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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE SEVEN AMENDMENTS TO THE CONSTITUTION
OF “The former Yugoslav Republic of Macedonia”
CONCERNING, IN PARTICULAR,
THE JUDICIAL COUNCIL,
THE COMPETENCE OF THE CONSTITUTIONAL COURT
AND SPECIAL FINANCIAL ZONES

on the basis of comments by

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I. Introduction

1. On 5 August 2014 the Minister of Justice of the “the Former Yugoslav Republic of Macedonia” (hereinafter referred to as “the Republic”), Mr Adnan Jashari, requested the opinion of the Venice Commission on the Draft Amendments XXXIII - XXXIX to the Constitution (hereinafter: “the 2014 Draft Amendments”)¹.

2. The 2014 Draft Amendments cover different areas: Amendment XXXIII gives constitutional definition to marriage and other forms of personal unions; Amendment XXXIV speaks of an International Financial Zone; Amendment XXXV speaks of the Central Bank; Amendment XXXVI regulates the status of the State Audit Office; Amendment XXXVII introduces a budget rule limiting public spending; Amendment XXXVIII redefines the composition of the Judicial Council; and, finally, Amendment XXXIX expands the jurisdiction of the Constitutional Court.

3. The authorities produced an English translation of the 2014 Draft Amendments (see CDL-RF(2014)030), as well as of the text of the Constitution and relevant legislation. The translation may not accurately reflect the original version on all points, and certain comments in this opinion may result from problems in the translation.

4. Mr Barrett, Ms Bazy-Malaurie, Mr Can, Mr Grabenwarter and Ms Omejec have been invited to act as Rapporteurs for this opinion. On 8-10 September 2014 a delegation of the Commission visited Skopje. It held a number of meetings with State authorities, judges, politicians, representatives of the civil society and legal scholars, in which the 2014 Draft Amendments were discussed. The Venice Commission is grateful to the Macedonian authorities and other stakeholders for their cooperation during the visit of the delegation.

5. *The present opinion was discussed in the Sub-Commission on Democratic Institutions on 9 October 2014 and adopted by the Commission ...*

II. Preliminary Remarks

A. The process of amending the Constitution

6. Under Articles 130 and 131 of the Constitution, the process of amending the Constitution may be initiated by the decision of the Government; the initiative has to be supported by a 2/3 majority vote of the total number of representatives (MPs).

7. On 27 June 2014, the Government announced an initiative for amending the Constitution. This initiative was submitted to the Parliament on 1 July 2014. On 16 July 2014 the Parliament by a 2/3 majority vote of the total number of MPs decided to start the amendment process.

8. On 27 August 2014 the text of the draft amendments was debated in the Parliament and adopted by a majority vote of the total number of MPs. The text has been then submitted to a 30-day public debate, as required by Article 131 (2) of the Constitution.

9. Following the public debate, the text of the amendments will be re-submitted to the Parliament for final approval (Article 131 (3) of the Constitution). At this point the decision to amend the Constitution has to obtain the support of at least 2/3 of the total number of MPs. Under Article 131 (4) of the Constitution certain most important changes require a “double majority”: the 2/3 majority of all MPs and the simple majority of MPs who “belong to the

¹ CDL-REF(2014)030, *Draft Amendments (XXXIII, XXXIV, XXXV, XXXVI, XXXVII, XXXVIII and XXXIX) to the Constitution of “the former Yugoslav Republic of Macedonia” and Explanatory Note*, Opinion 779/2014, Strasbourg, 19 August 2014

communities not in the majority in the population of Macedonia” (hereinafter: “the non-majority communities”).²

10. It is expected that the procedure for adopting the 2014 constitutional amendments will be completed by the end of October 2014. The authorities assured the delegation that the position of the Venice Commission will be considered very seriously and that recommendations made may be incorporated in the final text of the amendments to be submitted to the Parliament for definitive approval under Article 131 (3) and (4) of the Constitution.

B. Current political context

11. The Venice Commission notes that the amendments to the Constitution are proposed in the absence of opposition in the Parliament. Following the last elections the opposition refused to recognise their results and now boycotts the work of the legislature. The ruling coalition currently has 80 seats in the Parliament (out of the total number of 123 of MPs) and it is highly probable that it will obtain the support of the necessary number of MPs to pass the amendments. Since the ruling coalition includes a considerable number of Albanian deputies, it will, most likely, have the “double majority” required under Article 131 (4) of the Constitution.

12. The Venice Commission considers that, given the current political situation, it is not the most opportune moment for introducing constitutional amendments. In principle, the opposition should express its views in the parliament and a boycott is justified only exceptionally. On the other hand, the process of amending the Constitution requires the broadest political support. Even if the ruling coalition has the necessary number of votes in the Parliament to pass the amendments, it does not absolve the Government from conducting a genuine all-inclusive debate, as it results from Article 131 of the Constitution. It is regrettable that such a debate does not take place within the Parliament, which would be the best place for it.

13. The Commission recalls that “transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process”. In its opinion, “a wide and substantive debate involving the various political forces [...] is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards”.³ The Venice Commission expresses the hope that during the forthcoming stages of the constitutional process there will be constructive dialogue and co-operation between the parliamentary majority and the opposition.

III. Analysis

A. Draft Amendment XXXIII (Definition of marriage and “registered cohabitation” or any other form of registered life partnership)

14. Draft Amendment XXXIII introduces constitutional definition of marriage as a union solely between a woman and a man. It also introduces constitutional definition of “registered cohabitation” or any other form of “registered life partnership” as a “life union solely between one woman and one man”.

² The double majority rule was formulated in the 2001 Ohrid Framework Agreements which ended the civil war in the Republic; it is supposed to protect ethnic minorities from being easily outvoted by an ethnic majority. This rule applies to possible amendments to the Preamble to the Constitution; to the articles on local self-government; to Article 131; to any provision relating to the rights of members of communities, including in particular Articles 7, 8, 9, 19, 48, 56, 69, 77, 78, 86, 104 and 109, as well as to a decision to add any new provision relating to the subject matter of such provisions and articles of the Constitution

³ CDL-AD(2014)010, *Opinion on the draft law on the review of the Constitution of Romania*, adopted by the Venice Commission at its 98th Plenary Session (Venice 21-22 March 2014), § 28, further references are omitted

15. During the visit to the “country the delegation of the Venice Commission was informed that an identical definition of marriage is already contained in legislation. Thus, elevation of this definition to the rank of constitutional principles does not seem necessary from the legal point of view, since it will only confirm the existing situation.

