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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT
OF “THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”**

**ON AMENDMENTS TO SEVERAL LAWS
RELATING TO THE SYSTEM
OF SALARIES AND REMUNERATIONS
OF ELECTED AND APPOINTED OFFICIALS**

**Adopted by the Venice Commission
at its 85th Plenary Session
(Venice, 17-18 December 2010)**

on the basis of comments by

Mr Aivars ENDZINS (Member, Latvia)
Mr Gagik HARUTYUNYAN (Member, Armenia)
Ms Marisol PEÑA TORRES (Substitute Member, Chile)
Mr Ben VERMEULEN (Substitute Member, The Netherlands)

1. Introduction

1. The Constitutional Court of “the Former Yugoslav Republic of Macedonia”, by letter from its President of 21 September 2010, requested the Venice Commission to provide an amicus curiae opinion concerning a case initiated by the Constitutional Court on its own initiative, on the system of salaries and remunerations of elected and appointed officials in “the Former Republic of Macedonia”, including the judges of the Constitutional Court, as well as officials of the judiciary (judges of ordinary courts, public prosecutors, members of the Judicial Council, and of the Prosecutors Council).
2. The Commission appointed Mr Endzins (CDL(2010)113), Mr Harutyunyan (CDL(2010)114), Ms Peña Torres (CDL(2010)115) and Mr Vermeulen as rapporteurs in this issue.
3. The present amicus curiae brief has been adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

2. Background

4. The Constitutional Court submitted the following two questions to the Venice Commission:
 - Whether the rule i.e. prohibition on reduction of judges’ salaries is valid in times of crisis?
 - If yes, whether this prohibition applies to the judges of the Constitutional Court?
5. The questions of the Constitutional Court concern the following laws, recently adopted by the Parliament:
 - Law Amending and Supplementing the Law on Salaries and other Remunerations of Elected and Appointed persons in the Republic of Macedonia
 - Law Amending the Law on the Salaries of the Members of the Judicial Council of the Republic of Macedonia
 - Law Amending the Law on the Salaries of Judges
 - Law Amending the Law on the Salaries of Public Prosecutors
 - Law Amending the Law on the Salaries of the Members of the Council of Public Prosecutors of the Republic of Macedonia.
6. The four last-mentioned laws provide that the base on the salaries of the members of the Judicial Council, judges, public prosecutors and members of the Council of Public Prosecutors shall be in the amount of 25,726.00 Denars and shall be implemented with December 2011 inclusive.
7. The first-mentioned law, the Law Amending and Supplementing the Law on Salaries and other Remunerations of Elected and Appointed Persons in the Republic of Macedonia, provides that Article 2 of that Law shall be changed and read as follows: “The base set down pursuant to Article 11 of the Law on Salaries and Other Remunerations of Representatives in the Assembly of the Republic of Macedonia, in the amount of 23,153.00 Denars shall be implemented with the payment of the salaries for December 2011 inclusive, and a base in the amount of 25,726.00 Denars shall be implemented starting from January 2012.”
8. The effect of the Law Amending and Supplementing the Law on Salaries and other Remunerations of Elected and Appointed Persons in the Republic of Macedonia is a 10% reduction until 2012 of the base for salary calculation for all officials elected by the Assembly of the Republic of Macedonia, including the judges of the Constitutional Court. At the same time, the salaries of judges of the ordinary courts, public prosecutors, members of the Judicial Council and members of the Council of Prosecutors are not reduced and will be guaranteed at the current level. The explanation by the legislator is that the salaries of these categories of

public officials may not be reduced on any ground, because of the guarantee of judicial independence.

3. Question 1: Whether the rule i.e. prohibition of reduction of judges salaries is valid in time of crisis?

9. The letter of the President of the Constitutional Court does not specify what the source of the rule/prohibition on reduction of judges' salaries is. The Constitution does not contain any specific provision concerning the remuneration of the judiciary. However, the Constitution recognises that the constitutional order is based *inter alia* on the rule of law and on the division of state powers into legislative, executive and judicial branches (Article 8.1), and requires that courts are autonomous and independent (Article 98.2).

10. Furthermore, it must be assumed that guarantees concerning an adequate and stable income of judges are an essential element of the independence of the judiciary, as for instance guaranteed in Article 98.2 of the Constitution.

