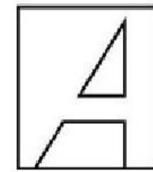

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Presentation
on

"Ensuring Independence and Impartiality of Justice in South East Europe"

by

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Thank you Mr. Chairman,

It is an honour and delight to participate in this Panel, and I would like to take this opportunity to both thank the organizers of the Rule of Law Symposium for having invited me, and congratulate them for having put together such an excellent and relevant conference. My name is Stefanie Ricarda Roos. I am the director of the Konrad Adenauer Foundation's Rule of Law Programme for South East Europe.

I. Introduction

The focus of my presentation will be on "ensuring independence and impartiality of justice in South East Europe". I have structured my presentation so that it reflects the main topics proposed by the organizers for this panel discussion. Therefore, I will

- first, try to identify challenges to ensuring independence and impartiality of justice (as well as the challenges to fair and rapid delivery of justice).
- Second, I should like to define roles and means, but also challenges of interaction between governmental and nongovernmental stakeholders regarding the ensurance of judicial independence and impartiality.
- Third, I would like to share with you a success story, and some lessons learned.
- I will leave the prioritization of the next steps for country stakeholders and donor support to the discussion and workshops.

Before I start, please allow me to briefly say a few words about the Konrad Adenauer Foundation's Rule of Law Programme for South East Europe which I am directing:

- The Rule of Law Programme started in April 2006, i.e. only a bit more than a year ago.
- It is designed as a regional programme to promote dialogue on rule of law issues within and among the countries in South East Europe.

- The seven programme participant countries are Bosnia-Hercegovina, Bulgaria, Croatia, Macedonia, Montenegro, Romania, and Serbia.
- The office of the rule of law programme is in Bucharest (Romania).
- The Konrad Adenauer Foundation, which has established the Rule of Law Programme for South East Europe, is a German political foundation that promotes the establishment and consolidation of democratic states based on the rule of law world-wide. In South East Europe, the Adenauer Foundation wishes to contribute to the development and solidification of an efficient legal order that is in accordance with the fundamental principles of the rule of law, and as such both a core element of a democratic system, and a prerequisite for the accession of Programme participant countries to the EU.
- In the past year, the Rule of Law Programme for South East Europe has focused primarily on the new EU-member countries Romania and Bulgaria.
- The promotion of judicial independence and impartiality is one of the priorities of the Rule of Law Programme, recognising that the right of each person to a fair trial before an independent and impartial tribunal is a fundamental human right, and that an independent justice system is a constitutive element of the rule of law, and as such a pillar of a democratic state based on the rule of law.[1]
- In the past year, we have carried out several projects relating to judicial indepence and impartiality in various countries of South East Europe, both on a national and regional level, and I am happy to share some of my experiences in this area with you.

[1] The State parties to the European Convention on Human Rights and Fundamental Freedoms (ECHR) have recognized this right through their ratification of the ECHR. Article 6, paragraph 1 of the Convention states: “[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

II. Challenges to ensuring judicial independence and impartiality (as well as fair and rapid delivery of justice) in SEE:

Let me now turn to the first question, identifying some of the most significant challenges to ensuring judicial independence and impartiality in South East Europe:

1. Differentiation between structural and implementational level

In answering this question, I find it useful to distinguish what I call the structural and the implementational level. By structural level, I mean the formal structures for ensuring judicial independence and impartiality, i.e. primarily the constitutional and legal framework for the protection of the independence and impartiality of justice. By implementational level, I mean both the proper functioning of the institutions whose mandate it is to guarantee the independence of the judiciary, and how judges, in their daily work, manage to deliver justice fairly, impartially, and independently.

a. Challenges stemming from deficiencies in formal structures

In the new EU member countries the formal structures for ensuring independence and impartiality are, generally speaking, in place: the Constitutions guarantee independence of the judiciary; legislation regarding the guarantee of independent and impartial courts and judges exist; institutions mandated to guarantee the independence of the judiciary (such as the Superior Council of Magistracy in Rumania, and the Supreme Judicial Council in Bulgaria) have been established and active for some time.

