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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**CONSTITUTION OF BULGARIA**

**Observations of the Bulgarian authorities**

The Bulgarian authorities note with satisfaction the generally favourable appraisal of the Venice Commission of the 1991 Constitution of the Republic of Bulgaria, which points in its Draft-Opinion that „large parts of the Constitution are well drafted and have provided a sound basis for the development of democracy in Bulgaria as well as for the smooth functioning of the democratic institutions”.

We would like to extend our appreciation to the Commission and the authors of the Comments in particular, for this principled appraisal which is of great importance and encouraging for the Bulgarian society and for the Bulgarian institutions.

It is in the light of this generally positive appraisal concerning also the latest amendments to the Constitution of February 2007 that we will consider some critical remarks made in the Commission’s Draft Opinion.

## **I. Chapter 2: Judiciary**

Special attention is dedicated to the judiciary with focus on the following issues:

### **1. Supreme Judicial Council (SJC):**

#### **1.1. Election of the parliamentary component of the Supreme Judicial Council by a simple majority:**

##### **Paragraphs 23, 24, 25 and 27 of the Draft Opinion**

We would note that the fact that eleven of the SJC’s members are elected by the National Assembly does not mean that they are representatives thereof. The idea of parliamentary representation is inapplicable here.

We would also like to recall the requirement of the provision of Article 130, paragraph 2 of the Constitution that the elected eleven lawyers should be of high professional and moral integrity which guarantees their free will and a possibility to act in accordance with their conscience and convictions and to feel in no way obliged to those who have elected them.

The current provision is based on the general provision of Article 81 of the Constitution. The following considerations in this regard could be invoked:

##### **Paragraphs 31 and 32 of the Draft Opinion**

In the general liberal regulation of the quorum under Article 81 of the Constitution, the application thereof when electing members of the SJC from the parliamentary component depends on the political will and benevolence of the parliamentary majority. The present parliamentary majority has manifested them in the last elections of members of the SJC from the parliamentary component. Substantial efforts were made to recruit candidates for elected members of the SJC from the Fortieth National Assembly mainly from the professional circles of sitting and former judges, prosecutors, investigators and lawyers, i.e. taking into account first of all their professionalism and knowledge in the functioning of the judicial system as well as their personal moral integrity. Out of the 11 members of the SJC, elected by the Parliament, 5 are judges, 1 is an investigator, 3 are lawyers and one is a professor in law.

##### **Paragraph 28 of the Draft Opinion**

The envisaged majority of two-thirds of the members of the National Assembly when electing members of the Inspectorate (Article 132a, paragraph 2 of the Constitution, February 2007

version) compared to the simple majority required for the election of the SJC's members should not be seen as an expression of inconsistency.

The main reasons to adopt such a solution contain the wish to emphasize the necessity of stability of the Inspectorate as a newly established body and its independence, including in respect of the Supreme Judicial Council in exercising its powers provided for in the Constitution. It has powers to inspect the activity of the judicial bodies without affecting their independence (Article 132a, paragraph 6 of the Constitution). This requires a high degree of trust in their profound competence, expertise and exigence as well as understanding the technique and the minutest details of the process of administration of justice towards all members of the Inspectorate, since they make the inspections independently. The Supreme Judicial Council is functioning as a collective body entrusted with the management of the judiciary and it is not obligatory that the above mentioned requirements should be present in the same degree for all its members. By the way, this problem will be eliminated by a future alignment of the parliamentary majority required for the election of the members of the SJC from the parliamentary component to the solution provided for at present in Article 132a, paragraph 2 of the Constitution concerning the election of the members of the Inspectorate.

## **1.2. Representation of judges, prosecutors and investigators in the Supreme Judicial Council:**

### Paragraph 33 of the Draft Opinion

The Bulgarian judiciary consists of courts, prosecution offices and investigation services. Consequently, it is quite natural that the Supreme Judicial Council, which represents the judiciary, should determine its composition and the organization of the work and manage of its activity and be a body comprising judges, prosecutors and investigator on the principle of quotas.

