7. CAPTURING THE JUDICIARY

A number of events in 2015 – 2016 indicate that there are a number of **inappropriate liaisons between elected politicians and magistrates**. The lack of investigation and prosecution of flagrant cases in which senior magistrates had allegedly been involved or cases that generate doubts about undue political interference justify not only for attacks against the independence of the judiciary, but also for its use for the protection of illegitimate interests. Public statements made by senior judges about corrupting influence over the judiciary by political and oligarchic circles remained without any consequences. One recent case in point is the statement of a group of judges that the system of random allocation of court cases is used for corrupt purposes, which also were not followed by any reaction. Parallel to this, continuing disclosure of scandalous stories about magistrates – often seedy – further discredited the judiciary. Failed or rigged elections of magistrates to management positions show that not only is there pressure on the judiciary from the outside, but there is also a willingness among particular circle of senior magistrates to serve political interests rather than to serve impartial justice. This environment, which continues even after the separation of SJC into prosecutorial and judicial chambers, facilitates capturing of the judiciary.

There has been no change in the practice of adopting strategic documents without much practical value but aimed mostly at simulating action, in view of forthcoming external evaluations and monitoring (such as the EU Anticorruption Report, CVM reports, etc.). Thus, in addition to the 2015 update of its *Anticorruption Strategy*, the government adopted an updated strategy to continue with judicial reform, outlining the goals and measures for the next seven years. A roadmap for the implementation of the strategy was adopted in 2016 and funding for the first measures have already been secured through the EU co-funded operational programs. Behind the officially declared main objectives (such as guaranteeing the independence of the court and the other judicial authorities, improving legal education, reducing the workload of magistrates and the various units of the judiciary, disciplinary proceedings, guarantees for the rule of law, protection of human rights, access to justice and humanity of justice, building trust in justice, etc.) it did not provide for specific working mechanisms and procedures. Furthermore, the parliament approved the strategy at the end of January 2015 in a revised and less effective version.

Constitutional amendments, concerning judicial reform, adopted in a more limited version than the submitted one, ended up with even lower chances of bringing about significant change.

Parliamentary appointments to the Supreme Judicial Council are to be made by at least two thirds' majority, creating risks for political stalemates.

The Council was separated into judicial and prosecutorial chambers, but members elected by judges did not prevail over parliament appointees in the judicial chamber, compromising judicial independence. Political appointees ended up equal in number to those elected by prosecutors in the prosecutorial chamber, thus keeping Prosecutor General's decisive vote and unlimited powers intact. The constitutional amendments defining the composition of the two chambers of the SJC restricted further the accountability of the Prosecutor's Office. Under the new rules, the future prosecutors' chamber is dominated by prosecutors. This, together with the centralized and hierarchical structure of the Prosecutor's Office, which has been preserved despite justified and repeated criticism, will further strengthen the powers of the Prosecutor General without any adequate safeguards against potential abuse.

Despite the constitutional amendments, the composition of the SJC and the rules for the election of its members were not changed. The reluctance to undertake more serious changes to the constitutional model of the judiciary was again justified by Constitutional Court rulings and claims that only a Grand National Assembly is authorized to make such changes. This model has already proved its ineffectiveness leading to the formation of a stable political majority within the SJC, through which all key decisions are being easily passed. This problem became clearly visible during a series of controversial decisions adopted by the SJC, including the dismissal of the Council's former head (formally known as the official representative of the council), proposed, discussed and voted on within 24 hours without any substantive justification whatsoever. Different options have already been formulated, ranging from decreasing the number of SJC members elected by the parliament to depriving the Prosecutor General and the chairs of the two supreme courts from their ex officio membership.

The Council's secret ballot provision was repealed thus bringing in open ballot and opportunities to further regulate the matter in the forthcoming amendments in the Law on the Judiciary. The judicial inspectorate's new powers for integrity, conflict of interest and property checks of magistrates were also adopted.

Among the important factors for the unsatisfactory results of **criminal justice** against corruption are the problems within the system itself: the existence of long accumulated systematic problems in the management of the judiciary, including the practice of appointment, career development, election of heads of courts and prosecutor's offices, performance appraisal, disciplinary practices, etc. In 2015, the governing body of the judiciary was involved in various inconsistent decisions or decisions taken under apparent external influence (elections of heads of key courts – Supreme Court of Cassation, Sofia Appellate Court and others). SJC's disciplinary practice continued to be extremely selective and mostly reactive – the most stringent disciplinary sanctions were imposed as a result of a public outcry.

