

Seminar on: „Bulgaria and Romania on the Eve of Their Accession to the EU – Achievements and Challenges in the Judicial Systems”, organized on December 15 and 16 in Sofia by Konrad Adenauer Foundation

Intervention of Ms. Anita Mihailova – member of the Supreme Judicial Council of the Republic of Bulgaria:”Achieving More Independence and Accountability of the Judiciary – Main Players, Main Themes”

## THE SUPREME JUDICIAL COUNCIL OF THE REPUBLIC OF BULGARIA – ACHIEVEMENTS AND CHALLENGES

**The principle of independence** of the judiciary is enshrined in the Constitution of the Republic of Bulgaria. In general terms, this principle implies the exercise of the powers of judicial authorities both in accordance with the effective legislation and under the conditions of non-interference by the legislative and executive branches.

**The safeguards that ensure the observation of the independence principle** are also regulated in the Constitution and are further developed in the effective Judiciary Act.

On the one hand, the introduction of immovability and functional immunity is in itself **a guarantee for magistrates’ personal independence** in Bulgaria. The manifestation of this guarantee is interrelated with professional competence and responsibilities under the conditions of transparency and public control. Professional competence implies the use of appropriate methods in order to ensure that magistrates are appointed, promoted, assessed, and receive professional training in full conformity with the requirements of equal treatment, objectiveness, and competition.

On the other hand, the establishment and functioning of the Supreme Judicial Council as a body of the judiciary is **an institutional safeguard**, which ensures that the principle of the independence of the judiciary is observed.

The safeguards for observing the principle of the independence of the judiciary are directly related to magistrates’ **responsibility** before the public, the other authorities, and the implementation of internal control within the judiciary, as a whole.

The purpose of having constitutional arrangements for the responsibility of the judiciary is to ensure the **balance** of the guaranteed principle of independence.

Hence the first issue to raise concerns the **interaction among the three powers and the accountability of the judiciary**.

What comes second is the requirement for the existence of legal mechanisms regulating the **responsibility of the judiciary before the public**.

Thirdly, though of particular relevance, the implementation and functioning of a comprehensive **mechanism for internal control within the judiciary**.

*Any democratic society aims at having these three essential forms of interaction and control regulated in the legislation in such a way that would ensure real responsibility of the judiciary, WITHOUT UNDERMINING THE PRINCIPLE OF INDEPENDENCE.*

The Bulgarian state has also made such efforts over the last years of democratic development. This is proved both by the amendments to the Constitution and the Judiciary Act and the institutional development of the Supreme Judicial Council over recent years. The processes of legislative changes and institutional decisions have been dynamic and have sometimes lacked consistency of the goals pursued, which has undoubtedly affected the course of the judiciary reform in Bulgaria. Nevertheless, the observers of the judiciary reform processes in our country have emphasized the positive outcomes and have gradually downsized the critical areas within the framework of the judiciary.

*As a representative of SJC I would like to make a brief analysis of the place and role this body has had over recent years in terms of securing the independence of the judiciary, as well as the tools and mechanisms applied by SJC in order to strike the balance between the independence and the responsibility of magistrates.*

Firstly, I will point out a specific feature of the Bulgarian judicial system, namely the fact that, unlike most European countries, it consists of three groups of magistrates – judges, prosecutors and investigators.

**The structure and composition** of SJC are a significant element in the analysis of the independence of this supreme body of the judiciary.

The Supreme Judicial Council was established in Bulgaria as a constitutional body when the currently effective Constitution came into force on July 13, 1991. This was both an expression of the political will for self-governance of the judiciary and a guarantee for ensuring its independence from the other two branches – the legislative and the executive. In its very initial form, SJC was the germ of the idea produced by the political forces and the executive. The way in which the body has evolved in terms of staff recruitment and development, and management show that the legislator also implied the idea of interaction among powers and control. Eleven of SJC's members are elected by the general assemblies of three groups of magistrates, and another eleven are elected by the Parliament with ordinary majority. There are specific requirements that the members elected have to meet, such as a minimum number of years of service in the legal profession, as well as a minimum of five years of service as magistrates.

