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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS
ON THE CONSTITUTION
OF BULGARIA**

by

**Mr James HAMILTON
(Substitute Member, Ireland)**

* This document will not be distributed at the meeting. Please bring this copy.

** This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.

The Request

1. The monitoring committee of the parliamentary assembly of the Council of Europe have requested the Venice Commission to give its opinion on the Bulgarian constitution, in particular as regards the recent amendments made in February 2007.
2. Most of these recent amendments relate to the judiciary. The provisions of the Constitution of Bulgaria and the law on the judicial system in Bulgaria have been the subject matter of previous opinions of the Venice Commission, in particular the Opinion on the Reform of the Judiciary in Bulgaria (22-23 March 1999 CDL-INF (1999) 005e), and the Opinion on the Constitutional Amendments Reforming the Judicial System in Bulgaria (17-18 October 2003 (CDL-AD (2003)16).

The Constitutional Basis for the Judicial System prior to the Amendments in 2007

3. The Constitution of the Republic of Bulgaria was adopted by the Grand National Assembly on 12 July 1991. It provides that the judicial branch of government shall be independent (Article 117.2) and that the judicial branch of government shall have an independent budget (Article 117.3). The judicial branch of government has three parts (a) the courts, (b) the prosecutor's office and (c) investigating bodies which are responsible for performing the preliminary investigation in criminal cases.
4. Justice is administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, courts of assizes (referred to in the most recent text which I have been sent as regional courts), courts martial and district courts. Specialized courts may be set up by virtue of the law, but extraordinary courts are prohibited (Article 119).
5. Judges, prosecutors and investigating magistrates are elected, promoted, demoted, re-assigned and dismissed by the Supreme Judicial Council which consists of 25 members (Article 129 (1)). There are three *ex-officio* members, the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Prosecutor General. Eleven of the members of the Supreme Judicial Council are elected by the National Assembly, and 11 are elected by the bodies of the judiciary. All 22 elected members must be practising lawyers of high professional and moral integrity with at least 15 years of professional experience. The elected members of the Supreme Judicial Council serve terms of 5 years. They are not eligible for immediate re-election. The meetings of the Supreme Judicial Council are chaired by the Minister of Justice, who shall not be entitled to a vote (Article 130).
6. Judges, prosecutors and investigating magistrates become irremovable after they have completed a five-year term of office following attestation and a decision of the Supreme Judicial Council. They may be removed from office only upon completion of 65 years of age, resignation, entry into force of a final sentence imposing imprisonment for an international criminal offence, permanent *de facto* inability to perform their duties for more than a year, or serious infringement or systematic neglect of their official duties, as well as acts undermining the prestige of the judiciary. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General are appointed and removed by the President of the Republic upon a proposal from the Supreme Judicial Council. Appointment is for a period of 7 years, and they are not eligible for a second term in office. The President may not deny an appointment or removal

upon a repeated proposal from the Supreme Judicial Council. An amendment to the Constitution in 2003 which would have permitted the removal of these three judicial officers by a vote of two-thirds of the National Assembly was held unconstitutional by the Constitutional Court.. Presidents of the other judicial bodies are appointed for a period of 5 years and are eligible for a second mandate.

7. The organisation and functioning of the Supreme Judicial Council, 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 are to be established by law (Article 133).
8. The prosecution office is responsible for bringing charges against criminal suspects, overseeing the enforcement of penalties, acting for the rescinding of all illegitimate acts, and taking part in civil and administrative suits whenever required to do so by law. An amendment passed in 2006 has also attributed the responsibility for leading investigation, supervising the legality of investigations and conducting investigations (Article 127). The investigating magistracy are within the system of the judiciary (Article 128).

The February 2007 Amendments to the Constitution relating to the Judiciary

9. The amendments to the Constitution made in February 2007 will give effect to the following changes.
 - (1) Article 130, which deals with the Supreme Judicial Council, has new paragraphs (6), (7), (8) and (9). Paragraph 6 confers on the Supreme Judicial Council power to appoint, promote, transfer and remove from office judges, prosecutors and investigating magistrates, impose disciplinary sanctions of demotion and removal from offices on judges, prosecutors and investigating magistrates, and organize the qualification of judges, prosecutors and investigating magistrates. In this regard the provision repeats what is already in Article 129(1). The paragraph also provides that the Council will adopt the draft budget of the judiciary.
 - (2) "Article 130 (7) provides that the Council will determine the scope and the structure of annual reports which the new Article 84 (16) requires the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General to produce. These have to be heard and passed by the Supreme Judicial Council (Article 130) and then submitted to the National Assembly which must also hear and pass those reports (Article 84 (16)).
 - (3) A new provision in Paragraph 8 provides that the mandate of an elected member of the Supreme Judicial Council is to expire in the event of resignation, a final judicial conviction for a crime, permanent *de facto* inability to perform duties for more than one year, disciplinary removal from office or deprivation of the right to pursue a legal profession or activity. In such an eventuality the new member must be elected from the same electoral component and will hold office until the expiry of the mandate (Article 130 (9)).
 - (4) Article 132, which provides for the civil and criminal immunity of judges, prosecutors and investigating magistrates will be amended so as to provide that

immunity now extends only to their official acts and that even then the immunity does not extend to acts which constitute an indictable international offence.

- (5) The amendments of 2007 also provide for the establishment of an inspectorate to the Supreme Judicial Council, which consists of a chief inspector and ten inspectors. The inspectors are to be elected by the National Assembly by majority vote for four years except in the case of the Chief Inspector whose term is five years. They may be re-elected but “not for two consecutive mandates” (Article 132a(4)). It is not totally clear in the English text what this means but it is assumed to mean that they are not eligible for a mandate that follows immediately their first mandate. The budget of the inspectorate is adopted by the National Assembly within the framework of the budget of the judiciary. According to Article 132a (6)

“the Inspectorate shall inspect the activity of the judicial bodies without affecting the independence of judges, court assessors, prosecutors and investigating magistrates while performing their duties. The chief inspector and the inspectors shall be independent and shall obey only the law while performing their duties. They are to submit an annual report to the Supreme Judicial Council and may send proposals and reports to other state bodies, including the competent judicial bodies.”

- (6) A new Article 130 (a), inserted in 2006, provides that the Minister of Justice will propose a draft budget of the judiciary and submit it to the Supreme Judicial Council for consideration, will manage the property of the judiciary, will make proposals for appointment, promotion, demotion, transfer and removal from office of judges, prosecutors and investigators, and will participate in the organisation of the qualification of judges, prosecutors and investigators.

