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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON AMENDMENTS TO SEVERAL LAWS
RELATING TO THE SYSTEM
OF SALARIES AND REMUNERATIONS
OF ELECTED AND APPOINTED OFFICIALS
(DRAFT AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT
OF “THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”)**

by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

The opinion is claimed in the context of the examination done by the Constitutional Court of Macedonia of the constitutionality of amendments in several laws adopted recently in that country in relation with the system of salaries and remunerations of elected and appointed officials, including the judges of the Constitutional Court.

The President of the Constitutional Court of the Republic of Macedonia explains that those laws have been adopted by the Assembly of the Republic for the purpose of reducing the negative economic consequences in the state caused by the economic crises.

He also refers to the essential issue in this case concerning the guarantees of judges' salaries and the prohibition of their reduction as one aspect of the independence of the judiciary even if we are assuming that the Constitutional Court is not part or a branch of the judicial system.

Hence, The President of the Constitutional Court of Macedonia asks the Venice Commission the following:

- (1) Whether the rule i.e. prohibition of reduction of judges' salaries is valid in time of crises.
- (2) If yes, whether this prohibition applies to the judges of the Constitutional Court.

The concept of "time of crisis"

Constitutions usually contain provisions about normality and abnormality. The latter involves the special faculties of the Executive Power to limit the fundamental rights to face the emergency and while it is necessary. Thus, the measures to face the emergency are essentially temporary and need to be regulated by the Constitution. This is the case of the "Constitutional States of Exception". But beyond these states of exception, it may be necessary to affect the fundamental rights of the citizens of the State by exceptional circumstances which impact it.

The Supreme Court of Argentina had stated that the basis of the emergency rules is the need to finish the serious situations that threaten the patrimonial order of the people who need to fulfil their obligations and decrease their negative impact on the economic and the institutional order and the society as a whole. In that sense, the measures to overcome the emergency have to be reasonable, with a limit in time, without changing the substance of the legal relationship and they have to be submitted to the constitutional control of the Court.¹ Consequently, the independence of the Court to control these measures is very important.

In relation with the question of the President of the Constitutional Court of the Republic of Macedonia, it is necessary to remember that article 54 of the Constitution of Macedonia states: "The freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution. The freedoms and rights of the individual and citizen can be restricted during the states of war or emergency, in accordance with the provisions of the Constitution. The restriction of freedoms and rights cannot discriminate on grounds of sex, race, colour of skin, language, religion, national or social origin, property or social status. The restriction of freedoms and rights cannot be applied to the right to life, the interdiction of torture, inhuman and humiliating conduct and punishment, the legal determination of punishable offences and sentences, as well as to the freedom of personal conviction, conscience thought

¹ Decision August 22th, 2002. "Tobar Leonidas vs. E.N. M. Defensa. Contaduría General del Ejército".

and religious confession.” Here are the standards the Constitutional Court should use in a case of a control of the constitutionality of each measure that could be adopted by the Executive. This, because the Court has the competence to protect the freedoms and rights of the individual and citizen related to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the grounds of sex, religion or national, social or political affiliation (article 110 of the Constitution).

The consequence of this is that exceptional measures in case of crises must be really exceptional because they may affect the freedoms and rights of individual and citizens beyond the constitutional states of exception. And if they be adopted, they always need to be controlled by the Constitutional Court.

The salary of Judges in the context of the Rule of Law

Article 8 of the Constitution of the Republic of Macedonia states that “the fundamental values of the constitutional order of the Republic of Macedonia are: (....)

- the rule of law
- the division of state powers into legislative, executive and judicial (...).”

The Rule of Law involves the following conditions:

- 1) A system where you can distinguish the power from its incumbent (institutionalized power);
- 2) The principle of separation of powers with an adequate system of checks and balances;
- 3) The respect of the fundamental rights and freedoms;
- 4) The existence of a system of control of the acts of the officials of the State and of their responsibilities.

Hereby, we can state that the separation of powers and specially the respect for the independence of the Judiciary is a basic element of the Rule of Law, because the individual and citizens trust that the tribunals will defend them from the abuse of power.

As the Constitutional Courts of Slovenia have stated “the implementation of the principle of the independence of the judiciary is not only intended for judges, but also and in particular for those needing judicial protection of their rights. In addition, the independence of judges is a prerequisite for their impartiality in concrete judicial proceedings and therefore for the credibility of the judiciary as well as the trust of the public in its work.”² In this sense, it is appropriate for judges’ salaries to be regulated only by law and not by provisions of low degree.³

Thus, legislation has to provide clear rules to determine the salary of judges in accordance with their important duties and special status in the society. As the Azerbaijan Constitutional Court remembers “Article 6.1 of the European Charter on the Statute for Judges provides that exercising judicial functions in a professional capacity is entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thus impairing their independence and impartiality.”⁴

It is possible to declare that the principle of the independence of judges has two aspects: 1) a subjective one, that is the right of each judge to obtain the conditions which permit him/her to exercise his duties with full respect of the importance of his/her function. 2) an

² Constitutional Court of Slovenia. Decision of 7-12-2006 (CODICES SLO-2009-3-006).

³ Ibid.

⁴ Constitutional Court of Azerbaijan. Decision of 23-01-2001 (CODICES AZE-2001-1-001).

objective one, that is the right of the society to have judges who exercise their functions in accordance with the guarantee of the rights granted by the Constitution.