16. That being said, the European Court of Human Rights (ECtHR) consistently held that Article 12 of the European Convention (“Right to marry”), leaves such matters largely at the discretion of the Member States and does not require them to recognise same-sex marriages, and it also does not prohibit recognition of such marriages⁴. The Court stressed that Article 12 grants the right to marry to “men and women” and that the choice of wording by the drafters of the Convention was deliberate.⁵ Furthermore, in a recent case of *Hämäläinen v. Finland* the Grand Chamber held that Article 8 of the European Convention on Human Rights (ECHR) cannot be interpreted as imposing an obligation on States to grant same-sex couples access to marriage. Several European States recently decided to include into their Constitutions a definition of marriage similar to the one under consideration. The proposed amendment, insofar as it concerns marriage as such, seems to follow this pattern.
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17. On the other hand, the proposed amendment also covers other forms of personal unions (defined as “registered cohabitation, or any other registered form of life partnership”). In a recent case against Greece (*Vallianatos and Others*) the Grand Chamber of the ECtHR examined a complaint from several same-sex couples who lived in stable relationships but were not allowed access to a legal status of partnership, which would be accessible to them if they were different-sex couples.⁷ The fact that the partnership legislation did not coversame-sex couples was found by the Court to be discriminatory, i.e. contrary to Article 14 of the ECHR, taken in conjunction with Article 8 thereof. The rule formulated by the Grand Chamber in this case may be stated as follows: where the State gives legal recognition to an “intermediate” form of personal union (i.e. a status falling short of marriage), it needs very serious reasons not to give same-sex couples access to such a status. In the concluding paragraphs of the judgment the Grand Chamber argued as follows:

“91. [...] [A]lthough there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. [...] [T]he trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples [...]. In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials. In that regard the Court refers particularly to Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe and to Committee of Ministers Recommendation CM/Rec(2010)5 [...]”

⁴ See, as a classic authority, *Schalk and Kopf v. Austria*, no. 30141/04, § 105, ECHR 2010. See also *Gas and Dubois v. France*, 15 March 2012, no. 25951/07, § 66; *X and others v. Austria*, 19 February 2013, no. 19010/07, §§ 105-110; *Hämäläinen v. Finland* [GC], 16 July 2014, no. 37359/09.

⁵ *Schalk and Kopf*, §§ 54 and 55

⁶ See, in particular, the opinion of the Venice Commission concerning similar amendments to the Hungarian constitution (CDL-AD(2011)016, *Opinion on the new Constitution of Hungary*, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), § 50). The absence of the pan-European consensus on this matter was also noted by the Venice Commission in its *Opinion on the draft law on the review of the Constitution of Romania* (CDL-AD(2014)010, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), § 86

⁷ *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, 7 November 2013

92. *The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention [...]. Nevertheless, in view of the foregoing, the Court considers that the Government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008”.*

18. The Venice Commission is not persuaded that such justification exists *in casu*; at least, no serious argument why same-sex couples do not deserve some sort of recognition (distinct from the full status of a married couple) has been put forward during the visit of the delegation or contained in the explanatory note prepared by the Government.

19. It is unclear whether the legislation now in force in the country provides for any “intermediate” form of unions (different from marriage) - the delegation of the Commission received conflicting accounts on this point. However, even if it does not, point 2 of the proposed amendment is problematic, if the authorities decide to introduce “intermediate” forms of recognition of personal unions.⁸

20. It is understood that the wording of the amendment, and in particular the reference to “life union” and “life partnership” will not be interpreted as prohibiting divorce or re-marriage. The Venice Commission also stresses that this amendment cannot be understood as banning *de facto* same-sex unions which are protected by Article 8 of the European Convention.

B. Draft Amendment XXXIV (International Financial Zone)

21. Amendment XXXIV provides for the creation of an international financial zone (IFZ) on the territory of the Republic, which will be governed by a special managing body established under a separate act on the zone. As the delegation understood from the explanations of the authorities during the visit, the managing body of the zone would include representatives of private investors and of the Government; the investors would have the majority in that body.

22. The amendment stipulates that legislation of the Republic will not be applicable within the zone (except for the criminal law which will remain in force). It appears that the managing body will have broad regulatory and even legislative powers in the zone.

23. The amendment also stipulates that regulations adopted in the IFZ will be “in accordance with the highest international standards” and that the IFZ will adopt acts “governing the prevention of money laundering terrorism financing and supervision under the applicable standards of the United Nations Organisation”.

24. Finally, special judicial bodies will be created in this zone which will examine disputes pursuant to “a special act of the zone”.

25. The Commission recognises that the creation of zones with special investor-friendly regulatory framework is one of possible ways of attracting foreign investment, creating jobs and increasing public revenues. Many states have tax free ports or special industrial development areas, or recognise that under-developed parts of the country need special

⁸ A side remark on the terminology is necessary. The current Article 40 of the Constitution speaks of “marriage” and “cohabitation”. The proposed amendment distinguishes between “marriage”, “registered cohabitation” and “other registered form of life partnership”. The exact relation between the last two terms is unclear, although everything suggests that the drafters of the amendment wanted to cover all alternative forms of personal unions, legally recognised but falling short of marriage. It is also not clear what does the proposed “registered cohabitation” (*регистраирана вонбрачната заедница*) mean in comparison with a “cohabitation” (*вонбрачната заедница*) contained in the current § 2 of Article 40 of the Constitution.

grants or tax treatment to encourage economic activity. The Venice Commission is not well-equipped to assess the effectiveness of such zones – this is the task of economists. That being said, the proposed amendment raises certain legal questions, which are addressed below.

• ***Unclear status and powers of the “managing body” and special courts***

26. The Commission notes that Amendment XXXIV is formulated in very vague terms. Thus, the status of the “managing body” and of the special courts, the extent of their powers, as well as their relation to the Constitution and to constitutional authorities of the Republic are not defined.

27. Amendment XXXIV, as it is formulated now, appears to give to the Parliament and the Government *carte-blanc* for creating a managing body of unknown composition and unclear powers to legislate within the zone and to enforce any such laws. Furthermore, special judicial bodies not belonging to the general court system are to be created to resolve disputes in the zone.

28. If this interpretation is correct, the issue of democratic accountability arises. If all laws (other than criminal laws) are to be enacted and enforced by a managing body rather than the constitutionally recognised lawmaker and executive, this zone becomes a sort of a “State within a State” separate from the existing constitutional structure. This, in turn, endangers the unity of the State which is guaranteed by Article 1 of the Constitution: “*The sovereignty of the Republic of Macedonia is indivisible, inalienable and non-transferable*”.

29. Furthermore, Article 2 of the Constitution proclaims that “*sovereignty in the Republic of Macedonia derives from the citizens and belongs to the citizens*”. In the opinion of the Venice Commission, creation of the IFZ should not result in the alienation of State power from the democratically elected bodies of the Republic. Nor should it deprive citizens of the country in any part of its territory of their basic rights guaranteed by the Constitution and by the international agreements to which the Republic is a party.

