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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BULGARIA

URGENT INTERIM OPINION

ON THE DRAFT NEW CONSTITUTION

Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure

on the basis of comments by

Mr Michael FRENDO (Member, Malta)
Mr James HAMILTON (Former member, Ireland)
Mr Eirik HOLMØYVIK (Substitute Member, Norway)
Ms Regina KIENER (Member, Switzerland)
Mr Martin KUIJER, (Substitute Member, the Netherlands)

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I. Introduction

1. By letter of 18 September 2020, the President of the National Assembly of Bulgaria, Ms Tzveta Karayancheva, asked for an urgent opinion of the Venice Commission on the Draft new Constitution of Bulgaria (hereinafter "the Draft", CDL-REF(2020)070). Mr Michael Frendo (member, Malta), Mr James Hamilton (former member, Ireland), Mr Erik Holmøyvik (substitute member, Norway), Ms Regina Kiener (member, Switzerland), and Mr Martin Kuijer (substitute member, the Netherlands) acted as rapporteurs.

2. On 23 September 2020, the Bureau of the Venice Commission authorised the rapporteurs to prepare an urgent opinion, which was confirmed at the Commission's plenary meeting on 8 October 2020.

3. Due to the Covid-19 pandemic, no visit to Sofia was possible, but video conferences were held on 5-6 November 2020 with the President of the National Assembly, representatives of parliamentary groups of the National Assembly, the Minister of Justice and the Prosecutor General, judges of the Supreme Administrative Court and the Supreme Court of Cassation, members of the Supreme Judicial Council and representatives of the civil society.

4. The present urgent interim opinion is based on an English translation of the Draft provided by the Bulgarian authorities. Certain issues raised may be due to problems of translation.

5. This urgent interim Opinion was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019).

II. Background

6. The Draft covers several areas. First, a few changes are made to the Preamble and to Chapters I and II, on the fundamental principles and human rights. Second, the number of MPs at the National Assembly is reduced by half (Chapter III). Third, the Draft reorganises the system of governance of the judiciary and of the prosecution service (Chapter VI). Most importantly, the single Supreme Judicial Council (the SJC) is split into two councils – one for judges and another for prosecutors. Fourth, the right of individual petition to the Constitutional Court is introduced (Chapter VIII). Finally, the Draft changes the procedure for amending the Constitution (Chapter IX).

1. Scope of the Opinion

7. At the request of the Bulgarian authorities, this opinion was prepared following an urgent procedure, and in a very short time. Due to health restrictions, a visit to the country was impossible. Given these constraints, the Commission decided to focus on the most important or problematic amendments. The Opinion therefore does not contain a comprehensive analysis of all changes proposed to the constitutional text.

8. This Opinion will focus in particular on the amendments to Chapter VI, on the organisation of the Bulgarian judiciary and of the prosecution service. The Venice Commission has previously adopted several opinions regarding judicial governance in Bulgaria.[1] Most recently, in 2015 the Venice Commission assessed amendments to the Constitution of Bulgaria on the judiciary

[1] See, in particular, Venice Commission, CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria; CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria; CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria; CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria; CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria.

(hereinafter "the 2015 Opinion").[2] The Commission subsequently issued two opinions on the Bulgarian legislation in this area: the opinion on the Judicial System Act (hereinafter "the 2017 Opinion"),[3] and the opinion on the draft amendments to the Criminal Procedure Code and to the Judicial System Act ("the 2019 Opinion").[4]

9. The Bulgarian authorities explained that the main rationale behind the amendments to Chapter VI was to respond to earlier recommendations from international partners, such as the EU and the Council of Europe bodies, notably the Committee of Ministers, the Venice Commission and GRECO. However, as it will be shown below, not all of those recommendations are addressed by the proposed constitutional reform. It is perfectly normal that the Constitution regulates only the most essential elements of the system of the judicial governance, and that other questions are left to the legislator to settle (see Article 145 of the Draft).[5] However, given the context, it is difficult, if not impossible, to analyse the changes to the constitutional text alone. Therefore, this Opinion will comment not only on the proposals contained in the Draft, but also on what is missing there, and what remains to be done at the legislative level.

10. Finally, as explained by the President of the National Assembly, the text under consideration may still undergo further changes. It can be modified by the National Assembly itself[6] and/or by the Grand National Assembly, if the National Assembly decides to launch a constitutional amendment process, dissolve itself and convoke the Grand National Assembly.

11. It is commendable that the Venice Commission has been involved in the constitutional reform process at such an early stage. That means, however, that this Opinion should necessarily be seen as an interim one, as a contribution of the Venice Commission to the on-going discussion on the possible directions of the constitutional reform. The Venice Commission is thus ready to revert to the matters discussed in this opinion at a later stage, once the text of the Draft undergoes further changes and the reform process has progressed.

2. Amendment process

11. On 2 September 2020 127 MPs of the National Assembly introduced the Draft. The text was published on the National Assembly's (the NA) website and an *ad hoc* committee was created within the NA to collect and discuss public input and experts' opinions.

12. The Draft was submitted to the NA which shall now decide whether or not to call for the Grand National Assembly (the GNA). The GNA is a body entitled to adopt a new Constitution (see Chapter IX of the Constitution). The need to convene the GNA is explained by the changes made to Chapter IX (on the constitutional amendments), which cannot be decided without the GNA.[7] The Constitution requires 2/3 votes in the NA to convene the GNA; this decision will also entail the dissolution of the NA.

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[2] See Venice Commission, CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria.
[3] See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria.
[4] See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act of Bulgaria, concerning criminal investigations against top magistrates.
[5] Which reads as follows: "The organization and the activity of the judicial councils of the judges and prosecutors, of the courts, the prosecution office and the investigating magistracy, the status of the judges, prosecutors and investigating magistrates, the conditions and the procedure for the appointment and removal from office of judges, court assessors, prosecutors and investigating magistrates and the materialization of their liability shall be established by law."
[6] The President of Bulgaria challenged this view in a request to the Constitutional Court to declare unconstitutional the decision of the NA to create a committee tasked with discussing amendments to the draft Constitution– – see para. 13 below.
[7] Admittedly, other changes might have been made by the NA itself (by ¾ of votes, in three rounds). A bill which was supported by at least two thirds, but less than three quarters of MPs may be reintroduced within a specific time frame and be adopted by 2/3 of the votes.

13. The parliamentary opposition and most of the representatives of the civil society the rapporteurs spoke to contended that the process of preparing and discussing constitutional amendments was rushed, that it was not transparent and was driven by the political convenience. In the words of the critics, the parliamentary majority introduced the Draft to divert attention from anti-government protests which had taken place in the summer 2020.[8] The proposal to amend some "hard" provisions of the Constitution which require convocation of the GNA has been criticised as deliberately complex, not having realistic chances to succeed. As a result, the parliamentary opposition and most of the expert community boycotted the work of the *ad hoc* committee on the constitutional reform. Moreover, the President of Bulgaria challenged before the Constitutional Court the decision to create the *ad hoc* committee on the constitutional reform.[9] The decision of the Constitutional Court is expected in December 2020.

14. The Venice Commission shall refrain from assessing the validity of claims about possible ulterior motives of the Government. It shall only assess the Draft at its face value. Furthermore, it will not discuss why the procedure involving the GNA was chosen, while some of the proposed changes could have been made by the NA itself. This is a matter of political choice. Finally, it will not comment on whether this procedure is in line with the Bulgarian Constitution. This is for the Constitutional Court of Bulgaria to decide. The Venice Commission will look at the process of preparation of the constitutional amendments from the perspective of the European rule of law standards, codified in the Rule of Law Checklist.[10]

15. The rule of law requires that the general public should have access to draft legislation and have a meaningful opportunity to provide input.[11] These requirements apply all the more strictly when it comes to revising a Constitution. The Venice Commission previously stressed that constitutional amendments should not be rushed, and "should only be made after extensive, open and free public discussions",[12] involving "various political forces, nongovernment organisations and citizens associations, the academia and the media"[13] and providing for "adequate timeframe".[14]

16. The Draft was prepared within the parliamentary majority, seemingly without any meaningful external input. On 2 September it was introduced by 127 MPs from the political party GERB, the United Patriots, Volya (which is not part of the parliamentary majority) and independent MPs. It appears that this initiative came as a surprise to the general public and to the constitutional experts, and was not preceded by any serious public debate, formal or informal. Now, once the Draft has been published and put on the agenda of the NA, the public, the expert community and other politicians may comment on it. It would have been more judicious and best practice to engage in public consultations *before* the proposed text was revealed. As stressed by the Venice Commission, constitutional amendments should be based on a "large consensus among the

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[8] See some media reports here: https://www.theguardian.com/world/2020/aug/20/political-storm-threatens-to-engulf-bulgarias-longtime-pm; https://www.politico.eu/article/bulgaria-lurches-into-political-crisis-over-its-murky-deep-state/; https://www.politico.eu/article/mep-rule-of-law-bulgaria-corruption-crisis/; https://www.politico.eu/article/bulgaria-how-it-became-mafia-state-of-eu/; https://www.politico.eu/article/vera-jourova-faces-heat-over-eus-soft-approach-to-bulgarian-corruption/ https://www.politico.eu/article/bulgaria-borissov-meps-adopt-resolution-targeting-corruption/

[9] On 14 October 2020, President Radev turned to the Constitutional Court with a request to declare unconstitutional the decision of the NA to form the ad hoc commission in order to discuss and amend the draft for a new Constitution. The President considers that any subsequent changes or deliberations in an already submitted draft of a new Constitution could be made only by the GNA. In the opinion of the President, the current NA only power under the Constitution is to discuss whether the GNA should be convened, whereas all substantive discussions should take place before the Grand National Assembly.

