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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION
ON THE DRAFT LAW ON AMENDMENTS TO THE JUDICIAL SYSTEM ACT OF BULGARIA

Adopted by the Commission
at its 51st Plenary Session
(Venice, 5-6 July 2002)

on the basis of comments by

Mr J. Hamilton (Substitute Member, Ireland)
Mr J. Said Pullicino (Member, Malta)
Ms H. Suchocka (Member, Poland)

1. By letter dated 15 April, Mr. Stankov, Minister of Justice of Bulgaria, requested the Venice Commission to give an opinion on the Bulgarian Draft Law on Amendments and Addendum on the Judicial System Act (CDL (2002) 105). The Draft Law was adopted by the Bulgarian Council of Ministers on 4 April 2002. On 10 April some concerns were raised in a meeting of the Supreme Judicial Council. Document CDL (2002) 106 contains the motives advanced in favour of the amendments as well as those concerns raised.

2. The Venice Commission invited Ms. Suchocka and Messrs. Hamilton and Said Pullicino who in 1999 had already acted as rapporteurs on a previous draft on the Reform of the Judicial system (CDL-INF (99) 5) to assume the same task in respect of the new Draft Law. The present opinion, to which the individual comments (CDL (2002) 69, 62 and 63 respectively) are annexed, was adopted Commission at its 51st Plenary Session on 5-6 July 2002 in Venice.

3. The principal changes proposed in the Draft Law are as follows:

a) Changes to the rules relating to the Supreme Judicial Council, in particular providing for the situation where a member is elected who does not meet the legal requirements for membership.
b) A new system for evaluation of judges, prosecutors and investigators during the three-year period before they become irremovable.
c) A procedure to allow for the demotion of certain judges.
d) The introduction of a competitive procedure for the appointment of certain judges and prosecutors
e) Provisions relating to the training of judges and the establishment of a National Institute of Justice.
f) Provisions relating to the qualification of judges.
g) The administration of the Supreme Judicial Council and judicial bodies.

4. Following an examination of the Draft Law, the Commission comes to the conclusion that it represents a thorough, coherent and comprehensive code for the judiciary, prosecutors and investigators. Many of the proposed changes are very positive. The Commission notes with satisfaction that the Supreme Council of Justice will have wide powers and that the role of the executive, i.e. the Minister of Justice, in the administration of justice remains limited.

5. Nevertheless, there are a number of concerns which relate essentially to the independence of the judiciary. The Commission is of the opinion that the draft should be amended in relation to the following points:

a) The Minister of Justice as the chairman of the Supreme Council of Justice should not be able to be able to block the discussion of a particular issue within this body. 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.
b) The role of inspectorate situated inside of the Ministry of Justice in the light of expanding competencies of the Supreme Judicial Council is not very clear. The Ministry of Justice should not be in a position to determine which information stemming from the Inspectorate is passed on to the Council.
c) Changes to the rules relating to the Supreme Judicial Council, in particular providing for the situation where a member is elected who does not meet the legal requirements for membership. The Supreme Judicial Council, especially its

parliamentary component, should not be in a position to decide on the validity of the election of a member of the judicial component of the Council.

d) The composition of the Supreme Council of Justice should be depoliticised by providing for a qualified majority for the election of its members.

e) The evaluation of judges, prosecutors and investigators during the three-year period before they become irremovable in their office should be restricted to courts of first instance. The annual evaluation of judges may create problems related to independence of the judges. The criteria for this evaluation seem to be too vague.

f) The incentives for magistrates provided for in Article 167a should only be applicable after the retirement from office.

g) The envisaged Code of Ethics should be approved by the Supreme Judicial Council but regulated at the level of law. It should precisely spell out the consequences of a breach of its rules.

h) Procedural rules for disciplinary proceedings should guarantee a due process. In particular, a member of the Supreme Judicial Council, who calls for disciplinary action against of a magistrate (or the lifting of immunity) should not be entitled to vote on his or her own proposal. Once the disciplinary panel of the Supreme Judicial Council has found in favour of the judge, this decision should be final. The relocation of a magistrate to another district or demotion to a lower court is doubtful as a disciplinary measure.

i) The procedure for lifting the immunity of magistrates should be improved.

j) The reasons for the dismissal of a judge (Article 131 of the draft law) cannot go further than the respective constitutional provisions (Article 129).

k) The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure.

l) Provisions relating to the training of judges and the establishment of a National Institute of Justice. These provisions should be more detailed and should determined the main action of the Institute. The Institute should be controlled by the Supreme Judicial Council rather than the Ministry of Justice.

m) The Judiciary should continue to be entitled to an autonomous budget.

