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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION ON THE CONSTITUTON OF BULGARIA

Adopted by the Venice Commission
at its 74th Plenary Session
(Venice, 14-15 March 2008)

on the basis of comments by

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1. By letter dated 24 May 2007, addressed to the President of the Venice Commission, the Chair of the Parliamentary Assembly of the Council of Europe's Monitoring Committee, Mr Eduard Lintner, requested an opinion on the Bulgarian Constitution, in particular as regards the amendments made in February 2007.

2. The Commission invited Messrs Céa Egana, van Dijk (CDL(2007)078), Hamilton (CDL(2007)079) and Neppi Modona (CDL(2008)003) to act as rapporteurs.

3. At its 72nd Plenary Session (Venice, 19-20 October 2007), the Commission discussed Mr. van Dijk's and Mr. Hamilton's comments with Mr. Evgenij Tanchev, Judge at the Constitutional Court of Bulgaria and Mr. Velchev, Prosecutor General of Bulgaria.

4. On 12-13 November, a delegation of the Commission, composed of Mr. Hamilton and Mr. Neppi Modona, accompanied by Mr. Schnutz Dürr from the Secretariat, visited Bulgaria and met with the Ministry of Justice, Parliament, the Ombudsman, the Supreme Court, the Constitutional Court and the Supreme Judicial Council. The delegation reported on its visit to the 73rd Plenary Session on 14-15 December 2007.

5. At its 74th Plenary Session (Venice, 14-15 March 2008), the Commission held an exchange of views with the Minister of Justice of Bulgaria, Ms Miglena Tacheva, who presented both oral and written observations (CDL(2008)035) on the draft opinion. The Commission welcomed the open attitude of the Bulgarian authorities as expressed in these observations and adopted the present opinion.

1. General remarks

6. At the meetings in Sofia in November 2008, some of the Bulgarian interlocutors had expressed their astonishment that the Venice Commission would give an opinion on the Bulgarian Constitution as a whole and not only on its judicial chapter.

7. The Commission would like to point out that it is bound by the request made by the Monitoring Committee of the Parliamentary Assembly, which refers to the Constitution as a whole, be it in particular as regards the 2007 amendments. Until now, the Venice Commission has never given an opinion on the Bulgarian Constitution as a whole, but has dealt so far only with its judicial chapter. Therefore, the request by the Monitoring Committee provides to the Venice Commission for the first time an occasion to assess the Bulgarian Constitution as a whole. Such a global view is preferable to dealing with only a single chapter within a larger text, because the various parts of a constitution – and the Bulgarian Constitution is no exception in this respect – are interrelated and need to be interpreted together and in the light of constitutional case-law and practice. Finally, the Commission is of the opinion that constitutions are living documents and evolve with society. Even if a Constitution suits a country perfectly at a given time and does not raise issues from an international law perspective at that time, both needs of society and national and international constitutional standards evolve and a general evaluation of a constitution after some time can only be beneficial (like the one currently being undertaken by the Venice Commission with respect to Finland).

8. While the Commission, on the basis of the request from the Parliamentary Assembly, thus has looked at the text of the Constitution as a whole, it notes that large parts of the Constitution are well drafted and have provided a sound basis for the development of democracy in Bulgaria as well as for the smooth functioning of the democratic institutions. The Commission therefore has limited itself with respect to these chapters to comments on some details, while the clear focus of the Opinion relates, first of all, to the provisions on the judiciary, and, to a lesser extent, to the human rights provisions.

9. In reply to some observations the Commission received from Bulgarian authorities in defence of current legal practice, the Commission wishes to underline that, although being aware of the present situation in a country, it makes abstraction from current issues, and investigates how a constitution might be interpreted and applied in practice, intentionally or not, even in a way contrary to its fundamental principles. It is this technique, which allows identifying weaknesses or ambiguities in a constitution, which should be remedied as a precaution. A constitution is a framework for society, which guides it both in ordinary times and, even more importantly, in times of emergency.

10. At its visit, the delegation of the Commission was informed that, in general, there are good relations between the executive and judicial branches in Bulgaria. Apart from the question what "good relations" means in terms of independence and impartiality of the judiciary, this information should not prevent the Commission from taking an abstract view on the Constitution and from looking into possible threats to the judicial system. Given that the Judiciary has as one of its jurisdictional tasks to control the Executive,"good relations" is not a guiding principle for evaluating the rule of law. The Constitution has to guarantee that judicial independence and impartiality is also ensured in times of tension and against possible future malevolent office holders. This is why the Commission insists on the introduction of appropriate safeguards, even if the Bulgarian Constitution is said to have served the country well in the past and provided a sufficient basis for accession to the European Union.

11. Most of the amendments made in February 2007 relate to the judiciary. The provisions of the Constitution of Bulgaria concerning the Judiciary and the relevant legislation in Bulgaria have been the subject matter of previous opinions of the Venice Commission, in particular its Opinion on the Reform of the Judiciary in Bulgaria (22-23 March 1999, CDL-INF(1999)005), and its Opinion on the Constitutional Amendments Reforming the Judicial System in Bulgaria (17-18 October 2003, CDL-AD(2003)16). While it is true that most of the suggestions made in these opinions were followed by the Bulgarian authorities, it is necessary to point out that a central recommendation, to provide for an election of the parliamentary component of the Supreme Judicial Council by a qualified majority to enable a certain representation from the opposition, was not implemented. Unfortunately, during the visit in Sofia, only few of the interlocutors of the Commission's delegation were in favour of taking up this suggestion.

