CENTER FOR THE STUDY OF DEMOCRACY

THE NECESSITY FOR CONSTITUTIONAL AMENDMENTS REGARDING THE JUDICIARY AND FUNDAMENTAL CITIZENS' RIGHTS

The constitutional model of the Judiciary in Bulgaria shows a number of deficits. It has been modified many times during the course of the negotiation process for Bulgaria's EU accession[1] and subsequently, as a result, some improvements were put in place. However, an effective mechanism for guaranteeing the comprehensive protection of human rights, separation of powers and rule of law has not yet been established. At the current stage of the country's development, the time has come again for amendments due to the existence of systemic problems, which despite the previous five moderate and frugal changes in the Constitution - in 2003, 2005, 2006, 2007 and 2015, remained unresolved or the adopted amendments proved unsuccessful. In parallel, the contradictory or incorrect reading/interpretation of the Constitution has proved to be an additional barrier to ensuring the legal order and justice. Thus, the rule of law still remains a largely theoretical construction. The most direct consequence of this is the lack of sufficient protection against political arbitrariness and concrete guarantees for exercising individuals' rights.

The search for a comprehensive solution to the problems of the judiciary inevitably goes through urgent measures and setting long-term goals. This opinion is limited to the urgent possible measures for changes in the constitution, which can be adopted by an ordinary National Assembly.

In the long run, but without further delay, there is still, and even more than ever, a need to convene a Grand National Assembly. Due to the restrictions imposed by a decision of the Constitutional Court № 3 of 10 April 2003 (constitutional case 22/2002), only a Grand National Assembly would be entitled to vote for changes in the organization and structure of the Judiciary, including on the place and structure of the prosecution. The logical democratic development of this future process would be the Great National Assembly to changing the Constitution, involve also abolition of this constitutional body.

In view of the parliamentary majorities envisaged for constitutional changes and in order to ensure the effectiveness and stability of the changes, an agreement is needed between the main political forces, between them and civil society, as well as the active position of the Judiciary. The lack of a broad constitutional consensus has so far thwarted any attempt at comprehensive reform in this sensitive area. The beginning of wider expert, professional and public consultations on possible and necessary changes was set at the end of 2019 by the President of the Republic.

The possible urgent measures need to repair the model of the judiciary by making adjustments to the status, composition, and powers of the Judiciary governing body – the Supreme Judicial Council (SJC) - and by introducing a mechanism for investigation against the Prosecutor General as well as new mechanisms to protect citizens' rights.

Proposals for urgent measures are based on the view that the existing unified model of recruitment and management of the Judiciary does not allow to differentiate the responsibility of each of the units of the

[1] During this period, both the peculiarities of the Bulgarian transition and a set of external factors influenced the course and scope of judicial reforms in Bulgaria. For more details see: Center for the Study for Democracy, Judicial Reform: The Prosecution Office and Investigation Authorities in the Context of EU Membership, 2005.

Judiciary for detecting, proving and punishing crime, including high-level corruption and organised crime.[2] Another starting point is the understanding that the established constitutional model of the Judiciary is not linked to a mechanism for shared political responsibility by the Legislature and the Executive, on which the independence and state of the third power, the Judiciary, largely depends.

The proposals are aimed at starting to address these deficits and cover the following areas:

First, in order to strengthen the independence of the Judiciary and the autonomy of the prosecution:

• To introduce a strict division of powers of the two panels in the SJC. The chairmen of the Supreme Court of Cassation and the Supreme Administrative Court are be elected only by the panel of judges, and the chief prosecutor is to be elected only by the panel of prosecutors;

• To reduce the parliamentary quota of the panel of judges, at the expense of judges elected by judges, and the parliamentary quota to include prominent jurists who are not magistrates, with the possibility of being nominated by civil society organisations;

• To increase the parliamentary quota of the prosecutorial panel to include prominent jurists who are not prosecutors, with the possibility of being nominated by civil society organisations.

The proposed changes would minimize the dominance, influence and pressure from politically elected members of the judges' panel within the panel itself and the Plenum of the SJC, as well as of the prosecutorial panel, to make decisions that affect only the court. At the same time, the influence of the Prosecutor General on the panel of prosecutors would be limited, at least on its part formed by the parliamentary quota of non-prosecutors.

In connection with the proposed separation of powers of the two panels, the suggestion would be either abolition of the Plenum of the SJC and its replacement with a general administration, or its retention (until the adoption of larger structural changes) to exercise only budgetary and management functions of buildings and others tangible assets and infrastructure, jointly used by the court and the prosecution.

