Judicial Reform – State of Play and Opportunities

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Judicial reform, along with corruption and organized crime, continues to be one of the serious challenges to Bulgaria's accession to the European Union (EU). Bulgaria was not included in the fifth wave of enlargement of the EU in 2004 not least because of unsatisfactory progress in these areas.

However, advancing judicial reform is not simply a precondition set from the outside and it should not be considered within the context of future membership only. The consistent introduction of complex reforms is also a serious domestic political challenge to the establishment of rule of law and market economy. The poor efficiency and the slow administration of justice and investigation, the lack of transparency and responsibility have negative effect on the economy, the security of the rights of individuals, the public confidence in the accessibility, objectivity and fairness of the institutions. Criminal prosecution and justice in respect of severe crimes – above all organized crime, economic crime and corruption, in particular political corruption – are not efficient. The need to solve these problems demands the establishment of an active, stable and incorrupt system for administration of justice and law enforcement as a political priority. This is a precondition for the success of reforms in all other spheres – the social sphere, the economy, and governance in general.

At the same time, Bulgaria has undertaken serious foreign policy commitments for reform of the judiciary, ensuing first of all from the negotiations on chapter 24 *Cooperation in the field of justice and home affairs* and the EU Accession Treaty.[2] The monitoring and evaluation instruments of the European Commission contain a summary of the assessments of the implementation of these commitments and the requirements for full membership of Bulgaria. According to the expert assessments, the implemented reforms only partially meet the requirements, while the reform in the pre-trial phase in Bulgaria should be continued in order to attain compliance with the EU efficiency criteria.[3] The findings of the lack of measures for optimization of the structure of the judiciary, for practical improvements in the pre-trial phase, for the transparency and accountability of the prosecution office, are quite clear. The recommendation is to continue the reforms, which should lead to an improvement of the efficiency and the accountability of the judicial system.[4] The achievement of concrete results in this

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[2] The negotiations on chapter 24 ended on 29 October 2003, and the Accession Treaty was signed on 25 April 2005.

[3] See Report of the First Monitoring Mission (peer review) to Bulgaria after closure of accession negotiations under chapter 24 in the fields of Justice and Home Affairs in Bulgaria, presented in July 2004; 2004 Regular Report of the European Commission on Bulgaria's progress towards accession.

[4] See 2005 Comprehensive Monitoring Report – Bulgaria, European Commission, 25 October 2005.

and other fields (border control, anti-corruption, and fight against organized crime) will influence the decision on the scheduled accession of Bulgaria on 1 January 2007 or its postponement. At the same time, the assessments and recommendations, made by the EU, should not be automatically accepted merely to fulfill, sometimes just as a formality, another commitment. The implementation must take into account the national context and adjustments should be made where this is needed to attain credible results.

Judicial reform in Bulgaria started in the early 1990s as part of the ongoing process of transition to democracy. Unlike political and economic reforms, reforms in the judiciary were much slower, explained to a certain extent by the conservatism inherent and necessary for any judiciary. The pace and substance of judicial reforms in Bulgaria were also influenced by other aspects of the transition process and by a set of external factors.

First, the official proclamation of the independence of the judiciary in the new Bulgarian Constitution (1991) and the consequent enactment of legislation on the judicial power – the Law on the Judiciary (1994) and the Law on the Supreme Administrative Court (1997), prompted **the political parties to seek indirect channels of influence**, which in the initial years of transition were ensured through **sweeping staff replacements** at all levels – from the rank-and-file to the senior positions. This process is now being repeated, but already at the level of governance of the judiciary – through the tussle for votes on the Supreme Judicial Council (SJC), which is more pronounced in the election of the parliamentary quota. As a body empowered to administer and govern the judiciary, the SJC plays a decisive role in respect of the members of the judiciary – it takes decisions on granting and withdrawal of the status of irremovability, lifting of immunity, imposing of disciplinary penalties. The SJC appoints and dismisses magistrates, including in senior positions, determines and nominates the applicants for the highest positions in the hierarchy of the judiciary – chairs of the Supreme Court of Cassation (SCC), the Supreme Administrative Court (SAC) and the Prosecutor General. The temptations to exert influence, pressure and to make bargains, including political, in the process are quite substantial. These are materialized through mechanisms driven by informal ties, although the judicial and the political "nomenclature" deny that political influence is possible referring to the formal independence of the judiciary.

