Policy Brief

Bulgaria's Experience in Reforming the Judiciary as a Challenge for EU Membership

EU with YOU
EPI
ASSOCIATION ZENITH

Policy Brief

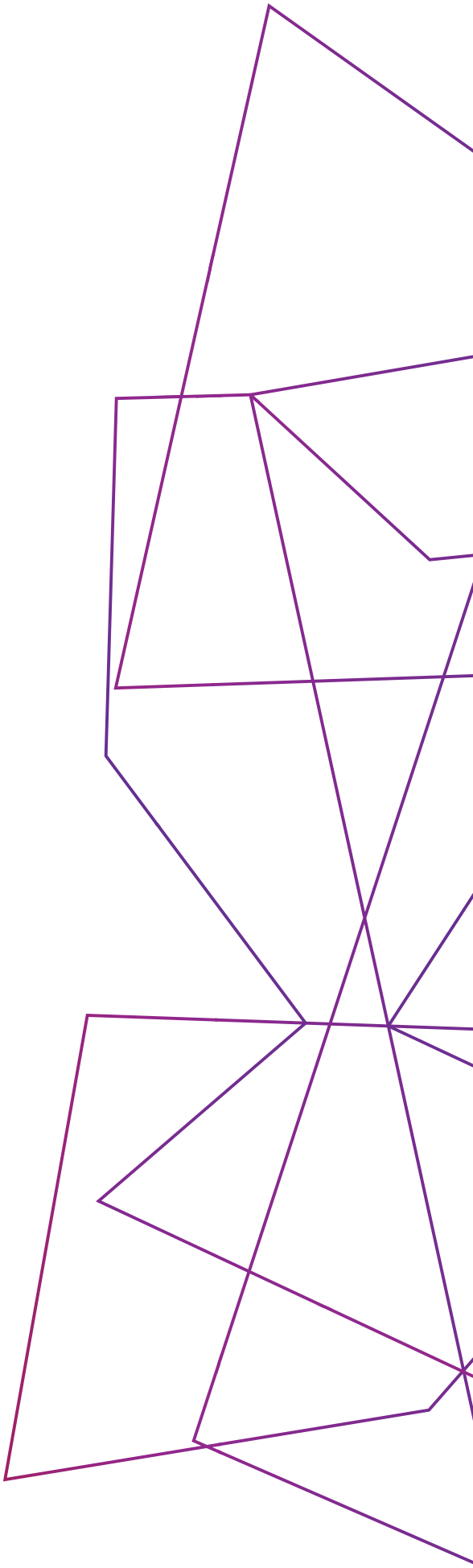
Bulgaria's Experience in Reforming the Judiciary as a Challenge for EU Membership

Published by:
European Policy Institute – Skopje

Author:
Julijana Nikolova

Graphic design:
Relativ

This document was developed under the Project Partnership Justicia – Regaining Citizens' Trust, funded by the European Union, through the Central Funding and Contracting Sector at the Ministry of Finance of the Republic of North Macedonia. The contents of this document do not reflect the official opinions and positions of the European Union. Responsibility for the information and views expressed in this document lies entirely with the authors.