12. The Constitution was first examined by the rapporteurs in the English translation that was available to the Venice Commission (CDL(2007)077). Following the visit of the Commission's delegation, the Bulgarian side transmitted a revised translation, on which the present opinion (CDL(2007)077rev) is based. While this new text does clarify some key issues (for example the guarantee of certain rights for citizens only – see point 3.1 below), it cannot be excluded that further recommendations in the present opinion are still based on problems of the translation and not to the authentic text.

13. The issues found can be roughly grouped in the following way:

- Judiciary
- Human rights issues
- Institutional and other issues

2. Judiciary

14. The previous opinions of the Venice Commission were critical of the judicial system of Bulgaria in a number of respects. Firstly, the blanket immunity of judges and prosecutors was criticised. Secondly, criticism was expressed of the structure of the Supreme Judicial Council. This criticism centred on the risk of politicisation of the Council by virtue of the election of 11 of its members by the parliamentary majority, and the role of the Minister of Justice in chairing the Council which risked to lead to a confusion between the executive and

judicial functions. Although the Constitution provided for the independence of the judiciary, its provisions were short on setting out the mechanisms by which this should be achieved effectively. Furthermore, there was some criticism of the length a judge might in effect be probationary (then three years). That period has now even been extended to five years.

2.1. The Constitutional Basis for the Judicial System prior to the 2007 Amendments

15. The Constitution of the Republic of Bulgaria was adopted by the Grand National Assembly on 12 July 1991. It provides that the judicial branch of government shall be independent (Article 117.2) and that the judicial branch of government shall have an independent budget (Article 117.3). The judicial branch of government consists of three parts (a) the courts, (b) the prosecutor's office and (c) investigating bodies which are responsible for performing the preliminary investigation in criminal cases.

16. Justice is administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, courts of assizes (referred to in the most recent text as regional courts), courts martial and district courts. Specialised courts may be set up by law, but extraordinary courts are prohibited (Article 119).

17. Judges, prosecutors and investigating magistrates are elected, promoted, demoted, re-assigned and dismissed by the Supreme Judicial Council which consists of 25 members (Article 129(1)) and has three *ex-officio* members, the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Prosecutor General. Eleven of the members of the Supreme Judicial Council are elected by (a majority of) the National Assembly, and 11 are elected by the bodies of the Judiciary. All 22 elected members must be practising lawyers (jurists) of high professional and moral integrity with at least 15 years of professional experience. The elected members of the Supreme Judicial Council serve terms of 5 years. They are not eligible for immediate re-election. The meetings of the Supreme Judicial Council are chaired by the Minister of Justice, who shall not be entitled to a vote (Article 130) and does not count as one of the 25 members of the Council.

18. Judges, prosecutors and investigating magistrates become irremovable after they have completed a five-year term of office following attestation and a decision of the Supreme Judicial Council. After that, their office ends only upon completion of 65 years of age, resignation, entry into force of a final sentence imposing imprisonment for an intentional criminal offence, permanent *de facto* inability to perform their duties for more than a year, or serious infringement or systematic neglect of their official duties, as well as acts undermining the prestige of the Judiciary.

19. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General are appointed and removed by the President of the Republic upon a proposal from the Supreme Judicial Council. Appointment is for a period of 7 years, and they are not eligible for a second term in office. The President may not refuse an appointment or removal upon a repeated proposal from the Supreme Judicial Council. An amendment to the Constitution in 2003, which would have permitted the removal of these three judicial officers by a vote of two-thirds of the National Assembly, was held unconstitutional by the Constitutional Court. Presidents of the other judicial bodies are appointed for a period of 5 years and are eligible for a second mandate.

20. The organisation and functioning of the Supreme Judicial Council, the courts, the prosecution office and the investigating magistracy, the status of the judges, prosecutors and investigating magistrates, the conditions and the procedure for the appointment and removal

from office of judges, court assessors, prosecutors and investigating magistrates, and the materialisation of their liability are to be established by law (Article 133).

21. The prosecution office is responsible for bringing charges against criminal suspects, overseeing the enforcement of penalties, acting for the rescinding of all illegitimate acts, and taking part in civil and administrative suits whenever required by law. An amendment passed in 2006 has also attributed the responsibility for leading investigations, supervising the legality of investigations and conducting investigations (Article 127). The investigating magistry are within the system of the judiciary (Article 128).

2.2. The February 2007 Amendments to the Constitution relating to the Judiciary

22. The amendments to the Constitution made in February 2007 give effect to the following changes.

(1) Article 130, which deals with the Supreme Judicial Council, has new paragraphs (6), (7), (8) and (9). Paragraph 6 confers on the Supreme Judicial Council power to appoint, promote, transfer and remove from office judges, prosecutors and investigating magistrates, impose disciplinary sanctions of demotion and removal from office on judges, prosecutors and investigating magistrates, and organise the qualification of judges, prosecutors and investigating magistrates. In this regard, the provision repeats what is already stated in Article 129(1). The paragraph also provides that the Council will adopt the draft budget of the Judiciary.

