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EXECUTIVE SUMMARY

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WHAT NEEDS TO BE CHANGED IN CRIMINAL JUSTICE

Andrei Yankulov

The most important problems leading to systematic deficits in the criminal justice system in Bulgaria can be divided into several groups: the structure of the institutions of the system and their powers and the necessary guarantees for checks and balances, the procedures of criminal cases, and problems of substantive criminal law.

I. The Structure of the Judiciary

One of the most problematic institutions of the Bulgarian judicial system is the Supreme Judicial Council (SJC) whose members by law are Presidents of the Supreme Courts, the Prosecutor General and 22 elected members, half of whom are elected by the judiciary itself and the other half by the Parliament. Such a structure does not correspond to the European standard in this respect. Other key problems of the judiciary are related to the state prosecutor. They consist in the very limited possibilities for balance and external control in the performance of its main function to carry out criminal prosecution, the excessively powerful position of the Prosecutor General in the SJC and the de facto widely exercised supervisory powers over the administration. Another issue to be considered is the fact that the investigative bodies are entirely procedurally subordinate to the state prosecutor. The lack of any procedural autonomy of the investigators undermines their constitutional status as magistrates as a part of the judiciary. Granting their autonomy will require a thorough redrafting of the established concept of the prosecutor's leading role at the investigative stage.

The structural changes proposed in the paper are in a way reflected in the currently debated amendments to the Constitution, which clearly represent a step in the right direction. At the same time, as a general remark it should be emphasized that working checks and balances are key to the successful functioning of any political system. In that sense, in order to overcome the problems stemming from the independence of the magistrates councils degenerating into a state of total uncontrollability, it is recommended to create a culture of enhanced public accountability of the councils.

II. The Role of the Prosecutor

A serious threat to the rule of law is the complete monopoly of prosecutorial powers over the accusatory function, excluding judicial control. The prosecutor is considered a “master” of the activity related to indicting persons with criminal responsibility for crimes of a general nature. Possibilities of external control or balance in this respect are extremely limited or completely non-existent. This gives

rise to a clear lack of compliance not only with the European standard, but also with the idea that there should be no uncontrolled power in the rule of law. In this regard, most European legal systems provide far more opportunities than Bulgaria for external checks and balances in the case of a refusal to exercise the accusatory function. Although our criminal proceedings are very similar in philosophy to the German system, in Germany there is a procedure for judicial control initiated by the victim, in cases when the state prosecutor does not exercise its accusatory function. The court is entrusted with the control function of verifying whether the state prosecutor's office acted in accordance with the principle of legitimacy. An example from Anglo-Saxon systems is the private indictment in England and Wales which has strong traditions and is applied often today as a balance to the refusal of the state body.

A key proposal in the paper is the introduction of judicial control in the event of the state prosecutor not performing their accusatory functions. In order to unblock the total prosecutorial monopoly over the accusatory function, constitutional amendments would be needed. Judicial appeal against all prosecutorial acts for which this is provided by law should be possible. By overseeing the lawful exercise of prosecutorial powers, the court would not enter the sphere of the sovereign right of the state prosecutor. The court should also be able to give mandatory instructions for the lawful conduct or completion of the investigation. Furthermore, taking some prosecutions on cases of a general nature such as those against heads of the institution outside the prosecutor's office would guarantee the independence of prosecutors from those who will be indicted and an appropriate form of balance to the prosecutor's authority. There is also a need to introduce or strengthen forms of judicial control in each of the following areas: 1) refusal to initiate an investigation, 2) suspension or termination of an investigation based on an official act, and 3) investigative inaction without the issuing of an official act. Judicial control is necessary as well when the state prosecutor performs accusatory functions. It should take place before the transfer to court and the commencement of the actual process. If some form of control on the substance of the indictment is executed before the verdict is delivered, this would lead to rejection of initially unfounded charges.

Another issue related to the Bulgarian state prosecutor's office is that, although it does not have such a power under the 1991 Constitution, it continues to exercise general supervision of the legality of the activities of the administrative authorities. In this respect, the Judicial System Act (JSA) must clearly define prosecutorial functions beyond the field of criminal justice.