The SJC continued to implement its *Strategy for Prevention and Fight against Corruption in the Judiciary*, adopted in 2013. The strategy is implemented

through annual action plans adopted by the council, which list the necessary measures and the deadlines for their execution. So far, however, no impact assessment of the already implemented measures has been done. In its progress reports, the Council focuses exclusively on checking the status of implementation of the measures and there is no evaluation as to whether these measures have actually contributed to the achievement of the strategy's goals.

The latest amendments of the *Law on the Judiciary* deprived the SJC of its role in the prevention of corruption transferring them to the Council's Inspectorate. As a result, the council's committee on professional ethics and prevention of corruption will no longer deal with the issue of corruption, for which it has already developed a certain capacity. At the same time, no mechanism was envisaged for transferring this capacity, including the staff, to the inspectorate thus putting at risk the sustainability of the work done so far.

Despite its formal independence from the other branches of power, the SCJ failed to adequately react to political pressure from the parliament and the executive. Recent cases such as allowing the Prime Minister to personally attend a council's session without being duly invited and failing to properly respond to calls for resignation made by two of the ruling political parties in parliament, left the impression that the council has little capacity to oppose to political interference.

The insufficient accountability of the Prosecutor's Office remains neglected by the reforms. The parliament missed the opportunity to obtain a proactive role in the process of overseeing the work of the Prosecutor's Office. During the early stages of the discussions on the constitutional amendments, there was a proposal for empowering the National Assembly to request special reports from the Prosecutor General on specific topics related to penal policy and the prevention and fight against crime. In the course of the debates, however, this proposal was narrowed down to the right of the Prosecutor General to decide if and when to present such reports.

Additional reporting by the Prosecutor General to parliament as a minimum requirement to ensure accountability remains only optional. There is still no effective mechanism allowing the parliament to exercise oversight over the work of the Prosecutor's Office. Before the constitutional amendments the parliament was only allowed to hold a hearing on the annual report of the Prosecutor General and then adopt it by a decision. This procedure, which survived the amendments, has already demonstrated its ineffectiveness. The parliament started to delay the hearing and adoption of the report, which was used as an excuse by the Prosecutor's Office not to make it public.

Therefore, this rule should be revised and the role and responsibility of the parliament should be increased by allowing the parliament to define the minimum scope and structure of the report and to return it for additional information if its contents do not meet the requirements.

Box 7. Lacking accountability and insufficient performance of the prosecution

The lack of adequate mechanisms for external oversight of the work of the Prosecutor's Office and the ineffective internal control mechanisms make the institution practically unaccountable. At the same time, the number of cases in which citizens file successful claims against and obtain compensation from the Prosecutor's Office remains significant. In 2015, they were 308 and the Prosecutor's Office was sentenced to pay BGN 2,495,245 as compensation.

At the same time, the efficiency of work of the prosecution against corruption crime and especially against high-level corruption remains low.

The *Report on the Enforcement of the Law and the Activities of the Public Prosecution and the Investigating Authorities in 2015* contains the admission that "despite some increase in the number of newly instituted cases and prosecutorial acts brought to court in comparison to 2014, the total number of bribery cases remains small, and for not very serious crimes". According to the data provided, as in previous reporting periods 60.6 % of all pre-trial proceedings for bribery are formed for minor cases of active bribery, many of which are attempts to conceal violations of the *Road Traffic Act*.

The data indicate low detection of general economic crimes – Art. 219 and Art. 220 *Criminal Code*, and of official malfeasance – Art. 282 CC – (convicted 12, acquitted – 13), although they contain an essential element of corruption.

In 2015, 153 proceedings for corruption crimes of **significant public interest** were observed by the prosecution, 13 pre-trial proceedings were submitted to court and there were two effectively convicted individuals. The largest share (33.2 % or 95 cases) of all 286 returned cases of crimes of significant public interest are those for corruption offenses in which there is an increase compared to 2014 (27.8 % or 82 cases), indicating that the deficiencies in investigating these matters had not been removed.

There is a lack of progress in the above areas as well as in countering bribery offenses in general.