30. In the opinion of the Commission, a body created to govern the zone must be ultimately subordinate to the national lawmaker. Democratically elected constitutional organs of the Republic should define the mandate of the managing body and should be able to change or revoke such mandate if necessary. Even though the managing body of the zone may enjoy certain autonomy, the constitutional organs of the Republic⁹ must retain at least residual control over the decisions of the former and assume responsibility for its actions. In the opinion of the Venice Commission only such interpretation is compatible with the constitutional order of the Republic.

31. Material competence of the managing body to adopt regulations must be described in precise terms. Instead of saying that national legislation does not apply in the zone, the amendment should indicate precisely the areas where the “managing body” has regulatory powers. Legislative powers must remain with the Parliament. The zone may have its own distinct regulations in certain areas (such as tax law, contract law or company law); special courts within the zone may have jurisdiction to hear particular types of cases (for example, disputes between companies domiciled in the zone), and certain disputes may be submitted to arbitration. However, general exclusion of the zone from the national legal space, proposed in the Amendment, is the source of particular concern for the Commission.

⁹ This term “constitutional organs” is used deliberately, to show that the exact relation between the “managing body”, on the one side, and ordinary State bodies (Parliament, Government, Constitutional Court etc.), on the other, is yet to be decided.

- ***Is there a need for a constitutional change?***

32. The rationale presented by the Government for proposing Amendment XXXIV does not explain which part of the scheme for the IFZ requires a constitutional change, and what specific provision of the Constitution prevents the authorities from creating the IFZ by adopting a new law or amending the existing ones. As follows from the amendment and from the explanations provided by the authorities, the composition and the scope of powers of the managing body in the IFZ will be governed by an act of Parliament. That means that the powers of that managing body can also be repealed by an act of Parliament. The same concerns any special legislation applied in the zone. If, as in the present case, everything is decided by a simple majority of the Parliament, why is a constitutional amendment needed?

33. Indeed the Republic had some success with the establishment of special industrial zones. However, those zones are established by law without constitutional amendment, and there seems to be no provision in the Constitution which would rule out the possibility of the special legislation applied to a particular territory or to a particular group of subjects.

34. Thus, Article 57 of the Constitution allows for more rapid development of economically underdeveloped regions. Nothing in the Constitution prevents the legislator from adopting special tax rules or company or banking laws for particular territories; there may be separate provisions in labour law or the rules for foreign companies or working rights for aliens in respect of the zone. Usually such differences are consistent with the legitimate purposes of legislation and do not cause an illegitimate discrimination.

35. Similarly with the establishment of special adjudicative bodies in the zone. If the constitution requires that a public power such as the judicial power, be applied through a unified structure across the state then an amendment might be needed. It is noteworthy that the original text of Article 98 (Judicial Power) of the Constitution set out that “there is one form of organisation for the judiciary”. If such provision is still in force, that could have been an obstacle to having a separate judiciary within the zone. However, that provision was deleted by Amendment XXV, which provides that the structure of the judicial system is established by a law adopted by a 2/3 majority of the Parliament. Therefore variations in the judicial structure reflecting the needs of special zones are not impossible under the current constitution.

- ***Compliance with international obligations***

36. The purpose of the IFZ is to provide financial services. For want of other economic incentives in the zone, the Government may be tempted to attract foreign investors with more relaxed standards of accounting, less transparency of operations, etc. Consequently, there is a potential risk that the zone becomes a haven for ‘dirty money’, even if it is not so intended. The Venice Commission stresses in this respect that creation of any such zone does not absolve the Republic from its international obligations, in particular those related to the fight against terrorism, money laundering, tax evasion, etc.

37. During the visit the delegation of the Venice Commission received assurances from the authorities that all transactions in the zone will be closely monitored and that all international standards, including the European ones, will be complied with. In the opinion of the Commission, the willingness of the authorities to respect international standards is welcome and should be reflected in the text of the Amendment. The formula currently used¹⁰ is too narrow. The Commission proposes to include in the Amendment a special paragraph stipulating that legislation and regulations applicable in the zone will be in compliance with the international obligations of the Republic and, in particular, with the European standards

¹⁰ “The zone shall adopt acts governing the prevention of money laundering terrorism financing and supervision under the applicable standards of the United Nations Organisation”

and best practices related to the fight against money-laundering, terrorism financing and tax evasion. This provision should be developed further at the legislative level; in particular the rules developed by FATF, Moneyval, OECD and other competent international bodies may be used by the authorities for standard-setting in the zone. The Amendment should also specify that the authorities of the zone, under the supervision of the constitutional organs of the State, must ensure full implementation of all international regulations, standards and best practices in this field, and take necessary measures to prevent and punish violations of such regulations, in particular measures in the field of international cooperation in criminal matters.

• **Conclusion**

38. The Amendment on the IFZ is not sufficiently precise and, in places, does not seem compatible with the constitutional order of the Republic. During the exchanges with the delegation of the Commission the authorities expressed readiness to re-draft this Amendment extensively. In the opinion of the Commission, the goals set by the Government can be achieved by a series of legislative changes. If nonetheless the Government decides to proceed with amending the Constitution, the Commission trusts that any new redaction of the Amendment will address the issues raised above.

C. Draft Amendment XXXV (National Bank)

39. Draft Amendment XXXV proposes to change the name of the central bank from “the National Bank of the Republic of Macedonia” to the “Bank of the Republic of Macedonia”. It also defines its basic objective as maintaining price stability, and proclaims the independence of the Bank.

40. The term “central bank” is a more descriptive one than “currency-issuing bank” in the current Article 60 of the Constitution. If the role of the central bank is to be set out in the constitution it is appropriate to identify its independence of decision-making and its functional autonomy, so the Amendment therefore goes in the right direction. As to renaming of the central bank, this issue is entirely in the hands of the national legislator.

41. Finally, it is unusual that the constitutional provision which defines the status and the role of the central bank, as well as the future constitutional amendment concerning the bank, are placed in Chapter II which is entitled “Basic freedoms and rights of the individual”. Probably it would be more appropriate to put those provisions in Chapter III: “The organs of State authority”.

D. Draft Amendment XXXVI (State Audit Office)

42. Draft Amendment XXXVI defines the State Audit Office as an “autonomous and independent body auditing public funds”. It empowers the Parliament to elect and dismiss the principal state auditor.

43. Amendment XXXVI is supposed to be added to Chapter II (“Basic freedoms and rights of the individual”), Section 4 (“Foundations for Economic Relations”) of the Constitution. However, it would be more appropriate to place it not in Chapter II but rather in Chapter III which regulates the organisation of State bodies.

44. In its 2013 Progress Report the European Commission concluded that the State Audit Office’s (SAO) independence still needs to be safeguarded constitutionally.¹¹ The proposed amendment seems to follow this recommendation and should therefore be welcomed.

