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Bulgarian Constitutionalism: Challenges, Reform, Resistance and . . . Frustration

Vesco Paskalev*

1 BACKGROUND

For the first dozen years after its adoption in 1991, the Constitution remained unchanged. All political parties have come to accept it as a foundation of the modern democratic state and were busy getting the country out of the economic stagnation that followed the collapse of communism. As a matter of fact, the reforms took in earnest only in 1997, after a severe banking crisis, hyperinflation and the introduction of a currency board. By then Bulgaria was already lagging behind the countries of Central and Eastern Europe, both in terms of economic growth and in their path toward accession to the EU. Yet, on most accounts, it would qualify as well-functioning constitutional democracy, regularly holding free and fair elections, where the incumbent governments were routinely ousted from power peacefully, and with the Constitutional Court reasonably often striking the new laws adopted by the National Assembly. The judiciary, albeit slow and inefficient, was perceived as fairly independent. Or so it appeared both to internal and to the external observers,[1] and also to the citizens, who were overwhelmingly concerned with the economy. They would recognize that the state administration is immensely corrupt, but this was not the main concern. The constitutional development became interesting only in the early 2000s, when the economy was growing again and the process of European integration brought the Justice and Home Affairs issues into the spotlight.

The political landscape in this period was dominated by three parties – the Bulgarian Socialist Party (BSP) – the rebranded communists, the Union of Democratic Forces (UDF) and the party of the Turkish minority – the Movement for Rights and Freedoms (MRF). As in many other post-communist countries, the

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1 For example, very early in the accession process, the European Commission recognized that the political criteria for membership were fulfilled. In 2002, Bulgaria was recognized to be 'functioning market economy' – two years ahead of Romania as the government of the day was proud to emphasize.

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main cleavage was between reform-minded right wing, with what is nowadays called 'neoliberal' agenda, and the left wing, which in theory had very similar pro-European and pro-market agenda, but in practice was dragging its feet. The MRF held the swing vote.[2]

2 POLITICAL CHALLENGES

2.1 The premier king

The first major challenge to the constitutional system came in 2001, when the former King Simeon Saxe-Coburg-Gotha returned from exile and was elected to be a prime minister. Bulgaria was a constitutional monarchy until 1947 and Simeon II, then 10 years old, was its last king. When the Republic was proclaimed he went into exile, and during the communism, he was living in Spain. Interestingly, he did not return to the country after the downfall of communism, and watched from a distance the adoption of a new republican constitution. Yet many people, including some of the leaders of the UDF, would argue that the post-war referendum which brought down the monarchy, organized by a communist-led government and with Soviet troops in the country, was illegitimate by implication, so was the republic ever since. Thus, throughout the 1990s, the former king enjoyed a romantic aura; in 1996, he paid a brief visit and was welcomed by a number of politicians, intellectuals and huge crowds on the streets. In 2001, he seems to have decided that the time is ripe to cash in these sentiments, returned in the country just before the parliamentary elections and in four months was back in power, this time as a prime minister. Ironically, he did not join the ranks of those who had questioned the legitimacy of the republic – mostly in the UDF – but found a party of his own – National Movement Simeon II (NMSS), and swept UDF out of power.

According to most analysts, the victory of Simeon II should be explained not so much with the legitimacy deficit of the republic or his personal charisma, but as an instance of a negative vote against the political establishment. By 2001, the citizens were certainly fed up with BSP, which dominated most of the governments until 1997, and were now disillusioned with the UDF, which took over in 1997. Although the latter managed to put the country on track for EU integration and back to growth, the citizens were still a long way from feeling this. Further, the privatization that was carried out was perceived by many as extremely

[2] For a more detailed account of Bulgarian constitutional development in its first decade, see Evgeni Tanchev, 'The Separation of Powers in the 1991 Constitution of Bulgaria', 8 Eur. Pub. L. 433–444 (2009).

corrupt. It was a small wonder that an aristocrat coming back from Europe with a promise for 'new morality in politics' would win many hearts and minds.

Now, the electoral victory of a former king – the only other such precedent in the world made by Norodom Sihanouk of Cambodia – by itself inevitably brings forward the issue of the form of government. When confronted with the question, Simeon – in what would become his characteristic style – would skirt it and insist that there are more immediate issues on the agenda of the country. Thus, the possibility of restoration was put off, although it remained open for quite a few more years until his party lost disastrously the subsequent polls and Simeon quietly disappeared back in Spain.

Yet Mr Saxe-Coburg-Gotha presented several other, more subtle challenges to the constitutional democracy in Bulgaria. The first was his initial reluctance to take a formal role in the government. There is no constitutional requirement for the leader of the winning party to become prime minister, though this was the case with the latest two. However, in the case of a former king and a governing party formed in his name, it was certain that he would become a centre of power completely outside of the three constitutional branches, exerting influence without a scintilla of transparency or accountability. So his apparent reluctance to take a formal office was met with significant criticism from all sides. It remains unclear why he wanted to do that – possible reasons were to avoid the need to swear allegiance to the republican Constitution, to avoid responsibility for the actual governance or to keep his aristocratic image untarnished by mundane issues and scandals that would inevitably follow. In any event, he yielded to the pressure and was sworn in as a prime minister. In all official documents as well as the media, he was addressed as Mr Saxcoburgothsky, rather than Simeon II. The constitutional law prevailed on this count.

In the same vein was his attempt to form an all-parties government. The NMSS won 120 of the 240 seats and with the MRF, which had supported him all along, he would have no trouble forming a government. Yet he called upon all parliamentary parties to join a unity government. This resonated well with the public opinion in Bulgaria, which was already disillusioned with the political pluralism and the sentiment for an *effective* government, which transcends partisan politics rebounced. The motives of Mr Saxe-Coburg-Gotha to offer such power share remain unclear, but perhaps again, it has something to do with the avoidance of responsibility for the day-to-day governance. In any event, both UDF and BSP were unimpressed and remained in opposition. Political pluralism prevailed.