III. Amendments in Criminal Procedure

In comparison to other criminal procedural systems (especially Western European ones), Bulgaria is characterized by more burdensome procedures and a formalistic approach. This raises some understandable risks to the rule of law. Not only the well-known judgments of the European Court of Human Rights (ECtHR) in the cases *"Velikova v. Bulgaria"*, *"S.Z. v. Bulgaria"* and *"Kolevi v. Bulgaria"*, but also about 70 others, identify systemic problems with criminal proceedings in the country. They are due both to shortcomings in the legal framework and to the behavior of the public authorities involved in the criminal justice system. Proposals to amend current legislation include, without limitation: establishing clear rules for subsequent repeal of prosecutorial orders regarding the termination of pre-trial proceedings and providing new forms of judicial control upon prosecutorial decisions concerning the implementation of punishments and the disclosure of investigative materials.

Moreover, a more flexible approach in the assessment of inadmissibility of evidence should be adopted on a normative level. If evidence is obtained through a violation or threat of violation of fundamental rights, it should be excluded on formal grounds. In other cases the exclusion should be left to the discretion of the determining authority according to the nature of the particular defect. Further, the evidentiary standard that an indictment must meet in order to enter into court should be reduced as it is practically the same as the one for a conviction. The current situation leads to an unrealistically high percentage of convictions in Bulgaria – consistently more than 95% of all indictments. The reasonable reduction of the evidentiary standard for an indictment would help to speed up the process and to implement the principle that the pre-trial phase has a preparatory character.

It is advisable for the Bulgarian legislator as well to simplify the formulation of an indictment. Within the Bulgarian criminal trial it is formulated twice – first during the investigation and then after its completion for trial. The law explicitly stipulates that whenever the person is investigated for the first time, they must be indicted. The logic is that the person should enjoy the rights of an accused person during the actual performance of the act against them and not after its completion. However, this is not the case in practice. Depending on the tactics of the investigative bodies, the indictment can be postponed over time. The factual indictment of the person through the first action taken against them must find suitable legal expression so that it is applied in practice and not only as a theoretical principle.

Under the present Bulgarian legislation the possibilities for amending the indictment are subject to restrictions which do not comply with the European standard. There can be no amendment of the prosecution without the explicit will of the prosecutor. Moreover, amendment of the indictment is allowed only at the first tier, since it is considered that the defendant has the right to hearing at two tiers. Such a requirement does not exist according to the case law of the Court of Justice of the EU (CJEU). Furthermore, an amendment at any time during the judicial proceedings would not be contrary to the European Convention of Human Rights (ECHR) if the defendant receives proper and complete information about the amendment and is provided with sufficient time and means to organize their defense in the light of the new information.

IV. Essential Problems of Substantive Criminal Law

Reformation of criminal justice in Bulgaria often evokes the issue of changes in substantive law. The amendments to the Criminal Code (CC) in recent years can be divided into two groups: 1) those resulting from Bulgaria's membership in international unions, mainly the EU, as well as from convictions by the ECtHR and 2) those caused by "criminal populism" – the constant aspiration of representatives mainly of the legislative and executive powers to create new criminal provisions and strengthen sanctions on existing ones in response to widespread public outrages. The first type of amendments is inevitable, whereas the second one is unnecessary and often harmful. Vicious practices include not taking into consideration criminological studies when increasing the severity of penalties and providing short-term prison sanctions when they can be replaced with alternatives that exclude the removal of the convicted person from their socium.

Given the changed socio-political environment and economic conditions since the creation of the current code in 1968, the need to adopt a new CC is frequently raised in public. However, there is nothing so revolutionary in the development of social relations in post-communist Bulgaria, which would require such a large investment of professional and public energy and resources in the adoption of an entirely new code. The changes required could also be safely made through amendments to the current criminal law.