6. For a detailed discussion of these and other issues raised by the rapporteurs, the Commission refers to the individual comments by the rapporteurs which are annexed to this opinion.

Appendix I

Comments by Mr J. Hamilton

Introduction

7. The Minister of Justice and European Legal Integration of Bulgaria has requested the Venice Commission to provide him with an analysis of the Bulgarian Draft Law on Amendments and Addendum on the Judicial System Act. The Draft Law was adopted by the Bulgarian Council of Ministers on 4 April 2002 and will be presented to the Bulgarian Parliament in June.

8. My comments are based only on an examination of texts, and I have not had discussions with the proposers of the Draft Law or other interested parties.

Constitution and Legal Situation

9. 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 of the Constitution) and that the judicial branch of Government shall have an independent budget (Article 117.3 of the Constitution). 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.

10. Justice is administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, courts of assizes, court martial and district courts. Specialised courts may be set up by virtue of a law, but extraordinary courts are prohibited (Article 119 of the Constitution).

11. Judges, prosecutors and investigating magistrates are elected, promoted, demoted, reassigned and dismissed by the Supreme Judicial Council which consists of 25 members. There are 3 *ex officio* members, the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court, and the Chief Prosecutor. Eleven of the members of the Supreme Judicial Council are elected by the National Assembly, and 11 are elected by the bodies of the judicial branch. 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 and European Legal Integration, who shall not be entitled to a vote (Article 130 of the Constitution).

12. Justices, prosecutors and investigating magistrates become unsubstitutable upon completing a third year in the respective office. They may be dismissed only upon 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 129.3 of the Constitution). They enjoy the same immunity as the members of the National Assembly (Articles 132.1 and 70 of the Constitution). Therefore, they are immune from detention or criminal prosecution but can be detained in the course of committing a grave crime. The immunity of a justice, prosecutor or investigating magistrate may be lifted by the Supreme Judicial Council only in circumstances established by the law (Article 132.2 of the Constitution).

13. The organisation and the activity of the Supreme Judicial Council, of the courts, the prosecution and the investigation, the status of the justices, prosecutors and investigating magistrates, the conditions and the procedure for the appointment and dismissal of justices, court assessors, prosecutors and investigating magistrates and the materialisation of their liability are to be established by law (Article 133 of the Constitution). This law is the Judicial System Act of the Republic of Bulgaria which has been enacted in 1994 and has been amended in 1994, 1996, 1997 and 1998.

The Draft Law

14. The Draft Law proposes a number of further amendments and modifications to the Judicial System Act. The stated purpose of the changes, as set out in the motives to the law, are as follows:

> "Over the period since the last essential amendments, the need has become clear to adopt a new Law to Amend and Supplement the Judicial System Act. The Reform Strategy for the Bulgarian Judicial System, the commitments undertaken by Bulgaria in its National Programme for the Adoption of the *Acquis* and the priorities listed in the Accession Partnership all require to reinforce the judicial system; enhance the professional training of magistrates; improve the administrative work of the judicial system; and better the operation of the Supreme Judicial Council. Thus, some of the political criteria for membership of the European Union will be met."

15. The principal changes proposed are as follows:

h) Changes to the rules relating to the Supreme Judicial Council, in particular providing for the situation where a member is elected who does not meet the legal requirements for membership.
i) A new system for evaluation of judges, prosecutors and investigators during the three-year period before they become irremovable.
j) A procedure to allow for the demotion of certain judges.
k) The introduction of a competitive procedure for the appointment of certain judges and prosecutors
l) Provisions relating to the training of judges and the establishment of a National Institute of Justice.
m) Provisions relating to the qualification of judges.
n) The administration of the Supreme Judicial Council and judicial bodies.

16. It is important, in evaluating the draft law, to have regard at all times to the provisions of Article 6(1) of the European Convention on Human Rights insofar as it provides that the determination of civil rights and obligations or of criminal charges must be made by an independent tribunal. In evaluating whether a tribunal or court is independent the European Court of Human Rights has consistently held that regard has to be had to four factors, firstly, the manner of appointment of its members, secondly, their term of office, thirdly, the existence of guarantees against outside pressure, and fourthly, the question whether the tribunal presents an appearance of independence (*Findlay v United Kingdom* [1997] 24 E.H.R.R 221)