¹¹ SWD(2013) 413, The Former Yugoslav Republic of Macedonia 2013 Progress Report, European Commission Working Document, § 4.32, p. 58
http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/mk_rapport_2013.pdf

45. The Amendment mentions “autonomy” and “independence” of the SAO. It is necessary to ensure that the exact content of those general terms is further developed in the law on SAO, in line with the recommendations by the International Organization of Supreme Audit Institutions (INTOSAI) which is the main international authority in this field¹². Amongst other guarantees of “independence” and “autonomy”, the most important are:

- a. the power of SAO to select audit issues and to act in accordance with self-determined programme and procedures (see Section 13 of the Lima Declaration of Guidelines on Auditing Precepts,¹³ Principle 3 of the Mexico Declaration on Independence of the Supreme Audit Institutions);¹⁴
- b. the power and obligation of SAO to report its findings annually and independently to the Parliament and publish its reports (see Principle 3 of the Mexico Declaration);
- c. the power of SAO to have unrestricted access to the documents and information for the proper discharge of its statutory responsibilities (see Principle 4 of the Mexico Declaration).

This list is not exhaustive; the law on SAO may refer to other powers of the SAO which follow from its constitutional status as an autonomous and independent body.

46. The Amendment proposes that the “principal State auditor” is appointed and dismissed by the Parliament. However, the position of the “principal State auditor” within the SAO is not defined. It is understood that he or she is the chief executive of that body with extensive powers¹⁵. The Amendment should stipulate that the term of office of the “principal State auditor”, as well as guarantees against arbitrary dismissal, are to be fixed in the law. Principle 2 of the Mexico Declaration, cited above, recommends appointment of the auditors for “sufficiently long and fixed terms”. It is up to the legislator to define what term is “sufficiently long” but in the opinion of the Venice Commission it should be comparable with the term of office of other highest State officials. If the law confers substantive powers to the deputy principal State auditor, his or her appointment, dismissal and removal from office should be governed by the same rules.

47. Finally, in order to avoid politicisation of the office of the “principal State auditor” it would be worth considering his or her election and dismissal by a qualified majority of votes (with the “double majority” or without).

E. Draft Amendment XXXVII (Budget deficit and public debt)

48. Draft Amendment XXXVII establishes maximum thresholds for the budget deficit (3% of the GDP) and for the public debt (60% of the GDP). The second part of the Amendment gives the Government the right to depart from this rule in the situations of emergency; the departure is subject to approval by the 2/3 majority of the Parliament. Item 2 of Amendment XXXVII is a transitional provision which postpones its effect to 1 January 2017.

49. Deficit and debt thresholds akin to the one under consideration became increasingly popular in recent years. In relation to a similar rule included in the new Constitution of Hungary¹⁶ the Venice Commission noted as follows:

“121. The adoption of constitutional provisions which impose [maintaining] the state deficit below 50 % per cent of GDP, responds to a legitimate aim. Thus, it cannot be criticized in the light of international and European standards of democracy, human

¹² See, in particular, Resolution 66/209 of the General Assembly of the UN which refers to INTOSAI documents, namely the Lima and Mexico declarations of the supreme audit institutions http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/66/209

¹³ http://www.issai.org/media/12901/issai_1_e.pdf

¹⁴ http://www.issai.org/media/12922/issai_10_e.pdf

¹⁵ If SAO is governed by a collegial institution, its members should be appointed and dismissed in the same manner as its head

¹⁶ CDL-AD(2011)016

rights and the rule of law, on the condition that the laws implementing the budget - by raising taxes or by cutting the expenses of the state - comply with these standards.“

50. That being said, the Venice Commission is not well-placed to analyse whether introduction of such rule is opportune in the context of the country and whether the limits set (3% and 60%) are attainable and defensible from the macro-economic point of view. The Commission may only refer the authorities to other expert organisation more competent in this field, such as IMF, World Bank, OECD, etc.

51. From the legal point of view, the Commission notes that Amendment XXXVII employs terms which are either unclear or misused. For example, it is understood the “public debt” comprises all sorts of debts accrued by the State authorities, municipalities, special public funds, enterprises with public participation. However, another, narrower interpretation of this term is also possible.

52. The Amendment speaks of the power of the Government to define “the fiscal policy in the Republic of Macedonia”. However, the term “fiscal policy” normally relates to the power of the State to collect taxes. Indeed, the budget deficit or the level of public debt partially depends on the “fiscal policy”, but not solely. This term should probably be changed to “budget policy”.

53. It is unclear how the amounts of “public debt”, “budget deficit” and GDP are calculated. These figures are usually collected by the Governmental agencies. Since it is the Government which is limited by the budget rule there appears to be a risk of manipulation of statistical information. At least, interlocutors of the delegation expressed their concern that such manipulation is likely.

54. The departure from the budget rule is possible in “exceptional situations” which include *inter alia* “external shocks” and “a significant decline in real gross domestic product”. Again, it is up to the Parliament to establish whether there has been an “external shock” or a “significant” decline in the real GDP. The Commission acknowledges that constitutional provisions in this context should not be too rigid, so vagueness of these formulations is understandable.

55. Finally, and most importantly, it is unclear how compliance with the budget rule will be ensured in practice. Thus, the Amendment is silent as to whether the acts of the Government and of the Parliament which entail financial liability of the State will be submitted to some sort of control (preliminary or posterior), and which body would be exercising such control. One may regard the Constitutional Court as a body competent to supervise compliance with the budget rule. However, it is not a part of its traditional functions. And even if the Constitutional Court is empowered to oversee the application of this rule by the Parliament or the Government, this power should be clearly set in the law or in the Constitution and modalities of the procedure of constitutional control should be defined.¹⁷

56. The proposed Amendment, as it stands now, appears to be a sort of an obligation of the Parliament before itself. Since the idea of including budget rules into constitutions is relatively new, the Venice Commission cannot suggest any time-tested legal mechanism for its implementation. It is up to the national legislator to develop and put in place such a mechanism.

¹⁷ A similar attempt to limit public deficit was made in the new Constitution of Hungary in 2011. In particular, the new Hungarian Constitution gave to the Budget Council a veto power in respect of the decisions of the Parliament in the budgetary sphere. In its opinion the Venice Commission warned the Hungarian authorities that entrusting the veto power to an external authority “with limited democratic legitimacy” does not seem a good solution – see CDL-AD(2011)016, quoted above, §§ 128-129

F. Draft Amendment XXXVIII (Composition of the Judicial Council)

57. The Draft Amendment XXXVIII is to replace the 2005 Constitutional Amendment XXVIII (hereinafter – the 2005 Amendment), which in turn replaced original Article 104 of the 1991 Macedonian Constitution. Draft Amendment XXXVIII (hereinafter – the 2014 Draft Amendment) re-defines the composition of the Judicial Council (JC).

