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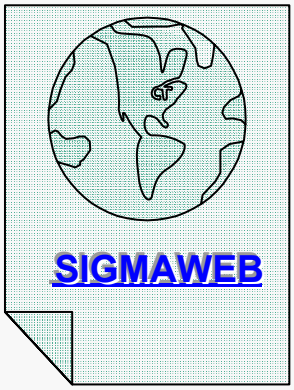

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► CONVERGING JUDICIAL CONTROL OF THE ADMINISTRATION IN EUROPE

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One of the fundamental principles of a state ruled by law is the obligation of all public powers to respect the legal order of the country. Governments and public administrations have strong powers that are legitimate and necessary in order to effectively carry out their functions. However, these powers can be considered to be excessive when they encroach decisively on individual rights. For this reason, tight controls need to be applied from outside the administration. The most important control instrument to ensure that the administration respects individual rights and the law is independent judicial control. Judicial control constitutes the strongest guarantee for individuals in their dealings with the administration in particular and with any public powers in general that their rights will be upheld.

Evolution of Judicial Control in Europe

The notion of independent judicial control in Europe is an evolutionary one — it has developed over the last two centuries and is still evolving. The fact that a judge can annul an administrative decision, oblige the administration to redress an unlawful situation, and compensate the wronged party is the utmost expression of the rule of law. It is also the most genuine means of ensuring that all public powers are effectively subject to the law and that citizens have their rights guaranteed when facing governments and administrations. This paper will overlook the debate about whether or not government actions should be subject to judicial control. The tendency is to respond positively when the government or ministers act as heads of the ministerial administration, but not when they act as policy-makers. Even parliaments are subject to constitutional review when they pass laws and to jurisdictional administrative review when they take administrative decisions.

Not all countries have fully embraced these principles. The more developed a country is in democratic terms, the more advanced the mechanisms of judicial control over governmental and administrative decisions and actions tend to be. Empirical evidence has shown that effective judicial control is a major element of the good governance that is indispensable not only for democracy, but also for economic development.

This perspective serves the general interests of a country. When a judicial ruling annuls an illegitimate or illegal administrative decision or obliges the state to compensate a wronged citizen, it does not diminish the efficacy or prestige of the administration or government; on the contrary, such a ruling contributes to improving public administrative action, asserts the public authority of the state, and helps to create public trust in state institutions.

All EU Member States have established systems for the judicial control of the administration. The establishment of such a system was one of the requirements that new Member States had to meet before joining the Union, as the majority had been under communist regimes where control of the administration was mainly carried out internally by the administration itself rather than by external independent courts. The rule of law, one of the fundamental requirements for EU membership set down by the so-called “Copenhagen criteria”, was considered to be non-existent in these countries without the effective establishment of judicial control over administrative acts and decisions.

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Approximation among Judicial Control Systems

Systems of judicial control differ among EU Member States. Different approaches to building the judicial control system have been used, depending on each country's culture and political history. However, a slow but steady and long-lasting approximation has been developing among European systems, with countries borrowing elements from each other in a constant interactive process. The European Court of Justice has also contributed decisively to approximating administrative justice across EU Member States by initiating actions conducive to the emergence of European administrative law.

This process of approximation related to judicial control of the administration is said to have started in the 19th century. Some European states had set up a kind of independent judicial review of the administration as a consequence of the idea of separation of powers between the executive and the judiciary. In France this occurred after the revolution and the creation of the *Conseil d'État* in 1799-1806. Similar institutions responsible for administrative justice were set up in Belgium (1831), unified Italy (1865), Spain (1845), Portugal (1875), and several *Länder* in Germany (between 1819 and 1900). Austria created in 1875 a single administrative court for the whole Austrian Empire. In the UK this function was fulfilled to a limited extent by the so-called Westminster courts.

In the period between world wars in the 20th century, approximation among judicial control systems in Europe became more apparent, and this process is continuing today. The basic reason for this increased visibility was that this period was marked by a multiplication of state interventions in both the economy and social life[1]. This increase resulted in the multiplication and extension of the state's powers. The expansion of the administration resulted not only in more administrative units with the creation of new ministries (for example, a ministry of health was created in the UK in 1919, and in the same year a ministry of public hygiene, assistance and social prevision in France), new administrative authorities, public establishments, public enterprises, etc, but also in new laws, especially laws on civil service (e.g. Switzerland in 1927, Netherlands in 1929, Belgium in 1937). It also resulted in laws regulating the new enlarged and reinforced powers of the public apparatus to ensure that all of these newly created, unparalleled administrations were kept under control and under the law.