Commentary

10. The previous opinions of the Venice Commission were critical of the judicial system of Bulgaria in a number of respects. Firstly, the blanket immunity of judges and prosecutors was criticized. Secondly, criticism was expressed of the structure of the Supreme Judicial Council. This criticism centred on the risk of politicisation of the council by virtue of the election of 11 of its members by the parliamentary majority, and the role of the Minister of Justice in chairing the Council which risked to lead to a confusion between the executive and judicial functions. Although the Constitution provided for the independence of the judiciary its provisions were short on setting out the mechanisms by which this should be achieved. Furthermore, there was some criticism of the length a judge might in effect be probationary (then three years). That period has now even been extended to five years.
11. The new provisions of the constitution in relation to civil and criminal immunity are in line with previous recommendations of the Venice Commission and are to be welcomed.
12. The difficulties relating to the structure of the Supreme Judicial Council have not been addressed since the earlier Venice Commission opinions. Eleven members are still elected by the Parliament and it remains possible for a simple majority of Parliament to elect all of these members. In the past it has been the case that all

eleven members were elected by the governing party and the opposition was left unrepresented. The following comment from the Opinion of 22-23 March 1999 is relevant:

“30. The composition of the Council as set out in the Act is not in itself objectionable. It could work perfectly well in an established democracy where the administration of justice is by and large above conflict of party politics and where the independence of the Judiciary is very pronounced and well established. In such a situation, one would not expect the representatives of Parliament on the Council to be elected strictly on party lines and in any event, even if that were to happen, those elected would not feel in any way committed to act under instructions or directives from the party that elected them.

31. The Venice Commission considers that even though the Supreme Judicial Council may not in fact have been politicised it is undesirable that there should even be the appearance of politicisation in the procedures for its election. In each of the two most recent elections for the parliamentary component of the Supreme Judicial Council, under two different Governments the respective opposition parties did not participate with the result that on each occasion the parliamentary component of the Supreme Judicial Council was elected exclusively by representatives of the governing parties.

32. A high degree of consensus in relation to the election of this component should be sought. The Bulgarian Parliament discusses nominations in advance of the vote in the plenary in a parliamentary committee. Such a mechanism should be capable of being used to ensure appropriate opposition involvement in elections to the Supreme Judicial Council.”

The problems identified in this passage continue and have not been solved by any amendment to the Constitution since then. It may be noted that the members of the new Inspectorate are elected by a two-thirds majority of the National Assembly but the Supreme Judicial Council requires only a simple majority.

13. A further problem is caused by the fact that three distinct components of the judicial branch in Bulgaria, the judges, the prosecutors and the investigating magistrates are all represented in a single body. There is, of course, no objection to prosecutors forming part of the judicial branch as is the case in many countries. However, it is nonetheless important to maintain the distinction between public prosecutors and court judges. In this regard, certain passages in the explanatory memorandum to Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System are of interest.

“Relationship between Public Prosecutors and Court Judges

The Committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status of certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterized by mutual respect, objectivity and the observance of procedural requirements.¹”

¹ Explanatory Memorandum to Recommendation (2000) 19 pp 33-34

14. In the light of this I would have concerns about a system under which persons directly representing judges or prosecutors are each members of the same body which exercises functions of appointment, discipline and dismissal over the other. While I see no problems in principle with a single judicial council which would deal with the three separate branches of the judiciary, it may be that appropriate specialised committees should deal with matters pertaining to the particular branches of the judicial arm so as to ensure that there is not a risk of undue pressure or influence being brought by one branch towards the other.
15. The role of the Minister for Justice as chair of the Supreme Judicial Council also gives rise to some problems (even though he has no vote). The Venice Commission opinion of 22-23 March 1999 suggested that the Minister for Justice should not chair the council when it is discussing proposals made by the Minister. At the time the Minister for Justice had been given new powers to address proposals to the Supreme Judicial Council in relation to appointing and dismissing judges which had formerly been the prerogative of the heads of the different branches of the judiciary. The recent amendments in 2006 seem to go even further in giving the Minister for Justice exclusive power to propose a draft budget for the judiciary and submit it to the Supreme Judicial Council for consideration, to make proposals for appointment, promotion, demotion transfer and removal from office, to manage the property of the judiciary, and to participate in the organization of the qualification of judges, prosecutors and investigators. These powers are very extensive and compromise the independence of the judicial branch of government by giving the Minister undue power over the judicial branch. Indeed, it is difficult to see how the amendments conferring the right to propose the budget on the Minister for Justice are consistent with Article 117 under which the judiciary is to have an independent budget, unless by that latter provision is meant simply that the budget is to be separate from other budgets rather than that it is to be subject to judicial control. In any event, the combination of these powers with the fact that 11 out of the 25 members of the council are directly elected by the majority party in parliament whereas the 11 members of the judicial component are elected by scattered elements in the judiciary from its three separate branches seems to place the Minister for Justice in a very dominant position within the Council and over the judiciary as a whole given his undoubted influence in relation to matters of appointment, dismissal, discipline and the like.
16. It seems to the writer clear that the Supreme Judicial Council will function only insofar as and to the extent that the Minister for Justice wishes it to do so. I do not have information as to the extent to which it has its own staff and resources, but by effectively confining the power of initiative to the Minister for Justice it seems clear that he will be the driver of its activities. This does not seem to me to be in accordance with the principle of judicial independence. It would I think be important that a functioning Supreme Judicial Council would have its own chief executive, its own staff and its own budget and be able to function independently of the Minister for Justice of the day.
17. The new proposals for annual reports to be provided to the council by the Supreme Court, the Supreme Administrative Court and the Prosecutor General and requiring those reports to be heard and to be passed both by the Supreme Judicial Council and by the National Assembly also give rise to concern. What are to be the consequences if these reports are found unsatisfactory and are not passed? Is this to be a ground on which the head of the particular branch of the judiciary concerned can be disciplined or held to account? It would be important to clarify how exactly this procedure is to work. There can be no objection to an annual report which provides factual information relating to, for example, the number of cases heard, the

outcome of those cases, the number of judges employed etc., but any suggestion that a report from the judiciary requires approval from the National Assembly as well as from a body composed largely of persons elected by the parliament give rise to concern as to a possible compromise of the position of the judges.

18. Similar concerns arise in relation to the proposed new Inspectorate. Although the Inspectorate is stated to be independent it is nonetheless elected by the National Assembly with no input from the judiciary. The requirement that it be elected by a majority of two-thirds of the members at least gives some likelihood that it will be a body elected by consensus, unlike the component elected to the Supreme Judicial Council by the National Assembly. It is also of assistance that it is expressly stated that the Inspectorate is to inspect the activity of the judiciary bodies without affecting the independence of judges, court assessors, prosecutors and investing magistrates while performing their duties. Nonetheless, it is conceivable that the activities of such a body could have a chilling effect on the judiciary to some extent. It is noted that the reports of the Inspectorate are to the Supreme Judicial Council rather than to the National Assembly, but nonetheless it would be preferable to minimize the political input into the appointment of members of the Inspectorate so as to ensure that it is not used as a mechanism to compromise the independence of the judiciary while at the same time ensuring that it is genuinely a tool to ensure the efficiency of the judiciary.
19. The Prosecutor's Office in 2006 was given a power to lead the investigation and supervise its legality (Article 127). It is not clear to the writer how this sits with the powers and functions of the investigating magistrates.