58. In 2005 the Venice Commission already assessed the composition of the JC, as defined by the 2005 Amendments.¹⁸ The 2005 opinion of the Commission concerned also Amendment XXIX (Election and dismissal of judges by the Council). The 2014 Amendment (i.e. the one under consideration) does not regulate elections and dismissals of judges by the JC, so this aspect is out of the scope of the present opinion.

- ***Composition of the JC under 2005 Amendment (current situation) and 2014 Draft Amendment (the proposal) – what is changing***

59. According to the 2005 Amendment (which reflects the current situation) the JC is composed of 15 members :

- eight members of the JC are elected by the judges from their own ranks. Three out of those eight must belong to the non-majority communities;
- two *ex officio* members (the President of the Supreme Court and the Minister of Justice);
- three members of the JC are elected by the Parliament by the double majority of the total number of MPs (i.e. must be supported by the majority of MPs belonging to non-majority communities);
- two members of the JC are proposed by the President of the Republic and are elected by the Parliament, and one of them must belong to non-majority communities. These members are from among university law professors, lawyers and other prominent jurists.

60. Under the 2014 Draft Amendment the Council continues to be composed of 15 members, but the Minister of Justice and the President of the Supreme Court are no longer members of the Council. Instead, the judges are to be represented by 10 members; three of them must belong to non-majority communities. The other five – “lay members” – are elected by the Parliament under the same rules as before.

61. At present the members of the JC are elected for a term of six years, with the right to one re-election. Under the 2014 Draft Amendment, the members of the JC will have no right to “consecutive re-election”.¹⁹

- ***Representation of non-majority communities within the JC***

62. The 2014 Draft Amendments contain provisions which are supposed to guarantee adequate representation of non-majority communities in the JC; those provisions are almost identical to those which exist now under the 2005 Amendments. Out of 15 members 4 must belong to the non-majority communities, and, in addition, three more must be elected by the double majority vote by the Parliament.

63. The mechanism guaranteeing certain minimal representation of non-majority communities in the JC under the 2005 and 2014 Amendments has its origins in the Constitution and in the 2001 Ohrid Framework Agreement (see, for example, points 4.3 and

¹⁸ CDL-REF(2014)030, §§ 46-54

¹⁹ But apparently can be re-elected after a “break”

5.2 of the Agreement)²⁰ That being said, both the Constitution (see Article 104 which established the composition of the JC prior to the 2005 Amendments) and the Ohrid Agreement provided only for the double majority rule. The 2005 Amendment and the 2014 Draft Amendment go further and indicate that a certain number of members of the JC (four) should belong to the non-majority communities. In other words, the 2005 Amendments introduced a direct ethnic quota, and the same rule is re-confirmed in the 2014 draft Amendment.

64. In its 2005 Opinion, the Venice Commission stated that the provisions concerning representatives of the non-majority communities “are to be welcomed” (§ 40). The question is whether the direct ethnic quota for selecting candidates is still an acceptable solution in the present-day conditions.

65. Ethnic-based criteria for selecting State officials are suspect, and it is particularly true in respect of the judiciary. In the 2014 Opinion on the high judicial and prosecutorial council of the Bosnia and Herzegovina the Venice Commission emphasised that “the judiciary should not be organised along ethnic lines”. That being said, such method of selecting candidates is not ruled out. Mechanisms of power-sharing between different ethnic communities are to be assessed in the light of the country’s recent history; ethnic criterion for eligibility to political posts may be defensible in the aftermath of a civil war but must be reconsidered after a passage of time - see, in particular, the 2005 opinion on the constitutional situation in Bosnia and Herzegovina.²¹ Such “dynamic” approach was employed by the Grand Chamber of the ECtHR in the case of *Sejdić and Finci v. Bosnia and Herzegovina*.²² In that case the Court accepted that introduction of ethnic criterion for standing for Parliamentary elections served a legitimate aim (§ 45) and probably helped to end hostilities in 1995. However, by 2009 the situation evolved, and disenfranchisement of Jews or Roms in the political sphere ceased to be justified.

66. In the Macedonian context the proposed Amendment serves to protect non-majority communities. Furthermore, ethnic quotas do not close access to the JC for the candidates from the majority communities. Consequently, the case of *Sejdić and Finci* cannot serve as a precedent. That being said, the method of the Court’s reasoning, namely the “dynamic” approach to the analysis of the ethnic-based election criteria, still applies.

67. The Venice Commission recalls in this respect that Point 10 of the UN Basic Principles on the Independence of the Judiciary²³ requires that judges are appointed without discrimination based on the ground of “national origin”. Recommendation of the Committee of Ministers of the Council of Europe no. R(94)12²⁴ calls for merit-based appointment of judges with regard to “qualifications, integrity, ability and efficiency” (see Principle 1, point 1(2)-c). Similar principles are proclaimed by the European Charter on the statute for judges: see, for example, point 2.1, which requires that judicial appointments are based on capacities and that the candidates should not be excluded on the basis of their ethnic origin.²⁵ The

²⁰ Framework for securing the future of Macedonia’s democracy and permitting the development of closer and more integrated relations between the Republic of Macedonia and the Euro-Atlantic community (Skopje, 18 August 2001)

<http://www.ucd.ie/ibis/filestore/Ohrid%20Framework%20Agreement.pdf>

²¹ CDL-AD(2005)004, *Opinion on the Constitutional situation in Bosnia and Herzegovina and the powers of the high representative*, adopted by the Venice Commission at its 62nd Plenary Session (Venice, 11-12 March 2005), § 75

²² [GC], nos. 27996/06 and 34836/06, 22 December 2009

²³ Endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

²⁴ Recommendation No. R(94)12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges, Adopted by the Committee of Ministers at the 518th meeting of the Ministers’ deputies, (13 October 1994)

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534553&SecMode=1&DocId=514386&Usage=2>

²⁵ DAJ/DOC (98) 23, European Charter on the status for judges, (8-10 July 1998)

http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

principle of “merit-based” appointment is cited with approval by the Venice Commission in its Report on Judicial Appointments, §§ 10 and 36-37.²⁶

68. In the opinion of the Venice Commission, there is a certain tension between the principle of “merit-based” selection of judges and selection of members of the JC along ethnic lines. The solution proposed in the 2005 and 2014 Amendments - namely the ethnic quotas for non-majority communities in the Judicial Council - appears to be even more radical than the legal mechanism of “double majority” provided originally by the Constitution for the election of the members of the JC.

69. That being said, in the circumstances the Venice Commission is prepared to maintain its previous recommendation. The “double majority” principle can hardly be applied in the context of election of judicial members of the JC. Further, the Commission reiterates that the ethnic quota in the specific context of the country is supposed to protect minorities and may thus be regarded as a sort of a “positive discrimination”.²⁷ Therefore, direct ethnic quotas remain another possible mechanism securing adequate representation of non-majority communities. The authorities must consider, however, whether ethnic quotas should exist in relation to the lay members of the JC elected by the Parliament.

