

The Rule of Law as Fata Morgana in Bulgaria

*Ekaterina Baksanova**

Bulgaria has traditionally been perceived as one of the most if not the most corrupted state in the European Union¹ (EU). The country is notorious for being captured and controlled by moguls' and mafia's interests². The institutional implosion and powerlessness has led to low levels of public confidence in authorities. Although these erosive processes have been consistent, recently, the situation has severely deteriorated, especially with respect to judicial independence as a pivotal element of the rule of law. Many factors are conducive to that situation, however, the key one lies with the wrong constitutional and institutional setup of the Bulgarian judiciary.

The following review does not aim at attaining a great analytical rigor, nor could it be exhaustive in exhibiting all judiciary related issues in the country. It rather attempts to put forward the relevant legal framework, as well as facts and events stemming from problematic areas pertaining to the functioning of the judicial system. This could serve to the unbiased observer as an impartial ground for evaluating to what extent the judicial independence in Bulgaria is threatened and undermined.

The promulgated in 1991 Constitution of the Republic of Bulgaria has erroneously conceived a model of the judiciary that keeps remnants of totalitarian times and consists of flaws which hamper the effective governing of the judiciary and its independence. The most significant deficiencies are: the post-totalitarian setup and functions of the Prosecutor's Office (PO) and the mistaken model of the Supreme Judicial Council (SJC). This, in turn, enables the union rather than the separation of powers.

The Post-Totalitarian Organization and Functions of the Prosecutor's Office

Unreformed Unaccountability and Omnipotence of the Prosecutor General

"Above me is only God" – these are the words of Ivan Tatarchev, the first democratic Prosecutor General (1992 – 1999) of the Republic of Bulgaria, spoken in the 1990s. The statement describes the *de facto* state-of-affairs with regard to the legal status of the Prosecutor General (PG) in the country, i.e. he is in reality unaccountable to no one and there is no effective and independent legally prescribed mechanism under which he can be criminally investigated.

These deficiencies were subsequently acknowledged by the European Court of Human Rights (ECtHR) in the *Kolevi v. Bulgaria case* (2009). In its decision, the Court noted that "...as a result of the hierarchical structure of the prosecution system and, apparently, its internal working methods" no prosecutor would press charges against the PG. The PG has "full control (...) over every investigation in the country" which means that he may dismiss or terminate a possible investigation against him. In addition to the PG's practically unlimited power over each and every act issued by a rank-and-file

* Ekaterina Baksanova graduated Masters of Law in Sofia University "Saint Climent Ohridski" and Loyola University Chicago (campus in Rome). She has more than 10 years expertise in issues regarding judicial reform in Bulgaria. She currently works at the Legal Programme of the Institute for Market Economics – one of the leading, most vocal and visible NGOs as regards deep-rooted rule of law problems in the country.

¹ Transparency International, *Corruption Perception Index 2019*

² "Others countries have mafia. In Bulgaria the mafia has the country":

<https://www.nytimes.com/2008/10/16/world/europe/16bulgaria.html>

"In mafia states such as Bulgaria, Guinea-Bissau, Montenegro, Myanmar (also called Burma), Ukraine and Venezuela, the national interest and the interests of organized crime are now inextricably intertwined." Moisés Naím <https://www.foreignaffairs.com/articles/2012-04-20/mafia-states>

or high-ranking prosecutor, he may only be removed from office by a decision made by the Supreme Judicial Council (SJC) which however is composed partly of members who are his subordinates (§ 207). Thus, the flaws in the legal and institutional framework with regard to the PG's lack of accountability and possibility for his independent, objective and effective investigation (with sufficient public scrutiny) were formally endorsed by authoritative European body.