Other Issues

20. I do not have any comments on the other changes effected to the Constitution in 2007, other than to say that none of them appear to me to be objectionable. Overall, I would agree with the view that the provisions of the Constitution of Bulgaria are on the whole in conformity with European standards. I have had the opportunity of reading Mr. Van Dijk's detailed criticisms of the original provisions of the Constitution of Bulgaria which are not confined to the recent amendments and I agree with the opinions expressed by him. Apart from the criticisms which I have made above in relation to the provisions concerning the judiciary I would agree with the view that the two issues which would give most cause for concern relate to the confining of rights to citizens in certain areas and to the position of national minorities. The latter issue is referred to in a number of Articles, starting with Article 1(3) which refers to no part of the people usurping the expression of the popular sovereignty. Article 2 prohibits the possibility of autonomous territorial formation. Article 3 provides for Bulgarian to be the official language of the Republic and the later provisions of Article 26 are at best barely tolerant of other languages. Article 11(4) prohibits the existence of political parties on ethnic, racial or religious lines. While a concern to protect the unity and integrity of the state is of course acceptable one would have a concern that such provisions could be used to prevent minority linguistic, ethnic or religious groups from organizing themselves at all.



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immunity now extends only to their official acts and that even then the immunity does not extend to acts which constitute an indictable international offence.

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- (6) A new Article 130 (a), inserted in 2006, provides that the Minister of Justice will propose a draft budget of the judiciary and submit it to the Supreme Judicial Council for consideration, will manage the property of the judiciary, will make proposals for appointment, promotion, demotion, transfer and removal from office of judges, prosecutors and investigators, and will participate in the organisation of the qualification of judges, prosecutors and investigators.

Commentary

10. The previous opinions of the Venice Commission were critical of the judicial system of Bulgaria in a number of respects. Firstly, the blanket immunity of judges and prosecutors was criticized. Secondly, criticism was expressed of the structure of the Supreme Judicial Council. This criticism centred on the risk of politicisation of the council by virtue of the election of 11 of its members by the parliamentary majority, and the role of the Minister of Justice in chairing the Council which risked to lead to a confusion between the executive and judicial functions. Although the Constitution provided for the independence of the judiciary its provisions were short on setting out the mechanisms by which this should be achieved. Furthermore, there was some criticism of the length a judge might in effect be probationary (then three years). That period has now even been extended to five years.
11. The new provisions of the constitution in relation to civil and criminal immunity are in line with previous recommendations of the Venice Commission and are to be welcomed.
12. The difficulties relating to the structure of the Supreme Judicial Council have not been addressed since the earlier Venice Commission opinions. Eleven members are still elected by the Parliament and it remains possible for a simple majority of Parliament to elect all of these members. In the past it has been the case that all

eleven members were elected by the governing party and the opposition was left unrepresented. The following comment from the Opinion of 22-23 March 1999 is relevant:

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The problems identified in this passage continue and have not been solved by any amendment to the Constitution since then. It may be noted that the members of the new Inspectorate are elected by a two-thirds majority of the National Assembly but the Supreme Judicial Council requires only a simple majority.

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The Committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status of certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterized by mutual respect, objectivity and the observance of procedural requirements.¹”

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15. The role of the Minister for Justice as chair of the Supreme Judicial Council also gives rise to some problems (even though he has no vote). The Venice Commission opinion of 22-23 March 1999 suggested that the Minister for Justice should not chair the council when it is discussing proposals made by the Minister. At the time the Minister for Justice had been given new powers to address proposals to the Supreme Judicial Council in relation to appointing and dismissing judges which had formerly been the prerogative of the heads of the different branches of the judiciary. The recent amendments in 2006 seem to go even further in giving the Minister for Justice exclusive power to propose a draft budget for the judiciary and submit it to the Supreme Judicial Council for consideration, to make proposals for appointment, promotion, demotion transfer and removal from office, to manage the property of the judiciary, and to participate in the organization of the qualification of judges, prosecutors and investigators. These powers are very extensive and compromise the independence of the judicial branch of government by giving the Minister undue power over the judicial branch. Indeed, it is difficult to see how the amendments conferring the right to propose the budget on the Minister for Justice are consistent with Article 117 under which the judiciary is to have an independent budget, unless by that latter provision is meant simply that the budget is to be separate from other budgets rather than that it is to be subject to judicial control. In any event, the combination of these powers with the fact that 11 out of the 25 members of the council are directly elected by the majority party in parliament whereas the 11 members of the judicial component are elected by scattered elements in the judiciary from its three separate branches seems to place the Minister for Justice in a very dominant position within the Council and over the judiciary as a whole given his undoubted influence in relation to matters of appointment, dismissal, discipline and the like.
16. It seems to the writer clear that the Supreme Judicial Council will function only insofar as and to the extent that the Minister for Justice wishes it to do so. I do not have information as to the extent to which it has its own staff and resources, but by effectively confining the power of initiative to the Minister for Justice it seems clear that he will be the driver of its activities. This does not seem to me to be in accordance with the principle of judicial independence. It would I think be important that a functioning Supreme Judicial Council would have its own chief executive, its own staff and its own budget and be able to function independently of the Minister for Justice of the day.
17. The new proposals for annual reports to be provided to the council by the Supreme Court, the Supreme Administrative Court and the Prosecutor General and requiring those reports to be heard and to be passed both by the Supreme Judicial Council and by the National Assembly also give rise to concern. What are to be the consequences if these reports are found unsatisfactory and are not passed? Is this to be a ground on which the head of the particular branch of the judiciary concerned can be disciplined or held to account? It would be important to clarify how exactly this procedure is to work. There can be no objection to an annual report which provides factual information relating to, for example, the number of cases heard, the

outcome of those cases, the number of judges employed etc., but any suggestion that a report from the judiciary requires approval from the National Assembly as well as from a body composed largely of persons elected by the parliament give rise to concern as to a possible compromise of the position of the judges.

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19. The Prosecutor's Office in 2006 was given a power to lead the investigation and supervise its legality (Article 127). It is not clear to the writer how this sits with the powers and functions of the investigating magistrates.

Other Issues

20. I do not have any comments on the other changes effected to the Constitution in 2007, other than to say that none of them appear to me to be objectionable. Overall, I would agree with the view that the provisions of the Constitution of Bulgaria are on the whole in conformity with European standards. I have had the opportunity of reading Mr. Van Dijk's detailed criticisms of the original provisions of the Constitution of Bulgaria which are not confined to the recent amendments and I agree with the opinions expressed by him. Apart from the criticisms which I have made above in relation to the provisions concerning the judiciary I would agree with the view that the two issues which would give most cause for concern relate to the confining of rights to citizens in certain areas and to the position of national minorities. The latter issue is referred to in a number of Articles, starting with Article 1(3) which refers to no part of the people usurping the expression of the popular sovereignty. Article 2 prohibits the possibility of autonomous territorial formation. Article 3 provides for Bulgarian to be the official language of the Republic and the later provisions of Article 26 are at best barely tolerant of other languages. Article 11(4) prohibits the existence of political parties on ethnic, racial or religious lines. While a concern to protect the unity and integrity of the state is of course acceptable one would have a concern that such provisions could be used to prevent minority linguistic, ethnic or religious groups from organizing themselves at all.