[10] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.

[11] Venice Commission, CDL-AD(2016)007, II.5.iv.

[12] Venice Commission, CDL-AD(2004)030, Opinion on the Procedure of Amending the Constitution of Ukraine, para. 28.

[13] Venice Commission, CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, para. 19.

[14] Ibid., para. 18.

political forces and within the civil society".[15] To build such a consensus it is better to receive public input as early as possible, to give the society a sense of ownership.[16] There may be exceptional circumstances which would justify a different procedure, but the Venice Commission does not see such circumstances here. It remains to be seen whether the ongoing parliamentary discussions and other public and civil society engagement will be capable of compensating for the absence of public debate at an earlier stage.

17. Second, as regards the legislative process, "where appropriate", impact assessments should be made before adopting the legislation.[17] The Venice Commission has also recommended providing explanatory memorandums to draft legislation.[18] This applies *multo magis* to the process of amending a Constitution. It should be remembered that law-making is not only an act of political will, it is also a rational exercise. No meaningful public debate is possible if the reasons for a policy are not put forward.

18. The Draft contains in appendix a brief explanatory note. To a large extent, this note restates the essence of the amendments, without giving the reasons why those amendments are necessary or any assessment of their potential impact. For instance, it is proposed to reduce the number of MPs from 240 to 120, but no clear explanation as to why this number was chosen is given or any analysis of its potential impact on political representation in Bulgaria in general and the operation of the Parliament in particular. Similarly, there is no explanation why the duration of the mandate of two chief judges and the Prosecutor General is reduced from seven years to five, and not some other length of term.

19. The Venice Commission is aware that some of the elements of the proposed reform stem from the recommendations of the international partners of Bulgaria, including the Venice Commission itself. Other proposals – such as the mention of the "national values and traditions" in the preamble – reflect political values. That being said, whoever proposes a bill must at least make a sensible effort to explain the considerations behind each proposal. In the Venice Commission's opinion, this has not been done in the present case, and the existing explanatory note is too sketchy for these purposes.[19]

20. In sum, the Venice Commission regrets that the launching of the constitutional reform was not preceded by an appropriate public debate, and that the reasons for the amendments were not well-explained. The process of the constitutional reform is still on-going, so the Venice Commission hopes that the Bulgarian authorities will elaborate on the reasons behind each proposal and ensure meaningful participation of the public, experts and of all political forces in this process. This should also lead to the drafting of a complete explanatory note explaining the general purposes of the amendments as well as rationale of each of them in detail.

III. Analysis

1. Preamble and Chapters I and II (fundamental principles and human rights)

21. The legal significance of preambles to Constitutions depends on the traditions and interpretative principles. It holds a certain symbolic significance as it is a way to underscore the importance of certain values. There is clearly no European standard for such texts and for the

[15] See Venice Commission, CDL-AD(2004)030, Opinion on the Procedure of Amending the Constitution of Ukraine, para. 28.
[16] The positive example of such public consultations can be found in Venice Commission CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland, see para. 14.
[17] See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.5.v.
[18] See, for example, CDL-AD(2008)042, Opinion on the Draft Law on protection against discrimination of "the former Yugoslav Republic of Macedonia", para. 32.
[19] The Bulgarian authorities developed on the reasons for some of the proposals contained in the Draft in their submissions to the Venice Commission.

values the constitutional legislators ascribe to the Constitution. However, in the Draft (according to the translation provided) the preamble does not contain anymore the reference to the rule of law as a fundamental value and aim of the Constitution. The Bulgarian authorities explained that the English translation of the Draft is inaccurate and that the original text in Bulgarian does refer to the rule of law. In the Draft, the drafters resolve to create "a democratic and social state that that follows the rule of law and affirms national values and traditions". Article 10 of the Draft and Article 4 of the current Constitution prescribe that Bulgaria shall be a state governed by the rule of law. It should be clarified whether the amendment to the preamble has any practical significance for the interpretation of the operative provisions in the Constitution. This is also true for the emphasis on national values and traditions, which should be understood in connection with European values now added to the Preamble – a positive step to be underlined.

22. Articles 4-9 in the Draft (moved from the final chapter of the current Constitution) regulate state symbols, such as the coat of arms of the republic (Article 4), the state seal (Article 5), the flag (Article 6), rules on the state seal and flag to be regulated by law (Article 7), the national anthem (Article 8), and the capital (Article 9). Such provisions are quite common among the Council of Europe member states.

23. As regards the amendment to Article 19, according to which "the freedom of belief and religion shall be inviolable", the relationship to the fundamental right guaranteed in Article 43 (which guarantees the freedom of conscience, the freedom of thought and the choice of religion and of religious or atheistic views) must be clarified. It gives the impression that the freedom guaranteed by Article 19 is inviolable, while it may be subject to restrictions according to Article 43 (2).[20] On the contrary, the (unchanged) Article 19 (4) could lead to excessive interference with freedom of expression, by prohibiting the use of religious institutions and communities and, in a still more problematic way, of religious beliefs to political ends, which is a notion open to wide interpretation. The Bulgarian authorities explained that Article 19 and 43 do not establish any hierarchy of rights proclaimed therein.

24. Article 20 (2) proclaims that the State will "take special care to promote the birth rate in accordance with the generally accepted standards of education, culture and socialization for the Bulgarian society". It is unusual to find reference to the promotion of the birth rate in a constitutional document and together with the expression "in accordance with generally accepted standards of education, culture and socialization for the Bulgarian society" this Article is so legally imprecise that one would suggest considering leaving it out altogether in a legal document. In any case, if the constitutional legislator chooses to include a provision on promotion of the birth rate, care must be taken not to frame the provision so that it allows for discriminatory practices, *e.g.* vis-à-vis ethnic or cultural minorities or women.

25. The amendment to Article 41 (2) guarantees the right to return to the country of "every person of Bulgarian origin", a notion which is added to the notion of "Bulgarian citizen". This addition should be interpreted in conformity with international standards. The term and the reasons for the amendments should be explained in the explanatory note, and it would be interesting to know whether the drafters had a specific group in mind (descendants of former Bulgarian citizens, "ethnic" Bulgarians, people born in Bulgaria, etc., also in the light of draft Article 31 (1) according to which "A Bulgarian citizen shall be anyone born of at least one parent holding a Bulgarian citizenship, or born on the territory of the Republic of Bulgaria, should he not be entitled to any other citizenship by virtue of origin. Bulgarian citizenship shall further be acquirable through naturalization).[21]

[20] See also Article 63 (2) which establishes the principle that fundamental rights should not be abused to the detriment of other rights.

[21] The Bulgarian authorities explained that the term "person of Bulgarian origin" is defined in para. 2, item 1 of the Additional provisions of the Bulgarian Citizenship Act as "a person to whom at least one of the ascending is Bulgarian".

26. Article 48 declares that voting in elections is not only a right but also a "civil duty". Even if most of the Venice Commission's interlocutors interpreted it as a moral and not a legal duty, the amendment to Article 48 could be understood as allowing for the regulation of compulsory voting in the electoral code, since such amendments to the electoral code in 2016 providing for negative consequences for not exercising the right and the obligation to vote were struck down as unconstitutional by the Constitutional Court in 2017.[22] Compulsory voting is not common among member states of the Council of Europe,[23] even if it does not seem to go against an international standard.[24] If the Draft seeks to introduce compulsory voting and if the Bulgarian authorities were to consider the introduction of sanctions in case a person does not cast a vote, the authorities are reminded of the need to ensure that such sanctions are proportionate. It would also be desirable to provide an explanation for such a proposal.

27. Article 48 maintains a blanket restriction on the right to vote for "those placed under judicial interdiction or serving a prison sentence". A constitutional revision should be used to bring the Bulgarian Constitution and election law in line with the European Convention on Human Rights (the ECHR) following the judgment of the European Court of Human Rights (the ECtHR) in *Kulinski and Sabev v. Bulgaria*.[25] In that case the ECtHR found that the blanket deprivation of prisoners' voting rights in the Constitution and the Electoral Code was not proportionate and thus amounted to a violation of Article 3 of Protocol 1 to the ECHR. The Venice Commission's 2017 opinion on the Bulgarian electoral code contained a similar recommendation. It is an international obligation of Bulgaria to revise the legal framework concerning prisoners' voting rights, starting with Article 48 in the Draft, which may provide for a more flexible rule in this respect (allowing for some restrictions on the voting rights but not imposing them in categorical manner).[26]

28. Finally, some of the proposed amendments enhance the protection of certain social and economic rights: amendments to Articles 22 (on the right to work and dignified conditions), 57 (social security), 58 (medical care) and 59 (education). In principle, these amendments are welcome, although it remains to be seen to what extent they will be implemented in the legislation and in practice. In this connection, it is important to ensure that the State's "control" over all medical facilities and the production of and trade in medicinal products (see the amendments to Article 58) does not go against the European Union legislation or international law obligations of Bulgaria.

