



Strasbourg, 27 February 2009

CDL(2009)039*

Opinion No. 515/2009

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW
ON AMENDMENTS TO THE LAW ON JUDICIAL POWER
OF BULGARIA**

**by
Mr James HAMILTON
(Substitute Member, Ireland)**

** This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The opinion of the Venice Commission is sought in relation to a draft law on amendments to the Law on the Judicial Power of Bulgaria (otherwise known as the Judiciary System Act (JSA)). The law is a lengthy, comprehensive and detailed provision of some 409 Articles which was adopted in 2007. It covers a variety of matters, including general principles, the Supreme Judicial Council, its Inspectorate, courts and court hearings, the prosecution office, the National Investigative Service, and the status, appointment, disciplining and dismissal of judges, prosecutors and investigating magistrates.
2. The draft law is itself an extensive document making amendments to many of the provisions of the JSA. Most of the amendments are of a technical nature, many of them dealing with matters such as changes in time limits and the like. The principal changes effected by the amendments would seem to be the following:-
 - 1) Changes intended to reorganize the investigative service and to strengthen the Prosecutor General's control over it.
 - 2) Changes relating to the Supreme Judicial Council. These represent some strengthening of that body.
 - 3) A provision requiring the Supreme Judicial Council to adopt a Code of Ethics for all judges and prosecutors.
 - 4) Changes to the provisions relating to discipline.
3. It does not appear that the Venice Commission was asked to give an opinion on the JSA itself and it is not proposed in these comments to attempt to do so now or to compare the JSA with the earlier legislation. I will make reference to one or two of its provisions where this seems relevant.
4. So far as concerns the investigation service, Article 148 of the JSA as amended provides for a unified and centralized National Investigation Service (NIS). The district investigative services are abolished and replaced by territorial units within the NIS. The Prosecutor General, under Article 141, determines the priorities of the NIS and receives reports from its Director. He or she also receives reports from the Ministers of Defence and the Interior on their police investigators. Under Article 138 specialized inter-agency investigative units can be established under the direction of a prosecutor nominated by the Prosecutor General.
5. Incidentally, it may be worth noting that the JSA provides a highly hierarchical structure in the prosecutor's office, with superior prosecutors all the way up to the level of Prosecutor General entitled to give directions to and receive reports from junior prosecutors in relation to specific cases. Given that there has long been reported to be a problem with corruption among some prosecutors in Bulgaria this seems to be an appropriate structure to counter this problem. However, it may also

be noted that the prosecutors retain elements of powers typically found in the traditional Soviet-style prokuratura model. Article 145 gives prosecutors wide powers to obtain documents and information, carry out inspections, summon citizens and representatives of legal persons, and to issue binding legal orders to all state bodies, legal persons and citizens. These powers appear to be exercisable without recourse to courts of law to obtain warrants or other authorization. In addition Article 145(5) refers to prosecutors' rights to protest illegal acts (although it is not clear to the writer that the prosecutor has the final say and it may be that a court can uphold the legality of the act protested against). Under Article 146 prosecutors can order immediate release from detention, again without court intervention. The Venice Commission has in various opinions been critical of the exercise of such powers by prosecutors without court intervention or supervision.

6. There are a number of changes made to the powers of the Supreme Judicial Council. The Venice Commission has in previous opinions been critical of the role of the Minister of Justice as chair of the SJC albeit he does not vote. While the Minister remains as chair another member can now chair the meetings in the Minister's absence. While it would still be preferable if the Minister did not act as chair a reduced role for the Minister would represent a step in the right direction.
7. The SJC is to adopt a Code of Ethics. The adoption of a formal code of ethics represents a welcome step. Its use as a basis for disciplinary proceedings aids legal certainty concerning what rules are applicable. The SJC is also to determine the number of judicial officials other than magistrates. It will have a power to recommend inspections of judges and prosecutors outside the annual programme. It will also have quicker and better access to information.
8. Nevertheless some problems previously identified by the Venice Commission in previous opinions have not been addressed. The system for election of the parliamentary component of the SJC still gives rise to a risk of politicization. The combination of powers in relation to judges, prosecutors and investigators in a single judicial council (such as powers of appointment and discipline) is problematical.
9. There have been some changes in relation to disciplinary powers which generally seem positive. The definitions of what constitute disciplinary offences in Article 307 seem more precise than heretofore and the reference to violation of the Code of Ethics is welcome as its adoption should provide greater clarity. Where a person is suspended pending criminal proceedings it is made clear there is to be no dismissal until the proceedings terminate. There is no mention of immunity for judges, formerly the subject of criticism by the Venice Commission.
10. The law provides for hearings before a disciplinary panel. (Articles 317-320) I cannot find any provision concerning how this body is selected. The actual decision except in minor cases has to be adopted by the SJC (Article 320). The provision whereby 1/5 of the members of the SJC can propose a disciplinary sanction is problematic since in such a case the accusers also act as judges. If members of the SJC bring the accusation they should not decide on it also. The provisions concerning the right of the judge or prosecutor accused to be heard and represented before the panel seems appropriate but there is no mention of a right to be heard and represented before the SJC which takes the actual decision. There is provision for appeal to a court. (Article 323)

11. Under Article 195 judges and prosecutors may not be members of political parties or organizations with a political goal or who carry out political activity. While this may be justifiable at present in the actual situation of Bulgaria it is recommended that its necessity be kept under review from time to time.
12. Finally, Article 67(2) of the Act provides for court assessors in military courts who may be generals, admirals, officers or non-commissioned officers in permanent military service. They take part in court hearings. I am not aware of any safeguards in the legislation to ensure that serving military personnel acting as court assessors are independent and impartial unless the requirement in Article 68(3) that they be designated by the general assembly of the judges of the Appellate Military Court on the proposal of their commanding officers can be so regarded (see *Findlay v United Kingdom* (1997) 24 221 97/8).

Conclusion

13. The proposed amendments do not appear to raise any particular objections and on the whole appear positive. However, a number of deficiencies in the judicial system criticized in previous Venice Commission reports have yet to be addressed.