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COMMENTS ON CONSTITUTIONAL AMENDMENTS REFORMING THE JUDICIAL SYSTEM IN BULGARIA

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Constitutional reform in Bulgaria, comments by Prof. Sergio Bartole, University of Trieste.

The amendments which are submitted to the attention of the Venice Commission deal with the Chapter six of the Bulgarian Constitution, and regard the judicial power and, specially, the personal status of the judges, prosecutors and investigators. The affected provisions are articles 129, para. 3 (and the additional para. 4), 131 and 132. The proposal provides also for the adoption of a transitional provision concerning the enforcement of the new rules by “the necessary legislation to bring the cases affected by this amendment into compliance with the Constitution of the Republic of Bulgaria". This last proposal is interesting as far as it shows that the new rules are not self-executing and cannot be directly applied by the concerned State's organs, because they require a necessary implementing legislation. This feature of the proposed new constitutional rules draws our attention to their binding effects on the incoming legislation: are their provisions sufficient to bind the hands of the Bulgarian legislator? Or are they leaving him a large extent of discretion in choosing the ways of implementation of the constitutional reform? To answer to these questions we have to look at the expressions used by the proposal and to find out if the used language is sufficiently clear and unambiguous.

Art. 129, para. 3.

This rule provides for the extension to five years of the period of time of service, which a judge, prosecutor or investigator has to complete in view of obtaining a decision of Supreme Judicial Council which allows them the irremovable status provided for these State's officials by the Constitution.

The rule does not specify the conditions in presence of which the Supreme Judicial Council could deny its consent. It would be advisable to offer to that body some criteria or test of judgement to circumscribe its discretion in confirming or denying the permanent status to the concerned officials. In some ways these guidelines should refer to the provisions dealing with the revocation of the permanent status, but it could be convenient adding criteria directly concerning the evaluation of the performance of the concerned officials after their temporary appointment and during the five years of service necessary to get the irremovable status.

According to the proposal, the permanent status “shall be revoked only" in presence of specific hypotheses, which are stated by the proposal itself. While in some cases the language is clear and unambiguous, in other cases the expressions used by the proposal should deserve a refinement to improve their binding effects on the incoming legislation.

For instance, it is said that the revocation shall be adopted “upon enforcement of a sentence of imprisonment for a premeditated offence". It would be useful adding the requirement that an appeal cannot be lodged against the sentence, which has to be definitive. Special rules could provide for the suspension of the concerned person from the office in view of the expiring of the time for appealing the sentence.

Another hypothesis of revocation of the permanent status is provided for the judicial officials "if there is a lasting incapability to carry out their duties for more than one year". The rule apparently regards a factual situation of "incapability" caused by physical conditions and health problems of the concerned person: perhaps it should be underlined that the "incapability" cannot regard the moral, social or political position of the official. Therefore, this hypothesis shall be clearly distinguished from the following one, which is expressed in an ambiguous phrase: the permanent status of judges, procurators and investigator may be revoked "if they systematically

fail to perform their official responsibilities or perform activities that undermine the prestige of the judiciary ".

It should be made clear that this last paragraph of art. 129, para. 3, is clearly distinguished from the previous one. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his (her) health problems. A question arises whether the failing implies or not a moral evaluation: is the hypothesis fulfilled only if a person does not de facto perform his (her) responsibilities by being absent from office or not dealing with the docket assigned to him (her)? Or, also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence ("perform activities that undermine the prestige of the judiciary"), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his (her) life. In both the cases it would require a major clarity and a refinement to avoid its evident ambiguity.

The new para. 4 of art. 129 can be approved.

Art. 131.

The old text of art. 131 should be substituted with a new text providing the requirement of the secret ballot not only in the case of appointment, promotion, demotion, transfer or release from duty of judges, prosecutors and investigators, and of application of art. 129, para. 2, but also in the new hypotheses covered by art. 132, para. 2 and 3. As it stands, questions of interpretation do not arise, and, therefore, it does not enlarge the scope of discretion of the implementing legislator.

Art. 132.

The proposal is aimed at completely redrafting the text of the old art. 132. On one side, the immunity of the judicial officials from criminal and civil liability is strictly connected to the performance of their duties (as the parliamentarians may not be held criminally liable for their votes and opinions expressed in the National Assembly). But, on the other side, the proposal is aimed at abrogating the equality in the enjoyment of the immunity between the members of the National Assembly and the judges, prosecutors and investigators. New rules are provided for the lifting of the immunity of these judicial officials by the Supreme Judicial Council, which are absent in the case of the parliamentarians. In the meantime the proposal is trying to directly identify "the circumstances" in presence of which the lifting of the immunity is allowed, and, therefore, the solution of entrusting this task with the legislator is avoided. New rules are added to distinguish (para 1 and 2) the lifting of the immunity with regard to the criminal and civil liability of the concerned officials for actions performed and rulings delivered in the performance of official duties, and (para 3) the lifting of the immunity from detention in view of statutory felonies which are not necessarily connected with the performance of official duties. Therefore two different immunities are established: immunity in respect of civil and criminal liability, and immunity from detention, the first one regards crimes committed in the performance of the official duties, the second one covers all criminal activities, with the exception of the felony in the act at the time of the arrest.

