Overcoming the Dependence on Personal Connections or How Good Decisions are Doomed to Fail – a Case Study on the Promotion Procedures in the Bulgarian Judiciary

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Introduction. The legal cadre in Bulgarian Judiciary

According to modern political science a successful modern society is one where stable institutions regulate social behaviour and take part in governance. The opposite, though historically widely practiced, model will be one based on nepotism or tribal culture – where blood ties or belonging to a common group determine one's position in society and social roles depend on innate characteristics of the people or personal favours to certain groups. Many countries and their judiciary stand in between these two extremes as a model of organisation. The difficult question is how to transform a system with a clear inclination towards nepotism into one of stable institutions and objective criteria to promote the best to govern to positions of power.

Bulgarian Judiciary is one such example – it has been criticised in sociological surveys (including by its members) for its dependence on interpersonal connections and a lot of political bargaining. This is especially true when the topic of the promotion of judges and prosecutors is discussed – there have been accusations by the press that too many of the cadres in the systems are relatives, spouses or otherwise related to the people on top.

In theory this should be prevented by the mechanisms of organised competitions for promotion, which were introduced by the Law on the Judiciary in force since 2004[1]. It envisaged[2] a central competition for all the members of the judiciary from the country to compete for all the free positions in the same level of the system. Also the competitions are held in a top-to-bottom order – all of the vacancies of the upper instance court have to be fulfilled before a competition for the lower level courts is announced[3]. The competitions are held by the same panel of assessing judges who propose a short list to the body that takes the decisions – the Judicial Chamber of the Supreme Judicial Council (SJC)[4]. There are also standard criteria for assessment of the acts of the candidates provided for by a publicly available act of the SJC. In short, whether successful or not, at least from the outside this

[1] An up-to-date text in Bulgarian may be found on: https://www.lex.bg/laws/ldoc/2135560660 - accessed 09.11.2021.

[2] Art. 176 – 194g ZSV.

[3] Art. 189, paragraph 1 ZSV.

[4] According to art. 130a, para 2 of the Constitution (as amended in 2015) it has 14 Members – the president of the two Supreme courts, 6 members elected by the judges and six members appointed by the parliament.

model looks predictable and based on merits. Thus it is a kind of an established institution for the systematic selection of capable people in charge of the judiciary who are to be promoted among its ranks.

However, since its introduction, it has been proven as incredibly ineffective because the centralisation requires a lot of resources and careful planning. The legislative idea of a predictable, standardised, (at least partially) objective and transparent promotion procedure has stalled, because it requires enormous amounts of effort to assess all of the candidates. These assessment was to be performed on a regular basis and extraordinarily – for judges who have not been recently assessed, but wish to participate in a competition, by acting judges in addition to their often burdensome schedule of hearings and pending judgements. Additional incentive to take part in the assessment commissions is limited to a small pecuniary amount and oftentimes this kind of participation can lead to interpersonal conflicts, because the ones who were not elected in the competitions continue to work in the same system (and often – the same building) as the appointed members of the assessment commission. No particular idea how to use resources more efficiently to perform this task of the Judiciary was discussed seriously by the legislator or the JSC.

Therefore, because the Judiciary feels an evident and pressing need to fill the vacancies on higher instances, a second mechanism continued to exist – the one of temporary secondment to another court (or temporary transfer to a higher instance). This is not done on central level, but locally – where there is a vacancy the president of the higher-instance court will issue an order to second a judge from the lower-instance court with the consent of the president of the latter to another court on the same or higher level. There are no established criteria when such a secondment is permissible. In other words, this situation is the opposite of the institutional way of growth trough competitions – it depends on personal relations and knowledge (this does not always lead to a "negative selection" – oftentimes the judges of the upper-instance court know whom of the colleagues from the lower-instance is able to handle a bigger workload and do it with better quality) and creates a personal bond, based on the idea of a received favour – secondment is not compulsory and can be revoked at any moment[5].

The legal reform and its reversal

In 2016 the National Assembly (Bulgarian parliament) adopted a series of profound amendments to the Act on Judiciary (Zakon za sadbnata vlast, ZSV) which seriously limited the ability to second judges to other courts for longer periods. The amendment to art. 227 of the ZSV limited the maximum duration of the secondment to another court to 12 months

[5] The uncertain and dangerous nature of the consequences of the secondment for unlimited duration in the judiciary has also been noted in the motives of Judgment No. 12/27.07.2018 in case No. 1/2018 of the Constitutional Court of Bulgaria.

and forbade repeated secondments. This was conceived as a barrier to the circumvention of the principle of career development trough open competition prescribed by law.