The third challenge to the still fragile constitutional culture was the reluctance of both Mr Saxe-Coburg-Gotha and NMSS to make clear political commitments, before the elections or ever after. Mr Saxe-Coburg-Gotha declared himself to be a 'pragmatist' and his ministers – technocrats; in a characteristic moment when asked

about his position on certain salient issues, he simply stated 'I will tell you when the time comes.' Even though today he is widely ridiculed for this, this sort of 'pragmatism' dominates the public space in Bulgaria ever since. The NMSS was shape-shifting in the same way – as it could not avoid positioning in the European political spectrum, it tried to join the European Peoples Party. As the EPP showed no enthusiasm to accept them (possibly not without some pressure by the UDF which was already a member), NMSS had no qualms to rebrand themselves as liberal and join ALDE, which was more welcoming. And when the next elections – in 2005 – returned a hung parliament – NMSS formed a grand coalition with BSP – by then their most outspoken opponent. Thus, the cleavage between left and right (or between communists and democrats if you will) which had domineered Bulgarian political life demised.[3] This may not be a problem – there is much to be said about the blurring of the left-right cleavage throughout Europe – but in Bulgaria, it was not superseded by *any* new cleavage at all, not even by identity politics.[4] As Ganev aptly puts it, today the political landscape is 'dominated by unskilled players who push the boundaries of acceptable behaviour'.[5]

Thus, although there were no formal changes neither of the text of the Constitution, nor of any of the laws governing the organization of the major institutions, Mr Saxe-Coburg-Gotha's government marked a major systemic shift. The constitutional settlement in the 1990s was marked by intense political conflict between two major ideological rivals, the central role of the National Assembly and unstable governments – a Rousseauistic model as Smilov qualifies it. According to him, the new settlement is characterized by reduced ideological divisions and reduced competition among the major political actors on policy issues.[6] The idiosyncratic style of Mr Saxe-Coburg-Gotha was hardly the only or even the main cause, yet this was the catalyst of the transformation which following Smilov can be described as quasi-constitutionalization. That is to say that a number of specific policy issues were taken out of the domain of normal democratic politics.

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3 Another irony is that if there was any cleavage between monarchists and republicans, it also demised soon after 2001 – partly because the potential monarchists found themselves in opposition, and partly because Simeon himself soon lost popularity.

4 For a bit more detailed discussion of the loss of meaning, see Vesco Paskalev, 'Rule of Law and Economic Recovery Are No Longer an Issue in Bulgaria – Now Reason and Commonsense Are under Question' in *EUDO Café*, 21 May 2013, available at https://blogs.eui.eu/eudo-cafe/2013/05/21/rule-of-law-and-economic-recovery-are-no-longer-an-issue-in-bulgaria-now-reason-and-commonsense-are-under-question/.

5 Venelin I. Ganev, 'Bulgaria's Year of Civic Anger', 25 J. Democracy 33–45, 33 (2014).

6 Daniel Smilov, 'Constitutionalism, Quasi-constitutionalism, and Representative Democracy: The Case of Bulgaria', 2009.

2.2 Quasi-constitutionalization phase one: currency board

The banking crisis of 1996 that was already mentioned, led to the introduction of an IMF-backed currency board in 1997. The Lev is now pegged to the Euro (initially to the Deutsche Mark) so the government is prevented from printing money and running deficits ever since. Although this is done by means of ordinary legislation, and by now the country is not dependent on any international institutions or creditors[7] so technically can repeal it overnight, it is widely accepted that this is a no-go zone. After the prolonged cycles of inflation in the 1990s, there is an unwritten consensus among virtually all political parties, matched by overwhelming public support for a policy of fiscal discipline. By virtue of this consensus,[8] the range of policies, which are subject to democratic politics, remains considerably limited.[9]

2.3 Quasi-constitutionalization phase two: European integration

The other quasi-constitutional norm – with much broader scope – came with the process of accession to the EU. By the end of 1990s, there was an explicit commitment of all major parties to EU accession. [10] Moreover, Bulgaria was lagging behind most of the other states from Central and Eastern Europe so during the negotiations it was aiming, above all, to catch up. This accorded to the conditions of membership – the so-called Copenhagen criteria – a similar quasi-constitutional status. As with the currency board no political actor would openly contest these requirements and all other policy issues were subjected to the progress towards the accession.

Now, to public lawyers what is called here quasi-constitutionalization may appear to be antithetical to the very essence of constitutional government, where the executive is conferred certain powers to act on a broad range of issues for which it is held to account by the parliament. On the other hand, the sovereign citizens were quite content with this European check on domestic administration and the opinion polls consistently showed more trust in the European Commission than in any of the domestic institutions. The regular reports of the

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7 As percentage of the GDP, the government debt is one of the lowest in Europe.

8 The temptation to call this 'constitutional convention' must be resisted, as the doctrine does not recognize conventions as a source of law.

9 Thus, the requirements of the Fiscal Compact, which Bulgaria signed in 2012 along most EU members, have been implemented well in advance. Ironically, the Constitution was *not* amended as recommended by the Compact as discussed below.

10 The institutional dimension of this consensus was that a number of committees dealing with EU integration would be bipartisan and decide by unanimity.

Commission on the country's progress to accession were widely regarded as an objective yardstick for the performance of the incumbent government.

Thus, the European Commission, as the IMF before it, was a major driver for institution-building and reform. Obviously, the old Member States needed to see in the candidates smoothly functioning states of their own image. Thus, the reform of the public administration and the judiciary were the main concern of the Commission, even though the EU law contains very few provisions on the way national institutions should be organized. This apparent lacuna was filled sometimes by reference to European soft law where it existed, or by following the example of other Member States. More often, when the Bulgarian administration had to come up with a project of its own, it would be presented with much fanfare in Brussels and the government would pledge to have it implemented by a certain date. The Commission would register these efforts in one year, and then check the progress in the next one. When, for various reasons, there was none, its report would be critical. The responsible minister would then claim that the reform must be speedily adopted because 'Brussels wants it' and any objections – from the opposition, ministerial colleagues or backbenchers – would be silenced.[11]