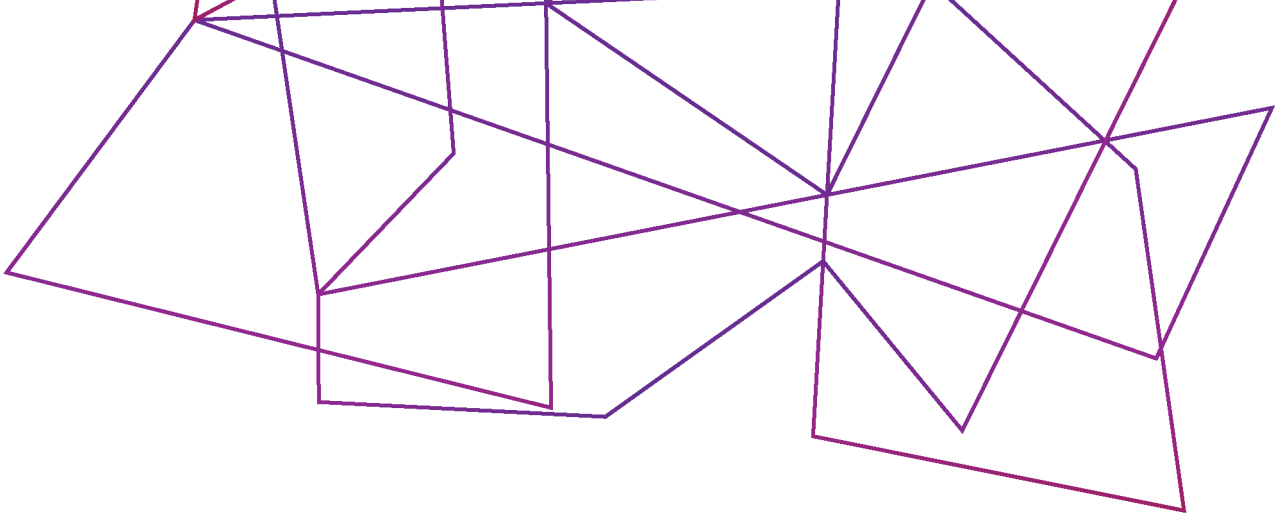
1. Bulgarian Constitutions and Judiciary

The first Bulgarian Constitution adopted on April 16, 1879; thereunder the judiciary 'in all of its breadth' as owned by the persons and places of the law, acting in the name of the King, where the relation of the King towards those persons and places was governed by a dedicated ordinance. This approach towards the judicial system was sustained up until 1947 when a Constitution was adopted with a majority of the Bulgarian Communist Party. In 1971, a new Constitution was adopted that reinforced the Soviet model of dispensation of justice and marked a further departure from the principles of separation of powers. Courts were tasked with 'nurturing dedication to the Motherland and promoting the goals of socialism, of conscientious observance of the laws and of labour discipline'.

Following the transition to democracy, the legacy of the different judicial systems from the times of tsardom and of communist Bulgaria alike resulted in a vast variety of proposed arrangements for the judiciary in the seventeen drafts of the new Constitution reviewed by the 1990-1991 Grand National Assembly, including drafts by members of the public, academia and legal science community. A Committee for drafting a Constitution and a Subcommittee for the Judiciary were established. Representatives of all stakeholders were invited to the sessions, and, with no experience in the area of democratic debate whatsoever, the decisions taken were of questionable rationale or feasibility. However, it can be argued that extensive civic participation was achieved in the drafting of the texts.

The Constitution adopted on July 12, 1991 embraced the principle of separation of powers, and the Chapter on the judiciary envisioned completely new structures and organisation, status, and independence guarantees.

More experienced legal experts at the Grand National Assembly and at the advisory groups to the committees on constitution drafting cautioned against the multitude of novel aspects requiring a complete overhaul of legislation, not only concerning the chapter on the judicial system but the other constitutional areas as well. While certain authorities might have possessed some remote historical experience (Administrative justice 1912-1948), others had none. It was envisioned that the National Assembly, within one year from entry into force of the Constitution, adopt the laws related to the judiciary. On July 22, 1994 the first governing law of the judiciary, the Judiciary System Act (JSA), was adopted detailing the structure and roles of individual units, status of magistrates, their rights and obligations, matters of irremovability and incompatibility, disciplinary liability and hierarchical aspects of career development, and the organisation and operation of the Supreme Judicial Council (SJC). Not only was the law passed with no consensus but also amidst intense political controversy. A lack of common understanding existed not only among political parties but also among academia, professionals and civic organisations, the outcome being an unstable and unpredictable legal environment.