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 5 October 2007

Opinion No. 444 / 2007

CDL(2007)079 *
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS
ON THE CONSTITUTION
OF BULGARIA**

by

**Mr James HAMILTON
(Substitute Member, Ireland)**

* This document will not be distributed at the meeting. Please bring this copy.

** This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.

The Request

1. The monitoring committee of the parliamentary assembly of the Council of Europe have requested the Venice Commission to give its opinion on the Bulgarian constitution, in particular as regards the recent amendments made in February 2007.
2. Most of these recent amendments relate to the judiciary. The provisions of the Constitution of Bulgaria and the law on the judicial system in Bulgaria have been the subject matter of previous opinions of the Venice Commission, in particular the Opinion on the Reform of the Judiciary in Bulgaria (22-23 March 1999 CDL-INF (1999) 005e), and the Opinion on the Constitutional Amendments Reforming the Judicial System in Bulgaria (17-18 October 2003 (CDL-AD (2003)16).

The Constitutional Basis for the Judicial System prior to the Amendments in 2007

3. The Constitution of the Republic of Bulgaria was adopted by the Grand National Assembly on 12 July 1991. It provides that the judicial branch of government shall be independent (Article 117.2) and that the judicial branch of government shall have an independent budget (Article 117.3). The judicial branch of government has three parts (a) the courts, (b) the prosecutor's office and (c) investigating bodies which are responsible for performing the preliminary investigation in criminal cases.
4. Justice is administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, courts of assizes (referred to in the most recent text which I have been sent as regional courts), courts martial and district courts. Specialized courts may be set up by virtue of the law, but extraordinary courts are prohibited (Article 119).
5. Judges, prosecutors and investigating magistrates are elected, promoted, demoted, re-assigned and dismissed by the Supreme Judicial Council which consists of 25 members (Article 129 (1)). There are three *ex-officio* members, the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Prosecutor General. Eleven of the members of the Supreme Judicial Council are elected by the National Assembly, and 11 are elected by the bodies of the judiciary. All 22 elected members must be practising lawyers of high professional and moral integrity with at least 15 years of professional experience. The elected members of the Supreme Judicial Council serve terms of 5 years. They are not eligible for immediate re-election. The meetings of the Supreme Judicial Council are chaired by the Minister of Justice, who shall not be entitled to a vote (Article 130).
6. Judges, prosecutors and investigating magistrates become irremovable after they have completed a five-year term of office following attestation and a decision of the Supreme Judicial Council. They may be removed from office only upon completion of 65 years of age, resignation, entry into force of a final sentence imposing imprisonment for an international criminal offence, permanent *de facto* inability to perform their duties for more than a year, or serious infringement or systematic neglect of their official duties, as well as acts undermining the prestige of the judiciary. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General are appointed and removed by the President of the Republic upon a proposal from the Supreme Judicial Council. Appointment is for a period of 7 years, and they are not eligible for a second term in office. The President may not deny an appointment or removal

upon a repeated proposal from the Supreme Judicial Council. An amendment to the Constitution in 2003 which would have permitted the removal of these three judicial officers by a vote of two-thirds of the National Assembly was held unconstitutional by the Constitutional Court.. Presidents of the other judicial bodies are appointed for a period of 5 years and are eligible for a second mandate.

7. The organisation and functioning of the Supreme Judicial Council, 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 are to be established by law (Article 133).
8. The prosecution office is responsible for bringing charges against criminal suspects, overseeing the enforcement of penalties, acting for the rescinding of all illegitimate acts, and taking part in civil and administrative suits whenever required to do so by law. An amendment passed in 2006 has also attributed the responsibility for leading investigation, supervising the legality of investigations and conducting investigations (Article 127). The investigating magistracy are within the system of the judiciary (Article 128).

The February 2007 Amendments to the Constitution relating to the Judiciary

9. The amendments to the Constitution made in February 2007 will give effect to the following changes.
 - (1) Article 130, which deals with the Supreme Judicial Council, has new paragraphs (6), (7), (8) and (9). Paragraph 6 confers on the Supreme Judicial Council power to appoint, promote, transfer and remove from office judges, prosecutors and investigating magistrates, impose disciplinary sanctions of demotion and removal from offices on judges, prosecutors and investigating magistrates, and organize the qualification of judges, prosecutors and investigating magistrates. In this regard the provision repeats what is already in Article 129(1). The paragraph also provides that the Council will adopt the draft budget of the judiciary.
 - (2) "Article 130 (7) provides that the Council will determine the scope and the structure of annual reports which the new Article 84 (16) requires the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General to produce. These have to be heard and passed by the Supreme Judicial Council (Article 130) and then submitted to the National Assembly which must also hear and pass those reports (Article 84 (16)).
 - (3) A new provision in Paragraph 8 provides that the mandate of an elected member of the Supreme Judicial Council is to expire in the event of resignation, a final judicial conviction for a crime, permanent *de facto* inability to perform duties for more than one year, disciplinary removal from office or deprivation of the right to pursue a legal profession or activity. In such an eventuality the new member must be elected from the same electoral component and will hold office until the expiry of the mandate (Article 130 (9)).
 - (4) Article 132, which provides for the civil and criminal immunity of judges, prosecutors and investigating magistrates will be amended so as to provide that

immunity now extends only to their official acts and that even then the immunity does not extend to acts which constitute an indictable international offence.

- (5) The amendments of 2007 also provide for the establishment of an inspectorate to the Supreme Judicial Council, which consists of a chief inspector and ten inspectors. The inspectors are to be elected by the National Assembly by majority vote for four years except in the case of the Chief Inspector whose term is five years. They may be re-elected but “not for two consecutive mandates” (Article 132a(4)). It is not totally clear in the English text what this means but it is assumed to mean that they are not eligible for a mandate that follows immediately their first mandate. The budget of the inspectorate is adopted by the National Assembly within the framework of the budget of the judiciary. According to Article 132a (6)

“the Inspectorate shall inspect the activity of the judicial bodies without affecting the independence of judges, court assessors, prosecutors and investigating magistrates while performing their duties. The chief inspector and the inspectors shall be independent and shall obey only the law while performing their duties. They are to submit an annual report to the Supreme Judicial Council and may send proposals and reports to other state bodies, including the competent judicial bodies.”

- (6) A new Article 130 (a), inserted in 2006, provides that the Minister of Justice will propose a draft budget of the judiciary and submit it to the Supreme Judicial Council for consideration, will manage the property of the judiciary, will make proposals for appointment, promotion, demotion, transfer and removal from office of judges, prosecutors and investigators, and will participate in the organisation of the qualification of judges, prosecutors and investigators.