The relationship between judges, prosecutors and investigators in a joint constitutional collegiate body, as is the Supreme Judicial Council, is to secure joint management of the judiciary in the three branches thereof: courts, prosecution and investigation, because of the close interrelation in their activity in spite of the undeniable specific features and differences in their concrete functions in the judiciary established by the Constitution. These relations are attained through a balanced participation of representatives of the three branches of the judiciary in the elective SJC's members staff and the "professional" ratio of both components (the judicial and the parliamentary ones) of the 22 elective SJC's members is as follows: 12 judges, 4 prosecutors, 3 investigators, 2 lawyers and one professor in law. Hence, evident from the above is the important "professional" role of the judges in the Supreme Judicial Council.

Since the Supreme Judicial Council adopts its own rules on the organization of its activity there is no problem, if it deems it necessary, to establish, within the framework of its autonomy, internal supporting bodies, including on specific issues of the different branches of the judiciary – for the judges, the prosecutors and the investigators (Article 30, paragraph 4 and Article 37, paragraph 3 of the Judicial System Act).

## **1.3. Removal from office of the SJC's members:**

### Paragraph 52 of the Draft Opinion

With regard to the remark of the Venice Commission that it is not clear by whom the members of the SJC may be removed from office because of disability or due to disciplinary reasons (Article 130(8) items 3 and 4) we would point out that there is an express provision to this effect in the Judicial System Act, Article 27, paragraph 5 of the JSA in witness thereof, regulating the majority required for the SJC to dismiss a SJC's member.

#### **1.4. Appeal against the decisions of the Supreme Judicial Council on issues concerning the staff:**

##### Paragraph 53 of the Draft Opinion

It would be recalled that the acts of the Supreme Judicial Council are administrative acts in the broad meaning of this concept. Accordingly, they are subject to appeal on an equal footing and at that, not before the court to which the magistrate concerned belongs, but before the Supreme Administrative Court (Article 120, paragraph 2, in combination with Article 125 of the Constitution).

#### **2. Powers of the Minister of Justice in respect of the judiciary:**

##### Paragraph 29 of the Draft Opinion

**2.1.** With regard to the remark that some of the powers of the Minister of Justice under Article 130a of the Constitution undermine the independence of the judiciary we would like to emphasize that the decisions on all issues concerning the status of the judges, their training, budget and accountability are entrusted to the SJC, while the Minister has no right to vote, which leads to the conclusion that the judiciary decides independently on issues pertaining to the human and material resources. This general principle is further developed in the JSA. It should be taken into account that it is the Minister of Justice who is the “transmission”, the connection between the legislature and the executive, on the one hand, and the judiciary, on the other hand which is why he/she has been given the function of chairing the SJC with no right to vote.

Accordingly, the thesis that the said powers of the Minister of Justice are very extensive and may compromise the independence of the judiciary by giving the Minister undue power over the judicial branch is incorrect. The Constitutional Court of the Republic of Bulgaria has delivered numerous judgments to that effect. In the opinion of the Constitutional court there is no functioning constitutional system providing for and ensuring absolute independence of any of the three Powers. The necessary balance should be attained through mutual restraint.

#### **2.2. The power of the Minister of Justice in respect of the development of the draft budget of the judiciary.**

##### Paragraph 31 of the Draft Opinion

This power should be seen in the context of the interaction between the executive and the judicial branches. Under Article 117, paragraph 3 of the Constitution the judiciary has its own independent budget. At the same time this budget is a part of the State budget which should be approved by the National Assembly.

The independence of the judiciary implies the necessity of having at its disposal sufficient material resources granted to it by the State, by the Minister of Justice respectively, in order to carry out its functions without prejudice to its independence. The power of the Minister of Justice should be considered in this light.