29. The amendment to Article 57 allows the authorities to enrol unemployed workers who are eligible for social assistance in so-called "employment programmes". Does it mean that an unemployed person could be obliged to accept vocational training and/or (unpaid) internships in

[22] See Venice Commission, CDL-AD(2017)016, Joint Opinion on Amendments to the Electoral Code, para. 63.
[23] Among the member states of the Council of Europe, voting is compulsory in Bulgaria, Belgium, Cyprus, Greece, Liechtenstein, Luxembourg and Turkey. The sanctions and enforcement for non-compliance vary.
[24] The European Court of Human Rights has not expressed itself against compulsory voting. In the case of *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, appl. no. 9267/81, para. 54) the Court underscored that "[Article 3 of the First Protocol to the ECHR] does not create any 'obligation to introduce a specific system' ("Travaux Préparatoires", vol. VII, pp. 130, 202 and 210, and vol. VIII, p. 14) (…). Here too the Court recognises that the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time." The duty on States to refrain from exercising coercion is limited to the free choice to vote for one party or another (ECtHR 11 January 2007, *Russian Conservative Party of Entrepreneurs and others v. Russia*, appl. nos. 55066/00 and 55638/00, para. 71). The former European Commission of Human Rights did once examine an application alleging that compulsory voting was contrary to the Convention and declared the application manifestly ill-founded (EComHR 22 March 1972, *X. v. Austria*, appl. no. 4982/71).
[25] See ECtHR, *Kulinski and Sabev v. Bulgaria*, 21 July 2015, application no. 63849/09.
[26] See Venice Commission, CDL-AD(2017)016, Joint Opinion on Amendments to the Electoral Code of Bulgaria, para. 59-62 and the ECtHR judgements *Hirst (2) v. the United Kingdom*, 6 October 2005, application no.74025/01; *Frodl v. Austria*, 8 April 2010, application no.20201/04, para. 25; *Greens and M. T. v. the United Kingdom*, 23 November 2010, applications nos.60041/08 and 60054/08; *Scoppola v. Italy (No. 3)* [GC], 22 May 2012, application no.126/05, and *Anchugov and Gladkov v. Russia*, 4 July 2013, application nos.11157/04 and 15162/05.

order to receive benefits? If that assumption is correct, international standards do not oppose such a system.[27] The implementing legislation will have to respect these standards.

2. Chapter III (National Assembly)

30. According to the amended Article 69, the NA will consist of 120 members (compared to 240 currently). The number of members of parliament varies between the member states of the Council of Europe, both in total numbers and relative to the population. From the comparative perspective, 120 representatives for a population of almost 7 million (58,333 inhabitants per representative) is low compared to countries of similar size, such as Sweden with a population of 10 million and 343 members of parliament (29,154 inhabitants per representative). But it is not particularly low compared to Germany, with 83 million inhabitants and (currently) 709 members of parliament (117,066 inhabitants per representative), or the Netherlands, with 17 million inhabitants and 150 members of parliament.

31. This question, however, cannot be resolved only with reference to a "European average". It is important to understand whether the size of the legislature is such as to suit the principle of representative democracy, which requires a minimum number of representatives to be meaningful.[28] This requirement also flows from Article 17 of the Draft, which proclaims the principle of political pluralism.

32. What may be problematic with the reduction of the number of MPs is however that it is abrupt, large (50%), and hardly justified in the explanatory note, which acknowledges that this amendment "significantly affects the organization and structuring of the National Assembly". A clearer and more viable justification should be given. When deciding on the number of MPs, the constitutional legislator must take into account a number of factors, such as the total population, geography, ratio of cities and rural districts, demographics and the existence of ethnic minorities, the unicameral or bilateral nature of Parliament, as well as the electoral system and the party system and the consequences of the reduction of the number of MPs for the delimitation of constituencies and the relation between members of parliament and their constituencies, as well as the practical minimum and maximum limit for the committee work. None of these factors and the amendment's impact on them are discussed in the explanatory note. The Bulgarian authorities recalled that the majority of those who voted in a referendum in 2016 were in favour of a reduction in the number of MPs, but this referendum was not binding.

33. Article 78 also amends the criteria for loss of mandate of members of parliament in case of imprisonment. According to Article 72 (1) item 2 of the current Constitution, the loss of mandate is prescribed in case of "entry into force of a sentence imposing imprisonment for an intentional crime, or when the execution of the imprisonment sentence has not been suspended", while the same provision in Art. 78 (1) item 2 of the Draft refers to "entry into force of a sentence imposing imprisonment for a general crime". As confirmed by the authorities, the change from "intentional crime" to "general crime" means a change in substance so that the threshold for the loss of mandate has been changed. The rapporteurs understand that the "general crime" in this context

[27] In the case of *Schuitemaker v. Netherlands* (ECtHR, 4 May 2010, appl. no. 15906/08), the applicant complained under Article 4 of the Convention that national legislation forced her to obtain and accept any kind of labour, irrespective of the question whether it would be suitable or not, by reducing her benefits if she refused to do so. The Court held that "it must in general be accepted that where a State has introduced a system of social security, it is fully entitled to lay down conditions which have to be met for a person to be eligible for benefits pursuant to that system. In particular a condition to the effect that a person must make demonstrable efforts in order to obtain and take up generally accepted employment cannot be considered unreasonable in this respect. This is the more so given that Dutch legislation provides that recipients of benefits pursuant to the Work and Social Assistance Act are not required to seek and take up employment which is not generally socially accepted or in respect of which they have conscientious objections. Therefore, the condition at issue cannot be equated with compelling a person to perform forced or compulsory labour within the meaning of Article 4 para. 2 of the Convention". See also the ILO Forced Labour Convention, 1930 (No. 29).

[28] Immanuel Kant's classic argument from the 1795 *Zum ewigen Frieden* that one or very few persons are more representative of the popular will than a numerous assembly, has not found approval in modern constitutionalism; see Immanuel Kant, *Zum ewigen Frieden,* ed. by Theodor Valentiner, Stuttgart 1963, pp. 28-29.

means any indictable offence, except for offences subject to private prosecution. Moreover, it is not clear whether the criteria, as understood in the context of Bulgarian law, distinguish between long and short prison sentences or between serious and less serious crimes. The Venice Commission has considered justified the termination of the mandate of a MP following a sentencing after the election if this was a cause of ineligibility to be elected (cf. Article 71 (1) of the Constitution).[29] While such a restriction pursues a legitimate aim and is common in the Council of Europe member states, the threshold for the loss of mandate should not be too low, and should be proportionate to the aim pursued, which is to safeguard the democratic functioning of parliament.[30]

34. Under the amended Article 90, the NA may hear and approve the annual reports of the two top courts (Supreme Court of Cassation and Supreme Administrative Court, item 16), as well as the semi-annual report of the Prosecutor General (item 17). Similar competences already appear under Article 84 (16) of the present Constitution.

35. It is unclear what would follow if these reports are not approved. More importantly, the need for approving the reports of the courts could be problematic from the point of view of the separation of powers. The approval/disapproval should not concern the substantive application of the law. It would be more appropriate to use words like “table and discuss” instead of “approve”.31 It would appear more appropriate to introduce such reporting obligation for the Judicial Council and the Prosecutorial Council (on this see more in the next section, on Chapter VI), as the competences of these councils are far more related to the functioning of the judiciary as such, including budgetary and organisational matters, and there is less risk of interference with the judicial independence in this process.

36. Article 90 item 18 further introduces the possibility for parliament to hear the Prosecutor General (the PG) “on matters related to specific criminal proceedings”. In so far as this competence includes criminal proceedings which are still *sub judice*, it may raise issues under the ECtHR case-law related to judicial independence and impartiality and the presumption of innocence,[32] as well as under the case-law of the European Court of Justice which held that the expression “judicial authority” in the framework decision 2002/584 on the European arrest warrant, also applies to the prosecution service. As a result, member states must make sure that the decision to prosecute in individual cases is impartial and independent, not only *de facto*, but also *de jure*.[33] In addition, caution is called for because the judiciary will not be on an equal footing with the political arena to represent its arguments why a certain judicial decision was taken. The reasons for a judicial decision are to be found in that judicial decision. The judiciary should show restraint to discuss its case-law in other fora. The last reason to exercise caution is because a discussion in the political arena will be conducted on the basis of limited understanding of the file that led to a particular judgment or limited understanding of a pending pre-trial investigation. Some national parliaments explicitly prohibit parliamentary debates on pending court cases.[34]

[29] See Venice Commission, CDL-AD(2015)036cor, Report on the Exclusion of Offenders from Parliament, para. 164.
[30] See Venice Commission, CDL-AD(2015)036cor, Report on the Exclusion of Offenders from Parliament, in particular para. 170.
[31] See a recent example in Malta. Article 29 of the Ombudsman Act reads: “The Ombudsman shall annually or as frequently as he may deem expedient report to the House of Representatives on the performance of his functions under this Act to the Speaker who shall instruct the Leader of the House to lay a copy on the Table of the House at the first available opportunity. The said report shall, as soon as possible, be discussed during a dedicated parliamentary sitting.”
[32] See for example, ECtHR 26 March 2002, *Butkevičius v. Lithuania*, appl. no. 48297/99.
[33] See ECtHR, judgments in the cases C-508/18, C-509/18 and C-82/19.
[34] For example, the *sub judice* rule is explicitly laid down in Order 42A of the Standing Orders of the UK House of Commons.