Commentary

10. The previous opinions of the Venice Commission were critical of the judicial system of Bulgaria in a number of respects. Firstly, the blanket immunity of judges and prosecutors was criticized. Secondly, criticism was expressed of the structure of the Supreme Judicial Council. This criticism centred on the risk of politicisation of the council by virtue of the election of 11 of its members by the parliamentary majority, and the role of the Minister of Justice in chairing the Council which risked to lead to a confusion between the executive and judicial functions. Although the Constitution provided for the independence of the judiciary its provisions were short on setting out the mechanisms by which this should be achieved. Furthermore, there was some criticism of the length a judge might in effect be probationary (then three years). That period has now even been extended to five years.
11. The new provisions of the constitution in relation to civil and criminal immunity are in line with previous recommendations of the Venice Commission and are to be welcomed.
12. The difficulties relating to the structure of the Supreme Judicial Council have not been addressed since the earlier Venice Commission opinions. Eleven members are still elected by the Parliament and it remains possible for a simple majority of Parliament to elect all of these members. In the past it has been the case that all

eleven members were elected by the governing party and the opposition was left unrepresented. The following comment from the Opinion of 22-23 March 1999 is relevant:

“30. The composition of the Council as set out in the Act is not in itself objectionable. It could work perfectly well in an established democracy where the administration of justice is by and large above conflict of party politics and where the independence of the Judiciary is very pronounced and well established. In such a situation, one would not expect the representatives of Parliament on the Council to be elected strictly on party lines and in any event, even if that were to happen, those elected would not feel in any way committed to act under instructions or directives from the party that elected them.

31. The Venice Commission considers that even though the Supreme Judicial Council may not in fact have been politicised it is undesirable that there should even be the appearance of politicisation in the procedures for its election. In each of the two most recent elections for the parliamentary component of the Supreme Judicial Council, under two different Governments the respective opposition parties did not participate with the result that on each occasion the parliamentary component of the Supreme Judicial Council was elected exclusively by representatives of the governing parties.

32. A high degree of consensus in relation to the election of this component should be sought. The Bulgarian Parliament discusses nominations in advance of the vote in the plenary in a parliamentary committee. Such a mechanism should be capable of being used to ensure appropriate opposition involvement in elections to the Supreme Judicial Council.”

The problems identified in this passage continue and have not been solved by any amendment to the Constitution since then. It may be noted that the members of the new Inspectorate are elected by a two-thirds majority of the National Assembly but the Supreme Judicial Council requires only a simple majority.

13. A further problem is caused by the fact that three distinct components of the judicial branch in Bulgaria, the judges, the prosecutors and the investigating magistrates are all represented in a single body. There is, of course, no objection to prosecutors forming part of the judicial branch as is the case in many countries. However, it is nonetheless important to maintain the distinction between public prosecutors and court judges. In this regard, certain passages in the explanatory memorandum to Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System are of interest.

“Relationship between Public Prosecutors and Court Judges

The Committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status of certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterized by mutual respect, objectivity and the observance of procedural requirements.¹”

¹ Explanatory Memorandum to Recommendation (2000) 19 pp 33-34

14. In the light of this I would have concerns about a system under which persons directly representing judges or prosecutors are each members of the same body which exercises functions of appointment, discipline and dismissal over the other. While I see no problems in principle with a single judicial council which would deal with the three separate branches of the judiciary, it may be that appropriate specialised committees should deal with matters pertaining to the particular branches of the judicial arm so as to ensure that there is not a risk of undue pressure or influence being brought by one branch towards the other.
15. The role of the Minister for Justice as chair of the Supreme Judicial Council also gives rise to some problems (even though he has no vote). The Venice Commission opinion of 22-23 March 1999 suggested that the Minister for Justice should not chair the council when it is discussing proposals made by the Minister. At the time the Minister for Justice had been given new powers to address proposals to the Supreme Judicial Council in relation to appointing and dismissing judges which had formerly been the prerogative of the heads of the different branches of the judiciary. The recent amendments in 2006 seem to go even further in giving the Minister for Justice exclusive power to propose a draft budget for the judiciary and submit it to the Supreme Judicial Council for consideration, to make proposals for appointment, promotion, demotion transfer and removal from office, to manage the property of the judiciary, and to participate in the organization of the qualification of judges, prosecutors and investigators. These powers are very extensive and compromise the independence of the judicial branch of government by giving the Minister undue power over the judicial branch. Indeed, it is difficult to see how the amendments conferring the right to propose the budget on the Minister for Justice are consistent with Article 117 under which the judiciary is to have an independent budget, unless by that latter provision is meant simply that the budget is to be separate from other budgets rather than that it is to be subject to judicial control. In any event, the combination of these powers with the fact that 11 out of the 25 members of the council are directly elected by the majority party in parliament whereas the 11 members of the judicial component are elected by scattered elements in the judiciary from its three separate branches seems to place the Minister for Justice in a very dominant position within the Council and over the judiciary as a whole given his undoubted influence in relation to matters of appointment, dismissal, discipline and the like.
16. It seems to the writer clear that the Supreme Judicial Council will function only insofar as and to the extent that the Minister for Justice wishes it to do so. I do not have information as to the extent to which it has its own staff and resources, but by effectively confining the power of initiative to the Minister for Justice it seems clear that he will be the driver of its activities. This does not seem to me to be in accordance with the principle of judicial independence. It would I think be important that a functioning Supreme Judicial Council would have its own chief executive, its own staff and its own budget and be able to function independently of the Minister for Justice of the day.
17. The new proposals for annual reports to be provided to the council by the Supreme Court, the Supreme Administrative Court and the Prosecutor General and requiring those reports to be heard and to be passed both by the Supreme Judicial Council and by the National Assembly also give rise to concern. What are to be the consequences if these reports are found unsatisfactory and are not passed? Is this to be a ground on which the head of the particular branch of the judiciary concerned can be disciplined or held to account? It would be important to clarify how exactly this procedure is to work. There can be no objection to an annual report which provides factual information relating to, for example, the number of cases heard, the

outcome of those cases, the number of judges employed etc., but any suggestion that a report from the judiciary requires approval from the National Assembly as well as from a body composed largely of persons elected by the parliament give rise to concern as to a possible compromise of the position of the judges.

18. Similar concerns arise in relation to the proposed new Inspectorate. Although the Inspectorate is stated to be independent it is nonetheless elected by the National Assembly with no input from the judiciary. The requirement that it be elected by a majority of two-thirds of the members at least gives some likelihood that it will be a body elected by consensus, unlike the component elected to the Supreme Judicial Council by the National Assembly. It is also of assistance that it is expressly stated that the Inspectorate is to inspect the activity of the judiciary bodies without affecting the independence of judges, court assessors, prosecutors and investing magistrates while performing their duties. Nonetheless, it is conceivable that the activities of such a body could have a chilling effect on the judiciary to some extent. It is noted that the reports of the Inspectorate are to the Supreme Judicial Council rather than to the National Assembly, but nonetheless it would be preferable to minimize the political input into the appointment of members of the Inspectorate so as to ensure that it is not used as a mechanism to compromise the independence of the judiciary while at the same time ensuring that it is genuinely a tool to ensure the efficiency of the judiciary.
19. The Prosecutor's Office in 2006 was given a power to lead the investigation and supervise its legality (Article 127). It is not clear to the writer how this sits with the powers and functions of the investigating magistrates.