- **Parliamentary majority needed to elect members of the JC**

70. The 2014 Draft Amendment, as it is formulated now, is unclear as to what majority is required for elections of the two members of the Council nominated by the President. Both members of the Council who are proposed by the President appear to be elected by a simple majority rather than a majority vote of the total number of MPs, which is the case for the three members elected by the Parliament under the “double majority” rule.

71. Furthermore, the Venice Commission recommends that the authorities consider election of the lay members of the JC by a qualified majority in the Parliament. In its Report on Judicial Appointments the Venice Commission emphasised that it is “*strongly in favour of the [depoliticisation] of [Judicial Councils] by providing for a qualified majority for the election of its parliamentary component*” (§ 32). *In casu* the Commission recommends that all lay members of the JC are elected by a qualified majority of the total number of MPs.²⁸

- **Overrepresentation of judges in the JC**

72. In its 2005 Opinion concerning the 2005 Amendment, the Venice Commission stated (§ 40) that “the presence of a judicial majority on the Council is to be welcomed”. It further recommended as follows:

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

²⁶ CDL-AD(2007)028, *Judicial Appointments*, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)

²⁷ See, in particular, *Report on the independence of the judicial system, Part I: the independence of judges*, where in § 26 the Commission held as follows: “Finally, merit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society.”

²⁸ It remains to be seen whether this qualified majority should also be “double majority” or not (2/3 of total numbers of MPs and 2/3 of the number of MPs from the non-majority communities); requiring a too high number of votes from the non-majority MPs may lead to a political stalemate, where few people would be able to block elections of lay members to the JC

73. In 2011 the Law on Judicial Council was amended to make it clear that the Minister of Justice is a member without voting rights. Further, Article 8 of the 2006 Law on Judicial Council prescribed that the President of the JC is elected from among the members of the JC, and that the Minister of Justice and the President of the Supreme Court cannot be elected as the President and Vice President of the JC. In other words, the recommendation of the Venice Commission has been implemented; the 2014 Draft Amendment proposes to establish it at the constitutional level and must therefore be welcomed. The question is whether the proposed composition of the JC under the 2014 Draft Amendments, namely 10 judicial members against 5 lay members, creates the right balance.

74. In its opinion on certain amendments to the Albanian Constitution,²⁹ the Venice Commission noted as follows:

“9. An autonomous Council of Justice [...] does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges.”

75. In the Report on Judicial Appointments, cited above, the Venice Commission took the following position:

“27. A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. [...]”

29. As regards the existing practice related to the composition of judicial councils, ‘basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members.’ Thus, a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.

30. In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. [...] Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of ‘corporatist management’.”

76. In 2013 the Venice Commission examined the composition of the Ukrainian High Judicial Council (HJC).³⁰ It concluded as follows:

“41. The HJC would [...] have 11 judges among its 15 members. This proportion seems even too high and could lead to inefficient disciplinary procedures. While calling for an appeal to a court against disciplinary decisions of judicial councils is required, the Venice Commission insists that the non-judicial component of a judicial council is crucial for the efficient exercise of the disciplinary powers of the council.”

77. Finally, in its 2014 Opinion on the Draft Law on the Review of the Constitution of Romania the Venice Commission, with reference to its earlier opinions,³¹ reiterated that *“members of the Judicial Service Commission, elected by their peers, should not wield*

²⁹ CDL-INF(1998)009, *Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania*, Adopted by the Sub-Commission on Constitutional Reform (15 April 1998)

³⁰ CDL-AD(2013)034, *Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine*, adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013)

³¹ CDL-AD(2010)039rev, *Study on individual access to constitutional justice*, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010)

decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches)".

78. Under the 2014 Draft Amendments the proportion of judicial vs. lay members in the JC is 10 to 5. Therefore, the judges are not only a "substantial element" or a "majority" in the JC: they represent a qualified majority (2/3) and thus "wield decisive influence".

79. Moreover, under the proposed amendment nothing prevents the Parliament from selecting one or several lay members from the ranks of judges. As the delegation of the Commission learned during the visit, at least one of the members of the current composition of the JC elected by the Parliament is actually a judge. The wording of the 2005 Amendment and 2014 Amendments are almost identical in this respect: they allow the Parliament to select lay members of the JC from the ranks of "university professors of law, lawyers and other eminent legal experts". The later term is interpreted very broadly: it permits the Parliament to elect even more judges to the JC in addition to the 10 judges who are already there.

80. This situation creates a risk of corporatism; although the JC should be depoliticised and the judges should represent a "substantial element or a majority" of its members, it should not completely insulate the JC from any external oversight. The Venice Commission thus considers that the number of judicial members of the JC may be reduced.³² Furthermore, the amendment should stipulate clearly that lay members of the JC cannot belong to the judiciary.³³

- **Other issues related to the composition of the JC**

81. The lawmaker should consider including in the Constitution provisions guaranteeing independence and impartiality of individual members of the JC and of the JC as a whole.³⁴ The removal of a member before the expiration of his mandate should be possible only for the reasons specified in the law.

G. Draft Amendment XXXIX (Part one: constitutional complaint)

82. The Draft Amendment XXXIX broadens the jurisdiction of the Constitutional Court (CC) to examine complaints from individuals about violations of their human rights (hereinafter – "constitutional complaints"). At present the CC can only consider constitutional complaints related to a certain very limited number of basic rights. Now the list of rights is substantially expanded, albeit it remains a closed list.

83. In general, constitutional justice is considered a cornerstone of constitutional democracy.³⁵ The Venice Commission has already particularly welcomed that some other States provided for the possibility of constitutional complaints by individuals for human rights

³² See, in particular, the 2013 *Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro*, CDL-AD(2013)028, endorsed by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013), where the Venice Commission welcomed the "parity between judicial and lay members".

³³ As one of the means of attaining parity the Constitution may provide for creating panels within the JC where judicial and lay members will be equally represented – see CDL-AD(2012)024, *Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro*, adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), § 21

³⁴ "Members of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality" - see Opinion no. 10(2007) of the Consultative Council of European Judges (CCJE), adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007), § 36 http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf

³⁵ Antonio La Pergola, Introductory statement. In: "The role of the Constitutional court in the consolidation of the rule of law", Proceedings of the UniDem Seminar organized in Budapest on 8-10 June 1994, Strasbourg: Council of Europe Press, 1994, p. 12

violations.³⁶ So, broadening of the competence of the CC in this field should be met with approval.