While this effect of conditionality is widely regarded – in Bulgaria and elsewhere – as positive, the drawback was that the administration switched to 'compliance mode'. Where directives explicitly call for *national* measures meant to achieve a certain end, the Bulgarian administration struggled to come up with a solution of its own. At political level, with the post-accession demise of conditionality, the ministers are often unable to mobilize political support for their reform proposals. This result is quite ironic, given the original intent to *develop* the institutional capacity of the country. Thus, the quasi-constitutionalization of a wide range of issues added to the demise of ideological differences in favour of an unholy alliance of populists and technocrats, to decrease the meaningfulness of ordinary politics even further. The feeling that there is no point of voting, let alone any civic engagement is now prevailing in the country.[12] As the issues are for these two reasons largely off the public agenda, the politics in Bulgaria are only about the people who would take office, and as a century-old Bulgarian adage has it, 'they are all rascals anyhow'.[13] As Jean Dreze and Amarthya Sen point out, what a democratic system achieves depends largely on what issues will engage the public, and the success of the democracy depends ultimately on the range and vigour of

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[11] See also G. Noutcheva & D. Bechev, 'The Successful Laggards: Bulgaria and Romania's Accession to the EU', 22 East Eur. Pol. & Societies 114–144, 127 (2008).

[12] See more in my commentary of the last general elections 'Bulgaria: The Non-voters in Power', *EUDO Café*, 20 Oct. 2014, available at blogs.eui.eu/eudo-cafe/2014/10/20/bulgaria-the-non-voters-in-power/.

[13] The phrase originates from the antihero of Bai Ganyo – a satirical novel by Aleko Konstantinov from 1895. It was meant to be critical, but a century later this seems to be rather the shared wisdom.

its practice.[14] The vigour of the Bulgarian democracy is fading by all measures – low voter turnout, low participation in political parties or trade unions, low number of small donations to parties or civic organizations.[15] The quasi-constitutionalization proved to be an all too convenient shield for inaction, clientelism and outright corruption; it allowed a quiet ascent of powerful oligarchs and persistent impossibility to reform the judiciary, to which I turn now.

Notwithstanding this democratic fallout, on the formal side the Bulgarian constitutional system seems to function quite normally. In a stark contrast to the 1990s, when no government was able to complete its mandate, most governments of this decade succeeded to finish it even with some prospects of being returned to office.

3 REFORM AND RESISTANCE

The more formal constitutional developments since the turn of the century revolved mostly around the judiciary. They were, naturally, in the form of amendments to the Constitution (with related changes in the ordinary laws regulating the judiciary) as well as by several key decisions of the Bulgarian Constitutional Court (BCC, the Court). In 1991, the new Constitution established a highly independent judiciary and a decade later it was widely perceived as ineffective and corrupt. Therefore the reforms were all aimed at restoring its integrity and accountability, without subjecting it to any of the other branches. For its part, BCC – which is itself outside of the judiciary system – took up the role of the defender of the status quo.

The BCC is characterized by the limited access of non-political actors to it. Cases can be initiated only by institutional actors, so there are few cases on constitutional rights and its general workload is low.[16] Further, most of the cases are for abstract review of the legislation in force and the Court has the power to give abstract interpretations of the Constitution. Although the two Supreme Courts may make references for constitutional review with regard to pending cases, they do this rarely, so the bulk of BCC's workload consists of abstract

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[14] Jean Drèze & Amartya Sen, *An Uncertain Glory: India and its Contradictions* 16 (Princeton University Press 2013).

[15] In the period between 1997 and 2013, the governments had no check from the civil society (the only exception being the unsuccessful teachers strike of 2007). The present author, following Pierre Rosanvallon, believes that informal contestation is an essential *part of the system* of checks and balances. See Pierre Rosanvallon, *Counter-democracy: Politics in an Age of Distrust* (Arthur Goldhammer (ed), Cambridge University Press 2008). In 2013, in the context of the crisis and the global wave of protest there was 'reawakening' as some called it, but this goes along with gradual hollowing out of the electoral process which does not bode well. I shall return to this issue in the conclusion.

[16] About fifteen cases per year. There were few years with less than ten cases, which means less than a case per each of the dozen judges.

review.[17] On account of these institutional characteristics, some qualify it as an additional legislative chamber, in the sense that the French Constitutional Council has been so qualified by Alec Stone Sweet.[18] In a recent study, Chris Hanretty even orders the judges along a left-right spectrum, but as the analysis was made solely on the basis of the number of dissents, without any consideration of the substance of the judgments or their context, one should be reasonably sceptical about this conclusion.[19] More plausible is the characterization of the Court as minimalist, eschewing any comprehensive doctrines in preference to mid-range settlements, which makes it quite unpredictable.[20] Smilov describes it also as 'improvisational', in the sense that 'it is based on certain familiar themes [of constitutionalism], presented in a novel light and adapted to the taste and capacity of the performer'.[21] Thus, it can be conceived as the 'dice' in the constitutional development, with many decisions deferential to the government and some occasional blows to it. If any bias can be identified at all, it is in favour of the status quo, which has put the Court on a collision course with several judicial reforms.

3.1 Breaking the ground

The first set of constitutional amendments were adopted in 2003 and were quite unimpressive. Above all, they limited the immunity of the *magistrates* – that is judges, public prosecutors and investigators. Earlier their immunities were equal to those of the members of parliament – they could be prosecuted only for serious crimes and after permission of the Supreme Judicial Council (SJC).[22] Now this immunity would apply only to deeds magistrates perform in their official capacity. Another amendment provided that the magistrates, who used to become

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17 Only 10% of the cases originate from the judiciary, and some of them are also requests for abstract review, see Chris Hanretty, 'The Bulgarian Constitutional Court as an Additional Legislative Chamber', 28 East Eur. Pol. & Societies & Cultures 540–558 (2014).

18 See Hanretty, 'The Bulgarian Constitutional Court as an Additional Legislative Chamber'.

19 This is not to say that the judges do not have their political preferences, or that certain decisions are not obviously biased. Yet it is very difficult to identify any *systematic* biases. But Hanretty is correct to note that the number of cases raises in periods of intensified political conflicts.

20 Daniel Smilov, 'Constitutional Culture and the Theory of Adjudication: Ulysses as a Constitutional Justice', in *Central and Eastern Europe After Transition: Towards a New Socio-Legal Semantics,* 144 (Alberto Febbrajo & Wojciech Sadurski eds, Ashgate 2010).

