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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REFORM OF THE JUDICIAL SYSTEM IN BULGARIA**

**DRAFT LAW ON THE  
AMENDMENT OF THE CONSTITUTION  
OF THE REPUBLIC OF BULGARIA**

**AND**

**EXPLANATORY MEMORANDUM**

REPUBLIC OF BULGARIA  
THIRTY-NINTH GENERAL ASSEMBLY

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*Draft!*

**LAW**

**ON THE AMENDMENT OF THE CONSITTUTION OF THE REPUBLIC  
OF BULGARIA**

(promulgated *The State Gazette*, issue 56 of 07.13.1991)

**§ 1.** The following amendments shall be made to Art. 129:

1. Para. 3 shall be amended as follows:

“(3) Upon completing 5 years of service as a judge, prosecutor or investigator and after attestation, with a decision of the Supreme Judicial Council, judges, prosecutors and investigators shall become irremovable. The irremovability shall terminate only upon:

- reaching 65 years of age;
- resignation;
- entry into force of a sentence that imposes a punishment of imprisonment for a premeditated offence;
- lasting factual incapability to carry out their duties for more than one year;
- systematic failure to perform their official duties or activities that undermine the prestige of the judiciary.”

2. A new para. 4 shall be created.

“(4) The administrative managers in the organs of the judiciary, with the exception of those under para. 2, shall be appointed to the managerial position for a term of 5 years with a right to seek second appointment.”

**§ 2.** Art. 131 shall be amended as follows:

“Art. 131. The decisions of the Supreme Judicial Council for appointment, promotion, demotion, transfer and release from duty of judges, prosecutors and investigators, for giving permission under Art. 132, para. 2 and 3, as well as the proposals it makes under Art. 129, para. 2, shall be carried by secret ballot.”

**§ 3.** Art. 132 shall be amended as follows:

“Art. 132. (1) Judges, prosecutors and investigators shall not bear criminal and civil liability for actions they performed in their official capacity and rulings they delivered in the course of exercising the judicial power, except where the action performed is a premeditated offence of general character.

(2) In the events under para. 1, accusations may not be brought against judges, prosecutors or investigators without permission by the Supreme Judicial Council.

(3) Judges, prosecutors and investigators may not be detained, except for a grave crime, and only with permission by the Supreme Judicial Council. Permission for detention shall not be required in the event of being caught in the act of a grave crime.

(4) Permission under para. 2 and 3 shall be obtained via a motivated request to the Supreme Judicial Council by the Chief Prosecutor or by no less than one fifth of the members of the Supreme Judicial Council, in accordance with a procedure laid down in law.”

#### TRANSITIONAL PROVISION

**§ 4.** Within six months of the entry into force of this law, the cases existing prior to this amendment shall be brought into compliance with the Constitution of the Republic of Bulgaria by way of Parliament passing the necessary legislative amendments.

## RATIONALE

1. The Draft Law on the Amendment of the Constitution of the Republic of Bulgaria is proposed in execution of the political will expressed in the Declaration of Political Forces on the Main Directions of the Reform in the Bulgarian Judicial System, signed on April 2, 2003 and of the Decision of the General Assembly of April 23, 2003, which creates an Interim Committee for the Preparation of Proposals for Amendments to the Constitution of the Republic of Bulgaria with scope of activities - amendments related to the reform in the judicial system and the membership of the Republic of Bulgaria in the European Union and NATO, by drawing also on interpretative Decision № 3 of 2003 of the Constitutional Court.

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 for improvement of the operations of the judiciary without compromising its independence, but with clearly developed criteria for the liability of each judge, prosecutor or investigator.

Solving the problems of the judicial system is a question of consistent and purposeful policy and of determination both on behalf of the political forces and on behalf of the judiciary itself. The framework of the amendments, as outlined in the Decision of the National Assembly of April 23, 2003, will not solve sweepingly and thoroughly the problems in the judicial system, but it represents a major step in this direction.

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.

The proposed provisions affect three legal institutes of the judiciary: **immunity and irremovability of the magistrates, as well as term of office of the managerial positions.**

2. The unanimous opinion of all parliamentary groups is that the immunity of magistrates must be separately provided for in the Constitution, and it must be limited to “functional”.

The substance of the “functional immunity” of magistrates is manifested in the following two components:

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

Those two components – civil and criminal non-liability for official actions and rulings, and requirement for permission by the SJC at an advanced stage of the criminal prosecution again in relation to official actions and rulings, constitute the specificity of the institute of the functional immunity of magistrates. It is meant to provide them with space that is free of pressure and

unwanted influence, so that they can freely and according to the dictates of their conscience decide on copies and cases. This functional immunity, however, is of limited scope. Functional immunity as a procedural impediment to bringing an accusation against a magistrate arises at a later stage of the of the criminal prosecution, when there is sufficient evidence /and not sufficient data, as is the case now/, on the basis of which the SJC may form a clear opinion and give, respectively refuse to give, permission for lifting of immunity.

With such contents and such scope, functional immunity will guarantee magistrates' independence when they decide on copies and cases, as an absolute characteristic of the whole judiciary, by at the same time it will not make them untouchable, because for all their actions outside their official service magistrates will bear liability on an equal footing with every citizen of the Republic of Bulgaria.

This is exactly the idea of the recommendations given on various occasions and at various levels by authoritative international institutions: the Regular Report of the European Commission on the progress of Bulgaria in the process of accession to the European Union for 2002; the Report on Bulgaria of the Group of States against Corruption (GRECO) of 2002; the Report on Bulgaria of the Workgroup of the Organisation for Economic Co-operation and Development (OECD) on the issues of corruption of 2003; the Memorandum on the Judicial System Reform prepared by the Venetian Commission etc.