Other Issues

20. I do not have any comments on the other changes effected to the Constitution in 2007, other than to say that none of them appear to me to be objectionable. Overall, I would agree with the view that the provisions of the Constitution of Bulgaria are on the whole in conformity with European standards. I have had the opportunity of reading Mr. Van Dijk's detailed criticisms of the original provisions of the Constitution of Bulgaria which are not confined to the recent amendments and I agree with the opinions expressed by him. Apart from the criticisms which I have made above in relation to the provisions concerning the judiciary I would agree with the view that the two issues which would give most cause for concern relate to the confining of rights to citizens in certain areas and to the position of national minorities. The latter issue is referred to in a number of Articles, starting with Article 1(3) which refers to no part of the people usurping the expression of the popular sovereignty. Article 2 prohibits the possibility of autonomous territorial formation. Article 3 provides for Bulgarian to be the official language of the Republic and the later provisions of Article 26 are at best barely tolerant of other languages. Article 11(4) prohibits the existence of political parties on ethnic, racial or religious lines. While a concern to protect the unity and integrity of the state is of course acceptable one would have a concern that such provisions could be used to prevent minority linguistic, ethnic or religious groups from organizing themselves at all.



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 - (2) "Article 130 (7) provides that the Council will determine the scope and the structure of annual reports which the new Article 84 (16) requires the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General to produce. These have to be heard and passed by the Supreme Judicial Council (Article 130) and then submitted to the National Assembly which must also hear and pass those reports (Article 84 (16)).
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- (5) The amendments of 2007 also provide for the establishment of an inspectorate to the Supreme Judicial Council, which consists of a chief inspector and ten inspectors. The inspectors are to be elected by the National Assembly by majority vote for four years except in the case of the Chief Inspector whose term is five years. They may be re-elected but “not for two consecutive mandates” (Article 132a(4)). It is not totally clear in the English text what this means but it is assumed to mean that they are not eligible for a mandate that follows immediately their first mandate. The budget of the inspectorate is adopted by the National Assembly within the framework of the budget of the judiciary. According to Article 132a (6)

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- (6) A new Article 130 (a), inserted in 2006, provides that the Minister of Justice will propose a draft budget of the judiciary and submit it to the Supreme Judicial Council for consideration, will manage the property of the judiciary, will make proposals for appointment, promotion, demotion, transfer and removal from office of judges, prosecutors and investigators, and will participate in the organisation of the qualification of judges, prosecutors and investigators.

Commentary

10. The previous opinions of the Venice Commission were critical of the judicial system of Bulgaria in a number of respects. Firstly, the blanket immunity of judges and prosecutors was criticized. Secondly, criticism was expressed of the structure of the Supreme Judicial Council. This criticism centred on the risk of politicisation of the council by virtue of the election of 11 of its members by the parliamentary majority, and the role of the Minister of Justice in chairing the Council which risked to lead to a confusion between the executive and judicial functions. Although the Constitution provided for the independence of the judiciary its provisions were short on setting out the mechanisms by which this should be achieved. Furthermore, there was some criticism of the length a judge might in effect be probationary (then three years). That period has now even been extended to five years.
11. The new provisions of the constitution in relation to civil and criminal immunity are in line with previous recommendations of the Venice Commission and are to be welcomed.
12. The difficulties relating to the structure of the Supreme Judicial Council have not been addressed since the earlier Venice Commission opinions. Eleven members are still elected by the Parliament and it remains possible for a simple majority of Parliament to elect all of these members. In the past it has been the case that all

eleven members were elected by the governing party and the opposition was left unrepresented. The following comment from the Opinion of 22-23 March 1999 is relevant:

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32. A high degree of consensus in relation to the election of this component should be sought. The Bulgarian Parliament discusses nominations in advance of the vote in the plenary in a parliamentary committee. Such a mechanism should be capable of being used to ensure appropriate opposition involvement in elections to the Supreme Judicial Council.”

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“Relationship between Public Prosecutors and Court Judges

The Committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status of certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterized by mutual respect, objectivity and the observance of procedural requirements.¹”

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15. The role of the Minister for Justice as chair of the Supreme Judicial Council also gives rise to some problems (even though he has no vote). The Venice Commission opinion of 22-23 March 1999 suggested that the Minister for Justice should not chair the council when it is discussing proposals made by the Minister. At the time the Minister for Justice had been given new powers to address proposals to the Supreme Judicial Council in relation to appointing and dismissing judges which had formerly been the prerogative of the heads of the different branches of the judiciary. The recent amendments in 2006 seem to go even further in giving the Minister for Justice exclusive power to propose a draft budget for the judiciary and submit it to the Supreme Judicial Council for consideration, to make proposals for appointment, promotion, demotion transfer and removal from office, to manage the property of the judiciary, and to participate in the organization of the qualification of judges, prosecutors and investigators. These powers are very extensive and compromise the independence of the judicial branch of government by giving the Minister undue power over the judicial branch. Indeed, it is difficult to see how the amendments conferring the right to propose the budget on the Minister for Justice are consistent with Article 117 under which the judiciary is to have an independent budget, unless by that latter provision is meant simply that the budget is to be separate from other budgets rather than that it is to be subject to judicial control. In any event, the combination of these powers with the fact that 11 out of the 25 members of the council are directly elected by the majority party in parliament whereas the 11 members of the judicial component are elected by scattered elements in the judiciary from its three separate branches seems to place the Minister for Justice in a very dominant position within the Council and over the judiciary as a whole given his undoubted influence in relation to matters of appointment, dismissal, discipline and the like.
16. It seems to the writer clear that the Supreme Judicial Council will function only insofar as and to the extent that the Minister for Justice wishes it to do so. I do not have information as to the extent to which it has its own staff and resources, but by effectively confining the power of initiative to the Minister for Justice it seems clear that he will be the driver of its activities. This does not seem to me to be in accordance with the principle of judicial independence. It would I think be important that a functioning Supreme Judicial Council would have its own chief executive, its own staff and its own budget and be able to function independently of the Minister for Justice of the day.
17. The new proposals for annual reports to be provided to the council by the Supreme Court, the Supreme Administrative Court and the Prosecutor General and requiring those reports to be heard and to be passed both by the Supreme Judicial Council and by the National Assembly also give rise to concern. What are to be the consequences if these reports are found unsatisfactory and are not passed? Is this to be a ground on which the head of the particular branch of the judiciary concerned can be disciplined or held to account? It would be important to clarify how exactly this procedure is to work. There can be no objection to an annual report which provides factual information relating to, for example, the number of cases heard, the

outcome of those cases, the number of judges employed etc., but any suggestion that a report from the judiciary requires approval from the National Assembly as well as from a body composed largely of persons elected by the parliament give rise to concern as to a possible compromise of the position of the judges.