> In Bulgaria, for example, the Supreme Judicial Council adopted a regulation on the competitive examination and evaluation of magistrates in accordance with the Judicial System Act. This act regulates the criteria and procedure for the evaluation of the professional and ethical qualities of magistrates.

Nevertheless, primarily in the pre-accession context, remaining deficiencies with regard to formal structures in both countries have been viewed as obstacles to

ensuring judicial independence and impartiality. I would like to give just two examples:

- In the case of Bulgaria, the European Commission, in its September 2006 Monitoring Report has included among the benchmarks to be met by Bulgaria the adoption of „constitutional amendments removing any ambiguity regarding the independence and the accountability of the judicial system".
- In the case of Romania, the Commission did not raise concerns regarding the constitutional framework. The challenges to ensuring judicial independence and impartiality in Romania seem to stem rather from the legislative framework. In a survey which – together with a local NGO – we conducted among Romanian judges, 70% of the participant judges said that they did not feel they were protected enough by the present Romanian law regarding pressure factors and conflicts of interest which could endanger their independence and impartiality. I will come back to this survey later on.

As regards the situation in the countries of the former Yugoslavia, challenges to ensuring judicial indepence and impartiality do, to a far greater extend than in Bulgaria and Romania, still stem from the constitutional framework as such. I would like to illustrate this with the example of Serbia: Following the successful referendum on Montenegro's independence, Serbia, at the end of September of last year (09/30/06), adopted a new Constitution – almost overnight. The new Constitution corresponds in general to European standards and to the recommendations of the Venice Commission. It is, however, from a rule of law point of view, considered to be incomplete and contradictory. One of the criticisms raised against it is the Parliament's overwhelming influence in the appointment of judges. Article 153 of the Constitution refers to the establishment of a Supreme Council of Justice, whose members should be elected by the Parliament. This Council should be an independent and autonomous institution, which will in turn provide for the independence of the courts and of the judges. The Supreme Council will present a slate of judges for Parliament's consideration. However, the judges will, in the end, be elected by the Parliament. The danger of the control of Justice through political parties comes as a consequence. An amendment of

those dispositions is therefore seen to be necessary in order to insure the independence of the judges as a fundamental requirement of a democratic order. (Montenegro has not yet adopted its new Constitution.)

b. Challenges stemming from deficiencies on the implementational level

I would now like to turn to the challenges to ensuring judicial independence and impartiality stemming from the implementational level. From my point of view, they are as important as those stemming from structural deficiencies. As I had already pointed out, by the implementational level I mean both the proper functioning of the institutions mandated to guarantee the independence of the judiciary, and the manner in which judges, in their daily work, deliver justice fairly, impartially, and independently. One of the test cases for the latter is how judges deal with pressure factors and conflicts of interest, and how the system protects them from these pressure factors and conflicts of interest.

I would like to illustrate this using one of our projects as an example:

Starting from the basic assumption that the independence and impartiality of a judge, both personal and substantive, can be influenced and endangered by various internal and external pressure factors and conflict of interest situations, and that the delivery of justice can especially be compromised by personal interests or personal relations of the judges themselves, we conducted a one-year project in Romania last year together with a Romanian NGO, the Society for Justice, on “Pressure Factors and Conflicts of Interest in the Judiciary”. The project consisted inter alia of a questionnaire in which we asked the participating judges to

- define “pressure factors” and “conflicts of interest”;

and to answer the following questions:

- Has pressure ever been exerted on you to take a specific decision in a case?
- Have you ever identified those interests that applied the pressure exerted on you, in a specific situation?
- Have you ever been able to prove the link between the pressure exerted on you and the interests that determined that pressure?

- Is “conflict of interests”, from the judges’ point of view, a very stringent actuality of the judiciary system?

I cannot go into detail regarding the individual answers given to these questions, but only wish to point out some conclusions. The answers to the questionnaires have been evaluated, and the conclusions drawn therefrom were put together in a handbook for judges. I am happy to send you the English version of this handbook in case you are interested in it.

