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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

adopted by the Commission
at its 64th plenary session
(Venice, 21-22 October 2005)

on the basis of comments by

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Table of contents

Introduction

1. By letter dated 27 July 2005, the Minister of Justice of "the Former Yugoslav Republic of Macedonia", Ms Mladenovska Gjorgjievska, requested the Venice Commission to give an opinion on a series of proposed amendments to the Constitution intended to enable a reform of the Judiciary (CDL (2005)087) mainly concerning a reform of the Judiciary. The Commission asked Ms Suchocka and Messrs Hamilton and Mazak to act as rapporteurs in this issue. Their comments have become documents CDL (2005)084, 082 and 083 respectively. On 29 September 2005, the Ministry of Justice organised an expert meeting on the draft amendments. On behalf of the Commission, Mr. Dürr from the Secretariat, presented a preliminary version of this [draft] opinion. The results of this meeting have been taken into account in the present text

2. The present opinion has been adopted by the Commission at its 64th plenary session (Venice, 21-22 October 2005).

General remarks

3. 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.

4. The amendments proposed can be divided into these categories as follows
1. the reform of the Judiciary including strengthening of the presumption of innocence and the right to fair trial,
2. the reform of the public prosecutor's office and the establishment of a State Prosecutor's Council,
3. the immunity of the prime minister and the members of the Government,
4. the new rule of voting in the second round of the direct presidential election,
5. the legal sources for the activities of the Constitutional Court.

5. This [draft] opinion considers each of the draft amendments in the order they appear in the Constitution (numbered XX to XXXIV).

Amendment XX - Presumption of innocence

6. The presumption of innocence is an essential right that the accused enjoys in criminal trials in all countries respecting human rights. This principle provides that the accused is presumed to be innocent until he/she has been declared guilty by a court. The burden of proof is thus on the prosecution, which has to convince the court of the guilt of the accused.

7. Amendment XX 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 translation of the amendment itself rather confusingly refers in English to "tort" rather than misdemeanours.

8. The proposed article lacks in its first paragraph a stipulation as to which state organ is empowered to prove the guilt of an accused person. It must be expressly a court. The next remark concerns the use of the word "entity" instead of "everyone" or "person". The word "entity" seems to refer also to legal persons. The presumption of innocence however has its value predominantly for natural persons.

9. The central question is whether it is necessary to regulate a specific kind of presumption of innocence for misdemeanours. If an administrative body decides on a misdemeanour involving civil or criminal matters, then according to European standards concerning the review of decisions passed by administrative authorities a suspect person must have the right to appeal against such a decision to a court (Article 6.1 of the European Convention on Human Rights - ECHR). Administrative bodies do not need to prove the guilt of a suspect person under criminal law but only under administrative law.

10. In order to overcome the problem of the overburdening of courts due to the established interpretation of Article 13.1 of the Constitution as set out in the "Rationale" of the amendments, the latter might be amended by **adding a provision to the effect that administrative penalties do not constitute a decision on the criminal guilt of a person and can be appealed against at a court of law. However, no judicial appeal is introduced such decisions become executable.**

Amendment XXI – Right to a fair trial

11. 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 ECHR.

12. The provision does not, however, refer to the **other rights set out in Article 6 ECHR**, 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.

13. It would seem desirable that the Constitution **should follow the text of Article 6 ECHR 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.

14. On the other hand, it **may be necessary to limit the scope of the public hearings** as provided for in amendment XXI. Proceedings without the need for a public hearing may be non-contentious inheritance cases, enforcement cases and similar procedural situations but also administrative cases.

15. In addition to a constitutional guarantee, the right to administrative proceedings without undue delays should be protected on the basis of an application or a complaint concerning the failure to act (inactivity) of an administrative authority. However, such a protection does not require a constitutional basis but can be dealt with in ordinary law.

16. 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 – Election of the President

17. This concerns the election of the President of the Republic 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 Commission's view is a **sensible reform**.

Amendment XXIII – Technical provision

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

Amendment XXIV- Removal of immunity for the President and ministers

19. 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 of the Council of Europe.