The Supreme Judicial Council

17. The composition of the Supreme Judicial Council has already been noted. In its opinion on the Reform of the Judiciary in Bulgaria (22-23 March 1999, CDL-INF (99) 5) the Venice Commission concluded that the composition of the Council, chaired by the Minister of Justice and European Legal Integration (who does not have a vote) and consisting of the Chairmen of the Supreme Court of Cassation and the Supreme Administrative Court and the Chief Prosecutor, together with eleven members elected by the parliament and eleven elected by the judges and the prosecutors, was not in itself objectionable. However, the Commission underlined the importance of the election of the parliamentary component being depoliticised. This had not been the case prior to 1999. I have no information as to what the more recent practice has been, or whether any steps have been taken to address the concerns expressed by the Commission in 1999. The present law does not address this question. It is appreciated, however, that the composition of the Council and the role of the Minister of Justice and European Legal Integration is fixed by the Constitution. The Commission's concerns in 1999 related more to questions concerning the political culture than to the text of the Constitution or the law.

18. The Supreme Judicial Council itself will under the draft proposals be given the right to contest the legality of an election by the meetings of delegates who elect the judicial component of the Council. Where they do so, the Council will appoint a five-member mandate commission, which will prepare an opinion on the legality of the contested election. The Supreme Judicial Council then rules on the matter. Until it does so, the person whose election is contested does not participate in the meeting.

19. This provision appears to me somewhat problematical. It is asymmetrical in that it applies only to the judicial members, but not the parliamentary component. It therefore opens up the possibility of the parliamentary component having a say on the validity of the election of the judicial component, but not the other way around. Given the whole manner in which elections by the National Assembly to the Council was the subject of heated political controversy on earlier occasions this strikes me as unwise. Secondly, I wonder if the Council itself should rule on the validity of the election of its proposed members. This might be a task more appropriately given to another body – perhaps the Supreme Administrative Court, or the three ex-officio members of the Council, or even the Constitutional Court. Thirdly, it does not appear that there is any prohibition on the Council transacting other business – for example, making judicial appointments - while some of its members cannot take part in deliberations because the legality of their election is subject to a challenge. In these circumstances the members of the Council charged with making decisions may not be disinterested.

20. The provisions of Article 26 concerning the role of the chair have been repealed and replaced by Articles 34a, 34b and 34c. There appear to be no changes of substance except the introduction of a rule that the agenda should be circulated in advance, which is appropriate, and a provision (Article 34b (2)) that the agenda is to be approved by the chair who is the Minister of Justice and European Legal Integration. The chair should not, in my view, have the power to prevent the Council from discussing and deciding a matter properly within its competence by means of refusing to approve an item for the agenda if this is the effect of the provision.

21. In Article 27 it is proposed to make a number of changes to the powers of the Council. Article 27 (1) 6 relates to the power to divest a judge, prosecutor or investigator of immunity or temporarily remove him or her from office. At present a decision on such a question can be requested by the Chief Prosecutor, the Presidents of the two Supreme Courts or the Minister of Justice and European Legal Integration. It is now proposed to add "and at the request of at least one fifth of the members of the Supreme Judicial Council". The Presidents, Chief Prosecutor and Minister should continue to have the power to seek a decision on such a question without any requirement in addition to convince one-fifth of the members before initiating a proposal. In other words, the provision should say "or at the request" instead of "and at the request". Perhaps this is a translation difficulty.

22. There seems to me, however, to be a more fundamental difficulty with the mechanics of exercising a power to dismiss or suspend a judge or remove the judge's immunity. If the judge, in such circumstances, is entitled to the protections of Article 6(1) of the European Convention on Human Rights, as it seems to me that he may, then if the Supreme Judicial Council is to preserve its status as an independent and impartial tribunal the moving party in such a hearing ought not to participate in the decision. It may be suggested that the one-fifth of the members are merely requesting the Council to make a decision and in so doing so do not pre-empt that decision, but in my view such a proposition would lack reality. It seems to me, therefore, that it would be desirable to add a provision to Article 27 to the effect that a member of the Council who requests a decision to discipline a judge, prosecutor or investigator, should not be entitled to vote on his or her own proposal.

23. The other changes to Article 27 seem to me beneficial, including the power to require and hear information from the courts, prosecutors and investigators, examine annual reports, and adopt codes of ethics.

24. Under the proposed revisions to Article 30 proposals concerning the number of judges, prosecutors and other office-holders and their appointment, promotion, demotion, transfer or removal from office must be presented via the Minister of Justice and European Legal Integration who shall submit them together with an opinion. The proposals must still, however, originate with the appropriate heads of courts or offices, and it does not appear the Minister is given any power of veto or right not to present the proposal unless the requirement that he approve the agenda can be so construed.