- ***Need for a law on the CC***

84. In most European countries constitutional provisions on constitutional courts are further developed in separate laws or constitutional laws. On the contrary, in the Republic there is no special law on the CC. Article 113 of the Constitution stipulates that “the working methods and the procedures before the Constitutional Court are regulated by an act of the Court”. The only legal act regulating activities and powers of the CC is currently the Rules of Procedure of 1992.³⁷ The Venice Commission finds this situation quite irregular. In the opinion of the Commission, it would be useful to adopt a separate law on the CC that would regulate issues relating to the status of its judges, basic conditions for the institution of proceedings before the CC, legal effects of the CC’s judgments, etc.³⁸ Reference to such law should be inserted in the Constitution, which means that a new paragraph should be added to Article 113 correspondingly. It is understood, however, that the adoption of any such law must not affect the power of the CC to regulate its own working methods and to develop the rules of procedure in the Rules of Court.

- ***Preparation for the introduction of the constitutional complaint***

85. So far, the very limited catalogue of constitutional rights³⁹ listed in Article 110 § 3 of the Constitution together with the procedural rules established in Section IV of the 1992 Rules of Procedure resulted in a negligible number of complaints about human rights’ violations before the CC.⁴⁰ Thus, in the course of 2013 it had a total of 22 such complaints. The Venice Commission observes that in the same period the European Court of Human Rights received over 500 complaints from the country. It shows that if the new remedy against human rights violations is introduced at the national level, there is a real risk of a strong growth in the number of cases the CC has to examine. The Commission considers that introduction of a new remedy of that kind requires careful preparation: adoption of procedural rules, development of new working methods, hiring and training law clerks and secretarial assistants, etc. In some other countries introduction of such remedy was preceded by a long preparatory period (up to two years, like in Turkey). The Venice Commission suggests that this welcome amendment should not have immediate effect, so that necessary preparations and amendments at the legislative level can be made.

86. To process a large number of complaints smaller decision-making bodies within the Constitutional Court should be established, in particular for processing clearly inadmissible complaints under a simplified procedure. The Government are invited to consider adding a

³⁶ See, for example, CDL-AD(2007)004, *Opinion on the Constitution of Serbia*, adopted by the Commission at its 70th Plenary session (Venice, 17-18 March 2007), § 82

³⁷ “Rules of Procedure of the Constitutional Court of the Republic of Macedonia” were adopted by the Constitutional Court on 7 October 1992

³⁸ It should be recalled that the Government proposed in 2005 the Draft Constitutional Amendment XXXIV, which provided that the types of decisions of the Constitutional Court, their legal effect and enforcement are to be regulated by law while the internal organisation of the Court is to be regulated by the Court itself. In its 2005 Opinion the Venice Commission noted: “66. ... The purpose is to fill a gap in the existing text and to provide a proper legal basis for the Court’s operation. While this is in full accordance with European standards in the field of constitutional justice (see also CDL-AD(2004)023, *Opinion on the rules of procedure of the constitutional court of Azerbaijan*, adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), §§ 5 et seq.) the amendment does not cover important elements of the activity of the Constitutional Court like the procedure before the Court. A coherent regulation of the activities of the Constitutional Court taking into account all aspects of its jurisdiction and operation would seem appropriate.” However, the 2005 Draft Constitutional Amendment XXXIV has never entered into force.

³⁹ “The freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as [...] the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation”

⁴⁰ In comparison, the Croatian Constitutional Court decided in 2013 on 6,554 individual complaints. For further details see the 2013 “Annual Report by the Constitutional Court of the Republic of Macedonia”, Skopje, February 2014 <http://www.ustavensud.mk/domino/WEBSUD.nsf>

provision to this end to the second new paragraph of Article 113 of the Macedonian Constitution.

- ***Why a limited list of rights?***

87. Regarding the catalogue of rights contained in § 1 of the Draft Amendment XXXIX, the Government did not substantiate the reasons why it enumerates the rights protected by the constitutional complaint instead of choosing a general clause approach. The Venice Commission notes that some very important rights which are universally considered as “basic” are not mentioned in the Amendment. For example, it will not be possible for an individual whose property was taken by the State to submit a constitutional complaint, although respect for property is guaranteed both by Article 30 of the Constitution and by Article 1 of Protocol No. 1 to the European Convention on Human Rights. Some other important rights – such as the right to strike (Article 38 of the Constitution) or the right to vote (Article 22) – are not mentioned in the Amendment either.

88. The Venice Commission has already recommended in respect of Ukraine that “a full constitutional complaint to the Constitutional Court - against all cases of violation of human rights through individual acts – should be introduced”.⁴¹ Chapter II of the Macedonian Constitution does not distinguish between different categories of rights, all rights there are labelled as “basic”. It is conceivable that not all basic rights listed in the Constitution may be transformed into a specific and legally binding obligation of the State. Certain rights, in particular socio-economic, may be regarded as “aspirations” rather than “rights” *stricto sensu*. However, in order to be coherent in the application of the Constitution the CC should in principle be able to examine complaints about violations of all rights which the Constitution describes as “basic”.

89. The Venice Commission recalls that a similar remedy was introduced in the Turkish Constitution and it was limited to rights guaranteed by the ECHR: *“Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.”* In the opinion of the Commission, material competence of the CC in the field of constitutional complaint may be defined in similar terms, if the national authorities consider that a constitutional complaint should not be recognised as a legal remedy against all basic rights guaranteed by the Constitution.

- ***Clarifications of certain terms used in the Amendment***

90. Another observation concerns the language of the Amendment: the delegation of the Commission understood that it does not always correspond to the language of Chapter II of the Constitution. For example, the Amendment mentions presumption of innocence, but is it exactly the same right as guaranteed by Article 13, part 1?⁴² The concept of “fair trial” mentioned in the Amendment seems to be borrowed from Article 6 of the European Convention, but it is absent from the Constitution as a separate concept. In order to avoid any ambiguity it would be better to delimit material competency of the CC in the Amendment by simply referring to the corresponding Articles of Chapter II of the Constitution. If the CC is supposed to protect some rights which are not directly mentioned in the Constitution but which are regarded as “basic rights” in the international law (in particular under the ECHR), this should be clearly stated in the Constitution.⁴³

⁴¹ CDL-AD(2013)034, § 11

⁴² This provision reads as follows: “A person indicted for an offence shall be considered innocent until his or her guilt is established by a legally valid court verdict.”

⁴³ See CDL-AD(2011)011, *Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary*, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), § 33

91. Further, the text of the Amendment should make it clear that only the person whose rights are affected has a standing to complain. As the text reads now it may be understood that one person may complain about a violation of the rights of another person. The Venice Commission has always warned the States against the introduction of *actio popularis* in their legal systems⁴⁴ and it should be made clear that only victims of violations have the right to complain. This comment applies only to individual constitutional complaints, not to proposals for abstract control of laws and other regulations.

92. The Amendment stipulates that constitutional complaint should concern a violation of the freedoms and rights of “the individual and citizen”. However, it should be lodged by a “natural or legal person”. It is understood that individual constitutional complaints may concern not only violation of the rights of citizens *stricto sensu* but also of other private persons, including foreigners and companies.