Classification of Systems

Different authors propose varying classifications of European systems of judicial control, and any classification is liable to be inaccurate. Usually a classification is made based on the criterion of approximation / differentiation of the system with respect to the French historical system. The historical French model was based on the assumption that the administration had to be judged by the administration, not by the judiciary, because judging the administration was still administrating. Consequently, the radical division of powers established by the revolution impedes the judiciary from judging the administration. It is therefore the administrative judge who judges the administration, not the judge within the judiciary. A clear distinction is made in France between the "*juge administratitif*" and the *"juge judiciaire*"

1 See Jean-Louis Halpérin, *Histoire des droits en Europe de 1750 à nos jours*, Éditions Flammarion, Paris, 2004.

These distinctions are rather historical, however, and have few important practical consequences when it comes to impartial adjudication and impartial delivery of administrative justice. In fact, in France "the protection of citizens against the acts of the administration is essentially judicial because of the age-old and deeply rooted credibility of the administrative judge"[2]. On the other hand, different degrees of efficiency in the functioning of each of these systems cannot be attributed to these historical distinctions, but rather to procedural designs.

Convergence of Principles and Mechanisms

In conclusion, notwithstanding the historical and cultural differences among administrative justice systems in Europe, a convergence of principles and mechanisms can be observed. This approximation will perhaps increase in the future with the constant development of new judicial co-operation mechanisms among EU Member States, which the Treaty creating a Constitution for Europe, adopted in Rome on 29 October 2004, also underpins.

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Judicial Protection of the Citizen under European Law

Gil Carlos Rodríguez Iglesias, former President of the European Court of Justice, contributed an article on the above subject to Sigma's previous newsletter, ***Public Management Forum (PMF).***

He describes how EC law has contributed to expanding the judicial protection of Member States' citizens. EU candidate countries, by ensuring the effectiveness of their national court systems, will be able to contribute, upon accession, to the effective functioning of the EU legal system.

To consult this paper, published in *PMF* Vol. VI, No. 1 (2000), click here

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[2] Dominique Turpin, *Contentieux administratif*, Hachette, 2nd Edition, 2001.

► ACCELERATING JUDICIAL REFORM IN BULGARIA

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Only two months before the signing of the EU Accession Treaty with Bulgaria, scheduled for April 2005, judicial reform has been identified as the major area in which Bulgaria will need to make rapid and substantial progress in order to meet commitments made earlier in the negotiations[3]. The Commission's Regular Reports on Bulgaria's progress towards accession have traditionally placed great emphasis on judicial reform. At present, the outstanding issues include "increase of the efficiency in the pre-trial phase, revisions of the structure of the Public Prosecution Office and the penal procedure"[4]. These reforms would entail new amendments to the Law on the Judicial System, the Penal Procedure Code and, most importantly, the Constitution itself. Considering that parliamentary elections will take place in June 2005 and that constitutional amendments would probably require the convening of a Grand National Assembly, it is very likely that the next two years (preceding accession, planned for January 2007) will be marked by actions to bring the judicial system in Bulgaria in line with European standards of impartiality, efficiency and accountability. These efforts will be closely monitored by the Commission, which will send several peer review teams and continue to issue the annual progress reports that determine the possible use of safeguard clauses, including the eventuality of postponing entry to the EU[5].

Finding the Right Institutional Model

Why is it that the greatest test in the accession process is probably finalizing judicial reform and establishing an independent judicial system that is trusted by the citizens? What specific obstacles does Bulgaria have to overcome? Institutional arrangements, efficiency, quality of legislative drafting, and the fight against corruption are different aspects of the judicial system that have been identified as areas needing improvement. This article presents some views that concern primarily the institutional side of reform, in particular efforts to find the right balance between independence and accountability, but interrelations with other issues will also be indicated.

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3 ***Presidency Conclusions of the European Council***, 16-17 December 2004.

4 European Commission, ***2004 Regular Report on Bulgaria's Progress towards Accession*** [SEC(2004)1199], 6 October 2004, pages 18-19 and 123.

5 European Commission, ***Strategy Paper of the European Commission on progress in the enlargement process*** [COM(2004)657 final], 6 October 2004, pages 3-4.

The few years immediately following 1989 in Bulgaria were characterized by a radical transformation of judicial authority[6] from a position of total subordination to the communist regime to a situation where the Constitution of 1991 granted wide immunity and autonomy to Bulgarian magistrates. The experiences of subsequent years demonstrated that, in order to achieve the objectives of judicial reform, the balance between institutional independence and accountability needed to be redressed, making magistrates more accountable to the legislature and the executive through greater involvement of these two political branches of government in personnel and management policy-making. So far, the reform of the 1991 constitutional model has included several amendments limiting the immunities of Bulgarian magistrates. In April 2004 the Law on the Judicial System incorporated these constitutional changes. It introduced limited terms of office (mandates) for senior judges and prosecutors, increased from three to five years the requirement of completed service before "irremovability" status can be granted, and transformed the unlimited immunity of magistrates to "functional" immunity related only to the performance of official duties[7]. Despite the significant changes that have already taken place, the majority of experts consider that the constitutional model requires further readjustments.

