



REPUBLIC OF BULGARIA



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**Comparative table: Reports by EU experts for the 4 Peer review (Mr. Björnberg and Mrs. Schuster) and the report by this Twinning Project**

<p><b>“Independence of the Judiciary Report from a <u>peer-review</u> visit to Bulgaria 20-24 March 2006”</b></p> <p><b>By Kjell Björnberg;</b></p> <p><b>EXTRACTS OF THIS REPORT :</b></p> <p>... ..</p> <p>2.6 .- “Parts of the proposed amendments to the Bulgarian Constitution, to which I will come back below, not only fails to enshrine the independence of the judiciary in the Constitution, but must furthermore be seen as a step backwards in the process of creating an independent judiciary and can be seen as serving to undermine the independence of judges by creating a closer connection of their administrative functions to the executive branch of the government”.<sup>1</sup></p>	<p><b>“Report <u>4 th Peer Review</u> February 2006” By Susette Schuster;</b></p> <p><b>EXTRACTS OF THIS REPORT</b></p> <p>“...There are no tangible improvements to report since the last peer review.</p> <p><i>The proposed amendments of the constitution - in particular Art. 130 paragraph 6- are worrisome and display a state of confusion regarding the strategy of the judicial re-form. ... ..</i><sup>2</sup></p> <p><i>The expert finds some of these amendments very worrisome. These concerns stem from the content as well as the way the amendments were drafted and brought into Parliament. These views are shared by the representatives of NGO’s (Helsinki Committee) and correspond to a weekly newspaper article of the respected KAPITAL from 7<sup>th</sup> February 2006.</i></p> <p><i>The resident twinning advisor of the project “Improvement of the Magistrates’ Legal Status and Strengthening the Capacity of the Supreme Judicial Council”, Judge Manuel Mazuelos Fernandez-Figueroa, has written an excellent comprehensive report on the effects of the changes of the constitution which was endorsed by the Supreme Judicial Council on the 2nd February 2006.”</i></p>
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<sup>1</sup> The same conclusions in the “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 “Improvement of the Magistrates’ Legal Status and Strengthening the Capacity of the Supreme Judicial Council” dated 31 January 2006.

The Supreme Judicial Council on its plenary session held on 1 February 2006 decided: “3.1. Support the report of RTA regarding present constitutional reform in Bulgaria, prepared by the Twining Project BG-04-IB-JH-04. 3.2. The report to be send to the Ad-Hoc Committee for amendments in Constitution at the Parliament”.

<sup>2</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).



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<ul style="list-style-type: none"> <li>○ <b>Regarding article 84.16</b>  <i>“I recommend that the responsibility for submitting annual reports on the activities of the courts to the National Assembly remain under the competence of the Supreme Judicial Council.”<sup>3</sup></i>   <i>“I recommend that the Minister of Justice, as well as any representative of the Ministry of Justice be removed from the Supreme Judicial Council. (see also below under 5.4).”<sup>4</sup></i> </li> </ul>	<ul style="list-style-type: none"> <li>○ <b>Regarding Art. 84 and art 129:</b>  <i>“Parliament should neither hear annual reports of the presidents of the 2 courts: this creates a misbalance between the Presidents, the Supreme Judicial Council and the Minister of Justice, nor should Parliament be responsible for dismissing these judges.</i>  <i>If Parliament wants to get knowledge of the state of affairs of the justice system (which is a reasonable wish) then the Minister of Justice as part of the executive should have to answer and report! It might be possible that the members of the Supreme Judicial Council must be consulted first as it is at present regulated in art. 27 of the Judicial System Act.</i>  <i>The disadvantage of this proposal is that it singles out the presidents of the courts from the judiciary and moulds them even more into political figures. Even at present the appointments are semi-political and not at all based on professional merits; the president of the Supreme Administrative Court was never an administrative judge before he came into office, instead he was the chairman of the group of the ruling parties’ deputies in Parliament.</i>  <i>Basically, the same holds true for the proposed dismissal of these presidents by Parliament (Art. 129). Instead, as some proposals for changes suggest, the Supreme Judicial Council should be the body that should propose the dismissals”<sup>5</sup></i> </li> </ul>
<ul style="list-style-type: none"> <li>○ <b>Regarding article 129 new paragraph 4</b>  <i>“Following the best practice, I recommend that the Supreme Judicial Council retain the sole competence to dismiss judges in the supreme courts.”<sup>6</sup></i> </li> </ul>	
<ul style="list-style-type: none"> <li>○ <b>Regarding new article 130 a</b>  <i>“Following the best practice, I recommend that the Minister of Justice should be removed from the position in the Supreme Judicial Council.”<sup>7</sup></i> </li> </ul>	<ul style="list-style-type: none"> <li>○ <b>Regarding Art. 130 paragraph 6:</b>  <i>“This is the most critical and potentially hazardous change. The wording is dangerously overbroad (the Minister of Justice exercises control over magistrates ....in respect of the procedure for the solution of cases). The paragraph is in conflict with</i> </li> </ul>

<sup>3</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>4</sup> Same recommendation in the “Report on the Strategic Approach and Priorities Proposals for Amendments in the Main Legislation” by the PHARE TWINNING PROJECT BG-04-IB-JH-04 “Improvement of the Magistrates’ Legal Status and Strengthening the Capacity of the Supreme Judicial Council” dated 28 November 2005.

