Strasbourg, 10 October 2005

Restricted
**CDL(2005)083**
Engl. only

**Opinion no. 355/2005**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

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

## Comments by

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## 1. Introduction

The Draft of the Amendments of the Constitution of the Republic of Macedonia (hereinafter "the draft") comprises the amendments concentrating on, in their substance, the reform of Judiciary including the changes of several other constitutional provisions.

The amendments proposed can be divided into these categories as follow

a) the reform of the judiciary including strengthening of the presumption of innocence and the right to fair trial,
b) the reform of the public prosecutor's office involving the position of the Supreme Public Prosecutor,
c) the immunity of the prime minister and the members of the Government,
d) the new rule of voting in the second round of the direct presidential election,
e) the legal sources for procedural tasks and decision making activities of the Constitutional Court.

It is neccesary to say that this opinion will not take into consideration the mistakes made during the translation of the draft if the mistakes do not change the proper meaning of the text.

## 2. The reform of judiciary

The reform of judiciary (hereinafter "the reform") covers the questions concerning the constitutional position of judges, their office and the State Judicial Council (hereinafter " The Judicial Council").

### *2.1. The tenure of judges*

When assessing the independence of the judiciary, the manner of appointment is one of the considerations that has to be taken into account.

One of the major changes concerns the tenure of the judges who are to be elected in the first instance only for the period of three years. After that time those judges who will have met the criteria stipulated by the law and the Judicial Council (see the amendment XXIX item 1 of the draft) can be elected for the tenure without limitations.

In the explanatory note to this amendment (XXVI) the authors of the draft present the reasons which are well-known predominantly in the countries from the post-Soviet block of states.

Regardless of these reasons I am of the opinion that every different solution of the judicature of first-time judges compared with proposed one could be better because of the necessity of enhancing the independence and impartiality of judges from the first moment of their positions as judges. Thus there are certain doubts on the suitability of this amendment from the standpoint of improving the conditions for guaranteeing the independence of Macedonian judiciary.

This opinion is based on the conviction that stipulating a probationary period for judges for the first three years of their tenure might raise the pressure on judges during the process for meeting the requirements given by the law. This might lead to incorrect judicial decisions in the effort to be elected for the life time period. In connection to this assertion it is needed to stress the composition of the Judicial Council, one of whose members according to the draft should be

the Minister of Justice as a representative of executive power. This allows a strong influence during the process of deliberation on meeting requirements by a specific judge.

In addition to this there might be another danger for impartiality and independence of judges with regard to the public. The judicial power would be exercised by two different groups of judges. The first one would be composed of judges elected for three years office and the second one would be represented by judges elected for life time period. Who would be responsible for the cases which would remain undecided by a lawful judge who would not be reelected for the life time period because of not meeting the criteria for re-election ? Another judge for three years office or a judge for life time period?

At the conclusion of this part of my opinion I would underline that most European countries prefer the tenure of a judge without time limit from the very beginning of their office.

I welcome the precision of the constitutional conditions for termination of the office of the judge including conditions for removal of the judge from their office.

Setting the amendment XXVI against the amendment XXIX it is necessary to suggest that the competences of the Judicial Council do not differentiate between termination of the office of the judge and removal of a judge from office, because it can only dismiss judges and judge-jurors.

### *2.2. The presumption of innocence*

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

According to the explanatory memorandum on the amendment XX to the Constitution the main aim of adopting this change is the effort of balancing the workload of courts regarding the power to decide on misdemeanours. On the other hand the question might be raised as to why it is necessary to use some new words for the establishment of the principle of the presumption of innocence.

The proposed article lacks in its first clause the stipulation as to which state organ is empowered to prove the guilt of an accused person. It must be expressly a court. My next remark concerns the use of the word “entity” instead of “everyone” or “person”. In relation to an entity it is needed to say that it can stipulate only the criminal responsibility for legal persons not for natural persons alike. The presumption of innocence however has its value predominantly for natural persons.

The next question is whether it is necessary to regulate a specific kind of presumption of innocence for misdemeanours. If an administrative body decides on a misdemeanour, then according to the European standards concerning the review of decisions passed by administrative authorities an suspect person must have the right to appeal against such a decision to a court. But administrative bodies or administrative courts do not need to prove the guilt of a suspect person from the criminal point of view but only under the tort law.

### *2.3. Speeding up the judiciary*

The implementation of article 6 paragraph 1 of the Convention of the Protection of Human Rights and Fundamental Freedoms with special regard to the right to proceedings

without undue delay makes good sense but there might be certain possibilities of better wording of the article proposed.

Firstly, it could be more precise to admit exceptions for conducting proceedings before courts publicly for instance in enforcement cases, inheritance cases and similar procedural situations. It could be expressed for example in this way. The public may be excluded only in cases laid down by law.

Secondly, proceedings without undue delays before an administration body or organisation or other institutions with public competences is a just demand protecting the public from undue delays in administrative procedures but that fundamental right should not include the right to fair trial in public. Proceedings before administrative bodies are performed usually in camera.