The current members of the SJC were elected in 2017 among high hopes for continuation of the trend set by the previous composition of the Council to regularly hold competitions for promotion. This was especially motivated by the fact that for the first time since the introduction of the actual Constitution of Bulgaria in 1991 the 6 members of the Council from the quota of the judges were elected trough direct suffrage. Most of them were esteemed judges from the Supreme courts.

However, these hopes were unfounded. The new system of judicial assessment by judges who left their seats for a year or two to dedicate themselves to the scrutiny of their colleagues' work, was mistakenly conceived by the SJC from the beginning with only 9 judges outside of the ranks of the SJC being selected to asses all the judges in Bulgaria (about 2200 judges who have to be assessed once every 5 years on average). This lead to an unprecedented stalemate of the promotion competitions – only 3 of these – for the Supreme Court of Cassation, the Supreme Administrative Court and the Appellate courts, have so far (November 2021) been successfully concluded and each took more than 3 years to complete. In comparison in the previous mandate 13 competitions for promotion and transfer to another court at the same level were successfully held[6].

Given the situation with the competitions for promotion, the legislator was under pressure from the SJC to act urgently and relax the stringent requirements introduced by the novel of art. 227 of the ZSV on secondment. This was done "elegantly" by the introduction of the new paragraph 2 of art. 227 ZSV, promulgated on 10.11.2017, in force since 14.11.2017 – all the requirements for secondment were abolished in case of a vacant position in the court where the judge was to be seconded to. To resolve the obvious conflict with the principle of predictability of secondment, including its term and prerequisites, the legislator decided in 2018 (instead of putting more stringent conditions and requirements) to introduce a new rule in art. 30, paragraph 5, point 18 ZSV granting a new power of the Judicial Chamber of the SJC – to terminate with an *ex nunc* effect any secondment of a judge, ordered by a decision of a court's president, for a period longer than 3 months, if procedural irregularities by the secondment are found or if there is a need to restore the seconded judge to his or her previous position due to increased caseload of the court of initial appointment. It is not clear from the wording of the Act whether this power is discretionary or not[7]. According to art. 36

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[6] According to the reports of the commission in the JSC for the period 2012 – 2016, available at
http://www.vss.justice.bg/root/f/upload/8/report_2013.pdf ;
http://www.vss.justice.bg/root/f/upload/8/report_2014.pdf ;
http://www.vss.justice.bg/root/f/upload/11/otchet-kpa-qnuari-dekemvri-2015.pdf , and
http://www.vss.justice.bg/root/f/upload/17/otchet-2016.pdf , all accessed on 09.11.2021.

[7] The wording of the provision: "The Judicial Chamber terminates the secondment of a judge in an institution of the Judiciary other that, where he sits as a judge according to the staff table, when the conditions and the

ZSV any appeal to the decision does not suspend its immediate application unless the court decides otherwise.

How the amendments to the law can influence the career path of any given magistrate may be illustrated by two examples:

The case of judge L.V.

The facts of the case can be established from the motives of the Judgement of the Supreme administrative court referred to *infra* – Judgement No. 8223/25.06.2020 in administrative case 13214/2018 of the VI division of the SAC[8].

With an order from the President of the Supreme Court of Cassation form 15.04.2016 judge L.V. was seconded from the court where he was appointed to sit, some 200 km from Sofia, to the Sofia Regional Court in the capital city. The reason for the involvement of the President of a Supreme Court is that he was the only head of a court superior to both the courts of the appointment of the judge and her secondment in accordance with art. 87, paragraph 2 of the ZSV. In 2018 the presidents of both the regional court where judge L.V. was appointed to sit and the higher instance – the district court, sent a letter to the Supreme Judicial Council with a request to terminate the secondment of judge L.V., because the average caseload of the court of the appointment was 77 cases per month which is above the mean for the country, which at that point was 46 cases per judge per month for the lowest tear of the judiciary – the regional courts. On 18.05.2018 the Judicial Chamber of the SJC decided that there is a situation of an increased caseload in the court where judge L.V. was initially appointed and that her secondment to the Sofia Regional Court has to be terminated on those grounds.

In its judgement, the Supreme Administrative Court upheld the lawfulness of that decision.

The motives of the judgement are, however, interesting in another aspect – judge L.V. argued that she was not properly informed about the proposal for termination of her secondment. He tried to react by lodging a formal explanation only on the day before the meeting of the Judicial Chamber of the SJC took place[9]. Also, it is clearly stated in the

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procedures of the present Act have not been followed by the secondment, or when there is a necessity for the assurance of the necessary staff in the institution of the Judiciary, where the judge has been seconded from." which uses the direct verb "terminates" instead of "may terminate" suggests that the power is not discretionary, but the prerequisite of a "necessity" for personal is left to the discretion of the Judicial Chamber.