Second, ensuring political support in parliament and in the government is not sufficient for lobbying on behalf of certain economic interests. In an environment where the rule of law – with some of its basic principles including judicial control over the acts of the executive, settlement of legal disputes in court and equitable access to justice – is increasing, those seeking profit through improper influence on government must also ensure they have "adequate support" within the bodies of the judiciary. This turns into one of the channels for spread of corruption in the three branches of the judiciary – the investigation service, the prosecution office and the courts. The role of the **judiciary** as last instance of control, particularly where the redistribution of national wealth is affected, makes it an intersection **of conflicting political and economic interests and breeds for corruptive pressure**. The surveys among the general public and the businesses in Bulgaria during 1998 – 2004 done through the Corruption Monitoring System of *Coalition 2000*, a Bulgarian public-private anti-corruption initiative, registered traditionally high levels of corruption pressure in the judiciary, despite the relative decrease of

those values in 2004.[5] The sluggish and inefficient functioning of the judiciary provokes corruption actions even where a party to a court case is convinced of the merits of its case. This is all the more frequent when attempting to ensure impunity for the crimes committed. It is not by chance that the notion of association of individual magistrates and representatives of the criminal world has settled firmly in the public opinion.

Third, the influence of political and economic interests on representatives of the judiciary and the proliferation of corruption practices became possible due to the **lack of mechanisms for accountability and control** – both internal and external – **of the work of the judiciary**. From the very beginning of the transition process the efforts to overcome the political domination over the court, the investigation and the prosecution, inherited from the communist system of governance, pushed the reforms mostly towards guarantees for their independence. The result turned out to be establishment of a pattern of formally fully independent judiciary, which remained, however, completely without accountability and control, thus vulnerable to informal influences. The lack of clear mechanisms for accountability and control is also one of the reasons why independence is quite often interpreted as untouchability. The most recent surveys and evaluations on the judicial systems in transition countries done by influential international institutions also pointed out that during the 1990s a priority in obtaining donor support has been granted to the efforts to strengthen the independence of and depoliticize the judiciary rather than to the introduction of standards for its accountability, efficiency and free access.[6] The public opinion and the business in these countries believe their judicial systems are not efficient.[7]

Fourth, **little harmonization was ensured between regulatory and judicial reforms**. Quite often the speedy enactment of new legislation is carried out without the necessary measures to enhance the implementing capacity of the courts, and in the sphere of criminal law – the capacity of the prosecution and the investigation as well. This trend is usually facilitated by the need to adopt huge volumes of legislation in compliance with the requirements for harmonization with European law within relatively short periods of time. At the same time, the legislative process itself suffers from lack of sufficient transparency, democratic participation and civil control. On the one hand, this has negative effect on the quality of enacted laws, and on the other, it provides conditions for certain private or corporate interests to unduly influence legislation to the detriment of the public interest, and in any case it hinders administration of justice.

Fifth, the persistent lack of political will and consensus on the need for radical judicial reform and its priorities has had an extremely negative effect. Along with that, **the prevailing part of the judiciary reacted skeptically to all attempts to change the status quo.** On the one hand, the lack of control and accountability were defended under the pretext of protecting the constitutional model of the judiciary and the principle of its independence. On the other, as a result of the defense of narrow guild interests, a poorly working model was consolidated.

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[5] See Anti-Corruption Reforms in Bulgaria, Center for the Study of Democracy, Sofia, 2005, pp. 18-22.

[6] See Judicial System in Transition Economies: Assessing the Past, Looking to the Future, James Anderson, David Bernstein, Cheryl Grey, The World Bank, 2005, pp. XII-XIII, p. 14.

[7] Ibid. according to data from the World Economic Forum, Global Competitiveness Report 2004.

In fact, it was the constitutional model itself – by placing institutions with various purposes, functions and role in criminal justice (the court, the prosecution and the investigation) within the judiciary – that stood in the way of creating a common platform for reforms, and quite often led to conflicting views and ideas.

Sixth, the issue of **the need for complete judicial reform** with strong emphasis on its anti-corruption aspects was put forth at the end of the 1990s by the **non-governmental sector in Bulgaria** – *Coalition 2000* through its annual Corruption Assessment Reports, the *Judicial Reform Initiative* through the Program for Judicial Reform (2000), the Center for the Study of Democracy – through the Judicial Anti-Corruption Program (2003), etc. The result of these efforts was the beginning of a public-private partnership with the bodies of the judiciary and the executive, mostly in the field of drafting strategic and program documents, but still underdeveloped in respect of the process of their implementation.