(2) Article 130(7) provides that the Council will determine the scope and the structure of annual reports which the new Article 84(16) requires the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General to produce. These have to be heard and passed by the Supreme Judicial Council (Article 130) and then submitted to the National Assembly which must also hear and pass those reports (Article 84 (16)).

(3) A new provision in Article 130(8) provides that the mandate of an elected member of the Supreme Judicial Council is to expire in the event of resignation, a final judicial conviction for a crime, permanent *de facto* inability to perform duties for more than one year, disciplinary removal from office or deprivation of the right to pursue a legal profession or activity. In such an eventuality the new member must be elected from the same electoral component and will hold office until the expiry of the mandate (Article 130(9)).

(4) Article 132, which provides for the civil and criminal immunity of judges, prosecutors and investigating magistrates, is amended so as to provide that immunity now extends only to their official acts and that even then the immunity does not extend to acts which constitute an indictable intentional offence.

(5) The amendments of 2007 also provide for the establishment of an inspectorate to the Supreme Judicial Council, which consists of a chief inspector and ten inspectors. The inspectors are to be elected by the National Assembly by qualified majority vote for four years except in the case of the Chief Inspector, whose term is five years. They may be re-elected "not for two consecutive mandates" (Article 132a(4)). It is not totally clear in the English text what this means but it is assumed to mean that they are not eligible for a mandate that follows immediately their first mandate. The budget of the inspectorate is adopted by the National Assembly within the framework of the budget of the judiciary. According to Article 132a(6)

> *"the Inspectorate shall inspect the activity of the judicial bodies without affecting the independence of judges, court assessors, prosecutors and*

investigating magistrates while performing their duties. The chief inspector and the inspectors shall be independent and shall obey only the law while performing their duties. They are to submit an annual report to the Supreme Judicial Council and may send proposals and reports to other state bodies, including the competent judicial bodies."

(6) A new Article 130a, inserted in 2006, provides that the Minister of Justice will propose a draft budget of the Judiciary and submit it to the Supreme Judicial Council for consideration, will manage the property of the Judiciary, will make proposals for appointment, promotion, demotion, transfer and removal from office of judges, prosecutors and investigators, and will participate in the organisation of the qualification of judges, prosecutors and investigators.

2.3. Supreme Judicial Council

2.3.1. Election of the parliamentary component by simple majority

23. The issues raised relating to the structure of the Supreme Judicial Council have not been addressed since the earlier Venice Commission opinions. Eleven members are still elected by Parliament where it remains possible for a simple majority of Parliament to elect all of these members. In the past it has been the case that all eleven members were elected by the governmental majority against the votes of the opposition.

24. In reply to this comment, the Bulgarian authorities have pointed out that the Supreme Judicial Council is not politicised because:

a) 11 members are elected by the Judiciary itself.
b) The three *ex officio* members are appointed to their posts by the President of the Republic upon nomination by the Supreme Judicial Council.
c) The tenure of the Supreme Judicial Council is five years whereas that of Parliament is four years. Consequently, these terms do not overlap.
d) The SJC is a permanent body, i.e. its members work full time and suspend their work at their previous posts. As such they are politically, financially and organisationally independent and they can be removed only under very restrictive circumstances.
e) The Council has its own budget, administration and inspectorate.
f) Also in other countries simple majorities elect the judicial council, while other countries have no such council at all.

25. The Commission wishes to underline that its Opinion does not comment on the present composition of the Supreme Judicial Council, neither as a whole nor any of its members. However, what counts for every judge - that judges not only have to be independent but also have to be seen to be independent - is all the more true of the Judicial Council, entrusted with the task to guaranteeing the independence of the Judiciary, which also reviews acts of the executive. The election of 11 members of this body by a governmental majority only, weakens its legitimacy and does not provide it with a sufficiently broad support in society.

26. The argument that judicial councils do not exist in all countries is valid, but does not exclude that adequate alternatives exist to promote and guarantee the independence of the judiciary What is more important, however, is that the Venice Commission does not orient its non-binding recommendations at the lowest common denominator of existing systems but will focus on what in its opinion is needed to fully comply with European standards. On a general basis, the Commission has dealt with the election of judicial councils also in its document on judicial appointments (CDL-AD(2007)028, para. 32). When asked in respect of any given country, it will make recommendations on this point based upon this general opinion, and taking the specificities of that country's system into account.

