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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE CONSTITUION OF BULGARIA

on the basis of comments by

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Mr Pieter van DIJK (Member, Netherlands)
Mr James HAMILTON (Substitute Member, Ireland)

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1. By letter dated 24 May 2007, addressed to the President of the Venice Commission, the Chair of the Parliamentary Assembly of the Council of Europe's Monitoring Committee, Mr Eduard Lintner, requested an opinion on the Bulgarian Constitution, in particular as regards the recent amendments made in February 2007.

2. The present draft opinion was drawn up on the basis of comments by Mr. José Luis Céa Egana, Mr Pieter van Dijk (CDL(2007)078) and Mr James Hamilton (CDL(2007)079), who were invited by the Venice Commission to act as rapporteurs.

3. This opinion was adopted at the … plenary session of the Venice Commission (Venice, …).

1. GENERAL REMARKS

4. Most of the amendments made in February 2007 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 its Opinion on the Reform of the Judiciary in Bulgaria (22-23 March 1999, CDL-INF(1999)005), and the Opinion on the Constitutional Amendments Reforming the Judicial System in Bulgaria (17-18 October 2003, CDL-AD(2003)16).

5. The text was examined by the rapporteurs in the English translation that was available to the Venice Commission (CDL(2007)077). Certain of the comments may be related to problems of the translation and not to the authentic text.

6. The issues found can be roughly grouped in the following way:

- Judiciary
- Human rights issues
- Institutional and other issues

2. JUDICIARY

2.1. The Constitutional Basis for the Judicial System prior to the 2007 Amendments

7. 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.

8. 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 as regional courts), courts martial and district courts. Specialised courts may be set up by law, but extraordinary courts are prohibited (Article 119).

9. 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)) and has 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) and does not count as one of the 25 members of the Council.

10. 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. Their office ends 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.

11. 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.

12. 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 materialisation of their liability are to be established by law (Article 133).

13. 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 by law. An amendment passed in 2006 has also attributed the responsibility for leading investigations, supervising the legality of investigations and conducting investigations (Article 127). The investigating magistry are within the system of the judiciary (Article 128).

2.2. The February 2007 Amendments to the Constitution relating to the Judiciary

14. The amendments to the Constitution made in February 2007 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 organise the qualification of judges, prosecutors and investigating magistrates. In this regard the provision repeats what is already stated 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 is 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 intentional 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 "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 130a, 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.

2.3. Supreme Judicial Council

15. 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 criticised. 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.

16. 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 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.
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> 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.
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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."

17. 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.

18. That, besides the ex officio members, only practising lawyers are eligible for membership of the Supreme Judicial Council would seem to be unnecessarily restrictive. One could in addition think of qualified persons from the circles of law professors and former judges who have taken up another profession, but also of competent representatives of society with no legal education. Persons with a representative mandate or political function should be excluded.

19. The role of the Minister of Justice as chair of the Supreme Judicial Council also gives rise to some problems (even though he has no vote). The Venice Commission's opinion of 22-23 March 1999 (CDL-INF(1999)005) suggested that the Minister of Justice should not chair the Council when it is discussing proposals made by the same Minister. At the time the Minister of Justice had been given new powers to make proposals to the Supreme Judicial Council in relation to appointing and dismissing judges, which had formerly been the prerogative of the presidents of the different branches of the judiciary. The amendments of 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 organisation of the training of judges, prosecutors and investigators. These powers are very extensive and may 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 of Justice rather than on the Supreme Judicial Council 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 in Parliament, while 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 of Justice in a very dominant position over the judiciary given his undoubted influence in relation to matters of appointment, dismissal, discipline and the like.

20The Venice Commission does not have information as to the extent to which the Supreme Judicial Council has its own staff and resources, but by confining the power of initiative for all its activities to the Minister of Justice**,** the latter will be the driver of its activities. This does not seem to be in accordance with the principle of judicial independence. It would 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 of Justice of the day.