Seventh, **international influence** and pressure are highly important for the progress of judicial reform in Bulgaria. Most often they have a favorable effect on home policies and are prerequisites for undertaking any reforms and for their success.[8]

Although external factors may come in different modalities, what they have in common is the concern of the foreign partners and the international organizations for the fate of democratic reforms. **The real danger of export of instability and crime from the emerging to the developed democracies raised** the concern about the effectiveness of criminal justice. Thus, accelerating judicial reform and attaining concrete results became relevant not merely as a requirement within the EU integration process, but also within the more general context of security – regional, European and global.

Alongside its positive effect on the judicial reform, this international dimension also revealed certain downsides. For example, there had been insufficient synchronization and coordination of efforts in support of the reforms, sporadic setting of priorities and short-lived requirements, unrealistic expectations for quick results from the changes, etc. They in turn had negative effect on the systematic nature, the consistency and the long-term prospects of the reform.[9] Thus, optimizing external influences and support should contribute to the progress of reforms.

When deciding on urgent priorities and the future approach, **several important domestic and international circumstances** that came to being in the last couple of years should be taken into consideration.

One, the Declaration on the Guidelines to Reform the Bulgarian Judicial System, signed by the political parties represented in parliament (April 2003). It officially launched and laid the **foundation of the first constitutional reform**, outlining its major guidelines for the purposes of:

[8] In recent years the Regular Reports of the European Commission played an important role, as well as the evaluations provided by a number of international organizations and institutions – the Venice Commission, the World Bank, the International Monetary Fund, the American Bar Association – Central European and Eurasian Law Initiative through the Judicial Reform Index for Bulgaria (volume I, 2002; volume II, 2004), the Accession Monitoring Program of the Open Society Institute, the United Nations Development Program (UNDP) – Bulgaria, etc. They provide analyses, criticism and proposals for further development of the judicial reform.

[9] For details, see Corruption Assessment Report 2003, *Coalition 2000*, Sofia, 2004, pp. 90-91.

- achievement of high administration of justice standards (fairness, speed, efficiency, accessibility and transparency);
- independence, impartiality, competence and responsibility of the magistracy;
- real division and mutual check of powers;
- increasing public confidence in the judiciary.

This declaration is an expression of the agreement between the parties presented in the parliament, to implement constitutional reform on issues of importance for the judiciary, such as enhancement of the mechanisms for coordination and interaction between the prosecution office, the investigation and the executive, changes in the structure and functions of the judiciary, and building up its implementing capacity.

The declaration was not exhaustive of the subject, but it laid the foundation for search of broad-based consensus for achieving these objectives. This potential has remained almost unutilized, but undoubtedly it would be required for the purposes of the forthcoming constitutional and legislative reforms in this field.

Two, the **Constitutional Court has issued several interpretative decisions** on proposed constitutional changes as regards the judiciary. **The principle foundation, established by consensus of the parties represented in parliament, concerning the priorities of the judicial reform, was greatly narrowed** by Decision No. 3/2003 of the Constitutional Court on constitutional case No. 22/2002, which defined the boundaries of the authority of an ordinary National Assembly (ONA) to modify texts of the Constitution, and to differentiate it from the authority of a Grand National Assembly (GNA).

Pursuant to Article 158, paragraph (3) of the Constitution, an ONA may not resolve on the "form of state structure" and the "form of government", because such competence has been granted exclusively to the GNA. The Constitutional Court assumed unexpectedly broad interpretation of the phrase "*form of state structure or form of government*", as well as of what is considered a change in these. According to the interpretation the form of state structure is determined by "the territorial integrity and the characteristics of the state as unitary state with local self-government, in which autonomous territorial formations are not allowed". The form of government, in turn, is determined by its being a parliamentary or presidential republic or a monarchy, as well as by the system of all basic constitutional institutions, established by the GNA, their existence, their place in the relevant branch of power, their structure and mode of formation, and their remit. This is also done with a view of retaining the balance between the institutions in compliance with the basic principles of the state – sovereignty of the people, political pluralism, division of powers, rule of law, and independence of the judiciary.

This interpretation resulted in narrowing the scope of the possible constitutional, and hence legislative, reform in respect of the judiciary. What thus remained feasible was to focus on measures for its institutional strengthening by revising the immunity and irremovability of magistrates and the mandates of administrative managers. The lack of broader consensus between the political parties represented in parliament further narrowed the possibility to undertake

a number of changes which could contribute to the implementation of efficient judicial reform.