In any country, the reform of traditionally conservative areas, such as the judicial system, is bound to encounter obstacles and delays. This is even truer in Central and Eastern Europe, where more than 40 years of communist domination resulted in public perceptions of judicial power characterised by mistrust and scepticism. At the same time, the rehabilitation of magistrates after 1989 was not helped by actual practices in the country. The inherited scepticism was now coupled with new concerns that magistrates were probably not yet ready or fit (due to low professional standards, ethical problems, dependence on senior colleagues, etc.) to operate in a framework of wide institutional guarantees of independence. It was perceived that the newly established high degree of self-control translated in practice into greater openness to capture by special interests and led to increased corruption concerns[8]. For these reasons, together with legislative amendments and organisational changes, the professional competence and personal integrity of Bulgarian magistrates also need to be enhanced.

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6 In Bulgaria the judicial authority is composed of three entities — judges, public prosecutors and investigators — all of whom are referred to as magistrates.

7 *Republica Bulgaria, Zakon za sudebnata sistema* (Republic of Bulgaria, Law on the Judicial System), Sofia, Izdatelstvo Sofi-P, 2004.

8 According to data provided by the Corruption Monitoring System of Coalition 2000, more than 75 per cent of the Bulgarian public believes that magistrates are corrupt. Center for the Study of Democracy, Judicial Anti-Corruption Program, Sofia, 2003 (page 90).

Judicial reform requires consistent political will and consensus among decision-makers, as reform efforts also have to counter evolving corporatist tendencies among magistrates. In the Bulgarian context, prosecutors and investigators have voiced their opposition to proposals to remove them from the judicial authority and place them under the control of the Ministries of Justice and Interior respectively, arguing that this would constitute a violation of the principle of judicial independence. However, some legal experts affirm that these changes are necessary, as the Prosecutor's Office has evolved into a highly centralized institution — with its head elected by the Supreme Judicial Council for a seven-year mandate — that is technically not accountable to the two political branches of government[9]. Indeed, finding a workable solution that respects the principles of both independence and accountability is a major task. This solution would also reaffirm that the independence of the judiciary does not constitute a corporate privilege of magistrates, but rather an essential tool for protecting citizens' rights.

With the advancement of EU negotiations, judicial reform in Bulgaria has been given a new impetus. While it is true that this area exemplifies the potential of the EU to influence the direction and speed of domestic reform, the EU does not advocate the introduction of a specific institutional model for the Bulgarian judicial system. Instead, it requires Bulgaria to reach European standards for an effective and professional judicial branch by implementing locally designed reforms. In any event, no unified European model exists in this area, and the legal systems of Member States provide a plurality of solutions for structuring judicial power, including different degrees of checks and balances between the three branches of government and a range of institutional arrangements for public prosecution and investigation. Bulgarian authorities are encouraged to review best practices and advanced solutions existing in Europe[10] and — through an expert and public debate — to propose changes at national level[11].

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9 See the accounts of Bulgarian experts concerning the improper influence exercised by the Prosecutor General on lower- rank prosecutors, as cited in the Judicial Reform Index for Bulgaria, July 2002, American Bar Association, **Central European and Eurasian Law Initiative** (pages 33-36).

10 For example, the EC/Phare programme for technical assistance in pre-accession restructuring provides financing for such activities. The EC Delegation in Bulgaria recently announced that during the period 1995-2004 the country received 20 million euros for programmes related to the reform of the judicial system. For the concrete implementation of the reform, the Commission has earmarked an additional 30 million euros. **Bulgarian News Agency**, 25 January 2005.

11 European Commission, ***Accession Partnership with Bulgaria*** [COM (2003)142 final], 26 March 2003; European Commission, ***Roadmaps for Bulgaria and Romania*** [COM (2002)624 final], 13 November 2002.