27. The Commission does recognise that the permanent status of the members of the Supreme Judicial Council, its administrative and financial independence and the terms of office, which is distinct from that of Parliament enhance the conditions of independence also of its 11 members elected by Parliament. Nonetheless, the following comment from the Opinion of 22-23 March 1999 remains relevant:

> "30. The composition of the Council as set out in the Act is not in itself objectionable. It could work perfectly well in an established democracy where the administration of justice is by and large above conflict of party politics and where the independence of the Judiciary is very pronounced and well established. In such a situation, one would not expect the representatives of Parliament on the Council to be elected strictly on party lines and in any event, even if that were to happen, those elected would not feel in any way committed to act under instructions or directives from the party that elected them.
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> 31. The Venice Commission considers that even though the Supreme Judicial Council may not in fact have been politicised it is undesirable that there should even be the appearance of politicisation in the procedures for its election. In each of the two most recent elections for the parliamentary component of the Supreme Judicial Council, under two different Governments the respective opposition parties did not participate with the result that on each occasion the parliamentary component of the Supreme Judicial Council was elected exclusively by representatives of the governing parties.
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> 32. A high degree of consensus in relation to the election of this component should be sought. The Bulgarian Parliament discusses nominations in advance of the vote in the plenary in a parliamentary committee. Such a mechanism should be capable of being used to ensure appropriate opposition involvement in elections to the Supreme Judicial Council."

28. The problems identified in this passage continue and have not been solved by any amendment to the Constitution since then. Unfortunately, the amendments of February 2007 even create incoherence in the system. The members of the new Inspectorate - which is seen as a subsidiary organ to the Supreme Judicial Council by the Bulgarian authorities - are elected by a two-thirds majority of the National Assembly whereas the election of the parliamentary component of the Supreme Judicial Council requires only a simple majority. Why should a subsidiary organ enjoy the trust of a qualified majority of Parliament, whereas a simple governmental majority is deemed sufficient for the Council, which is in charge of the Judiciary as a whole?

2.3.2. Role of the Minister of Justice as chair of the Supreme Judicial Council

29. The role of the Minister of Justice as chair of the Supreme Judicial Council also gives rise to some problems (even though he has no vote). The Venice Commission's opinion of 22-23 March 1999 (CDL-INF(1999)005) suggested that the Minister of Justice should not chair the Council when it is discussing proposals made by the same Minister. At the time, the Minister of Justice had been given new powers to make proposals to the Supreme Judicial Council in relation to appointing and dismissing judges, which had formerly been the prerogative of the presidents of the different branches of the judiciary. The amendments of 2006 seem to go even further in giving the Minister for Justice exclusive power to propose a draft budget for the judiciary and submit it to the Supreme Judicial Council for consideration, to make proposals for appointment, promotion, demotion, transfer and removal from office, to manage the property of the judiciary, and to participate in the organisation of the training of judges, prosecutors and investigators. This power are very extensive and may compromise the independence of the judicial branch of government by giving the Minister

undue power over the judicial branch because he or she both makes these key proposals and chairs the Council that has to adopt a position on these proposals at the same time.

30. While the Constitution *à priori* seems to confine the power of initiative for all its activities to the Minister of Justice, the Commission's delegation learned that also the other members of the Council have a right to initiative. However, the direct constitutional basis for this right for the Minister, taken together with his or her chairmanship in the Council, clearly give an elevated weight to the proposals by the Minister as compared to that of any other member of the Council. The Minister will be the driver of the Council's activities. This does not seem to be in accordance with the principle of judicial independence.

31. In particular, it is difficult to see how the amendments conferring the right to propose the budget on the Minister of Justice rather than on the Supreme Judicial Council itself are consistent with Article 117 under which the judiciary is to have an independent budget. The Bulgarian authorities have pointed out that the Minister only proposes the budget as a basis for discussion in the Supreme Judicial Council, which then decides on the final draft to be submitted to Parliament. Still, by making a first proposal and chairing the Council, the Minister clearly retains the leading role in the process.

32. The combination of these powers with the fact that 11 out of the 25 members of the Council are directly elected by the governmental majority in Parliament, while the 11 members of the judicial component are elected by scattered elements in the Judiciary from its three separate branches seems to place the Minister of Justice in a very dominant position over the Judiciary, given his or her undoubted influence in relation to matters of appointment, dismissal, discipline and the like. Consequently, at least when discussing proposals made by the Minister, the latter should not chair the Council (in general, see also the Venice Commission's Report on Judicial Appointments, CDL-AD(2007)028, para. 35, which recommends attributing the chair of the council to one of its non-judicial members).

2.3.3. Representation of judges, prosecutors and investigators in the Supreme Judicial Council

33. A further problem is caused by the fact that three distinct components of the judicial branch in Bulgaria, the judges, the prosecutors and the investigating magistrates, are all represented in a single body. There is, of course, no objection to prosecutors forming part of the judicial branch as is the case in many countries. However, it is important to maintain the distinction as to functions and powers between public prosecutors and court judges. In this regard, certain passages in the explanatory memorandum to Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System are of interest.

> *"Relationship between Public Prosecutors and Court Judges*
>
> *The Committee considered it important to state clearly that, although, public prosecutors and judges are part of the same legal system and although the status of certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterised by mutual respect, objectivity and the observance of procedural requirements." (Explanatory Memorandum to Recommendation (2000) 19, pp 33-34)*

34. In the light of this, the Commission would have concerns about a system under which persons directly representing prosecutors are members of the body which exercises functions of appointment, discipline and dismissal over the judges.

35. Article 117(2) puts the prosecutors on the same line with judges as members of the Judiciary. If this was a matter of terminology only, it would not meet with much objection. However, the provisions that follow this provision indicate that it has as a consequence that the different functions of the courts and the prosecution are not sufficiently taken into account. The prosecution should have no involvement whatsoever in the ultimate administration of justice, nor in the appointment and functioning of judges, and the operation of the court system.