With its subsequent Decision No. 8/1 September 2005 on constitutional case No. 7/2005 (issued upon request from the SCC), the Constitutional Court revised to a certain extent its definitive position on structural changes in the judiciary. The five queries for interpretation it received, all dealing with the form of government, focused on whether it would constitute a change in the form of government, if a text in the Constitution would read that: 1. The court is the basic holder of judicial power and it is the sole administrator of state justice; 2. The prosecution office is restructured and its powers within the judiciary are only related to upholding the indictment in court; 3. The investigation service is restructured and the investigators become investigating magistrates; 4. The prosecution office, the investigation service and the Ministry of Interior (MoI) implement the government policy in the fight against crime and their activities are monitored by the National Assembly; 5. The SJC is restructured and the manner of its formation is changed. The decision ruled that changes in the Constitution as referred to in the first four queries "do not constitute changes in the form of government and may be introduced by an ordinary National Assembly, provided they do not disrupt the balance of powers and are in compliance with the basic principles of the current constitutional model of the state – rights of the individual, sovereignty of the people, political pluralism, rule of law, division of powers and independence of the judiciary". The query under paragraph 5 was discarded as inadmissible.[10]

That revision of the previous ruling was rather cautious. The qualifications in the decision allow for different interpretations, including narrowing ones, which could have a long term impact. For example, since there was no interpretation of the basic principles of the constitutional model of the state, they could be vested with different substance. This, however, could have negative consequences, in particular with respect to the division of powers and the independence of the judiciary. Under the pretext of compliance with these principles the necessary reforms could be limited or frustrated. The same applies to the balance of powers, which has been legally and factually disrupted in the Bulgarian model, and so changes, rather than preservation of the status quo, are required. From this point of view it is not possible to assert conclusively that the stance of the Constitutional Court would facilitate and speed up the judicial reform. It is a matter of political will and political responsibility for these decisions to be taken within the legislative branch.

Three, some **moderate amendments to the current Constitution** were adopted.[11]

The amendments to Chapter 6 of the Constitution, adopted on 24 September 2003, were the first step towards the breaking of the obviously inefficient model and towards overcoming the limitations to serious legislative changes in the field of the judiciary, set by the decisions of the Constitutional Court.

[10] The decision was signed with dissenting opinion by Justice Roumen Yankov. The dissenting opinion substantiated the inadmissibility of the request as a whole. One of the reasons stated was "the fact that there is no request for interpretation of constitutional principles, norms or provisions, but rather a request as to in what terms should the existing structure of the judiciary as stated in the Constitution be changed by an ordinary National Assembly".

[11] For details, see The Bulgarian Constitutional Reform within the Context of the Accession of the Republic of Bulgaria to the European Union (2003 – 2005), Center for the Study of Democracy, Sofia, 2005 (www.csd.bg).

The bill provided for changes in three constitutional provisions on the judiciary – immunity, irremovability of magistrates and mandates for appointment to head administrative position in the judiciary, new wording of Articles 129, 131 and 132 of the Constitution and a transitional provision for settlement of existing cases. The objective of the amendments was to strengthen the guarantees for efficient and impartial administration of justice as a first step in the process of judicial reform.

In their new wording the modified principles of limited (functional) immunity of the magistrates and time-limited terms for administrative managers in the bodies of the judiciary, as well as the corrections to the institute of irremovability, reproduce the structural problems of the judiciary in its current model. They apply to the same extent to its three components – the courts, the prosecution office and the investigation service, disregarding the different status of the judges, the prosecutors and the investigators, ensuing from their different authority and functions in trial, the differences in the degrees of transparency, policies for selection, appointment and career promotion. At the same time, the introduction of these partial changes before other needed reforms in the judiciary and the other branches did not help the obtaining of better balance and coordination of the branches of power.[12]

Thus, in spite of the consensus by which the amendments were adopted, their importance should not be overestimated. **The constitutional debate in the parliament** was narrowed merely to the requirements set by EU accession, but **did not provide the foundation for larger scale changes which are possible within the limits of Decision No. 3 of the Constitutional Court. These could be implemented by an ordinary National Assembly** – for example, introduction of mechanisms for accountability of the units and bodies of the judiciary, and the Prosecutor General in particular, introduction of the figure of "independent prosecutor" – an official outside of the prosecution office system, with prosecutorial functions vested in him to investigate corruption crimes, committed by magistrates, etc.

The second phase of the constitutional reform referred mostly to changes ensuing directly from future EU membership, whereas all important issues of the judicial reform, including those of the organization and structure, and the potential convening of a GNA for enactment of changes in the form of government, were not even put to discussion.

At the same time, there are areas where reform – although not directly related to the judiciary – could have still facilitated its work, could have enhanced human rights protection and restriction of the channels for proliferation of corruption in the bodies of the judiciary and other government institutions – for example, the constitutional consolidation of the ombudsman institution (incl.