Inspectorate

25. The draft law amends the law relating to the Inspectorate within the Ministry of Justice and European Legal Integration whose principal function is to inspect the organisation of the administrative work of courts, prosecution offices and investigation services, and inspect and summarise the organisation, institution, progress and closure of court, prosecution and investigation cases. It cannot inspect the work of the Supreme Courts or the Chief Prosecutor or the Supreme Prosecution Offices. The inspectorate functions under the Chief Inspector who is appointed by the Minister of Justice and European Legal Integration. The independence of inspectors is strengthened by the removal of the limit of their term of office (although it is not clear what the new term of office is to be or whether it is intended to be for an indefinite period) and by providing for the same procedures for removal as for a judge. An inspector who was formerly a judge may return to that position. On the whole the changes to these provisions seem positive.

Regional Court, District Court, and Court of Appeal

26. The chairmen of these courts are required to prepare annual reports and produce statistical data. The regional court as well as the district court and court of appeal are to hold general meetings and each court can propose a person as president of the court following a secret ballot. These developments are positive.

The Chief Prosecutor

27. The Chief Prosecutor is required to prepare an annual report. Again, this is a positive development.

28. Article 116 is being amended to delete the prohibition on the prosecutor terminating criminal proceedings without the permission of the court. This provision was introduced in 1998. The Commission in its Report of 22-23 March 1999 described this as a proportionate response to a perception of fraud among elements of the prosecution service. However, the organisation of the prosecutor's office in Bulgaria is hierarchical and the Chief Prosecutor should have sufficient authority to control his subordinates' activities without having to seek leave of a court of law in order to discontinue criminal proceedings. In my view the change now proposed is to be welcomed if the problems envisaged in 1998 have been sorted out.

Status of the judges, prosecutors and investigators

29. The draft law refers to newly defined positions as "administrative leaders" of the bodies of the judiciary. These include presidents and vice-presidents of courts, chief prosecutors and their deputies, and the directors and senior staff of the investigative bodies. Except in the case of the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court and the Chief Prosecutor, these positions are to be for a fixed term of five years (renewable once) or seven years (not renewable). At the end of the term the judge retains his position and status as a judge and retains his rank and salary (Article 125a). It seems to me that this is a reasonable way of dealing with the administrative burden falling on the presidents of courts, prosecution offices and investigation agencies.

30. Article 127 (4) makes some changes in the qualification for appointment to the Supreme Courts or the Supreme Court Prosecution Offices. The qualification period is reduced from fourteen years practice to twelve including eight years as a judge, prosecutor, investigator, attorney or inspector. It is not clear to me whether that means that at least eight years must have been served in that capacity or whether it merely allows this period to be reckoned. If it is mandatory academic lawyers lacking this length of experience could be excluded. Under the former rule only five years experience as a judge, prosecutor or investigator was required as part of the fourteen years total.

31. Article 127a, 127b and 127c provide for the holding of competitions for judicial office up to and including the court of appeal if there is no applicant who has successfully graduated from the National Institute of Justice. The legality of the contest can be challenged before the Supreme Judicial Council and appealed to the Supreme Administrative Court. The rules for the contest are laid down by the Council. This seems to me a positive development.

Evaluation

32. Judges, prosecutors and investigators become permanent and irremovable after three years service. This is a constitutional provision. Article 129 proposes to introduce an evaluation process for all judges before the end of that period.

33. There are certain safeguards built into this process. The evaluation is carried out by a committee appointed by the head of the court, prosecution office or investigation service. Certain elements must be taken into account, including the opinion of the direct superior who must make an annual evaluation. The procedure for evaluation is set by the Supreme Judicial Council. A negative evaluation is treated as a proposal for removal on grounds of absence of qualities to discharge professional duties (Article 131 (3)). The matter then goes to the Supreme Judicial Council with a right of appeal to the Supreme Administrative Court.

34. The appointment of temporary or probationary judges who may not be removed is a very difficult area. A recent decision of the Appeal Court of the High Court of Justiciary of Scotland (*Starr v Ruxton*, [2000] H.R.L.R 191; see also *Millar v Dickson* [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to a discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability, to say the least, of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent. While the situation of the Bulgarian temporary judge subject to evaluation by fellow judges is a far cry from the Scottish sheriff dependent on reappointment by the executive the following extracts from the judgment of Lord Reed in *Starrs v Ruxton* are apposite:

> *"Given that temporary sheriffs are very often persons who are hoping for graduation to a permanent appointment, and at the least for the renewal of their temporary appointment, the system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the executive when his appointment comes up for renewal: in short a relationship of dependency."* (at p.243)
>
> *"There can be no doubt as to the importance of security of tenure to judicial independence: it can reasonably be said to be one of the cornerstones of judicial independence."* (at p.245).