Firstly, criminal repression should be rationalized. Contrary to the generally accepted concept of a constant increase in crime, objective data in fact shows a clear trend in the opposite direction since the beginning of the 21st century. Strengthening criminal repression in the case of declining crime is something difficult to defend. The need to remove from the system penalties such as life imprisonment without parole has been repeatedly commented upon by criminalist experts. It is undeniable that the severity of this punishment is excessive and its usefulness as a reaction to the most serious attacks against the person is highly questionable. Proposals for legal amendments regarding criminal sanctions include an extension in the scope of probation to serve as an alternative to short-term imprisonment. Furthermore, probationary measures for at least part of the probationary period for a conditional sentence should be more widely used so as not to leave the victim with the false sense of reassurance that there has not been conviction at all. The extension of the institution of releasing perpetrators from criminal liability by imposing administrative sanctions for actions with a lower level of public danger should also be supported. In addition, consideration should be given to rationalizing the system of administrative penalties.

Secondly, criminal offences should be formulated in a clearer manner to avoid any doubt as to what action is forbidden and what is the sanction, if committed. One of the most easily visible problems is the too frequent duplication between administrative offences under special laws and crimes referred to in the Criminal Code. The only distinguishing criterion between the two types of liability is the degree of public danger of the act committed. This, however, is the discretion of the law enforcement authority. It is necessary in this respect to assess which of the duplicated types of offences should be decriminalized and remain only as administrative offences, and which – vice versa. A similar problem also exists regarding the listings under the Criminal Code of different crimes which have very similar features. This in practice creates ambiguity as to which should be applied. An additional manifestation of the same problem is the criminalization through unclear blanket terms due to constantly changing rules from the other normative act to which the blanket refers. Undoubtedly, conviction arising from a vague criminal law is contrary to the basic legal principle of lawfulness of the crime.

Finally, the need for new adequate protection of modern social relations requires continuing the renewal mainly of the Primary Part of the CC. For instance, there is an undeniable need to criminalize torture as a separate form of crime. Moreover, there should be introduced a qualifying mark of the crimes against the person when they are committed because of the sexual orientation of the victim. The general problem of violations in public procurement law should also be approached. In addition, thought needs to be given to the introduction of criminal responsibility for legal entities and the broader use of privileged provisions in the case of crimes involving corruption offences.

V. Conclusion

The great failure of Bulgarian criminal justice undoubtedly lies in the results of the so-called "cases of high public interest". It consists in the double standards and selectivity in starting and conducting investigations against famous and influential figures from politics and business, the long judicial phase and the complete lack of the results promised at the beginning. A real change in the reaction against high level political and governmental corruption, misuse of public resources, erosion of free market competition, media control and poor investment environment is inevitable so that the rule of law in Bulgaria is guaranteed.

REQUIREMENTS FOR RULE OF LAW AND PROBLEMS OF ADMINISTRATIVE JUSTICE IN BULGARIA

Hristo Hristev

I. Administrative Justice and Guaranteeing the Rule of Law

Administrative justice is the branch of the judiciary entrusted with the responsibility of guaranteeing the protection of the rights and legitimate interests of citizens and subjects of private law in their relations with the bodies of the executive. It has a particular importance in the functioning of the rule of law as a state in which the administration and, more broadly, the public authorities in general are subject to the law and in which there is a clear and respected hierarchy of norms. It is before the administrative courts that a major part of the disputes related to the regulation of various forms of economic activity and to the application of European Union law in Bulgaria are resolved. These courts, the Supreme Administrative Court (SAC) in particular, deal with cases related to public regulation in some of the potentially most sensitive matters that constitute a substantial corruption interest. The extent to which the legal framework and the functioning of administrative justice in Bulgaria satisfy the requirements for the rule of law established in domestic, international and EU law should be reviewed, although it has rarely been under the attention of the European Commission after Bulgaria's accession to the Union.

The question of compliance with the fundamental requirements of the lawful exercise of public authority in the Republic of Bulgaria, stemming from the rule of law, cannot be examined solely from an internal legal point of view. It should also consider the obligations of the country arising from the application of the ECHR and from the operation of EU law. With regard to the ECHR, while the rule of law is not explicitly dealt with in the Convention, its preamble mentions it as a common value of Convention member states. A significant part of the cases in which the ECtHR refers to the rule of law relate to access to justice and guaranteeing the right to fair process. Moreover, the rule of law is one of the cornerstones of the EU and its legal order. Respect for it is one of the mandatory conditions for accession to the Union. The CJEU attaches particular importance to the need to ensure the independence of national courts.