The same year the *Kolevi v. Bulgaria* case was issued by the ECtHR, the Venice Commission³ stated in its [Opinion no. 515/2009](#) that in Bulgaria "...prosecutors retain elements of powers typically found in the traditional Soviet-style prokuratura model" (p.3). One of the aspects of this heritage is the "general supervision of legality" (Art. 127, para. 5 of the Constitution of the Republic of Bulgaria and Art.136, para. 5 of the Judicial System Act). As pointed out by the Venice Commission it is "a loosely defined competency to intervene in the name of the State in administrative (non-criminal) cases and even in private disputes, conduct checks and issue binding orders even where there is no case to answer under the Criminal Code." In a nutshell, this means that prosecutors have unreasonably broad powers that allow them to transcend the typical criminal prosecution and step into various areas of public life in the form (or under the disguise) of "supervision of legality". This is not just a theoretical risk provided for by the law that bestows quasi-judicial function to the PO. In practice, it has proven to be used in order to enter with dubious motives in the legal sphere of businesses, public life, etc. The abovementioned flaws were also acknowledged by the numerous reports of the European Commission (EC) under the Cooperation and Verification Mechanism⁴.

Thus, the lack of effective and legitimate control over the PG, the practical inability to carry out a criminal investigation and press charges against him (if there is a reasonable doubt that he might have committed a crime), his omnipotence in carrying out checks that may not end up in court combined with the strict hierarchy and strong centralization of the PO, in practice makes him the only unaccountable high-ranking public official who enjoys such immunity and privileges. These inherited structural and functional defects turn the Prosecutor's Office and the PG into an active participant in the vibrant political life in the country, despite the fact the PO is part of the judiciary and must refrain from such activities. That creates conditions where the PO could be used a tool for exerting undue pressure, intimidation and racketeering. Whoever "has" the PO, possesses control of the entire state. That, in turn, makes the PG the real *capo di tutti i capi* not only in the judiciary but in the whole country. This omnipotence remained untouchable in the Constitutional reforms in 2015, hence leaving the PO unreformed, despite domestic and external criticism. The lack of results in the fight against and persecution of corruption, especially in regard to high-ranking officials, additionally aggravates the depth of the problem. The need for democratization of the functions of the prosecutor's office is dire.

Mistaken Model of the Supreme Judicial Council

Structural Problems that Undermine Instead of Safeguard Judicial Independence

The Supreme Judicial Council (SJC) is the collective body governing the judiciary. It possesses competences over the career development of magistrates⁵, appointment of heads of courts and prosecutor's offices, work assessment, disciplinary actions, budgetary issues, protecting judicial independence, etc. Until 2015 the SJC was a joint organ for judges, prosecutors and investigative magistrates. Subsequently, its setup was reorganized.

³ The European Commission for Democracy through Law, Council of Europe

⁴ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en

⁵ In Bulgaria the term magistrates includes judges, prosecutors and investigative magistrates.

Due to years of criticism by the Venice Commission, the EC and domestic public pressure for reform, a Constitutional reform with regard to the judiciary took place in 2015. One of its aims was to divide the SJC in two colleges so as to ensure that prosecutors would no longer interfere in the appointment, career development, assessment and discipline of judges. This measure was introduced as a guarantee for the independence of judges corresponding to a greater extent to the European and international standards for judicial independence. However, some decisions (for instance, budget, judicial map, etc.) still remain within the competence of the common body of all magistrates – the Plenum of the SJC. Hence, the division into two colleges is crucial but insufficient step in the right direction. Moreover, according to the Constitution and the Judicial System Act, the SJC consists of 25 members: 11 members are elected by the Parliament – 6 for the Judicial College, 5 for the Prosecutorial College. Another 6 judges are elected directly by their peers for the Judicial College, 4 more prosecutors and 1 investigative magistrate are elected by their peers for the Prosecutorial College. The last 3 are *ex officio* members elected by the SJC Plenum: the PG, the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court (part of the respective colleges). As evident from the numbers, less than half of the Judicial College’s members are judges elected directly by judges which does not fulfil the minimum standard⁶, and are a minority both in the SJC and the Judicial College. The rest represent a possible channel for undue political influence. In practice, currently there is a core of only 4 to maximum 5 judges (all elected by their peers) who defend principled positions and are consistent in safeguarding judicial independence. All members of the Prosecutorial College are by design dependable on the PG – his term of office is 7 years, while the one of the SJC’s members is 5. Therefore, all prosecutors who become members of the SJC would at some point during the term of office of the PG go back to the PO where they are his subordinates. That puts them in a position of obedience or else the PG might retaliate. This is quite visible in practice – when the PG proposes a certain voting, the decisions in the Prosecutorial College are unanimous and in line with his proposal.⁷ It is, hence, inevitable to conclude that the PG and “his” College as well as the judges chosen by Parliament outweigh the other members in the common Plenum and have a significant influence in the decisions of the SJC.