[8] Available at http://sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/8f2f0bfdd08b7c31c2258591002ed579?OpenDocument, accessed on 09-11-2021.

[9] It shall be noted that art. 30, paragraph 5 ZSV does not set any delay for the implementation of the decision to terminate the secondment and it can have immediate effect.

judgement that the court to which judge L.V. was seconded – the Sofia Regional Court, had a higher number of cases per judge per month – 79, as the court of appointment, but this does not concern the procedure of termination of a secondment, where only the caseload of the court of initial appointment is to be taken into account. Finally, the statement made by the president of the Sofia Regional Court that judge L.V. is also needed in this court that has a higher number of cases per judge was found irrelevant, since this court was by law excluder from the procedure of termination of the secondment. It is also of interest, although as a detail, that the numbers in the caseload statistics used by the Supreme Administrative Court do not perfectly match – at one instance it is stated that the caseload of the court of initial appointment was 79 cases per judge per month, in another one the number is 79, in a third instance it is 72.

The judgement illustrates the perfectly arbitrary nature of both the institution of the secondment and the powers to terminate it. The Supreme Administrative Court emphasizes that secondment is only a temporary mechanism to alleviate the courts of significantly higher burden of cases. However, the court provided no reasoning as to what the motives for the initial secondment were or whether the semi-arbitrary power of the Judicial Chamber of the SJC to terminate the secondment had to be exercised with a certain care to the overall burden on the different courts and the system as a whole. The Court just baldly ignored any need to assess whether a “necessity” for more personal exists where this personal is to be transferred from a court with a greater caseload somewhere else.

This in turn proves that the decision on whether to second a judge or to terminate the secondment are left to the discretion of the respective powers within the Judiciary, which also happen to be quite different organs – the presidents of the higher-level courts order the secondment, but the termination is done by the Judicial Chamber of the SJC. Their motives on what to do to alleviate the problems of certain courts can, and very often do, differ. However, the direct consequences fall on the seconded judge, who can find him or herself in the pressing need to change workplaces within a couple of days, since the decision has immediate effect.

The case of judge S.S.

On the 30.01.2014 S.S. was appointed as a junior judge[10] in a District court in a town about 270 km from Sofia. On 21.11.2017 the Judicial Chamber of the SJC declined to appoint him to sit in the Sofia Regional Court or another court close to the capital, because of the lack of free positions. In the motives to the decision it was indicated that at that time judge

[10] This is a special status in the Bulgarian Judiciary where a freshly appointed judge may sit in a second-instance district court (the district court in Sofia is called Sofia City Court) as a junior member in a panel of three judges to acquire experience and to be tutored by the other two. The status is regulated in art. 238 – 243 ZSV.

S.S. was sitting as a seconded junior judge to the Sofia City Court[11]. With a different decision form the same date judge S.S. was appointed to a regional court in the district of his initial appointment, some 240 kilometres from Sofia.

On 15.01.2018 judge S.S. was seconded, again with an order of the President of the Supreme Court of Cassation, to sit in the Sofia Regional Court[12]. By a request from the President of the regional court where judge S.S. was appointed, the Judicial Chamber of the SJC terminated the secondment on 23.06.2020 because the average caseload of the latter court was 77 cases per judge per month, rising to 79 at times[13], more than the national average of 47 monthly cases per judge. The caseload was comparable to the caseload of the Sofia Regional Court where judge S.S. was seconded to.

At first, the case does not demonstrate any differences to the abovementioned case. However, in the same meeting of 23.06.2020 the Judicial Chamber of the SJC deliberated and decided on the promotion of 9 junior judges from different courts across the country to the office of judge in a Regional court. One of the promoted junior judges came from the District court where judge S.S. was initially appointed as a junior judge, situated in the region of which the Regional court of appointment of judge S.S. was. But the Judicial Chamber of the SJC found that due to social reasons – young child and a husband, this junior judge shall be transferred to the regional court of another city in another region, where she chose to live. More importantly, this was done not trough the filling a vacant position in the latter, but by an opening of a new position for a judge there, decided in the same meeting of the Chamber.

Since the vote to suspend the secondment of judge S.S. followed the votes on the promotion of the junior judge to a newly created position in a more convenient regional court, one of the members of the Judicial Chamber raised the question on whether there are reasons to change the status quo of judge S.S., where the newly appointed judge could easily be transferred to the position of the latter in the same region where she used to be appointed as a junior judge. It was also noted that the caseload in the court where judge S.S. was seconded from has not changed since the time of his appointment and since there was no change of circumstances a termination of the secondment was inappropriate. The majority found that the law did not provide for a change of the caseload as a prerequisite for the termination of the secondment, only a situation of a higher caseload at the time of the termination. Once again, the opinion of the president of the Sofia Regional Court, where judge S.S. was seconded to, was not taken into account.

