BULGARIAN INSTITUTE FOR LEGAL INITIATIVES

How to Hold the Prosecutor General Accountable Without Holding Him Accountable?

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The rush legislative actions regarding the establishment of an accountability mechanism for the prosecutor general might seem "strange" for the Venice Commission, however, for an internal observer they are a logical continuation of the efforts which started back in 2019. Efforts through which the Bulgarian government, parliament, Constitutional Court and the prosecution itself made everything possible to build the mise-en-scene for the play named "How to hold the prosecutor general accountable without holding him accountable".

It is important to remind about the key elements in the overall evolvement of the problem which started back in 2009 with the ECHR decision on the "Kolevi vs Bulgaria" case. As soon as March 2010 in the its regular CVM report, the EC called on Bulgaria to install appropriate checks and balances among institutions in the judicial system and criticizes the lack of accountability for the PG. Once again, the report from July 2012 underlined the need for undertaking such measures and the continuing passiveness of the Bulgarian authorities. Next comes the report from 2016 where it is said that Bulgaria has to launch an independent analysis of the prosecutor's office. The latter is published in the fall of 2016 and there the European prosecutors are giving concrete examples for the overcoming of this very deficit in our judicial system and its institutional organization. One of their suggestions is that *„ … a senior and independent judicial figure outside the PORB should have responsibility for supervising an investigation into allegations of criminal wrongdoing of a PG with the assistance of NIS officers (made available by the NIS deputy PG) or senior MoI police officers. For these purposes, the investigating officers, being NIS or MoI, should be answerable to the above mentioned figure responsible for conducting the investigation"*.[1] In January 2017 the CVM report included a recommendation for the establishment of a roadmap for the implementation of the recommendations of the SRSS report. The Bulgarian answer was the exotic idea for the establishment of a unified accountability mechanism for the "three big" in the system – the Presidents of the SCC, SAC and the PG.

[1] P. 6 at https://justice.government.bg/Files/Executive%20Summary%20Final%20Report%20BG%2020122016%20in%20BG.pdf

In the CVM report from 2018 the EC delicately reminded - *„Another sensitive point on which deliberations have not yet reached a conclusion concerns the procedures in place to hold accountable the most senior positions in the magistracy, including a serving Prosecutor-General, in the event of serious allegations of wrongdoing or criminal acts.“*.[2] Additional explanation is provided in the footnote to this part, namely *„The lack of effective mechanisms for the investigation of a serving Prosecutor General was identified by the European Court of Human Rights as one of the key shortcomings of the Bulgarian criminal justice system in a landmark case from 2009, the follow-up to which is still under monitoring by the Council of Europe. See Kolevi vs Bulgaria,https://hudoc.echr.coe.int/eng#{"itemid":["001-95607"]}).“*

This is also the last attempt of the European Commission to tell Bulgaria, through the political language of the CVM, that the country has a problem with the accountability of the PG and that this problem has not found its adequate solution.

In 2019 10 years have turned from the court's decision on the Kolevi case. Ten years of cat and mouse game with which apparently the Department on the Execution of judgements of the ECHR was fed up, because in June of the same year on a round table organized in Bulgaria, representatives of the Department gave the country a deadline until October 1, 2019, to come up with suggestions for the execution of two judgements versus Bulgaria, one of them being on the Kolevi case. The round table was carried out on June 20, 2019 and only a week earlier the then Minister of Justice Danail Kirilov introduced changes and amendments to the CrimPC establishing a mechanism for a temporary removal of the "three big". Seriously criticized by magistrates and experts, the draft law crashed after the negative opinion of the Venice Commission issued in December 2019.

However, this did not stop the ruling party to, literarily days of the VC opinion, introduce in the Council of Ministers (on December 7, 2019) a new draft for changes and amendments to the CrimPC. The novelty is that for the first time, the figure of the ueberprosecutor is introduced (from German *ueber* – over, above), who has to be a prosecutor from the Supreme Cassational Prosecution, heading the respective inspectorate and having immunity regarding the control of the PG over his acts. Such an immunity could fall in collision with art. 126, 2 from the Constitution, therefore the CofM coupled the draft with a request (adopted at a meeting of the CoM from December 18, 2019) submitted to the Constitutional Court, for interpretation of that very article, according to which „The Prosecutor General shall oversee the legality and provide methodological guidance to all other prosecutors.“ The decision of the CC from July 20, 2020 is so to say in the right direction as it opens the door for the ueberprosecutor on the principle that *nemo judex in causa sua* (nobody can be a judge on his own case).

We are approaching December 2020 when, circumventing the regular legislative procedure, a draft law was introduced and adopted on first reading in the plenary, introducing again the figure of the ueberprosecutor. There are some modifications though. The PG's alter ego will

[2] See p. 5 at https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-com-2018-850_en.pdf

now be elected by the Plenary of the SJC and by having the same mandate as the PG (7 years) will have enough time to work solely on preliminary checks and investigations against the PG. According to the interpretative decision of the CC, the actions of the ueberprosecutor will not be violating art. 126, 2 from the Constitution.

Having read the reaction of the Venice Commission from last week, one can conclude that its opinion was not sought after, but this last draft is more of a political than a legal character, anyway. **What is it aiming at?**

- It is obvious that the introduction of the draft law is part of the already running election campaign (even the terms for the election of the new prosecutor coincide with the end of the mandate of the current parliament) and wants to show that the governing party is seriously trying to resolve one of the most important issues of the everlasting judicial reform;
- In case the draft becomes a law, the latter will be waved from Brussels to Washington D.C. like a victory flag and the answer to all recommendations from the last 10 years;
- It will be explained that the last hurdle before our entry in the Schengen zone has been overcome;
- Any reasonable conversation about a continuation of the reform in our judicial system will be blocked.

What can be done?

In November 2019 BILI carried out a survey[3] among the magistrates on that very topic. Logically judges and prosecutors are not of the same opinion about who should prosecute and indict the PG, but they unite on the question who should not and this is a prosecutor from the SCP or from the specialized prosecution (7,3% from the prosecutors and 6,8% from the judges). It seems that the preferences are for a collective body, but they are also not categorically expressed. However, most of the judges and prosecutors (54,5% prosecutors and 67 judges) support the necessity for changes in art. 126, 2 from the Constitution which means that it is high time to rethink the functions of the PG and the conformity with the Constitution of the figure of the PG as a separate (stand alone) institution within the framework of the judicial system. The suggestion from the functional analysis of the prosecution are also on the table, however, part of them are related to giving the investigation service its operational independence back. If politicians want to take the opinion of the magistrates under consideration without appearing weak, they can consider a hybrid model – establishment of a mixed committee or such comprised only by investigators (investigators committee similar to what the grand jury does in the common law systems), which decision to indict or not should be binding for the prosecutor to whom it will be delivered. There are options and the better

[3] See the outcomes from the survey here http://www.bili-bg.org/cdir/bili-bg.org/files/2019-11-06_Survey_PG_SCJ_ENGLISH.pdf

approach is to discuss them and not letting a compromised parliament impose its opinion in the last minute.