35. The European Commission on Human Rights, in Application No. 28899/95, *Stieringer v Germany*, 25 November 1996, found that there was no violation of Article 6(1) of the Convention where a criminal trial in Germany was held before three judges, two of whom were probationary, and two lay assessors. Prior to completion of their probationary period the probationary judges were liable to removal by the judicial authorities, subject to a right to challenge their removal before a disciplinary court. Under German law their participation in the trial had to be justified by some imperative necessity; the German courts had found such necessity to exist. The Commission held that there was no breach of Article 6(1). In that case, the executive had no role in the removal process which was subject to judicial control.

The system under the proposed Bulgarian law is therefore more akin to that accepted by the European Commission in *Stieringer* to that condemned by the Scottish courts in *Starr v Ruxton.*

36. Nonetheless, the difficulties in principle with systems of evaluation of temporary judges, whether in civil or common law systems, are clear. The European Charter on the Status of Judges, adopted by the Council of Europe in July 1998, provides in paragraph 3.3 that where judges are appointed for a trial period, which should necessarily be short, any decision not to reappoint them should be taken by or on the advice or recommendation of or with the agreement of a body independent of the executive or the legislature with a membership of at least half consisting of the judge's peers. Given the composition of the Supreme Judicial Council which has a substantial component elected by the legislature, it seems doubtful that the proposed arrangements conform to the Charter.

The explanatory memorandum to the Charter, comments as follows:-

> *"Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the point of view of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".*

The Charter is, however, not legally binding.

37. The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice (UN DOC.E/CN.4/Subs.2/1985/18/Add.6 Annex 6) states:

> *"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".*

38. Despite the safeguards which are built in to the draft law I continue to have misgivings about the proposal. It seems to me to undermine the independence of the individual judge during the three-year period of removability. Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

39. I accept, however, that to an extent misgivings about evaluation may be more justified in a common law system where judges are appointed late in life having had lengthy prior experience as legal practitioners. Systems of evaluation of judges are harder to justify in such a case. Where the judiciary is a lifetime career into which young lawyers are recruited the case for some form of evaluation, particularly early in the judge's career, may be stronger. In such a case, however, the case for exercising control over the type of case the judge may hear is strong. In *Stieringer* the probationary judges were not entitled to exercise criminal jurisdiction except in cases of imperative necessity.

40. If there is to be a system of evaluation, it is essential; firstly, that control of the evaluation is in the hands of the judiciary and not the executive. This criterion appears to be met by the Bulgarian law. Secondly, the criteria for evaluation must be clearly defined. In

my view the criteria set out are in some respects too vague. One of the criteria for evaluating the judge is "quality of carrying out the respective proceedings and of the orders drafted" (Article 129 (4)). It seems to me that once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created. Some of the criteria in Article 129 (4) are susceptible to very subjective evaluation. How does one measure motivation to work or team integration? How can one apply "incentives and sanctions" while respecting the independence of the judge?

41. I should add that my comments relate primarily to the judges and investigating magistrates whose individual independence requires to be safeguarded. Different considerations may apply to the prosecutors who work in a hierarchical system and where therefore it is independence of the prosecutor's office as a whole which requires protection rather than the independence of the individual prosecutor from his fellow prosecutors who are superior in the hierarchy.

42. Article 129 (6) also provides for the appointment of retired judges as judges where there are no other applicants. These seem to me inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure.

43. Article 131a provides for a new system of demotion of judges, prosecutors and investigators, but not by more than two levels in the judicial hierarchy. The grounds for demotion are that the judge, prosecutor or investigator no longer possesses the required abilities to fulfil his professional duties. The matter is heard by the Supreme Judicial Council, which is subject to appeal to the Supreme Administrative Court. The difficulty I see with this is that a judge who has not got the abilities to fulfil his duties on one level may not have them at any level. If he is demoted, how is the litigant in the lower court to have confidence in that judge's decision?

44. Illegally dismissed judges are entitled on reinstatement to an indemnity not to exceed nine months salary (Article 139e). It is not clear to me on what principled basis this limit can be justified.

45. Promotion of judges in rank and salary can take place only after an evaluation (Article 142 (3)) under the procedures laid down in Article 129, which includes an annual evaluation by the direct superior. It follows that any judge wanting to be promoted or paid a salary increase must be evaluated annually. This again created similar difficulties of compatibility with the necessary independence of the individual judge for the reasons already set out above.