18. Similar concerns arise in relation to the proposed new Inspectorate. Although the Inspectorate is stated to be independent it is nonetheless elected by the National Assembly with no input from the judiciary. The requirement that it be elected by a majority of two-thirds of the members at least gives some likelihood that it will be a body elected by consensus, unlike the component elected to the Supreme Judicial Council by the National Assembly. It is also of assistance that it is expressly stated that the Inspectorate is to inspect the activity of the judiciary bodies without affecting the independence of judges, court assessors, prosecutors and investing magistrates while performing their duties. Nonetheless, it is conceivable that the activities of such a body could have a chilling effect on the judiciary to some extent. It is noted that the reports of the Inspectorate are to the Supreme Judicial Council rather than to the National Assembly, but nonetheless it would be preferable to minimize the political input into the appointment of members of the Inspectorate so as to ensure that it is not used as a mechanism to compromise the independence of the judiciary while at the same time ensuring that it is genuinely a tool to ensure the efficiency of the judiciary.
19. The Prosecutor's Office in 2006 was given a power to lead the investigation and supervise its legality (Article 127). It is not clear to the writer how this sits with the powers and functions of the investigating magistrates.

Other Issues

20. I do not have any comments on the other changes effected to the Constitution in 2007, other than to say that none of them appear to me to be objectionable. Overall, I would agree with the view that the provisions of the Constitution of Bulgaria are on the whole in conformity with European standards. I have had the opportunity of reading Mr. Van Dijk's detailed criticisms of the original provisions of the Constitution of Bulgaria which are not confined to the recent amendments and I agree with the opinions expressed by him. Apart from the criticisms which I have made above in relation to the provisions concerning the judiciary I would agree with the view that the two issues which would give most cause for concern relate to the confining of rights to citizens in certain areas and to the position of national minorities. The latter issue is referred to in a number of Articles, starting with Article 1(3) which refers to no part of the people usurping the expression of the popular sovereignty. Article 2 prohibits the possibility of autonomous territorial formation. Article 3 provides for Bulgarian to be the official language of the Republic and the later provisions of Article 26 are at best barely tolerant of other languages. Article 11(4) prohibits the existence of political parties on ethnic, racial or religious lines. While a concern to protect the unity and integrity of the state is of course acceptable one would have a concern that such provisions could be used to prevent minority linguistic, ethnic or religious groups from organizing themselves at all.



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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**COMMENTS
ON THE CONSTITUTION
OF BULGARIA**

by

**Mr James HAMILTON
(Substitute Member, Ireland)**

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The Request

1. The monitoring committee of the parliamentary assembly of the Council of Europe have requested the Venice Commission to give its opinion on the Bulgarian constitution, in particular as regards the recent amendments made in February 2007.
2. Most of these recent amendments relate to the judiciary. The provisions of the Constitution of Bulgaria and the law on the judicial system in Bulgaria have been the subject matter of previous opinions of the Venice Commission, in particular the Opinion on the Reform of the Judiciary in Bulgaria (22-23 March 1999 CDL-INF (1999) 005e), and the Opinion on the Constitutional Amendments Reforming the Judicial System in Bulgaria (17-18 October 2003 (CDL-AD (2003)16).

The Constitutional Basis for the Judicial System prior to the Amendments in 2007

3. The Constitution of the Republic of Bulgaria was adopted by the Grand National Assembly on 12 July 1991. It provides that the judicial branch of government shall be independent (Article 117.2) and that the judicial branch of government shall have an independent budget (Article 117.3). The judicial branch of government has three parts (a) the courts, (b) the prosecutor's office and (c) investigating bodies which are responsible for performing the preliminary investigation in criminal cases.
4. Justice is administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, courts of assizes (referred to in the most recent text which I have been sent as regional courts), courts martial and district courts. Specialized courts may be set up by virtue of the law, but extraordinary courts are prohibited (Article 119).
5. Judges, prosecutors and investigating magistrates are elected, promoted, demoted, re-assigned and dismissed by the Supreme Judicial Council which consists of 25 members (Article 129 (1)). There are three *ex-officio* members, the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Prosecutor General. Eleven of the members of the Supreme Judicial Council are elected by the National Assembly, and 11 are elected by the bodies of the judiciary. All 22 elected members must be practising lawyers of high professional and moral integrity with at least 15 years of professional experience. The elected members of the Supreme Judicial Council serve terms of 5 years. They are not eligible for immediate re-election. The meetings of the Supreme Judicial Council are chaired by the Minister of Justice, who shall not be entitled to a vote (Article 130).
6. Judges, prosecutors and investigating magistrates become irremovable after they have completed a five-year term of office following attestation and a decision of the Supreme Judicial Council. They may be removed from office only upon completion of 65 years of age, resignation, entry into force of a final sentence imposing imprisonment for an international criminal offence, permanent *de facto* inability to perform their duties for more than a year, or serious infringement or systematic neglect of their official duties, as well as acts undermining the prestige of the judiciary. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General are appointed and removed by the President of the Republic upon a proposal from the Supreme Judicial Council. Appointment is for a period of 7 years, and they are not eligible for a second term in office. The President may not deny an appointment or removal

upon a repeated proposal from the Supreme Judicial Council. An amendment to the Constitution in 2003 which would have permitted the removal of these three judicial officers by a vote of two-thirds of the National Assembly was held unconstitutional by the Constitutional Court.. Presidents of the other judicial bodies are appointed for a period of 5 years and are eligible for a second mandate.

7. The organisation and functioning of the Supreme Judicial Council, 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 are to be established by law (Article 133).
8. The prosecution office is responsible for bringing charges against criminal suspects, overseeing the enforcement of penalties, acting for the rescinding of all illegitimate acts, and taking part in civil and administrative suits whenever required to do so by law. An amendment passed in 2006 has also attributed the responsibility for leading investigation, supervising the legality of investigations and conducting investigations (Article 127). The investigating magistracy are within the system of the judiciary (Article 128).

The February 2007 Amendments to the Constitution relating to the Judiciary

9. The amendments to the Constitution made in February 2007 will give effect to the following changes.
 - (1) Article 130, which deals with the Supreme Judicial Council, has new paragraphs (6), (7), (8) and (9). Paragraph 6 confers on the Supreme Judicial Council power to appoint, promote, transfer and remove from office judges, prosecutors and investigating magistrates, impose disciplinary sanctions of demotion and removal from offices on judges, prosecutors and investigating magistrates, and organize the qualification of judges, prosecutors and investigating magistrates. In this regard the provision repeats what is already in Article 129(1). The paragraph also provides that the Council will adopt the draft budget of the judiciary.
 - (2) "Article 130 (7) provides that the Council will determine the scope and the structure of annual reports which the new Article 84 (16) requires the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General to produce. These have to be heard and passed by the Supreme Judicial Council (Article 130) and then submitted to the National Assembly which must also hear and pass those reports (Article 84 (16)).
 - (3) A new provision in Paragraph 8 provides that the mandate of an elected member of the Supreme Judicial Council is to expire in the event of resignation, a final judicial conviction for a crime, permanent *de facto* inability to perform duties for more than one year, disciplinary removal from office or deprivation of the right to pursue a legal profession or activity. In such an eventuality the new member must be elected from the same electoral component and will hold office until the expiry of the mandate (Article 130 (9)).
 - (4) Article 132, which provides for the civil and criminal immunity of judges, prosecutors and investigating magistrates will be amended so as to provide that

immunity now extends only to their official acts and that even then the immunity does not extend to acts which constitute an indictable international offence.

