Strasbourg, 10 October 2005

Restricted
CDL(2005)082
Engl. only

Opinion no. 355/2005

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT CONSTITUTIONAL AMENDMENTS CONCERNING THE REFORM OF THE JUDICIAL SYSTEM IN "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

Comments by

Mr James HAMILTON (Substitute Member, Ireland)

THE REQUEST

1. On 27 July 2005 the Minister of Justice of the former Yugoslav Republic of Macedonia requested the Venice Commission to give its opinion on a series of proposed amendments to the Constitution intended to enable a reform of the judiciary. The letter requesting the opinion stated that the reform is directed towards the elimination of identified weaknesses in the judicial system and that the two key areas underpinning this reform are strengthening its independence and increasing its efficiency.

2. I propose to consider each of the draft amendments in the order they appear in the Constitution.

DRAFT AMENDMENTS

Amendment XX

3. The first amendment is to Article 13.1 of the Constitution which provides that a person is considered innocent until guilt is established by a court of law. This provision is apparently seen as a barrier to conferring jurisdiction on administrative or other public bodies to deal with minor matters. The intention as set out in the "Rationale" attached to the amendment is to enable a distinction to be drawn between crimes and misdemeanours although the text of the amendment itself rather confusingly refers in English to "tort" rather than misdemeanours. Assuming the Rationale correctly describes the effect of the amendment in Macedonian law the amendment seems an appropriate response to the problem described.

Amendment XXI

4. This provision inserts into the Constitution the right to a fair trail in public without undue delay before an independent and impartial court or other body which right was not previously found in the Constitution. It is intended to give effect to Article 6 of the ECHR.

5. The provision does not, however, refer to the other rights set out in Article 6, which include the right to be informed in detail of the accusation in a language the accused understands, the right to time and facilities to prepare a defence, the right to legal aid, the right to call and examine witnesses and the right to have an interpreter.

6. It would seem to the writer desirable that the Constitution should follow the text of Article 6 more closely. This is all the more so since, as the Rationale points out, in case of conflict the text of the Constitution would prevail over the Convention.

7. As a general comment, the Constitution tends to be laconic. While brief statements of principle in a Constitution may be admirable there are places where more detail may be desirable.

Amendment XXII

8. This concerns the election of the President which is by popular vote. At present in order for a candidate to be elected he or she requires both a majority of the votes cast and that a majority of the electorate have voted. If these conditions are not met the whole process is repeated and it seems could go on *ad infinitum*. The amendment would require only a majority of the votes cast and in the writer's view is a sensible reform.

Amendment XXIII

9. This is a technical provision necessitated following Amendments XXVIII and XXXII discussed below.

Amendments XXIV

10. This provision transfers the power to remove the immunity conferred on the President and the Minister from the Government to the Parliament (Assembly). The present provision leaves the power to lift members of the Government's immunity to the Government itself. This is clearly undesirable. The amendment, derives from a recommendation by GRECO.

Amendment XXV

11. The effect of this amendment is to change the system of appointment of prosecutors. At present all Prosecutors are apparently appointed, not merely nominated, by the Government. (The English text of the Article 91 of the constitution says the Government "proposes" the Public Prosecutor but the context suggests this means appointment and not merely nomination. The English text of the Rationale of the Draft Amendment XXV is confusing; it should of course say that it is the Parliament who appoints and removes the Supreme Public Prosecutor and not the other way around). Under the amendment now proposed the Supreme Public Prosecutor will be nominated by the Government and appointed by Parliament. Other prosecutors will no longer be appointed by the Government but will be appointed by the State Prosecutors' Council (see Amendments XXII and XXXIII).

Amendment XXVI

12. This Draft Amendment refers to this appointment and dismissal of judges. The proposed changes are as follows: -

13. In the first instance a judge will be appointed for a probationary period of three years. At present appointment is permanent *ab initio*. The writer has some concerns about the desirability of such probationary periods. Those concerns centre on the undesirability of judges being under pressure to decide cases in any particular way. If such a procedure is to be in place it seems to the writer that a refusal to confirm the judge in office should be made according to the same criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

14. The appointment of temporary or probationary judges is a very difficult area. A recent decision of the Appeal Court of the High Court of Justiciary of Scotland (*Starr v Ruxton*, [2000] H.R.L.R 191; see also *Millar v Dickson* [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to a discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability, to say the least, of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.