Training

46. Article 146a of the draft law proposes to establish a National Institute of Justice with the Ministry of Justice and European Legal Integration. It will be managed by a Managing Board composed of four representatives of the Supreme Judicial Council and three representatives of the Ministry of Justice and European Legal Integration. The Board will elect a Director of the Institute. The Minister of Justice and European Legal Integration will issue rules and "determine the constitution of the Managing Board" (which seems inconsistent with the earlier provision laying down the composition of the Board).

47. The principal function of the National Institute is the improvement of the knowledge and skills of judges, prosecutors and investigators, and training persons to obtain the qualification to be a judge, prosecutor or investigator. Persons who successfully complete courses have priority in appointment, setting remuneration and promotion. Indeed, Article 163 makes training at the Institute a requirement for judicial appointment.

48. In my opinion since the successful completion of a course is in most cases a prerequisite to judicial appointment control of the Board should rest with the judicial bodies themselves. Otherwise there is a risk that the independence of the judicial bodies is compromised. In my view the Board should consist only of representatives of the judges, prosecutors and investigators.

Incentives

49. Article 167a proposes the presentation of prizes, badges of honour, proclamation of "Judge of the Year", "Prosecutor of the Year", "Investigator of the Year" and even promotional incentives by the Supreme Judicial Council.

50. It is of the essence of judicial or prosecutorial independence that difficult and unpopular decisions have to be taken from time to time. Such decisions may not be likely to win approval even from a distinguished body such as the Supreme Judicial Council (11 of whose 25 members, be it remembered, are elected by Parliament). The singling out of certain judges and prosecutors for such accolades in my view is likely to inhibit rather than encourage the exercise of judicial independence. Judges should not have one eye to their popularity ratings, even among their fellow judges. Furthermore, there may be a risk of encouraging a Stakhanovite approach to judicial and prosecutorial work.

Disciplinary Responsibility

51. As already noted, the Supreme Judicial Council is empowered to adopt codes of ethics for judges, prosecutors and investigators.

52. Articles 168-185 of the Judicial System Act deals with disciplinary responsibility. A range of sanctions for offences and omissions, unjustified delay, or breach of oath, by judges, prosecutors and investigators are provided. The sanctions range from reprimand through reduction of pay, demotion and relocation to dismissal and can be imposed only following a hearing by a disciplinary panel of the Supreme Judicial Council, with an appeal to the Supreme Administrative Court. Dismissal is, however, in the case of an irremovable judge, applicable only for breach of oath.

53. The draft law proposes to add to the grounds on which disciplinary responsibility can be imposed "acts falling within or without the scope of their official duties and violating the Code of Ethics" (Article 168 (1)).

54. Given the serious consequences for judges, prosecutors and investigators which can ensue for breach of the Code of Ethics it seems to me it would be desirable that such codes be given statutory effect as well as being adopted by the Supreme Judicial Council and that the precise disciplinary consequences of different breaches of the code be spelt out.

Administration

55. The draft law proposes to strengthen the administration of the Supreme Judicial Council and the other courts by establishing new offices of Secretary General of the Council and Court Administrators. The administration of the Supreme Courts, the Chief Prosecutor's Office and the National Investigation Service remain subject to rules to be established by the respective heads of those bodies. These provisions seem to me to be appropriate.

Budget

56. The draft law proposes to repeal the provision under which the judicial system has an autonomous budget (Article 196). The autonomous budget of the judiciary is, however, provided for by Article 117(3) of the Constitution of Bulgaria. It is not clear to me whether Article 196 is being repealed because it is considered unnecessary in the light of the Constitution, or whether it is intended to effect a real change in the budgetary system. I can find no new provisions which correspond to the repealed provisions in Article 196. If it is in fact intended to take away the judiciary's right to an autonomous budget this would represent a serious diminution in the independence of the judicial system.

Other Matters

57. A new provision in the draft (Article 12 (4)) requires judges, prosecutors and investigators to disclose their income and property annually to the Court of Auditors. This is a valuable safeguard against possible corruption.

58. Two other matters raised by the Commission in its opinion of 22-23 March 1999 have not been attended to in the draft law. In particular, in addition to the matters already referred to relating to the composition of the Supreme Judicial Council, these include:

a) clarifying that Article 172 should refer only to administrative irregularities so as to avoid undue influence by the executive on the courts, and
b) the continuance of the system of relocation of a judge, prosecutor or investigator to another district, as a disciplinary sanction, which the Commission considered open to objection.