Amendment XXV – Appointment of prosecutors

20. 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 translation 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 – Appointment and dismissal of judges

21. This draft amendment refers to this appointment and dismissal of judges. The proposed changes are as follows:

22. In the first instance a judge will be appointed for a probationary period of three years. At present, appointment is permanent *ab initio*. The **Commission has 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. Judge on probation might give an incorrect judicial decision in the effort to be confirmed for life time.

23. 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 ECHR 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.

24. 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 ECHR. 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*.

25. 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".

26. 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."

27. 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').

28. 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".

29. Despite the fact that the decision to make a permanent appointment rests with the State Judicial Council rather than the executive or the legislature the Venice Commission continues to have misgivings about the proposal. It seems 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.

30. 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. It seems 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. A **refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office**.

31. 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.

32. 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.

33. 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 – Scope of judges' immunity

34. The immunity of judges should serve only for protecting the judges during their performance of the powers vested in them (functional immunity). The aim of the immunity of judges should not be a tool for absolving a judge from a criminal responsibility if the judge commits a crime. On the other hand the immunity of judges must ensure that the instruments of criminal law will not be abused for charging judges with crimes due to their performance of their competences.

35. The wording of Amendment XXVII on the immunity of judges is certainly an improvement because it **links the benefit of immunity to the performance of the judge's office**. 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.

36. The proposal appears to be **appropriate and represents a considerable improvement on the current very imprecise text**. In addition the exercise of the function of making decisions on judges' immunity by the Judicial Council rather than the Parliament is an important safeguard for judicial independence.

37. Nevertheless, the question arises whether in cases in which the Judicial Council refuses to lift the immunity of a judge, such a refusal will be valid for ever or only for the time during which a judge remains in office and whether he or she can be prosecuted thereafter. While the problem may be mitigated by the fact that judges are appointed until retirement (at least after the probationary period) it seems that **an immunity for acts directly related to the function of the judge should be upheld also after the end of the tenure of the judge**. This should be specified in the Constitution.

Amendment XXVIII - Composition of the State Judicial Council

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

39. 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.

40. The **proposed reform is to be welcomed as providing for a depolitisation** of the appointment and removal of the Judiciary. In particular, the presence of a **judicial majority on the Council is to be welcomed** as are the provisions concerning representatives of the non-majority communities.

41. In order to minimise the influence of the executive, the mandatory **membership of the Minister of Justice** in the State Judicial Council could be changed to a **right to be present at the sessions** of the Judicial Council or membership without voting rights. The amendment provides that the President of the Supreme Court is also the president of the State Judicial Council. In order to strengthen the independence of the Council from the courts in respect of which it exercises its competences, an alternative would be to have the Council elect its president.

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

43. The loss of the status of judge for whatever reason should be a reason for losing the membership of the Council for members appointed on behalf of the Judiciary.

44. The draft seems to envisage the Judicial Council as a full time organ because it provides that members of the Council are not to hold any other public function or profession. The Commission has doubts as to the necessity of having a Judicial Council as a full time organ. Judges and other members of the Council could continue to exercise their activity as a part time occupation. Accordingly, a provision setting out which other occupations are incompatible with membership in the Council would be appropriate (for example, these might include membership of the Government, except the Minister of Justice, office as a prosecutor, membership of the Parliament).

45. If, on the other hand, the drafters insist that there be a full time Judicial Council in order to insulate the judges who are members of the Council from their colleagues who are members of the courts in respect of which the Council exercises its competences,

some exceptions to the rule of holding no other profession may be necessary allowing for example publishing or teaching activity. In any case, the President of the Supreme Court and the Minister of Justice have to be exempted because they could not exercise their functions otherwise. Obviously, the question of a full or part time Judicial Council has also budgetary consequences due to the necessary replacement of judges who sit in the Council.

Amendment XXIX – Election and dismissal of judges by the Judicial Council

46. 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**.