The abovementioned deficiencies do not represent only hypothetical risks for judicial independence and the rule of law in the country. They are systematic structural problems which combined with other factors like “the professional ethos and the general political culture”⁸ seriously threaten and sometimes directly undermine the pillars of our democratic society. Below are a few of the more significant instances where judicial independence has been brutally violated with no corresponding and proportional reaction from the relevant authority (SJC, PO, etc.). These examples are not in any way exhaustive but they are illustrative of the current state-of-affairs in Bulgaria regarding the rule of law.

The Consequences – Concrete Examples

1. In 2013, a wiretapping recording was released in the media revealing a discussion between the Prime Minister (PM) Boyko Borisov, Miroslav Naydenov (at the time, a Minister of Agriculture) and Nikolay Kokinov (a former Sofia City prosecutor). During the conversation, the **latter told the PM about the newly appointed PG: “Do not laugh, you chose him”**.

2. In April 2019, a former President of the biggest court in the country (Sofia Regional Court – SRC), claimed that his appointment (in 2012) as a President of the SRC was possible only after a meeting with the then President of the Supreme Administrative Court, the President of the Sofia City Court)

⁶ “[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary” Recommendation CM/Rec(2010)12):

<https://rm.coe.int/16807096c1>

⁷ More details are available here: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)018-e)

⁸ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)031-e)

and the country's biggest mogul, oligarch and politician D. Peevski⁹. The former president of the SRC stated: **"I knew that no election could take place without the support of the bad, it would have been impossible"**. Mr. Peevski had said: "However, I hope it does not happen like the last time – and now I quote – and this person does not backslide like the last one (Pengesov)¹⁰ did (...)".

3. In October, 2019, day before the hearing and election of the new PG, the Prime Minister (PM) bluntly stated on national TV: **"...this time** I decided that whatever they elect, that's it! I didn't intervene at all."¹¹

4. The election of the new PG took place at the end of 2019 under unprecedented public protests against him. Due to the support of the former PG, the new one was expectedly elected (only four judges – elected by their peers – voted against) by the SJC. The President of the Republic of Bulgaria vetoed the appointment owing to flaws in the procedure and the fact that it was only one candidate. The latter was harshly criticized both by civil society and professionals from the system. During the hearing and voting in the SJC, the former PG, Sotir Tsatsarov, bluntly acknowledged the following after Lozan Panov (President of the Supreme Court of Cassation) expressed criticism against the procedure and the qualities of the nominee: "Listening to him, I think that Mr. Panov speaks like a person whose procedure has been crystal clear, totally informative and competitive. Listening to him, I even think that Mr. **Panov speaks like a person who seems to have never participated in such a procedure at all**, that he observed it from the side, and for that reason he has every reason to judge its flaws and, of course, to judge the flaws of the procedure in principle. I would ask the following question – **how is the current procedure different from the procedure by which the President of the SCC was elected? How does this procedure differ from previous procedures?** Of course, **I do not exclude the procedure by which I have been elected.** (...) Two more months will pass and since no term of office is eternal, I will also leave this place. And **then no one will know what exactly happened here - and more importantly – what happened in another building, no, in two other buildings.** I know it, I will not tell it and I will tell you why. I will not say it not because I respect Lozan Panov. I will not say it because I respect the Supreme Court of Cassation, I respect the court and I respect its President. Not this President, but the position of President". A handful of journalists dared to ask which are those "two buildings". An answer to that question was never really given.