Here are some of the conclusions:
Only 30% of the judges surveyed answered in the affirmative to the question “*Have you been subjected to any pressure in order to pass a certain decision?”* , and the majority indicated that those had been indirect pressures, or suggestions more than actual pressure. Compared to the fact that a total of 70 % answered positively to the question “Do you feel you are sufficiently protected by the legislation from possible pressure factors external to the system?”, the percentage of judges who had actually been pressured seems to be small. It is nevertheless worthwhile to take a look at some of the pressure factors which the judges named, as they, themselves, constitute a challenge to effectively ensuring judicial impartiality. Among the pressure factors mentioned in each seminar which we conducted on this topic were the following:

- the media, which the judges perceived primarily as indirect pressure, or suggestions more than actual pressure;
- material pressure factors, such as the low payment of judges;
- the lack of unitary jurisprudence;

and

- the heavy case load (which also constitutes a challenge to the efficiency of justice).

Challenges to ensuring impartiality of justice also stem from conflicts of interest. When asked the question “*Is conflict of interests, from the judges’ point of view, a very stringent actuality of the judiciary system?”,* 45% responded positively.

During our discussions with the judges, special attention was paid to the status of judges working in small communities, because after several years in office the impartiality image is almost absent, given that the judge's acquaintance circle reaches a significant share of the total number of families in the community. Interestingly, the judges themselves stated that this may be added to the list of reasons which justify the transfer of a judge.

From my point of view, one can add the following to the list of rather "soft" challenges to ensuring judicial independence and impartiality:

- **the understanding of the concept of „judicial independence"**
  Independence is still often seen as a privilege of judges, rather than as a privilege and right of citizens in a democratic state based on the rule of the law. Courts and judges only administer this privilege for the society and its members.
- **the distrust of the society in the justice system**
  one of the reasons for which is
- **corruption in the judiciary**
  - which is still a common phenomenon in most if not all countries in SEE;
  - hardly anybody denies it;
  - but the effective fight against it proves to be difficult, as it is a very sensitive issue and the reactions of stakeholders towards anti-corruption campaigns are correspondingly strong.
    Example: Anti-corruption campaign of Romanian Ministry of Justice, and the criticism raised against it.

III. Roles and means of interaction between governmental and nongovernmental stakeholders

I would now like to turn to the second issue, the roles and means of interaction between governmental and nongovernmental stakeholders regarding the ensurance of judicial independence and impartiality. Let me start by pointing out that the Konrad Adenauer Foundation is an international, nongovernmental

organization which – through its Rule of Law Programme for South East Europe – co-operates with both governmental and nongovernmental stakeholders. In the past, our co-operating partners have been the Ministries of Justice, the Superior Judicial Councils or Superior Council of Magistracy, the Constitutional Courts, the General Public Prosecutors' Offices, National Institutes for Magistracies, Judges Associations, Courts, NGOs who work in the area of rule of law, and academia. Through this, we have gained some experience with regard to the roles and means of interaction between governmental and nongovernmental stakeholders.
I would like to conclude from this experience that the interaction between governmental and nongovernmental stakeholders in the area of justice reform, in particular as it regards the promotion of the independence of the judiciary, can pose a challenge to ensuring impartiality and independence of justice itself. The reasons for this are manifold. As time is short, I would like to name but three, which are:

- state institutions' own perception of their authority and its extent; and
- the remaining distrust of national institutions vis-à-vis nongovernmental actors;
- Civil Society/NGOs perceiving themselves as having to be the „watch-dog" or rather the critical voice/opposition to state institutions – many NGOs avoiding co-operation with state institutions.

