

FINDINGS

FROM A CIVIC MONITORING OF THE PROCEDURE FOR HEARING THE NOMINEES FOR INSPECTORS AT THE INSPECTORATE TO THE SUPREME JUDICIAL COUNCIL CARRIED OUT BY THE PARLIAMENTARY LEGAL AFFAIRS COMMITTEE ON DECEMBER 15, 2011

BULGARIAN INSTITUTE FOR LEGAL INITIATIVES (BILI)

Introduction

As part of the “Transparent Judicial Appointments Initiative” the Bulgarian Institute for Legal Initiatives (BILI)¹ performed civic monitoring over the procedures establishing the leadership on key institutions within the judicial power. The present monitoring was performed by three BILI representatives – Bilyana Gyaurova-Wegertseger, Yoanna Mikova and Hristo Ivanov.

These findings are supported by Ms. Antoaneta Tconeva, President of the Institute for Public Environment Development, who was also present at the hearing.

This evaluation of the procedure carried out by the parliamentary Legal Affairs Committee used as its main standard the recommendation of the European Commission from the July, 2011 Report on the progress in Bulgaria under the Co-operation and Verification Mechanism. According to it when it comes to the appointments within the judicial power they should:

*“fully respect the principles of transparency, independence, integrity and professional merit”.*²

Important additional evaluation standard is provided by measure 2.1.2 of the Judicial Reform Strategy³ of the Bulgarian Government providing for:

“Introduction of guarantees for publicity and competitiveness in the procedure for election of Supreme Judicial Council members from the parliamentary quota, including by public announcement of the nominations sufficient time before the election with a view to holding a public discussion for them, an obligation to publish platforms, conducting public hearings of the candidates.”

We consider that this measure should be construed broadly to include the Inspectorate of the Supreme Judicial Council (hereafter “SJC”). An additional argument for relying on it is the forthcoming election of a new Supreme Judicial Council and the importance that the conclusions from the present monitoring are applied to that procedure.

Findings

1. „Procedural rules for the hearing of the candidates for inspectors at the Inspectorate to the SJC”⁴ (see Appendix I below “Rules”) were adopted in an extremely opaque manner, making

¹ BILI is a nonpartisan, independent nongovernmental organization, registered in public benefit which has specialized in the area of judicial reform and the establishment of the rule of law. BILI is financed exclusively by internationally acknowledged donors and its grants are targeting the scope of work of the organization.

² http://ec.europa.eu/dgs/secretariat_general/cvm/docs/com_2011_459_en.pdf

³ “Strategy to Continue Judicial Reforms in the Conditions of Full European Union Membership”, available in English at http://www.justice.government.bg/new/Documents/Ministry/Strategy_EN_FINAL_25.06.2010.doc

civic participation and control impossible: as is evident from the attached Minutes, the Rules were adopted at a “Retreat session” of the Legal affairs committee (hereafter “Committee”) carried out outside Sofia in the town of Varshec on December 05, 2011 – a mere ten days before the actual hearing which took place on December 15, 2011. Neither a Notice of an intention to adopt such Rules nor a Draft was announced in advance. It is obvious that a period of just ten days between the adoption of the Rules and the Hearing is completely insufficient for the forming of public opinion on them, not to mention participating in the actual procedure.

2. The actual hearing was reduced to a mere formality: The procedural Rules foresee the absurd “up to 2 minutes” for introduction of the candidate by the nominating MP (§ 2) and personal introduction of the candidate “up to 3 minutes” (§ 3). In essence the entire hearing of all 12 candidates for this key institution for the quality of the jurisprudence and the judicial reform in the country lasted for less than three hours. Similarly, the procedural Rules suggested in the final report⁵ (see Appendix II below “Report”) of the Committee for the procedure of the election of inspectors by the plenary of the Parliament also foresee up to two minutes for introduction of the candidates (§ 1), deliberations on all candidates **altogether** (§ 2), regardless the fact that they will be elected individually, and three minutes for each candidate to reply to a question if there is such (§ 3)⁶.

3. The hearing procedure completely isolated the public:

3.1 The nominations were kept in secret until the very last moment: The deadline for submission of the nominations foreseen in the Rules, was December 13, 2011, only two days before the actual hearing (December 15, 2011). This alone made it completely impossible for the civil society, the media and the magistrates to get acquainted in advance with the nominations and to bring up relevant questions regarding their professional experience and behavior. However, even this tight deadline was violated and the nominations were announced only 36 hours before the hearing by the Committee.

