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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS
ON CONSTITUTIONAL AMENDMENTS
REFORMING THE JUDICIAL SYSTEM
IN BULGARIA**

by
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Proposed Amendments to the Constitution of Bulgaria concerning the tenure and terms of office of Judges, Prosecutors and Investigators.

1. The opinion of the Venice Commission is sought in relation to a proposed amendment to the constitution of Bulgaria which deals with the tenure and term of office of judges, prosecutors and investigators.

The Existing Provisions

2. Article 129 of the Constitution of Bulgaria provide that judges, prosecutors and investigating magistrates shall be elected, promoted, demoted, re-assigned and dismissed by the Supreme Judicial Council. The chairman of the Supreme Court of Cassation, the chairman of the Supreme Administrative Court and the Chief Prosecutor are appointed and dismissed by the president of the Republic on a motion from the Supreme Judicial Council for a period of seven years, and are not eligible for a second term in office. The president may not deny an appointment or dismissal on a repeated motion. Judges, prosecutors and investigating magistrates become unsubstitutable upon completing a third year in office. They may be dismissed only upon retirement, resignation, upon the enforcement of a prison sentence for a deliberate crime, or upon lasting actual disability to perform their functions over more than one year.
3. Article 131 of the Constitution of Bulgaria provides that any resolution of the Supreme Judicial Council to appoint, promote, demote, re-assign or dismiss a judge, a prosecutor or an investigating magistrate, or a resolution pursuant to Article 129 paragraph 2 (which relates to the removal of the chairmen of the two Supreme Courts or the Chief Prosecutor) shall be passed by a secret ballot.
4. Article 132 of the Constitution provides that judges, prosecutors, and investigating magistrates shall enjoy the same immunity as the members of the National Assembly. This immunity is defined in Articles 69 and 70 of the Constitution which provide that members of the National Assembly shall not be criminally liable for their opinions or votes in the National Assembly, and that a member of the national assembly shall be immune from detention or criminal prosecution except for the perpetration of a grave crime, when a warrant from the National Assembly or, in between its session, from the chairman of the National Assembly shall be required. No warrant is required when a member is detained in the course of committing a grave crime but the National Assembly, or, in between its sessions, the chairman of the National Assembly, shall be notified forthwith. Article 132(2) provides that the immunity of a judge, prosecutor or investigating magistrate shall be lifted by the Supreme Judicial Council only in the circumstances established by the law.

The Proposed Constitutional Amendments

5. The proposal to amend the Constitution would have the following effects:

- (a) At present judges, prosecutors and investigating magistrates become permanent upon completing a third year in office. This will be changed to completion of five years service as a judge and the irremovability will not operate unless the judge has been attested and the Supreme Judicial Council decides that he or she is to become irremovable.
- (b) There are some changes in the criteria for removal of a judge. The retirement age is to be fixed at 65 years which is not mentioned in the existing Constitution. A new ground of removal is to be added if judges “systematically fail to perform their official responsibilities or perform activities that undermine the prestige of the judiciary”.
- (c) A provision is to be added to the Constitution to the effect that administrative officials are to be appointed for a term of five years with a right to subsequent appointment.
- (d) A number of changes are proposed to the existing immunity of judges. Firstly, it is to be clarified that judges, prosecutors and investigators shall not bear criminal or civil liability for actions they perform or rulings they deliver in the course of performing their official duties, except where the action performed constitutes a premeditated offence of general character. In such an event, accusation may not be brought against a judge, prosecutor or investigator without the permission of the Supreme Judicial Council. Judges, prosecutors and investigators are not to be detained except for statutory felonies and only with the permission of the Supreme Judicial Council. Permission is not to be required in the event of arrest for a felony in the act. Where the permission of the Supreme Judicial Council is required this must be obtained following a motivated request to the Council either by the Chief Prosecutor or at least one-fifth of the members of the Council, in accordance with terms and procedures to be laid down in law.

