

TO:

THE COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

Sofia, 21 September 2017

MEMORANDUM OF BULGARIAN NON-GOVERNMENTAL ORGANISATIONS

Re.: Report of the Committee on Legal Affairs and Human Rights “New threats to the rule of law in Council of Europe member States: selected examples” and related draft resolution adopted by the committee on 5 September 2017

We, the undersigned Bulgarian non-governmental organisations (NGOs) welcome the initiative for evaluation and analysis of the state of the rule of law in Bulgaria, and in other member States as well as of the related issue of the independence of the judges. Serious problems persist in this area in a number of member States, which are getting even worse in some respects. As NGOs that are actively working on monitoring these areas, we have long considered that periodic monitoring and PACE resolutions on this subject are an important means of maintaining and improving democratic standards, the independence of the courts and the rule of law, and we believe that the resolution proposed by the Committee will contribute substantially in this direction. With this memorandum, we would like to express our opinion on its content regarding Bulgaria.

Our concern with regard to the draft PACE resolution stems most of all from the very general nature of the recommendations it formulates with regard to our country, which visibly contrast with the more specific recommendations about other countries that are subject to this resolution. At the same time, the content of the report and the too general nature of the recommendations appear to be inadequately harmonized with the observations, opinions and recommendations expressed on these issues by other international institutions monitoring in the same field, such as the European Commission's Cooperation and Verification Mechanism, the International Association of Judges, as well as with those of the Council of Europe bodies, such as the Venice Commission, the European Court of Human Rights (ECtHR) and the Committee of Ministers, which monitors the implementation of the Court's judgments.

The report notes the constitutional and legislative reform of the judiciary in Bulgaria at the end of 2015. In this regard, we support the Committee's view that, although this reform has made some progress, the repeatedly criticized risk of politicization of career decisions affecting judges and prosecutors due to the high number of members of the Supreme Judicial Council (SJC) elected by the National Assembly remains a serious concern. Indeed, in Bulgaria judges elected by judges still have no majority in both the SJC plenary and the newly formed judges' chamber, despite the recommendation of the Venice Commission (Report CDL-AD (2010) 004-e) and Recommendation CM / Rec (2010) 12 of the Committee of Ministers: "In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers." [1]

At the same time, the requirement for a qualified majority for the election of the SJC members from the National Assembly, introduced in 2015, does not guarantee the prevention of so-called "political horse-trading" and the politicization of the SJC continued to take place through publicly known backstage arrangements between the parliamentary parties about their "quotas" for members of the SJC. This became apparent also in the recent election of the parliamentary quota of the new SJC, as well as in election of the new chairperson of the Supreme Administrative Court one month before the expiry of the mandate of the current SJC, who will also become an ex officio member of the new council for the next seven years.

The division of the Supreme Judicial Council into a judicial and a prosecutor's chamber left important decisions such as the election of the presidents of the two Supreme Courts, the budget and the qualifications of the judges, in the competence of the plenary SJC, and these decisions are still taken by a majority, which includes prosecutors and SJC members elected by politicians, despite repeated concerns expressed by the International Association of Judges, the Venice Commission and the Committee of Ministers of the Council of Europe. Moreover, although the possibility of prosecutors' influence on judges' career decisions was abolished in 2015, an unfortunate amendment to the Judicial System Act, mentioned in the report, was adopted in 2017, enabling the prosecutor's office to oblige the SJC judicial chamber to automatically dismiss judges who are accused by the prosecution - without any discretion, possibility for defense or judicial review of the necessity for such a measure and regardless of the merits of the charges. In this way, the prosecutor's office has the opportunity to remove "inconvenient" judges from criminal proceedings throughout the period before their completion. In Bulgaria, the initiation of criminal proceedings is at the discretion of the prosecution with no possibility for judicial control. It should be mentioned that the pre-trial stage of the criminal proceedings may last

long. Recently there was a case of a wiretapping of a judge and his office where secret court deliberations were taking place at the request of a public prosecutor in a case of suspicion of corruption to which the prosecutor was a party. The accused judge was subsequently acquitted at first instance.

In view of the above we believe that institutional and procedural guarantees for judges' independence in Bulgaria continue to be insufficient and not in compliance with the recommendations of other international bodies, and we would like to see specific recommendations in the draft PACE resolution addressing these concerns.

We note with regret that, when drafting the report on Bulgaria, the scope of the fact-finding has apparently been limited and seems to be reduced to the opinion of two experts. It did not include a visit to the country, did not pay attention to a number of recent recommendations by international observers and did not analyze judgments of the ECtHR, which are important for the functioning of the judiciary, the execution of which continues to be monitored by the Committee of Ministers. While some of these judgments have been mentioned, the report does not contain due analysis of the issues raised by them. In addition, it does not include other, also important groups of judgments, such as Velikova, Djangozov and Kitov, directly related to the functioning of the law enforcement and judicial systems, and in particular to the effectiveness of the prosecution in investigating violations of the right to life and of the prohibition of torture and inhuman treatment by law enforcement officers, as well as the ineffective investigation of such assaults and of the possible racist motives of the assaults by third persons.[2] All of these are directly related to structural defects in the functioning of the Bulgarian judicial system and especially of the prosecution, which is responsible for the effectiveness of the investigation, the identification and the bringing of the perpetrators to court.

