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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE PROVISIONS ON THE JUDICIARY IN THE DRAFT CONSTITUTION OF THE REPUBLIC OF SERBIA

on the basis of comments by

Mr James HAMILTON (Substitute member, Ireland)
Mr Jeffrey JOWELL (Member, United Kingdom)
Mr Georg NOLTE (Substitute member, Germany)
Ms Hanna SUCHOCKA (Member, Poland)

I. Introduction

1. By letter dated 20 June 2005 the Minister of Justice of the Republic of Serbia, Mr Stojkovic, asked the Venice Commission to provide an assessment of the Chapter on the Judiciary in the draft Constitution of Serbia, approved by the Government of Serbia in June 2004.

2. *The present draft Opinion, based on comments by Messrs Hamilton (Ireland), Jowell (United Kingdom), Nolte (Germany) and Ms Suchocka (Poland) was examined and adopted by the Venice Commission at its … Session in Venice on ..*

II. General Comments

3. The provisions of the draft Constitution seek to establish judicial independence and an independent public prosecutorial service. Judicial independence is a fundamental tenet of democracy and the rule of law and a necessary ingredient of a fair trial. An independent judiciary ensures that governments and administrations may be held to account and that duly enacted laws are enforced. Judicial independence appears in the first chapter of the draft Constitution on basic principles. Article 3 declares the rule of law to be the supreme value of the Constitution and refers to the independence of the judiciary as one of its components. Independence of the prosecution service from undue interference ensures that duly enacted laws are enforced without political or personal bias.

4. In respect of the independence of the judiciary, there are a number of international and Council of Europe instruments which specify the basic mechanisms required to achieve proper standards of independence. The most authoritative text is Recommendation (94)12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges. This text is fairly succinct and leaves many issues to the discretion of national authorities. More detail is provided by Opinion No 1 (2001) of the Consultative Council of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judges.

5. There is no common European standard with respect to the office of the public prosecutor. In some states prosecutors, being formally part of the executive, are more or less dependent on the political branches of government, while in others they are more independent, being part of the judiciary. There are also other distinctions between the different national models, such as with respect to the extent of the duty or the discretionary power of whether to prosecute. Any system, however, has to take into account Recommendation (2000)19 of the Committee of Ministers on the Role of Public Prosecution in the Criminal Justice System which provides that nature and scope of the independence of prosecutors should be established by law. This should safeguard against the undermining of the independence but also ensure that the prosecutor's office does not become so powerful as to be a threat to the democratic system.

III. Comments Article by Article

JUDICIARY

Article 125 – Basic Provisions

6. The first sentence of the first section affirms the principle that judges are "independent and subordinated to the Constitution and the Law only". This provision is similar to provisions in

other European Constitutions, e.g. Art. 97 of the German Grundgesetz[1], although the word 'subordinate' in the English translation may not be the best expression of this idea.

7. With the exception of the Supreme Court, provided for in Article 129, and the Constitutional Court, which is defined as an independent and autonomous court organ (see Articles 170-178), all other courts of law are to be provided for by organic law, which is to specify the jurisdiction and competence of courts. It might be added that, while the existence of the Supreme Court is to be constitutionally established, the Constitution says little about it (see Article 129). It might be questioned whether it is wise to leave quite so much to organic law. This question has some importance since organic laws are far easier to adopt and amend than the Constitution. It has however also to be taken into account that Serbia is a country in transition and that changes in the structure of the court system may be required in the near future. There is therefore a case for having rules which are not too rigid.

8. Since Article 3 (and, by implication, other fundamental rights in the constitution) requires for its implementation that courts of law are established, it seems misleading to state that courts of law may be 'abolished' by an organic law. It would be preferable for the Article to provide that an organic law shall provide for the 'establishment, organisation, function and hierarchy (subject to Article 129 which sets out the superiority of the Supreme Court of Serbia) of courts of law' (or words to that effect). Such a formulation would surely imply that some courts may be discontinued, so long as access to justice and the rule of law (under Article 3) are maintained.

9. The ban on the establishment of temporary and extraordinary courts, including military courts, is to be welcomed.

Article 126 – Permanence and Immovability of Judges

Appointment for an unspecified period

10. Under Art. 126.1 of the draft, 'a judge shall be initially appointed to a five-year term, and to an unspecified period of time after that'. The term 'for an unspecified period' is presumably to be understood as an appointment until the age of retirement, subject to an early termination of office by virtue of Art. 128. It might be preferable to spell out more clearly here that it is indeed a permanent appointment until retirement.