3. Chapter VI (Judiciary)

a. Creation of two independent councils

37. The Draft proposes significant changes in the composition and working of the Supreme Judicial Council (the SJC). The Venice Commission has on a number of occasions assessed institutional reforms of the Bulgarian judiciary. In this respect, it should be underscored that there is no institutional quick-fix to an independent and impartial judiciary operating according to high professional standards.[35] Institutional reforms should go hand-in-hand with and not replace a long-term effort aiming to improve the professionalism, transparency and ethics within the judiciary as well as building a culture of respect for judicial independence among other state powers.[36]

38. Under the current Constitution, judges, prosecutors and investigators in Bulgaria have the common status of "magistrates" and are governed by the SJC. Before 2015 the SJC was a single body, composed of the representatives of magistrates (judges, prosecutors and investigators), elected by their peers, *ex officio* members, and lay members elected by the NA.

39. The constitutional reform of 2015 split the single SJC into two chambers – one for the judges and another for the prosecutors and investigative magistrates. The Plenary SJC remained but was stripped of most of its powers regarding appointment, disciplining and removal of judges and prosecutors. These powers went to the two distinct chambers. However, the Plenary SJC retained the nomination/dismissal powers vis-à-vis the two chief justices (the President of the Supreme Court of Cassation and the President of the Supreme Administrative Court) and the PG, as well as the power to remove elected judicial members, and some regulatory powers.

40. The 2015 reform was a step forward, but still fell short of the European standards.[37] Indeed, the prosecutors continued to play an important role in the governance of judges – through the Plenary SJC, where they were represented by prosecutors elected by their peers and by those (former) prosecutors who were elected under the "lay member" quota. Judges elected by their peers were in a net minority in the Plenary SJC and in a slight minority in the Judicial Chamber.

41. The Draft makes a further step in the right direction. Most importantly, the SJC plenary is abolished, and in effect two independent councils are created, one for judges and one for prosecutors and investigators (they will be referred to as the "Judicial Council" and the "Prosecutorial Council" respectively). Article 136 (1) proposes to confer on the two councils the function of appointing, promoting, demoting, transferring and releasing from office judges and prosecutors/investigators respectively.

42. The suppression of the Plenary SJC would imply that a number of previous recommendations of the Venice Commission have been implemented. Thus, under the new system the Minister of Justice would not chair the Plenary SJC anymore;[38] the Plenary SJC would not nominate candidates for the position of two chief justices and the PG. The suppression of the Plenary addresses the concern that the prosecutors, and the PG in particular, are excessively

[35] This point has been stressed in recent Venice Commission opinions, see CDL-AD(2020)022, Ukraine, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on Draft Amendments to the Law 'on the Judiciary and the Status of Judges' and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (Draft Law No. 3711), CDL-AD(2019)027, Ukraine, Opinion on Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, paras. 6-8; para. 13-15; Venice Commission, CDL-AD(2018)022, "The Former Yugoslav Republic of Macedonia", Opinion on the Law Amending the Law on the Judicial Council and on the Law Amending the Law on Courts, para. 12.

[36] See Michal Bobek and David Kosař, "Global solution, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe", in *German Law Journal* 2014, Vol. 15. No. 07, pp. 1257-1292.

[37] See Venice Commission's 2017 Opinion, para. 13 et seq.

[38] See Venice Commission, CDL-AD(2015)022, para. 69.

involved in the governance of judges. So, dividing the SJC into two separate councils is in line with previous Venice Commission recommendations and should be welcomed.[39]

43. The presence of the Minister of Justice on the councils, even on a non-voting basis, which has been retained in the Draft is a source of concern for the Venice Commission. While there may be occasions where the presence of the Minister of Justice in the councils is required, for example in budgetary matters, a general right for the Minister of Justice to participate on the work of the councils may be regarded by the judiciary as a form of pressure from the executive power, especially when the councils decide on disciplinary or career matters. It would therefore be preferable that the presence of the Minister of Justice be limited to some specific issues or excluded for some specific issues.[40]

b. Composition of the Judicial Council

44. Despite positive changes, the composition of the Judicial Council is still not fully in line with some of the Council of Europe standards. Most importantly, judges elected by their peers are still in a minority in the Judicial Council. Article 137 provides for the composition of the Judicial Council which is to consist of the two chief judges *ex officio*, seven judges elected by their peers and six members elected by the NA by two-thirds majority. While judges make up 9 out of 15 members of the Judicial Council, and thus have a majority, only 7 of judicial members are elected *by their peers*. The remaining two judges are members *ex officio*. This composition does not correspond with the parameters set out in Recommendation CM/Rec(2010)12, which states that "[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary".[41]

45. In order to comply with this Recommendation, the Venice Commission recommends the Bulgarian authorities to review the composition of the Judicial Council so that to give the judges elected by their peers at least half of the number of the seats in this body.

46. What is also very important is to have a well-balanced council, not only between the judicial and non-judicial members, but also among the judicial members so that they represent different types of judges and levels of the judiciary, while ensuring balance between the regions, gender balance etc. This can be difficult to achieve, particularly on a body which if it is to be effective should not have too many members. Such a balance is more likely secured through elections among the judges rather than *ex officio* membership. It is sufficient that the Constitution expresses the principle, while the specific procedures and criteria for a balanced representation of all levels of courts should be regulated in law (cf. Article 145).

c. Composition of the Prosecutorial Council

47. According to draft Article 138, the Prosecutorial Council consists of 11 members, four of which are elected directly by the prosecutors and one is elected directly by the investigating magistrates, while the PG is a member *ex officio.* There is an ongoing discussion on whether prosecutorial councils should contain a majority of prosecutors elected by their peers. While the Consultative Council of European Prosecutors (CCPE) has advocated this approach in its opinions, it has not met general agreement. There are different considerations which need to be balanced with one another. Unlike judges, prosecutors are often organised in a hierarchical

[39] See Venice Commission, CDL-AD(2015)022, para. 55.
[40] See Venice Commission, CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para. 33.
See also Venice Commission, CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 97; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para.16
[41] Para. 27. See also Venice Commission, CDL-AD(2015)022, para. 39; CDL-AD(2017)018, para. 14; CDL-AD(2019)031, para. 69.

system, with lower prosecutors subordinated to the higher ones.[42] There is a risk that, as members of a prosecutorial council, prosecutors would vote as a block, following instructions (formal or informal) from their superiors. A prosecutorial council lacking a strong and truly independent component will not be an efficient check on the powers of senior prosecutors, and of the PG in particular.

48. Indeed, these concerns are less relevant in countries where there is a long tradition of independence of individual prosecutors. And it is important to avoid another extreme, namely that the council is dominated by political appointees.[43]

49. The Venice Commission recalls that the question of accountability of the PG has been at the centre of the judicial reform in Bulgaria for many years, ever since the ECtHR laid bare this problem in the case of *Kolevi and Others v. Bulgaria*.[44] In that case the ECtHR found a violation of Article 2 of the European Convention due to the fact that it was impossible to perform an independent investigation into the offences allegedly committed by the PG. The main conclusion of *Kolevi* was that, due to his/her unique position within the Bulgarian legal order, the PG is virtually immune from any criminal liability.

50. In 2019 the Bulgarian authorities made an attempt to remedy this situation, by proposing a mechanism of suspension of the PG suspected of a crime. However, in its 2019 Opinion the Venice Commission concluded that this mechanism would not work. In particular, the Venice Commission demonstrated that given a strong presence of prosecutors in the Plenary SJC (in its current composition), it is very unlikely that this body would ever authorise a suspension of the PG, which would be a pre-condition for any effective investigation against him/her.[45]

51. In the proposed system, the questions of elections/removal of the PG will be decided by the Prosecutorial Council. On the one hand, as noted above, the creation of two separate councils removes the prosecutors from the judicial governance, and this is positive. On the other hand, the separate Prosecutorial Council will be even more than before consolidated around the PG, who is the former and potentially the future hierarchical superior of nearly all of its members.

52. As noted in the 2019 opinion, "in the current composition of the Prosecutorial Chamber of the SJC all of the lay members are former prosecutors or investigators". [46] These former prosecutors are entitled to return to the prosecution service (immediately) after serving as lay members. In these conditions, the Prosecutorial Council is unlikely to protect the career of individual prosecutors or appoint senior prosecutors against the will of the PG.