21. The new proposals for annual reports to be provided to the Supreme Judicial 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 Council and by the National Assembly also give rise to concern. What will be the consequences if these reports are found unsatisfactory and are not passed? 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 and the general way in which the budget has been spent 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.

22. Especially in exercising its functions of appointment according to Article 130(6), the Supreme Judicial Council should, if not act on the recommendation of the President or Board of the court concerned, at least should hear, of course in addition to the person concerned, the President or Board before taking a decision.

2.4. Role of Prosecutor's office

23. 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 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
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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 characterised by mutual respect, objectivity and the observance of procedural requirements." (Explanatory Memorandum to Recommendation (2000) 19 pp 33-34)

24. In the light of this, the Commission 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 there are 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 or chambers 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.

25. Article 117(2) puts the prosecutors on the same line with judges as members of the judiciary. If this was a matter of terminology only, it would not meet with much objection. However, the provisions that follow this provision indicate that it has as a consequence that the different functions of the courts and the prosecution are not sufficiently taken into account. The prosecution should have no involvement whatsoever in the ultimate administration of justice, nor in the appointment and functioning of judges, and the operation of the court system. In addition, for the sake of clarity 'independent' should be added next to 'impartial' in Article 117(2).

26. In 2006, the Prosecutor's Office was given a power to lead the investigation and supervise its legality (Article 127.1). It is not clear how this sits with the powers and functions of the investigating magistrates. The powers to "act for the rescission of all illegitimate acts" remind of the powers of the prosecutor in the previous system. The power of the prosecution should be restricted to act on behalf of the State in criminal cases and – if required – to act on behalf of the State as a party in civil cases. The prosecution should not be given a general mandate in matters perceived to be illegitimate and clearly should have no powers of supervising or interfering with the courts. Article 127.5 should therefore be deleted. Article 127.6 should be limited in this sense.

2.5. Further judicial issues

27. 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. The inspection should only concern material issues such as the efficiency with which the judicial bodies have spent the money allocated to them. The inspectors should not have the power to investigate complaints; that should be left to the Supreme Judicial Council itself, since this requires knowledge of or experience with the administration of justice.

28. 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 minimise 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.

29. In Article 121(3) it should be added that the decisions and judgments are to be pronounced in public.

30. Article 122(2) on the right to legal counsel does not say anything about the right to and conditions of free legal aid. This should not be totally left to the legislature.

31. Article 124 gives the false impression that the Court of Cassation has also jurisdiction to review the judgments of the Supreme Administrative Court ("all courts"). It should expressly

exclude administrative justice from the jurisdiction of the Supreme Court of Cassation. Furthermore, it should be made clear that the Court of Cassation cannot interfere with the functioning and judgments of other courts on its own motion but only if an admissible appeal in cassation has been lodged. The same holds good, *mutatis mutandis*, for the Supreme Administrative Court (Article 125): it may exercise its review function only if an admissible appeal has been brought. Also in Article 120(1) it should be specified which court or courts will have jurisdiction to review administrative acts. As the provision reads, it suggests that all courts do so.

32. The scope of jurisdiction of the Supreme Administrative Court is not very clear. The words "other acts established by law" in Article 125(2) are very general and vague. The core of the scope of jurisdiction should be regulated in the Constitution, especially whether administrative jurisdiction also extends to judicial review of administrative acts of local authorities.

33. Article 129(3) provides for a Probationary period of five year. Such periods raise serious difficulties for judicial independence but if they are to apply they should not be longer than is needed to assess a judge's suitability. Five years seems too long a period. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. This should not be interpreted as excluding all possibilities for establishing temporary judges. If probationary appointments are considered absolutely indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office" (see also CDL-AD(2005)038, para. 30).

34. As concerns the removal from office because of disability or due to disciplinary reasons (Article 130(8) items 3 and 4), it should be specified by whom the member may be removed, since this could lead to interference with the nomination procedure of judges.