The Minister of Justice submits the draft-budget for consideration and adoption by the SJC which in fact proposes the budget to the National Assembly. The the draft-budget is presented to the National Assembly by the official representative of the SJC and not by the Minister of Justice. The final version of the budget is approved by the National Assembly.

In order to secure the independence of the judiciary the following measures have been implemented:

- The Draft of the new Rules of Procedure of the Ministry of Justice provides for establishment of a new independent Budget of the Judiciary Unit directly subordinated to the Minister of Justice. The functions of the Unit are specified in compliance with the principle of independence of the Judiciary.

- In view of strengthening the capacity of the SJC administration for implementation of the budget of the judiciary, a Budget and Finance Standing Committee was set up with the Supreme Judicial Council on 1 November 2007. Two representatives of the Ministry of Justice dealing with issues of the budget of the judiciary attend the meetings of the above Commission thus securing timely exchange of information regarding the implementation of the budget of the judiciary.

### **2.3. Power of the Minister of Justice to manage the judiciary property.**

#### Paragraph 33 of the Draft Opinion

From a historical point of view the material procurement of the judiciary operation has always been a function of the Ministry of Justice. This has its reasons. Article 117, paragraph 1 of the Constitution states that “the judiciary shall protect the rights and legitimate interests of the citizens, the legal persons, and the State”. Under Article 119, paragraph 1 of the Constitution the main function of the judiciary is to decide legal disputes and secure the legal sphere. The function of the administration of the judicial bodies is to assist their main activity by providing efficient book-keeping and technical service. There is no administration within the judiciary responsible for the preparation of managerial acts.

Accordingly, the power of the Minister of Justice established by the law to organize management of the judiciary property as well as the respective provisions of the JSA do not infringe the constitutional principle of separation of powers. Moreover – it provides substantive conditions for the main function of the judiciary – the administration of justice in the Republic of Bulgaria.

The Constitutional Court already has case-law on this issue.

### **2.4. The power of the Minister of Justice to make proposals for appointment, promotion, demotion, transfer and dismissal of judges, prosecutors and investigators:**

#### Paragraph 29 of the Draft Opinion

Judges, prosecutors, and investigators are elected, promoted, demoted, transferred and removed from office by the Supreme Judicial Council (Article 129, paragraph 1 of the Constitution) with a decision to be adopted by secret ballot (Article 131 of the Constitution). Such decisions are taken without the participation of the Minister of Justice (Article 130, paragraph 5).

In fact the Minister may only make proposals but the decision is adopted by the Supreme Judicial Council, by a secret ballot, with no participation of the Minister of Justice. In this particular case there is neither transfer of powers to the Minister of Justice, nor deprivation of such powers by the Supreme Judicial Council. This power conferred on the Minister of Justice for eight years simply underlines the interaction and the cooperation between the different branches of power without prejudice to the autonomy and the independence of whichever of them.

With regard to this power of the Minister of Justice there is the case-law of the Constitutional Court which justifies, to the required and sufficient extend, the absence of intervention of the executive in the judiciary operations.

## **2.5. The Minister of Justice as chair of the Supreme Judicial Council:**

### Paragraph 29, 30, 32 of the Draft Opinion

The Supreme Judicial Council is an autonomous legal entity having its own powers, its own budget and own administration and is represented by one of its elected members (Article 16 of the JSA).

The Judicial System Act defines the Supreme Judicial Council as a standing body which, under Article 33, paragraph 1 of the JSA, has its sessions at least once a week. Having regard to this provision, the functioning of the SJC is not dependent on the will of the Minister. It is an obligation of the Minister of Justice stipulated by the law.

