



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 3 March 2008

Opinion no. 444 / 2007

CDL(2008)003*

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS
ON THE CONSTITUTION
OF BULGARIA**

by

**Mr Guido NEPPI MODONA
(Substitute Member, Italy)**

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GUIDO NEPPI MODONA, Comments on the provisions of the Constitution of Bulgaria concerning the Judiciary, following the visit of the Venice Commission delegation in Sofia (November 11th-13th 2007).

1. I will deal above all with the main issue of the independence of the judiciary from political power, specifically from the Parliament and the Minister of Justice.

The previous opinions of the Venice Commission were critical of the constitutional provisions on the judicial system in a number of respects. As for the specific issue of the independence of the Judiciary, criticism was expressed about the composition and the appointment of the Supreme Judicial Council and the role of the Minister of Justice, who was entrusted with the power to chair the Judicial Council.

The Venice Commission pointed out the risk of politicisation of the Supreme Judicial Council, since eleven out of its twenty five members are elected by a simple majority of the Parliament, and the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General, who are appointed by the President of the Republic, are members *ex officio*. As for the role of the Minister of justice, who presides over the Judicial Council, the previous opinions of the Venice Commission pointed out that it risked to lead to a confusion between the executive power and the functions of the Judicial Council, guarantor of the independence of the judiciary.

The provisions relating to the structure of the Supreme Judicial Council and the role of the Minister of Justice have not been addressed since the earlier opinions of the Venice Commission, nor have they been solved by the recent amendments to the Constitution made in 2006 and in February 2007. On the contrary, it seems that the powers of the Minister of Justice within the Supreme Judicial Council have increased, since he has been given the powers to propose a draft budget for the judiciary, 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 (art. 130a); that is to say, powers that can deeply interfere in many aspects with the independence of the judiciary.

On the other hand, the exclusive powers of the Supreme Judicial Council concerning all provisions on the legal status of judges seem in some way weakened by the establishment of a new body, the Inspectorate, whose members are elected by the National Assembly with a two-thirds majority. The Inspectorate is given the power to inspect the activity of the judicial bodies, to send signals, proposals and reports to other state bodies, and to submit an annual report to the Judicial Council (art. 132a). From a general point of view, the respective functions of the new body and the Supreme Judicial Council in controlling and governing the members of the judiciary are unclear; as for the relations between the judiciary and the political power, in any case it cannot be without meaning that all the members of the Inspectorate are elected by Parliament, even though with a qualified majority.

2. The main object of the meeting with the Bulgarian authorities was to discuss the constitutional provisions, both the original ones and the latest amendments, that in accordance with the Venice Commission criteria could undermine the independence of the Judiciary. We had very comprehensive meetings with all the bodies in some way concerned with the relation between the judiciary and the political power, that is to say the executive power, in person of the Deputy Minister of Justice; the legislative power, in person of the Deputy Chairman of the National Assembly and of a representative of the opposition parties; the Judiciary, in person of the Deputy Chairman of the Supreme Court; the Prosecutor General; some members of the Supreme Judicial Council; the President and some judges of the Constitutional Court; the Ombudsman.

It was in some way surprising that almost all the interlocutors, including those belonging to the Judiciary, were eager to underline that the relations between political bodies and the judiciary were so satisfactory that they did not feel any need of changing the current constitutional provisions in order to improve the guarantees of independence of the judiciary. The general opinion was expressed that the principle of the independence of the judiciary was deeply rooted in the Bulgarian political and institutional culture; that political bodies had always been and are currently respectful of the autonomy of the judiciary as a whole and the independence of single judges; that judges and prosecutors are far from political interests and are quite depoliticised.

3. On account of the above mentioned opinion, only one of our interlocutors endorsed the proposal to provide a qualified majority for the parliamentary election of the eleven lay members of the Supreme Judicial Council, in order to avoid the potential event that all the members elected by the Parliament belong to the ruling parties. Nobody endorsed the proposals to give to a lay member other than the Minister of Justice the role of chairman of the Judicial Council; to remove the new powers of the Minister of Justice provided for in art. 130a; to clarify the effective role of the Inspectorate and its functions in comparison with the competencies of the Supreme Judicial Council.

We tried in vain to convince our interlocutors that from a constitutional point of view it does not matter if the current relationship with the political powers is very positive and currently there is no risk of political interference on the independence of the judiciary; it does not matter if only one out of the eleven current members of the Supreme Judicial Council elected by the Parliament has a political qualification.

We tried to convince them that the main function of a democratic Constitution is to provide appropriate tools able to guarantee for ever the independence of the judiciary and to avoid the possibility of undue agreements between politics and justice or exchange of favours between politicians and the highest levels of the judiciary.

We tried to explain that a perfect harmony between the judiciary and political bodies is not a signal of good health for the democratic institutions, but a danger for the implementation of the principles of legality and equality. In fact, it is quite normal that conflicts and tensions characterise the relations between political powers and the judiciary, since politics is governed by the principles of appreciation and utility, while justice acts in accordance with the principles of legality and equality.

This being the political context, we found during the meetings in Sofia that the reasons for the "perfect harmony" between politics and justice, to which our interlocutors almost unanimously referred to, were not completely convincing.