21 Smilov, ibid.

22 According to the Constitution, the SJC is the head of the self-governing judiciary (the latter includes courts, public prosecution and investigation services). It consists of twenty-five members with five years term, eleven of which are elected from the National Assembly and another eleven – by the electoral colleges of judges, prosecutors and investigators respectively. The organization of these elections itself is a controversial constitutional issue which for reasons of space cannot be addressed in this rapport. The remaining three seats are filled ex officio by chairs of the Supreme Court of Cassation and Supreme Administrative Court, and the Chief Prosecutor. The Minister of Justice is also a member of the SJC and presides its sittings, but without a vote.

irremovable automatically after three years in office, will now be so only after five years and after successful attestation.[23] Finally, the administrative managers of the branches of the judiciary – that is chairs of the courts and chiefs of the prosecutorial and investigation services – would keep their positions for a five-year term, renewable once.

This is all that was left from a much more ambitions reform initiated by Anton Stankov, Minister of Justice in Mr Saxe-Coburg-Gotha cabinet. Initially, the NMSS, for all its faults, was resolved to reform the judiciary, by amendments of the Judicature Act and of the Constitution wherever necessary. The reform was generally supported by all factions in the parliament, but was met with resistance from the judiciary and eventually effectively blocked by two decisions of the BCC.[24] The government proposed a number of sweeping changes of the structure and functioning of the law enforcement system, most notably to transfer the investigation from the judiciary to the executive and to provide for the judges and other magistrates to elect the administrative managers of the respective units from their ranks. While the court chairs are supposedly *primi inter pares,* responsible for mundane administrative tasks, in practice they wield substantial informal influence over their colleagues.[25] The logic behind the proposal for their election was the belief in the integrity of the majority of rank and file magistrates, who would elect their colleagues whose credentials are impeccable. Thus, the system would be cleaned from the bottom up, and without interference from the other branches. The Supreme Court of Cassation (SCC) was not impressed.[26] It referred the law to the BCC and the latter responded by perhaps the most sweeping decision since it was created, invalidating this, and a number of other provisions of the amended Judicature Act.[27] This was justified on the ground that the new arrangement encroached the powers of the Supreme Judicial Council (SJC) to appoint and *promote* judges enshrined in Article 129.[28] Indeed, even before the BCC decision, many lawyers were sceptical whether the reform is compatible with the constitutional text. Yet the Constitution does not say anything explicit about the appointment of the courts' chairs, and strictly speaking, they are not superiors to their fellow judges so the Court could decide otherwise.

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23 The attestation itself is regulated by the Judicature Act, and consist of a complex assessment of the magistrates performance at the respective position conducted by SJC every five years.

24 Decision No. 13 from 16 Dec. 2002, CC 17/2002 and Decision No. 3 from 10 Apr. 2003, CC22/2002 respectively.

25 Besides the informal influence, they have a substantial role in the way the cases are distributed. Even though by now the distribution is supposedly randomized by a computer, scandals with manipulation of the system arise on a regular basis.

26 The reform would not affect its own chair, who is elected by the SJC and confirmed by the President of the Republic as stipulated in Art. 129 of the Constitution.

27 Decision No. 13 from 16 Dec. 2002, CC 17/2002.

28 All references to articles are from the Constitution, unless other source is indicated.

This was a serious blow to the reformers, but they did not give up on the idea; moreover, the transfer of the investigation out of the judiciary would require constitutional change anyway. As elaborated in the previous section, the judicial reform was part of the accession process so it was not impossible for the government to gather a constitutional majority.[29] Then the Chief Public Prosecutor delivered his blow to the reform.[30] It came by means of request to the BCC to deliver an interpretative decision on the meaning of the phrase 'form of government' in the Constitution.[31] Article 158 stipulates that changes in the form of government can be made only by a Grand National Assembly.[32] The 'Grand' in this case means that it has 400 MPs instead of the 240 sitting in the ordinary National Assembly *and* that a Grand National Assembly must be elected for a short term, solely for the purpose of amending the Constitution. The latter makes it politically undesirable for any party, which hopes to actually win the elections. When the Constitution was adopted in 1991, the phrase 'form of government' was generally understood to mean above all republic as opposed to monarchic, and parliamentary as opposed to a presidential system. In 2003, the constitutional court judges thought differently. In their decision they expanded the concept to cover almost everything that is already regulated by the articles of the Constitution, holding that anything that changes the established balance between the constitutional institutions amounts to change in the form of government.[33] BCC went on to give examples: the abolition, merger or transfer of any constitutional body, as well as the creation of major new constitutional bodies, or the change of their structure or method of appointment would all affect the form of government.[34] The form of government would be changed even if some of their competences are abolished, for example, the power of the Court to issue interpretative opinions.[35] The Court went on with its examples to specify a few that would not affect the form of government so they can be made by an ordinary parliament.[36] Those were the introduction of terms of office for the administrative managers, the limit of the immunities of the judges, the creation of ombudsman

[29] This is three quarters from all MPs, which over time can be reduced to two-thirds.
[30] His power were to be somewhat limited by some reform proposals.
[31] In view of one of the dissenting judges such a question was inadmissible, as it required the Court to 'become an oracle' and make it protector of the status quo, see Decision 3 from 10 Apr. 2003, CC 22/2002, Jankov, J. dissenting. With its examples what *would* be permissible the Court actually went further than this, in effect shaping future legislation.
[32] This may resemble the famous eternity clause of the German Basic Law, but actually it comes from a national tradition dating back to the Turnovo Constitution, adopted in 1879.
[33] Decision No. 3 from 10 Apr. 2003, CC 22/2002.
[34] Mentioning the 'transfer' killed off the plan to move the investigation in the executive.
[35] The reader would certainly notice how the judges did not miss the opportunity to cement their own powers.
[36] Still deciding with constitutional majorities and following special procedure.

and the introduction of constitutional complaints. The latter two were not on the agenda of the reformists,[37] and the former two were eventually adopted as described above.[38]