Conclusion

59. The draft law represents a thorough, coherent and comprehensive code for the judiciary, prosecutors and investigators. Many of the proposed changes are very positive. I do, however, have a number of concerns which relate essentially to the independence of the judiciary, and more particularly to the necessary independence of every individual judge. I believe that there is both the scope and the need to further amend the draft law in ways which would strengthen that independence. My principal concerns relate to (a) the method of challenging the legality of elections for the judicial component in the Supreme Judicial Council, (b) the evaluation process for the individual judge during the three-year probationary period and annually thereafter, (c) the possibility of appointing retired judges, (d) provisions allowing for the demotion of judges, (e) the control of judicial training which in my view should rest with the judicial bodies and (f) control of the budget of the judicial system.

Appendix II

Comments by Mr J. Said Pullicino

The Supreme Judicial Council and the Independence of the Judiciary

60. 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.

61. 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.

62. 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.

63. 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]).

64. 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"*.

65. 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

66. 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.

67. 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

68. 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

69. 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.

70. 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

71. 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.

72. 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

73. 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.

74. 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.

75. 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

76. 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.

77. 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

78. 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.

79. 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.

80. 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.

81. 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.

82. 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'.

83. 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

84. 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.

85. 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

86. 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

87. 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

88. 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

89. 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.

90. 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.

91. 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.

Appendix III

Comments by Ms H. Suchocka

92. The fundamental principles of the Judiciary are proclaimed by the Constitution from 1991. The Constitution establishes the general rules concerning the judicial power, i.e. independence of courts and judges, the system of courts and prosecutor's office and the role of Supreme Judicial Council. The constitutional provisions concerning the Supreme Judicial Council are of great importance because they completely change the system of judiciary existing before. Article 129 providing for the establishment of a special body entrusted with a great competencies with respect to courts and judges changed radically the position of the minister of Justice. Judicial Councils with nationwide competence have taken over competencies exercised previously by the executive. The constitution has created a framework and basis for the ordinary legislation in this matter. The Law on Judiciary has been adopted in 1994. In 1998 important amendments were made to this Law. The draft being now under discussion proposes the new amendments to the Law, mainly in three areas: the competencies of the Supreme Judicial Council; some questions concerning irremovability of judges and training of magistrates and especially the establishment of National Institute of Justice.

93. As it has been stated in the Motives to the Law to amend the Judicial System act, the commitments undertaken by Bulgaria in its National program for Adoption of the acquis and the priorities listed in the Accession Partnership, require to reinforce the judicial system and especially the professional training of magistrates, and better operation of Supreme Judicial Council. I would like to concentrate myself only on this two points.

1. Provisions concerning the role of Supreme Judicial Council

94. The new amendments do not change substantially the role of the Council. As I mentioned above, the position of the Council has been clearly described in the Constitution with a widely defined competencies and the ordinary law cannot change this position.[1] The now proposed amendments are rather of technical nature. (Art. 20 p. 2 ,5 concerning the situation when a member is elected who does not meet the legal requirements.) In art. 27 there are the new competencies of the Council p. 10-15, they don't involve any objection. It is a logical consequence of the very strong position of the SJC. In the light of art. 27 (1) p.3 the SJC shall determine the number not only of judges but also prosecutors, investigators, bailiffs,

[1] It has been stated very clearly in the report on Bulgarian Judiciary in: Monitoring the EU Accession Process: Judicial Independence ed. by Central European University Press, Budapest 2001: " Bulgarian Supreme Judicial Council has broad competencies, it determines the number of judges, draws up the draft budget for the judiciary and submits it to the Government, makes the proposal to the President of the Republic as to the appointment of the Presidents of the Supreme Court and of the Supreme Administrative Court, further the Council operates as the disciplinary authority. What is rather exceptional is that it is in the Council's competence to appoint and dismiss judges. As the appointing body the Council also has the power to lift judges' immunity if requested by the General Prosecutor. It should be recalled, however, that the Council is the representative body of all three groups making up the magistracy (judges, prosecutors and investigators), further that these three branches elect only 11 members of the Council. Another 11 members are elected by Parliament whereas the President of the Supreme Court, the President of the Supreme Administrative Court and the General prosecutors sit ex officio in the Council.
In Bulgaria the draft budget of the judicial branch is drawn up and submitted to Government by the Supreme Judicial Council. The Bulgarian Constitutional Court held that the executive has no power in the process of drafting the judiciary's budget, it is obliged to incorporate the Council's proposal in the draft state budget and submit it to the National Assembly. The Government may formulate its own proposals and objections but may not alter the draft budget elaborated by the Council.