It has been my observation that the relationship between governmental and nongovernmental stakeholders in the justice sector is often still not a natural one, as holds true for the relationship between civil society and state institutions in general in many of the region's transitioning countries. This might have to do with both state institutions' perception of their authority and its extent, in particular vis-à-vis nongovernmental actors, and the related distrust vis-à-vis nongovernmental institutions or stakeholders, and how civil society sees their role. Let me illustrate what I mean with two examples:

Last year, a relatively new local NGO published a comprehensive report on the justice system in one of our programme participant countries in SEE. The report

analyzes many aspects of justice affairs, ranging from court management to the personal relations among judges and prosecutors, to the quality of the paperwork prepared by lawyers. The report included, inter alia, an analysis of the work of all relevant institutions in the justice sector, such as the state institution in charge of guaranteeing the independence of the judiciary, the Ministry of Justice, the Constitutional Court and the Ombudsman institution, the court system, the attorneys at law, other legal professions and their relationship with each other, as well as the legal education system. In reaction to the publication of the report, the national institution whose constitutional mandate is to guarantee the independence of the judiciary distributed a „communique" to the media and relevant institutions in which they criticized the NGO for its report, arguing that the NGO did not have the right to analyze the justice system without having been „authorized" to do so. The inference from that statement was that the only institutions who had the right to comment on the justice system were the institutions who had a constitutional mandate to do so.

This example illustrates that many state institutions understand their authority and its extent in the sense of a monocracy, or an exclusive right to the management of justice issues. The understanding that the independence and impartiality of justice can only be ensured through the combined effort of both governmental and nongovernmental stakeholders is not fully developed everywhere yet.

The second observation which I have made during the past fourteen months is that it was not only the various governmental institutions which appeared to be rather reserved as to their co-operation with NGOs. Both Civil Society and NGOs are reluctant to co-operate with state institutions that have as part of their responsibility the safeguarding of an independent and impartial judiciary.

IV. Success stories and lessons learned

As you all know, it is not easy to see tangible results if you are working on such complex and delicate issues as challenges to ensuring judicial independence and impartiality. Success stories to be shared are more the exception than the rule. With that said, I would like to conclude my presentation by sharing one such success story with you, and also some of the lessons learned.

The success story is the project on „Pressure Factors and Conflicts of Interest" which we carried out last year in Romania.

This project was based on the belief that only a multi-faceted approach can effectively defend judicial independence and impartiality against factors and situations which threaten them. This approach must include not only institutional and normative instruments. Rather, it must also include awareness-raising and consciousness-building measures. Among the latter are seminars which help judges and those responsible for guaranteeing judicial independence and impartiality to reflect upon which pressure factors and conflict of interest situations exist, why and how they can negatively impact judicial independence and impartiality, and how judges can deal with these situations in their daily work.

To this end, we have organized – throughout last year – seven one-day seminars for judges in different court districts in Romania in which we discussed the concepts of judicial independence and impartiality, pressure factors and conflict of interest situations, and the means and mechanisms which exist to protect judges from unjustified interference.

At every seminar, we were able to observe how the reservations and tension that perhaps existed at the beginning declined during the day. That boosted the dialogue and removed the initial reluctance of the participating judges to talk to their peers. The judges did not only raise technical matters – whether or not they had a computer at their office, what their wage was, how many judges sat in their courthouse, what the daily caseload was – but they also approached the so-called "soft" issues which go to the very core of the justice act.

The second aim that we fulfilled started from the belief that independent and impartial justice could only be successfully guaranteed if all the actors involved

co-operate instead of working against each other. Through our project we have sought to establish a forum gathering representatives from all institutions responsible for safeguarding an independent judiciary, make them sit at the same table and have an open, critical and objective dialogue, jointly address the challenges to the ensurance of judicial independence and impartiality, and discuss the opportunities to improve that particular aspect. Apart from judges, we invited to each of our seminars a member of the Superior Council of Magistracy, an official representative from the Ministry of Justice, as well as a number of people representing the civil society – by civil society I mean members of our co-operating partner SoJust. In most of the seminars we managed to create the kind of climate that encouraged a constructive dialogue among the participants with notable and helpful outcomes regarding the improvement of the independence of the judiciary. The role of the Rule of Law Programme was that of a mediator of rather facilitator, and that we facilitated and moderated the interaction.

The third tangible result of this seminar was the guidebook for judges on pressure factors and conflicts of interest which we produced following the seminars. The guide defines independence and impartiality, lists pressure and influence factors as well as legal tools and measures that help prevent conflicts of interest and remove pressure factors impairing independent justice.

This concludes my presentation. Thank you very much for your attention.

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