35. It should be indicated whether the judge concerned may lodge an appeal against the decision of the Supreme Judicial Council (Article 131) to a court other than the court to which he belongs or wished to be admitted. Since the Judicial Council is not a court, access to court should in principle be open to members of the judiciary to have their "civil rights" determined (Article 6 of the European Convention on Human Rights).

36. 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 (Article 132).

3. HUMAN RIGHTS

3.1. Discrimination against foreigners

37. A major concern of the Commission is that a number of provisions of the Bulgarian Constitution restrict fundamental rights to citizens only.

38. Already the title of Chapter Two of the Constitution ("Fundamental Rights and Obligations of Citizens") is inappropriate since the constitutional provisions concerning fundamental rights may not be restricted to citizens only in such a blanket way. In fact, Chapter Two *does* contain provisions about fundamental rights of foreigners.

39. In the same vein, it is preferable not to include a provision about the definition of "citizenship" in the chapter dealing with fundamental rights, since this creates the wrong

impression that, in principle, only citizens are entitled to those rights. Article 25 should rather be included in Chapter One.

40. A major issue is Article 6(2), which restricts the prohibition of discrimination to citizens. According to Article 1, in connection with Article 14, of the European Convention on Human Rights, Bulgaria has the obligation to ensure equal treatment to "everyone within its jurisdiction", which includes aliens. That does not stand in the way of the granting of certain privileges to citizens, such as the right to vote and the right to be elected as a member of the National Assembly. However, such exceptional privileges do not require, and do not justify a general restriction of the right to equal treatment to citizens.

41. There is also no justification to restrict the foreign policy mandate to care for the well-being and fundamental rights and freedoms of citizens (Article 24(2)). Bulgaria has to ensure these values for all persons under its jurisdiction without discrimination.

42. The prohibition of discrimination on the ground of sexual orientation has been expressly recognised in the law of several European States, and its inclusion should be considered on the occasion of the drafting of future amendments of the Constitution.

43. Notwithstanding the precedence given to ratified treaties (thus also the EU accession treaty) of Article 5(4), the restriction to citizens of economic freedoms, in Article 19, paragraphs 2 and 4, does seem to be in violation of the fundamental freedoms of movement of persons and services and the prohibition of discrimination of EU citizens as guaranteed in European Community law. There is also no justification for not extending the right to work to foreigners who legally reside in the country (Article 48). As far as the rights of foreigners are concerned, there should be a reference to the obligations of Bulgaria resulting from its accession to the European Union, and to other treaty obligations, comparable to the reference in new Article 22.

44. There is no reason to restrict to citizens the right of information (Article 41(2)), the right of petition (Article 45), the right to social security and welfare aid, for the right to medical insurance, the right to found schools and the right to a healthy environment (Articles 51-53 and 55) as well as the obligations enumerated in Articles 58, 60, 61, 80 and 86(2).

45. The same is true for the right to peaceful assembly (Article 43), for which moreover some indication of the grounds of restrictions that may justify limiting the right of assembly, should preferably be laid down in the Constitution itself, in accordance with the second paragraph of Article 11 of the European Convention on Human Rights.

46. There is also no justification for restricting the right to association to citizens (Article 44) because paragraph 2 provides sufficient possibilities to prevent activities of associations of foreigners for the protection of public interest. It is preferable that paragraph 3 refers to paragraph 2 for the grounds on which an organisation may be prohibited.

47. Finally, the protection of the rights and legitimate interests by the judiciary (Article 117(1)), the right to contest and the right to legal counsel (Article 122(1)) have to be open to non-citizens like to citizens. The same is true for access to the bar (Article 134(1)), at least as far as citizens of other EU-countires are concerned. The blanket exclusion of foreigners from the right to participation in local government is not appropriate (Article 136(1)). The Ombudsman should have the right to appeal to the Constitutional Court not only against a law which infringes the right of citizens but in relation to the rights of any person (Article 150(3)).