The Supreme Judicial Council on its plenary session on 14 December 2005 decided to send this report to the Ministry of Justice for the new JSA and to the Parliament for the on-going amendment in the actual JSA.



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<p><i>“I recommend that the Supreme Judicial Council to obtain its own administration and finances.”<sup>8</sup></i></p> <p><i>“I recommend that the Supreme Judicial Council retains its competence to draft and propose budget for the judiciary to the Council of Ministers, at least as long as the Minister of Justice remains in any position in the Supreme Judicial Council.”<sup>9</sup></i></p> <p><i>“I recommend</i>  <i>1. that all positions as judges, prosecutors and investigators be filled after a full and open competition based on merits according to official criteria,</i>  <i>2. the present very strong role of court presidents in proposing candidates to vacant positions as judges etc. be reduced and</i>  <i>3. a full transparency be introduced</i></p>	<p><i>Art. 117 of the Constitution (separation of powers) and besides the regulation seems unnecessary. If no fundamental changes are indeed intended, as the expert was told by the Minister of Justice, then such a potentially dangerous provision should not be enacted at all. It is a sign into the wrong direction and can be misused. One might even asks whether such a provision still conforms with the first of the <b>Copenhagen Criteria 1993</b> , namely to ensure stability of institutions guaranteeing democracy, the rule of law, human rights and respect towards minorities.</i></p> <p><i>In the <b>Accession Partnership Agreement with Bulgaria 2003</b> the priority in the field of Justice was identified as follows: drawing a clear divide between the powers of SJC and those of the Ministry of Justice to ensure respect for the independence of the judiciary.</i></p> <p><i>This amendment clearly points to the opposite direction, namely to the direct influence of the executive over the judiciary”<sup>14</sup>.</i></p> <p>○ <i><b>“The way the amendments were drafted</b></i></p>
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<sup>5</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>6</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>7</sup> Same recommendation in the mentioned “Report on the Strategic Approach and Priorities Proposals for Amendments in the Main Legislation” by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (28 November 2005).

<sup>8</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>9</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>10</sup> Same recommendation in the mentioned “Report on the Strategic Approach and Priorities Proposals for Amendments in the Main Legislation” by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (28 November 2005) and in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>11</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>12</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>13</sup> Same recommendation in the mentioned “Report on the Strategic Approach and Priorities Proposals for Amendments in the Main Legislation” by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (28 November 2005) and in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).

<sup>14</sup> Same recommendation in the mentioned “Report on the Amendments in the Constitution of Bulgaria 2006”, by the PHARE TWINNING PROJECT BG-04-IB-JH-04 (31 January 2006).



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*in the appointment process.”<sup>10</sup>*

*“I recommend that the proposed amendment to the Constitution giving the Minister of Justice the competence to organize the magistrates qualification to be forsaken.”<sup>11</sup>*

*“I recommend that the legal position of the National Institute of Justice as a fully independent organ and its relation on one hand as free standing from the Ministry of Justice and on the other hand its connection to the Supreme Judicial Council be clarified.”<sup>12</sup>*

*“I recommend that, judicial inspectors be removed from within the central organisation of the Ministry of Justice. Judicial inspectors should be re-assigned to work directly under the control of the Supreme Judicial Council.”<sup>13</sup>*

*To the expert the critical amendments (of art. 129,130) were extremely hastily drafted, without even a prior policy consultation of the Minister of Justice or the Supreme Judicial Council. These enormous changes took both institutions by surprise, as they were not expected nor discussed in any prior version by the stakeholders. Instead up until mid-December 2005 the Supreme Judicial Council prepared an informal proposal for different changes of the constitution and of ordinary legislation inline with the recommendation resulting from the above mentioned Phare twinning programme. Sensitive amendments like these in Art. 129 and 130 need a broad prior public discussion. The amendments are the more puzzling as some of the key problems (political control over the Prosecutor General) which were publicly and politically debated for a rather long time were not sufficiently addressed; instead some other changes were drafted without any practical need (duty to report before Parliament of the President of the Supreme Administrative Court and the President of the Supreme Court of Cassation).*