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Bulgarian Legal Traditions and Current Reforms

Effective and coherent judicial reform could also take into account the broad legal traditions in the country. In my opinion, the consideration of current reform efforts from an historical perspective and the search for a certain legal continuity would contribute to encouraging a sense of ownership and commitment to reform. An historical investigation of the process of establishing and sustaining a modern constitutional order in Bulgaria during the period 1878-1944, despite its inherent imperfections and hesitations, reveals the gradual development of a comprehensive and sound understanding of the meaning and constituent elements of the principles of rule of law and judicial independence. These are the same concepts that Bulgaria aims to reintroduce and put into practice now. In addition, a survey of the same period provides evidence of the significant Bulgarian experience in adopting and adapting foreign legal concepts and institutions. A review of this experience can help to identify some of the factors that determine the success and viability of receiving new models. The attached document, ***The Bulgarian Judiciary in the Period between 1878 and 1944 — the History of a Modern Institution and Community***, provides such a review.

Going beyond institutional issues, it is often emphasized that the outcome of judicial and administrative reforms in transition countries also depends on changing attitudes and capacities among professional groups and in the society as a whole. Accordingly, judicial reform is a transformation process that requires time to alter values and mentalities, i.e. to re-introduce in the collective value system the important principles of rule of law, separation of powers and judicial impartiality. To achieve this objective, specific efforts should also be invested in developing a new generation of legal professionals. Training programmes for magistrates and public administrators, organised by the National Institute of Justice and by the Institute of Public Administration and European Integration, as well as educational programmes aimed at the wider public, would benefit from the incorporation of constitutional and legal history surveys. Learning about the values and practices of prominent legal scholars and practitioners and about past debates on major constitutional and legal issues could stimulate public understanding and increase the momentum for further reform.

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► JUDICIAL CONTROL OF THE ADMINISTRATION IN EUROPE: PROGRESSIVE CONSTRUCTION OF A COMMON MODEL

A state based on the rule of law implies the capacity of citizens to submit administrative actions to judicial control.

All European countries have now accepted this fundamental idea, which has resulted in a reinforcement of the role of the courts in controlling the administration throughout Europe.

Even if this development is based on different traditions, an increasingly solid framework of common principles is emerging.

Jean-Marie Woehrling
Secretary General
Central Commission for the Navigation of the Rhine
France

Jean-Marie Woehrling's paper on *Judicial Control of the Administration in Europe: Progressive Construction of a Common Model* focuses on the following topics:

Foundations of Judicial Control of the Administration

- Two objectives of judicial control of the administration
- Position of judicial control in the administrative process
- Philosophy of law: two systems

Tendencies in the Development of Judicial Control of the Administration

- Extension of the concept of legality
- Europeanisation of judicial control of the administration
- Emergence of a set of major principles of European administrative law
- Increasingly demanding rules of administrative procedure

Different Options in the Organisation of Control of the Administration by the Courts

- Institutional choices
- Paving the way for judicial remedies: wide or narrow conditions of admissibility
- Extent of control: actions and behaviour of the administration that can be submitted to the courts
- Intensity of control: judicial control of the power of assessment accorded to the administration
- Rules of judicial procedure

Problems Encountered in the Judicial Control of the Administration

- Increase in the number of appeals
- Judicial control as a factor in the complexity and inefficiency of public activity

This paper is available in the original French version or in an English translation:

L'administration et le Contrôle juridictionnel en Europe: Construction progressive d'un modèle commun

Judicial Control of the Administration in Europe: Progressive Construction of a Common Model

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► JUDICIAL REFORM IN ALBANIA

Introduction

It is generally accepted today that a country's progress in judicial reform is difficult to evaluate due to the different assessment criteria. Having said this, it is nevertheless possible to note Albania's steps forward in implementing judicial reform in recent years[12], even though several challenges still lie ahead.

While the Albanian general public[13] and international organisations that are closely monitoring reforms continue to criticize the functioning of the judicial system, the Albanian Government has undertaken significant measures, and constitutionally independent bodies have brought about some positive changes.

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High Council of Justice
Albania

This paper does not intend to assess the progress of judicial reform, but to provide information on its different components and on the ways in which they are being implemented.

Legal Reforms

In November 1998, following a popular referendum, the interim constitutional provisions were replaced by a new Albanian Constitution. Prior to that, the Criminal Code, the Civil Code and the respective Codes of Procedure[14] were approved, together with the 1996 Law "On the Magistrates School". Since then, several important laws on the judiciary have been approved, i.e. in 1998 the Law "On the Organisation of Judicial Power" and the Law "On the Creation of the Office for the Administration of the Judicial Budget, followed by several laws on the organisation and functioning of judicial institutions — the High Court (2000), the High Council of Justice and the Ministry of Justice (2001), and the Courts for Serious Crimes (2003).