53. The Commission therefore reiterates that it is very important that lay members of the Prosecutorial Council do not have any present or future hierarchical (or de facto) subordination links to the Prosecutor General and represent other legal professions. This has already been recommended in the 2017 opinion.[47] Achieving the above outcomes would require in addition an evolution of professional ethos and political culture,[48] as well as closer examination of institutional

[42] The Bulgarian authorities argued that the 2016 reform of the Judicial System Act lead to the decentralisation of the prosecution service and increased the independence of individual prosecutors.
[43] See Venice Commission, CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, para. 33, 35 and 36.
[44] See also the Committee of Ministers materials on the execution of this judgments: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809e7bfc.
[45] See para. 27 et seq. of this opinion.
[46] See Venice Commission, CDL-AD(2019)031, para. 27.
[47] See para. 69.
[48] See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria.
[48] See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act of Bulgaria, concerning criminal investigations against top magistrates, para. 70.

and procedural rules so as to reduce to a certain extent the PG's institutional or *de facto* leverage (see the 2017 opinion)[49] over other prosecutors or members of the Prosecutorial Council.

d. Election of lay members to the two councils

54. According to Article 139 (1), lay members should be "practising lawyers of high professional and moral integrity with at least fifteen years of professional experience".[50] As explained to the rapporteurs, the term "practising lawyer" does not necessarily mean in this context defense lawyers admitted to the Bar. This term refers to people having a legal diploma and working in the legal sphere for fifteen years at least. Indeed, some of them may be defence lawyers, but the Commission recommends that other legal professions are represented as well: the lay component of both councils should be professionally diverse.

55. The Draft does not describe the process of nomination or filtering of candidates to the lay members' positions. There is a risk that the lay members will be persons with strong political connections. To avoid that, it is important to provide a system of pre-selection or nomination of candidates which ensures that the lay component of both councils consists of experienced persons who have no personal interest in the outcome of the decisions they make and who are not permeable to political influence. Where lay members of the judicial councils are to be elected by Parliament, it is common to find a provision that they are selected from amongst persons nominated by expert bodies such as the law faculties of the universities and the professional associations of lawyers[51] and perhaps from some other categories such as retired judges. These matters, however, may be left to the legislator (cf. Article 145).

56. What should be mentioned in the constitutional text is what to do if the 2/3 majority in the NA required to elect lay members is not reached. Without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. To address this, the Constitution might provide, for example, that the power to choose a certain minimal number of lay members in this case is temporarily transferred to the President or another independent officeholder (like the Ombudsman, for example), if Parliament is uncapable on agreeing on the candidates and reaching the necessary majority. Other anti-deadlock mechanisms can be considered as well.

e. Functions of the two councils

57. The proposed new Article 140 deals with the powers and functions of the two councils. The powers related to appointments, promotion, dismissal and discipline of judges and prosecutors, including the two chief justices and the PG,[52] are now concentrated in the two councils. This is positive.

58. At the same time, the Constitution does not specify whether the decisions on disciplinary matters of the two councils are subject to judicial review.[53] Previously, the Venice Commission noted that there should be a possibility of an appeal to an independent court against decisions of disciplinary bodies, in conformity with the case-law of the ECtHR;[54] however, regarding the scope of such appellate review, the Venice Commission stressed that the appellate body should act

[49] See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, para. 35.
[50] The Venice Commission understands that this qualification criterion is applied both to the lay members and judicial/prosecutorial members.
[51] See Venice Commission, CDL-AD(2015)022, para. 49-51; CDL-AD(2017)018, para. 16.
[52] The Venice Commission understands that the power "to appoint and dismiss the administrative heads" relates to the power of the two councils to appoint and remove court presidents and heads of the prosecutorial offices, and not purely administrative personnel.
[53] The right to lodge and appeal against a decision of the SJC before the Supreme Administrative Court is guaranteed at the legislative level, by the JSA.
[54] On the applicability of Article 6 ECHR to disciplinary proceedings against judges and therefore the right to appeal to an independent court, see ECtHR *Ramos Nunes de Carvalho e Sá v. Portugal [GC]* - 55391/13, 57728/13 and 74041/13, Judgment 6.11.2018.

with deference to the judicial council.[55] This is *a fortiori* true if the disciplinary council itself is an independent body, and if the procedure before it offers guarantees of fair trial – in this case the need to have a review by an independent court becomes less relevant.

59. The Draft confers administrative functions to the two councils. These include the power to adopt a draft budget (Article 140 (1)), as well as to resolve organisation matters (Article 140 (10). The councils should be given the means – in particular the human resources – to deal with such issues.

60. Since the Government draws up the State budget (Article 87 (2) of the present Constitution and Article 93 (2) of the Draft), and since the Draft provides that the Minister of Justice manages the immovable property of the judiciary and participates in its organisation, it appears reasonable that he/she also proposes the budget for the judiciary. In terms of independence, there is no international standard that requires budgetary autonomy for courts, but the views of the judiciary should be taken into account when deciding the budget.[56] The process of approval of the draft budget by the Judicial Council/Prosecutorial Council (or the Plenary SJC in the current system), following a proposal of the Minister, is in line with this recommendation. In order to ensure that the position of the judiciary in budgetary matters is made known to the NA, the Constitution could require that the views of the Judicial Council/Prosecutorial Council on the budget proposal be made public and included as an attachment to the Government's proposal for the State budget.[57]

61. As to the role played by the two councils in the "matters related to the organisation of the operation of the respective system" (Article 140 (10)), the Venice Commission previously warned the legislators in other countries against overburdening the councils with administrative powers.[58] With regard to the elected component of judges and prosecutors the qualities which make for a good judge or prosecutor and, moreover, a judge or prosecutor who earns sufficient respect and popularity to be elected by his or her colleagues, are not necessarily the qualities which make a good manager or administrator. It is a truism that managers and administrators often have to make unpopular or difficult decisions and elected bodies are not always in the best position to do so. This does not exclude that instead of decision-making powers the councils should have an advisory role and a right to be consulted.

62. On the other hand, it is important to ensure that the administrative support functions (distribution of offices, financial resources, allocation of assistants, etc.) are not abused to put pressure on judges. So, it would also be wrong to concentrate those powers exclusively in the hands of a Minister of Justice or another government official. A mechanism of "shared responsibility", involving the two judicial councils but not overburdening them with everyday administrative management of the courts and prosecution offices, may be devised. As regards the power to manage the immovable property of the judiciary (see Article 142 (2) of the Draft), it should be ensured that the Minister's competence only concerns real estate management and that a court or a public prosecutor's office is not relocated to a less representative or less centrally located building, or at least not without their approval.

63. Furthermore, as stated above, it would be more appropriate for the two councils to submit their own reports to the NA, and not for the two supreme courts (see Article 90, items 16 and 17).

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[55] See Venice Commission, CDL-AD(2019)008, North Macedonia - Opinion on the Draft Law on the Judicial Council, para. 35.

[56] See the Council of Ministers, Recommendation CM/Rec(2010)12, Guideline 40; CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 53-55.

[57] See Venice Commission, CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 184.

[58] See Venice Commission, CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, para. 98, 100, 102 and 103. See also CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, para. para. 66, 71 and 72; CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para.26; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, para. 39.

The separation of powers requires that the supreme courts should not be answerable to the parliamentarians. By contrast, a governance body like the Judicial Council or the Prosecutorial Council may be required to submit general reports on the functioning of the respective systems (which in any event should exclude any reporting on the specific cases *sub judice*).

64. In sum, the Constitution should clarify that the two councils give their opinion on the proposed budget of the judicial system,[59] and that they participate in deciding organisational matters, and are required to submit general reports to the NA. The details may be left to the law to regulate.

f. Competencies of the prosecution service outside the criminal law sphere

65. The competencies of the prosecution office are set out in the unamended Article 134 (6) (present Article 127 (6)), according to which the prosecution office shall ensure that legality is observed, in particular, by taking part in civil and administrative proceedings whenever required to do so by law. Thus, the Draft does not meet the long-standing recommendations of the Venice Commission, according to which functions and powers of the prosecution service outside of the criminal law sphere should be curtailed.[60] While this matter does not necessarily have to be addressed at constitutional level, the envisaged reform would be a good occasion to do so. If the constitutional provision is nonetheless maintained, the oversight powers of the prosecutors should be restricted in the law.[61]

g. Probationary period for young judges and prosecutors

66. Despite the Venice Commission's former criticism based on established international standards,[62] five years' probationary periods for new judges are maintained (Article 136 (4) of the Draft and Article 129 (3) of the present Constitution). The acquisition of tenure is decided by the Judicial Council, which provides a certain safeguard against arbitrary or politically motivated terminations of the probationary period. However, as emphasised in the 2017 Opinion, the Venice Commission has always been critical of the very idea of probationary periods for judges, as such status undermines their independence.[63] The same recommendation has been made by GRECO.[64] The Venice Commission reiterates its position and recommends to remove such probationary periods or to surround them with all necessary guarantees. Should it nonetheless be maintained, permanent appointment after the probationary period should be the rule. In this respect, it is welcome that the Plenary of the SJC has established standards and indicators for ethical and performance reviews following the probationary period.[65] However, objective criteria for refusal of appointment to the position of tenure, with the same procedural safeguards as for removal of judges with tenure, should also be specified in the law if not in the Constitution.[66]

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[59] Participation of the SJC in the budgetary process is regulated in detail by the JSA.