[12] The term of office principle has actually been introduced by the SJC, elected in December 2003, with members appointed according to the then-existing procedure based on quotas. This procedure, in particular the election of the parliamentary quota by a simple majority, allows for indirect influence of the ruling majority on the appointment of heads of courts, prosecution offices and investigation services, and also the making of decisions of importance for the judiciary. In turn, the representatives of the various bodies of the judiciary, elected within its quota, quite often lobby for the interests of their own institution. All of the above hinders the formulation of a uniform and objective stance of the Council members. The appointments of administrative managers more often than not are the result of unscrupulous compromise and are made in the absence of required mandatory criteria and alternative candidates, especially in prosecution offices and investigation services.

election by qualified majority, the right to refer to the Constitutional Court) and of alternative methods of dispute resolution, more stringent requirements to lawyers for compliance with professional ethics and discipline, etc. Considering the prevailing attitudes of the public and policy makers these are both possible and needed.

For years reforms have been haphazard and superficial with little practical results. Thus, what is needed now is a comprehensive approach, comprising further constitutional, legislative, structural and institutional reforms. Building a consensus on the broadest possible range of basic issues relevant to the judicial reform is a prerequisite for establishment of legal and institutional stability and confidence in the institutions investigating crimes and administering justice. It would also put an end to a practice – quite typical for the period of transition – where political intervention and corrupt pressure become substitutes for independent and professional decisions, as well as an end to conflicts between the institutions, including conflicts between the various bodies of the judiciary.

The future constitutional changes, based on a broad consensus, should achieve two complementary objectives: consolidate a working model of division and **balance of powers,** where **the judiciary** is both independent and accountable, and where **the Constitutional Court** acts above all as guardian of the constitutional consensus with fewer opportunities for biased interpretations of the constitutional norms which impair the supremacy of the legislative branch.

Civil initiatives for reforms in the judiciary

In response to the strong need for changes and in clear contrast to the position of the executive that judicial reform has been completed, in the late 1990s the *Judicial Reform Initiative* was launched. The initiative, with the Center for the Study of Democracy as its Secretariat, united the efforts of Bulgarian professional associations and non-governmental organizations involved in judicial reform, among them the Union of Bulgarian Jurists, the Bulgarian Judges Association, the Chamber of Investigators in Bulgaria, the Legal Initiative for Training and Development, etc., representatives of government institutions, including magistrates, and experts. In 1999 – 2000 the Initiative developed a Program for Judicial Reform in Bulgaria, which outlined its priorities: development of the legislative basis of the reform, enhancement of the professionalism and responsibility of magistrates, modernization of the work of the bodies of the judiciary and their administration, opening of the judiciary to society.

As a result of the public-private partnership, the major priorities of the program were included in the Strategy for Reform of the Bulgarian Judicial System, adopted by the government in October 2001. The partnership continued successfully also in the work on the Judicial Anti-Corruption Program, initiated by the Center for the Study of Democracy. The program was prepared by leading Bulgarian jurists, including magistrates, and was the result of the joint efforts of leading non-governmental organizations, representatives of governmental institutions and experts. The document was published in the fall of 2003 and contained a number of specific proposals for reform of the judiciary, which were further developed in 2004 – 2005 and presented to the attention of politicians, experts and civic organizations.

The proposals of the Center for the Study of Democracy for reforming the judiciary referred to the **principles of organization, governance and structure of the judiciary.** They are targeted on achieving accountability, promptness, effectiveness and more effective counteraction against crime, and formation of independent and efficient judiciary in compliance with advanced European standards through constitutional and legislative changes, which could bring about:

- Introducing clear-cut checks and balances between the branches of power by having **the National Assembly elect the Presidents of the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General** by a qualified majority and for terms exceeding four years; the National Assembly should have the power to remove those officials before their term expires and decide on lifting their immunity only under conditions and following a procedure strictly defined in the Constitution; a logical follow-up to this principle would be **the possibility to make these magistrates (in view of their administrative responsibilities) answer parliamentary questions in cases specifically provided for and under a procedure established in advance**. This way, the National Assembly could play a vital part in ensuring the checks and balances among the three powers, without interfering with the independence of the judiciary[13]. This is necessary because the judiciary is subject to control to a far lesser extent in comparison to the legislative and the executive branches, but at the same time it holds the authority of control in respect of the decision making process. This refers in particular to administrative justice – in respect of control over decisions of the executive, and to the role of the Constitutional Court (although being a body situated outside of the judiciary) – in respect of interpretation of the will of legislators.