15. The European Commission on Human Rights, in Application No. 28899/95, *Stieringer v Germany*, 25 November 1996, found that there was no violation of Article 6(1) of the Convention where a criminal trial in Germany was held before three judges, two of whom were probationary, and two lay assessors. Prior to completion of their

probationary period the probationary judges were liable to removal by the judicial authorities, subject to a right to challenge their removal before a disciplinary court. Under German law their participation in the trial had to be justified by some imperative necessity; the German courts had found such necessity to exist. The Commission held that there was no breach of Article 6(1). In that case, the executive had no role in the removal process which was subject to judicial control. The system under the proposed Macedonian law appears therefore more akin to that accepted by the European Commission in *Stieringer* to that condemned by the Scottish courts in *Starr v Ruxton*.

16. Nonetheless, the difficulties in principle with systems of evaluation of temporary judges, whether in civil or common law systems, are clear. In the words of the European Charter on the statute for judges, adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) at para.3.3;

> *"Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed"*.

17. Principle 12 of the UN Basic Principles on the Independence of the Judiciary (adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) states: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

18. On the face of it, this principle seems to discount the possibility of probationary periods of appointment for judges, unless 'appointment' itself was interpreted broadly so as to encompass a probationary period (it might be argued though that the latter would strain the ordinary meaning of the word 'appointment').

19. The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice (UN DOC.E/CN.4/Subs.2/1985/18/Add.6 Annex 6) states:

> *"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually"*.

20. Despite the fact that the decision to make a permanent appointment rests with the State Judicial Council rather than the executive or the legislature I continue to have misgivings about the proposal. It seems to me to undermine the independence of the individual judge during the three-year period of removability. Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

21. If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the judiciary and not the executive. This criterion appears to be met by the Macedonian law. Secondly, the criteria for evaluation must be clearly defined. The criteria should, in my opinion, be the same which would justify the removal of a judge from office. It seems to me that once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created.

22. So far as concerns the removal of judges, a judge can at present be removed from office if convicted of a crime and sentenced to a prison term of at least six months. This provision will remain. A judge can also be removed for a "serious disciplinary offence" defined in law, making him or her unsuitable to hold office as decided by the State Judicial Council, or for unprofessional and unethical conduct, as decided by the Judicial Council. The new text will refer only to serious violation of the Constitution, and a finding to this effect will require a two-thirds decision of the total membership of the Judicial Council.

23. This latter provision appears to give a greater protection for the independence of judges, though it may be desirable to confer on the Judicial Council some sanction to deal with unprofessional behaviour by judges falling short of the standard of serious violation of the Constitution, for example by admonishing a judge in private.

24. Principle 22 of the UN Basic Principles on the Independence of the Judiciary states that "Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings." If the Judicial Council were not to be considered the highest court, principle 22 suggests that there should be an appeal of some kind to the highest court from a decision of the Judicial Council.

Amendment XXVII

25. This provision sets out in clearer terms than in the existing text the scope of judges immunity from prosecution, detention and arrest, and provides that decisions to remove that immunity are for the Judicial Council (at present such decisions rest with the Parliament). Procedures for removing this immunity are to be determined by law. The Judicial Council cannot remove a judge's immunity except by a two-thirds vote of the total membership. The proposal appears to the writer to be appropriate and represents a considerable improvement on the current very imprecise text. In addition in the writer's opinion the excise of the function of making decisions on judges' immunity by the Judicial Council rather than the Parliament is an important safeguard for judicial independence.

Amendment XXVIII

26. This provision relates to the composition of the State Judicial Council. At present the Council consists of seven members elected by the Parliament, from the ranks of "outstanding members of the legal profession". The term of office is six years and may be renewed once only.

27. Under the proposed amendment there will be 15 members. Eight are to be selected from among the judges by a procedure to be regulated by law. (Presumably this selection is to be by the judges themselves; the text does not make this clear and it would be desirable that it should). The President of the Supreme Court and the Minister for Justice are ex officio members and the former is to preside over the Council. Three members are to be appointed by Parliament and two by the President.

28. The presence of a judicial majority on the Council is to be welcomed as are the provisions concerning representatives of the non-majority communities.

29. Members of the Council enjoy immunity which only the Council can remove. The procedures for dismissal correspond to those pertaining to the judges.

30. Members of the Council are not to hold any other public function or profession. It is not clear to the writer why this should be so. Presumably the judicial members will continue to exercise their judicial offices as well. Why should a law professor appointed to the body not continue to teach? It is hard to see that membership of the Council should be a full time occupation. In the writer's opinion this provision needs to be more focused. Perhaps a provision setting out which other occupations are incompatible with membership of the Council would be more appropriate (for example, these might include membership of the Government, except in the case of the Minister of Justice, office as a prosecutor, membership of the Parliament).

31. In the writer's opinion the proposed reform is to be welcomed as providing for a depoliticisation of the appointment and removal of the judiciary.