[60] Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, para. 112.

[61] As to the scope of such restrictions, the Venice Commission observed in its 2017 opinion that "coercive powers of the prosecution service outside of the criminal law sphere should be seriously restricted, if not totally suppressed. The JSA should describe, with sufficient precision, in which cases (falling outside of the scope of the Criminal Procedure Code) the prosecutors may seize documents, summon people for questioning, enter private premises, issue binding orders, etc. If such actions interfere with privacy, secrecy of correspondence, etc., they should be accompanied by appropriate procedural safeguards (such as the requirement of a "reasonable cause", the need to obtain prior judicial authorisation, etc.)." CDL-AD(2017)018, para. 43.

[62] Venice Commission, CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 34 et seq.; CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, para. 48; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, para. 78.

[63] See Venice Commission CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, paras. 78, and CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, paras. 32-35.

[64] See GRECO, Compliance report Bulgaria. Corruption prevention in respect of members of parliament, judges and prosecutors, 23 June 2017, para. 30-34.

[65] See GRECO, Compliance report Bulgaria. Corruption prevention in respect of members of parliament, judges and prosecutors, 23 June 2017, para. 31.

[66] Venice Commission, CDL-AD(2005)038, Opinion on the Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", para. 30. For example, in Norway,

h. Prosecutorial monopoly and the possibility of bringing the Prosecutor General to criminal liability

67. As explained above, the question of accountability of the PG has been at the centre of discussions between Bulgaria and the Council of Europe for many years. Bulgaria has an international obligation to address this matter following the *Kolevi* judgment of the ECtHR (see also *S.Z. v. Bulgaria*).[67] It would be a missed opportunity if the current constitutional reform did not address this issue.

68. In its 2019 opinion, the Venice Commission made a number of recommendations as to how to improve the accountability of the PG. On 7 December 2019, the Bulgarian Ministry of Justice responded to the opinion by publishing a revised draft law, which would amend the Judicial System Act (the JSA) and the Criminal Procedure Code (the CPC). The main idea of the December 2019 draft law was to create a figure of an independent prosecutor who would deal with cases where the criminal liability of the PG and his or her deputies may be potentially at issue.[68]

69. The issue of the role of the PG in case where he or she is under investigation was addressed in a judgement of 23 July 2020 by the Constitutional Court of Bulgaria, which held that the legality supervision and methodological guidance over the activity of all prosecutors, carried out by the PG under Article 126 § 2 of the Constitution, does not apply to cases where a prosecutor conducts inquiries, investigations or other procedural acts related to allegations against the PG. The Court's interpretation was based on the principle that no one should be the judge in his or her own case.

70. That is a welcome development .Following this judgment, the Constitution should provide, in cases of potential conflict of interests with the PG and his/her deputies, for a special independent investigative/prosecution mechanism: the PG who is under criminal investigation or prosecution should be suspended and an acting independent Prosecutor should be appointed. The latter would not derive its mandate from nor be answerable to the Prosecutorial Council.

71. Providing for a judicial avenue in serious cases where the investigation has not been opened may be a useful addition to the current system – this was recommended by the 2019 Opinion[69] and follows from p. 34 of the Committee of Ministers Recommendation Rec(2000)19, which calls on the States to give "interested parties of recognised or identifiable status" the right to challenge decisions of public prosecutors not to prosecute "by way of judicial review, or by authorising parties to engage private prosecution".[70]

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which maintains a system of temporary apprentice judges on two-year contracts, the Act on Courts para. 55 h provides the same guarantees against removal in the two-year period as for judges with tenure.

[67] See the ECtHR, *S.Z. v. Bulgaria*, no. 29263/12, 3 March 2015.

[68] The December 2019 draft proposed to entrust such investigations to the head of a future Inspectorate Department at the Supreme Cassation PO ("the HID"). The HID will be elected or dismissed at the request of three members of the Prosecutorial Chamber of the SJC, by a majority of at least eight (out of eleven) votes. His or her seven years' mandate could be terminated only on specific grounds. The HID would enjoy procedural and administrative independence when supervising an investigation against the Chief Prosecutor (as well as his or her deputies) and it would not be possible to modify his or her decisions related to such investigation. The HID could entrust investigative acts to other prosecutors or to investigators from the National Investigative Service ("NIS") or designate another supervising prosecutor; the Chief Prosecutor would not have the power to interfere with the decisions of these prosecutors or investigating magistrates concerning him or her.

[69] Para. 52.

[70] See also Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA: 1. "[…] victims, in accordance with their role in the relevant criminal justice system, [should] have the right to a review of a decision not to prosecute." (Article 11 (1)), and further, in (2): "[…] at least the victims of serious crimes [should] have the right to a review of a decision not to prosecute." The Directive does not require judicial review of the decision not to prosecute, whereas the CM Recommendation seems to offer the States an

72. In sum, the Venice Commission strongly recommends to the Bulgarian authorities to provide in the Constitution for a mechanism whereby in case of potential conflict of interests the Prosecutor General could be suspended and an independent acting Prosecutor, answerable before another authority than the Prosecutorial Council, would be appointed to investigate the case. The Commission stands ready to continue to work with the Bulgarian authorities in order to design such mechanism. The Commission further recommends to provide for the judicial review of decisions not to open an investigation or not to prosecute.

i. The two Inspectorates

73. The Draft provides for the creation of two Inspectorates – one dealing with the judges and another with the prosecutors (see Article 144). Each council has its own inspectorate, which is a logical step after the creation of two separate councils, and is to be welcomed. The inspectorates' main task is "to inspect the operation of the judiciary bodies without interfering with the independence of judges, jurors, prosecutors and investigating magistrates in the performance of their duties" (Article 144 (6)).

74. The chief inspectors as well as the inspectors are elected by the NA by a two-third majority. The Venice Commission recommends in this respect, as in respect of the election lay members of the two Councils (see paragraph 56 above), to provide for an anti-deadlock mechanism in cases this majority cannot be reached.

75. The next question is who should nominate the candidates to those positions. In the 2017 Opinion the Commission expressed concern that in the currently existing system inspectors may have political obligations vis-à-vis one or another party in parliament. In order to increase political detachment of the inspectors, the Venice Commission recommended in 2017 giving the Chambers of the SCM the power to nominate a certain number of candidates for the appointment by Parliament to the positions of the inspectors.

76. It remains unclear on what grounds the inspectors may be removed from office. In the opinion of the Venice Commission, their removal should be subject to the same criteria and safeguards as for judges and prosecutors (see Article 136 (4) of the Draft). Addressing these issues at legislative level (Article 144 (10)) does not look appropriate. As recommended in 2017, the power to remove inspectors should be given to the two councils, and it should be specified at the constitutional level. Judicial review should be ensured and further safeguards would be welcome.

77. The functions of the two inspectorates are not entirely clear from the constitutional text. The Inspectorates cannot discipline or dismiss magistrates or prosecutors – the final say belongs to the respective council. However, they can collect and supply information on the basis of which the council can act. The inspectors may bring disciplinary cases against judges and prosecutors, along with other institutional actors having this power (in the current system – the Minister of Justice or the competent president of the court/head of the prosecutorial office). In addition, the two Inspectorates also conduct integrity checks and examine property declarations of judges and prosecutors. The Inspectorates are also competent to examine virtually every aspect of the activities of courts, prosecution offices, individual judges and prosecutors: internal organisation and working arrangements, financial situation of magistrates, their assets, their behaviour in the private sphere, etc.

78. The 2017 Opinion examined the functions of the Inspectorate very closely: "Even if the formal decision-making power remains with the [SCM, now – one of the two councils], entrusting the Inspectorate with so many new functions (which are often overlapping with the functions of the

alternative between a judicial review (following hierarchical appeals, where appropriate) or a private prosecution mechanism.

[SCM …]) may result in shifting the real power from the [SJC] to the Inspectorate".[71] It is important to note that the Inspectorates operate "under" these two councils (see Article 144 (6) of the Draft). Thus, the law must ensure that the Inspectorates, combining all those important powers, but elected by the NA alone, do not become more powerful than the two councils.[72] The competences and responsibilities of the inspector's office should be specified in the law, in particular to prevent any overlapping with the councils' powers (see Article 145). In particular, it should be made clear that only the two councils have the right to impose disciplinary liability and remove judges/prosecutors from office. Reviews or evaluations by the inspectors should not have a determinative effect on the judges' and prosecutors' careers, and the criteria for evaluation should be established by the councils. It should also be clear how the "attestation" of judges and prosecutors (see Article 140 item (7)) corresponds to the power of the Inspectorate to "inspect the operation of the judiciary bodies" (see Article 144 (6)). Ethics commissions in courts must report any suspected breaches to the SJC Judicial Chamber, which is empowered to impose disciplinary sanctions.[73] While these ethics commissions are expected to report in the future to the new Judicial Council, inspectors should narrowly co-operate with them.

79. Furthermore, the boundary between matters which the inspectors can deal with and more serious matters where normal criminal procedures are to apply is unclear. The inspectors are charged with dealing with matters concerning the "integrity" of judges – does this include serious cases of bribery? Will they have powers to use special investigative measures, for example? According to the Bulgarian authorities, the inspectors will not have the power to investigate crimes.