- **Decentralization, transparency and accountability of the public prosecution system** by changing the hierarchical model to which it is confined at present; putting in place better guarantees for the independence of prosecutors when they decide on individual files or cases, which is in fact independence of any superior prosecutor or the administrative manager; *e.g.* requiring that any instructions given to a prosecutor should be in writing, giving the prosecutors the right to object against the instructions given by a senior prosecutor or withdraw from the case in the event of disagreement; introducing stringent sanctions to put an end to the unlawful practice of giving oral instructions to prosecutors down the line, etc.; **regular and *ad hoc* reporting by the Prosecutor General** to the SJC, or alternatively to the National Assembly, if the proposal to have the Prosecutor General elected by parliament is accepted.

- Introducing the institution of **a public official empowered by the law to exercise prosecutorial functions**, or alternatively a team of such officials outside the hierarchical structure of the prosecution as it stands currently. Those officials should be elected by the National Assembly, to perform long term functions (*e.g.* instituting preliminary proceedings, investigating,

[13] Arguments to that effect are included in Decision No. 1 / 14 January 1999 of the Constitutional Court. It draws attention to "the necessary connection between the legislative and the executive branches" and points out that "… division of powers does not mean they should not cooperate and function in coordination. On the contrary – the three branches are bound by relations of mutual control and deterrence, set forth in the Constitution. The division of powers should not lead to isolation, but to cooperation and interactions between them".

bringing and maintaining charges of suspected **crimes committed by high-level politicians and magistrates,** or of suspected **corruption within the judiciary etc.)** or elected for a specific case; those officials should avail of the immunity of magistrates.

- A general review of the **immunity,** provided to a wider spectrum of individuals (members of parliament, members of the Constitutional Court, individuals in senior positions in the executive).

- Strengthening of the magistrates' right of independent decisions by limiting **the control exercised by superior magistrates as regards magistrates at lower levels** and excluding any direct intervention in the resolution of cases or improper pressure by senior magistrates on those at lower levels.

- Changing of the **status of the SJC and the procedure for forming its membership** (including the number of its members, their election and term of office, and the eligibility requirements) – the members should only be elected by the bodies of the judiciary and the chairperson should be elected by the National Assembly and report to the Assembly both regularly and on invitation; if the parliamentary quota in shaping the SJC is retained, the election by parliament should be by a qualified majority.

- Change in the constitutional model – **situation of the investigation and the prosecution outside the judicial branch**,[14] while adopting a model based on a wide consensus.[15] Under the current constitutional model – **separation of the organizational, personnel and financial management of the investigation and the prosecution from those of the courts within the SJC.**

Regardless of the fact that the structural changes alone could not solve all the problems facing the judiciary, their implementation or non-implementation should determine to a great extent the substance of the future decisions on governance, functions and principles of organization of the judiciary, as well as the entire procedural legislation.

- The gradual introduction of the European requirements for **the size of the budget** of the judiciary (in the countries of the European Union the budget of the judiciary usually amounts to 2 – 4% of the gross domestic product, and in Bulgaria for the year 2004 it was only 0.54%[16]; for 2005 the increase is only by 12%[17]), and also of stringent rules and transparency in its appropriation in implementing the priorities of the judicial reform, and not for *ad hoc* tasks or group interests.

[14] For details, see Judicial Anti-Corruption Program, Center for the Study of Democracy, Sofia, 2003; Corruption Assessment Report 2003, *Coalition 2000*, Sofia, 2004.

[15] The proposal for a new model of the judiciary, where the investigation service (and in one of the alternatives – the prosecution office as well) should be excluded from the judiciary, is subject to review due to the forthcoming restriction of the scope of activities of the investigation and transfer of major functions of the investigation service to police investigation bodies within the MoI as provided by the new Criminal Procedure Code, which is to come into force as from 29 April 2006.

[16] See Judicial Reform Index for Bulgaria, volume II, American Bar Association – Central European and Eurasian Law Initiative, Sofia, 2004.

[17] About 0.56% of the gross domestic product of Bulgaria calculated on the grounds of data included in Basic Macro-Economic Indices of the Macro-Framework of the State Budget by the Agency for Economic Analysis and Forecasting as of August 2005.

