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## **THREATS TO JUDICIAL INDEPENDENCE IN BULGARIA** **-THE CASE OF JUDGE MIROSLAVA TODOROVA-**

The dismissal of Judge Miroslava Todorova by the Supreme Judicial Council (SJC) in July 2012<sup>1</sup> continues to generate grave concerns about the politicization of the judiciary discipline system in Bulgaria.<sup>2</sup> Judge Todorova served as the leader of the Bulgarian Judges' Association and, in that capacity, was critical of what many perceived as political interference in judicial affairs. In this context, her dismissal raises questions about the use of the discipline system to retaliate against the legitimate exercise of the right to freedom of association and expression. If the discipline system is used in a retaliatory manner, it would undermine the impartiality of the judiciary in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

### **I. Judge Todorova's Dismissal Was Not Proportionate and Appears Politically Motivated.**

The events surrounding Judge Todorova's dismissal illustrate that the system for disciplining judges may be susceptible to abuse for political purposes, a situation which could lead to retaliatory discipline that is designed to chill or punish legitimate free expression. While her dismissal in July 2012 was not explicitly tied to her criticisms of the SJC and the Minister of the

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<sup>1</sup> See, e.g., Alex Bivol, "Sacked Bulgarian judges union chief says will appeal, as support pours in," *The Sofia Globe* (July 13, 2012), available at: <http://sofiaglobe.com/2012/07/13/sacked-bulgarian-judges-union-chief-says-will-appeal-as-support-pours-in/>.

<sup>2</sup> This statement was prepared by the Justice Defenders program of the American Bar Association, Center for Human Rights. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Interior,<sup>3</sup> the timing and severity of the punishment suggests that the disciplinary action was politically motivated as a result of her advocacy for an independent judiciary.

Judge Todorova served as a judge in the Sofia City Criminal Court for over seven years without incident.<sup>4</sup> She was purportedly dismissed for failure to issue decisions in a timely manner. However, she was only disciplined after she filed a libel suit against the Interior Minister for comments he made about her conduct in a specific case.<sup>5</sup>

Judge Todorova's dismissal, the most severe sanction that the SJC can issue,<sup>6</sup> was not a proportionate<sup>7</sup> response to the judge's alleged infractions, particularly if there was any intention to punish Judge Todorova for her comments on the judiciary.<sup>8</sup> Judge Todorova's failure to issue judgments in a timely manner in three cases was improper; however, it appears that the defendants in those three cases were not disadvantaged or unjustly deprived of their liberty or other rights.<sup>9</sup> As a result, the SJC's dismissal of the judge was disproportional and not necessary

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<sup>3</sup> In her role as head of the judges' union, Judge Todorova was known for her outspoken and pointed criticism of the Minister of the Interior, Tsvetan Tsvetano, the Supreme Judicial Council, which is tasked with administration of tribunals, and of an overall lack of impartiality in the ranks of judges. See, e.g., Alex Bivol, "Sacked Bulgarian judges union chief says will appeal, as support pours in," *The Sofia Globe* (July 13, 2012), available at: <http://sofiaglobe.com/2012/07/13/sacked-bulgarian-judges-union-chief-says-will-appeal-as-support-pours-in/>. Her advocacy included a January 2011 letter to the Parliamentary Assembly of the Council of Europe expressing concern about the independence of the Supreme Judiciary Council and political interference in ongoing criminal trials. An additional open letter to parliamentary and government leaders was signed by Judge Todorova in December 2011 which sharply criticized the procedure for selecting members of the SJC and SJC Inspectorate. Letter from Miroslava Todorova, et. al, available at: [http://www.bili-bg.org/cdir/bili-bg.org/files/Letter\\_Inspectorate\\_Parliament\\_EC\\_Eng.pdf](http://www.bili-bg.org/cdir/bili-bg.org/files/Letter_Inspectorate_Parliament_EC_Eng.pdf).

<sup>4</sup> Decision of the Bulgaria Supreme Administrative Court, available at [www.dnevnik.bg/getatt.php?filename=o\\_1979033.doc](http://www.dnevnik.bg/getatt.php?filename=o_1979033.doc), para. 3.3.

<sup>5</sup> Sofia News Agency, "Libel Case against Bulgaria's Top Cop Relaunched," October 18, 2012, available at [http://www.novinite.com/view\\_news.php?id=144240](http://www.novinite.com/view_news.php?id=144240).

<sup>6</sup> See Judiciary System Act, SG No. 64/7.08.2007, Article 308, full text available at [http://www.vks.bg/english/vksen\\_p04\\_06.htm#Chapter\\_sixteen](http://www.vks.bg/english/vksen_p04_06.htm#Chapter_sixteen) (English translation provided by the Bulgaria Court of Cassation).