11. Recommendation (94) 12 of the Committee of Ministers of the Council of Europe states that judges' remuneration should be guaranteed by law (Principle I.2b.ii) and be "commensurate with the dignity of their profession and burden of responsibilities" (Principle III.1.b). Likewise, according to the Venice Commission, 'the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. [...] The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria'.¹

12. In the same vein Article 13 of the Universal Charter of the Judge provides: "The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judge's work and must not be reduced during his or her judicial service." An analogous provision is contained in the European Charter on the Statute of Judges, demanding that "judicial salaries must be adequate, to ensure that the Judge has true economic independence and must not be cut at any stage of a Judge's service (Judges' Charter in Europe, para. 8).

13. The Consultative Council of European Judges of the Council of Europe, adds in its Opinion No. 1: "While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living" (para. 62).

14. Likewise, the UN Human Rights Committee has indicated that member states should take specific measures guaranteeing the independence of judges and protecting judges from any form of political influence in their decision-making, *inter alia*, by establishing judges remuneration (International Covenant on Civil and Political Rights, Article 14, General Comment No. 32, para. 19).

15. However, as for any guarantee of judicial independence, the mentioned guarantee is not an end in itself: it pursues the aim to ensure proper, qualified and impartial administration of justice, and the implementation of the right to a fair trial.

¹ Report on the Independence of the Judicial System. Part 1: Judges (CDL-AD(2010)004), para. 46.

16. In some countries, the prohibition to decrease the remuneration of judges is expressly set out in the constitution. For example, Article 3, Section I of the Constitution of the United States of America contains a direct prohibition to diminish a judges' remuneration during his or her term in office.

17. Some constitutional courts have decided that even in a situation when a state experiences financial difficulties, the judges' salaries must be especially protected against excessive and adverse fluctuations; see for instance the Judgment of 18 February, 2004 by the Constitutional Tribunal of Poland. The Constitutional Court of the Republic of Lithuania has ruled that any attempt to decrease judges' remuneration or social guarantees or decrease the budget for the courts should be interpreted as an infringement upon the independence of the judiciary (Judgment of 6 December, 1995). The Constitutional Court of the Czech Republic was of the opinion that the judge has inalienable rights to an unreduced salary (Judgment of 15 September 1999), but a temporary, justified freeze of judges' gross salaries cannot be considered as interfering with their independence (Judgment of 2 March 2010). And the Slovenian Constitutional Court has declared that "[p]rotection against a reduction of the salary of an individual judge, if such is intended to ensure its stability and consequently the judge's independence, must namely be understood as protection against any interference which might cause a reduction of the judge's salary which the judge justifiably expected upon assuming office." (Judgment of 7 December, 2006).

18. However, if there is no specific constitutional provision unconditionally prohibiting a reduction of the salaries of judges, there is some room for the legislature in case of (economic) crisis. So the Constitutional Court of the Republic of Latvia in a Judgement of 18 January, 2010 noted that "judges are also citizens, and their special status and role does not grant them immunity in situations, when the state, in dealing with a complex situation, passes decisions with regard to its population. ... under special conditions – in a situation of economic recession, when the state is forced to introduce a general decrease of remuneration in the institutions funded by the state budget - it is possible to derogate from the principle prohibiting the decrease of judges remuneration."

19. Other constitutional courts have also concluded that the prohibition to reduce the remuneration of the judiciary cannot be absolute. The Constitutional Court of Slovenia has pointed out that 'the protection of judges against a reduction of their salaries is namely not absolute; it does entail, however, that the reduction of judges salaries is justified only in truly exceptional instances, on the basis of review of the concrete circumstances in each individual case.' (Judgement of 11 December, 2009). The Constitutional Court of Lithuania decided that "the decrease of salaries is prohibited, unless exceptional conditions are present" (Judgement of 15 January, 2009).

20. The conclusion, therefore, is that, in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges' salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge's profession and his or her burden of responsibility. If the reduction does not comply with the requirement of the adequacy of remuneration, the essence of the guarantee of the stability of conditions of judge's remuneration is infringed to a degree that the basic aim, pursued by that guarantee, i.e. a proper, qualified and impartial administration of justice is threatened, even leading to a danger of corruption.