3.2 Smooth accession

The second set of changes were adopted in 2005, and they did not raise any such controversies as they were directly related to the act of accession to the EU.[39] Apart from mentioning the EU on several occasions as appropriate, there were three substantive amendments. The first was the provision that Bulgarian citizens may be extradited to other countries if an international treaty so requires. This was necessary to make the European Arrest Warrant operational. Unlike in several other Member States, this did not raise any controversy in Bulgaria. More controversial was the removal of the constitutional ban on sale of land to foreigners. Obviously, this was against the fundamental principles of free movement and non-discrimination. Notwithstanding the ease of circumvention of this ban,[40] land proved to be a sacred cow in the Bulgarian public imagination, so the government wisely negotiated a derogation for the first seven years after the accession. Thus, Article 22 of the Constitution was amended to allow to foreigners to acquire land under the terms of the Treaties that is after the expiry of the derogation. Interestingly, besides the reference to the 'accession to the EU', the Constitution mentions also other international treaties which are ratified with qualified majority (two-thirds) of the parliament.[41] Bulgaria is not a party to any such treaty but this potentially can apply well beyond the EU without constitutional implications if only the relevant treaty is ratified by qualified majority. Nevertheless, the society remains quite hostile to the idea of foreigners buying Bulgarian land and in 2013, when the seven years derogation was about the expire, on the initiative of a small right wing party, the parliament adopted a

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37 An Ombudsman was created in 2006, see below.

38 The reform of the judiciary was not the only front where the government clashed with the top courts. Its privatization agenda was similarly challenged by the public prosecution, which requested review of the decisions for sale of state assets. As these decisions are taken by public bodies, they are subjected to review by the Supreme Administrative Court which thus annulled a number of major privatization deals. Government's response was to reduce the scope of review.

39 In its decision on the form of government, BCC had wisely indicated that integration in the EU would not amount to a change of the form of government.

40 All that was needed was to register a limited liability company in Bulgaria, which would qualify as a Bulgarian entity so it could acquire land without any restrictions. The foreigner would be its sole shareholder. The present author has done it a couple of times for British citizens buying second homes in Bulgaria.

41 The requirement for qualified majority for ratification of certain international treaties, such as those of the EU, itself represents a separate amendment as it creates a class of privileged treaties. The 'ordinary' international treaties require simple majority and are normally rubber-stamped by the parliament.

moratorium on any purchases by foreigners and obliged the government to take steps to renegotiate this. Most lawyers consider this decision invalid as it apparently contradicts the Constitutional text, and it has not produced any discernible effect.

The third amendment deserves attention only to the extent that it inspired some debate on the form of control the National Assembly would exercise on the ministers participating in the Council of the EU. Thus far the accession had enjoyed the 'fast track', but at this moment, some of MPs realized that membership involves some limitations on their own prerogatives. So they briefly floated the idea for rigorous parliamentary control of the kind the Scandinavian parliaments are known for. Yet the idea was soon abandoned partly on the realization that the National Assembly would not have the capacity to exercise such control, and partly because there is no such control in the Southern Member States, with which the Bulgarians are used to compare ourselves. The comparative law argument carried the day: the amended Article 105 requires the government only to inform and give account to the parliament for its part in the adoption of EU legislation – things that the government is required to do for all issues anyway.

Following these amendments, Bulgaria signed the Accession Treaty on 25 April 2005 and ratified it with an almost unanimous vote in parliament on 27 May 2005. There was some debate about holding a referendum, but the parliamentary powers had little taste for it. Thus far, Bulgaria has not held referendums on any issue in its history as a democratic country.[42] The country had joined North Atlantic Treaty Organization (NATO) – which enjoyed weaker, though still positive support in the opinion polls – without a referendum. There was little to be gained by holding one on the EU – at the time *all* parties were in favour of the integration, so there would hardly be any meaningful public debate and the result would be preordained.

3.3 Further reform of the judiciary

The next round of reform efforts and the respective strike back came in 2006. Following the general elections of 2005, a grand coalition was formed around BSP, which has won plurality of seats in a hung parliament. The socialists were joined by NMSS and MRF, which were governing together before the elections, and the new government continued the same course. Although the Accession Treaty was

[42] The first referendum in its democratic history was held only in 2013, on the question for construction of a new nuclear power plant. The turnout was barely over 20%. Recently, the citizens seem to have developed some taste for direct democracy, and in 2014 more than 500,000 signatures were gathered calling for referendum on electoral reform. The parliament subverted the procedure and was dissolved soon thereafter (for unrelated reasons). A referendum was called for by the new parliament in 2015 and nearly 2 million people voted in favour of electronic voting. This is still to be implemented.

already signed, the conditionality remained as the European Commission has wisely introduced a few safeguard clauses allowing the EU to postpone the date of actual membership from 2007 to 2008 and also to extend the monitoring in certain areas even after the accession date. The focus on the reform of judiciary remained.

This is perhaps the set of the most significant amendments so far. First, the idea for transfer of the investigation from the judiciary to the executive was finally implemented, in a quite creative manner. In a nutshell, the investigation was divided into two tiers – investigators (*sledovateli*) and investigating police officers (*doznateli*). As the Constitution mentions only the former, the latter could be located in any of the branches by means of ordinary legislation. The former – who used to investigate all crimes (and were only *assisted* by the police) – now would be responsible only for the most serious ones, while the latter were assigned to deal with everything else. Thus, this reform was implemented largely by amendments to the ordinary legislation. One constitutional provision that had to be changed was Article 128 that used to state: 'The Investigators are part of the judiciary. They conduct investigations in criminal cases.' This was amended to say 'in criminal cases *as prescribed by law*'. The other constitutional provision that was changed was to expand the powers of the prosecutors to conduct investigations too. As smooth or banal all this may appear, for its implementation in practice a number of investigators had to be made redundant – which was quite tricky for those who have become irremovable after five years in office – and an army of police investigators had to be employed and trained. This development was paradoxical in at least two ways. First, what BCC held to be impossible to do by constitutional amendment, was done by means of ordinary legislation. Second, the professed intent of the Court to preserve the status of the existing constitutional institutions led to (partial) dismantling of one such institution. What was the import of all this for the integrity of the judiciary and the fight against corruption and organized crime is beyond the scope of the present report.