80. In sum, it is recommended to provide in the Constitution that the two respective councils may nominate candidates to be elected as inspectors by the NA; that only the two councils can remove them, and that inspectors, in performing their functions, should not encroach on the constitutional powers of the two councils regarding the career and the discipline of judges and prosecutors. The more detailed regulations can be left to the legislator.

j. Other draft amendments to Chapter VI

81. The Draft does not specify the qualifications for office of judges and prosecutors but appears to leave this in the hands of the respective councils (Article 140 (3), (5), (6) and (9)). It is not clear whether Article 145 which provides for certain matters to be prescribed by law applies to these questions and, if so, what is to be prescribed by law and what is to be left to the councils themselves. It would be desirable to specify the basic qualifications for judicial office in law, and not leave the matter entirely to the discretion of the council.

82. The Draft is short on the practicalities of the disciplinary system, which is addressed by a number of provisions whose interrelation is not entirely clear.[74] Under Article 140 (6) the respective councils have the power of dismissal of judges and prosecutors. Under Article 140 (8) they are to impose disciplinary sanctions of demotion and dismissal. Under Article 136 (4) item 5, a judge or a prosecutor may be dismissed in case of a "serious infringement or systematic neglect of their official duties, as well as actions damaging the prestige of the judiciary".[75] The

[71] Para. 57.
[72] These matters are regulated in detail at the legislative level, by the JSA.
[73] GRECO (Group of States against Corruption), Fourth Evaluation Round, Corruption prevention in respect of members or parliament, judges and prosecutors, Compliance Report – Bulgaria, para. 61.
[74] The Bulgarian authorities explained that those matters are regulated in detail by the JSA and that the rules of ethical conduct are set out in the Code of Ethics of Bulgarian Magistrates, adopted by the Plenary SJC.
[75] The latter notion was deemed "problematic" in the 2017 Opinion (para. 108) and it might be worthwhile to reiterate the following: "The Venice Commission acknowledges that, in defining unethical behaviour, the law may have recourse to some comprehensive formulas. In such cases, it is better to use a mixed legislative technique: together with such comprehensive formulas, the law should list most common types of unethical behaviour. These may include, for example, heavy drunkenness in public, grossly indecent or disorderly behaviour, failure to comply with civil obligations ascertained by a court decision, obsessive gambling, fraternizing with known criminals, publicly attacking constitutional values, etc. These specific examples will cover the majority of situations in which a judge

question arises whether Article 136 (4) defines the only grounds for dismissal or whether the law may describe other "conditions for the removal from office" – see Article 145. This question is important in particular in relation to the powers of the inspectorate to carry integrity checks and verify declarations of judges and prosecutors – see Article 144 (6) of the Draft.

83. Furthermore, it is unclear whether other sanctions than "dismissal and demotion" are constitutionally permissible, and, if so, who may impose such lesser sanctions, which should be possible to ensure respect for the principle of proportionality.[76] There is no proposal for a disciplinary council or committee, so it may appear that every decision in disciplinary matters should be taken by a full council. This may be difficult in practice.

84. It is not clear who may initiate the proceedings (only inspectors, or also the presidents of the courts or heads of the prosecutor's offices and the Minister of Justice, every interested person, etc). It is unclear whether the disciplinary proceedings should respect some basic fair trial guarantees.[77] Finally, provisions on the conflict of interest rules, are missing and should be added. If one of the members of the council initiates, in his/her capacity within the judicial or prosecutorial system, a disciplinary case, he or she should not act as both "prosecutor" and "judge" in such matters and sit in the respective council while this case is examined, let alone chair such meetings.

85. In sum, the scope of matters to be regulated by law pursuant to Article 145 needs to be stated with greater precision. To leave such matters to the discretion of the two councils, which have no direct democratic accountability, and without any constitutional guidance, is not prudent.

4. Chapter VIII (Constitutional Court)

86. The current Constitution in Article 150 follows an indirect model of access to constitutional justice. Access to the Constitutional Court (the CC) requires a motion from competent bodies and officeholders.[78] The Draft introduces the right of individual constitutional complaint (see Article 161 (1) item 9): "After all remedies have been exhausted, the Court rules on requests by a citizen or a legal entity to establish the constitutionality[79] of a law that violates their rights and freedoms". It appears that, under the Constitution, the person complaining has to be personally affected to have a standing.

87. The introduction of the right of individual complaint is welcome, as it strengthens individual rights. By referring to an exhaustion of remedies Article 161 (1) item 9 seems to introduce a so-called "normative constitutional complaint", where the individual can complain against the violation of his or her subjective fundamental rights through an individual act based on an allegedly unconstitutional normative act.[80] However, the formulation used is not completely clear. In order to avoid that this provision could be interpreted as the basis for an *actio popularis*, an abstract control without the applicant even being the victim of the allegedly unconstitutional provision, a reference to a concrete case should be added. Such an *actio popularis* risks seriously overburdening the Court.[81] However, an even better guarantee for the protection of human rights than the normative constitutional complaint is the 'full constitutional complaint', which is directed not only against the unconstitutional norm as such but also against the individual act applying

may be considered to be acting unethically, and will also serve as guidance for those rare cases where the all-embracing formula may be needed."

[76] The Bulgarian authorities clarified that other sanctions are constitutionally permissible and are regulated by the JSA.

[77] These matters are regulated by the JSA.

[78] At least one-fifth of all members of the NA, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court or the PG. In addition, both the Ombudsman and the Supreme Bar Council can refer to the CC laws that violate individual rights and freedoms.

[79] It would be more logical in this context to write "the unconstitutionality".

[80] Venice Commission, CDL-AD(2010)039rev, Study on individual access to constitutional justice, para. 77.

[81] Ibid. para. 4, 43, 123.

that provision.[82] The Bulgarian authorities might wish to consider introducing a full constitutional complaint.

88. Article 162 introduces a mechanism to raise a constitutionality issue through a court examining a specific case. If a discrepancy between an applicable law and the Constitution is suspected, the court adjudicating at last instance shall, on a motion of the party concerned or on its own motion, stay the proceedings and refer the matter to the CC. This is clearly a step forward to strengthen individual rights, and therefore to be welcomed. During the proceedings in lower courts, it may not be clear which instance is the last one – which can refer to the constitutional court –, as that depends on both the will to appeal and procedural rules for appeal. According to both the new Article 161 (1) item 9 and the explanatory note, individual constitutional complaint should only be possible where all other remedies have been exhausted. This seems to indicate that direct individual access to constitutional justice is only possible after the case has been finally settled by a court without recourse to further appeal. Which court can refer matters to the CC is important for individual or private entities for which rights and freedoms are at stake, since a denial of constitutional review at an early stage would entail uncertainty as to their constitutional rights and freedoms. It is also unclear whether a party should raise the issue of constitutionality immediately, before the first-instance court, or wait until the case reaches the last stage. The Venice Commission has previously stated that "[f]rom the viewpoint of human rights protection, it is more expedient and efficient to give courts of all levels access to the constitutional court".[83]

5. Chapter IX (amendments to the Constitution)

89. The current Constitution of Bulgaria is one of few that prescribe a procedure before a special body for the adoption of a new Constitution or specific parts of it – a Grand National Assembly (the GNA).[84] The convocation of the GNA is a politically difficult decision, because it implies the dissolution of the NA. The Draft simplifies the constitutional amendment procedure by abolishing the GNA and authorising the NA, by a qualified majority, to adopt all changes to the Constitution as well as a new Constitution (Article 165). A certain category of changes, including the adoption of a new Constitution, should be confirmed by a national referendum (Article 170).

90. The Draft provides that, as a rule, constitutional amendments shall require a majority of three quarters of the votes of all MPs in three ballots on three different days (Article 168 (1)). A bill which was supported by more than two thirds, but less than three quarters of MPs may be reintroduced within a specific time frame (Article 168 (2)) and then passed with a lower majority (2/3). More important changes (set out in Article 166) require a majority of four fifths of the votes of all MPs in three ballots on different days (Article 169 (1)). Here again, a reintroduction leading to adoption by a lower majority (3/4) already reached in the previous process is possible. In both cases, it may very well be that the higher initial qualified majority requirements are simply symbolic, and that the subsequent lower qualified majority requirements will be the main rule.

91. In addition, a new Constitution needs to be adopted in a referendum with a turnout of more than 50 %. The requirement of a referendum to validate a new Constitution or amendment to certain provisions enjoying special protection is found in the constitutions of several other Council of Europe member states.[85] Depending on the political context and tradition for referendums, a minimal requirement for turnout can be a major obstacle for constitutional reform. It can effectively confer a veto on a relatively small minority who persuade their supporters to abstain rather than vote against – indeed, abstention becomes a more effective tool of opposition than a vote against.

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[82] Ibid., para. 79. seq. On this point see in particular the speech given by the President of the Venice Commission at the occasion of the celebration of the 140th anniversary of the Constitution of Veliko Tarnovo: "A normative constitutional complaint and, even better, a full constitutional complaint would provide comprehensive protection of human rights in Bulgaria", https://www.venice.coe.int/files/GB_Speech_VelTarnovo.pdf.