- (5) The amendments of 2007 also provide for the establishment of an inspectorate to the Supreme Judicial Council, which consists of a chief inspector and ten inspectors. The inspectors are to be elected by the National Assembly by majority vote for four years except in the case of the Chief Inspector whose term is five years. They may be re-elected but “not for two consecutive mandates” (Article 132a(4)). It is not totally clear in the English text what this means but it is assumed to mean that they are not eligible for a mandate that follows immediately their first mandate. The budget of the inspectorate is adopted by the National Assembly within the framework of the budget of the judiciary. According to Article 132a (6)

“the Inspectorate shall inspect the activity of the judicial bodies without affecting the independence of judges, court assessors, prosecutors and investigating magistrates while performing their duties. The chief inspector and the inspectors shall be independent and shall obey only the law while performing their duties. They are to submit an annual report to the Supreme Judicial Council and may send proposals and reports to other state bodies, including the competent judicial bodies.”

- (6) A new Article 130 (a), inserted in 2006, provides that the Minister of Justice will propose a draft budget of the judiciary and submit it to the Supreme Judicial Council for consideration, will manage the property of the judiciary, will make proposals for appointment, promotion, demotion, transfer and removal from office of judges, prosecutors and investigators, and will participate in the organisation of the qualification of judges, prosecutors and investigators.

Commentary

10. The previous opinions of the Venice Commission were critical of the judicial system of Bulgaria in a number of respects. Firstly, the blanket immunity of judges and prosecutors was criticized. Secondly, criticism was expressed of the structure of the Supreme Judicial Council. This criticism centred on the risk of politicisation of the council by virtue of the election of 11 of its members by the parliamentary majority, and the role of the Minister of Justice in chairing the Council which risked to lead to a confusion between the executive and judicial functions. Although the Constitution provided for the independence of the judiciary its provisions were short on setting out the mechanisms by which this should be achieved. Furthermore, there was some criticism of the length a judge might in effect be probationary (then three years). That period has now even been extended to five years.
11. The new provisions of the constitution in relation to civil and criminal immunity are in line with previous recommendations of the Venice Commission and are to be welcomed.
12. The difficulties relating to the structure of the Supreme Judicial Council have not been addressed since the earlier Venice Commission opinions. Eleven members are still elected by the Parliament and it remains possible for a simple majority of Parliament to elect all of these members. In the past it has been the case that all

eleven members were elected by the governing party and the opposition was left unrepresented. The following comment from the Opinion of 22-23 March 1999 is relevant:

“30. The composition of the Council as set out in the Act is not in itself objectionable. It could work perfectly well in an established democracy where the administration of justice is by and large above conflict of party politics and where the independence of the Judiciary is very pronounced and well established. In such a situation, one would not expect the representatives of Parliament on the Council to be elected strictly on party lines and in any event, even if that were to happen, those elected would not feel in any way committed to act under instructions or directives from the party that elected them.

31. The Venice Commission considers that even though the Supreme Judicial Council may not in fact have been politicised it is undesirable that there should even be the appearance of politicisation in the procedures for its election. In each of the two most recent elections for the parliamentary component of the Supreme Judicial Council, under two different Governments the respective opposition parties did not participate with the result that on each occasion the parliamentary component of the Supreme Judicial Council was elected exclusively by representatives of the governing parties.

32. A high degree of consensus in relation to the election of this component should be sought. The Bulgarian Parliament discusses nominations in advance of the vote in the plenary in a parliamentary committee. Such a mechanism should be capable of being used to ensure appropriate opposition involvement in elections to the Supreme Judicial Council.”

The problems identified in this passage continue and have not been solved by any amendment to the Constitution since then. It may be noted that the members of the new Inspectorate are elected by a two-thirds majority of the National Assembly but the Supreme Judicial Council requires only a simple majority.

13. A further problem is caused by the fact that three distinct components of the judicial branch in Bulgaria, the judges, the prosecutors and the investigating magistrates are all represented in a single body. There is, of course, no objection to prosecutors forming part of the judicial branch as is the case in many countries. However, it is nonetheless important to maintain the distinction between public prosecutors and court judges. In this regard, certain passages in the explanatory memorandum to Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System are of interest.

“Relationship between Public Prosecutors and Court Judges

The Committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status of certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterized by mutual respect, objectivity and the observance of procedural requirements.¹”

¹ Explanatory Memorandum to Recommendation (2000) 19 pp 33-34

14. In the light of this I would have concerns about a system under which persons directly representing judges or prosecutors are each members of the same body which exercises functions of appointment, discipline and dismissal over the other. While I see no problems in principle with a single judicial council which would deal with the three separate branches of the judiciary, it may be that appropriate specialised committees should deal with matters pertaining to the particular branches of the judicial arm so as to ensure that there is not a risk of undue pressure or influence being brought by one branch towards the other.
15. The role of the Minister for Justice as chair of the Supreme Judicial Council also gives rise to some problems (even though he has no vote). The Venice Commission opinion of 22-23 March 1999 suggested that the Minister for Justice should not chair the council when it is discussing proposals made by the Minister. At the time the Minister for Justice had been given new powers to address proposals to the Supreme Judicial Council in relation to appointing and dismissing judges which had formerly been the prerogative of the heads of the different branches of the judiciary. The recent amendments in 2006 seem to go even further in giving the Minister for Justice exclusive power to propose a draft budget for the judiciary and submit it to the Supreme Judicial Council for consideration, to make proposals for appointment, promotion, demotion transfer and removal from office, to manage the property of the judiciary, and to participate in the organization of the qualification of judges, prosecutors and investigators. These powers are very extensive and compromise the independence of the judicial branch of government by giving the Minister undue power over the judicial branch. Indeed, it is difficult to see how the amendments conferring the right to propose the budget on the Minister for Justice are consistent with Article 117 under which the judiciary is to have an independent budget, unless by that latter provision is meant simply that the budget is to be separate from other budgets rather than that it is to be subject to judicial control. In any event, the combination of these powers with the fact that 11 out of the 25 members of the council are directly elected by the majority party in parliament whereas the 11 members of the judicial component are elected by scattered elements in the judiciary from its three separate branches seems to place the Minister for Justice in a very dominant position within the Council and over the judiciary as a whole given his undoubted influence in relation to matters of appointment, dismissal, discipline and the like.
16. It seems to the writer clear that the Supreme Judicial Council will function only insofar as and to the extent that the Minister for Justice wishes it to do so. I do not have information as to the extent to which it has its own staff and resources, but by effectively confining the power of initiative to the Minister for Justice it seems clear that he will be the driver of its activities. This does not seem to me to be in accordance with the principle of judicial independence. It would I think be important that a functioning Supreme Judicial Council would have its own chief executive, its own staff and its own budget and be able to function independently of the Minister for Justice of the day.
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