36. The Bulgarian authorities have pointed out that within the Council the judges enjoy a majority because its judicial component is composed of 6 judges, 4 prosecutors and 1 investigator. Parliament had taken into account the same proportion at the election of its component of the present Council, which means that together with the two *ex officio* Presidents of the Supreme Court of Cassation and the Supreme Administrative Court a majority of 14 judges sit in the Council. In addition, becoming permanent members of the Council, magistrates would not represent the 'guild' they emanate from (judge, prosecutor or investigator).

37. This calls for a threefold reply. First, the fact that the present Parliament followed the ratio between judges and other magistrates prescribed for the judicial component does in no way guarantee that this will be the case also for future appointments. Again, the recommendations of the Venice Commission do not criticise present post holders but seek to ensure the independence of the judiciary independent of present practice or intentions. A present practice cannot be a surrogate for a constitutional guarantee.

38. Second, if judges were no longer count as 'judges' once being member of the Council, an even more serious problem for independence would arise because then, with the exception of the two supreme court presidents, judges would not be represented at all ! This cannot be a valid understanding of the Council's composition.

39. Third, consequently, we are faced with a Judicial Council in which a majority of judges decides on the appointment and promotion of prosecutors and investigators. This situation clearly is undesirable as well.

40. While there are no problems in principle with a single judicial council which would deal with the three separate branches of the judiciary, in that situation appropriate specialised committees or chambers should deal with matters pertaining to the particular branches of the judicial arm so as to ensure that there is not a risk of influence being brought by one branch towards the other.

2.4. Further judicial issues

2.4.1. Annual reports

41. *A priori*, the new proposals for annual reports to be provided to the Supreme Judicial Council by the Supreme Court, the Supreme Administrative Court and the Prosecutor General, and requiring those reports to be heard and to be passed both by the Council and by the National Assembly, also give rise to concern. There can be no objection to an annual report which provides factual information relating to, for example, the number of cases heard, the aggregate outcome of those cases, the number of judges employed and the general way in which the budget has been spent etc., but any suggestion that a report from the judiciary requires approval from the National Assembly as well as from a body composed largely of persons elected by the parliament give rise to concern as to a possible compromise of the position of the judges.

42. The Bulgarian authorities have explained that the word 'pass' does not mean approval of these reports by the Council and by Parliament, and that no individual cases are discussed. The recent discussion of such a report by the Prosecutor General seems to have triggered useful discussions on judicial reforms in Parliament.

43. With this understanding, the Commission has no objection to the reports.

2.4.2. Role of the Prosecutor's office

44. In 2006, the Prosecutor's Office was given a power to lead the investigation and supervise its legality (Article 127.1). The function of investigating magistrates has historic roots but their role has been reduced in the wake of the accession to the European Union. The Venice Commission has no objection to investigators as such.

45. General powers to "act for the rescission of all illegitimate acts" clearly would go too far if they would imply that the prosecutors could intervene in cases in which they are not merely parties. The competences of the prosecution should be restricted to acting on behalf of the State in criminal cases and – if required – to acting on behalf of the State as a party in civil cases. The prosecution should not be given a general mandate in matters perceived to be illegitimate and clearly should have no powers of supervising or interfering with the courts. The delegation of the Venice Commission was satisfied to learn that the powers of the prosecutors' office are limited to act as a party in proceedings before the courts and the prosecutors do not have a general right to 'supervision' of court proceedings. However, this should be expressed more clearly in the text.

2.4.3. Inspectorate

46. According to the Constitution, the Inspectorate is an independent body. As it is elected by a majority of two-thirds of the members, there is some likelihood that it will be a body elected by consensus, as opposed to the component elected to the Supreme Judicial Council by the National Assembly. On the other hand, the Inspectorate has no input from the Judiciary. It is of assistance that it is expressly stated that the Inspectorate is to inspect the activity of the judiciary bodies without affecting the independence of judges, court assessors, prosecutors and investing magistrates while performing their duties. Nonetheless, it is conceivable that the activities of such a body could have a chilling effect on the judiciary to some extent. The inspection, therefore, should only concern material issues such as the efficiency with which the judicial bodies have spent the money allocated to them. The inspectors should not have the power to investigate complaints; that should be left to the Supreme Judicial Council itself, since this requires knowledge of or experience with the administration of justice.

47. It is noted that the reports of the Inspectorate are to the Supreme Judicial Council rather than to the National Assembly, but nonetheless it would be preferable to minimise the political input into the appointment of members of the Inspectorate so as to ensure that it is not used as a mechanism to compromise the independence of the judiciary while at the same time ensuring that it is genuinely a tool to ensure the efficiency of the judiciary.

2.4.4. Probationary period for judges

48. Already in its 2002 opinion, the Venice Commission was critical of a probationary period of three years for judges (CDL-AD(2002)015, para. 34 seq.). Article 129(3) now provides for a Probationary period of even five years. Probationary periods raise serious difficulties for judicial independence but if they are to apply they should not be longer than is needed to assess a judge's suitability. Five years seems too long a period. The Venice Commission considers that setting probationary periods can undermine the independence of judges,

since they might feel under pressure to decide cases in a particular way. This should not be interpreted as excluding all possibilities for establishing temporary judges. If probationary appointments are considered absolutely indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office" (see also CDL-AD(2007)033, para. 38 seq.).