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[11] The minutes of the meeting can be found at http://www.vss.justice.bg/root/f/upload/18/pr47-21-11-2017-sk-0.pdf - visited 09.11.2021, v. pp. 28 – 29.

[12] This could be established from the minutes of the meeting of 23.06.2020, see next footnote.

[13] As per the minutes of the meeting on 23.06.2020, available on: http://www.vss.justice.bg/root/f/upload/28/pr-21-23-06-2020-%D0%A1%D0%9A.pdf , accessed 09.11.2021, v. pp. 67 – 89.

S.S. did not file an appeal against the decision. As a final result on 07.08.2020 S.S. resigned as a judge and was discharged from this position with a decision of the Judicial Chamber of the SJC[14].

Once again, the case is a clear example of the lack of criteria mad the possibilities for abuse with the institution of secondment. The use of caseload as a prerequisite for termination of the secondment – a highly disputed topic in a system where the most overburden courts have three times more cases than the ones with the smallest number of cases, proves that even this seemingly objective criterion can be abused. In this case a new placement was created for one judge, but not for another, who was seconded. The final outcome was the loss of a judge with 5 years of professional experience.

Analysis regarding the European practice

According to Opinion No. 1 of the CCEJ judges shall be promoted or moved to a more desirable court on the basis of objective criteria (para. 25) which guarantee that career advancement is "based on merit, having regard to qualifications, integrity, ability and efficiency". As demonstrated, the current system of secondment in Bulgaria allows for great margins of uncontrolled discretion on behalf of different organs. On the other hand, by tying the career decisions to at least the discretion of two factors – the court presidents and the SJC, it creates an environment where better connections to certain groups in the Judiciary can make the difference between a smooth and effortless path to a desired position and a random carrousel of secondments, which in turn may lead to unlawful influence on the judge, contrary to the standard set in paragraph 65 of Opinion No. 1 of the CCEJ.

According to Opinion No. 17 of the CCEJ an adequate way to organise promotions will be an effective system of evaluation of the judges, but this system also needs to guarantee the independence of the individual judge (para 5) and to be fair – i.e. to produce predictable results in a reasonable timeframe. However, such a system is currently lacking in Bulgaria. A total reshuffling of the current model of evaluation, which will allow for quicker promotion competitions, is needed.

The problem from the perspective of the conflict of institutions vs connections

The situation of the organisation of competitions for promotion in the Bulgarian Judiciary shows how a good legislative intention can be totally corrupted in its implementation. By providing more assessment opportunities for judges, the legislative wanted to create a more predictable, professional and organised Judiciary. However, the lack of rules on the effectiveness of the assessment has opened the door for a lot of

[14] The minutes of the meating of the Judicial Chamber can be found at http://www.vss.justice.bg/root/f/upload/28/pr-28-07-08-2020-%D0%A1%D0%9A.pdf accessed 09.11.2021.

criticism, which has undermined the system of promotion through competition in the Judiciary.

In turn, the pressing need to organise the system and provide for enough judges where they are needed opened the door for the use of instruments serving purposes that are alien to the predictable career advancement, such as the secondment of judges. So in this case the wish to introduce a more open, competitive system of promotion based on merit and evaluation was confronted with the inability to supply it with enough personal and organisational resources. This in turn ruined the creation of a transparent and objective system of promotion and introduced the exact opposite – the possibility to use unmotivated and discriminatory decisions based on current needs and wishes of certain actors within the Judiciary.

However, dismantling the system of secondment in a quick fashion will also have serious consequences, since all the seconded magistrates will have to immediately return to their original positions after years of service in another city or instance within the system. This requires a strategic long-term solution to the problem of promotion, while keeping all the short-term risks of overburdening of the system in mind. The only possible solution will be to further reform the evaluation process by speeding it up and using the personal resources of the system to adopt effective assessment procedures. This solution will be very hard to find and will require comprehensive assessment of the current state, evaluation of the resources at hand and creation of such procedures that guarantee objective career decisions.

This will also require a reform of the current system where court presidents still have a say in questions of the placement of certain judge within the Judiciary – trough decisions for secondment, appointment of evaluation commissions etc.

Conclusion

In summary, the creation of elaborate systems for career development without the necessary resources creates a risk of undermining the whole system of appointments in a national judiciary and its replacement with alternative, shadowy mechanisms for personal selection in the system. Steps to prevent that are needed before the whole judiciary becomes clogged with vacant positions in the higher instances, taken by seconded judges who are vulnerable to outside influences. The situation illustrates the saying “the road to hell is paved with good intentions” and shows the hidden risk with hastily constructing control mechanisms.

Practical solutions need to be found in a professional, informed discussion.