48. The restriction to citizens of the right to contest administrative acts in Article 120(2) is in violation of the right of access to court under Article 6 of the European Convention on Human Rights, if "civil rights or obligations" in the sense of Article 6 are involved.

49. In the above cases the restriction of rights to “citizens” should be deleted.

50. The exclusion from local elections of all non-citizens who are not EU citizens in Article 42(1), even if they have been residents of the country for a long time, is not in violation of any international or European legal rule, but deviates from a more and more common trend in Europe. It is recommended that this point be reconsidered.

3.2. Rights of minorities

51. Based on the obligation of equal treatment of persons belonging to National Minorities under the Framework Convention, the Constitution should expressly take into account the rights of these persons rather than to rely on the general rule of non-discrimination only.

52. Rights of minorities relate to 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 while 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 fully acceptable, one would have a concern that such provisions could be used to prevent minority linguistic, ethnic or religious groups from organising themselves at all.

53. In particular, the Constitution should guarantee that the provisions concerning the use of a minority language laid down in the Framework Convention on National Minorities are guaranteed (Article 36(3)).

3.3. Other human rights issues

54. Article 11(4) is not in conformity with the freedom of association as laid down in Article 11 of the European Convention on Human Rights, since the exclusions mentioned - with the exception of “parties which seek the violent seizure of state power” - cannot be justified on the basis of the second paragraph of Article 11. Political parties of a specific denomination are quite common in Europe.

55. It should be specified in either in the text of the Constitution or in an explanatory memorandum, that the special status of the Eastern Orthodox Christianity - Article 13(3) - does not have any legal consequences that would grant it a privileged treatment in violation of the prohibition of discrimination on the basis of religion laid down in Article 6(2).

56. Article 18(3) should either itself, or by reference to an implementing law, ensure that the State rights with respect to radio frequencies do not stand in the way of a reasonable and proportional access to these frequencies by private broadcasting corporations. The reference in paragraph 5 is too vague in that respect, because it does not contain any constitutional guarantee of access.

57. Article 25(5), providing for diplomatic protection, is formulated in too absolute terms. In providing diplomatic protection Bulgaria will have to respect the limits of public international law, which guarantee the sovereignty and territorial integrity of the foreign State concerned. The same holds true for Article 26(1). In exercising their constitutional rights and fulfilling their constitutional obligations abroad, Bulgarian citizens will have to respect the laws of the country of residence.

58. The provision in Article 28 that every attempt on human life shall be punished as a most serious crime needs to be limited. Exceptions need to be made if, e.g., a policeman kills a person in a proportionalact of self defence or in defence of another person.

59. Article 31(2), which guarantees that no one shall be forced to plead guilty, does not sufficiently cover other aspects of the right to remain silent in order not to incriminate oneself, and the right to be informed about this right. It is unusual to find such a provision in a constitution. A confession could contain information, which could be known only to the perpetrator of the crime.

60. Article 31(5) guarantees that prisoners are kept under good conditions but does not seem to take into account the situation of persons who have been detained but not (yet) sentenced.

61. The grounds of restrictions that may justify interference with the right to respect of privacy (Article 32), should preferably be given in an exhaustive way in the Constitution itself in accordance with the second paragraph of Article 8 of the European Convention on Human Rights ("in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

62. The term "extreme necessity" in Article 33(2) is not sufficiently determined. The Constitution should refer to specific grounds of limitation of the right to the inviolability of the home in conformity with the second paragraph of Article 8 of the European Convention on Human Rights (see preceding paragraph).

63. It is preferable to list exhaustively the grounds of interference in family life also in Article 47(5) of the Constitution, in accordance with the second paragraph of Article 8 of the European Convention on Human Rights (see paragraph 61).