21. As several constitutional courts (see paras. 18 and 19) have argued, an exceptional situation justifying a reduction of the salaries of judges may exist when a country suffers

considerably from the consequences of an economic crisis², and for good reasons the legislature finds it necessary to cut the salaries of all state officials. In such a situation, a general reduction of salaries funded by the state budget may include the judiciary, and cannot be qualified as a breach of the principle of the independence of judges. Such a general measure is in line with the Venice Commission's Report on the Independence of the Judicial System³ which states that "the level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria". Finally, it may be seen as a token of solidarity and social justice, demanding of judges a proportional responsibility for eliminating the consequences of the economic and financial crisis of their country, by putting on them a burden equal to that for other public officials.

4. Question 2: If yes, whether this prohibition applies to the judges of the Constitutional Court?

22. As has been argued above, the constitutional principle of the independence of the courts is not an absolute obstacle to a general salaries cut of public officials that includes the judiciary. However, *if* the legislature assumes that the principle of judicial independence contains an unconditional prohibition on the reduction of judges' salaries, the question arises whether that prohibition is *also* applicable to the members of the Constitutional Court.

23. The Assembly of "the Former Yugoslav Republic of Macedonia" assumes that that is not the case. Probably its reasoning is based on the structure of the Constitution, which makes a distinction between the 'ordinary' courts and the Constitutional Court. The status of the Constitutional Court is regulated in Chapter IV – "The Constitutional Court of Macedonia" – whereas the status of 'ordinary' courts is dealt with in Chapter III – "The Organisation of State Authority", Part 4: "The Judiciary". The constitutional principle of the independence of the courts is laid down in Article 98.2 of the Constitution, which is part of Chapter III, Part 4 dealing with the 'ordinary' courts, and which has no equivalent in Chapter IV concerning the Constitutional Court.

24. According to the Venice Commission, however, it is clear that the principle of the independence of the courts also applies to the Constitutional Court, even though Article 98.2 of the Constitution is not explicitly declared applicable. Article 108 of the Constitution provides that "the Constitutional Court of the Republic of Macedonia is a body of the Republic protecting constitutionality and legality." It decides, *inter alia*, on the conformity of laws with the Constitution (Article 110) and repeals or invalidates a law if it determines that the law does not conform to the Constitution (Article 112.3).

25. This cannot mean anything else but that the Constitutional Court is a State Authority as regulated in Chapter III. As the Constitutional Court of Lithuania has declared: the fact that "the Constitutional Court has the constitutional power to interpret the Constitution and to make decisions which are binding on all law-making and law-applying institutions, leaves no doubt that the Constitutional Court is an institution exercising state power" (Judgement of 6 June, 2006).

² Cf. on the harsh consequences of the global economic crisis for Macedonia the paper by Will Bartlett, *The Social Impact of the Global Economic Crisis in the Western Balkans with a focus on the Republic of Macedonia*, Pecob's Papers Series, July 2010.

³ Part I : Judges, para. 46.

26. Moreover, it cannot mean anything else but that – in conformity with the division of state powers as outlined in Article 8.2 of the Constitution - the Constitutional Court belongs not to the legislative and the executive branches, which are dealt with in Chapter III, Parts 1-3 (on the Assembly, the President and the Government), but belongs to the judiciary, regulated in Chapter III, Part 4. As the Lithuanian Constitutional Court in the aforementioned Judgement ruled, the existence of separate chapters in the Constitution on the 'ordinary' courts and the Constitutional Court cannot mean that the Constitutional Court is not a court. On the contrary, the existence of a separate chapter serves to emphasise its particular status in relation to all state institutions executing state power, highlighting the specific purpose and competence of the Constitutional Court. In conclusion: judicial independence is an inherent element of constitutional courts as well, if not *a fortiori*.

27. Therefore, it is not compatible with the position of the Constitutional Court that it is considered as anything other than a court to which the principle of judicial independence is applicable. The conclusion must be, therefore, that if the legislator was guided by the principle of judicial independence as implying that salaries of judges may not even be reduced in the situation of crises, than that same principle must likewise be applied to the members of the Constitutional Court.