3.2 The documents requested from the candidates and the MPs who have nominated them are scanty and don’t provide an adequate basis for deliberating on the fitness of the candidates and the motives for their nomination: a reference to the website of the Parliament⁷ shows that none of the attached biographies is more than one and a half pages long, the requested “Cadre Inquiries” (References) are not published, motivations on behalf of the nominating MPs are lacking. We have no reasons to believe that the Performance Assessments that are prepared for each magistrate have been considered in any way: they are neither included in the necessary nomination documents, nor were they mentioned during the hearing. Moreover, among the nominating MPs there is one who has a pending criminal case against him.

3.3 The procedure does not foresee in any way possibilities for civic participation - i.e. asking questions or presentation of statements on behalf of nongovernmental organizations (including professional ones). Despite the fact that on December 14, 2011, BILI has requested access to the hearing in accordance with the parliamentary rules, the Chairwoman of the Committee has denied access of the organizations’ representatives motivating it with lack of seats in the hall. Only after

⁴ Procedural rules for hearing of the candidates for inspectors in the Inspectorate at the SJC, adopted with Protocol № 107, from December 05, 2011:

<http://www.parliament.bg/bg/parliamentarycommittees/members/226/steno/ID/2271>

⁵ „Report, entry №: 153-03-142/16.12.2011 REGARDING: Hearing and deliberation on the nominations for inspectors in the Inspectorate at the SJC”,

<http://www.parliament.bg/bg/parliamentarycommittees/members/226/reports/ID/3132>

⁶ The rules according to which the parliament elected two members of the SJC from the parliamentary quota were similarly not adequate. What is more - they did not provide for any hearing in the Committee, a fact which goes into a complete contradiction with the more important governance and policy-making mandate of the SJC.

⁷ <http://parliament.bg/bg/parliamentarycommittees/members/226/documents> (only in Bulgarian)

the intervention of other MPs and journalists and almost 40 minutes of waiting, BILIs' representatives were granted access.⁸

4. In practice, the Committee failed to evaluate in substance the integrity and fitness of the candidates for the Inspectorate to the SJC with regard to its concrete constitutional role:

4.1 Neither the Rules nor their practical implementation foresee an *in-depth check up* of the professional experience, the past and the existence of some corruption factors of the nominated candidates. Neither the Committee nor some other bodies are performing detailed preliminary check up of the candidates. The required "Cadre Inquiry" (Reference) is nothing more than a formal document. It does not in any way guarantee the integrity of the candidate. At no stage of the selection an analysis of the relevant facts from the obligatory Magistrates' Performance Evaluations, their Asset Declarations or Declarations of Conflict of Interest was performed. No questions were asked of some of the candidates and those that were put forward did not do much to clarify the background, the motivation or the vision of the nominees. The *ad hoc* questioning about affiliation to secret and public organizations which might lead to some dependence is not related to any possibility for a follow up checkup in the existing registers or by the civic organizations and the media. Despite the attempts to isolate the public opinion from the process of evaluating the nominees, BILI provided all members of the Committee with a material raising some serious questions about one of the candidates and his work as a Chair of the Ethics Committee at the SJC. Not a single question was asked during the hearing of this nominee. There was also no substantive discussion on the question whether magistrates in the age of retirement should be included in the composition of the Inspectorate.

4.2 The Committee failed to discuss the issue whether the candidates individually or collectively (the majority of which are prosecutors and investigators) possess the necessary expertise to perform relevant checkups on all aspects of administration of justice, including the specific work of the judges on civil, commercial and administrative cases: the attempt of one of the members of the Committee to ask one of the nominated prosecutors this particular question, was received with protests from the other members of the Committee and the Chairwoman stated that no more such questions should be asked.

4.3 The Committee completely ignored the problem that if the new composition of the Inspectorate is elected among this pull of nominees, the Inspectorate will be dominated by non-judges and this inevitably will raise concerns about the legitimacy of checkups on judges: only two of the nominated are acting judges and one of them is working at a district level. The majority is coming, and after the running out of their mandate as inspectors (with exception of the candidates who are in the age of retirement), will be returning to the Prosecution Service. The Committee ignored this issue even after it was raised by the current Chief Inspector who was present during the session and by one MP. BILIs' statement (see Appendix III) citing Decision № 8/2005 of the Constitutional Court on cons. Case № 7/2005, according to which the court is "the main bearer of the judicial power" and the recommendations of international observers, that the decisions on issues related to the career of the judge shall be taken by judges - Opinion № 515/2009 of the European Commission for Democracy through Law (the Venice Commission), Resolution № 1730 (2010) of the Parliamentary Assembly of the Council of Europe (section 7.2.2), was also ignored.

