, that the Serbian system follows the Austrian-Polish system with the effect of decisions *ex nunc.* Problems arise however with international agreements. According to Article 87 para. 2 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*. It must be clear that this cannot be the legal situation with respect to international treaty. Here, the Republic of Serbia will have to terminate a treaty in conformity with the Vienna Convention on the Law of Treaties and the respective provisions in the treaty itself. It is

suggested that the Constitutional Court only decides that the treaty is not applicable in internal law any more (cf. Article 140a of the Austrian Federal Constitution).

VII. Remarks on provisions in Chapter VI to IX

28. Article 105 provides for “punitive provisions” for certain cases of misconduct of parties in the Constitutional Court proceedings. Such disciplinary measures form a common feature of procedural law. However, one should bear in mind that such sanctions may - following the case law of the ECHR - be qualified as criminal charges within the meaning of Article 6 of the ECHR. In this case the procedural guarantees must be respected.

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COMMENTS BY Mr JOWELL

29. This Law contains 111 sections, attempting at times to envision every possible permutation on each topic with which it deals. In general, it seems to me that the Law contains some unnecessary detail so that occasionally the principles behind it get submerged. However, the objective of the Law is positive to the extent that it attempts to provide:

- efficient working arrangements for the Court;
- fair access to the Court;
- reasonable and fair procedures for the appointment, dismissal or disciplining of judges, and
- an appropriate relationship between the Court and the National Assembly.

30. Particular criticisms of aspects of the Law are mentioned below, but I may have misunderstood the intent of some phrases due to questionable translation. Provisions on which I do not comment should be presumed satisfactory.

I. Introductory Provisions (Articles 1-8):

31. **Article 3** provides that the work of the Constitutional Court is "public" (subject to the exceptions in that Article). This Article must be read together with **Article 35** (access to all case-files) and **Article 75** (allowing discretion to the Court as to when public hearings are held).

32. While it is right that hearings of the Court should be open to the public, and that parties should have access to the proceedings of the other parties, it is rare that all of a court's documentation, records and indeed deliberations should be open to the public. In addition, confidential information should be protected.

33. **Articles 3, 7 and 8** provides that both a Law and Rules for the Procedure of the Constitutional Court will be established and that other procedural laws may be applied. It should be made clear here and in other sections where procedures are mentioned or required (as in the suspension or discipline of judges) that they should provide for the highest standards of procedural justice (in other words, be compatible with Article 6 of the ECHR). This applies also to **Articles 79, 89 and 135**.

II. Election, appointment and termination of office of Constitutional Court judges (Articles 9-20)

34. The bank of 15 judges appointed for terms of 9 years (**Article 9**) satisfies European standards, although some provision might be made, depending on the case-load, for dividing into separate chambers of 7, perhaps for certain types of case.

35. **Article 13** permits judges to be relieved of duty if they "violate the provision of conflicts of interest". Does this refer to the oath of office's reference to impartiality? (if so, that should be made clear).

36. **Article 14** permits Constitutional Court judges to be professors of law. While I can see the value of that, I wonder whether the burdens of a full-time professorship would not interfere as much with their work as any other full-time (and non-political) occupation.

37. As mentioned in para. 5 above, fair procedures for dismissal or suspension of a judge should be required.

III. Organisation of the Constitutional Court

38. This Part sensibly seeks to ensure the efficient running of the Court by means of the appointment of Registrars and Advisors. It also mentions, in **Article 27**, that "resources needed" for its work are provided from the Budget of the Republic "on the proposal of the Constitutional Court". Does this envisage that the National Assembly has no discretion to refuse or amend the Court's proposal? In most democracies budgetary allocation is a matter for the legislature, but in the UK, since 2005, the relevant Minister is under a statutory duty to provide "adequate" resources to the courts. Perhaps a similar provision could be included in the Law.

IV. Procedures before the Constitutional Court

39. **Article 29** provides a most comprehensive list of possible participants before the Court. It is in **Article 29(1)** that the "authorised propounder" is defined as including certain public bodies. Insofar as this provision seeks to privilege those bodies in litigation, or give them special access to the Constitutional Court, then I believe that this provision offends democratic standards, where public bodies and others should be accorded equality of treatment.

40. However, more generally, apart from giving certain state bodies exclusive access to challenge the constitutionality or legality of general acts (which, as I have said in the paragraph above, I do not think justified) I cannot see any reason for defining the myriad of possible participants in litigation in this way (and then ending in **Article 29(13)** with "other persons". If it is intended that everyone shall have access to the Constitutional Court, in the way of an *actio popularis*, then this should be said. If standing (*locus standi*) is intended to be more limited, then this could be defined by a suitable phrase such as: 'anyone who has a real/ substantial/ interest in the matter shall have access to the Court' (compare **Article 58**, providing that "all persons" who have a complaint about the infringement of human rights etc. may bring a complaint before the Court, and then simply amplifies this by referring to "natural or legal persons or . . .state and other authorities").

Again here, any principle is being lost in the detail.

If, however, the reason for the inclusion of this long list of bodies is to indicate who the defendants (rather than the claimants or plaintiffs) may be before the Court, then again, it might be simpler to employ a formula that simply refers to ' bodies performing public functions'.

41. **Article 39** permits the Constitutional Court or an "authorised propounder" to take the initiative to assess the constitutionality or legality of general Acts (in the case of the Constitutional Court, by a two thirds majority of all its judges). In the Anglo-Saxon tradition it is not for the courts to initiate challenges to either legislation or other decisions or acts of government. The courts may in some circumstances give advisory or hypothetical opinions, but only in response to a person who claims that the act or decision is (or will be) unlawful. We would also regard a *judicially*-initiated challenge to a bill (projet de lois) which is not yet enacted by the legislature, as an offence to the separation of powers.

42. Insofar as there may be a challenge to a disputed Act, **Article 44** is creative in that it permits a suspension of the Act to permit its rectification and **Article 45** permits its enforcement if 'irreversible detrimental consequences' would result.

43. **Article 47** is to be welcomed as it permits conformity with international law to be a standard in assessing the constitutionality of Acts.

44. **Articles 81** make a distinction between 'decisions', 'orders' and 'conclusions' of the Court. **Article 82** then sets out a list of 'decisions' and **Article 83** a list of 'orders'. Yet **Article 84**

requires them both to contain an 'introductory part', an 'ordering part' and 'reasons'. If they are to be treated in the same way in those respects, what is the point of calling them different names?

V. Legal effects of Constitutional Court Acts

45. This Part satisfactorily sets out the various legal consequences of unconstitutional acts or decisions, including the remedy of compensation ("just satisfaction" under the ECHR) under **Articles 94, 97 and 98**.

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COMMENTS BY Ms SUCHOCKA

I.

46. 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).

47. 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.

II.

48. 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.

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

49. 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:

50. 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.

IV.

51. 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.

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

52. 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.

53. 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.

VI.

54. 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.'*

55. 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.

56. 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.

VII.

57. 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?

VIII.

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

IX. Part III. Organisation of the Constitutional Court

59. 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.

60. 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.

X. Procedures before the Constitutional Court

61. 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.

62. 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

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

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

64. 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.'

65. 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.*

66. 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.'

67. 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.

68. 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:

69. 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.

XII.

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

71. 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.

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

XIII.

73. 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.

XIV.

74. 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.

XV.

75. 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.

76. 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.

XVI.

77. 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.