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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**DRAFT OPINION
ON THE CONSTITUTIONAL AMENDMENTS
REFORMING THE JUDICIAL SYSTEM IN
BULGARIA**

On the basis of comments by

**Mr Sergio Bartole (Substitute Member, Italy)
Mr James Hamilton (Substitute Member, Ireland)**

1. *By letter dated 26 August 2003, the Minister of Justice of Bulgaria, Mr. Stankov, requested the Venice Commission to give an opinion on the draft Law to Amend and Supplement the Constitution of Bulgaria ("the draft" - CDL (2003) 63).*

2. *Already in 1999, the Venice Commission had given a first opinion on the reform of the judicial system in Bulgaria (CDL-INF (99) 5). At its 55th plenary session (Venice, 13-14 June 2003) the Commission had adopted the conclusions of the Memorandum on the Reform of the Judicial System in Bulgaria (CDL-AD (2003) 12) following a visit of Messrs Bartole and Hamilton to Sofia on 18-20 May 2003.*

3. *The Commission invited Messrs Bartole and Hamilton to continue to act as rapporteurs in this issue and asked them to provide comments on the proposal. Their comments are contained in documents CDL (2003) 56 and 55 respectively.*

I. Existing Provisions

4. Article 129 of the Constitution of Bulgaria provides 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.

5. 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.

6. 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.

II. Provisions of the draft Law to Amend and Supplement the Constitution of Bulgaria

A. Immunity

7. A number of changes are proposed to the existing immunity of judges (draft Article 132 of the Constitution). 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.

8. 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 draft will continue to provide for immunity from criminal process, albeit in a more limited form.

9. The draft Article 132 (3) provides for immunity from detention for judges, prosecutors and investigators. They may be detained only for grave crimes and with the permission of the Supreme Judicial Council. It is not clear whether the detention requires also a decision of the judge who is entrusted with the relevant criminal procedure. A judicial decision should however be required in view of implementing the guarantees provided for by the international treaties in the field of human rights. The permission of the Supreme Council will not be sufficient, because it deals with the interests covered by the judicial immunity, while only the decision of the competent judge insures the consideration of the personal interests of the concerned person that is the judicial official who is criminally prosecuted. The Council authorizes the exercise of the powers of the judge.

10. As regards the procedures to be followed by the Supreme Judicial Council in lifting immunity, the Supreme Judicial Council has been entrusted with the relevant decision-making powers, and allowing the chief prosecutor and "no less than one fifth of the members" of the Council to request a deliberation in the matters. When evaluating the importance of these novelties, the reader has to keep in mind that the draft leaves unfortunately untouched the constitutional and legislative provisions concerning the composition of the Supreme Judicial Council, notwithstanding the suggestions submitted by the Venice Commission that the rules dealing with the Council should be completely redrafted to insure the presence in the body also of members elected with the support of the parliamentary opposition, and to avoid - therefore - giving the parliamentary majority the chance of electing all the members of the Council.

11. The idea of entrusting the power of initiative both to the chief prosecutor and to some members of the Council has to be approved. The failing of initiative of one shall be compensated by the initiative of the others, and vice versa. On the other hand, 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 draft 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 immunity should be lifted.

B. Acquisition of the status of irremovability

12. 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.

13. The rule does not specify the conditions in presence of which the Supreme Judicial Council could deny its consent. It would be advisable to offer to that body some criteria or test of judgement to circumscribe its discretion in confirming or denying the permanent status to the concerned officials. These guidelines could refer to the provisions dealing with the revocation of the permanent status, but it might be convenient adding criteria concerning the evaluation of the performance of the concerned officials after their temporary appointment and during the five years of service necessary to qualify for the irremovable status.

14. In its 2002 Opinion the Commission recommended 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 draft does not appear to be confined to the courts of first instance.

C. Loss of status of irremovability

15. The current draft contains some changes in the criteria for removal of a judge. A new ground of removal is to be added if judges systematically fail “to perform their official responsibilities” or in case of activities that “undermine the prestige of the judiciary” (Article 129(3)).

16. The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. A question arises whether the hypothesis is fulfilled only if a person does not *de facto* perform his or her responsibilities by being absent from office or not dealing with the docket? Or, also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence (“perform activities that undermine the prestige of the judiciary”), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his or her life. In both the cases it would require a major clarity and a refinement to avoid its evident ambiguity. This provision should either be removed or made more specific so as to specify clearly what sort of conduct is envisaged.

17. The draft further stipulates that the dismissal shall be adopted “upon enforcement of a sentence of imprisonment for a premeditated offence”. It would be useful adding the

requirement that an appeal cannot be lodged against the sentence, which has to be definitive. Special rules could provide for the suspension of the concerned person from the office in view of the expiring of the time for appealing the sentence.

18. It should be also recalled that among the reforms identified by the Commission delegation during the May 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.”

19. The draft 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.

20. In general, it can be said that the discussion in Bulgaria seems to focus too much on extreme situations which require the removal from office or even the lifting of the immunity of magistrates. A proper and balanced use of disciplinary measures might have the desired effect without the need of having recourse to such 'ultimate' tools.

D. Role of the Investigation Service

21. The draft continues to provide for the same immunity for judges, prosecutors and investigators. The latter function is a peculiarity of the Bulgarian legal system. There are doubts whether this function meets the European legal standards. In most European countries investigations are made directly by the police. The special status attributed to the investigators could imperil the functioning of the investigating police acting under the responsibility of the prosecutors, on one side, and of the executive power, on the other side. It could be difficult identifying the role played by these authorities in the performance of investigative activities and, therefore, it could be difficult to assert their liability. It follows that the reform could even fail in obtaining tangible results in the war against criminality.

III. Elements from previous Venice Commission opinions not yet taken into account

22. 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.

23. 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 draft does not address the issues relating to the composition and powers of the Supreme Judicial Council although under the draft 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.

IV. Conclusions

24. The proposed constitutional amendments go in the right direction but they are not sufficient to bring about a comprehensive reform of the judicial system in Bulgaria. This has been acknowledged by the drafters of the current constitutional amendment who had to take into account that the scope of a reform of the judicial system by way of “simple” constitutional amendments was limited by the decision of the Constitutional Court of 10 April 2003 requiring the election of a constituent “Grand National Assembly” for more profound changes.

25. A major recommendation of the Venice Commission since 1999 - the depolitisation of the Supreme Judicial Council by providing for a qualified majority for the election of its parliamentary component - might however have been possible even within the framework of the current amendments. The lack of such a provision may be felt even stronger after the current amendments which give substantially more powers to the Supreme Judicial Council including the possibility for one fifth of its members to request the lifting of immunity of a magistrate. In this respect it can also be regretted that other recommendations by the Commission were not included in the current draft, namely that an expert body be instituted to investigate cases and to provide its opinion on the lifting of immunity to the Supreme Judicial Council before the latter take a vote on this issue and to ensure that anyone who makes a proposal on the lifting on immunity cannot vote this same proposal.

26. Furthermore, the Commission is of the opinion that the discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria for this decision already at the constitutional level. In any case, this procedure should be restricted to courts of first instance.

27. According to the draft’s transitional provision, within six month following their adoption the current constitutional amendments will have to be implemented through an amendment of the Law on the Judicial System. The Commission hopes that some of its recommendations can be taken into account in this legislative amendment. In order to overcome the problems of the judicial system in Bulgaria a comprehensive approach based on further, structural amendments to Chapter VI of the Constitution may however prove necessary.

28. The Venice Commission remains at the disposal of the Bulgarian authorities for assisting with these future steps.