II. Problems of Administrative Justice in Bulgaria

A particular problem in this regard, which is also of importance for the administrative courts, is the legal structure of the SJC. The most significant criticism is the large political quota in its composition, as well as the participation of prosecutors in the resolution of personnel matters concerning judges and in the management of courts. Hiring candidates from outside the system through the so-called “external competition”, rather than those with an internal career path, is also problematic. Another issue is the promotion and relocation of existing magistrates which, in the absence of clear criteria for evaluation and review of their work, allows a high degree of subjectivity. Serious shortcomings are also revealed in the regulations for the secondment of magistrates between the different units of the judiciary. Objective and clear criteria are needed as well for the allocation of cases to ensure fair process and effective protection of the rights of citizens, legal entities and entities treated as such.

In 2018 the Administrative Procedural Code (APC) was amended with the aim of reducing the workload of the SAC. However, a year later some of the controversial changes were declared unconstitutional. Unfortunately, the Constitutional Court was unable to consolidate a majority to sanction other key amendments which question the rule of law, such as the significant increase in fees in administrative cases, especially in cassation appeal, as well as the change of jurisdiction of certain categories of disputes over the lawfulness of acts of the executive authority. Still remains unanswered the question why, given the possibility of the SAC being unloaded of certain categories of cases concerning the lawfulness of acts issued by central executive authorities and specialized regulators, these were assigned as priority to the Administrative Court – Sofia District, which led to its overloading.

Certain problematic tendencies can be seen in relation to the controversial practice of the SAC on particularly important issues. These include the judicial control over the competitions for appointment and promotion of magistrates, the measures of disciplinary responsibility of magistrates and the control of legality over acts of the central executive authorities. Disturbing judgments have also been issued in cases of public importance or rulings on disputes allegedly related to a significant corruption interest such as the case of the revocation of the license of "Corporate Commercial Bank" (CCB) AD. Moreover, there can be observed SAC rulings which illustrate a misinterpretation of fundamental principles relating to the application of EU law in the Member States and, in particular, to the obligation of the national court to ensure effective protection of the rights of subjects of private law. Indicative of the existence of serious deficiencies in the application of EU law by the supreme administrative jurisdiction are also certain cases brought before the Constitutional Court of the Republic of Bulgaria, initiated at the request of SAC panels.

III. Proposals for Legal Amendments

In the context of the preparation for accession of Bulgaria to the EU, there was created a legal framework of administrative justice that gives a satisfactory expression of the general principle of the rule of law. However, problematic tendencies still exist. These deficits can be overcome by adopting the following measures.

Firstly, it is necessary to consider constitutional and legislative changes aimed at excluding the influence of representatives of the state prosecutor's office with regard to personnel appointments concerning the court, as well its financial, material and information security. Criteria must be introduced at the legislative level to guarantee that the National Assembly will appoint members to the SJC who enjoy high professional authority. Secondly, the legislative framework for the appointment and promotion of magistrates should be refined. A more detailed process for checking the personal integrity and professional ethics of the judiciary should be introduced. It should include regular assessment of all magistrates, a thorough check of their property status and that of persons related to them. There is also a need to establish additional rules guaranteeing the principle of random distribution of cases, especially between the different court panels of the SAC. Following, changes in legislation that limit access to court, such as the increase of fees in administrative cases, should be avoided. Contradictory practice on important issues should be resolved in a timely manner through the interpretative work of the SAC or through deliberate legal amendments. The supreme administrative jurisdiction should also improve the performance of its function to guarantee the accurate and uniform application of laws in cases of public importance in connection with suspicions of corruption at the highest level. Finally, the existence of full-fledged rule of law in Bulgaria implies the effective application of the legal framework of European integration, for which the administrative courts and the SAC in particular have a special role and responsibility.