93. Further, the Amendment should probably explain what “individual acts or actions of a state body” mean. It should be clear that constitutional complaints may be lodged against not only administrative but also judicial acts, including decisions of the Supreme Court.⁴⁵ It is also important to state explicitly that the CC has the power to quash individual acts (both administrative and judicial), to order the reopening of the proceedings and to award compensation where necessary. The constitutional complaint can be considered as an “effective legal remedy” by the ECtHR only if the CC has sufficient powers and can restore the rights breached. Finally, the authorities should consider whether the CC should be competent to hear complaints about inaction by the State bodies and officials along with their “acts”.

94. Finally, it is questionable whether “extraordinary remedies” should be mentioned in the Amendment. According to the Strasbourg case-law, only effective domestic remedies need to be exhausted before applying to the ECtHR; extraordinary remedies are often considered not “effective” since a person using them cannot be certain whether and when his or her case will be considered.⁴⁶ The applicants wishing to submit a constitutional complaint to the CC should not be required to exhaust remedies which are ineffective according to the standards set in the Strasbourg case-law.

H. Draft Amendment XXXIX (Part two: appeals against the decisions of the Judicial Council)

95. It is proposed that the Constitutional Court will hear appeals lodged against a decision of the Judicial Council on the election, dismissal, or other disciplinary sanctions pronounced against a judge of⁴⁷ a president of a court. It will also hear appeals against a decision of the Council of Public Prosecutors on the election, dismissal, or other disciplinary sanction against a public prosecutor.

⁴⁴ See CDL-AD(2008)030, *Opinion on the draft law on the Constitutional Court of Montenegro*, 2008, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), § 51; see also CDL-AD(2011)011, cited above, § 59

⁴⁵ In CDL-AD(2011)050corr, *Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia*, adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), the Venice Commission reiterated that “the establishment of the possibility of a full constitutional complaint before the Constitutional Court is highly recommended from a human rights’ perspective. If the Constitutional Court is not allowed to review judgments of the ordinary courts, there will be more applications to the European Court of Human Rights seeking human rights protection. States such as Turkey or Hungary, which have recently amended their systems of constitutional justice, tend to submit decisions of ordinary courts to the jurisdiction of the Constitutional Court. It is recommended that similar steps be taken by the Serbian legislator” (§§ 48-49).

⁴⁶ For example, in the case *Berdzenishvili against Russia* ((dec.), no. 31697/03, 29 January 2004)

⁴⁷ In the original version. Probably, it means “or a president of a court”

96. The Venice Commission has consistently asserted that there should be the possibility of an appeal to an independent court against decisions of disciplinary bodies.⁴⁸ That being said, the scope of the appeal should be limited; in particular, as regards judicial appointments, the appellate body should not encroach upon the powers proper to the Judicial Council. Judicial Councils should have a certain discretion, which must be respected by the appellate body. Currently appeals against decisions of the JC are examined by a special Appeal Panel formed within the Supreme Court. The Venice Commission is aware of the fact that the ECtHR is currently examining cases lodged by former judges dismissed by the JC where they alleged that the Appeal Chamber of the SC was not an impartial body⁴⁹. The Venice Commission cannot prejudge the outcome of the proceedings before the ECtHR; however, it is clear that if the appeal jurisdiction is transferred to the CC, the possible risk of conflict of interests will be reduced.

97. Examination of appeals against the decisions of the JC in disciplinary cases is not a part of the core functions of a constitutional court. In such proceedings the Constitutional Court does not appear as constitutional, but rather as an appellate court. As the Venice Commission has stated in relation to Serbia, “the Constitutional Court is the first and only court to examine the respective decisions of the judicial and prosecutorial councils. The Constitutional Court will therefore have to examine challenged facts more thoroughly than may be necessary in constitutional complaint proceedings”.⁵⁰

98. Furthermore, the combined effect of introduction of the constitutional complaint and redirecting appeals in the disciplinary cases to the Constitutional Court may be problematic, in terms of a possible drastic increase of the workload of the Constitutional Court.

99. In view of the above, a better solution would be to keep appeal jurisdiction within the Supreme Court but at the same time develop rules which would prevent any possibility for conflict of interests between members of the JC, members of the appeal chamber within the Supreme Court, and those who have the right to initiate disciplinary proceedings against judges.

IV. Conclusions

100. The Venice Commission notes the diversity of the constitutional changes submitted by the Government to the Parliament in July 2014. Some of the proposed changes are positive. The Commission welcomes, in particular, inscribing in the Constitution the independent status of the State Audit Office and of the central bank, broadening the scope of constitutional complaint, and removing the Minister of Justice and the President of the Supreme Court from the Judicial Council.

101. Nevertheless, as stated above, the Venice Commission considers that some proposals need to be clarified or further improved. The main recommendation by the Commission concerns the following points:

(a) as regards Draft Amendment XXXIII which defines marriage and different forms of personal unions as a life union between a man and a woman, the Venice Commission recognises that the States have large discretion in regulating the institution of marriage. However, the Amendment should not exclude possibility of giving same-sex couples some sort of legal recognition, provided that such recognition is given to different-sex couples;

⁴⁸ CDL-AD(2010)004 Report on the Independence of the Judicial System Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), Study No. 494/2008, Strasbourg, 16 March 2010, §§ 43 and 82, item 6

⁴⁹ See the communicated case of *Snežana Gerovska Popčevska and 5 other applicants against the former Yugoslav Republic of Macedonia*, nos. 48783/07 et al., 18/02/2013.

⁵⁰ CDL-AD(2011)050corr, *Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia*, adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), § 50

(b) as regards Draft Amendment XXXIV which provides for the creation of an International Financial Zone governed by a special “managing body”, the Venice Commission considers that there is a risk that this “management body” will receive excessively broad powers and will not be subordinate to the constitutional organs of the State and thus not accountable to the people. Quasi total exclusion of this zone from the legal order of the State does not seem to be compatible with the basic provisions of the Constitution. During its visit to the country the delegation of the Venice Commission understood that the Government was ready to re-draft that Amendment quite extensively. The Venice Commission invites the authorities to revise the Amendment so as to ensure that creation of a special legal regime for foreign investors does not result in the establishment of a “State within a State”, and that all international obligations of the country are fully applicable and enforced within the zone;

(c) finally, concerning Draft Amendment XXXIX which gives the Constitutional Court powers to decide on constitutional complaints from individuals concerning a wide range of basic rights, the Venice Commission welcomes this development. However, this reform will be successful only with careful preparation, which would require the adoption of a law on the Constitutional Court and a clear definition in the Constitution of the scope of basic rights which are protected by this legal remedy.

The Venice Commission remains at the disposal of the authorities for any assistance they may require in the process preparing such a law.