<sup>7</sup> The European Court of Human rights has concluded that the regulation of speech criticizing political interference in the judicial process may serve legitimate purpose but that the penalty of dismissal was not "necessary in democratic society" because it was not proportional. The Court noted that the fear of sanctions could have a "chilling effect" on the exercise of freedom of expression and that this effect, "which works to the detriment of society as a whole, is likewise a factor which concerns the proportionality of, and thus the justification for the sanctions imposed on the applicant. . ." *Kudeshkina v. Russia*, App. No. 29492/05 (Sept. 2009), para. 99, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91501>. See also *Id.* at paras. 81-84, 102. Additionally, the Committee of Ministers has explicitly recommended that all judicial disciplinary sanctions must be proportionate. Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM/Rec(2010)12 (Nov. 17, 2010), available at: <https://wcd.coe.int/ViewDoc.jsp?id=1707137>. See also European Charter on the Statute of Judges, Article 5.1, DAJ/DOC (98) 23 (July 1998), available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf).

<sup>8</sup> In the *Kudeshkina* case, the dismissal of a Russian judge was held by the Court to be a disproportionate governmental response that was unnecessary in a democratic society that had a chilling effect upon the exercise of the right to free expression. *Kudeshkina v. Russia*, App. No. 29492/05 (Sept. 2009), paras 100-101.

<sup>9</sup> Petition of Judge Miroslava Stefanova Todorova concerning the decision adopted by the Supreme Judicial Council (SJC) in Disciplinary Case No 3/2012 (hereinafter Todorova Petition), pp. 6-8. According to Judge Todorova, of the

to achieve the legitimate goal of ensuring the timely issuance of opinions. Given the tremendous backlog of cases and Judge Todorova's distinguished service, the judicial system would be better served by retaining her with a reduced caseload.<sup>10</sup>

## II. The Current Judicial Disciplinary System May Chill or Punish Legitimate Speech.

The average caseload for Bulgarian judges is very high, causing many to be in technical infraction of the deadlines for issuing opinions.<sup>11</sup> There is, therefore, great concern that disciplinary action could be used for political reasons to punish members of the judiciary who criticize interference in judicial affairs.<sup>12</sup>

The European Court of Human Rights has noted that that issues surrounding the “functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10.”<sup>13</sup> While the Court has recognized that civil servants and judges have a duty to the government to protect confidentiality and not to impugn the fairness or impartiality of the judicial system without cause, the Court has also recognized a robust protection of political or trade-union free expression.<sup>14</sup> In other words, judges who level unfounded accusations of bias against the judiciary may not be protected; however, discussions of administrative concerns and undue political influence or interference in judicial processes are protected, particularly when that discussion is part of a political debate or union activity.<sup>15</sup>

The potential for abuse of the disciplinary system to remove vocal critics or union leaders from judicial office is great. The SJC is chosen in a political process—with the National Assembly choosing a majority of the members—and there is no guarantee or requirement that members of

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three cases, two of the defendants were released as a result of Judge Todorova's failure to submit an opinion; the third defendant had been acquitted, so the failure to submit an opinion delayed the prosecutor's appeal, but did not affect the defendant's freedom.

<sup>10</sup> Judge Todorova's service as a judge began in 2004. Decision of the Bulgaria Supreme Administrative Court, available at [www.dnevnik.bg/getatt.php?filename=o\\_1979033.doc](http://www.dnevnik.bg/getatt.php?filename=o_1979033.doc), para. 3.3. Judge Todorova adjudicated a relatively high number of cases as a member of the Sofia City Court, which is itself the busiest court in Bulgaria. *Id.* In 2009, Judge Todorova adjudicated 250 criminal cases, which was almost 100 cases more than some of her colleagues. *Id.* In 2010, she resolved 218 cases and in 2011 she resolved 309 cases, again more than any other Judge in the penal division of her Court. *Id.* In addition to her heavy caseload, Judge Todorova indicated that she took on additional cases from retiring or overworked colleagues, accepted teaching responsibilities in the State school for judges and prosecutors, aided with peer-reviewing of her colleagues, and began duties as the head of the judges' union. *Id.* Judge Todorova allegedly faced other obstacles as well, including the frequent lack of a dedicated desk or computer on which to complete her work and a significant volume of highly complex cases. Todorova Petition, pp. 6-8.

<sup>11</sup> Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism, at 6-7, COM (2012) 411 final (Jul. 18, 2012) (Hereinafter Bulgaria CVM Report), available at: [http://ec.europa.eu/commission\\_2010-2014/president/news/archives/2012/07/pdf/1\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/news/archives/2012/07/pdf/1_en.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> *Kudeshkina v. Russia*, App. No. 29492/05 (Sept. 2009), para 86.

<sup>14</sup> *See, e.g., Case of Palomo Sanchez And Others v. Spain*, App. Nos. 28955/06, 28957/06, 28959/06, 28964/06 (Sept. 2011), para. 56, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106178>.