IV. Conclusion

We should keep in mind that the construction of fully functioning rule of law in which the actual supremacy of law is guaranteed is not just a matter of normative regulations. It is a long and dynamic process, which implies both appropriate regulatory resolutions as well as their effective implementation.

PROTECTION OF THE RIGHT TO PRIVATE PROPERTY IN THE LIGHT OF THE CONFISCATION LEGISLATION OF THE REPUBLIC OF BULGARIA

Georgi Atanasov

I. Overview

The paper is elaborated in search of the reasons for the failure of Bulgarian laws regarding confiscation of the property of criminals and corruption to accomplish their objectives. The risks for investors in property in Bulgaria in terms of the legal regime of confiscation liability is also outlined.

The legal regime for the protection of private property in the state until 2009 was relatively well constructed, complete and coherent. This was the case, however, only regarding the protection of private property from attacks by natural and legal private entities. The situation was different when it came to the protection of private property by the unlawful or quasi-legal actions of the state and its bodies.

II. Confiscation Laws in Bulgaria and Their Purpose

The current legal regime in Bulgaria does not comply with the requirements for any restriction of the right to property to be consistent with a legitimate purpose and for the restriction to be proportionate in the presence of such purpose. The idea of introducing intolerance to organised crime and corruption was distorted. It became an unconstitutional legal regime for the prosecution and sanctioning of persons who have never committed a crime or other offence and whose property is completely legally acquired. The laws which introduce the confiscation regime - the Law on Forfeiture of Illegally Acquired Property (2012) and the Law on Counteracting Corruption and Forfeiture of Illegally Acquired Property (2018), suffer from obvious deficiencies. They add a new type of "confiscation" liability to the rules on criminal, administrative, disciplinary and civil liability. Bulgarian national confiscation laws are not directed against criminals and corrupt officials, but against persons who are owners of "illegally acquired property". The latter is a notion that has no meaning per se and its content is a matter of interpretation by law enforcement and the court.

The confiscation laws in Bulgaria are a national compilation of legal resolutions which are completely incompatible with the Bulgarian national legal order, with the principles of the rule of law and the European legal area and with the rules for the protection of the right to free use of property under Art. 1 of Protocol 1 of the ECHR. For instance, the burden of proving the origin of the property or the origin of the funds for its acquisition lies in the owner’s obligation for the full and primary proof under the Bulgarian civil procedural law (proof beyond any doubt). Hence, the state guarantees itself a high probability of “formal victory", based on a presumption and given its statutory procedural advantage.

One of the two disguised objectives of the confiscation laws is the seizure of property with no established origin. This objective also has a purpose - the confiscation of property acquired from criminal activity. Thus, someone's property could be confiscated under an unwritten legal presumption, i.e. on the assumption that it was acquired from a crime. Another unformulated but very tangible legal presumption is that if a person tends to commit crimes and cannot be established otherwise, then their property has been formed by a previous undetermined criminal activity that cannot be investigated and proven. The limits of admissible proof and the means of proof placed at the disposal of the proprietor within the framework of civil procedural law are also problematic. The negative consequences of not being able to prove in court beyond all doubt the grounds and origin of the property or the means of acquiring it are entirely at the expense of the owner of the property.

III. Comparison Between the “Civil Confiscation” Regimes in The United States and Bulgaria

For the purposes of the paper, it is appropriate to compare the most important elements of the regime of "civil confiscation" in the United States and the Bulgarian one. The parties to civil confiscation proceedings in the United States are the prosecution and the relevant property, whereas under Bulgarian law they are the state through the Commission for Counteraction of Corruption and Forfeiture of Illegally Acquired Property (the Commission) and the owner of the property right claimed as illegally acquired. In the US there cannot be forfeited non-extant property rights, their monetary value or property of equivalent value. However, in Bulgaria the Commission attempts to impose on the court an interpretation that non-existent assets should also be subject to forfeiture. The two regimes also differ in the fact that in the US it is the evidentiary burden of the prosecutor to prove the connection of the property with the crime, whereas in Bulgaria the burden of proving the origin and its legality rests with the owner of the item. Other key dissimilarities between the two regimes are related to the relationship between criminal and civil proceedings and the legal possibilities for parallel proceedings.