64. In accordance with Article 15(2) of the European Convention on Human Rights, the list of non-derogable rights in Article 57(3) should also include a reference to Article 5, paragraph 3 (*nullum crimen, nulla poena sine lege)*.

4. **Other issues**

65. Does the provision in Article 5(4) that binding treaties supersede "any domestic legislation" also apply to provisions of the Constitution that are not in conformity with treaty obligations? How does paragraph 4 relate to paragraph 1 stipulating that the Constitution shall be the supreme law? It is recommended that the relation between international law and the Constitution be more specifically regulated.

66. Moreover, Article 5(4) should also include, next to treaties, decisions of international organisations that are binding for Bulgaria, such as certain resolutions of the United Nations Security Council, indictments by the International Criminal Court and secondary legislation of the European Union. Although it may be said that the binding force of these decisions ensues from the treaties establishing these organisations, and that for that reason they are sufficiently covered by the reference to treaties, it is recommended that the Constitution be more specific about the fact that these decisions are also part of the domestic legal order and supersede conflicting domestic law.

67. The provision in Article 7, which establishes State liability, should specify whether it also includes illegitimate rulings and acts of the legislature and the judiciary.

68. In its general and unspecified formulation, Article 9(1) would seem dangerous because it could even be interpreted as justifying a coup d'Etat by the army. The responsibility for the

sovereignty, security and independence of the country has to lie with the three branches of State power mentioned in Article 8, with the checks and balances provided in the Constitution. The army may get involved in the protection of State sovereignty, security and independence, but there cannot be a monopoly of the army in this respect in a democratic State governed by the rule of law. On the other hand, Article 100(1) provides that the President of the Republic shall be the Supreme Commander in Chief of the Armed Forces, while paragraph 5 stipulates that in a case of emergency the National Assembly shall be convened. Therefore, the issue raised here may be a matter of terminology and consistency rather than a issue of principle.

69. Does the fact that in Article 64(1) the term of National Assembly of four years is set without leaving any room for exceptions mean that Parliament cannot be dissolved in the meantime for any reason? This would not seem very likely.

70. The term "state post" in the incompatibility rule for members of parliament in Article 65(2) is not very clear. Does this also include membership of a local board or council, and membership of the judiciary?

71. The election of the Ombudsman (Article 91a(1)) should require a qualified majority to provide the office with a politically and socially broad base.

72. A provision should be made for the case that two candidates obtain the same number of votes in the presidential election (Article 93(4)).

73. If and for as long as the Chairperson of the National Assembly will have to assume the Presidency of the Republic, his or her chairmanship in the Assembly will have to be performed by his or her deputy. Otherwise there may be the appearance of an overlap of executive and parliamentary powers (Article 97(4)).

74. It is not clear how the responsibility of the Prime Minister under paragraph 2 of Article 108 relates to the responsibility of each individual minister for his or her own activities under paragraph 3.

75. The law on the bar should only regulate certain procedural and safeguarding conditions (Article 134(2)) In principle, the legal profession should be free to organise the bar and its activities.

76. The "populace" in Article 138 would seem to include also non-citizens, while Article 42(1) indicates that only citizens may vote in local elections. As said before, there is a trend in Europe to also give the right to vote in local elections to non-citizens with a long period of residence.

77. It is rather unusual to leave an option as to the way in which the mayor will be elected. Moreover, it is rather unusual that, also in large municipalities, the executive powers are invested in one person only (Article 139)

78. It seems that the regions have as their main task to enforce the policy of the central state *vis à vis* the municipalities (Article 143(3)) and do not enjoy any regional autonomy, which would allow them to pursue specific regional interests. The "regional policy" referred to in Article 142 would thus in fact be a central policy on regions rather than a policy developed by the regions themselves. While such a strongly centralised approach remains a possible option, it should be noted that in Europe there is a tendency to provide for autonomy also on the regional level in line with the principle of subsidiarity.