Conclusions

- 6. A number of earlier opinions of the Venice Commission are relevant to the proposal. Those opinions have raised a number of concerns which are not addressed in the new proposal. The following matters appear to be relevant:-
 - (a) In its Opinion on the Reform of the Judiciary in Bulgaria adopted by the Commission on 22-23 March 1999 (CDL-INF (99)5) the Commission expressed concerns about the politicisation in the procedures for election of the parliamentary component of the Supreme Judicial Council. In a subsequent opinion on the draft law on amendments to the Judicial System Act of Bulgaria adopted by the Commission on 5-6 July 2002 (CDL-AD(2002)15) the Commission referred to the desirability of depoliticising the composition of the Supreme Judicial Council. The Commission also expressed concerns about procedural rules for disciplinary proceedings which permitted persons who called for disciplinary action against a judge to vote on their own proposal. The new proposal does not address any of the issues relating to the composition and powers of the Supreme Judicial Council although under the proposal the Council

will be given more extensive powers in relation to confirming the tenure of judges and removing them from office than exist at the moment.

- (b) In its 2002 Opinion the Commission expressed the opinion that the evaluation of judges, prosecutors and investigators during the three-year period before they became irremovable in their office should be restricted to courts of first instance. This would seem to be all the more important if the period during which a judge is to be evaluated is now to be extended to five years. However, the new proposal does not appear to be confined to the courts of first instance.
7. The proposed draft does address a number of problems which were identified by the Commission's delegation during its visit to Bulgaria on 18-20 May 2003. Amongst the recommendations of the Commission delegation were that magistrates should not benefit from a general immunity but that the immunity should be confined to protection from civil suits for actions done in good faith in the course of their functions. It is, however, unfortunate that the proposal will continue to provide for immunity from criminal process, albeit in a more limited form
8. Nor is it clear to me why the permission of the Supreme Judicial Council should be required for the detention of a judge, prosecutor or investigator charged with a felony or with an offence committed in the course of performing an official function (which would include the offence of taking a bribe). (Incidentally, I do not know whether the expression "statutory felonies" relates to all criminal offence or merely the most serious).
9. Among the reforms identified by the Commission delegation during the 2003 visit was a proposal in the following terms
- “any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion of the capacities or behaviour of the judges concerned before any political body or a body with a political component would make a final decision.”
- The proposal does not appear to contain any such safeguard for the independence of the judges and indeed by strengthening the power of the Supreme Judicial Council in relation to the removability of judges without taking any corresponding moves to depoliticise that body the scope of political interference in relation to the removal of judges remains and may indeed be increased.
10. So far as concern the new grounds for removal of the permanent status of a judge, the provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a clear provision which is not inappropriate. However the second leg of the definition refers to judges who perform activities who perform activities that undermine the prestige of the judiciary. This is a somewhat vague and subjective formulation and I think this provision should either be removed or made more specific so as to specify clearly what sort of conduct is envisaged by the provision.

11. I see no difficulty in principle with fixing a retirement age of 65 although it is somewhat lower than that fixed in many jurisdictions. It might be thought appropriate, however, to have a saver for any existing judges subject to a higher age limit if there are any such.
12. The proposal to strengthen the administrative officials in the organs of the judiciary seems to be an appropriate one.
13. As regards the procedures to be followed by the Supreme Judicial Council in lifting immunity, the 2002 Opinion of the Commission expressed concern relating to procedures which would allow a person to make a proposal in the Supreme Judicial Council and also to vote on it. These procedures are continued in the new proposal which indeed gives them constitutional expression. It would seem preferable that any such move should, as was recommended in relation to the removal of judges, require to be approved by a small expert body composed solely of judges who would give an opinion in relation to whether an immunity should be lifted.
14. As a general comment, the now clarified grounds on which a judge may be regarded as immune from civil or criminal prosecution seem to follow more closely the analogous provisions which apply in relation to members of the National Assembly.

James Hamilton
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