<sup>15</sup> *Wille v. Liechtenstein*, App. No. 28396/95 (Oct. 1999), paras. 67-70, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58338>.

the SJC be appointed from the judiciary.<sup>16</sup> Though terms on the SJC are not-renewable, which tends to preserve SJC independence, deliberations and voting on disciplinary matters are not fully transparent, and the reasons are withheld from the public until the sanction is final.<sup>17</sup> Again, given that so many judges in Bulgaria, due to circumstances outside of their control, are in arrears on issuing opinions in cases, the potential for selective retribution from the SJC is extremely high.

### **III. The Current Judicial Disciplinary System Can Be Exploited for Malicious Purposes.**

The danger posed by the SJC disciplinary system extends beyond the chilling of free expression and free association. The SJC system, in its current state, does not have sufficient protections to prevent selective discipline of judges for judgments and opinions that are unpopular with the government.<sup>18</sup> Selective disciplinary actions for protected actions would contravene the Convention,<sup>19</sup> and would undermine the impartiality of the judiciary in Bulgaria. Any dismissal under these conditions may also contravene principle 18 of the UN Basic Principles on the Independence of the Judiciary, which provides that “judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.”<sup>20</sup> All disciplinary sanctions must be proportionate to the conduct as well.<sup>21</sup>

As Judge Todorova was dismissed despite her continuing overall fitness and willingness to serve, her dismissal signals a willingness to use the disciplinary system to dismiss judges for infractions that do not rise to the high level set by the UN and to use disproportionate sanctions in certain cases while showing leniency in others.<sup>22</sup> Any such politically-motivated disciplinary proceedings would be incompatible with international law and would profoundly undermine the independence of the judiciary.

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<sup>16</sup> Judiciary Systems Act, Articles 16-18. The Organization for Security and Cooperation in Europe’s (OSCE) Experts Meeting on Judicial Independence determined that bodies overseeing judicial disciplinary proceedings should be 1) separate and independent from bodies overseeing judicial administration, and; 2) have at least two-thirds of their members drawn from the judiciary. *See Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Challenges, Reforms And Way Forward*, Expert Meeting Report of June 23-25, 2010, report available at: <http://www.osce.org/odihr/71178>.

<sup>17</sup> Judiciary Systems Act, Articles 313, 318 and 320.

<sup>18</sup> Of particular concern to the Bulgaria CVM Report, pp. 6-7.

<sup>19</sup> *See, e.g., Lutsenko v. Ukraine*, App. No. 6492/11 (Nov. 2012), paras. 104-110, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112013>. *Kudeshkina v. Russia*, *supra*, App. No. 29492/05.

<sup>20</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; ECOSOC 2006/23, Strengthening basic principles of judicial conduct, available at <http://www2.ohchr.org/english/law/indjudiciary.htm>.

<sup>21</sup> Again, as noted above, all judicial disciplinary sanctions must be proportionate. *See* Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM/Rec(2010)12 (Nov. 17, 2010), available at: <https://wcd.coe.int/ViewDoc.jsp?id=1707137>. *See also* European Charter on the Statute of Judges, Article 5.1, DAJ/DOC (98) 23 (July 1998), available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf).

<sup>22</sup> Bulgaria CVM Report, at 6, where the European Commission noted inconsistent results of SJC disciplinary investigations.

#### **IV. Judge Todorova's Dismissal Should Be Reconsidered.**

Finally, given the recent decision by the Supreme Administrative Court that the SJC may have ignored clear statutory limitations in disciplining Judge Todorova in at least one instance,<sup>23</sup> the SJC should reconsider the sanction issued against Judge Todorova. As the Supreme Administrative Court found, at least one of the cases that formed the basis for discipline was improperly considered by the SJC in dismissing the judge because it fell outside of the SJC's temporal jurisdiction.<sup>24</sup> Of the other two cases that were central to the disciplinary complaint, at least one should arguably have been excluded from review as well. Given that the decision to dismiss Judge Todorova was based on these three cases combined, the exclusion of one of those cases undermines the justification for dismissal. As a result, the SJC should be directed to reconsider the matter and develop a penalty that is proportional to her misconduct.

#### **V. Conclusion**

The independence of the judiciary will likely be threatened if the disciplinary process is not fixed to minimize political motives and interference. While the SJC should be commended for working to reduce endemic delays in the Bulgarian judicial system, it must not selectively discipline judges for their opinions. The current court backlogs open the door to the potential politicization of judicial discipline on a broad scale. Any politicized dismissal critically endangers the fair and impartial administration of justice. Judge Todorova's dismissal may have been a direct result of her criticisms of the SJC and the Interior Minister, though the process's current opacity makes it impossible to know for sure. Regardless, the potential for misuse of the disciplinary system to silence legitimate and protected free expression and association must be rectified to ensure judicial independence in Bulgaria.

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<sup>23</sup> Decision of the Bulgaria Supreme Administrative Court, available at [www.dnevnik.bg/getatt.php?filename=o\\_1979033.doc](http://www.dnevnik.bg/getatt.php?filename=o_1979033.doc),

<sup>24</sup> Id.