5. The Committee concluded the hearing without making an assessment or commenting in any other way on the nominees:

⁸ See a report in „Dnevnik” news website (in Bulgarian): http://www.dnevnik.bg/bulgaria/2011/12/15/1531412_kandidatite_za_sudebni_inspektori_uveriha_deputatite/

5.1 The provided for by the Rules (6) debate was not conducted. Besides asking questions, the members of the Committee did not comment in any way on the way the nominees presented themselves or their fitness for the office.

5.2 The prepared Report does not contain information on the performance of the individual nominees that would inform the voting by the other members of the parliament: in particular the MPs will elect a new composition of the Inspectorate without the knowledge that not an insignificant number of the candidates demonstrated uncertain knowledge of the particular powers of the Inspectorate, how they differ from those of other similar institutions as well as their correspondence with criminal and disciplinary procedures. MPs will also know nothing of the particular motivation of each nominee. And, perhaps most importantly, they will not learn of the fact that there are honorable professionals among the candidates and who they are, neither will this be made known to the Bulgarian public and the rest of the magistrates in a procedure worthy of the high calling of a servant of justice.

6. The conduct of the election by the plenary of the Parliament promises to be no less opaque and perfunctory: at the time of the hearing there was no information on when will the election of inspectors by the plenary take place. This makes planning the (attempts at) participating by the civil society difficult. Later on, the election was included in the agenda for December 20th, 2011, less than a week after the hearing. A period that makes impossible any public debate or reaction and it is difficult to not assume that it is designed for this effect exactly.

Conclusion

The manner of conducting the mandated by art. 46 of the Judicial System's Act hearing by the Legal Affairs Committee of the Parliament is manifestly and consistently opaque and at no stage includes assessment of the integrity and the professional merits of the candidates. This is evident both from an analysis of the "Rules" and from the monitoring of the conducted hearing by the Committee. There was no check of the background and past performance of the nominees, no sufficient examination of their motives and visions and thus – no basis to form an objective and merit-based opinion. In essence the Committee failed to exercise its due care and bare its political responsibility to ensure that only the best and freest of any doubts and influences will be elected. It also made every effort to stonewall the civil society whose participation and scrutiny could have compensate for its failure.

The observed manner in which the Parliament exercises its powers in appointing inspectors to the Inspectorate with the Supreme Judicial Council is more than simply corrosive of the independence of both the appointees and the institution as a whole. It is part of a consistent practice of making appointments to the judicial branch in a way that stonewalls the civil society, hides the nominees from public scrutiny, fails to examine of all relevant circumstances in their background and professional behavior, and fails to apply objective merit-based criteria relevant to the particular office for which the appointment is being made. This approach erodes the public trust in the judicial branch, denies the empowerment of a public mandate to the appointees and opens the door for electing people of doubtful qualities and motivation and burdened by unanswered questions about their past that make them dependent on the opaque majorities that have supported them. It is easy to trace how this tainted manner of forming the leadership of key judicial branch institutions replicates itself in the way appointments and other discretionary powers are performed in the judiciary itself.

Recommendation

On May 5, 2010 in an open letter (Attachment IV) to the President of the Parliament Ms. ---- [check spelling] eleven leading Rule of Law NGOs proposed detailed draft rules to be adopted in reform of the parliamentary procedure for appointing of high public officials, including in the judicial branch. It

is important that the Parliament conducts inclusive public discussion on the basis of these proposals and amend the Judicial System Act and the Rules on the Structure and Proceedings of the National Assembly. The implementation of the reformed procedure should be subjected to civic monitoring for its compliance with the principles of transparency, inclusiveness, objectivity and relevance to the particular office. It is of particular importance that this effort is geared toward reforming the procedure for electing members of the SJC from the parliamentary quota (sometimes in the fall of 2012). In this respect, it is imperative that the Council of Ministers exercises its legislative initiative and the Parliament supports the implementation of the cited in the Introduction measure 2.1.2 from the “Strategy”.

Appendixes:

I. Procedural rules for hearing of the candidates for inspectors in the Inspectorate at the SJC, adopted with Protocol № 107, from December 05, 2011

<http://www.parliament.bg/bg/parliamentarycommittees/members/226/steno/ID/2271>

II. Report, entry №: 153-03-142/16.12.2011 REGARDING: Hearing and deliberation on the nominations for inspectors in the Inspectorate at the SJC,

<http://www.parliament.bg/bg/parliamentarycommittees/members/226/reports/ID/3132>

III. Letter to the members of the Legal Affairs parliamentary Committee from December 14, 2011

http://www.bili-bg.org/cdir/bili-bg.org/files/IVSS_let_2_15.11.2011.pdf

IV. Open Letter to the Chairwoman of the Parliament Mrs. Cecka Cacheva supported by eleven NGOs from May 05, 2010

http://preview.bili-bg.org/cdir/bili-bg.org/files/Letter_VSS_NS.pdf