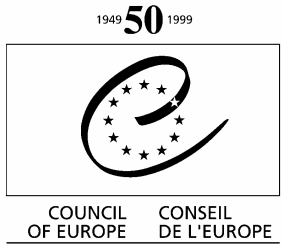

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REFORM OF THE JUDICIAL SYSTEM ACT IN BULGARIA

Comments by

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1. Introductory remarks

The present report refers to the Amendments to the Judicial System Act of the Republic of Bulgaria introduced by the Act passed by the National Assembly on September 30th, 1998. The criteria for the evaluation of these Amendments are taken from the requirements concerning the independence of the judiciary included in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and other related international documents.*

The following comments are therefore concerned with the adequation the Bulgarian Law in question to the mandates contained in the international texts which are quoted below. Three additional observations should be made:

a) These comments do not include a judgement on the constitutionality of the Amendments, i.e., as to whether they are compatible with the Bulgarian Constitution of 1991. That task has already been undertaken by the Bulgarian Constitutional Court as witnessed in its decision of January 14th, 1999.

b) The comments will refer not only to the Amendments' strict conformity (or lack thereof) with the requirements concerning the independence of the judiciary derived from the European Convention, but also to considerations on the suitability of these Amendments from the standpoint of improving the conditions for guaranteeing that independence.

c) It is generally assumed that the main purpose of the very existence of a Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State and, especially, from pressure on the part of the Executive Power in matters such as the selection and appointment of judges and the exercise of disciplinary functions. Therefore, some attention must be given to examining whether the Amendments will permit the Supreme Judicial Council to act as an autonomous entity or, on the contrary, whether they permit the other powers of the State to unduly influence the Supreme Judicial Council's decisions.

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* The relevant legal mandates include:

Art. 6.1, European Convention: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law".

Art. 10, Universal Declaration of Human Rights: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

Art. 14.1, International Covenant on Civil and Political Rights. "In the determination of any criminal charge against him, or of his rights and **obligations** in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

2. Composition of the Council (Articles 17(2) and 18(1) of the Judicial System Act.

The Amendments introduced by the Act of September 30th, 1998 reforming the composition of the Council do not seem to represent any threat to the independence of the Judiciary, nor do they imply any increase of Governmental or Parliamentary influence or presence in the Supreme Judiciary Council. The reforms affecting Articles 17(2) and 18(1) of the Judicial System Act increase from five to six the number of members elected by judicial bodies, a change which does not affect the independence of this organ since the judges' representatives are elected among the judges themselves.

However, a comment must be made in relation to the members of the Council elected by Parliament (eleven members, according to Articles. 130(3) of the Constitution and 16(3) of the Judicial System Act). Since there is no provision in the Constitution or in the Act concerning the majority required for this election, it seems that the ordinary or common majority established by Article 81(2) of the Constitution, (i.e., "a majority of more than one half of the present Members") would suffice. Some concern must be expressed on this point, since it allows the party or parties with a parliamentary majority at the moment of the election to greatly influence the composition of the Council. Requiring a qualified majority (as in other systems) would be a more appropriate means for obtaining a more balanced composition of the Council, thus avoiding any one party from having a decisive influence on the selection of the Council's members.

3. Election of a new Council (Article 81 of the Transitional and Final Provisions)

Under the Amendments Act, transitional provision number 81 of the Judicial System Act provides for the election of a new Judicial Council, and as a consequence, the dismissal of the one previously in existence, well in advance of the end of the latter's mandate. Given the system of election of the members of the Council appointed by the National Assembly, this implies that the new Council will more intensely reflect the tendencies of the present parliamentary majority.

The Constitutional Court has already ruled that the reform of transitional provision number 81 does not contradict the Constitution, since, as stated in the Court's decision, pursuant to Article 4 of the Transitional and Final Provisions of the Constitution "the genuine existence and functioning of these institutions whose existence as organs of the judiciary is stipulated by the Constitution created the opportunities for the judges and the prosecutors appointed there to participate in the election of the members of the judiciary quota as well as to be eligible within this quota as members of the Supreme Judiciary Council."

Since the Constitutional Court is the supreme interpreter of the Constitution, empowered to issue binding interpretations of the constitutional text (Article 12.(1).1, Constitutional Court Act), no further considerations on the constitutionality of the Amendments are warranted. However, some comments are required if Article 6.1 of the European Convention is taken as the criterion for evaluation.