recordation judges, and court officials at all courts, prosecution offices and investigation services while the Minister (art. 30 p. 6) may only make proposals and provide opinions on the legality of the proposals to the Supreme Judicial Council. It can involve questions: what exactly is the role of the Minister of Justice.[2] With a view to strengthen institutional capacity of the Council and its ability to carry out management activities, the Supreme Judicial Council is gradually creating and expanding its own administration. Taking into account that the Supreme Judicial Council comprises not only judges but also the prosecutors and investigators it is obvious that the Council would replace the ministry of Justice and became an organ with all administrative competencies and organizational structures typical for the Ministry of Justice. It is very clearly seen in the chapter sixteen on the Administration of the bodies of the Judiciary. Art. 187 p.2 states that the administration of the bodies of the Judiciary shall be the administration of the Supreme Judicial Council, of the Supreme Court of Cassation, of the Supreme Administrative Court, of the Chief Prosecutor, of the Supreme Prosecution Office of Cassation, of the Supreme Administrative Prosecution Office, of the National Investigation Service, of the courts, prosecution offices and investigation services. In the field concerning the administration of the bodies of Judiciary minister of Justice shall act in strict coordination with the Supreme Council of Judiciary (art. 188.2). The administration of the Supreme Judicial Council shall be headed by the new administrative office Secretary General. It is a model going very far to create a very strong Council with a very strong administration and decision making competencies while the Minister is rather an opinion making organ. This kind of model is not very often met in the EU countries.

95. The model proposed for Bulgaria is now much closer to the model existing now in Hungary. This Hungarian solution is not free of critics. According to some critics the operation of the Council is rather bureaucratic resulting in the increase of the administrative burden of judges.[3] Some argue that it is actually the Office of the Council composed of civil servants, which has the real power and not the Council itself. Many of the employees of the Office used to work at the competent department of the Ministry of justice prior to the reform and their mentality still reflects the old times when courts were clearly subordinated to the bureaucracy of the Ministry.

96. However in Bulgarian model there still is a structure within the Ministry of Justice, the *Inspectorate*, (chapter 4) which inspects and summarises the administrative activities of courts, as specified in this chapter. Though the Inspectorate has no direct supervisory or administrative authority over the judicial branch, it carries out regular inspections of the courts in order to track civil and criminal cases through the lower courts and to ensure that

[2] It is worthwhile to remember here that the discussion on the competencies of the ministry of Justice took place in year 1998/1999. The amendments to the JSA introduced in November 1998 have extended the Minister's participation in the operational work of the SJC by way of empowering the Minister to make proposals as to the appointment, promotion, demotion, reassignment and dismissal of judges; as to lifting immunity of judges and their suspension; as to initiating disciplinary proceedings against any member of the judiciary; and as to his competence "to draw judges' [except from the two Supreme Courts] attention to failures to observe the rules of handling cases and duly inform the SJC. Even such a limited competencies have been seen by many as a challenge to the principle of separation of powers and is even as compromising the independence of the judiciary. The Constitutional Court has ruled on the constitutionality of Minister's extended competencies and has upheld them in its judgment of 14 January 1999. The judgment states:
The right of the Minister of Justice to table a motion to the effect of the appointment, promotion, demotion, reassignment and dismissal of judges does not violate the principles of separation of powers and independence of the judiciary since the [SJC] is the only organ having the right to take decisions on these issues. When these decisions are being taken, the Minister is not entitled to a vote.

[3] As concerns the evaluation of judges, for instance, the Council elaborates the criteria but the extremely time consuming evaluation itself is done by the judges themselves.

standards regulating the progression of a case through the courts have been met. The *Inspectorate* analyses and summarizes cases and acts of judges and reports back to the SJC in matters that might affect promotion or result in disciplinary action.

97. The role of inspectorate situated inside of the Ministry of Justice in the light of expanding competencies of the SJC is not very clear.

2. Training of Judges

98. Art. 146a introduces to Bulgarian legal system the new institution in charge of training all magistrates i.e. National Institute of Justice. It is a very positive solution. In my opinion it is a very good idea that the Institute being a second/level budget spending unit with the Minister of Justice shall be founded through the budget of the Ministry of Finance and through international programmes and projects. There arise however some doubts concerning the role of the Institute. The judicial authority in most of the countries comprises *exclusively judges* in the strict sense and the special school, institute are created only for training judges. In Bulgaria *judges, public prosecutors and investigators* form part of the judicial branch and all together are called magistrates. In such a situation it could be difficult in practice to organise the training for all the groups by one common Institute of Justice. I have such an impression that this provision is of very general nature and it should be much more detailed described not to be only theoretical solution but exactly working institution.