Amendment XXIX

32. The effect of this Amendment is to transfer responsibility for the actual election and dismissal of judges from the Parliament to the Judicial Council. At present the Council's functions in this regard are merely advisory. The Council will also appoint the Presidents of the Courts, will evaluate the work of judges and decide on judicial promotions, on the discipline of judges, their secondment, the removal of their immunity, and will continue to appoint two members of the Constitutional Court. The proposal is an important move to strengthen the independence of the judiciary as an institution and to insulate the judiciary from political influence or interference.

Amendment XXX

33. This amendment refers to the State Prosecutor's Office. The current text of the Constitution refers to the Prosecutor but the only provisions relate to the Prosecutor's immunity and incompatibility of the function with any other office. Under the new proposal the office is defined as a unitary and independent state body given the function of criminal investigation and prosecution and "other tasks defined by law". The Supreme State Prosecutor is to be appointed and dismissed by the Parliament on the Government's nomination. There is to be a State Prosecutors' Council (see Amendment XXXII) which will appoint the other prosecutors. The term of office of the Supreme State Prosecutor is six years. There is no re-election. For other prosecutors appointment is for an unlimited duration with a review after three. Dismissal procedures parallel those for judges with the State Prosecutors' Council having a parallel role to that of the State Judicial Council in the case of prosecutors other than the Supreme State Prosecutor.

34. On the whole these are good provisions and appear to be in line with the provisions of Recommendation Rec (2000) 19 of the Council of Europe on the role of public prosecution.

35. I would, however, have some concern at the fact that while criteria for the dismissal of the Supreme State Prosecutor are established in the text the determination of whether those criteria are met is left solely with the Parliament. It seems to the writer that if dismissal is in the sole discretion of Parliament the Office may become politicised and the Supreme State Prosecutor may be compelled to respond to populist pressure and may not have the necessary independence to take unpopular decisions. It would be desirable that some non-political independent body should rule on whether the criteria for dismissal are met before the Parliament could exercise this power; this function could be conferred on the State Judicial Council, on the Constitutional Court or the Supreme Court, or perhaps on some body of senior judges established for this purpose.

36. It would also, in the writer's opinion, be desirable that the suitability of candidates for appointment be similarly independently assessed. Finally, with regard to the proposed three-year probationary period for prosecutors other that the Supreme State Prosecutor I would make similar comments to those already made in relation to the probationary appointment of judges.

Amendment XXXI

37. This provision deals with the immunity of prosecutors and parallels the provisions relating to judges. Immunity can be revoked by the Council of State Prosecutors in the case of prosecutors other than the Supreme State Prosecutor for whom the body which removes immunity is the Parliament. I would have a concern about this latter provision and in my opinion this risks a politicisation of the office and is undesirable for the same reason the current law whereby Parliament revokes the judges' immunity is undesirable. I think this function should be conferred on another body, as with the examination of whether the criteria for appointment or dismissal of the Supreme State Prosecutor are met.

38. The provision also prohibits political activity within the State Prosecutors Office. Notwithstanding the provisions of Recommendation Rec (2000) 19 in the writer's opinion this provision is entirely justifiable particularly in the context of an emerging democracy. In the writer's opinion political activity in the prosecutor's office is incompatible with the maintenance of the independence of the prosecution service.

Amendment XXXII

39. This amendment establishes the State Prosecutors' Council as an analogous body to the State Judicial Council. *Ex officio* members are the Supreme State Prosecutor and Minister of Justice; the prosecutors elect five, the Parliament two, and the President appoints two. There are analogous provisions to those of the Judicial Council concerning minority representation and immunity. I would make the same comments concerning incompatibility of membership of the Council with other functions as in the case of the Judicial Council.

Amendment XXXIII

40. This is an analogous text to Amendment XXIX concerning the State Prosecutors' Council's role in appointing and dismissing, promoting, disciplining and lifting the immunity of prosecutors other than the Supreme State Prosecutor.

Amendment XXXIV

41. This amendment provides that the kinds of decisions of the Constitutional Court, their legal effect and enforcement are to be regulated by law and that the internal organisation and the manners of operation of the Court are to be regulated by the Court itself. The purpose is to fill a gap in the existing text and to provide a proper legal basis for the Court's operation.

CONCLUSIONS

42. The proposed amendments form a clear and coherent body of law aimed at strengthening the independence of the judicial branch and of the prosecutor's office by transferring powers to regulate these organs from the legislature to the State Judicial Council and the State Prosecutor's Council. There are a number of ways in which the text could be further improved as referred to in detail above but the overall thrust of the proposed reform is a very positive one.