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(VENICE COMMISSION)

REFORM OF THE JUDICIAL SYSTEM IN BULGARIA

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REFORM OF THE JUDICIAL SYSTEM ACT IN BULGARIA.

The Supreme Judicial Council and the Independence of the Judiciary.

The Supreme Judicial Council plays an important role as the administrator of the judiciary. Its introduction sought to provide the judiciary with an independent organ which could largely assume on an independent basis the powers traditionally held by the Government. However, the Ministry of Justice appears to exercise extensive administrative and supervisory powers, and continues to hold substantial powers in relation to personnel and material resources for the administration of justice. While the Council's powers are clearly defined (Article 27), the Ministry's are not. In the Regular Report on Bulgaria's Progress Towards Accession (2001), the Commission for the European Communities expressed concern that the unclear split of roles and responsibilities between the Supreme Judicial Council and the Ministry of Justice, contributes to the poor functioning of the judicial system.

In a consolidated opinion of the Venice Commission on the Constitutional Aspects of the Judicial Reform in Bulgaria, the view was expressed that: *"The Venice Commission does not consider that there can be, in itself, any objection to the election of a substantial component of the Supreme Judicial Council by the Parliament"*. Although the Supreme Judicial Council is supposed to represent and administer the judicial power, it is composed not only of judges. The majority of its members are appointed by Parliament (eleven of its members) or represent non-judicial functions. This reflects to an extent the influence of the political branches on the judiciary. To date no provision has been introduced in the Constitution or in the Judicial System Act concerning the majority required for the election in relation to the members of the Council elected by Parliament. It therefore seems that an ordinary majority would suffice. This allows a party enjoying parliamentary majority at the time of the election, to impose itself in the composition of the Council. No one party should be allowed to having a decisive influence on the selection of the members.

The fact that the Minister of Justice serves as the chair (though without voting rights), confirms the extensive direct and indirect administrative powers which the Ministry of Justice continues to exercise. The Minister appears to have a dual role in the Supreme Judicial Council, as member of the Government and the chair of the meetings. This may be considered to compromise the separation of powers and the independence of the judiciary. In an established democracy where the administration of justice is by and large above party politics and the independence of the judiciary is pronounced, such features would not be of great concern. In Italy for example the organ with constitutional significance which guarantees the independence of the judiciary is the *Consiglio Superiore della Magistratura*. It is presided by the President of the Republic. The law regulating the functioning of the *Consiglio* gives the Minister of Justice the faculty to formulate requests and remarks on matters for which the *Consiglio* is specifically competent. The Minister can also participate in the sittings if requested by the President or when the Minister considers it necessary in order to make communications or give clarifications. However, in recently established democracies, such influence could well reflect widespread mistrust or lack of confidence in the judiciary.

The fact that agenda to be discussed in the meetings of the Supreme Judicial Council, is to be *"approved by the chair"* (Article 34b[3]) is another matter which solicits concern.

Similarly, in terms of Article 34a the chair *"shall organize and moderate the meetings of the Council"*. Another instance which highlights the involvement of the executive. Similar considerations apply with respect to the Minister's power to convene meetings of the Supreme Judicial Council (Article 34b[1]).

It is pertinent to note that the proposed amendments do not take into account the opinion expressed by the Venice Commission in 1999 on judicial reform in Bulgaria, where it was proposed that: *"there is, however, a case to be made that when the Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it"*. Similarly, Article 172 still provides the Minister with the possibility to intervene in judicial proceedings, notwithstanding that he is not a party to the same. I concur with the opinion expressed by Luis Lopez Guerra in his comments on the Reform of the Judicial System Act (1999) that, *"if there are, or seem to be, 'irregularities' in the Court's handling of a case, it is the task of the parties to the proceedings, including the prosecutor, to denounce these irregularities to the competent court, making use of the appropriate legal remedies. The intervention of the Executive Power would therefore represent an undue influence in the judicial process"*.

The rapporteur has no information of the staff employed with the Supreme Judicial Council and the frequency it meets. If there are faults in this regard, there is a high probability that the Supreme Judicial Council will not be an effective administration, and would leave the door open for continued executive involvement in administration and supervision.

Election of a member to the Supreme Judicial Council and contestation.