5. On November 11th, 2019, judge Atanaska Disheva (SJC member elected directly by judges and who voted against the election of the new PG) stated during an interview on the Bulgarian National Radio¹² that **she is scared** because of her critical position towards the new PG. She further stated: "I am a human being, and I also monitor what is happening in the judicial system, and what is done in such cases. I myself **have been subjected to a very serious attack last year for something of lesser significance than to what I'm currently saying and doing. The price I pay is huge**, I don't know if it's justified. Many colleagues, as well as other people, have told me that it is important for them to hear a voice and to feel hope."

6. On November 14th, 2019, during the re-election of the new PG (after the President of the Republic vetoed his appointment), Ivan Geshev said to Atanaska Disheva in the hall of the SJC during the break: *"I congratulate you, Mrs. Disheva, you will have a brilliant political career ahead of you, you will make a great municipal counsellor.*
I asked - are you threatening me?

⁹ Who is Delyan Peevski: <https://www.nytimes.com/2013/06/29/world/europe/after-political-appointment-in-bulgaria-rage-boils-over.html>

¹⁰ A former President of the Sofia Court of Appeals

¹¹ <https://www.btv.bg/video/shows/lice-v-lice/videos/bojko-borisov-ne-sam-se-mesil-tozi-pat-v-izbora-za-kandidat-za-glaven-prokuror.html>

¹² https://bnr.bg/horizont/post/101190130/atanaska-disheva-ot-vss-e-pritesnena-sled-izkazanata-kritichna-pozicia-za-geshev?fbclid=IwAR3haUm4ShALC1BQqvcnnWtdwgB_1ABH-iQiue_kJHeS9XA0OReZi-TTMrA

He said, "No, no." And he laughed ...

I declare that I take this as a genuine threat and insinuation as regards my future, both as a member of the SJC and as a judge. I say this to support my position with regard to the lack of professional and moral qualities of the candidate."

7. While the election procedure of the new PG was already ongoing (and the only candidate Ivan Geshev was already nominated), in September, 2019, an **unprecedented attack took place against a panel of judges** from the Sofia Court of Appeal which rendered a decision by virtue of which an Australian national who committed a murder in 2007 was released on parole due to fulfilling all legal requirements prescribed by law. The current Chairperson of the Bulgarian Judges Association (BJA) Kalin Kalpakchiev and BJA's former Executive Secretary Dessislava Ivanova were members of the panel. The BJA has been known for being vocal and critical towards vicious practices in the judiciary. Therefore, their decision was used as an occasion for public and aggressive action against them for "releasing a murderer who killed a Bulgarian boy". The Prime Minister, the PG (both former and current), politicians, and certain media participated in the verbal attack and set the tone for the public. At the current moment, the tools for society's manipulation have developed significantly. Most media in the country is controlled by a couple of moguls who are loyal/supportive to and never critical of the status-quo. This is evident from Bulgaria's poor ranking in the Reporters Without Borders Ranking¹³ where the country ranks 111 in the world (preceded by Ethiopia and followed by Mali), i.e. the worst in that regard in the EU and is deteriorating.

As regard the release on parole case, one of the political parties (from the ruling coalition) even organized a protest demanding the members of the panel be discharged from office and filed a request for that to the SJC. Calls for physical violence against the judges upheld by the crowd at the protests received broad media coverage which further exacerbated the tensions between society and judges. Instead of protecting the individual judges' independence, the Judicial College of the SJC adopted a declaration, proclaiming they fully share the public concerns that the panel had "outstepped the balance between law and justice" and referred to the Inspectorate of the SJC to initiate a disciplinary investigation against the members of the panel. The disciplinary proceeding is still ongoing.