The other objective the reformers were pushing was to make the judiciary itself more accountable. The obvious difficulty is that accountability appears to be antithetical to independence, and the BCC has demonstrated its zeal to entrench the latter. One of the amendments adopted in this set would allow impeachment for professional misconduct of the chairmen[43] of the two Supreme Courts and the Chief Prosecutor by the National Assembly, upon the initiative of one quarter of the MPs and by qualified majority vote (Article 127(4)). Quite predictably, BCC found this unconstitutional. In its earlier decision on the form of government, the

[43] So far they have always been men, even though an overwhelming number of the ordinary judges in Bulgaria are women.

Court had already claimed powers to review constitutional amendments. Not many courts in the world can do so, and as noted in the beginning of this section, the BCC is not particularly activist. Yet if it is accepted that an ordinary National Assembly cannot amend certain constitutional rules, it logically follows that it is for the BCC to review whether the amendments adversely affect those rules. Thus, it was only a matter of time when it would strike. In a very brief judgment, the Court found that the possibility of impeachment violates the principle of separation of powers, which is a matter of form of government and therefore cannot be done by an ordinary parliament.[44] In a powerful dissent Judge Tanchev – a former professor of constitutional law and contributor to this journal – argued that the rigid insulation of the branches that was being established by the Court actually defies the principle of separation of powers. Another provision, the new item 16 in Article 84 requiring the chairs of the two Supreme Courts and the Chief Prosecutor to present to the parliament annual reports for the performance of the respective branches – obviously a much weaker form of accountability – survived.[45]

The third aspect of the reforms of 2006 was the creation of an ombudsman. The officeholder is elected by the parliament and his or her competences are regulated by ordinary legislation. This was quite uncontroversial and is of limited interest for constitutional lawyers. Even though the ombudsman can initiate constitutional review on the initiative of individual complainants, none of the incumbents so far has shown an appetite for using this power. Thus, Bulgaria remains one of the few countries in Europe where citizens do not have effective access to constitutional review. In view of the present author, this is the single most important amendment that is needed as it would force the Court to develop jurisprudence on rights. It will also have to decide the bulk of its cases in a less political context. Yet this has not been high on the agenda of any of the major parties.

Another important change was that the Minister of Justice was given certain powers in the management of the logistics of the judiciary by a new Article 130a. Now he or she can prepare a proposal for the budget of the judiciary (though it is adopted by the SJC),[46] manage its property, may take part in the organization of vocational training of the magistrates and may make *proposals* for their appointments, promotion and discharge.[47] This can be seen as another step in

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44 Decision No. 8 from 13 Sep. 2006, CC 7/2006.

45 Actually even this was later amended in the sense that this trio would present the reports to the SJC, and the latter will lay them before the National Assembly.

46 The budgetary autonomy of the judiciary was asserted by several early decisions of BCC.

47 The Minister of Justice has been an ex officio member of the SJC, and even chairs its sittings, but cannot vote.

reducing the hold on power of the court chairs and chiefs of prosecution, without compromising on the independence of the magistrates in exercising their core functions.

3.4 More amendments

The fourth set of amendments went on in the same direction. The new Article 132a established an Inspectorate – a new controlling collegial institution. Its members are elected by the National Assembly by qualified majority (two-thirds of all MPs) for a four (or five) years term renewable once, but the body is officially under the auspices of the SJC. The task of the Inspectorate is to monitor how the magistrates discharge their functions, without interfering in their decisions. The Inspectorate can monitor and report on the number of cases decided by each judge, the timeliness of their decisions, the fairness of the workload allocation, etc. Following the earlier skirmishes with the BCC, the Inspectorate has to lay its annual reports to the SJC and not to the parliament. However the difference was mooted by an explicit constitutional provision that the information for the activities of the Inspectorate is public.

The other important amendment introduced in 2007 was to empower the municipal councils to set the local taxes. Beforehand, the Constitution stipulated that the amount of taxes must be determined by an act of parliament, thus making it impossible for the parliament to delegate this to other bodies. For the sake of flexibility and financial decentralization, this requirement was removed. The taxes still need to be established by law, but the statute may allow to local councils to fix the exact amount within limits.

3.5 Fiscal amendments – why bother?

By now, the idea of amending the Constitution has lost its aura of something extraordinary that used to generate significant public discussions and mobilized bipartisan support earlier.[48] So in 2011, at the height of the austerity policies introduced all over Europe and in anticipation of the Fiscal Compact,[49] a new set of projected amendments were introduced to enshrine the commitment to fiscal discipline in the text of the Constitution. The amendments would actually go beyond what the Fiscal Compact would require, and also beyond the German

[48] Thus, in the 2007 set there were quite a few changes to the text which are embarrassingly banal, such as new s. 2 of Art. 9 stating that the status of the army is regulated by the law.

[49] Officially the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, signed on 12 Mar. 2012 by twenty-five countries, which happened to be all of the members of the EU except for the Czech Republic and the UK.

constitutional amendment in that sense.[50] Besides the now common requirement for a balanced budget, the proposal contained a requirement for qualified majority vote for adoption of laws introducing new taxes or amending the rates of the existing ones. These amendments were promoted by the Minister of Finance, one of the most influential members of the government, and a notorious fiscal conservative. Little thought was given to the wide-reaching constitutional significance of this proposal. Although the EU-related amendments had already set the precedent for a requirement for a qualified majority vote, it applies only to international treaties. As a general principle, Bulgarian law does not recognize any hierarchy between the laws. If this proposal was to be adopted, the tax laws would be elevated to a special status and the doctrine of implied repeal would become inapplicable to them. As the text of the amendment did not define what precisely is a tax law, and the relevant codes govern a number of other issues, this could potentially raise a flood of hard constitutional cases similar to the 'legal basis' disputes in the European Court of Justice. Further, and perhaps more importantly, it would set in stone the status quo – adopted by simple majority – and make the resistance to reforms – to reforms in *any* direction – very powerful. This was already seen in the case of the judiciary reform. In any event, and not for these reasons, this set of proposals fell victim to petty interparty bickering and after the initial debate it was not even put to a vote.[51] When the Fiscal Compact was signed in March 2012, the National Assembly dully ratified it, but this did not revive the constitutional amendments until 2013 when the parliament was dissolved prematurely. After all that was said about the quasi-constitutionalization of everything European, this last failure may appear somewhat surprising. Yet given the currency board in place since 1997 and its own quasi-constitutional status, another commitment to austerity, albeit this time in the text of the constitution, would hardly make a difference. Moreover, all of the substantial requirements of the Fiscal Compact were implemented in the Planning of the State Budget Act anyway.