2. Accession-driven Judicial Reforms

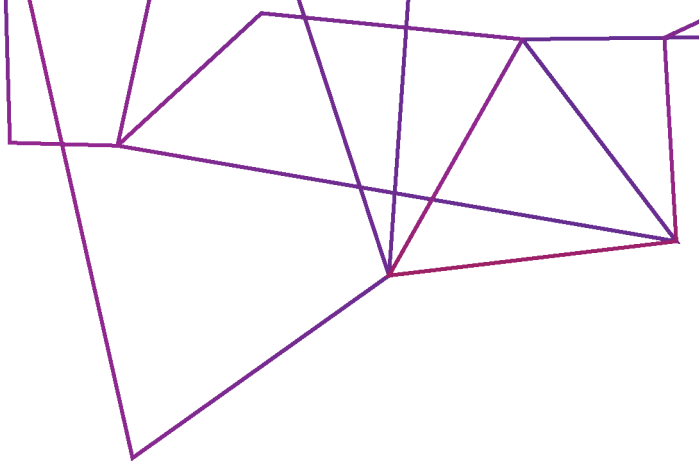
Bulgaria's EU accession process entered an active stage with the decision taken by of the European Council in Helsinki (1999) on opening negotiations with the ten countries from Central and Eastern Europe, Cyprus, and Malta and the corresponding division of these countries in two groups. The significance of the Regular Reports on Bulgaria's progress towards Accession to the EU increased due to the existence and the visibility of monitoring and evaluation according to uniform benchmarks conducted by the European Commission (EC). The reports brought the problems in the judicial system closer to the public and civil society organisations as well as to the professionals in the system. The consistent and systematic posing of issues acted as an incentive for the government, professional associations, academia, and the public to propose solutions to the problems identified in the reports.

The first Regular Report of the EC on the progress of Bulgaria towards Accession to the EU (1998) read that reform of the judicial system had started and that a three-tier jurisdiction had been introduced. It was noted that courts of appeal were constituted throughout the country and the Supreme Court of Appeal and the Supreme Administrative Court started work. There was a finding to the effect that the main challenge was in terms of transformation of the inherited system. These amendments entered into force on April 1, 1998 and nearly seven years after the adoption of the new Constitution, amidst a huge legislative vacuum affecting areas instrumental for the functioning of the system. Early on it became clear that the envisioned model of a unitary cadre of magistrates posed barriers to the effective operation of the system, yet the Constitutional Court ruled that the introduction of the model was effectively a change of 'form of State structure or form of government', which, under the Constitution, required convening the Grand National Assembly. The opinion of the judiciary professional organisations and of academia was not sought by the Constitutional Court in the decision-making procedure. This decision predetermined the impossibility of restructuring the judiciary and effecting radical reform in its organisations and functions.

The conclusions that additional efforts were required to change investigation procedures, strengthen the judiciary against possible corruption, speed up and make more transparent and efficient the handling of cases in order to reduce the number of outstanding cases, reduce pre-trial detention time to meet international standards, enforce rulings effectively and restore public confidence in the Judiciary were formulated back then, too. Regardless of the type of document or authoring institution, these conclusions persist even today in the reports on the judiciary of Bulgaria. Over the past ten years they were coupled, more and more pressingly, with calls for accountability and criminal liability of the Prosecutor General and the Prosecutor General deputies.

As a result of the desire of governments to meet the recommendations in the Regular Reports on the progress towards Accession to the EU, in order to fulfil the **political criteria for membership**, a number of amendments to the act governing the judiciary and even to the Constitution of the Republic of Bulgaria were effected, since the absence of reform in the judiciary, or of results, along with the deepening problem of corruption threatened to become a real obstacle to the accession of this country to the EU. On April 2, 2003 the political forces represented in the National Assembly, adopted a Declaration on the Main Directions of the Reform in the Bulgarian Judicial System thereby recognising the need for the reform of the Bulgarian judiciary with a view to improve its performance, demonstrating readiness to carry out reform based on consensus and addressing all the concerns of the EC regarding the judicial system identified in the regular progress reports. An ad hoc Parliamentary Committee was established for drafting amendments to the Constitution of the Republic of Bulgaria focusing on revisions concerning the reform of the judicial system and membership of the Republic of Bulgaria in the EU and NATO. The ad hoc Committee proposed amendments which, according to the justification of the draft, were 'imperative and represented a priority, as they directly affected the effective and impartial functioning of the judicial system and responded to the expectations of Bulgarian citizens of improved functioning of the judiciary while preserving its independence and yet with clearly established criteria for responsibility for each single judge, prosecutor and investigator'. The changes focused on three aspects: immunity and irremovability of magistrates, and setting of mandates for high-ranking positions. The changes included additional constitutional requirements for irremovability, namely increasing the required length of service from three to five years and the cumulative introduction of evaluation adopted with a decision of the SJC, introduction of functional immunity, and a five-year mandate for high-ranking administrative positions in the judiciary.