IV. Conclusion

The confiscation legislation introduced after 2009 by the government in Bulgaria has no legal analogy in EU countries or in another country with a constitutional system. The property rights of the persons are not provided with adequate means of protection to enable them to effectively exercise their rights in the confiscation proceedings. Unfortunately, the changes in government since 2021 have not had the necessary impact on the existing confiscation legislation. Despite some isolated attempts aimed at correcting the existing erroneous practice and unfortunate legislative decisions introduced after 2009, it seems that the "penal populism" prevails at this stage. This means that the effects of the “forfeiture of illegally acquired property” regime, including those restricting the right to protection of private property, will continue to be part of the law of the land for some time to come. And undoubtedly, all the risks faced by local citizens and legal entities fully apply to the assets of foreign investors as well.

ANALYSIS OF THE PROBLEM OF STATE FEES ARISING IN CIVIL CASES

Anastas Punev

I. Current Legal Framework and Essential Problems of State Fees in Civil Cases

One of the key issues in the daily work of the judiciary is the regulation of state fees in civil and commercial cases. The current legal framework (Art. 1 of Tariff No. 1 for State Fees collected by the courts under the Civil Procedure Code, hereinafter referred to as the "Tariff"), which provides for collection of a fee of 4 % of the value of a given claim, counterclaim and a third person claim, but no less than BGN 50, poses a variety of problems. These include but are not limited to the fact that fees are payable in advance in full as a condition for starting the process in general, their cumulation with all other costs as a burden to a claimant and their comparison with other fees and costs payable. Moreover, although the judicial function of the state is established as a service for which a corresponding fee is payable, the amount of the fee is determined in view of the material interest of the dispute, rather than the content of the judicial service received. However, the amount of 4% is incomparable to other frequently paid state fees.

A common misconception is that funds collected from state fees enter the budget of the judiciary and serve to uphold the effective performance of the judicial function of the state. All revenue goes into the state budget, while additional revenue from state fees remains unallocated during the following year. As a result, revenue from state fees does not serve to improve the functioning of the system.

Comparative legal analysis shows that there is not a single European country in which state fee is regulated in a similar way to Bulgaria. Proportional fees are generally an exception. Even in countries which have introduced them they do not amount to 4% and their definition is more flexible. Germany, which is closest to the Bulgarian system as a way of establishing state fees, has a complex mixed system. Any increase in the price of the claim leads to meeting certain thresholds where the fee becomes simple. Moreover, Bulgaria is an example of one of the few countries where lawyers' costs are not higher than court costs. ECtHR practice also calls into question the current regulation of the Tariff. Such an example are the cases *Stankov v. Bulgaria* and *Mikhalkov v. Bulgaria*.

In judicial practice, other unlawful and worrying trends can be observed. These require consideration of a change to the framework. For instance, the payment of a state fee is a condition for the regularity of each claim. Further, pursuant to Art. 70, para. 3 of the Civil Procedure Code, when valuation poses a difficulty at the time of submission of a claim, the cost of the claim is determined approximately by the court, which may lead to abuse. The argument in favor of fees based on preventing too many unfounded claims from being submitted, has also proved to be unsubstantiated. There are several quite different legislative provisions which could be applied to limit dishonest claims, such as the introduction of security for costs payable to the benefit of the defendant.

II. Recommendations

To overcome the challenges of the current legal framework of state fees, several possible solutions should be considered. Examples are the transition from proportional to simple fees, or at least reducing fees as a percentage (e.g. 1 or 2 %) and capping and providing more exemptions from the duty to pay state fees. Other ideas include fees becoming payable only after the conclusion of the case or only for a part of the judicial tier, including progressive increase according to the tier. This would encourage less frequent appeals against correct decisions. Another possibility is for the court to have the right to allocate the responsibility for costs according to complex criteria and not only to the outcome of the case. An extended procedure for the partial reimbursement of the state fee may be envisaged in certain cases. Partial exemption from the state fee could also be considered, as well as the possibility for legal entities to benefit from this light procedure. Lastly, combating procedural abuse would help to reduce state fees without adversely affecting the process.