The other three members of the Council are members *de iuris* – the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and the Prosecutor General. It is the Minister of Justice that chairs JSC's sessions, but he does not have the right to vote. Therefore, more than one third of the members of the Council are elected by the legislative branch, while a representative of the executive chairs the sessions of the supreme body of the judicial power. The issue as to whether this body of the judiciary, as it is structured, is able to secure magistrates' independence has been raised on numerous occasions. Has the constitutional idea about the interaction among powers not become a form of dependence of the judiciary both from the legislative and the executive? A variety of viewpoints have been shared, each of them presenting a number of reasonable arguments. As for my impressions from the Supreme Judicial Council, seven out of the eleven members of the parliamentary quota are active magistrates, two are lawyers, and two are professors in law, none of them being a member of a political party. Therefore, there are a total of 21 active magistrates among SJC's members, which shows that **the legislative power has aimed at ensuring a strong presence of the magistrates**, while the participation of persons with other professions has been minimized. The lack of members with specific commitments to political parties is yet another proof that **the legislative power has aimed at ensuring SJC's independence**.

As regards the participation of the Minister of Justice in his capacity of a chair of SJC's sessions, I believe that the role of the Council in society and its development as an independent body require that it should have **its own chairperson elected among SJC's members**. Thus, the functions of the Minister of Justice as a representative of the executive power will be distinguished from the functions of SJC. In parallel, this will bring about additional institutional independence of the body. It will contribute both to the unity of the judiciary and the better functioning of the judicial system as one single whole. It will disperse any doubts with regard to the effectiveness of the principle of the division of powers. This is the line of the recommendations made by the European Commission in the Monitoring Report of May 2006, which have been incorporated into the June 2006 Action Plan of the Bulgarian Government.

The fourth amendment to the Constitution of the Republic of Bulgaria, which is being discussed in the National Assembly, provides, in its sections regarding the accountability of the judicial power, for an amendment to the Third Amendment, which, at first glance, does not seem essential. The amendment implies that the annual reports of the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General will be submitted to SJC for discussion, and SJC shall submit them to the National Assembly. Hence the conclusion that the legislator has reconsidered the idea about the accountability of the judiciary **by assigning the accountability to SJC in its capacity of the supreme body of the judiciary which unites all the relevant units**. It is obvious that the legislator is not far from the idea of having SJC's

functions distinguished from the ones of the Ministry of Justice; moreover, as a result of the Third Amendment to the Constitution the Minister of Justice received extremely wide powers. This distinction between the executive and the judiciary prompts the conclusion about the need for the Supreme Judicial Council to have its own chair.

The analysis of SJC's human resources and operation requires addressing the issue as to whether **a standing body** would be more appropriate for the implementation of the full range of the Council's functions. There are similar practices in most European countries, which provide a positive model. Some of the leading magistrates in Bulgaria have promoted in public the idea about constituting the Supreme Judicial Council as a standing body. I share this idea, as I believe that SJC's role in terms of securing the independence of the judiciary has been increasing. Being a supreme body in charge of managing human resources in the judiciary, the Council has taken over all the functions and responsibilities related to magistrates' career development. In order for this development to be objective and based on the principles of professionalism, competition and transparency, the members of this body should be entirely committed to the functions assigned to them.

This will be the **safeguard for the magistrates' individual independence from administrative managers.**

An alternative to the existence of SJC as a standing body is the idea about the establishment of a **separate standing assessment and supervision body with the Supreme Judicial Council.** This idea is included in the Action Plan of the Government of June 2006 and it is the outcome of some research and recommendations made by Bulgarian, Spanish and German experts within the framework of the Twinning Project implemented by SJC: *Strengthening the Administrative Capacity of SJC and Improving Magistrates' Statute.* The purpose of setting up such a body is to ensure the centralization of the activities related to magistrates' appointment, promotion, assessment and disciplinary liability, which will contribute to reducing the influence exercised by administrative managers and will enable SJC to perform these legally regulated activities under the conditions of objectiveness, impartiality and respect for the professional achievements and qualities of each magistrate.