Initial appointment for five years

11. More difficult is the issue of the initial appointment for a period of five years. It is true that in many countries of continental Europe, where relatively young and inexperienced lawyers are appointed as judges, the initial appointment tends to be for a probationary period. Nevertheless, this practice raises concerns as to the independence of these judges who might feel under pressure to decide cases in a particular way[2].

[1] Art.97.1: *"Judges shall be independent and subject only to the law."*

[2] A decision of the Appeal Court of the High Court of Justiciary of Scotland (*Starr v Ruxton*, [2000] H.R.L.R 191; see also *Millar v Dickson* [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.

12. There is no conclusive case-law by the European Court of Human Rights on this subject[3] and it is not explicitly addressed by Recommendation (94)12 of the Committee of Ministers on the independence, efficiency and role of judges. It is however addressed in other texts. The Explanatory Memorandum to the European Charter on the statute for judges, adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) at para.3.3 voices doubts:

> *"Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed"*.

The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice (UN DOC.E/CN.4 /Subs.2/1985/18/Add.6 Annex 6) states:

> *"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually"*.

13. Obviously there are on the one hand serious concerns with respect to judicial independence, on the other hand, the practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before appointing him or her until retirement seems also fairly compelling in a country where people with limited experience are appointed as judges. If probationary appointments may therefore be considered indispensable in some countries, it is essential in that case to introduce appropriate safeguards.

14. One possible safeguard would be to limit the role of such judges, ensuring that they receive appropriate guidance from colleagues appointed on a permanent basis and do not take final decisions on their own. Polish law for example includes the institution of 'assessor' before becoming a full judge. A reduction of the- excessive- five year-period would also alleviate the problem.

15. The crucial point will be to provide for sufficient procedural safeguards, established by (preferably organic) legislation in order to ensure that all decisions are based on objective criteria. Recommendation (94)12 states that *"all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency"*. The proposed system fails to meet these criteria. The decision on appointment following the probationary period would be taken by a political body, the People's Assembly in the form of elections, i.e. a discretionary act not to be justified according to objective criteria. The Commission is of the opinion that the High Judicial Council should be entrusted with taking status decisions on probationary judges so as to ensure that the decisions are based solely on merit and not influenced by undue political considerations. These decisions of the High Judicial Council should be subject to appeal to a court.

[3] The European Commission on Human Rights, in Application No. 28899/95, *Stieringer v Germany*, 25 November 1996, found that there was no violation of Article 6(1) of the Convention where a criminal trial in Germany was held before three judges, two of whom were probationary, and two lay assessors. Prior to completion of their probationary period the probationary judges were liable to removal by the judicial authorities, subject to a right to challenge their removal before a disciplinary court. Under German law their participation in the trial had to be justified by some imperative necessity; the German courts had found such necessity to exist. The Commission held that there was no breach of Article 6(1). In that case, the removal process was subject to judicial control.

Article 127 – Appointment. Immunity. Conflict of Interest

Appointment

16. The provision in Art. 127 on appointing judges raises serious concerns. Judges and presidents of courts shall be 'elected by the People's Assembly, at the proposal of the High Judicial Council'. The President of the Supreme Court of Serbia shall be 'elected' (presumably by the People's Assembly, although it is not specifically stated) at the proposal of the President of the Republic, 'who has obtained the opinion of the general sitting of the Supreme Court of Serbia'. The involvement of parliament in judicial appointments risks leading to a politicisation of the appointments and, especially for judges at the lower level courts, it is difficult to see the added value of a parliamentary procedure. In Serbia the People's Assembly hitherto has not limited its role to confirming candidates presented by the High Judicial Council but it has rejected a considerable number of such candidates under circumstances where it seemed questionable that the decisions were based on merit. This is not surprising since elections by a parliament are discretionary acts and political considerations will always play a role.

17. As set forth above[4] Recommendation (94)12 requires that judicial appointments should be based on objective criteria and merit and not on political considerations. The main role in judicial appointments should therefore be given to an objective body such as the High Judicial Council provided for in Articles 133-135 of the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same.