8. On September 12th, 2019, the new executive director of the National Radio attempted to single-handedly take down the transmission led by the longtime journalist Silvia Velikova. For the past 15 years she has been one of the leading investigative journalists covering the issues related to the judicial system in a professional, objective and thorough way. The director wanted to take away from her the possibility to cover judiciary issues. She stated that, according to the Radio's new management, the **problem is that she is too critical towards the Prosecutor's Office and the only candidate for the position of PG.**

9. In December, 2019 the President of the Republic of Bulgaria initiated a series of consultations with a wide range of stakeholders regarding the need for constitutional reform in respect to the abovementioned flaws in the setup and organization of the judiciary which undermine judicial independence and threaten the quality of justice administered to citizens. These discussions include key issues such as the powers and accountability of the PG and the structure of the SJC. The initiative is timely as Bulgaria is obliged before the Council of Europe to reorganize the status of the PG and the deadline for that has already expired. Any calls for reform in that regard have thus far been met with serious opposition, to say the least, by the PG himself, politicians, the executive, etc. Therefore, some form of offence towards the President of the Republic was anticipated. No one, however,

¹³ <https://rsf.org/en/bulgaria>

expected that the PG will simultaneously send a request to the Constitutional Court to interpret Art.103 from the Basic Law¹⁴ and release special intelligence (wire-tapping) involving a conversation between the President and a general from the Air Force regarding the appointment of the President's wife as a PR in the Air Force while he was still its Commander and the verification conducted in that regard by the Anti-Corruption Commission. The latter found no conflict of interests. Thus, the PG is currently attempting to create the impression that the President had committed treason for trying to obstruct the investigation of the Commission (that is far from clear in the wire-tapping audio file). The request to the Constitutional Court is perceived by renowned jurists as a political act for the text of Art. 103 of the Constitution is quite clear and needs no interpretation.

10. In light of the abovementioned Kolevi v. Bulgaria case, for the sake of clearer context it is also worth mentioning two cases of **alleged suicides of two high-ranking prosecutors** Nikolay Dzambov and Vassil Mikov. The former committed suicide during the term of office of the most notorious PG Nikola Filchev in **2000**, i.e. two years prior to the murder of Kolev (Kolevi v. Bulgaria case) due to an undue pressure from the PG Nikola Filchev. In September, **2019**, Vassil Mikov (one of the most vocal opponents of Nikola Filchev) also allegedly committed a suicide. He was a high-ranking prosecutor who was deeply disappointed by the state in which the prosecutor's office is in, had also claimed in recent years that he feels the same undue institutional pressure as in the time of Filchev.

In Conclusion

As evident from the above, the imperfect constitutional and institution framework of Bulgarian judiciary is conducive to opaque practices which imply the presence of either corruption, nepotism or blunt incompetence. Or perhaps all of them. Apparently, decisions for electing a particular individual at a key high-ranking judicial position, incl. the PG, result from an undue influence and illegitimate practices in which politicians and moguls are involved rather than from established legal procedure and merits-based, transparent selection process as stipulated by law. Procedures are deprived of content, meaning and use. In some of the cases, there are obvious indications or at least a reasonable assumption that crimes were committed or at the minimum illegitimated practices took place and require further investigation. Considering however, that the PG might have participated in them, or facilitated them, or at least allowed for them to be ignored, basically, they cannot be investigated. It is a vicious circle in which those who should fight corruption and nepotism participate in them. And those who oppose this situation of a state captured by illegitimate interests are constantly targeted and harassed. The democratic backsliding and the statehood's erosion in Bulgaria are more and more alarming. The institutional disintegration is indicative of the fact that check-and-balances system is collapsing and the rule of law is in reality Fata Morgana – just an illusion over the horizon.

¹⁴ "The President and the Vice President shall not be liable for actions performed in the performance of their functions, except for a high treason and violation of the Constitution"