79. It should be expressly regulated that it is the Constitutional Court itself, which takes note of or decides on the termination of the mandate of one of its member**s** (Article 148(1)) and that the member concerned will continue to function until a successor is appointed. In order to avoid

situations where the Court cannot convene because of lack of quorum, judges whose term of office expired should continue to sit at the Court until their successor takes up office**.**

80. In order to ensure a smooth rotation and a balance between the nominating authorities, it should be added in Article 148(3) that the term of office of the new judge will be for the number of years left of the nine years term of his or her predecessor.

81. The secondary law of the European Union would seem not to be covered by "international treaties to which Bulgaria is a party" in Article 149(1).4. It is recommended to mention European Community law.

82. Sufficient room should be left to the Constitutional Court to adopt its own rules of procedure and regulate its own practical organisation (Article 152). The possibility for the Court to adapt its procedure without the necessity of an intervention by Parliament is important even from the point of view of the independence of the Court.

83. It is unclear what is meant by “the generally established procedure” for the establishment of the Grand National Assembly in Article 157.

84. The meaning of Article 160(3) is not clear. Since the Grand National Assembly has a limited task and limited powers (see Article 162(2)), there would seem to be no reason why the whole mandate of the National Assembly should end. At least clarification is needed which body will perform the usual parliamentary duties during the performance of its functions by a Grand National Assembly.

5. CONCLUSION

85. The provisions of the Constitution of the Republic of Bulgaria, including its recent amendments, are on the whole in conformity with European standards. Nonetheless a number of shortcomings have been identified, the most serious one being the limitation of several fundamental rights to citizens.

86. Provisions concerning the possibility of restricting the enjoyment of certain fundamental rights are not sufficiently specific, which weakens their constitutional guarantee and makes it impossible to judge their conformity with the exhaustive lists of limitation grounds laid down in the European Convention on Human Rights.

87. The rights of persons belonging to national minorities would seem not to be adequately taken into account.

88. The election of the Ombudsman should require a qualified majority.

89. It should be the Constitutional Court itself, which takes note of or decides on the termination of the mandate of one of its members and judges whose term of office expired should continue to sit at the Court until their successor takes up office.

90. The new provisions of the Constitution in relation to civil and criminal immunity in the Judiciary are in line with previous recommendations of the Venice Commission and are to be welcomed. On the other hand, 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 Parliament while it remains possible for a simple majority in Parliament to elect all of these members.

91. Furthermore, a number of issues in Chapter Six on the Judiciary give rise to comment:
    1. The role of the Minister of Justice as chair of the Supreme Judicial Council with the right to initiative is problematic.
    2. The Minister's right to propose the budget may contradict the constitutional principle of the budgetary independence of the Judiciary.
    3. Membership in the Judicial Council should be incompatible with any representative mandate or political function.
    4. It should be ensured that within the Supreme Judicial Council judges, prosecutors and investigating magistrates cannot interfere within each other's affairs.
    5. The fact that annual reports to be provided by the Supreme Court, the Supreme Administrative Court and the Prosecutor General are to be heard and to be passed by the Supreme Judicial Council and submitted to the National Assembly gives rise to concern as to the independence of the judiciary.
    6. The jurisdiction of the Supreme Court of Cassation and the Supreme Administrative Court are not sufficiently clearly distinguished.
    7. The Probationary period of five years for new judges raises serious difficulties for judicial independence
    8. The involvement of the President of the Republic in the appointment of judges should be a merely procedural one, while the actual selection of candidates should be made by the Supreme Judicial Council.
    9. Some aspects of the status and powers of the prosecution office, like the exercise of certain powers of general supervision over the legality of acts, remain unclear and seem to have kept certain elements of the former Prokuratura.
    10. The Inspectors, although formally independent, are given too broad powers, with the risk of interference in the administration of justice.

92. The Commission remains at the disposal of the Parliamentary Assembly and the authorities of Bulgaria for further assistance.