The amendments to the Constitution from March 2006 were again driven by the accession to the EU. The revisions aimed at increasing public awareness regarding the operation of the judiciary for the purpose of providing constitutional basis for closer interaction between the three branches of government. The amendments envisioned fine-tuning the constitutional prerogatives of the prosecution in the area of criminal investigation along with other roles of the prosecutor as keeper of the law, namely the 'constitutional basis was created for the pre-trial phase of criminal proceedings – investigation and indirect preliminary investigation', i.e. sidestepping the need to convene the Grand National Assembly in order to deprive the investigation authorities of independence and subordinate them to the prosecutor. Thereby the powers of the SJC were also enlarged and an Inspectorate with the SJC was established to scrutinise the operation of judicial authorities with no prejudice to the independence of judges, jurors, prosecutors and investigators in exercising their duties. The objective was to promote good governance of the judiciary and strengthen the ethical standards of magistrates. The amendments to the JSA that ensued from the constitutional changes vested prerogatives in the SJC of endorsing rules of professional conduct adopted by the professional associations of judges, prosecutors and investigators.



3. The Growing Role of Civil Society in Monitoring and Evaluating Judiciary Reform

Despite these efforts, Bulgaria did eventually join the European Union on January 1, 2007, with the requirement to tackle deficits in a limited number of areas that would require additional efforts on the part of the country, while the Commission monitored the progress and provided assistance for addressing the shortfalls. The European Union incorporated in the Treaty of Accession a dedicated mechanism to support Bulgaria and Romania in sustaining the reform of the judiciary and fighting corruption. With the Cooperation and Verification Mechanism (CVM) the Commission effectively continued the monitoring of the judicial systems in Bulgaria and Romania and provided annual evaluations and a list of recommendations. The launching of those reports by the Commission would be notable events for the public and for the representatives of the government and the judiciary, and not least for the media, civil society organisations, and the opposition. The need for efficient and effective, highly professional and timely justice and the controversial results of the efforts in the pre-accession period also stimulated the participation of a wider range of citizens and professionals in the reform debate. In this context the government included in the ESIF-funded programs a priority for citizen control over judiciary reform, and more than 50 grant contracts with more than 40 civil society organisations (CSOs) were concluded.

In the CVM reports, civil society and its engagement with the issues of judicial reform were highly acknowledged by the Commission, and as a result the SJC adopted a decision to establish a Civil Council (CC) of professionals and non-governmental organisations to the SJC (2012), rules and criteria for the selection of constituent organisations and operating procedures. 18 organisations were approved as members of the CC, one of them subsequently opting out. The first session of the CC took place on January 14, 2013 on the premises of the SJC. The first meeting was attended by representatives of the SJC, and this would become a usual practice ever since. The website of the SJC contains a special section dedicated to the CC: http://www.vss.justice.bg/page/view/2684. There, the agenda and the minutes for each session are posted along with opinions of the CC or civil society organisations with the SJC, activity reports, annual plans, and analyses of the operation of the CC. The CC prepares analyses and opinions, supports studies upon request by the SJC, and deliberates on reports on topics posed by the latter.

In 2014 the CC organised a regular session to discuss the Updated Strategy for Continuation of the Judicial Sector Reform[1], with the Minister of Justice, Deputy Minister of Justice and eight SJC members in attendance. Following the adoption of the Updated Strategy the Government carried on the consultations with stakeholders in the Consultative Council on Judicial Reform[2] and established the practice of publishing regular updates on general progress and on emerging priorities in the reform process. In view of the fact that the Reform Strategy was only scheduled to run until the end of 2020[3], until a new one was adopted these mechanism could be used as a starting point for a broader public debate on the future of the Bulgarian judicial system and on the priorities for possible reform initiatives beyond 2020.