2.4.5. Other issues

49. Article 122(2) on the right to legal counsel remains silent about the right to and conditions of free legal aid. It would be preferable to guarantee this right already on the constitutional level and not to leave this issue to the legislature alone.

50. The wording of Article 124 gives the false impression that the Court of Cassation has also jurisdiction to review the judgments of the Supreme Administrative Court ("all courts"). It should expressly exclude administrative justice from the jurisdiction of the Supreme Court of Cassation. Also in Article 120(1) it should be specified which court or courts will have jurisdiction to review administrative acts. As the provision reads, it suggests that all courts do so. This may be clear in practice but it would seem necessary to make the wording of the Constitution unambiguous.

51. The scope of jurisdiction of the Supreme Administrative Court is not very clear. The words "other acts established by law" in Article 125(2) are very general and vague. The core of the scope of jurisdiction should be regulated in the Constitution, especially whether administrative jurisdiction also extends to judicial review of administrative acts of local authorities.

52. As concerns the removal from office because of disability or due to disciplinary reasons (Article 130(8) items 3 and 4), it should be specified in the Constitution by whom the member may be removed (preferable the Council itself), since this could lead to interference with the nomination procedure of judges.

53. It should be indicated whether the judge concerned may lodge an appeal against the decision of the Supreme Judicial Council (Article 131) to a court other than the court to which he belongs or wished to be admitted. Since the Judicial Council is not a court, access to court should in principle be open to members of the judiciary to have their "civil rights" determined (Article 6 of the European Convention on Human Rights).

54. The new provisions of the Constitution in relation to civil and criminal immunity are in line with previous recommendations of the Venice Commission and are to be welcomed (Article 132).

3. Human rights

3.1. Discrimination against foreigners

55. A major concern of the rapporteurs was that a number of provisions of the Bulgarian Constitution seem to restrict fundamental rights to citizens only. This issue was addressed by the new translation of the Constitution (CDL(2007)077rev). Now, a footnote next to Article 6 explains that the "term 'citizen' refers to all individuals to whom this Constitution applies". Consequently, it seems that the term "citizen" shall be read as "everyone", except when it is used together with the adjective "Bulgarian" (Articles 24(2), 25, 26(1), 35(2), 36(1), 59, 65 and 110).

56. The Venice Commission does not allege that in practice there is discrimination against foreigners and the Commission takes good note of the explanation by the Bulgarian authorities that ordinary legislation rules out such discrimination.

57. Nonetheless, the Commission remains of the opinion that the equivalent of "citizen" should be replaced with the equivalent of "everyone" during a future constitutional revision. This would make the wording of the Constitution unambiguous. It would also make the wording more consistent. The provisions where the wording should be changed are as follows:

- The title of Chapter Two of the Constitution ("Fundamental Rights and Obligations of Citizens")
- Article 6(2) (equality)
- Article 19, paragraphs 2 and 4 (economic freedoms),
- Article 43 (peaceful assembly)
- Article 48 (right to work),
- Article 41(2) (right to information)
- Article 44 (right to association**)**
- Article 45 (right of petition)
- Articles 51-53 and 55 (right to social security and welfare aid, right to medical insurance, right to found schools and the to a healthy environment)
- The obligations enumerated in Articles 58, 60, 61, 80 and 86(2)
- Article 117(1) (protection of the rights and legitimate interests by the Judiciary)
- Article 120(2) (right to contest administrative acts)
- Article 122(1) (right to legal counsel)
- Article 134(1) (assistance by the bar)
- Article 136(1) (right to participation in local government, at least as concerns EU citizens)
- Article 150(3) (the Ombudsman's right to appeal to the Constitutional Court requesting the annulment of laws, which infringe upon human rights).

58. It is also preferable not to include a provision about the definition of "citizenship" in the sense of "Bulgarian citizenship" in the chapter dealing with fundamental rights, since this creates the wrong impression that, in principle, only citizens are entitled to those rights. Consequently, Article 25 ought to be included rather in Chapter One.

59. The Venice Commission learned that discrimination on the ground of sexual orientation is excluded on the level of ordinary law. The Commission recommends adding this guarantee on the constitutional level as well, following trends into that direction in Europe.

60. As far as the rights of foreigners are concerned, there should be a reference to the obligations of Bulgaria resulting from its accession to the European Union, and to other treaty obligations, comparable to the reference in new Article 22.

61. The exclusion from local elections of non-citizens who are not EU citizens in Article 42(1), even if they have been residents of the country for a long time, is not in violation of any international or European legal rule, but deviates from a more and more common trend in Europe. It is recommended that this point be reconsidered.

3.2. Rights of minorities

62. Based on the obligation of equal treatment of persons belonging to National Minorities under the Framework Convention, the Commission deems it preferable that the Constitution expressly takes into account the rights of these persons rather than to rely on the general rule of non-discrimination only.