A similar legal framework has also been established in certain "transition countries" from Central and Eastern Europe – the Czech Republic, Slovakia, Latvia, and Slovenia.

These are the reasons for accepting the proposal for providing for immunity as "functional", which is manifested in a completely new version of Art. 132 with four paragraphs and respective harmonizing changes to Art. 131 of the Constitution.

The new elements of the version of Art. 132 are the following:

- Art. 1 provides for criminal and civil non-liability of magistrates for their actions in their official capacity and rulings delivered in exercising the judicial power, except where the action committed is a premeditated offence of general character; it has substantive legal character.
- the disciplinary liability of magistrates is preserved; disciplinary liability has as its grounds the violation of working discipline, viewed as a totality of all working responsibilities of the magistrate as an employee and thus it is excluded from the scope of the proposed text of Art. 132, para. 1 of the Constitution.
- criminal and civil non-liability in deciding on copies and cases shall not apply where the action performed is a premeditated crime of general character; this means that magistrates shall not bear criminal and civil liability in their decision-making official activities for offences that are prosecuted upon complaint by an aggrieved person, such as insult and libel; this follows the established international practice: The Basic Principles on the Independence of the Judiciary, adopted by the UN, Recommendation of the Committee of Ministers of the Council of Europe № R (94)12 on the Independency, Efficiency and Role of Judges, etc.
- para. 2 lays down the functional immunity in a procedural aspect – immunity only in relation to crimes of government office; there is a procedural barrier to criminal prosecution initiated against a magistrate – this is the requirement for a permission by the Supreme Judicial Council at a stage when there is enough evidence collected and the

criminal prosecution has reached the point of laying an indictment; this is the time when it may be requested that a magistrate's immunity be lifted; The choice of this point guarantees collection of enough evidence of a committed crime to justify the need for lifting the immunity before the competent authority;

- para. 3 does not allow magistrates to be detained in order to guarantee their authority; it is planned not to allow for magistrates to be detained unless there is a serious offence and with permission from the Supreme Judicial Council too; no permission from the Supreme Judicial Council is required for detention in the event of being caught in the act of a grave crime; In accordance with the Universal Charter of the Judge adopted by the Central Council of the International Association of Judges "criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.";
- para. 4 defines who may turn to the Supreme Judicial Council in relation to lifting the immunity of magistrates: the chief prosecutor and 1/5 of the members of the Supreme Judicial Council; the procedure is planned to be specified by law; lifting immunity at the initiative of one fifth of SJC members is introduced to guarantee the normal flow of a criminal action against a judge and to remedy any potential passivity within the system of prosecutors as well as any attempt to baulk a criminal action; the initiative of one fifth of SJC members will begin only when the prosecution does not bring a criminal action against persons when there are legal grounds or enough information that such persons have committed a crime; this one fifth of SJC members does not initiate a criminal action, nor does it perform an indictment function; the one fifth of SJC members will only initiate the lifting of the immunity and will send the materials to the competent prosecutor with a view to instituting preliminary proceedings; this is also the idea of the recommendations of the Venetian Commission in its Memorandum to Reform the Judiciary.

*The difference from the legal framework existing at present is:*

- *magistrates will have only qualified "functional immunity" and not a general one, i.e. it is made equal to the immunity of members of parliament as it is now;*
- *it will be allowed to bring a criminal action against a magistrate for acts related to their office but before laying an indictment there must be a permission from the SJC if the criminal action is to continue;*
- *outside of any acts related to their office, all magistrates without exception will bear civil and criminal liability.*

**3. The irremovability** of magistrates is laid down even now as a principle in Art. 129, para. 3 of the Constitution - after 3 years of working in the judiciary, one becomes "irremovable"; an irremovable magistrate may be removed from office only if there are four exhaustively specified grounds – only then can he/she leave the judiciary. This principle is furthered in the Judicial System Act and there is considerable practice of the Constitutional Court in relation to it.

Irremovability is closely linked to the principle of independence of the judiciary. They are mutually dependent and give meaning to each other. Irremovability is a direct token of the independence of a magistrate. It is a fundamental part of his/her personal independence.

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

- increase the required length of service after which magistrates acquire the status of irremovability from 3 to 5 years;
- along with the above, there is "promotion" to a constitutional provision of the requirement for 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”; there is a similar wording in existing international legal documents such as: the United Nations Basic Principles on the Independence of the Judiciary; Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges – the grounds of “incapacity”, “serious infringement”; it is believed that extending the possibility of removing magistrates for systematic failure to perform their official duties or activities that undermine the prestige of the judiciary will lead to increasing their liability; these grounds are laid down at a constitutional level in Sweden, Ireland, Lithuania, Slovakia, Greece and Malta;
- reformulate the “upon retirement” ground existing in Art. 129, para. 3 of the Constitution into “reaching 65 years”. There are similar provisions in Greece, Austria, Germany, Slovakia, Slovenia, Lithuania, Latvia, Malta, Poland, Estonia and Belgium.

**4. 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 a managerial position in courts, prosecutor’s offices and investigations services is occupied only for a certain period after which the procedure for occupying this position is initiated again, etc. The term of office characterizes the position itself, the very managerial post in the system of the judiciary. The term of office is not an element of a magistrate’s legal status. It characterizes the position and not the holder of the position.

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 magistrates. A magistrate 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 magistrate who, losing his irremovability, leaves the judiciary (see item 3).

**5.** The draft law contains one **transitional provision** too. It obligates lawmakers to regulate within 6 months the existing cases with legislative amendments in accordance with the constitutional amendments made.

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