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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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## The Draft Law on the Amendment of the Constitution of the Republic of Bulgaria

### A. Topics and Proposals

1. The Declaration of Political Forces on the Main Directions of the Reform in the Bulgarian Judicial System, signed on April 2, 2003 and the Decision of the General Assembly of April 23, 2003 creates an Interim Committee for the Preparation of Proposals for Amendments to the Constitution of the Republic of Bulgaria.

2. The changes in the judiciary are pressing and are a priority because they affect directly the effective and unbiased functioning of the judicial system and are in response to the expectations of Bulgarian citizens.

3. The proposals for amendment of the Constitution in connection to the judicial reform, prepared and submitted as a Draft Law on the Amendment of the Constitution, pursuant to the requirements of Art. 154 of the Constitution, were drawn up and accepted with unanimity by the Interim Committee for the Preparation of Proposals for Amendments to the Constitution of the Republic of Bulgaria.

4. The proposed provisions affect three legal institutes of the judiciary:

- a) immunity
- b) irremovability of the judges
- c) term of office of the managerial positions.

5. The substance of the functional immunity of judges is manifested in the following two components:

a) Civil and criminal non-liability for actions performed in their official capacity and rulings delivered on cases and copies, except where the action performed is a premeditated offence of general character.

b) If, however, criminal prosecution were initiated in connection with a judge's actions performed in their official capacity or delivered rulings, then, in order for an accusation to be brought against such judge, there must be permission by the Supreme Judicial council (SJC).

6. The irremovability of judges is laid down even now as a principle in Art. 129.3 of the Constitution – after 3 years of working in the judiciary, one becomes “irremovable”; an irremovable judge may be removed from office only if there are four exhaustively specified grounds – only then can he/she leave the judiciary.

The new points in the proposed provisions of para.3 as follow:

Increase the required length of service after which judges acquire the status of irremovability from 3 to 5 years;

Along with the above, there is “promotion” to a constitutional provision of the requirement or affirmative attestation for the length of service;

Introduce a new ground for losing the status of irremovability and removal from office, namely: “systematic failure to perform their official duties or activities that undermine the prestige of the judiciary.

7. The term of office for managerial positions is another major characteristic that concerns the structure of the judiciary – administration of official duties. The rule appears to be that managerial position in courts, prosecutor’s offices and investigations services is occupied only for certain period after which the procedure for occupying this position is initiated again, etc.

As far as this essential feature is concerned, the term of office for managerial positions in the organs of the judiciary differs from the irremovability of judges. A judge who has become irremovable may occupy a managerial position and after that – another position, but he/she remains in the system of the judiciary unlike a judge who, losing his irremovability, leaves the judiciary.

#### B) The topics in the Consultative Council of European Judges

1. All the questions about the immunity, the irremovability of the judges and the term of office of the managerial positions are in relation to the independence of the judges

The independence involves irremovability, appointment for life and irresponsibility.

That means:

The judges must be appointed on full-time until the legal retirement age.

It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office.

The irremovability means that the judges cannot be removed from office or for another place save the exceptions foreseen in the law and particularly those deriving from disciplinary sanctions.

The irresponsibility it means that the judges cannot take responsibility for their decisions on cases. The law must foresee the terms of civil, criminal and disciplinary liability.

2. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Their independence is not a prerogative or a privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.

This independence must exist in relation to political power and in relation to every power of the society generally.

A fair judge must be in first place impartial – to have a subjective and an objective impartiality. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination, or bias, which affects – or may be seen as affecting – their ability to adjudicate independently.

The independence thus serves as the guarantee of impartiality. The impartiality is a duty of the judge. The independence of the judges is a duty for the State and for society generally. This has

implications, necessarily, for almost every aspect of a judge's career: from training to appointment and promotion and to disciplining.

3. The independence of the judiciary should be guaranteed by domestic standards at the highest possible level. Accordingly, States should include the concept of the independence of the judiciary either in their constitutions or among the fundamental principles acknowledged by countries which do not have any written constitution but in which respect for the independence of the judiciary is guaranteed by age-old culture and tradition.

The UN basic principles provide for the independence of the judiciary to be "guaranteed by the State and enshrined in the Constitution or the law of the country". Recommendation No. R (94) 12 specifies that: "The independence of judges shall be guaranteed pursuant to the provisions of the European Convention on Human Rights and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law".

The European Charter on the statute for judges provides still more specifically: "In each European State, the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level".

4. Tenure – period appointment: this the approach least problematic from the viewpoint of independence.

The basic principle of independence is not compatible with appointments for a limited period of years. The judge cannot be independent if he has a sword of Damocles suspended above his head. However, the UN basic principles, Recommendation No. R (94) 12 and the European Charter on the statute for judges all refer to the possibility of appointment for a fixed legal term, rather than until a legal retirement age.

The European Charter also refers to recruitment procedures providing "for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis".

## II

5. The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:

a) the judge, if he wishes, is considered for re-appointment by the appointing body and

b) the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.

6. The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and transparency of the method of appointment or re-appointment as a full-time judge are of special importance.

7. Tenure- irremovability and discipline:

It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office.

The European Charter affirms that this principle extends to appointment or assignments to a different office or location without consent (other than in case of court re-organisation or temporarily), but both it and Recommendation No. R (94) 12 contemplate that transfer to other duties may be ordered by way of disciplinary sanction.

Then we considered that the irremovability of judges should be an express element of the independence enshrined at the highest internal level; that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline, and that it would be useful to prepare standards defining, not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including, for example a move to a different court or area.

8. The functional immunity of judges:

11. The great corollary of the principle of independence of judges is the non-responsibility of them for their decisions.

However, the corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course.

The need for caution in the recognition of any such liability arises from the need to maintain judicial independence and freedom from undue pressure.

We must distinguish the criminal, civil and disciplinary liability.

Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes cannot claim immunity from ordinary criminal process. But must be entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.

The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has become common in some European States. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

9. About the civil liability we must say: as a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise in good faith of their functions. Judicial errors, whether in respect of jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, should be dealt with by an appeal; other judicial failings which cannot be rectified in this way (including excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State. That the State

may, in some circumstances, be liable under the European Convention of Human Rights, to compensate a litigant, is a different matter, with which this opinion is not directly concerned.

The European Charter on the statute for judges contemplates the possibility of recourse proceedings when the judges may incur civil liability for grossly wrong decisions or other gross failings, with the safeguard that prior agreement should be obtained from an independent authority with substantial judicial representation.

The Charter emphasises the need to restrict judges' civil liability to (a) reimbursing the State for "gross and inexcusable negligence" by way of legal proceedings requiring the prior agreement of such independent authority.

We think that it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions to any personal liability, even by way of reimbursement of the State, except in a case of wilful default.

#### C. The Constitutional Topics:

1. We think that the constitutional principles for judges are not the same for the public prosecutors (and investigating magistrates?).

2. It must be constitutional matter:

a) The judges of Courts shall form a single body governed by a single statute;

b) The judges shall be independent and subject only to the law;

c) The judges shall be irremovable and shall not be transferred, suspended, retired or dismissed except as provided by law.

c) Judges shall not be held liable for their decisions except as provided by law: Criminal liability like any citizen; disciplinary liability by an independent body; civil liability directly for the State and only in a case of wilful default

d) Practising judges shall not be detached to serve in functions unrelated to the activity of the courts unless authorised by the appropriate higher council;

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