Article 19 of the draft law has introduced the possibility to contest the legality of an election of a Supreme Judicial Council member by the Supreme Judicial Council itself. However, the draft law should specifically state who is entitled to contest the legality of an election. Can any member sitting on the Supreme Judicial Council contest the legality of an election, or does contestation depend on a decision taken by the Supreme Judicial Council in terms of Article 34c of the law (i.e. if at least two thirds of the members of the Supreme Judicial Council having the right to vote have attended, and a simple majority of the votes of those present has been attained) ? Furthermore, ideally where the validity of the election is contested on the initiative of the Supreme Judicial Council, the matter should not be reviewed by the Council.

I also propose that in the light of the advisory opinion delivered by the Constitutional Court in October 1999, whereby it was declared that the re-election of council members after serving a term of five years was unconstitutional (regardless of the duration of their term or the reason for its termination), the Constitution should be amended to reflect this opinion.

Appointment and promotion of judges, prosecutors and investigators.

In terms of Article 30 of the draft law, it appears that candidates for appointment are selected and proposed by senior officials of the courts, prosecutors' offices and investigation services. There appears to be a lack of national criteria and co-ordinated procedures for purposes of recruitment and this could give rise to unwarranted subjectivity. This might be considered to be a deficiency which calls for rectification. Such a list would facilitate both self-assessment by candidates and the provision of structured references in their support. For obvious reasons, the guiding principle in selection must be that the appointment should be made on

merit without regard to ethnic origin, gender, marital status, sexual orientation, political affiliation, religion or disability, except where the disability prevents the fulfillment of the physical requirements of the office. From a reading of the law, it is not clear what mechanisms the Judicial Council is adopting to judge the qualities of selected candidates and it appears that its decision is dependant on the assessment of the person proposing the candidate. One could consider introducing specific tools for purposes of assessment.

Code of Ethics for judges, prosecutors and investigators.

Article 27 of the draft law provides the Supreme Judicial Council shall *"adopt a code of ethics for judges, prosecutors and investigators"*. The establishment of ethical standards is the primary tool for combating corruption. If corruption encroaches into the judiciary and its bodies, that would mean the collapse of the plans and programs that are devised to protect society from the negative impact of the various forms of corruption. The introduction of such rules are to ensure that judges are prohibited from using their office to gain personal advantage; that judges are impartial; regulate the manner in which judges perform their duties. An effective means of enforcing ethical rules is essential, and the judiciary is the appropriate body to fulfill this role. Granting another branch of government a role in investigating and prosecuting violation of judicial ethics could infringe judicial independence.

The introduction of Article 12 whereby judges, prosecutors and investigators are obliged to declare their income and assets upon appointment and annually, is also positive in that it is another device in preventing corruption. Among its many other advantages, disclosure of the source of assets is helpful in countering any public mistrust if the wealth of a judge appears to have an unclear origin. However, it must be emphasized that this information should under no circumstance be used as a means to curtail a judges' independence.

The Inspectorate.

Article 35 of the Judicial System Act provides for the establishment of an Inspectorate, which falls under the authority of the Ministry of Justice. Another supervisory power available to the Ministry, which permits the Inspectorate to make intrusive investigations into the operations of the courts and the actions of the individual judges. Although the Inspectorate appears to have no direct decision-making authority over the judicial branch, it examines the organization of administrative activities of district, regional and appellate courts.

The Chief Inspector and the inspectors are appointed by the Minister of Justice and European Legal Integration (Article 36 and 36a), subject to the opinion of the Supreme Judicial Council. This should to a certain extent guarantee a certain extent of impartiality. Furthermore, it appears that the Inspectorate can only provide information to the Supreme Judicial Council through the Minister of Justice, except in cases not falling under Article 35(1) – (5). Under current legislation, the Inspectorate reports directly to the Supreme Judicial Council. I am of the opinion that the involvement of the executive is extensive and might curtail and limit on the independence and impartiality of judges. A reading of the proposed amendments might deliver the wrong message in that it appears that the Ministry of Justice has a discretion as to which information is passed on to the Supreme Judicial Council. The amendments should ensure that any such potential danger is removed.

Evaluation of judges, prosecutors and investigators.