- A possible change would be for the National Assembly (NA) to appoint the Prosecutor General and the latter to take an oath before it. Such a decision would not affect the principle of separation of powers, but rather would lead to a constitutionally established interaction and balance between them. In its case law, the Constitutional Court has consistently held that the separation of powers "should not lead to isolation but to cooperation and interaction between them", and that the three authorities are "equal, independent and deter each other, but also interact" (decisions 6/93, 1/99, 15/99, 11/2002,12/2008). In addition, the Bulgarian model is aware of such a decision, namely that of the election by the National Assembly of the Chief Judicial Inspector and the inspectors from the Inspectorate to the SJC. In any case, the current model of appointing the Prosecutor General with a presidential decree (after his election by the SJC) and the possibility of only one refusal/denial is a formal and ineffective approach. The proposed new procedure is neither appropriate nor necessary for the election of the heads of the two Supreme Courts, because, unlike the Prosecutor General, their influence on the Judiciary and judges is by no means unlimited, centralized or hierarchical.

Second, the establishment of an independent mechanism for the investigation of the Prosecutor General in case of suspicion of an intentional crime.

The two legislative proposals of the government as of 2019 do not offer such a mechanism. To be effective, this mechanism must be located outside the prosecutor's office. One of the possible options is for the National Assembly, by a qualified majority, to elect an *ad hoc* person or a certain number of persons with legal knowledge and practice who are not, at the time of their election, prosecutors or investigators. By election, that person or persons should be empowered to investigate, prosecute and maintain the charges against the Prosecutor General, in cases specifically defined by the Constitution and

[2] For more details see: Center for the Study of Democracy, Crime without Punishment: Countering Corruption and Organized Crime in Bulgaria, Sofia, 2009.

the law, on suspicion of an intentional crime committed. These persons should have immunity and the status of magistrates. This mechanism could also be used to investigate internal corruption in the Judiciary (or only in the prosecutor's office). As the achievement of a qualified majority can be problematic or time-consuming, it is recommended to elect several such persons, at the beginning of the term of each ordinary National Assembly, and to maintain a list of reserve investigators. If necessary, one among them could be randomly selected by the Chairman of the National Assembly to head an investigation. This idea was first developed by the experts of the Center for the Study of Democracy back in 2003 and has been repeatedly proposed over the years in search of a correction to the established model of the judiciary through constitutional and legislative changes.[3]

Another possible option that deserves attention is the investigation be carried out by a judge from the criminal division of the Supreme Court of Cassation, appointed by the chairman of the court on a random basis, to whom prosecutorial functions should be assigned.

Third, to limit the possibility of unmotivated and undocumented interference of the Prosecutor General and superior prosecutors in the internal conviction and work of their subordinate prosecutors. This requires legislative clarification of the authority of the Prosecutor General to “exercise supervision as to legality” and to “provide methodological guidance regarding the work of all prosecutors", provided for in Article 126, paragraph 2 of the Constitution.

Fourth, detailed legislative enshrining of the hypothesis for the early release of the Prosecutor General in case of non-fulfillment of the powers arising from the Constitution and the law, and reformulation of the declared unconstitutional para 4 of art. 129 of the Constitution (providing among others, for a possibility the Prosecutor General is to be released by the President of the Republic on a motion by one-fourth of the National Representatives, passed by a majority of two-thirds of the National Representatives).

Fifth, easing the procedure for selecting judicial inspectors by a smaller majority, as 2/3 for the Inspector General and for everyone else is difficult to be achieved.

Sixth, legislative clarification of the concepts of justice and administration of justice, which the Constitution uses without defining them.

Seventh, introducing an individual constitutional complaint by expanding the authorised bodies and persons under Article 150 of the Constitution, that may approach the Constitutional Court.

- To enable Bulgarian citizens to refer to the Constitutional Court (CC) to challenge the unconstitutionality of laws that violate their constitutional rights, since now only the Ombudsman and the Supreme Bar Council are empowered to do so. This will give citizens the right to address the Constitutional Court directly, and not to seek the mediation of these two institutions, to which they most often do not have direct access.
- To introduce some filters for filing an individual constitutional complaint, such as personal interest of the complainants, direct violation of their constitutional rights arising from the challenged law, and a deadline after the adoption of the challenged law in which the complaint can be filed.

These and other limitations in the type and scope of the proposed constitutional complaints are necessary in order to prevent the transformation of the Constitutional Court, which is not a judicial body and is located outside the system of the judiciary, into a fourth judicial instance. In addition, the consideration of an unlimited number of individual complaints, even if only on their admissibility, could lead to a workload blocking the work or to unreasonably inflate the composition and apparatus of the Constitutional Court. Last but not least, the unlimited right to an individual complaint can demotivate the courts to hear citizens' cases in a timely and effective manner.

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[3] See Center for the Study of Democracy, Judicial Anti-Corruption Program, Sofia 2003.