47. There is no standard model that a democratic country is bound to follow in setting up its Judicial Council so long as the function of this Council fall within the aim to ensure the proper functioning of the independent Judiciary within a democratic State. Though models exist where the involvement of the legislative and the executive branches of power is excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of state power.

48. Arguably, the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of the Judicial Council is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions. Since the involvement of such a highly political body as Parliament in the election of judges may result in the politisation of this procedure, the **proposal that judges should not be elected by Parliament seems fully justified**.

49. Bearing in mind these prerequisites for an establishment of a judicial body governing the Judiciary in a particular state the Commission is of the opinion that the **draft stipulates the position of the Judicial Council more clearly than before, better clarifies its powers and other related tasks**.

50. Despite certain innovations there are also certain shortcomings. One of them concerns the fundamental question of definition of the position of the Judicial Council within the constitutional framework. To put it more precisely there are doubts as to relations of the Judicial Council to the other highest constitutional bodies. Which constitutional body will

be empowered to review decisions of the Judicial Council ? Administrative or constitutional Judiciary ? Or the Assembly ? According to the draft, the Judicial Council is a closed institution, which can be influenced only through the process of voting and electing of the members of the Council but in very limited proportion.

51. An analysis of the situation in different countries that have introduced the institution of a Judicial Council shows that while their *raison d'être* as guardians of judicial independence has not been questioned, they may have a tendency to evolve into 'new justice ministries'. For instance, with regards to the broad scope of authority enjoyed by the Judicial Council in a new member state, the European Union has expressed the following opinion: 'According to some critics, the operation of the Council is rather bureaucratic, resulting in the increase of the administrative burden of judges. Some argue that it is actually the Office of the Council, composed of civil servants, which has the real power and not the Council itself. Many of the employees of the Office used to work at the competent department of the Ministry of Justice prior to the reform, and their mentality still reflects the old times, when courts were clearly subordinated to the bureaucracy of the Ministry.'

52. Transferring all decisions regulating the situation of judges to the State Judicial Council would be too far-reaching a move if there was no control of the activities of the Council. Authority should be divided and balanced. The nature of some of the Council's prerogatives and the status (scope of immunity) granted to its members give it a position nearly comparable of that enjoyed by courts, but those institutions should be clearly differentiated. The Council is not a court of law but is supposed to guard their independence. What is more, granting the council such a position effectively makes it the only organ that is not accountable but enjoys the right to decide on all aspects of the situation of judges. According to the draft amendments, the Council would concentrate in its hands the powers of both the executive and judicial authority and that may jeopardise its role as a guarantor of the Judiciary's independence.

53. The State **Judicial Council could draw up proposals concerning judicial appointments** whilst having some other organ, for instance the **President, making the actual appointments**. Judicial appointments, after all, rank amongst classic presidential prerogatives. The President's right to appoint judges should be restricted in such a way that he could appoint judges solely from amongst the candidates proposed by the State Judicial Council.

54. Furthermore, the **State Judicial Council should not be the organ giving final rulings on the disciplinary responsibility of judges**. A court could be designated to function as a disciplinary court. If this solution was not followed at least an appeal against disciplinary decisions of the Council to a court should be available.

Amendment XXX – State Prosecutor's Council

55. The problem of creating sufficient guarantees of independence as well as safeguarding the effectiveness of the Judiciary is a problem common to all post-

communist states. These countries search for the best model of the prosecutor's office, devoid of political influence. As the Commission has pointed out before - for instance in relation to the reform of Bulgarian Judiciary (see CDL-AD (2003) 12, point 15.f) – there is not a single European model for prosecutor's office that would constitute a European standard. Whereas in some countries, the prosecutor's office is part of the judicial system (not the Judiciary) in other countries (e.g. the Czech Republic or Poland) the prosecutors' office is part of the executive, but free of political directives and influence in individual cases and is only institutionally linked to the executive through the person of the justice minister.

56. 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 in Amendment XXX, 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 Parliament upon 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 years. 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.