**According to Article 130, paragraph 5 of the Constitution the meetings of the Supreme Judicial Council are chaired by the Minister of Justice who is not entitled to a vote.**

The proposal that the Minister of Justice should not chair the meetings of the SJC when discussing proposals made by him/her does not take into account the legal nature of his/her proposals as a declaration of will. They are insignificant as rights and constitute only issues on which he/she approaches the SJC and submits proposals on them which thereafter are discussed and decided by the SJC. The 25 members of the SJC are fully independent from the Minister of Justice in an official and organizational aspect. They independently decide on such matters at the discussions within the Commissions and adopt final decisions at the sessions of the SJC, as a collegiate body, while the Minister of Justice does not take part therein (Article 130, paragraph 5, sentence 2 of the Constitution). To deprive the Minister of Justice of the right to chair the sessions of the SJC when discussing such issues would be a breach of the Constitution.

The “chairmanship” itself is an organizational and technical right granted to the Minister of Justice by the Constitution to “give the floor” and maintain the necessary normal order in the course of the meeting and in no way predetermines the outcome of the decision to be adopted.

## **3. The Inspectorate with the Supreme Judicial Council.**

### Paragraphs 46 and 47 of the Draft Opinion

**The doubts regarding even only “indirect intervention” of the Inspectorate in the administration of justice raise an important issue and therefore deserve particular attention.**

We consider that such doubts cannot have grounds neither in Article 132a, paragraph 6 of the Constitution, nor in the JSA, nor in the Regulation on the organization and the activity of the Inspectorate with the Supreme Judicial Council. Article 132a, paragraph 6 of the Constitution provides that the Inspectorate “shall inspect the activity of the judicial authorities, without affecting the independence of the judges, the court assessors and the prosecutors”. The provision of Article 132, paragraph 6 is a general one but is neither “unclear”, nor “vague”. The Inspectorate inspects the activity of the judicial bodies without affecting the independence of the judges, the court assessors, the prosecutors and the investigators in the performance of the functions thereof.

The inspection and analysis of the activity of the judiciary by the Inspectorate as well as the submission of the annual reports on its activity to the Supreme Judicial Council add transparency for the public about the activity carried out by the bodies of the judiciary.

#### **4. Other issues concerning the judiciary:**

##### **4.1. Probationary period for judges**

###### Paragraph 48 of the Draft Opinion

The extension of this term from 3 to 5 years (with the amendment to the Constitution of September 2003) was inspired by the necessity to verify the professional and moral qualities of the magistrates in their working environment in order to ascertain that they may become irremovable.

The 5-year application of the new regulation has produced better practical results and provided more guarantees that only judges, prosecutors and investigators with verified, ascertained and proved professional and moral qualities may become irremovable.

##### **4.2. Role of the Prosecutor's office within the framework of the uniform judiciary**

###### Paragraph 35, 44 and 45 of the Draft Opinion

Under Article 127 of the Constitution "the Prosecution Office shall ensure that legality is observed..." This is its main function established by the Constitution. The exercising thereof by the prosecution office, along with its participation in the criminal proceedings (Article 127, p.p. 1, 2, 3 and 4) where the essential part of the constitutionally established competence and activity of the prosecution office are undoubtedly implemented, cover also: taking action for revocation of illegitimate acts (Article 127, p. 5 of the Constitution) and participating in civil and criminal matters in the cases provided for by the law (Article 127, p. 6 of the Constitution). The revocation of illegitimate acts, including of illegitimate administrative acts under Article 120, paragraph 2 of the Constitution is an irrefutable power of the court – of the general and the administrative courts, of the Supreme Court of Cassation, respectively, under the rules established in the Civil Procedure Code, and of the Supreme Administrative Court – under the rules of the Administrative Procedure Code, effective as from 12 July 2006. The prosecutors participate in others administrative and civil proceedings with the entitlement of a party to the court proceedings in the cases provided for by the law (Article 26, paragraph 3 of the Civil Procedure Code and Article 16 of the Administrative Procedure Code). On these issues the prosecutors participate in pursuance of its constitutional power of a State body of the judiciary which ensures that legality is observed (Article 127 of the Constitution).