Article 129 provides for the evaluation of judges, prosecutors and investigators before the lapse of the initial three years of service in office. It is a fact that judges are expected to meet high standards of performance. It is not uncommon to find in different legal systems means to evaluate judges performance in the execution of their duties. Whilst ensuring that new judges have the necessary qualifications, this could impinge on a judge's independence.

The draft law does not appear to restrict this evaluation, for purposes of confirmation, to courts of first instance. The provision provides for evaluation of judges sitting in the Supreme Court of Cassation and Supreme Administrative Court (Article 129[3]). I am of the opinion that evaluation at this level could be seen as a means of restricting security of tenure and thereby could impinge on the impartiality of judges. I propose that the issue concerning evaluation for purposes of irremovability should be limited for courts of first instance. A positive note is that the procedure for evaluation is set by the Supreme Judicial Council.

Evaluation is also resorted to for the purpose of promoting a judge, prosecutor and investigator in rank (Article 142). Therefore, promotion is not automatic. The amendment aims at rectifying the prevailing lacuna in that the law does not presently contain any clear criteria for evaluating eligible judges.

Term of office.

Article 129 of the Constitution stipulates that the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court, and the Chief Prosecutor shall be appointed for a period of seven years, and are not eligible for a second term of office. The draft law provides for terms of office for other leaders of the bodies of the judiciary (Article 125a). In certain instances they may be appointed for two sequential terms of office (example – president of division at the Supreme Court of Cassation, president and vice-president of a court of appeal). One might argue that the independence will in principle be greater if one had not to worry about re-election after a few years.

With respect to the president of the Supreme Court of Cassation, Vice-President of the Supreme Administrative Court, Chief Prosecutor, Director of the National Investigation Service, the draft law does not provide for terms of office. I fail to understand why members of the Supreme Judicial Council have expressed their concern *"regarding the introduction of term of office for the presidents both of the Supreme Court of Cassation and the Supreme Administrative Court"*, once the matter is regulated by the Constitution.

Disciplinary Responsibility and Incentives for Judges, prosecutors, and investigators.

There are two kinds of judicial accountability. The first is the accountability which arises as a result of the requirement for every judicial officer to give reasons for his or her decisions. Such reasons enable the parties and interested persons to know why a particular decision was reached. Such reasons are also necessary in order to enable an appellate court to know why a particular decision was reached and provide the appropriate remedies. Another kind of judicial accountability relates to tenure, and in particular, to the circumstances which give rise to disciplinary measures, including dismissal from office.

As a general rule, disciplinary measures aim at ensuring a judges' impartiality, and they do not appear to threaten their independence. I fully concur with Article 179 of the draft law in that the a right of appeal adverse disciplinary rulings is guaranteed. The removal of a judge's right to appeal decisions imposing disciplinary sanctions would surely reduce judges' security from improperly imposed disciplinary sanctions. However, this right of appeal should in my opinion be limited only to the judge or other judicial officer against whom disciplinary proceedings are instituted. If the disciplinary panel of the Supreme Judicial Council finds in favour of the judge, the decision should be final and conclusive.

Another amendment proposed in the draft law provides for the initiation of disciplinary proceedings on advise by *"The Minister of Justice and European Legal Integration,* and *one fifth of the members of the Supreme Judicial Council"* (Article 171[2]). Therefore, I understand that the initiation of disciplinary proceedings on the Minister's advice is no longer possible, unless one fifth of the members of the Supreme Judicial Council concur. However, one should keep in mind that eleven members sitting on the Council are members of Parliament. Under these circumstances, one would expect that any initiative by the Minister of Justice on disciplinary matters against a member of the judiciary would very likely achieve the requested support from a large part of the members of the Council. Of added concern is the fact that there have been instances where in elections for the parliamentary component of the Supreme Judicial Council, the respective opposition parties did not participate with the result that on each occasion the parliamentary component was exclusively elected from the governing parties.

Although the draft law would appear to grant the disciplinary defendant a means of defence, it fails to stipulate which procedural rules are to be followed when collecting and evaluating evidence. This matter should be regulated by special rules which reflect a due process as guaranteed by the Constitution.

In terms of Article 169, one of the disciplinary measures which may be adopted is the *"relocation to another court region for up to three years"*. A measure which could give rise to debate since it could very well affect the impartiality of judges'.

I do not agree with Article 167a as proposed. The incentives enlisted should only be applicable after a judge, prosecutor or investigator retires from office.