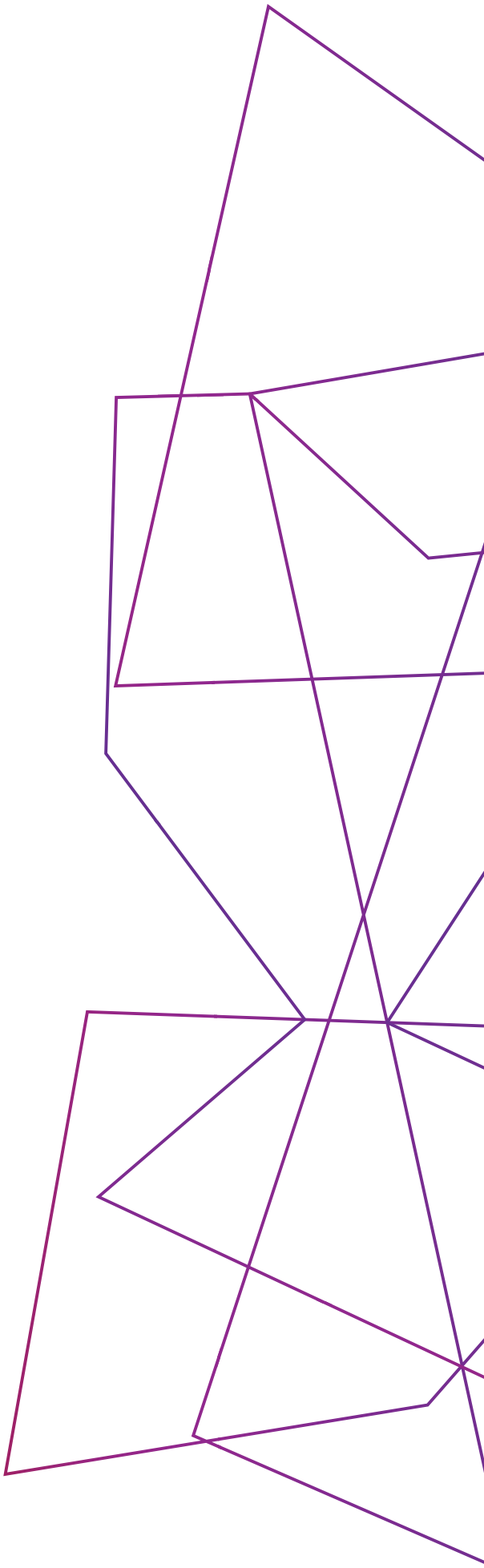
The implementation of the Updated Strategy led to substantial reforms introduced with the amendments to the Constitution adopted by the National Assembly in 2015. More specifically, these changes were in terms of establishing separate colleges of prosecutors and judges within the SJC, while at the same time enhancing the decision making process in connection with staffing and with appointment of SJC members and strengthening the role of the Inspectorate with the SJC with respect to the ethics of magistrates. The principle of 'one magistrate - one vote' was introduced in voting for SJC. However, at the last moment, the National Assembly gave up the principle of having more members of the SJC selected by judges than Parliament-appointed members. This triggered a crisis in government and the ruling majority. At the time, this change was underpinning the judicial reform program of some of the political forces in the newly-elected Parliament, the rationale being that this would eliminate the political influence on the judicial system and boost the independence of magistrates. The subsequent amendments to the JSA allowed observers who were explicitly authorized by public-benefit, non-profit legal entities and duly registered by the relevant college of the SJC prior to the selection day, to attend all stages of the selection process of members of SJC. Additionally, a Partnership Council of three elected SJC members appointed by the Plenum, by representatives of each of the professional association of judges, prosecutors and investigators (the membership of those associations being required to be not less than five per cent of the relevant number of judges, prosecutors and investigators), as well as representatives of judges, prosecutors and investigators non-affiliated with such organisations. The organisation and the operation of the Council was stipulated with a regulation of the Plenum of the SJC adopted one year and three months after the revision of the law. The Partnership Council was constituted nearly two years later, on July 11, 2019, and eight sessions took place. The operation of the Council is also public and can be found on the website of the SJC: http://www.vss.justice.bg/page/view/10479.