The ineffectiveness of this institution, including in the investigation of corruption, has been established and has led to specific recommendations in a number of documents by international experts and institutions, such as the EC Cooperation and Verification Mechanism reports and the expert analysis of the effectiveness and the functioning of the prosecutor's office by the European Commission's Structural Reform Support Service (SRSS) of December 2016. The unaccountability of this institution and its existence outside of the system of checks and balances is also reflected in the ECtHR judgment in the case of Kolevi v. Bulgaria (whose execution is also under enhanced supervision of the Committee of Ministers of the Council of Europe) and requires specific recommendations for reform, which should include its inclusion in the normal democratic mechanisms for accountability and mutual control.

Unfortunately, the draft resolution does not contain specific recommendations for the reform of this institution, which is obviously necessary from the analysis of the abovementioned groups of judgments.

Probably due to the narrow scope of the sources of information on the state of the rule of law, the report does not reflect attempts to influence the judiciary on the part of other authorities and its public vilification by top politicians, as well as the unsuccessful and even hostile collaboration between the judicial, executive and legislative branches over the judicial reform.

We consider it particularly important that the reforms described in the report are being conducted against the backdrop of open public hostility by representatives of the executive and legislative branches over the judiciary, and in particular against specific judges and the Union of Judges in Bulgaria who are asserting their independence. Also, over the past several years, high-ranking representatives of the executive branch have attempted to influence the courts' internal convictions, which as the ECtHR observed in a number of judgments,[3] illustrate the contemptuous attitude of the then Minister of the Interior and current chairman of the largest parliamentary group towards the presumption of innocence. Such public appearances are widely reported in the media and well known to Bulgarian society, but have remained entirely outside the scope of the report.

In the period since the adoption of the constitutional amendments in December 2015, a smear media campaign was launched against judges and lawyers who were in favor of the reform. The media campaign is being carried out by media that are close to the authorities, as well as by those belonging to oligarchic circles gravitating around the authorities and related high-ranking representatives of the SJC and the prosecution. Materials in the print media are often unsigned, factual statements made in them are based on unclear sources, and the opinions usually coincide with the positions of individuals and groups who oppose the continuation of the judicial reform.

Particularly defamatory insinuations were published against the Chairman of the Supreme Court of Cassation - Mr. Lozan Panov, who, immediately after his election, began to discuss publicly the serious structural problems of the judiciary and to expose behind-the-scene deals within it. In May 2017, he turned to the President of the Republic with a proposal to discuss reform of the Prosecutor's Office. In response, both the Minister of Justice and the Chairman of the National Assembly's Legal Committee have publicly commented that the Chairman of the Supreme Court of Cassation should take care of the court he is in charge of, and if he has proposals for legislative changes, he should run for Parliament.

Already before the adoption of the new constitutional amendments, politicians and representatives of the SJC started targeting with criticism the reformist Association of Judges in Bulgaria, the largest professional organization of judges. In July 2016, during the discussion of a bill requiring professional judges' organizations to disclose their membership to the SJC, several MPs openly denounced in Parliament the Association of Judges, accusing it of lies, non-transparent funding and "undue influence" on the administration of the judiciary. In turn, several SJC members from the pro-governmental majority in 2016 repeatedly accused the Association of Judges of aggressiveness, politicizing the problems and "creating obstacles" to the adoption of legislation. The adopted amendments to the Judicial System Act had the unmistakable purpose of having a chilling effect on the membership of judges in the Association of Judges through an obligation to disclose membership in that organization, against which the majority of SJC members have repeatedly demonstrated public hostility.

The new attempt to change the Judicial System Act, which failed in July 2017 as a result of public criticism, aimed at limiting the sources of funding for the professional organizations of magistrates to membership fees and donations, as described in the report, is a logical continuation of the systemic harassment by the authorities and the SJC over the Association of Judges.

Unfortunately, the draft resolution does not contain any recommendations regarding the pressure on the reformist professional organizations in Bulgaria. Such recommendations could prevent further actions of this type, which are likely to continue.

In conclusion, while appreciating the commitment of the PACE to the reform of the judiciary in Bulgaria, we believe that promoting measures aimed at sound guarantees of the rule of law, the separation of powers and the independence of the judiciary would receive a strong impetus if in its resolution the Assembly formulates more specific recommendations to Bulgaria in the above-mentioned areas.

Respectfully,

Krassimir Kanev, Chairperson of the Board, Bulgarian Helsinki Committee

Yordanka Bekirska, Executive Director, Bulgarian Lawyers for Human Rights

Bilyana Gyaurova-Wegertseder, Director, Bulgarian Institute for Legal Initiatives

[1] See: Report on the Independence of the Judicial System Part I: The Independence of Judges

adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010 и Recommendation CM/Rec(2010)12) to members states on judges: independence, efficiency and responsibilities, at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e).

[2] See the summary of the most important judgments against Bulgaria at: <https://rm.coe.int/1680709740>.

[3] See e.g. among the most recent judgments: ECtHR, Gutsanovi v. Bulgaria, No. 34529/10, Judgment of 15 October 2013; ECtHR, Toni Kostadinov v. Bulgaria, No. 37124/10, Judgment of 27 January 2015; ECtHR, Slavov and Others v. Bulgaria, No. 58500/10, Judgment of 10 November 2015; ECtHR, Alexey Petrov v. Bulgaria, No. 30336/10, Judgment of 31 March 2016; ECtHR, Petrov and Ivanova v. Bulgaria, No. 45773/10, Judgment of 31 March 2016; ECtHR, Popovi v. Bulgaria, No. 39651/11, Judgment of 9 June 2016. Cf. on the same problem from the point of view of the quality of the investigation under articles 2 and 3 of the Convention in: ECtHR, Dimitrov and Others v. Bulgaria, No. 77938/11, Judgment of 1 July 2014, § 148.