All above mentioned points constitute neither "supervision", nor "interference" by the prosecutors with the work of the court. On the contrary, they assist the court in executing its powers. The Court, and the Court only, is in these cases the only authority established by the Constitution which administers justice in the country and takes decisions on civil and administrative disputes. In addition, the participation of the prosecutors in the cases provided for by the law for revocation of illegitimate acts and in court hearings on civil and administrative matters in the cases expressly provided for by the law, has its legal traditions in the Bulgarian legislation and administration of justice for decades.

## **II. Chapter 3 - Human rights**

### Paragraphs 55 to 58 and 60 of the Draft Opinion

The competent authorities in Bulgaria have carefully considered all the comments contained in the Draft Report (doc. CDL(2008)004prov.) with regard to the provisions of the Constitution of the Republic of Bulgaria, guaranteeing, in accordance with its international legal obligations, the rights and freedoms of all persons within its jurisdiction, including foreigners.

The only exceptions regard certain rights, for which Bulgarian citizenship is expressly required (ref: Articles 24(2), 25, 26(1), 35(2), 36(1), 59, 65 and 110).

The term "citizen" was employed in the Constitution of 1991 to emphasize that all individuals possess inherent dignity and rights, which are not granted and may not be taken away by the State; that the new Bulgarian State may not treat persons under its jurisdiction as "subjects" (as, unfortunately, was often in practice the case in pre-1989 authoritarian times). Consequently, the use of the term "citizen" was never intended to attempt to limit the scope of the international legal obligations assumed voluntarily by Bulgaria under the relevant international legal instruments. It may be recalled in this context, that Bulgaria is a party to all major United Nations conventions in the field of human rights and has been fulfilling its obligations fully and in good faith. Furthermore, pursuant to the provision of Article 5(4) of the Constitution of 1991, these legal instruments are part of domestic law. Consequently, the will of the legislator was perfectly obvious - that everyone within the jurisdiction of the Bulgarian State shall be secured the rights and freedoms as guaranteed by these conventions. Had this not been the case, as a minimum, the international legal instruments providing for the equal treatment of everyone, including foreigners, would not have been included in the domestic law.

#### Paragraphs 59 and 61 of the Draft Opinion

Discrimination on the grounds of sexual orientation is indeed prohibited by law in Bulgaria. Likewise, the non-inclusion of non-citizens who are not EU citizens in local elections is not in violation of any existing legal rule. In this context, the respective comments of the Venice Commission concerning "trends" "in Europe" have been taken note of.

#### Paragraphs 62, 65 and 66 of the Draft Opinion

The general principle of equal treatment/non-discrimination of all persons, including those belonging to minorities, is legally guaranteed and scrupulously observed in Bulgaria in all spheres. This has been the essential characteristic of Bulgaria's successful model of ethnic relations, based on the values of pluralist democracy and civil society. This model has withstood to pressure and has proved its value and sustainability "both in ordinary times and in times of "emergency". It is therefore of crucial importance to preserve and develop this model in accordance with its main principles. In this context, the relevant suggestions of the Venice Commission have been taken note of and will be given consideration in the light of Bulgaria's international legal obligations in this sphere.

It should also be clarified in this regard that it is not the Decision No. 4 of 1992 of the Constitutional Court, but the Constitution of the Republic of Bulgaria itself that recognises "the existence of religious, language and ethnic differences, respectively of bearers of such differences" in Bulgaria. The Decision of the Constitutional Court merely recalls and reiterates this constitutional fact.

#### Paragraph 63 of the Draft Opinion

The provisions of Articles 1(3), 2 and 3 of the Constitution are in full conformity with Bulgaria's international legal obligations. These provisions do not (and are not intended to) deny the rights and freedoms of individuals, irrespective of their ethnic affiliation. The provision of Article 1(3) is intended to secure Bulgarian society as a whole from past totalitarian practices, which had also adversely affected the rights of persons, belonging to minorities. It would particularly be recalled here that Article 29(1) of the Constitution provides, *inter alia*, that no one shall be subjected to forcible assimilation. Likewise, the provision of Article 3 should be read in conjunction with Article 54(1) of the Constitution, which stipulates that everyone shall have the right, *inter alia*, to develop their own culture in accordance with their ethnic identification. This right is fully recognized and guaranteed by the law.