*To the expert the way these crucial and extremely sensitive amendments were drafted is a clear sign of the lack of structure and vision in implementing a legal reform strategy and additionally the complete lack of understanding of the meaning of basic principles shared by the EU member states e.g. the rule of law and the independence of the judiciary.”*

- *“The constitutional amendments in the framework of the Strategy on the Reform of Judiciary*

*The expert comes to the harsh conclusion above when taking the Strategy on the Reform of the Judiciary from October 2003 onwards with the latest period 2006-2007 into account. The latest programme was adopted by the Supreme Judicial Council on 11th January and by the Council of Ministers on February 2nd 2006.*

*The critical constitutional amendments (art. 129, 139) do not harmonize with the above mentioned programme for the implementation of the Strategy. At no point of the programme such a fundamental*



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	<p><i>change of management of the judiciary was envisaged. Instead, the programme speaks of “consolidation” of the capacity of the Supreme Judicial Council for governance of the judicial system and, “improvement” of the administrative operations of the judiciary.</i></p> <p><i>Obviously, the drafters of the constitutional amendments were not aware of the strategy paper at all and of the commitments and reform goals the Bulgarian Ministry of Justice has made to the European Commission.</i></p> <p><i>This raises doubts how serious the programme on Strategy for Reform is taken by the Bulgarian Government itself. It might just be a paper in order to please the Europeans.”</i></p>
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Mr. Kjell Björnberg in the “Independence of the Judiciary Report from a peer-review visit to Bulgaria 20-24 March 2006” also points out the following recommendations:

- *Judges should be enabled to organise and form professional associations.*
- *The excessive number of courts should be reduced and the workload, premises, equipment etc. better counterbalanced between the courts.*
- *The possibility of introducing restrictions in bringing in new facts and evidence in proceedings after an appeal should be considered.*
- *The system of random allocation of cases should be fully introduced as soon as possible.*
- *The creation of a complete and functioning land-register built on a cadastral system should be given a high priority.*
- *Court presidents should be obliged to act in cases of misconduct by judges in the court.*

Mrs. Susette Schuster in her “Report 4 th Peer Review February 2006” also says:

***“... Amendment of the Judicial System Act***

*At present, a draft on amendments of the Judicial System Act is in Parliament, but will be voted on only after the changes of the constitution come into force. It is likely therefore that the draft bill will undergo changes. The content of the draft corresponds to what is the reported towards the European*



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*Commission in the questionnaire. For the expert the most important proposition is to introduce the principle of competition at the initial appointment to the bodies of the judiciary. This includes the appointment to permanent positions and not only to the position of young judges or young prosecutors.*

*The legislative proposals by the already mentioned Phare Twinning Project “Improvement of the Magistrates’ Legal Status and Strengthening the Capacity of the Supreme Judicial Council” were more far reaching than the present draft and were also addressing the problem of the presently very strong position of the court presidents in regard of handing in proposals for promoting, attestation or asking for disciplinary proceedings of individual judges. As the expert wrote in her earlier reports, the power of court presidents for the career of the individual judges cannot be overestimated. Besides, without the co-operation of the court presidents it seems almost impossible that disciplinary proceedings can be instituted against a magistrate, taking into account that the disciplinary/anti-corruption commission of the Supreme Judicial Council still has no investigative power.*

*Again, this is not a minor problem. Organizing the judiciary not so hierarchically would be an enormous step forward to making the magistrates more accountable for their decisions and potential misdemeanours in office.*

*One other point raised and addressed by the Phare Twinning was to introduce a competency of the Supreme Judicial Council in Art. 27 SJA of “adopting regulations about the magistrates legal status”. The aim of such a competence would be to adopt detailed Council regulations on Disciplinary liability of magistrates as well as their legal status which includes technical regulation on the internal independence. To the expert the recommendations of the Phare Twinning project are extremely high quality suggestions.*

*All in all, although this draft contains deficiencies and discrepancies it will be an improvement to the current situation in the field of appointment of judges.*

*However, the expert was told that after the current draft becomes effective, then a commission will be installed to revise the whole Judicial System Act again. This information is supported by the Strategy for Reform 2006-2007, which mysteriously runs: “Adoption of a Judicial System Amendment and Supplement Act and elaborations of a new Judicial System Act”. The expert did not get an explanation why this is necessary and what the policy aims behind the completely new law will be. She strongly advises against such a fundamental review of a just amended law.*

*Therefore, it is at this moment quite unpredictable what will be the state of affairs of the Judicial System Act at the end of 2006. This is worrying as the law is of such fundamental importance to the functioning of the judicial system.”*