The Fourth Amendment to the Constitution of Bulgaria provides for the establishment of an **Inspectorate with the Supreme Judicial Council** – a standing body with seven members, elected in conformity with the term of office of the National Assembly. The Inspectorate is expected to perform **control over the activity of all magistrates** with no right to rule on the substance of judicial acts. The legal regulation of this new body, whose establishment is to be addressed by the National Assembly, has aroused a lot of debates. One of the main issues raised concerns the doubling of the functions of this new body and the functions of the Inspectorate with the Ministry of Justice. These two bodies, however, are a derivative of the legislative and the executive, respectively. While they both are

assigned control functions with respect to the judiciary, a logical question to ask is whether this might affect the independence of the judiciary and to what extent the control to be exercised by this new body – envisaged in the Fourth Amendment – might be conducive to influencing the judiciary. *I believe that the proposal about the creation of an internal standing assessment and supervision body with SJC, which was also promoted by the Bulgarian Government and included in the Action Plan of June, as a derivative of the judiciary itself provides both a higher level of safeguards in terms of independence and the implementation of **self-control within the system.***

The Supreme Judicial Council, in its current composition, has operated under the conditions of a dynamic development of the legal framework, higher requirements set by the other two powers and the public.

Nevertheless, I believe that the Council has successfully met most of the challenges. I would like to mention but some of these challenges, which, in my opinion, are relevant and directly related to guaranteeing the principle of the independence and accountability of the judiciary:

- The Council's activity is **open**, which secures transparency and allows for control to be exercised both by the magistrates and the public. The sessions of SJC are open. The minutes of the sessions and the body's decisions are published on the Council's web site. Each session is followed by a press conference with representatives of the media. SJC's practice in this respect has been consistent.
  
- After long discussions, analyses and adoption of the best European practices, an **Ordinance on Magistrates' Assessment** was passed as secondary legislation of SJC. The Regulation came into force on October 1, 2006. The detailed and comprehensive regulation of the assessment criteria and indicators, as well as the regulation of auxiliary assessment boards whose members are elected by the National Assemblies of the respective units of the judiciary, as a safeguard of objectiveness in the assessment process is an indisputable achievement of this legal act. The assessment criteria defined in the Ordinance – which were designed within the framework of SJC's Twinning Project – have been incorporated in the draft of the new Judiciary Act in line with the recommendations made in the Action Plan of the Bulgarian Government.
  
- As an implication of the latest amendment to the Judiciary Act, which introduced the competition system for all the positions in the judiciary, the relevant amendments to the **Competitions Ordinance** of SJC were adopted. Ever since competitions have been held in conformity with the relevant legal requirements. In my opinion, the competition approach should be limited

only to the initial appointment to a position within the judicial system. As for further promotion, the principle of career development should be applied. Otherwise, SJC's assessment functions will be underestimated, which might undermine the career development of magistrates.

- **The disciplinary practice** of SJC has improved. There have been an increasing number of disciplinary proceedings against magistrates who do not meet their obligations within the legal time limits and do not comply with the rules of good professional behavior. These proceedings have had a favorable impact on the magistrates' discipline and have contributed to improving the overall style of performing professional duties within most of the judicial bodies. The disciplinary proceeding proved to be a good mechanism of magistrates' personal responsibility and a balancing mechanism of independence.

- **The interaction between the legislative and the judiciary** has improved. It has become good practice to jointly discuss drafts of laws concerning the judiciary, draw up positions and submit them to the Legislative Committee of the National Assembly. Upon SJC's initiative, the positions and recommendations of foreign experts – Spanish and German magistrates working as consultants under SJC's Twinning Project – in relation to legislative initiatives concerning the judiciary have been timely submitted to the Ministry of Justice

**The above outline of the activity of the Supreme Judicial Council in relation to the independence of the judiciary does not claim to be comprehensive, but it casts some light both on the important achievements so far and the challenges before us.**