63. Rights of minorities relate to a number of Articles, starting with Article 1(3) which refers to no part of the people usurping the expression of the popular sovereignty. Article 2 prohibits the possibility of autonomous territorial formation. Article 3 provides for Bulgarian to be the official language of the Republic while the later provisions of Article 26 are at best barely tolerant of other languages.

64. Article 11(4) prohibits the existence of political parties on ethnic, racial or religious lines. A concern to protect the unity and integrity of the state is of course fully acceptable. Like the second paragraphs of Articles 9 and 10 of the Convention on Human Rights, paragraph 2 of Article 11 of the European Convention allows limitations to the right of association. However, according to the case law of the European Court of Human Rights such limitations have to be proportional (see for example *United Communist Party of Turkey and Others v. Turkey*, Reports no. 1998-I and *Sidiropoulos and Others v. Greece*, Reports 1998-IV). It is therefore the Commission's concern that such provisions could be used to prevent minority linguistic, ethnic or religious groups from organising themselves at all.

65. The Bulgarian authorities point out that Bulgaria protects human rights including those of persons belonging to ethnic, religious and linguistic minorities. Bulgaria ratified the Framework Convention for the Protection of National Minorities. Decisions of the Constitutional Court of Bulgaria recognise "the existence of religious, language and ethnic differences, respectively of bearers of such differences" (Decision No. 4 of 1992). The Bulgarian authorities insist that Bulgaria's model of interethnic relations, based on the values of civil society and pluralist democracy is successful.

66. The Commission understands these arguments. Nonetheless, it suggests to amend some of the above mentioned provisions in the Constitution by softening their wording in order to convey an open attitude towards minorities also in the language used in the Constitution.

3.3. Limitations of Human Rights

67. A number of articles of the Constitution guarantee human rights but remain silent about possible limitations to these rights or simply refer to limitation by law without giving substantive criteria as to the scope of such laws. For example, the grounds for limiting the right to respect of privacy (Article 32), should preferably be listed in an exhaustive way in the Constitution itself in accordance with the second paragraph of Article 8 of the European Convention on Human Rights ("in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

68. The Bulgarian authorities have pointed out that through its ratification, the Convention is part of the national legal system and, consequently, the 'second paragraphs' of the Convention rights, i.e. the limitation clauses, are part of national law. The Venice Commission maintains, however, that it is preferable from the point of view of effective protection of the rights concerned that such substantive limitation clauses be added to the various rights of the human rights chapter in the Constitution itself. Most of the rights enshrined in Chapter 2 of the Constitution do not contain limitations clauses at all. This is however too optimistic a view. A number of human rights do need the possibility of their limitation in the general interest. Where such limitations are necessary, they themselves need to be limited in order not to encroach on the essence of these rights and to be restricted to "pressing social needs". This is the purpose of the second paragraphs of human rights clauses. The limitation of the limitation results in an effective guarantee for human rights.

69. Furthermore, reliance on the second paragraphs of the Convention as part of national law creates a problem of hierarchy in the Bulgarian legal system. As an international treaty, the Convention ranks between the Constitution and ordinary law. Consequently, a right guaranteed by the Constitution without limitation clause cannot be limited by such a clause in a lower ranking text and no limitation would be possible at all ! In practice, such a situation is untenable and the legislator will be forced to limit certain rights. However, in order to avoid excessive limitations, 'their regulation should be added directly in the Constitution.

70. For example, the provision in Article 28 that every attempt on human life shall be punished as a most serious crime needs to be limited. Exceptions need to be made if, e.g., a policeman kills a person in a proportional act of self defence or in defence of another person.

71. In Article 33(2) there is a limitation clause but the term "extreme necessity" is not sufficiently determined. Again, the Constitution should refer to specific grounds of limitation of the right to the inviolability of the home in conformity with the second paragraph of Article 8 of the European Convention on Human Rights (see paragraph 67).

72. It would be preferable to list exhaustively the grounds of interference in family life also in Article 47(5) of the Constitution, in accordance with the second paragraph of Article 8 of the European Convention on Human Rights (see paragraph 67).

73. In accordance with Article 15(2) of the European Convention on Human Rights, the list of non-derogable rights in Article 57(3) should also include a reference to Article 5(3) (*nullum crimen, nulla poena sine lege)*.

3.4. Other human rights issues

74. Article 11(4) seems not to be in conformity with the freedom of association as laid down in Article 11 of the European Convention on Human Rights, since the exclusions mentioned - with the exception of "parties which seek the violent seizure of state power" - cannot be justified on the basis of the second paragraph of Article 11 ECHR. Political parties of a specific denomination are quite common in Europe.

75. The Venice Commission was informed that the special status of the Eastern Orthodox Christianity - Article 13(3) - does not have any legal consequences that would grant it a privileged treatment in violation of the prohibition of discrimination on the basis of religion laid down in Article 6(2). This explanation is satisfactory.

76. Article 18(3) should either itself, or by reference to an implementing law, ensure that the State rights with respect to radio frequencies do not stand in the way of a reasonable and proportional access to these frequencies by private broadcasting corporations. The reference in paragraph 5 is too vague in that respect, because it does not contain any constitutional guarantee of access.