- Introduction of **uniform statistics** on crime – about the opening and progress of criminal cases, including corruption crimes. There is no such statistics as of now.[18] Currently the Ministry of Justice, the Ministry of Interior, the Supreme Prosecution Office of Cassation and the National Investigation Service keep their own statistics based on different indicators and criteria, which hinders the obtaining of reliable information, efficient interaction and undertaking of appropriate measures.[19]

- Accelerated introduction of **new technologies** in the judiciary – introduction of computers, automated systems for keeping court files, electronic system for management of case files, etc.,[20] and avoiding the possible duplication of funding projects in the same area.[21]

- Adoption of legal regulations **allowing conducting proceedings in electronic form** both by the parties to the case and by the court.[22]

- In connection with the need to strengthen the role of **the Constitutional Court as guardian of the constitutional-legal consensus and as warrantor of compliance with the constitution,** there was a proposal to replace the existing quota principle for election of constitutional justices with election only by the National Assembly (retaining the participation of the judiciary and the President of the Republic in the process only with possibility for nomination of some of the constitutional justices) by qualified majority, such that is required for enactment or amendments to the Constitution. A decision in this respect could contribute to strengthening the independence of the Constitutional Court and could provide guarantees against politicizing constitutional justice.

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[18] The lack of uniform statistics is part of the larger problem of lack of working mechanisms for exchange of information between the individual components of the judiciary and between them and other competent authorities involved in the fight against crime and corruption. The Uniform Information System against Crime, provided for in the Law on the Judiciary, is still not operational. The actual introduction of the system has been postponed again and again, which further hinders the fight against corruption.

[19] For the purpose of overcoming this problem experts from the Center for Study of Democracy and *Coalition 2000* have prepared a system of indicators for the collection of statistical data on the work of judicial bodies and of the Ministry of Interior in detecting and prosecuting corruption offences. The proposal for indicators, presenting the recommendations of the institutions concerned (see Anti-Corruption Reforms in Bulgaria, Center for Study of Democracy, Sofia, 2005, pp. 41-43), was submitted to the Anti-Corruption Coordination Commission, but it has not been used yet in its work as expected.

[20] The National Automated System for management of court files has been approved by the SJC in 2003, but the number of the courts where it has been introduced, is fairly small. At present the system is really operational in 15 courts (in 2004 the announced number was 27 with expectations for some 55) compared to the total number of courts – 153. However, even where the court file keeping systems have already been transferred on electronic media, there are no reliable guarantees for protection of the information and the documents processed and stored in electronic format, thus the risks concurrent with the prevailing paper document turnover, are retained.

[21] The software of the National Automated System has been developed under a project of the US Agency for International Development and has been delivered to the SJC. Later on, a tender was called by the Ministry of Justice under the PHARE Program, with LOT-1 about "system for management of the movement of court case files".

[22] Proposal for regulative provisions within the judiciary on acceptance and issue of electronic documents, signed with universal electronic signature (draft laws on amendments to the Civil Procedure Code, the Criminal Procedure Code, the Criminal Code and the Law on Electronic Document and Electronic Signature) has been adopted by the Council of Ministers in late 2004. The proposal was prepared by an inter-departmental expert group, including representatives of the Center for the Study of Democracy.

These proposals have been presented at various public forums with participation of representatives of the three branches of power, experts and non-governmental organizations; they have also been submitted to the responsible governmental institutions. Initially they received support mostly at the expert level, but a substantial portion of the proposals is already present in a number of political party programs. To be effected, these would require explicit support in parliament.

Government policy for reform of the judiciary

After a long period of denying the need for reform and undertaking partial changes, as from 2001 the government, and recently the judiciary as well, have undertaken actions in response to urgent domestic and international challenges.

- The first official attempt to set the judicial reform on more comprehensive conceptual foundation was the Strategy on the Reform of the Bulgarian Judicial System adopted on 1 October 2001 by the government and the program for its implementation approved in March 2002. The highlights of these documents coincide to a great extent with the objectives and measures set forth in the Program for Judicial Reform, elaborated within the Judicial Reform Initiative.

In the first two years after the adoption of the strategy the implementation of measures set forth therein did not result in substantial progress of judicial reform. The judiciary continued to get negative assessments of its work both from the civil society and from the European institutions and other international organizations. Therefore, and in view of Decision No. 13/2002 of the Constitutional Court, which declared as non-constitutional a number of the newly approved changes in the Law on the Judiciary, in the spring of 2003 the government updated both the strategy and the program for its implementation.

The Supreme Judicial Council adopted a Strategy for the Fight against Corruption in the Judiciary (February 2004) with the objective to obtain stability in the administration of justice; enhancement of public confidence in the judiciary; ensuring conditions for enhanced transparency and efficiency in the work of the bodies of the judiciary; introduction of effective mechanisms for detection and penalizing corruptive practices among magistrates; provision of prerequisites for intolerance to corruption in the judiciary by the population; ensuring active civil participation in the prevention and detection of corruptive practices in the judicial system.