#### Paragraphs 64 and 74 of the Draft Opinion

In a relevant Decision the Constitutional Court of the Republic of Bulgaria has clearly defined the scope of Article 11(4) of the Constitution. The Court stated that Article 11(4) prohibits the existence of political parties, the membership of which is expressly limited by its articles of association to persons belonging to a particular racial, ethnic or religious group, irrespective of whether it is in a majority or in a minority. This provision does not contain limitations on - and consequently may not be used to prevent - any minority religious, ethnic or religious groups from "organising themselves at all". On the contrary, there are both political parties, the membership of which includes overwhelmingly persons, belonging to particular ethnic groups, and associations formed by persons, all of whom belong to a particular ethnic group. One of these parties is a partner in the current coalition government, and it was also one of the two parties that formed the previous government of Bulgaria. Therefore the provision of Article 11(4) could not be seen as being not in conformity with Article 11 of the ECHR or other relevant international legal obligations assumed by Bulgaria.

#### Paragraphs 67 to 73 of the Draft Opinion

It should be reiterated that the provisions of the Constitution of the Republic of Bulgaria provide a basic framework in the respective sphere, in this case the rights and freedoms of all persons, while more detailed provisions are contained in "ordinary" domestic law. Pursuant to the provision of Article 5 (4) of the Constitution, the international legal instruments, to which Bulgaria is a party, are part of its domestic law and take priority over any conflicting provisions of domestic legislation.

The provisions of the Constitution and of "ordinary" domestic law are interpreted in the light of Bulgaria's relevant international legal obligations, therefore the "problem" of hierarchy has not arisen.

#### Paragraphs 76 to 78 of the Draft Opinion

The provision of Article 31(2) is intended to protect Bulgarian society from past authoritarian practices, when there were cases where innocent persons had been convicted in political trials on the sole basis of confessions extracted by torture or similar methods.

Concerning Article 31(5) it should be noted that the situation of persons who have been detained but not sentenced is regulated by extensive provisions in domestic law and in conformity with Bulgaria's international legal obligations in this sphere.

### **III. Other Issues**

#### Paragraph 79 of the Draft Opinion

Concerning Art.7 establishing state liability when it relates to legislative acts it should be noted that the issue of unconstitutionality should in advance be decided by the Constitutional Court as a precondition to the liability of legislature.

#### Paragraph 80 of the Draft Opinion

The new translation of the constitution has clarified this ambiguity since the candidates who are in civil service shall suspend its performance upon the registration of his candidacy. According with the principle of separation of powers it has been a constant constitutional practice that a judge or mayor or member of a municipal or city council should suspend performance of his job for the time of duration of the electoral campaign.

Paragraph 82 of the Draft Opinion

According to the Art.77, paragraph 2, vice chairperson might be authorized by the speaker to carry out any activities devolved by him until he performs presidential duties within two months period when the presidential elections will be held.

Paragraph 83 of the Draft Opinion

Ministerial responsibility should be interpreted in the context of rationalized parliamentary government. Ministers are individually responsible to Parliament for performance of their duties and do not enjoy limited immunity like MP's or magistrates. Council of ministers is politically collectively responsible to the parliament and no confidence to the cabinet is voted with absolute majority.

Paragraphs 81, 88 and 89 of the Draft Opinion

Should be given consideration when the next amendment constitutional procedure would take place.

**With these clarifications, the comments contained in the Opinion on the Constitution of Bulgaria, kindly prepared by the European Commission for Democracy Through Law (Venice Commission) will be brought to the attention of the relevant body for consideration during a future constitutional revision.**

13.03.2008