The required independence of judges and courts stipulated in Article 6.1 of the ECHR implies the absence of undue pressures on them in their task of issuing judgements. If the Council of the Judiciary has the power to appoint judges, adopt disciplinary measures, and decide other matters concerning the status of judges, it seems reasonable that this Council should likewise be independent vis-à-vis the other powers of the State. This would at least imply a fixed term of mandate during which the members of the Council would be irremovable, except in cases bod behaviour or the inability to exercise their functions. The possibility of early dismissal of all or some of the members of the Council by decision of a new parliamentary majority decreases the Council members' independence and, therefore, the independence of the judiciary.

It must be pointed out that if Transitional Clause number 4 of the Constitution is interpreted as allowing the dismissal of the Council and the election of a new Council when new structural and procedural laws which implement constitutional mandates are enacted (once the three-year term prescribed in transitional Clause 3(3) of the Constitution has elapsed) the irremovability and, therefore, the independence of the Council members might be seriously threatened. Under the pretext of developing constitutional mandates, any new parliamentary majority could introduce new procedural laws to "implement" the Constitution and thus alter the composition of the Council to "adapt" it to the new organisation of the judiciary.

4. **The Role of the Minister of Justice: appointments (Articles 27(2) and 30(2) of the Judicial Systems Act)**

The presence of the Minister of Justice in the Council, in the capacity of Council President as provided for in Article 130(5) of the Constitution, does not seem, in itself, to impair the independence of the Council. Moreover, in those countries that have adopted similar institutions, the presence of members of the Executive Power in the Councils of the Judiciary is not infrequent. Thus, the Italian Constitution establishes that the President of the Republic shall preside the Council of the Judiciary (Article 104) and the French Constitution makes the President of the Republic President of the Council. Furthermore, in France the Minister of Justice is bi the ex officio Vice President of the Council as well as its President, in the absence of the President of the Republic.

Similarly, the possibility open to the Minister of Justice, in the new paragraph (2) of Article 27 of the Judicial Systems Act, to "present his opinions on the nominations of judges, prosecutors and investigators," does not seem to jeopardise the independence of the Council, since the Ministry of Justice may have useful data and information on the candidates which might aid the Council members in their task of deciding among the candidates proposed for the offices or vacancies to fill.

Concerning new paragraph (2) of Article 30 of the Judicial System Act, several comments should be made:

Paragraph (2) of Article 30 reads as follows:

> "The Minister of Justice and Legal European Integration may address proposals to the Supreme Judicial Council for the purposes of Article 27(1)1, 3 and 4, concerning all positions of judge, prosecutor or investigator."

In European countries the Executive Power frequently has the competence to propose candidates to fill posts on the judiciary. Such is the case of France where the Minister of Justice (pursuant to Article 65 of the Constitution and Organic Law 94/100 of February 5th 1994) has the right to propose to the Council candidates for filling all judicial vacancies, (with the exception of the judges of the Court of Cassation, the First Presidents of the Appellate Courts and the Presidents of the Courts of Grand Instance). Therefore, it would seem that the Bulgarian Minister of Justice's powers to propose candidates for the judiciary are not significantly different from practice generally accepted in the European context. Furthermore, the final decision on the appointments in question is left to the Council.

It should be pointed out, however, that the Bulgarian Minister of Justice's power to propose candidates for the judiciary, if not contrary to the principle of independence of the Council of the Judiciary, --and, in general, to the principle of judicial independence—seems to contradict one of the more relevant justifications for the existence of a Judiciary Council, i.e., to reduce or eliminate the influence of the Executive power in the appointment of judges. The method of election of the members of the Council appointed by Parliament by common or ordinary majority, and the possibility of the existence of "governmental candidates" for judicial vacancies could very possibly originate a strong tendency to appoint those judges supported by the party or parties in power, in clear contradiction with the purposes generally pursued by the creation of Councils of the Judiciary.

5. The role of the Minister of Justice: disciplinary proceedings (Article 171(2) of the Judicial System Act)

Article 171(2) of the Judicial System Act in its reformed version, reads

> "The Minister of Justice and European Legal Integration may advise the initiation of disciplinary proceedings against any judge, prosecutor or investigator."

Once again, in European constitutional systems it is not unusual for the Minister of Justice to have some powers to initiate disciplinary proceedings against members of the judiciary. And, since it is as an independent entity (whether a court or the Council) the one that has the final word on the matter, the independence of the judiciary may be considered to be guaranteed. The French and Italian examples may also serve to illustrate this case: the Ministers of Justice in those countries may refer to the Council those acts they consider constitute disciplinary offences.