Completely new procedural rules are provided for by entrusting the Supreme Judicial Council with the relevant decision-making powers, and allowing the chief prosecutor and "no less than

one fifth of the members" of the Council to request a deliberation in the matters. When evaluating the importance of these novelties, the reader has to keep in mind that the proposal leaves unfortunately untouched the constitutional and legislative provisions concerning the formation and the membership of the Supreme Council, notwithstanding the suggestions submitted by the Venice Commission that the rules dealing with the Council should be completely redrafted to insure the presence in the body also of members elected with the support of the parliamentary opposition, and to avoid - therefore - giving the parliamentary majority the chance of electing all the members of the Council. In any case the idea of entrusting the power of initiative both to the chief prosecutor and to some members of the Council has to be approved. The failing of initiative of one shall be compensated by the initiative of the others, and vice versa.

According to the new art. 132, para. 1, the judges, prosecutors and investigators “shall not bear criminal or civil liability for action they performed or rulings they delivered in the course of performing their official duties". This provision indirectly offers elements for the interpretation of art. 129, para. 3, as far as it does not include the disciplinary liability in the scope of the immunity provided for. The revocation of the irremovable status is apparently allowed because of actions performed or rulings delivered in the course of performing the official duties of the concerned officials. That is, there isn’t a judicial disciplinary immunity. The result of this systemic reading of the proposal look dangerous: it does not give any suggestion in view of restricting the discretion of the legislator in the implementation of the new rules dealing of art. 129, para. 3, last paragraph. On the other side, criminal or civil liability can be lifted when a premeditated offence of general character is committed. From the requirement of the general character of the offence we could draw the consequence that the legislation cannot provide for the punishment of specific offences which can be committed by judicial officials only: there is no space for a special judicial criminal law. But the reference to the general character of the offence could be interpreted also in another way: we could read the language of the proposal as a reference to offences of general interest. This interpretation would leave a large scope of discretion to the legislator in drafting the rules providing for the criminal liability of the judicial officials.

Para 3 of art. 132 extends the immunity to the detention in prison of judges, prosecutors and investigators. They may be detained only for statutory felonies and with the permission of the Supreme Judicial Council. It is not clear whether the detention requires also a decision of the judge who is entrusted with the relevant criminal procedure. A judicial decision should be required in view of implementing the guarantees provided for by the international treaties in the field of the human rights. The permission of the Supreme Council will not be sufficient, because it deals with the interests covered by the judicial immunity, while only the decision of the competent judge insures the consideration of the personal interests of the concerned person that is the judicial official who is criminally prosecuted. The Council authorizes the exercise of the powers of the judge.

Obviously this rule shall not be applied in the event of arrest for a felony in the act.

Both the rule of para. 2 and the rule of para. 3 don't identify the stage of the procedure when the deliberations of the Supreme Council have to be asked. It could be advisable to offer some constitutional guidelines to the legislator on this matter.

a) It is evident that the proposal draws inspiration from the art. 132, para. 2, presently in force. This provision allows the introduction of a distinction between the Members of the National Assembly and the judges, prosecutors and investigators, notwithstanding the fact that all of them enjoy the same immunity according to art. 132, para. 1. As a matter of fact, the mentioned para. 2 provides for the possibility of lifting the immunity of judges, prosecutors and investigators "by the Supreme Judicial Council only in the circumstances established by the law". Art. 72, which deals with the prerogatives of the Members of the National Assembly, does not provide for such an intervention of the legislator and directly states the circumstances which allows the lifting of the immunity of the parliamentarians. Therefore, the amendments of the Constitution should imply a strengthening of the guarantees of the judicial officials restricting the freedom of choice of the legislator. But we have seen that this result is only partially obtained because of the ambiguity and the lack of clarity of the language adopted in the proposal.

It is evident that the legislator has a large scope of discretion if the expressions used by the Constitution in identifying the circumstances of a possible lifting of the immunity of the judges, prosecutors and investigators are unclear and insufficiently precise.

b) The proposal keeps the equality of immunity of judges, prosecutors and investigators which is a peculiarity of the Bulgarian legal system. We can doubt whether this principle meets the European legal standards. It was frequently stressed that the investigation are made directly by the police in most European countries. The special status recognized to the investigators could imperil the functioning of the investigating police under the responsibility of the prosecutors, on one side, and of the executive power, on the other side. It could be difficult identifying the role played by these authorities in the performance of investigative activities and, therefore, it could be cumbersome asserting their liability. It follows that the reform could fail in getting good results in the war against the criminality, which is presently interesting the Bulgarian society and requires a more effective intervention of the competent public authorities. We have to keep in mind that the Bulgarian authorities have frequently complained in the past about the difficulty of identifying the responsibilities of some of the judicial officials, and especially of some of the prosecutors and investigators in dealing with the crime, the corruption and the illegality.

Perhaps it could be convenient leaving in force the provision of art. 132, para. 2, only for the investigators in view of insuring more flexibility to the rules concerning them.

University of Trieste, September 3rd, 2003 (Prof. Sergio Bartole)