3.6 Judiciary reform back in focus

In June 2013, Bulgarian citizens took to the streets in numbers unseen since 1997, only a couple of weeks after a newly elected government (BSP and MRF) was

[50] The so-called Schuldenbremse (debt break) clause was introduced in Art. 109 of the Basic Law as early as 2009. In 2011, similar amendments were introduced in the Austrian, Italian and Spanish constitutions.

[51] See the full story in Mihail Vatsov, 'Constitutional Change through Euro Crisis Law: Bulgaria', 2015, a report in the framework of the research project *Constitutional Change through Euro Crisis Law*, conducted by the European University Institute, Florence, available at http://eurocrisislaw.eui.eu/bulgaria/

sworn in. The protests were sparkled by the appointment of Delyan Peevski, an alleged shady mogul, as head of the State Agency for National Security (abbreviated in Bulgarian as DANS).[52] The protests continued for months on end, and even though the government remained in office for another year, after BSP was defeated in the EU elections in 2014 the MRF walked away and snap elections were called. This episode brought a new impetus to the reform of the law enforcement system, whose formal independence by now is perceived as a thin veneer for its dependence on oligarchic circles. The major partner in the new government sworn-in in the autumn of 2014 is GERB, whose leader Boyko Borissov was the first prime minister to be returned to power since 1989. Few believe in his commitment to reforms, which failed to materialize in his first term in office (2009–2013) and he appears to be all too comfortable with Peevski, whose media empire is demonstrably friendly to GERB and to Borissov in particular. The smaller partner in the coalition, which according to many has outsize representation, is the Reformist Block (RB) – itself a motley coalition of various small parties, which consolidated during the 2013 protests. Despite a number of failures of their own – and many argue that joining Borissov's government was their original sin – several of its ministers seem poised to reform in their sectors. The Minister of Justice – Hristo Ivanov – stood out and early in his term announced a comprehensive strategy for judicial reform, which was supported by a comfortable majority in the parliament in January 2015. Indeed, nowadays few would want to openly stand against the reform of a system that is believed to be pestered by corruption, nepotism, inefficiency and incompetence. Faithfulness to the established constitutional balance is no longer appealing in a country where citizens overwhelmingly believe that the whole system established during the transition is broken. Yet, more subtle tactics for defence of the status quo are commonly deployed, for example, an outspoken endorsement of the main principles of a proposed reform is often matched with floating of alternative proposals, which differ on key details. The other form of resistance is Putinesque *ad hominem* attacks of the reformers – many of them with background in non-government organizations receiving foreign funding – as unpatriotic. Thus, in May 2015, a number of MPs from the government side of the aisle introduced new draft constitutional amendments in the parliament while the Ministry of Justice announced its proposals for amendments to the Judicature Act. In December 2015 the constitutional amendments were finally adopted in a watered-down version, which prompted the resignation of the Minister of Justice and a major rift in the governing coalition. At the time of writing, the amendments to the Judicature Act are still pending.

[52] For more details, see Ganev, 'Bulgaria's Year of Civic Anger'.

The central element in this set of constitutional amendments is the division of the SJC into two senates – one consisting of judges and responsible for their appointment and dismissal, and another – for the investigators and public prosecutors. The details are further developed in the proposed amendments to the Judicature Act, and the idea has been floated by several earlier reform proposals too. This is meant to place the decisions under the watch of those who are in the best position to know their colleagues and to estimate their professional and moral qualities. Under the existing system, all members of SJC decide together on all issues. It is believed that in this way the public prosecution, through its representatives in the SJC, wields influence over the judges on the benches. The structural change would also concentrate the elections in a way to reinforce the principle that judges are elected by judges.[53] The latter is also to be facilitated by the proposed creation of a General Assembly of the judges to elect directly the respective members of the SJC. While this certainly makes good sense, the reform is modest at best and by itself it would not be sufficient to restore the integrity of the system. If the SJC is discredited as it is, its division in two senates is unlikely to prevent the system from reproducing itself. Yet, it relies on the same rationale that was behind the proposal for election of the administrative managers of each unit of the judiciary, which was killed off by the BCC in 2002. A similar proposal is now being made for the Judicature Act, the fate of which is still to be seen.

The division of the SJC is complemented by another proposal in the same vein, though not at the constitutional level – the creation of sub-commissions in the SJC for attestation of the magistrates. The idea is to make clear the responsibility for the appointments and promotions. Blurred responsibility is a problem for all collective decision-makers but in the SJC it has reached farcical levels. It is hoped that smaller bodies will be able to actually scrutinize the resumes of magistrates while under the current system the full college merely rubber-stamps proposals decided somewhere else. For their part, the constitutional amendments gave some new powers to the Inspectorate to make integrity checks of the individual magistrates. The issue of conflicts of interests has been a major concern and could previously be addressed only by the SJC in the course of disciplinary proceedings. These measures, along with the creation of two senates in the SJC, exemplify the general trend to endow the judiciary with a structure, thus institutionalizing some checks and balances *within the system*. If the judiciary is to be independent and cannot be meaningfully controlled by the other branches, internal mechanisms for accountability need to be developed.

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[53] The proposal has been criticized as not reaching far enough in this direction. See Ivanka Ivanova, 'The Judiciary Reform Proposals: Two "Yes", Two "No" and the Elephant in the Room', *Dnevnik*, 3 Jun. 2015. The elephant in the room according to Ivanova is the immense unchecked power of the Chief Prosecutor, which is virtually untouched by any of the proposals.