However –as stated previously-- the peculiarities of the Bulgarian Supreme Council of the Judiciary derived from the fact that Parliament appoints eleven of its members by a simple majority vote,

may lead us to consider that the prerogative provided under Article 171(2) (new version) of the Judicial System Act could eventually place undue pressure on the members of the judiciary, since it leaves judges open to the possibility of disciplinary sanctions in cases in which they disagree with the wishes of the Executive Power. It should be underscored that the eleven members of the Council appointed by the Parliament by and "ordinary" simple majority, will very likely reflect (in a parliamentary system), not only the preferences of the Parliamentary majority, but also the one of the majority- sustained Government. In other words, any initiative by the Minister of Justice on disciplinary matters against a member of the judiciary will very likely find considerable support from a sizeable part of the members of the Council. The leverage this situation gives the Executive in matters concerning the judiciary should not be overlooked.

Therefore, to suppress any direct interference of the Government in disciplinary proceedings it might be preferable to grant the power to advise the initiation of disciplinary proceedings to the Inspectorate. Although appointed by the Minister of Justice and European Legal Integration, inspectors must have the approval of the Council to be appointed (Article 36.a of the Judicial Systems Act), and therefore, they offer a greater guarantee of impartiality.

6. The role of the Minister of Justice: warnings to the Courts (Article 172 of the Judicial System Act)

Art. 172 of the Judicial System Act (amended) grants the Minister of Justice and European Legal Integration the power to "bring to the attention of regional, district and appellate judges (...) what appear to the Minister to be irregularities in their work of initiating and processing certain cases...".

As it is well known, the main goal of the independence of the judiciary is to guarantee that judges and courts will be subject only to the Law in taking their decisions on the cases subject to their jurisdiction, without the interference of any external influences other than the Law. The parties to a proceeding may point out the irregularities they perceive, either to the Court ruling on this case, or to a superior court, using the legal remedies at their disposal. What the principle of independence of the Judiciary excludes is interference in the judicial process from any outside source that is not a party to the proceedings.

The provisions of Article 172 of the Judicial System Act provide for precisely that type of intervention by the Minister of Justice, which is not a party to the proceedings. The Minister may warn the Court that the manner in which the proceedings are being conducted is (in his opinion) wrong or incorrect. Given the powers and privileged position of the Executive, such warning may represent, not only a pressure on the Court to "mend its ways" in the direction suggested by the Minister, but also a disadvantage for one or both of the parties to the proceedings, thus affecting the impartiality of the judicial process. Furthermore, it is difficult to understand the meaning of the concluding provision "and the Minister shall notify the Supreme Judicial Council accordingly," since the powers of the Council are of an administrative and governmental nature, rather than jurisdictional.

Thus, 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 interference in the judicial process.

7. Authorisation of leaves (Article 190(2) of the Judicial System Act)

Article 190(2), introduced by the Amendments Law, regulates the authorisation of judges' leaves. Its subparagraph 4 establishes that the Minister of Justice shall have the power to authorise leaves of absence of the presidents of district and appellate courts. This provision may be considered to confer on the Executive Power an administrative competence over certain judges that contravene the principle of independence of the judiciary. It seems that it would be more coherent with this principle to confer that competence to the Council of the Judiciary.

8. Some general conclusions.

If the reforms introduced by the Amendments Act were analysed separately, one by one, it would be difficult to consider that any one of them represents a threat to the independence of the judiciary. Equivalent measures may be found in European countries where the independence of the judiciary is taken for granted.

Considered as a whole, however, the reforms may be cause for some concern. The Judicial System Act, prior to its reform, already contained regulations that could be considered detrimental to judicial independence, since following constitutional mandates, it established too close relationship between the Supreme Judicial Council and the ruling majority in Parliament, as eleven members of the Council were (and still are) to be elected by the National Assembly without requiring a qualified majority vote. Two main additional reasons for concern may be found in the amended Act: a) increased powers of the Minister of Justice in relation to proposing candidates and advising on disciplinary measures, and b) the dismissal of the Council and the election of a new one, whose eleven members elected by parliament would undoubtedly reflect the ideology and political tendency of the parliamentary majority supporting the government.

All in all, it is difficult to avoid the impression that the main goal of the reform was to increase the influence of the Executive power on the Supreme Judiciary Council and, in an indirect way, on the Judiciary Power itself. This appearance, in itself, could damage the public confidence in the Courts and, therefore, reduce rather than increase, their ability to cope effectively with the problems of criminality facing the Bulgarian Society.

In the long term, probably the best may to transform the Supreme Judicial Council into a body protected from external influences (or the appearance thereof), would be to alter, with or without constitutional reform, the manner of electing Councils members, making it more difficult for the parliamentary majority of the moment to almost decisively (by choosing eleven members of the

Council, of the thirteen who constitute a ruling majority) determine the composition of the Council. In the meantime, and although the new powers assumed by the Executive by virtue of the reform of the Judicial System Act are not directly incompatible with a regime of judicial independence, a judicious and restrained use of these new powers would be highly recommended.