The Problem of the Constitutional Placement of the Prosecution Office

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I am rather surprised that although we are discussing the placement of the prosecution office and the investigation service in view of the judicial reform, this discussion is attended by representatives of the investigation only. In the prosecution office there is a conservative group which does not want even to communicate.

Naturally, as a Bulgarian I would like the process of accession to the European Union to continue, ending up with the acceptance of Bulgaria as a full member without any safeguard clauses. However, I am afraid that at present it is more important to tell the truth – whatever it is, although it may be painful.

As a state and as Bulgarians we often become our own enemies, failing to point out the substantial problem. Several years ago, under considerable pressure by the society, a debate on possible amendments to the Constitution started. It ended with the adoption of some amendments in 2003. At that time everybody was saying the big problem was that magistrates (according to the Bulgarian Constitution magistrates are the judges, the prosecutors and the investigators) had unrestricted immunity, and that immunity created prerequisites for corruption and was an obstacle to the judicial reform. Now, a question comes forth – what happened after the immunity of the magistrates was reduced to functional immunity? Actually, nothing changed substantially, what was also my forecast at the time, namely – it was all merely deluding people. Before the amendments the Supreme Judicial Council acted as a grand jury in respect of all crimes committed by magistrates, now it acts as such only for a very limited range of crimes, but nevertheless the number of cases has not increased.

Now we start talking about reform again, we make commitments in respect of the European Union membership, we promise that in two months we shall have a final draft of a new Criminal Procedure Code, and we boast of our new concept.

First, the new concept is not much different from the concept of 1999 and it may be summarized as follows: a model of criminal procedure where the pre-trial phase is guided by the prosecutor with police officers and investigators working for him/her cause. The place of the investigators is determined by the need to have a more independent structure available, because apart from street crime, Bilgaria also has organized crime, financial crime, business crime, and corruption, which are typical for the powerful people. It would be appropriate to have a special structure, although a small one, to deal with such investigations.

The second mistake is that we fail to properly define the problem. The big problem is not with the investigation, because it operates under the procedural guidance of the prosecutor. The investigator does what he/she is told by the

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prosecutor and there is no doubt about that. Since 1999 we have had a decent model, which was further developed and so that 90% of the cases are being investigated by the police and maybe less than 10% are being investigated by the investigation service.

Now a new Criminal Procedure Code[63] is to be prepared and I would assist to that process as a professional. We need to define precisely the provisions, the ideas about alternative case resolution means need to be developed further, to distinguish between the disputable and indisputable in the trial phase, the law of evidence should be relieved from unnecessary formalities, etc. The truth is that we simply do not tell the truth, we continue to deceive ourselves. The problem of the Bulgarian judicial reform is not the criminal proceedings. The big problem of the Bulgarian reform is structural and it is related to the Constitution and the system of checks and balances, as perceived in the Constitution.

So far, in the course of 15 years, no political party has won two consecutive rounds of elections. And I have asked myself whether the reason was purely an economic one. One of the reasons is that all political parties come forth with the slogan that they will curb corruption and reduce crime to some acceptable limits. However, when a political party comes to power it turns out that it has no mechanism to achieve that because the mechanism of the state accusation, which otherwise is a typical function of the executive, is not a subject to it. The reform of the Bulgarian Communist Party was said to require the waiver of the principle of democratic centralism. But it was at least called "democratic". At present there is one structure which has full hold of the state accusation and this structure is extremely powerful. Within this structure there is no democracy in decision making. Decisions are taken by a single person. Investigators have all the reasons to say they do whatever the prosecutor tells them to do.

What we have is a pyramidal structure with all the power in the hands of a single individual. The question, however, is a structural one because it does not refer to the personality of that individual. There were problems with the former Prosecutor General, there are problems with the present one, there will be problems with the next one as well because there are no conditions for external control, there is no balance of powers.

When the matter refers to the court, the court proceedings are public. The court is controlled by the two parties in the public proceedings – there is defense, the lawyer, on the other side stands the prosecutor. They have opposing interests. Apart from the procedural law, the court adheres also to rules approved by the Minister of Justice, referring to the case-flow. That is, there are 8 or 10 books, registers, etc. There is no answer to the question why the executive has not assumed so far its functions in respect of control of the case-flow in the pre-trial phase of the process. Therefore, if the investigator has two months to conduct the investigation (a requirement related to the reasonable terms and the efficiency of the administration of justice in the pre-trial phase), no one should infringe on his case. If the observing prosecutor is willing to help, he could perform some of the procedural actions for the investigator, as he is entitled by law, or may attend all procedural actions. The case may not be taken from the hands of the investigator as long as he has to conduct the investigation. No one bothered to show that the state has not set any rules on the case-flow

[63] See note 61 on page 146.

in the pre-trial phase and that one need not wait for the creation of a Uniform Information System for Counteracting Crime because the first thing to be done is to have a uniform system on paper. But there is no such thing on paper. In reality, this is the meaning of control by the other branches, but they have not assumed authority over the pre-trial phase of the process.

This is all about what the Deputy Prosecutor General stated in public, namely – that the court has too much power. The huge power is in the pre-trial phase, which is behind closed doors. There, just one instance of preliminary proceedings may destroy human fates. Our friends in Europe know that case when the prosecution took the liberty to act arbitrarily in respect of the court, bringing the police in the court's premises. This was an unprecedented incidence of arbitrariness, and we know what the substantial criminal law stipulates. We cannot react because the same decision of the Supreme Judicial Council, enforced at the time with police, has not been implemented by the prosecution itself and since we have a lot of power, I would like to ask: may the court request the assistance of the police in order to implement that decision? Of course it may not. Let them accuse us of having too much power.

Therefore, I believe it is high time to rub salt in the wound and to say: the problem is with the constitutional placement of the prosecution office. The constitutional placement of the prosecution office does not belong together with the court, because justice need not be merely done, people should know it is done. First, the court may not share a meal, the same common finances, the same common budget, the same common buildings, with one of the parties in the process. Second, the practice of the present Supreme Judicial Council as well showed that the common selection of prosecutors, investigators and judges is absolutely wrong and leads to substantial mistakes, because the idea of the principle of competition in practice is not applicable to the centralized structures and there was not a single competition for investigator and prosecutor with managerial functions. Inasmuch as there were controversial applications for the court, they were settled by the 1/3 of representatives of the prosecution and the investigation.

I am not a great optimist, but I believe I would live to see a better Bulgarian Constitution. There is no other system like ours in Europe. If the system was good, it would have been introduced in at least one other country. But there is no such country. Even where prosecutors and investigators have the status of magistrates, because they must have relative independence, they are never in the same administration with judges in terms of staffing and in terms of material labor conditions. Although we keep repeating one and the same thing, after all we don't want to solve our own problem. There must be political will in order to solve this problem. I am just ringing the bell, but I am not the one to form the political will.