The key element of the reform – the establishment of the two senates – was adopted, but with an all-important twist, secured by the Chief Prosecutor in alliance with the nominally oppositional MRF and BSP. As explained above, the SJC has eleven members elected by the National Assembly and eleven members elected from within the judiciary. The numbers are enshrined in the Constitution and, following the BCC decision on the form of government, they are difficult to amend by an ordinary parliament. These twenty-two elected members, together with the three *ex officio* ones, must now be distributed between the two senates. According to the initial proposal, the judges' senate was to comprise of six members elected by judges and five members elected by the parliament. The rationale was that the judge's own representatives should dominate their senate. According to the final version of the adopted amendment, the number of the political appointees has been increased to six, in defiance to the original aim. Conversely, the prosecutors' senate was intended to comprise four prosecutors and one investigator elected within the systems and six members elected by the parliament. It was considered that an increased political representation in *this senate* is more appropriate to provide a measure of accountability to the *procuratura* while insulating the judges. The version that was adopted reversed this. Now the senate comprises four prosecutors, one investigator and five political appointees; it is presided by the Chief Prosecutor. Since the Bulgarian prosecution is hierarchical, with all prosecutors reporting to the Chief Prosecutor, those who are elected to the SJC are unlikely to become emancipated from the latter overnight, even though they are called to hold him to account. Thus, the small change in the distribution of the political appointees between the two senates (six to five as opposed to five to six) guarantees that the prosecutors' senate is dominated by the representatives of the prosecution, while the political influence over the judges is increased.[54] Those who are elected to the SJC are unlikely to become emancipated from the latter overnight, even though they are called to hold him to account. The immense formal and informal powers of the Chief Prosecutor are certain to remain intact and unchecked by anyone.

Reinforcing accountability within the SJC itself is the aim of another amendment – the removal of the constitutional requirement for secret voting. Indeed, the open ballot exposes the individual members of SJC to public scrutiny, but in view of this author, the expectation that this will reduce any dependencies

[54] The initial proposal of the Minister of Justice Hristo Ivanov was for seven members of the prosecutors' senate to be elected by the parliament. Facing the resistance of the prosecutor-in-chief, he was forced to compromise to six which could still provide a measure of external accountability of the *procuratura*. When he saw the adopted amendment doing the opposite, he resigned provoking a crisis in the governing coalition and unprecedented protests of the judges. Yet the status quo in the judiciary remains unperturbed.

on shady sponsors is uncertain; 'naming and shaming' in front of the general public is unlikely to work in such highly specialized matters. On the contrary, the transparency of the vote risks making the members even more controllable. The adopted Constitutional text is now silent on the issue, and it will be settled in ordinary legislation.

More important is the amendment of Article 130 that now stipulates that the parliament elects the members of the SJC with a qualified majority of two-thirds. The apparent aim is to ensure that the political appointments will be made with cross-party support. While this is commendable, the experience from other similar arrangements is that instead of finding consensual figures, parties trade horses. As the amendments leave the incumbent SJC members in office until the end of their terms, it is impossible to say which will be the case.

Finally, the latest constitutional amendments provided a long overdue extension of the access to the BCC for individual grievances. The proposal stops well short of introduction of direct complaints of the kind that made the Hungarian Constitutional Court famous in the 1990s, and the access to the BCC will be mediated by the Supreme Bar Council. The self-regulator of the legal profession is now able to initiate constitutional review of laws, which encroach individual rights and freedoms. This arrangement is odd, as the Bar Council is not involved in any court cases, and it remains unclear how it will choose the cases it will bring to the BCC. It is very likely for this power to remain dormant especially having in mind that the ombudspersons have made a very limited use of it, too. An earlier proposal to allow the ordinary courts in the course of pending proceedings to make referrals for unconstitutionality was abandoned.[55]

4 CONCLUSION: FRUSTRATION WITH 'THE SYSTEM'

According to the Freedom House's *Nations in Transit* index, Bulgaria is now a *semi-consolidated* democracy (3.29 overall Democracy Score), ranking a little worse than Hungary (3.18) and slightly better than Romania (3.46).[56] While this is precisely where one might expect to see the country, it is worrying that both Hungary and Bulgaria have dropped lately (Romania is stable). Bulgaria was considered as a consolidated democracy in 2006 and retained this status for three years only. While in the last few years, the civil society has developed according to

[55] So far only the Supreme Administrative Court and the Supreme Court of Cassation have such power, and they use it very rarely.

[56] Freedom House, 'Nations in Transit 2015', available at https://freedomhouse.org/report/nations-transit/nations-transit-2015. The lower the number, the better democracy is.

the index, all other institutions that are key to the functioning democracy, including Judicial Framework and Independence, have deteriorated.[57]

While the open attacks against constitutionalism in Hungary and now Poland have attracted a lot of media and academic attention,[58] its slow decay behind a formally democratic façade in Bulgaria is largely unnoticed. The judicial independence proved to be a good shield against public accountability behind which shady dependencies flourish. Another paradox neatly illustrates the general disillusionment with the existing constitutional system. In February 2013, people took to the streets in great numbers to protest against the high electricity bills. As Borissov shrewdly handed in the resignation of his first government, the protests continued with no apparent cause and many called for a 'change of the system' without much of an idea what the system should be substituted for. Yet the frustration with the established constitutional order is far too obvious. While the civil unrest on the streets was high (and included 6 self-immolations), the turnout on the snap elections held in May the same year remained low (51%). A new wave of mass protests erupted in June, only a few weeks after the elections, they continued for months on, and eventually led to new snap elections held in October 2014. The turnout then hit the historic low at 49%.[59] Ganev claims that the June protests erupted to preserve the quality of the existing democratic system and prevented an impending further decline.[60] This author finds this view far too optimistic – the intense engagement outside the normal constitutional framework *while disengaging from participation in the established mechanisms* is not a sign of healthy recovery. Rather it shows that the constitutional system rings increasingly hollow.

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57 I am grateful to Ruzha Smilova for drawing my attention to these figures.

58 Kim Lane Scheppele, 'Hungary and the End of Politics', May 2014. See also Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law Inside Member States?' 21 Eur. L. J. 141–160 (2015).

59 The low turnout is further exacerbated by the increasingly common practice of buying votes – for as low as GBP 20 a piece. See further commentary in Vesco Paskalev, 'Bulgaria: The Non-Voters in Power', in *EUDO Café*, 20 Oct. 2014.

60 Ganev, 'Bulgaria's Year of Civic Anger'.

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