57. There can be no doubt that the amendments seek to achieve effective guarantees ensuring the political neutrality of the prosecutor's office and on the whole these provisions appear to be in line with the provisions of Recommendation Rec (2000) 19 of the Council of Europe on the role of public prosecution. However, the nature of the office of prosecutor is quite different from that of a judge. Often, individual prosecutors do not enjoy independence but are part of a hierarchical structure under the authority of the prosecutor general.

58. Consequently, it seems **not necessary or coherent to establish a prosecutors' council entirely patterned on the model of a judicial council**. Prosecutor's councils are rarely institutions of a constitutional nature but are rooted in legislative acts. Those councils differ in character. Whilst entrusted with certain features of self-governing bodies, as a rule, they serve as an advisory organ. On the other hand, it would be desirable that the suitability of candidates for appointment be independently assessed. A **prosecutor's council rooted in a legislative act may usefully perform the assessment function** and might also advise on the suitability of candidates for permanent appointment.

59. Furthermore, given the historical background of the office of prosecutor in communist countries, if the office of prosecutor is to be regulated on the level of the Constitution it is important that this be done in such a way as to **specify precisely the place of the prosecutor** in the judicial system and thereby to avoid questions concerning the constitutional legitimacy of the institution as compared to the independent judiciary

60. Also, with regard to the proposed three-year probationary period for prosecutors other that the Supreme State Prosecutor similar comments to those already made in relation to the probationary appointment of judges may apply in this case.

61. Finally, the Commission has 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 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.

Amendment XXXI – Immunities of prosecutors

62. 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**. There is a concern about this latter provision, which risks a politicisation of the office and is undesirable for the same reason as set out above relating to Amendment XXX. The current law whereby Parliament revokes the immunity is undesirable. 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.

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

Amendment XXXII – State Prosecutors' Council - composition

64. 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. On this point, see the comments relating to Amendment XXX.

Amendment XXXIII – State Prosecutors' Council – appointment and dismissal of prosecutors

65. 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 – Constitutional Court

66. This amendment provides that the kinds of decisions of the Constitutional Court, their legal effect and enforcement are to be regulated by law and the internal organisation of the 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. While this is in full accordance with European standards in the field of constitutional justice (see also opinion on Turkey CDL-AD(2004)023, point 5 seq.) the amendment does not cover important elements of the activity of the Constitutional Court like the procedure before the Court. A coherent regulation of the activities of the Constitutional Court taking into account all aspects of its jurisdiction and operation would seem appropriate.

Conclusions

67. 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. Nevertheless, there are a number of ways in which the text could be further improved, namely:.

1. The amendments should make clear that judicial component of the State Judicial Council have to be selected by the judges themselves (Amendment XXVIII).
2. The State Judicial Council could draw up proposals concerning judicial appointments whilst having some other organ, for instance the President of the Republic, making the actual appointments (Amendment XXIX).
3. The Venice Commission has concerns about the desirability of probationary periods for judges. If the drafters deemed such a system indispensable, a refusal to confirm a judge in office should be made only according to objective criteria and with safeguards as apply for removal from office. Against any such decision an appeal to a court must be available (Amendment XXVI).
4. The State Judicial Council should not be the organ giving final rulings on the disciplinary responsibility of judges (Amendment XXIX).
5. In disciplinary matters judges should benefit from an appeal from a decision of the State Judicial Council to a court (Amendment XXVI).
6. Given the different roles and scopes of independence of judges and prosecutors it does not seem necessary to establish a prosecutors' council entirely patterned on the model of a judicial council (Amendments XXX and XXXI).
7. In order to avoid politicisation, the dismissal and removal of immunity for the Supreme State Prosecutor should not lie with Parliament (Amendment XXXI).

8. The provision on the presumption of innocence could be re-formulated (Amendment XX).
9. The provision on fair trial should follow the text of Article 6 ECHR more closely and it may even be may be necessary to limit the scope of the public hearings (Amendment XXI).

Notwithstanding the above remarks, the overall thrust of the proposed reform is a very positive one and the transfer of the appointment of judges from Parliament to the State Judicial Council is to be particularly welcomed.