In the 2018 Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism[4], the Commission concluded that some of the recommendations had already been implemented and a number of others were very close to implementation. On this basis, the Commission concluded that the monitoring of the benchmarks of Judicial Independence and Legal Framework (plus Organised Crime) could be considered provisionally closed. Given that in some cases developments were ongoing, continued monitoring was required to confirm this assessment. The Commission was confident that Bulgaria would be able to fulfil all the remaining recommendations. This diplomatic language simply meant that no reports would be published, yet the mechanism would remain effective as would the monitoring of benchmarks for progress. With the decision to have reports on the Rule of Law for all Member States, Bulgaria and Romania effectively became subject to double monitoring under the CVM and under the Rule of Law Mechanism.

1 Adopted by the Council of Ministers (CoM) in December 2014 and enacted by Parliament in January 2015.
2 Established with CoM Decree No. 3 of 2016.
3 The debate on continuing the judicial sector reform beyond 2020 has not been concluded and no subsequent updates took place.
4 COM (2018) 850 final, 13.11.2018.

To address the concerns of the services of the Commission that in the absence of monitoring reform might stall or get misdirected, the Council of Ministers established a National Mechanism for Monitoring the fight against corruption and organised crime, judicial reform and the rule of law and a Coordination and Cooperation Council[5]. The Council was created for the implementation of the National Mechanism for Monitoring through providing coordination in the area of the executive, cooperation and dialogue with other state authorities and with non-governmental organisations, along with overall monitoring and integrated reporting on the progress achieved in the fulfilment of measures and activities, progress of judicial reform included. It would become operative once the EC cancels/terminates the effect of its Decision establishing the CVM.

Representatives of non-governmental organisations – a 'Civil Council' – take part in the operation of the Council in the capacity as observers. The members of the Civil Council are engaged with independent observation of progress and execution of the measures and activities according to the said indicators providing opinions and proposals to the Council for improvement of effectiveness of reform implementation.



5 Decree No 240 of September 24, 2019.

4. Current Challenges and Recommendations

The process of reform of the judiciary in Bulgaria is still ongoing, with no establishment of a solid and clearly defined framework for the judicial system or consensus amidst political parties, the judiciary, and the public on the concept for the development of the setup and organisation of the judicial system in sight. The role and place of the prosecution and investigation against the Prosecutor General and deputies thereof are the issues that fuel most of the debates and are a source of perpetual disagreement. The road towards the resolution of those fundamental issues spreads across the metaphorical minefield that is the legacy of prior amendments, including judgments of the Constitutional Court. The experience of Bulgaria indicates that the consensus of parliamentary parties alone is not sufficient to effect reforms as parliamentary representation tends to be too dynamic, especially in times of crises that follow one after another. A much broader agreement is required, and civil society and professional organisations in the area of the judiciary need to be instrumental to achieve this.

In Bulgaria, the institutions of all the three branches of government - the executive, the legislative, and the judicial power - have put in place the legal conditions for civil engagement in the formulation and monitoring of judicial reform policies. The success of participation and impact of civil society is most heavily contingent on the proactiveness of those civil society and professional organisations.

Any change in the system, before being effected, must be matched with the relevant legal basis and resources, otherwise inefficiency would inevitably undermine the trust in the change and this would affect not just the specific step of the reform but the entire system and justice too.

The frequent shifts and revisions of the legal framework are a key source of mistrust in the system even among magistrates. The experience of this country comes to show that adopting changes with no independent assessment of the impact, strengths and weaknesses of the currently effective arrangements compromises the quality of legislation, leads to enactment of new regulations which, when enforced, bring about the conclusion that the previous regulations were better, hence proposals for reversal. Many of the legislative amendments in recent years have resulted from recommendations in reports by the EC, yet our experience demonstrates that those require broad-based public discussion and that proposed changes must take into account the overall impact and not just be confined to ticking off yet another measure in yet another action plan instead. The EC usually would highlight the problem, whereas the relevant solution as well as the responsibility are within the national prerogatives.

There should be a much stronger focus on the integrity of the judicial system, this integrity being not just as good as the integrity of each individual member of the judiciary but also as good as the quality and stability of legislation, the excellence of law education, the relevant resources and independence of the budget of the judiciary and the adoption and observance of highest ethical standards by all constituent members of the system.