The measures outlined in the strategy and set forth in detail in the program for its implementation for 2004 – 2005 are targeted at reform of the daily work of the magistrates and include strengthening the managerial capacity of the SJC, consolidation of the status of the magistrates, control mechanisms against corruption in the judiciary, ensuring transparency of the activities of the judicial bodies, automated allocation of cases, etc. The strategy provides also measures for reform in the activities of the administration of the judiciary, inclusive of stronger control of the processing of documents, facilitated access to administrative activities in the judiciary and improved mechanisms for appointment, career development and enforcement of administrative sanctions in respect of judicial employees. A separate section deals with measures

for promotion of the efforts of the judiciary to prevent corruptive practices, including through the media.

- The Council of Ministers adopted in December 2004 a National Concept for the Reform of Criminal Justice in the Republic of Bulgaria. Immediately after the approval of the National Concept, in expression of agreement on the major priorities, the Prosecutor General, the Director of the National Investigation Service and the Minister of Justice signed a joint declaration in support of the concept and in expression of readiness for joint action for its implementation.

- The legislative initiative of the government in the field of the judicial reform most often refers to amendments to the basic law on the structure of the judiciary – the Law on the Judiciary. It has been repeatedly amended since its enactment in 1994, but it could not attain its objective to develop an independent, efficient and incorrupt judicial system. The amendments of 2002 failed because most of the changes were declared non-constitutional.

Substantial amendments to the Law on the Judiciary were adopted in the 2003 – 2004 period. They developed further the amendments introduced to the chapter *Judicial Power* of the Constitution and suggested solutions to a number of problems – introduction of the principle of competition, attestation, legislative consolidation of training and measures for enhancement of the qualification of magistrates and the establishment of the National Institute of Justice, etc.

In implementation of the commitments undertaken in connection with the membership in the EU, in October 2005 a new Criminal Procedure Code was enacted.[23] The most substantial new provisions in the code concern the pre-trial proceedings and collection of evidence. Investigation within the pre-trial phase (including cases related to organized crime, economic crime and corruption) shall be carried out by police investigators – investigation bodies within the MoI. The range of crimes which will continue to be investigated by investigators, has been reduced to crimes against the Republic, crimes against peace and humanity and crimes committed by persons holding immunity, which account for about 3% of the total number of *corpus delicti*. The new texts consolidate the role of the prosecutor as *dominus litis* of pre-trial proceedings. The figure of the supervising prosecutor is introduced, who should implement day-to-day control and management of investigation. There are a number of new instruments and principles which should guarantee higher quality, efficiency and swiftness of the penal process: the possibilities for transformation of the preliminary investigation into police investigation and for return of the case by the observing prosecutor due to breach of procedure have been excluded; new methods for collection of evidence have been included – investigation by undercover agents, controlled delivery and escrow transaction; reduction of terms through introduction of quick trial, immediate court proceedings, hearing of the case in court now upon request not only by the accused, but by the victim as well, summary court investigation before the first instance; expansion of the range of crimes to which the institute of plea bargaining could be applied, etc.

The new Criminal Procedure Code was enacted in response to the European requirements as regards procedural norms and rules, but it did not solve the structural and organizational problems of the judiciary, which in the end

[23] Promulgated in the State Gazette, No. 86 / 28 October 2005, in force as from 29 April 2006.

will continue to exert negative influence on the process of further reform. The coming into force of the new procedural norms before implementation of the constitutional changes in the structure and management of the judiciary, in particular in respect of investigation and the persecution office, as well as in respect of overcoming the lack of accountability and the lack of control over the judiciary, could hinder and even block the application of some of them. The major shortcoming of this approach is that the reform of the procedural law preceded changes in the Constitution, which, if adopted, would affect the main actors in the penal process, such as the bodies of investigation and prosecution, and would require changing the procedural law yet again.

Thus, the dynamics of the reform measures continues to be influenced not by the inherent logic of the required changes, but by external considerations and opportunistic reasons.

In conclusion, foremost on the agenda of judicial reform in Bulgaria is the **revision of the balance of powers** and in particular the structure and organization of the judiciary, achieving higher efficiency, swiftness and transparency in the work of the courts, the investigation and the prosecution, establishment of mechanisms for accountability and control against the abuse of authority and corruption within the judiciary itself, and mechanisms for control by the other branches of power.

These changes, set within the context of the entire process of legal and institutional reforms, are needed not only for Bulgaria to meet formally the criteria for accession to the EU. In reality, it would mean that the judiciary and the law enforcement bodies will be able to provide efficient protection of human rights and freedoms, of the economic and social development, while responding adequately to the expectations for restriction of corruption and organized crime on the national level and will play an active role in counteractions against transborder crime.