Immunity

18. Article 127 would give to judges the same immunity as that to be given to deputies. It is very doubtful whether there is a need for such a wide immunity for judges. In its Opinion on the Reform of the Judiciary in Bulgaria (CDL-INF (1999)005) the Venice Commission stated that *"while no doubt immunity could be justified if it were necessary to prevent judges or prosecutors from interference from vexatious proceedings it ought not to operate to place judges and prosecutors above the law."* Parliamentary immunity emerged as a safeguard against the monarchic executive. It protects the functioning of the parliament by preventing political prosecution of deputies. Immunity is an exception to the democratic principle of equality before the law. Thus it can only be justified for judges as far as it is necessary to exclude interference with the workings of the court. Therefore, if any, there should only be a limited functional immunity for judges from arrest, detention and other criminal proceedings that interfere with the workings of the court. Their immunity should not, however, extend to a general exclusion of criminal investigation. A wider immunity cannot be justified with the argument that it is necessary for the reputation of judges since clarification of facts by court procedure is a better and faster way to save a deserved reputation.

Conflict of interest

19. With respect to conflict of interest Art. 128.3 refers to an organic law. This seems justified. An even better wording would be: "An organic law shall specify functions, activities or private interests that are incompatible, or have the appearance of being incompatible with an independent judicial function." It might be considered whether to include in the text a prohibition of the membership of judges in political parties. Such a provision seems useful in

[4] At para. 15

particular in a new democracy to protect judicial independence, although there is no common European practice in this respect.

Article 128 – Termination of Office and Disciplinary Responsibility of a Judge

Termination of office

20. This Article provides that a judge's term of office terminates at his request, on meeting the conditions for retirement, and by dismissal. Retirement age is 67 or after 40 years of service. Presumably it should state "whichever first occurs". The age of retirement cannot be changed so as to affect the individual judge.

21. As for judicial appointments, the People's Assembly is to decide on termination of a judge's office. By what criteria and on what grounds? The arguments set forth above against involving the People's Assembly in decisions on judicial appointment are even more compelling for dismissals. The respective section of the Article should be excluded.

Disciplinary responsibility

22. The provisions as to discipline and dismissal are vague and unclear. The grounds justifying the dismissal of a judge are left to determination by organic law. Having regard to their importance, it would seem preferable to define them in the Constitution. The High Judicial Council is responsible for first-instance disciplinary decisions. A special court organ is to act on appeal. This "special court organ" is not defined but should preferably be spelt out in the text.

23. Under the text, judges are accountable for a violation of their duties or of the reputation of the judicial authorities. The latter appears problematic. Judges may be strongly criticised by public opinion for decisions taken by them which were required by the law. In cases where disciplinary action is justified, the judge bringing the judiciary into disrepute will have done so by violating his or her duties as a judge. This criterion seems therefore sufficient, and the reference to the reputation of the judicial authorities should be deleted.

THE OFFICE OF THE PUBLIC PROSECUTOR

Article 130- Jurisdiction and Hierarchy

Powers

24. The functions of the Office are defined as prosecuting the perpetrators of criminal and other penal offences. It is also to apply legal remedies in order to protect constitutionality and legality. The Constitution is silent on what exactly is meant by this latter provision. It would appear from the fact that the Constitution, in Article 136 to 137, establishes a position of Ombudsman as a state authority to monitor the work of state administration and respect for human and minority rights that it is not intended that the prosecutor's office should have these functions. Moreover, if this provision were to be understood as referring to the traditional socialist system of extraordinary appeals by the Public Prosecutor against final court decisions, there is a strong risk of conflict with the principle of legal certainty. The European Court of Human Rights repeatedly has found the exercise of such remedies to be in violation of the Convention. If the reference to the office of the public prosecutor applying legal remedies in order to protect constitutionality and legality is to remain, it ought to be clarified to make it clear that the principle of legal certainty will be respected and that the decision on such matters rests with the courts and that the prosecutor's function is no more than to bring such issues before the court for determination.

Independence

25. The draft opts for a model which leans strongly towards independence. The Office of the Public Prosecutor is conceived as an "independent state body" (Article 130.1) and public prosecutors, like judges, are irremovable after a probationary period of five years (Article 131.2). The Head of the Office is (only) appointed to a six-year term (Article 131.1.2), but "at the proposal of the High Judicial Council" (Article 132.1). This last provision suggests that the appointment to the Head of the Office is still conceived as a regular career move and not as a political appointment. Only the Supreme Public Prosecutor of Serbia is a political appointment, as he is nominated by the President of the Republic after "having obtained" the presumably *non*-binding "opinion of the High Judicial Council" (Article 132.1.2). But also the Supreme Public Prosecutor of Serbia benefits from a six year appointment period during which he or she is, in principle, irremovable.