By the beginning of 2004, the Courts for Serious Crimes started to function in the context of the reform of criminal legislation, aimed at improving the results of the fight against organised crime and trafficking. A single court for serious crimes, located in Tirana, covers the entire territory of Albania, and an appellate court also has similar territorial jurisdiction. In the meantime, parliament approved a legislative package, referred to as "the anti-mafia package", aimed at preventing and punishing organised crime, trafficking, terrorism, and corruption. This package is already being implemented by all courts, in particular by the courts for serious crimes.

In this context, work is ongoing in the establishment of other courts of special jurisdiction, such as specialised juvenile courts in the framework of the legislative reform of the juvenile justice system.

[12] Different reports prepared by European and international organisations acknowledge this fact, even though a long process still lies ahead.

[13] "The legal sector in Albania possibly has a reputation that is worse than it deserves. This results from people not understanding how institutions function and thus becoming suspicious."; *OSCE Legal Sector Report for Albania 2004*, page 3.

[14] 1995 Code of Criminal Procedure and 1996 Code of Civil Procedure.

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Recently, in view of the lack of appropriate contempt and enforcement powers given to judges, a group of experts drafted for the Commission for Legal Reform[15] the proposals required for incorporation in upcoming legislative amendments. These recommendations set down the appropriate mechanisms that the court should have so that the parties appear before the judges, hearing sessions are not postponed, orders of the judge are executed by the parties, etc. Important reform measures have also been taken in the Bailiff Office, and these reforms are continuing.

The establishment of the Commission for Legal Reform has been an important step in the continuation of legal reforms. This new mechanism offers to the executive branch and to the Ministry of Justice its continuing professional contribution to the identification and follow-up of legislative reform of the justice system.

Formation, Quality and Structural Safeguards of Judges

It is a well known fact that all judges in Albania have formal university-level legal training and that the School of Magistrates[16] offers a three-year academic programme comprised of theoretical knowledge and courtroom experience.

Numerous efforts have been made to upgrade the teaching quality in law faculties by reforming the curricula, training teachers, and improving organisational and administrative matters, in compliance with the Bologna process.

The upcoming amendments to the School of Magistrates' Law and the medium-term and long-term strategic plans being prepared by the School will modernize its activity and contribute further to the formal and continuous training of judges of first instance courts and courts of appeal by increasing their knowledge and professionalism.

Regarding the selection and appointment process for judges, the Constitution of the Republic of Albania stipulates that judges of first instance courts and courts of appeal are to be appointed by the President of the Republic, following the proposal of the High Council of Justice (art. 136.4). The 1998 Law on the Organisation of Judicial Power, articles 19 and 24, sets down the criteria for citizens who are eligible for appointment as judges of first instance courts and courts of appeal. The 2001 Law on the Organisation and Functioning of the High Council of Justice (Law No. 8811) and the Regulation on Examination of Judicial Candidates together set down the appointment procedure[17].

Following a decision of the High Council of Justice, a joint working group of Council of Europe experts and Albanian experts is developing a new system for the professional and moral evaluation of judges. This system, which will base the evaluation of judges on objective and subjective criteria, aims to not only evaluate judges, but to also support the career system and identify training needs of judges.

15 The Commission for Legal Reform was established on an Order of the Prime Minister with a view to promoting legislative reforms, in particular to assist the Ministry of Justice in increasing the efficiency and professionalism of these reforms.

16 The School of Magistrates is the only institution responsible for initial and continuous training of judges and acts in accordance with its organic law and its regulations: 1996 Law on the Magistrates' School (Law No. 8136) and Internal Regulations of the Magistrates' School, 27 March 1998.

17 To access the regulations and all legal acts regulating the activity of the High Council of Justice, visit its website.

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Court Staffing, Resources and Security

The process of rationalization of the courts is now underway, and will follow a path leading from the Ministry of Justice to the High Council of Justice and finally to the President of the Republic. This process aims to redistribute courts and judges throughout Albania so as to ensure that judges have equally balanced workloads and that courts have at their disposal relatively even numbers of experienced and new judges.

The School of Magistrates is also responsible for the education and training of court chancellors and administrative staff, and for this purpose a training manual is being prepared. Court chancellors and administrative staff will be provided with knowledge and practical skills in areas such as court and case management, human resources and financial management, procedural skills, security and emergency management, public access, etc.

In the last two years intensive work has been undertaken in selected district courts, referred to as “pilot courts”, to introduce court administration issues and to launch new systems, techniques, and technologies required for a court to meet EU standards of efficiency and fairness and for the establishment of an improved and transparent legal system.

The Office of the Administration of the Judicial Budget (OAJB) has just finished building two brand new court buildings and plans to continue upgrading the building infrastructure of the courts. At the same time, under the EU CARDS 2003 Programme, the building of the Court for Serious Crimes will be constructed.

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