A special cross government unit for investigating corrupt acts of officials occupying senior government and other positions (Specialized Unit "Anti-corruption") was established by an agreement between the Prosecutor's Office, the MoI and the State Agency for National Security on 24 March 2015. Internal rules for the organization and operation of the unit were adopted. Until October 2015, the

unit brought charges against 12 magistrates (eight judges, three prosecutors and one investigator), including seven magistrates at managerial positions. A total of 161 inquiries for crimes committed by magistrates were launched and 88 of them were completed. Eight magistrates were brought to court, including six judges (for of them at managerial positions), one prosecutor (also at managerial position) and one investigator. Ten pre-trial proceedings against senior public officials were also launched, 11 persons were charged and four persons were brought to court.

Source: Report on the Enforcement of the Law and the Activities of the Public Prosecution and the Investigating Authorities in 2015, (published on 10 May 2016, available at: http://www.prb.bg/bg/news/aktualno/godishen-doklad-za-2015-g/); Report on the 2015 Action Plan on the Implementation of the Recommendations of the Report of the European Commission of January 2015 under the Cooperation and Verification Mechanism (adopted by the government on 10 March 2016).

Long-standing problems with the prosecution's **pre-trial performance** prove one of the obstacles to a breakthrough in countering state capture and high level corruption. A number of high-profile cases with significant political impact were launched and heavily advertised but none of them ended up in convictions against senior politicians or public officials. These include, among others, the case for thousands of voting ballots found in a printing company and allegedly produced in violation of the law, the case against the former chair of the Commission for Prevention and Ascertainment of Conflict of Interest (a case in which the most important evidence was stolen in the course of the proceedings), the case against a former Deputy Speaker of the National Assembly, the series of cases against a former interior minister, etc. The lack of results in any of these cases increased the perceptions about the political influence of the Prosecutor General (without any checks and balances), which prevents the normal functioning of both the judiciary and the entire political system. On the one hand, the current status quo (prosecution powers and untouchability) of the Prosecutor General is in the interests of politicians who are discredited in their past or present. For their "exoneration" they need liaisons with magistrates and achieve it if necessary at the cost of pressure and influence. On the other hand, political protection is desired by a number of members of the judiciary to attain career, positions and "protection" from liability.

The highly centralized and hierarchical structure of the Prosecutor's Office and the unlimited powers of the Prosecutor General without any accountability for a 7-year term of office need to be reformed. Initial steps to limit the considerable leverage of the Prosecutor General to put pressure on individual magistrates and politicians, as well as to serve partisan political interests should include: reduction of the Prosecutor General's term of office from 7 to 5 years and introduction of regular assessment of his/her and the Prosecution performance; introduction of rules, restricting the power of the Prosecution to perform the so-called "inquiries" on persons who have allegedly committed a crime (these

inquiries are not part of the criminal proceedings and the persons on whom they are performed do not have the procedural rights to defend themselves during the proceedings; at the same time, they represent a very strong instrument by which any prosecutor can seriously damage the public standing of an individual or disrupt the work of an institution); strengthening the specialized unit to combat corruption, financial and tax fraud and smuggling, led currently by the Prosecutor General, expanding its powers to investigate and prosecute high level corruption; this unit should be led by a senior prosecutor with the rank of a deputy prosecutor general or special prosecutor appointed by the Plenum of SJC under the rules and procedures for electing Prosecutor General.

Alternatively, another option would be the creation of an independent body to prosecute high-level corruption – in or outside the Prosecution. It could be led by a prosecutor with the rank of deputy prosecutor general, nominated by the Minister of Justice and elected by the SJC, with its own separate mandate (not coinciding with the term of office of the Prosecutor General), situated outside of the team of the Prosecutor General. The head of this body – in cooperation with the Minister of Justice and with the assistance of respective European experts – should select and nominate the members of the team to be elected by the SJC.

Another non-traditional option that could be considered, would be the **introduction of judicial control over a wider range of prosecutorial acts**: for instance, every act of termination of a case, even when it is not requested by the person concerned; opportunity for anyone who has received a refusal to institute pre-trial proceedings on his/her complaint, to ask the court (and not only by the higher prosecutor) to rule on the decree for the refusal. This would lead to additional burden on the courts, but would provide independent oversight. This is an extreme measure that could hardly be applied in the current constitutional framework. However, it should be considered in the future and could be undertaken if other measures fail to provide the expected results and the existing deadlock would be not resolved.

To overcome the extremely large deficits in the governance and the performance of the judicial branch, including the unaccountable power of the Prosecutor General, and to counter effectively its capturing by illegitimate political interests require more fundamental and successive constitutional and legislative changes.