26. This proposed system has its advantages and disadvantages. The advantage is the relatively strong insulation of the Office of the Public Prosecutor from political influence. This is particularly important for cases of ordinary crime in which those who hold political power might want to protect "friends" or "clients" from prosecution. This arrangement may, however, also become dysfunctional, for example if the public prosecutor himself misbehaves. A particular problem can arise in relation to crimes whose prosecution raises issues which also concern the responsibility of the government, in particular in foreign affairs. The prosecution of certain terrorist and other international crimes requires a certain scope of discretion. It is here that the prosecutorial independence and the power of the executive to shape foreign policy can come into conflict. Full independence of the prosecutor could lead to a situation in which a state body which is not accountable to any democratically elected institution could determine matters of foreign affairs. On the other hand, where the government rather than an independent prosecutor is responsible for prosecution there is a risk that certain crimes, including even grave violations of human rights, may go unprosecuted for reasons of political expediency. In this regard paragraph 16 of Rec (2000) 19 is relevant:

> *"Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law."*

27. Regardless of whether a fully independent prosecutorial systems is to be evaluated as positive or negative in a particular case, it must be recognised that the lack of accountability to a democratically elected institution also shields those decisions from the influence of public opinion. This has both positive and negative aspects – the prosecutor is sheltered from populist pressure but on the other hand may be out of touch with public opinion. There may be a case for making the prosecution of certain grave crimes, those concerning exterior security and international crimes in some way open to the influence of the government. One possible way would be the creation of a special prosecutor for such crimes, whose appointment and termination of office can be influenced more strongly by the executive. The example of the United Kingdom, could be cited in this respect. There the Attorney General, who is politically accountable to parliament, is responsible for the prosecution of certain sensitive matters such as incitement to racial hatred, while the independent Director of Public Prosecutions prosecutes most crimes. In Germany the *Generalbundesanwalt*, who can be dismissed by the Government, is responsible for prosecuting a limited number of grave crimes which typically concern state security. The German system is however based on the federal state structure and cannot be easily copied in Serbia. If Serbia decides to go in the direction of having a prosecutor that is independent of the government it should respect section 14[5] of Recommendation (2000)19. If

[5] 14. *In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.*

it chooses to make the prosecutor more subordinate to government, then section 13[6] of that instrument will apply.

Structure

28. Section 2 of Article 130 provides for a hierarchical structure of the Office of the Public Prosecutor. This is not unusual and as such gives no reason for criticism. However, it has also to be taken into account that Article 133 establishes a joint High Judicial Council for Judges and Prosecutors. That means that in the Serbian system of government, the public prosecutor's office is not linked to the executive authority but constitutes a separate organ with close links to the judiciary. The consequence should be an organisational and territorial structure of prosecution organs in parallel to the court structure. Prosecutors would thereby become the prosecutors of courts at individual levels. Such a solution, however, is not being proposed.

Article 131 – Public Prosecutors

Transfers

29. Article 131.3 is designed to ensure the personal independence of public prosecutors by providing for their internal immovability. Given the fact that the offices of the Public Prosecution are hierarchically structured, independence for prosecutors is less important than for judges. Therefore, the question whether a prosecutor can be transferred against his or her will may not be the most relevant, and even become an obstacle to legitimate considerations of rotation. It seems to be more pertinent whether a subordinate prosecutor must comply with instructions which – in his or her opinion – transgress the law, or violate a duty of a prosecutor to prosecute or not to prosecute in a specific case. In this regard it is necessary that Section 10 of Rec(2000)19 be observed[7]. Such questions can be, and currently are, covered by the Serbian

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[6] 13. *Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:*

a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;

b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;

c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;

d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

− to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;

− duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels;

− to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;

e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;

f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

[7] *All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.*

Law on the Public Prosecutor's Office, but they still seem to be more important than the question of the transfer of a prosecutor. As regards the substance of the rule on transfers, under the envisaged system of a joint High Judicial Council it would be appropriate to involve this Council in such decisions.

Immunity. Conflict of Interest

30. With respect to immunity and conflict of interest, the considerations set forth above for judges8 apply also to prosecutors.

Disciplinary responsibility

31. Regulations pertaining to the disciplinary responsibility of prosecutors are lacking. Article 128.4 clearly applies only to judges. The regulations pertaining to prosecutors and invoking the appropriate regulations pertaining to judges contain no mention of a prosecutor's disciplinary responsibility. Section 5 of Article 131 should be appropriately supplemented in such a way: "the constitutional provisions related to conflict of interest, immunity, disciplinary responsibility of judges shall apply to the Public Prosecutor.