77. Article 31(2), which guarantees that no one shall be forced to plead guilty, does not sufficiently cover other aspects of the right to remain silent in order not to incriminate oneself, and the right to be informed about this right. The provision prohibiting conviction solely by virtue of a confession is unusual. A confession could contain information, which could be known only to the perpetrator of the crime.

78. Article 31(5) guarantees that prisoners are kept under good conditions but does not seem to take into account the situation of persons who have been detained but not (yet) sentenced.

4. Other issues

79. The provision in Article 7, which establishes State liability, should specify whether it also includes illegitimate rulings and acts of the legislature and the judiciary.

80. The new translation of Article 65(2) clarifies that it is civil servants (probably including members of the judiciary) but not local board or council members who have to suspend their activities upon candidacy to the National Assembly.

81. The election of the Ombudsman (Article 91a(1)) should require a qualified majority to provide the office with a politically and socially broad base.

82. If and for as long as the Chairperson of the National Assembly will have to assume the Presidency of the Republic, his or her chairmanship in the Assembly will have to be performed by his or her deputy. Otherwise there may be the appearance of an overlap of executive and parliamentary powers (Article 97(4)).

83. It is not clear how the responsibility of the Prime Minister under paragraph 2 of Article 108 relates to the responsibility of each individual minister for his or her own activities under paragraph 3.

84. The "populace" in Article 138 would seem to include also non-citizens, while Article 42(1) indicates that only citizens may vote in local elections. As said before, there is a trend in Europe to also give the right to vote in local elections to non-citizens with a long period of residence.

85. While it is unusual to leave an option as to the way in which the mayor will be elected, the Venice Commission was informed that this is a general choice left to the legislator not an individual choice for each municipality. Consequently there is no objection to such a choice. Moreover, it is rather unusual that, also in large municipalities, the executive powers are invested in one person only (Article 139).

86. It seems that the regions have as their main task to enforce the policy of the central state *vis à vis* the municipalities (Article 143(3)) and do not enjoy any regional autonomy, which would allow them to pursue specific regional interests. The "regional policy" referred to in Article 142 would thus in fact be a central policy on regions rather than a policy developed by the regions themselves. While such a strongly centralised approach remains a possible option, it should be noted that in Europe there is a tendency to provide for autonomy also on the regional level in line with the principle of subsidiarity.

87. While this is not specified in the Constitution, according to Article 11 of the Constitutional Court Act, it is the Court itself, which takes note of or decides on the termination of the mandate of one of its members. Very positively as well, Article 5(2) of the Constitutional Court Act provides that the member concerned will continue to function until a successor has assumed his or her duties. This avoids situations where the Court cannot convene because of lack of quorum.

88. The Venice Commission welcomes the revised Article 150(3) of the Constitution, which allows the Ombudsman's to appeal to the Constitutional Court seeking the annulment of unconstitutional legislation. The Commission suggests that this appeal could be complemented by an individual appeal to the Court. An overburdening of the Court could be avoided by limiting such appeals to cases where the application of an unconstitutional law is alleged as opposed to an unconstitutional individual act.

89. The secondary legislation of the European Union would seem not to be covered by "international treaties to which Bulgaria is a party" in Article 149(1). It is recommended to mention European Community law.

5. Conclusion

90. The provisions of the Constitution of the Republic of Bulgaria, including its recent amendments, are generally in conformity with European standards and in line with constitutional practice in other European states. The Constitution has provided a sound framework for the development of a democratic system in Bulgaria and this achievement has been internationally recognised by Bulgaria's accession first to the Council of Europe and thereafter to the European Union.

91. This does, however, not mean that there is no room for further improvements in the text. This concerns in particular:

1. Provisions concerning the possibility of restricting the enjoyment of certain fundamental rights are not sufficiently specific
2. The rights of persons belonging to national minorities should be more clearly safeguarded on the level of the Constitution.
3. The election of the Ombudsman should require a qualified majority.

92. Furthermore, a number of issues in Chapter Six on the Judiciary give rise to comment:

1. The role of the Minister of Justice as chair of the Supreme Judicial Council with the right to initiative is problematic.
2. The Minister's right to propose the budget may contradict the constitutional principle of the budgetary independence of the Judiciary.
3. Membership in the Judicial Council should be incompatible with any representative mandate or political function.
4. It should be ensured that within the Supreme Judicial Council judges, prosecutors and investigating magistrates cannot interfere within each other's affairs.
5. The Probationary period of five years for new judges raises serious difficulties for judicial independence
6. The Inspectors are given too broad powers, with the risk of interference in the administration of justice.

93. The new provisions of the Constitution in relation to civil and criminal immunity in the Judiciary are in line with previous recommendations of the Venice Commission and are to be welcomed. On the other hand, the difficulties relating to the structure of the Supreme Judicial Council have not been addressed since the earlier Venice Commission opinions. Eleven members are still elected by Parliament while it remains possible for a simple majority in Parliament to elect all of these members. One solution might be to have only one third of the members of the Council to be elected by Parliament with a qualified majority.

94. The Venice Commission welcomes the constructive reaction of the Bulgarian authorities to this opinion and remains at their disposal as well as that of the Parliamentary Assembly for further co-operation.