In the first aspect, a sufficient salary is a real guarantee of the independence of the judges, of the dignity of their office and the scope of their duties. Hence, it is convenient for the Constitution to grant this dignity to prohibit the adoption of any provisions that might lead to incompatibility with that rule. At the same time, when the law establishes the salary of judges, they have legitimate confidence that the rules will not be changed. But the society can have the same confidence.

In the case of the Republic of Macedonia, the original laws granted the level of salaries of the members of the judiciary. For instance, the Law on the Salaries of the members of the Judicial Council of the Republic of Macedonia (Official Gazette of RM, nos. 139/2009 and 67/2010) and the Law on the Salaries of the members of the Council of Public Prosecutors of The Republic of Macedonia (Official Gazette of RM, nos. 139/2009 and 67/2010) state that the respective salaries may not be decreased by another Law or decision of a state body. We understand that the original intention of the legislator was to grant stability to the salaries of the members of the judiciary branch.

Likewise, the Slovenian Constitutional Court has declared that “protection 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 be understood as protection against any interference which might cause a reduction of the judge’s salary which the judge justifiably expected upon assuming the office. The same applies in cases of possible payments to judges for work-related matters that do not form a fixed part of a judge’s salary.”⁵

The reduction of judges’ salaries represents, in our personal point of view, another risk in our democracies. It is related with corruption. If the country undergoes a time of crisis, it usually affects all the society, Thus, if the salaries of the judges are reduced, they might easily be more sensitive to receiving bribes which would affect their independence. The United Nations Convention against Corruption declares in its article 11.1: “Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary”.

Finally, in relation with this point we can conclude that it is not possible to reduce the salary of judges even in time of crisis because the principle of independence of judges may be seriously affected with a real damage for individual and citizens who need the protection of their rights and freedoms. Additionally, the reduction of judges’ salaries may open the door to a serious wave of corruption inside the judiciary. In the end, it is the own Rule of Law which is weakened.

The special situation of the judges of the Constitutional Courts

Constitutional Courts are an expression of constitutional justice. It implies that the power, specially from the governments, is limited by constitutional rules and there are procedures to enforce these limitations. For Mauro Capeletti, constitutional justice derives from

⁵ Constitutional Cour of Slovenia. Decision of 7-12-2006 (CODICES SLO-2009-3-006).

the expansion of the bill of rights.⁶ As we know constitutional justice has three dimensions: a) constitutional justice of freedom; b) organic constitutional justice; and c) transnational constitutional justice.

Therefore, constitutional justice and, inside it, the labour of the Constitutional Courts is a key piece of the Rule and Law and also of democracy.

The Constitutional Court of Lithuania has declared 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.”⁷

Hence, independence is a common value shared by Constitutional Courts and the tribunals that belong to the Judicial Power, but in the case of the first, independence has a particular sense according to the objects of Constitutional Justice. For this reason, Constitutions usually regulate the Constitutional Court and the Judicial Power in a separate chapter. As the Lithuania’s Constitutional Court had said “the existence of a separate chapter serves to emphasise its particular status, not only in the court system but also in relation to all state institutions executing state power”.⁸ In fact, many Constitutional Courts control the executive and legislative acts, but judicial decisions as well.

Consequently, we can say that Constitutional Courts have a special position in the State. This characteristic carries on to grant its independence in a special way. In other words, it is necessary to ensure that the Court will not be subordinated to other branches of the State.

Some Courts accept that it is possible to reduce the salaries of judges if it is justified and only by the law.⁹ Herewith, the Constitution allows the legislator to reduce the salaries of judges in accordance with the principle of proportionality which demands to analyse the relationship between means and purposes. But, usually, Constitutional Courts have to control these kinds of measures and grant that the proportionality is real. So, how can Constitutional Courts exercise that function if they are fully involved in the decision?

As I have stated, the status of the judges is not the same in the State. If the salaries of judges who belong to the Judicial Power can be reduced in certain and limited circumstances, it is not possible, on the other hand, to do the same thing with the salaries of constitutional judges.

Hence, there is no a violation to the principle of equality before the law if we state the difference between the situation of constitutional judges and the rest of the judges, because it is objective according the principle of separation of powers and the checks and balances system.

In conclusion,

- (1) Although some Courts (South Africa) accept the reduction of salaries of judges, by the law, in exceptional circumstances such as a time of crises, we think that that reduction presents a serious inconvenient for the Rule of Law and democracy as well. This conclusion is especially serious in times of corruption as is the situation nowadays.

⁶ Capeletti, Mauro.” Necesidad y legitimidad de la justicia constitucional”. En: Obras. La justicia constitucional. Dimensiones de la justicia en el mundo contemporáneo. Editorial Porrúa, México, 2007, p. 311

⁷ Decision June 26th 2006 (CODICE LTU-2006-2-009).

⁸ Ibid.

⁹ Constitutional Court of South Africa. Decision June 6th, 2002. (CODICE RSA-2002-2-010).

- (2) Even though we accept the reduction of salaries of ordinary judges –who belong to the Judicial Power- the nature itself of Constitutional Courts prevents the acceptance of the same under serious risk for the functioning of the system of checks and balances in the Rule of Law.