[83] Venice Commission, CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, para. 86.

[84] See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para. 56.

[85] See CDL-AD(2010)001, para. 47.

The Revised Guidelines on Referendums make it clear that a turnout quorum should be avoided; while "[a]n approval quorum or a specific majority requirement is acceptable for referendums on matters of fundamental constitutional significance".[86]

92. The provisions on the constitutional amendments raise two main issues. First of all, the distinction between the two procedures – one required for "important" changes and one required for ordinary changes to the Constitution – is not entirely clear. Thus, Article 166 stipulates that "changes in the form of government regulation and state government" would require a special procedure (with 4/5 of votes in the first round and ¾ in the second). The question is what amounts to a "change in the form of government". The current constitution makes a similar distinction in Article 158 (3) – the involvement of the GNA is required for those changes which modify "the form of state organization and in the form of government". As demonstrated by the recent constitutional history (namely the 2015 reform), amending the structure of the judicial governance bodies does not necessitate the convocation of the GNA. But what if this structure is changed so drastically that it eliminates all guarantees of independence of the judiciary and puts it under the control of the executive? Would such a reform require, under the current Constitution or the Draft, a special procedure? The same question may be raised in relation to the distinction made between the adoption of a completely new Constitution (Article 170 (1) – in this case there is a requirement of a minimal turnout for the referendum) and the adoption of amendments which "change the republican and the parliamentary foundations of the state government" (Article 170 (2) – in this case there is no turnout requirement for the referendum). As explained by the Government, there is jurisprudence of the Constitutional Court as to what constitutes a "form of government" within the meaning of those provisions of Constitution - Decision № 3 of the Constitutional Court of 2003 under constitutional case № 22/2002. The form of government within the meaning of Article 158 (3) should be interpreted broadly and includes a number of constitutional texts on institutions, as well as their activities and powers.

93. It would be more appropriate to formulate more precisely which elements of the government system are "hard provisions" and which are not (like, for example, it is done in Article 166 item (5) which stipulates that amendments to the chapter on amendments require a higher majority). In addition, it may be necessary to describe explicitly the role played by the Constitutional Court in this process, which may be a guarantor that the proper constitutional procedure is followed.

94. Secondly, the Venice Commission does not see the rationale behind the changes to the amendment procedure. It is still unclear why the majority MPs decided to make the Bulgarian constitution more flexible, what important reforms were blocked because of the current model of amending the Constitution, and why those reforms cannot be implemented within the framework of the current reform, which, in any event, already requires a convocation of the GNA. The explanatory note is very brief on this point: it describes the proposed changes and reiterates, correctly, and with reference to some other legal orders, that there is significant variation among the Council of Europe member states concerning the balance between flexibility and rigidity.[87] .

95. In sum, while making the Constitution more easily amendable is not contrary to European standards, such an important change should have a convincing explanation, and should be subject of a very thorough public debate. The fact that similar rules on amendment can be found in some other countries is not as such an argument demonstrating the necessity of the reform in Bulgaria.

6. Transitional and Concluding Provisions

96. Most of the proposed amendments will be applicable from the moment of their adoption; therefore, no special transitional rules are necessary. However, the Draft does not include provisions on the transition from the old SJC to the new structures. It is unclear whether the

[86] Venice Commission, CDL-AD(2020)031, II.7.
[87] Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, ch. VII.

mandate of the SJC and its individual members, as well as other officeholders in the judicial and prosecutorial system will continue as provided by the current Constitution or interrupted. At any rate, the Draft should set clear (and realistic) time frames for the implementation of the amendments.

IV. Conclusions

97. The Venice Commission has been asked by the President of the National Assembly of Bulgaria, Ms Karayancheva, to evaluate the draft new Constitution of Bulgaria (hereinafter "the Draft") proposed by a group of majority MPs and currently pending before the National Assembly of Bulgaria. At the request of the authorities, this Opinion was prepared following an urgent procedure. This Opinion does not comment on all proposed changes but only on the most important ones, with the focus on the reform of the judiciary (Chapter VI of the Constitution).

98. Given the time constraints and the fact that the Draft may still undergo further changes following debates in the National Assembly (the NA) and, probably, in the Grand National Assembly (the GNA), if the decision to convoke the GNA is taken, this Opinion was prepared as an interim one. The Venice Commission is ready to revert to the matters discussed in this Opinion at a later stage, once the text of the Draft has undergone further changes and the reform process has progressed.

99. The Venice Commission notes at the outset that the Draft has been prepared within the parliamentary majority, seemingly without any external input. It appears that this initiative was not preceded by any serious public debate, formal or informal. The reasons for certain amendments were not well-explained; in particular, the explanatory note is rather succinct. The process of constitutional reform is still on-going, so, while regretting that the launching of the constitutional reform was not preceded by an appropriate public debate, the Venice Commission recommends the Bulgarian authorities to elaborate on the reasons behind each proposal and to ensure meaningful participation of the public, experts and all political forces in this process.

100. The amendments to the Preamble and to Chapters I and II are either welcome (especially those enhancing the protection of social and economic rights) or unobjectionable. However, some clarifications are needed. For example, the relationship between Articles 19 and 43 should be clarified, while the obligation of the State "to promote the birth rate in accordance with the generally accepted standards of education, culture and socialization for the Bulgarian society" (Article 20 (2)) should not be used to justify discrimination of cultural or ethnic minorities or of women. A blanket restriction on the right to vote for convicts sentenced to imprisonment (Article 48) should be replaced by a more flexible rule, to be in line with the judgement of the European Court of Human Rights (the ECtHR) in the case of *Kulinski and Sabev v. Bulgaria.*

101. The Draft proposes to reduce the number of MPs in the NA from 240 to 120. This number seems to be chosen arbitrarily, without a thorough assessment of the impact which the reduction of the size of the NA may have on the Bulgarian political system.

102. The most important amendments are made to Chapter VI, concerning the Bulgarian judiciary and the prosecution service. The Draft makes several steps in the right direction. Most importantly, the plenary Supreme Judicial Council (the SJC) is abolished, and two independent councils are created, one for judges and one for prosecutors and investigators. The abolition of the plenary SJC would imply that a number of previous recommendations of the Venice Commission have been implemented. Thus, under the new system the Minister of Justice no longer chairs the Plenary SJC and the Plenary SJC no longer nominates candidates for the position of the two chief justices and the Prosecutor General (the PG). The abolition of the plenary SJC would also address the concern that the prosecutors, and the PG in particular, are

excessively involved in the governance of judges. So, dividing the SJC into two separate councils is in line with previous Venice Commission recommendations and should be welcomed.

103. However, certain issues still have to be addressed – either in the proposed Draft or at the legislative level:

- While judges will be in the majority in the future Judicial Council, in order to fully comply with the Recommendation CM/Rec(2010)12) of the Committee of Ministers of the Council of Europe, at least half of the seats should belong to judges *chosen by their peers* from all levels of the judiciary;
- As regards the composition of the Prosecutorial Council, lay members sitting there should have no present or future hierarchical ties to the PG and should represent other legal professions;
- A certain number of lay members sitting on both councils may be nominated by the professional associations of lawyers, universities, etc., in order to increase the diversity within the councils. An anti-deadlock mechanism should be provided for the situations where the NA cannot reach the 2/3 of votes for electing lay members;
- The main tasks of the two councils should be regulated in more detail and should focus on the appointments, career and discipline of judges and prosecutors;
- The competencies of the prosecution service outside of the criminal law field should be reduced to the necessary minimum;
- Probationary periods for the young judges or prosecutors should be removed or conditions for not confirming the tenure should be narrowly defined in the law;
- Notwithstanding the principle of "prosecutorial monopoly" enshrined in Articles 126 and 127: the Constitution should allow, in cases of potential conflict of interests, for the suspension of a PG who is subject to criminal investigation or prosecution and for the creation of a mechanism of independent prosecution, not subordinated in any manner to the PG, and for the judicial review of the decisions not to open investigations or not to prosecute – that would facilitate to implementation of general measures required by the Committee of Ministers following the ECtHR judgments in the cases of *Kolevi and Others v. Bulgaria* and *S.Z. v. Bulgaria*;
- The two councils should be able to nominate candidates for the respective inspectorates to the NA, and only the two councils should be able to remove them. The law should delimit clearly the powers of the inspectors, which should not encroach on the constitutional role of the two councils regarding the career and the discipline of judges and prosecutors;
- Article 145 should be more precise as to the scope of matters to be regulated by the law (grounds for disciplinary liability, disciplinary procedures, disciplinary bodies within each council, conflict of interests rules, etc.).

104. The introduction of the right of individual complaint before the Constitutional Court and of the referral of the cases by ordinary courts to the Constitutional Court is welcome, as it strengthens individual rights.

105. Making the Constitution more easily amendable (by removing the requirement to convoke the GNA) is, as such, not contrary to the European standards. However, such an important change should have a convincing explanation, and should be subject to a very thorough public debate, and the existence of different procedures of amendment should be considered thoroughly.

106. The Venice Commission reiterates that those recommendations should be seen as interim, and that it would be ready to provide assistance to the Bulgarian authorities if the process of the constitutional reform advances further.