Article 132 – Appointment and Termination of Term in Office of Public Prosecutor

32. The reservations expressed with respect to the involvement of the People's Assembly in the appointment and termination of office of judges, also apply, although not with the same force, to Public Prosecutors. With the possible exception of the Supreme Public Prosecutor, for whose appointment involvement of the People's Assembly may be justified, appointment by the President on the proposal of the High Judicial Council would be preferable.

Articles 133-135 - HIGH JUDICIAL COUNCIL

Article 133- Powers and composition

Joint Council for judges and prosecutors

33. The draft adopts the solution that prosecutors and judges comprise a common Judiciary Council. In the light of European standards, this solution (a common *magistrature*) does not evoke reservations, although it should be noted that this is not a widely encountered model. It seems important that both the judges and the prosecutors should not only be independent of other institutions in the State, the Executive and the Legislature, but should also be independent of each other. It would be undesirable for the prosecutor to have influence over matters concerning the judiciary and equally undesirable that the judiciary should exercise control over the prosecutor's office.

Character

34. The Council is described as an independent and autonomous judicial body. This emphasis on independence is welcome although opinions may differ whether the Council should be described as a judicial body.

Composition

35. The Council is to be composed of four judges, four prosecutors, one lawyer and two law professors. This composition provides the best possible guarantees for judicial independence and legal expertise. However, especially if in accordance with this Opinion the role of the People's Assembly in judicial appointments were to be eliminated, it may be desirable to provide for a broader composition including also a lay element.

[8] At 18 and 19.

Article 134 – Position of a Member of High Judicial Council

36. With respect to immunity and conflict of interest, the considerations set forth above for judges[9] apply also to the members of the High Judicial Council.

Article 135 – Decision-making

37. Article 135 provides that, if a decision of the High Judicial Council pertains solely to judges included in the Council, public prosecutors are to be excluded from its composition. Similarly, if a decision of the Council pertains solely to prosecutors included in the Council, judges are to be excluded. This provision seems somewhat obscure. One may assume that it does not refer only to decisions concerning individual judges or prosecutors on the Council but is intended to refer to judges or prosecutors who are represented by the Council. If this is the case then the intention seems to be that where the Council is deciding on matters which are relevant to the judges, the prosecutors do not take part and *vice versa*, but where they decide on a matter relating both to prosecutors and to judges then everyone takes part. This seems to be a rather complex provision and one wonders whether it would not be simpler to establish two separate councils, one to deal with matters pertaining to the judges and the other to deal with matters pertaining to the prosecutors. For the latter, a legislative and not a constitutional basis would appear sufficient.

OMBUDSMAN

Article 136 – Powers

38. In its Opinion on the draft law on the Ombudsman of Serbia (CDL(2004)041), the Commission recommended that the Ombudsman institution be given a constitutional basis. It is welcome that Articles 136 and 137 of the draft achieve this.

Article 137 – Position

39. According to Section 1, the Ombudsman would be elected by the People's Assembly at the proposal of the President. The recently adopted Serbian law on the Ombudsman enables each parliamentary group to propose a candidate. This seems a better system than enabling only the President to make such proposals. The Venice Commission Opinion also recommended a qualified majority for the election of the Ombudsman. As set forth above for judges, there should only be functional immunity. Finally, it would seem desirable to define in the Constitution the grounds on which an Ombudsman's office may be terminated.

IV. Conclusions

40. The clauses in the draft Constitution which the Venice Commission has considered generally seek to implement the overriding principle of the rule of law, including judicial independence, as set out in Article 3 of the Constitution in accordance with European standards. The Commission has identified some provisions of the draft which require greater clarity. It has also suggested changes to other provisions which, although not necessarily contradicting ideal European standards, could benefit from some amendment, modification or reconsideration.

[9] At 18 and 19.

41. The Commission is, however, particularly concerned about the role of the People's Assembly in judicial appointments and dismissals. The election of judges by parliament corresponds to a tradition in former Yugoslavia but the current constitutional reform in "the former Yugoslav Republic of Macedonia" shows that this system is no longer uncontested in the region. In the Commission's view an involvement of the People's Assembly in decisions on the dismissal of judges and permanent appointment of judges following a probationary period is not in line with European standards protecting judicial independence.