Dismissal of Judges, prosecutors, and investigators.

The Bulgarian Constitution provides that dismissal of a judge, prosecutor, and investigating magistrate is **only** possible on retirement, resignation, upon the enforcement of a prison sentence for a deliberate crime, or upon lasting actual disability to perform their functions over more than one year (Article 129). The issue concerning dismissal is also regulated in the draft law (Article 131), which adds to the circumstances in which a judge may be dismissed. This provision should strictly reflect what is stipulated in Article 129 of the Constitution. As things stand the draft law conflicts with the Constitution, in that the latter restricts the instances when a judge, prosecutor or investigator may be dismissed from office. Although the draft law has not added the reasons for which a judge may be dismissed, I propose that retirement should not be included amongst the reasons of dismissal. The draft

law does not provide for a mandatory retiring age, although one would presume that this would be the generally established retiring age.

The inability to remove a judicial officer from office, in the absence of decision by the Supreme Judicial Council, is deemed to be a valuable protection for judicial officers. It means that no judicial officer can be removed from office unless the Supreme Judicial Council is of the view, after a hearing, that grounds exist for such removal.

Incompatibility between the office of judge, prosecutor, investigator with other offices.

Article 132 seems to permit judges to move between the judiciary and the executive or legislature and back. This unnecessarily weakens the important distinction between the three different branches, and could negatively affect a judges' independence. However, the draft law provides for reinstatement within fourteen days from the filing of an application with the Supreme Judicial Council. The proposed amendment is positive in that it clarifies the procedure for purposes of reinstatement. However, I do not believe that this proposed amendment is adequate to curtail the concern expressed above and it is clear that the Council is not entitled to refuse an application for reinstatement.

Immunity.

In terms of Article 134 of the Judicial System Act judges, prosecutors, and investigators enjoy the immunity of members of Parliament. It is apparent that the proposed amendments do not take into account the concern expressed by the Commission of the European Communities in its report (2001) that: *"The fact that criminal investigators with the functions they exercise in Bulgaria (some of which are exercised by police elsewhere), are members of the judiciary, is unusual. Requests to the Supreme Judicial Council to lift immunity are rare. Such provisions on immunity make it difficult to know the potential scale of corruption or criminal activity in the judiciary"*. Legislative amendments are appropriate in order to improve the procedure for lifting, where necessary, the immunity from criminal prosecution.

Judicial Compensation.

The draft law has also improved the rules on judicial compensation (Article 139b – 139g) . While this cannot on itself prevent judicial corruption, judges should receive adequate compensation, which does not leave them unusually vulnerable to corruption.

National Institute of Justice.

The draft law provides for the establishment of the National Institute of Justice (Article 146a). It is natural, and proper, that modern governments are taking a greater interest in judicial training and continuing education, thereby seeking to improve the individual and institutional efficiency of judges and other court officials. In a dynamic and changing society the judiciary has to be constantly renewing its intellectual resources. Once judicial apprenticeship would have been regarded as an admission of self-doubt or incapacity. Nowadays, judicial education is regarded as the norm. It is an undisputed fact that members of the judicature are very busy and it is unrealistic for them to seek out their own professional development. The need to maintain judicial independence is no argument against the desirability of judges becoming better informed.

So long as judicial training and education is left in the hands of the Judicial Supreme Council, the judges or an autonomous and independent institution from the executive, there should not be any apprehension that educational programs could compromise judicial independence. The Supreme Judicial Council should be given a leadership role, in encouraging the continuing education of judges. Alternatively a judicial training center may be established and operated by a non-governmental organization, where the Ministry of Justice could be possibly represented on a Board of Governors. It is an undisputed fact that the administration of justice involves substantial expense to government, and governments are entitled to see that the resources provided to the court system are used efficiently and effectively. I believe that the concern expressed by the Supreme Judicial Council on the 10th April 2002 with respect to the establishment of a National Institute of Justice which falls under the authority of the Ministry of Justice, is justified and warrants attention.

I endorse the proposal that training should also be available for prosecutors, investigators and clerical staff. In terms of the Bulgarian Constitution, the prosecutors and the investigators are part of the judicial branch, and planning decisions for the improvement of the judiciary should deal with these branches too.

May, 2002.