In addition to that the right to administrative proceedings without undue delays should be protected by ordinary courts in the administrative judiciary on the basis of an application or a complaint concerning the failure to act ( inactivity) of an administrative authority. Hence such a protection does not require a constitutional basis. Within this reason it is enough to resolve undue delays in proceedings before administrative bodies in the extent of an ordinary law.

### *2.4. The immunity of judges*

The immunity of judges should serve only for protecting the judges during their performance of the vested power. The aim of the immunity of judges should not be a tool for absolving a judge from a criminal responsibility if the judge committees a crime. On the other hand the immunity of judges must ensure that the instruments of criminal law will not be abused for charging judges with crimes due to their performance of their competences. Thus the new wording of the immunity of judges in comparison with the old one is really better because it links the benefit of immunity with performance of the judge's office.

According to the draft the Judicial Council decides upon the immunity of the judges by two-thirds majority of votes from the total number of the members of the Judicial Council with a procedure determined in a law. It seems to me suitable to propose the renewal of this clause on the consequence in cases in which The Judicial Council refuses to lift the immunity of a judge. The question is whether such a refusal will be valid for ever or only for the time during which a judge carryies his/her office. This should be expressed in the Constitution specifically.

Amendment XXVII item 3 should also be completed to include the possibility of taking a judge into custody only on the basis of agreement of the Judicial Council.

### *2.5. The Composition of the Judicial Council and its competences*

As it has been said before (for instance in relation to the reform of Bulgarian judiciary) there is no standard model that a democratic country is bound to follow in setting up its Judicial Council so long as the function of this Council fall within the aim to ensure the proper functioning of the independent judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of state power.

Arguably, the judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place

only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of the Judicial Council is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions.

Bearing in mind these prerequisites for an establishment of a judicial body governing the judiciary in a particular state I am convinced that the draft stipulates the position of the Judicial Council more clearly than before, better clarifies its powers and other related tasks.

Despite certain innovations there might be certain shortcomings. One of them concerns the fundamental question of definition of the constitutional position of the Judicial Council within the constitutional framework. To put it more precisely there are doubts as to relations of the Judicial Council to the other highest constitutional bodies especially operating within to judicial power. Which constitutional body will be empowered to review all decisions of the Judicial Council ? Administrative or constitutional judiciary? Or the Assembly ? According to the draft the Judicial Council creates a internally closed institution which can be influenced only through the process of voting and electing of the members of the Council but in very limited proportion.

The Justice Minister as a mandatory member of the Judicial Council opens a question on the expedience of his or her participation in the Judicial Council because the Minister of Justice is a representative of executive power with a specific relation to judiciary as a whole. The Minister of Justice should have only the right to be present at every session of the Judicial Council if he or she wants to. This proposal reacts to a question of minimizing the influence of executive power over the judiciary.

It is a suitable solution to define the reasons of termination and dismissal of a member of The Judicial Council in the Constitution directly. Bearing in mind that more than a half of the members will be judges then another reason for loss of the status of membership of the Judicial Council should be originated by the draft – decay of the function of a judge or expiration of his/her office regardless to the reason.

The competences of the Judicial Council represent the standards essential for an appropriate functioning in connection to the judiciary and its good administration. It could be said that the performance of other duties stipulated by a law might be replaced by words “other competences” .

**3. The position of The Public (State) Prosecutors Office in the future**

We can read in the draft (the amendment XXX and its explanation) that in the Constitution of the Republic of Macedonia the position of the Public Prosecutors Office in the legal system of the Republic of Macedonia and in the domain of criminal justice, as a single and independent state body, responsible for implementation of the function defined by the Constitution for persecution of the perpetrators of criminal acts, is not sufficiently regulated.

I would like to raise the only question of the necessity of regulating the Supreme State Prosecutor and other state prosecutors office within the Constitution. Setting-out these state bodies to the Constitution opens the question regarding the constitutional nature of these officials. State prosecutors should be in a common sense apprehended as a part of executive power which operates also in criminal investigations and proceedings but not as a part of the judicial power. This claim is valid also in relation to other competences of prosecutors performed in public.

Hence I am almost convinced that state prosecutors do not need for their proper functioning a constitutional basis. This basis belongs to the Government as the highest executive body within the State. If this argument is solid then there will not be reasonable ground for state prosecutors and their office to demand the constitutional basis for their competences and duties which can be carried out easily under an ordinary law.

Admittedly setting state prosecutors and their highest representative including the State Prosecutors´ Council in the Constitution is the solution fully accepted in quite a few countries. But I would require the more precise definition of the constitutional position of prosecutors as state servants in connection with all branches of state power. I want to know how to understand the constitutional position of state prosecutors (The Supreme State Prosecutor and other state prosecutors office and the State Prosecutors´ Council) in comparison with the highest constitutional institutions within the constitutional framework created by the Constitution.

**4. The amendment on the Constitutional Court of Macedonia**

This amendment to the Constitution does not raise any specific questions. The solution proposed seems to be in accordance with the demands for procedures and proceedings before constitutional judiciary.