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EXERCISING CONTROL OVER THE PROSECUTION FUNCTION – the necessary criminal justice reform

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The structure of the judiciary following the new Constitution of 1991 represents a hybrid between the models before and after September 9th, 1944. The Prosecutor's Office is paired with the courts in a unified judicial system in order to protect it from political influence. The reasoning behind this approach is that the structure of the Prosecutor's Office corresponds to that of courts. However, contrary to that logic, the figure of the Prosecutor General of the communist constitutions has been preserved, even though it does not have a counterpart in the court system.

Over the years, the figure of the Prosecutor General has increasingly become a *de facto* center of power, mainly because:

- **His power in the structure of the Prosecutor's Office is incontestable** given his wide potential to exert formal, as well as informal, influence on prosecutors, and the overall environment of subordination established by the inherited institutional culture;
- **The Prosecutor's Office has a monopoly on whether, when, for what or against whom to press charges** (its prosecution function), which allows it to initiate/not initiate criminal proceedings without any control, as well as to keep investigations frozen and activate them at a convenient time, etc. **The double standards in the exercise of criminal repression over the years** have started to come to light in many cases of high public interest;
- **The Prosecutor's Office has in practice continued to exercise the so-called "general review of legality"** over the work of the administrative institutions — which was its main function during the totalitarian regime — even though this is not among its competences included in the new Constitution;
- **The Prosecutor's Office exerts a tangible influence on courts through the governing body of the unified judicial system — the Supreme Judicial Council.**

The issues surrounding the figure of the Prosecutor General, notably his immunity and lack of accountability, are to a great extent rooted in the overall capabilities of the institution. **Therefore, these issues cannot be solved by only amending the position of the Prosecutor General in the legal order**, as most of them will remain, irrespective of any legislative reforms adopted in that regard.

The fourth of the above-stated issues was partially addressed by the constitutional reforms of 2015 which divided the JSC into two colleges — Judges' College and Prosecutors' College. Now, as **public discussions on the problems of the judicial system are back in the limelight, two main ideas for future reforms have emerged**: 1) removing the figure of the Prosecutor General; and 2) strengthening the political control over the Prosecutor's Office by either transferring it from the judiciary to the executive, or by separating it as an independent structure outside both the judiciary and the executive, or yet by leaving it within the scope of the judiciary, while introducing mechanisms for parliamentary oversight.

All considerations and proposals for legislative reforms should take into account the existing state of affairs in the public space they intend to regulate. This includes the social progress, the institutional traditions (and weaknesses), and the political culture of the society in question, which all help predict the outcome of such reforms. In societies with long-standing democratic traditions it might be realistic to expect that the mechanism of parliamentary oversight over the prosecution function will not be used for criminal repression of political opponents or, conversely, for protection of political allies. Unfortunately, the reality in Bulgaria does not offer any strong assurances that Parliament would be able to adequately exercise control over the conduct of criminal proceedings, especially if this control is only institutional, and not an integrated element of the proceedings.

This is why future reforms should focus on the following possible and necessary aspects: 1) complete abolishment of the “general review of legality” function, and; 2) establishing mechanisms for external procedural control over the prosecution function. This control should be carried out by courts and should apply equally to cases where charges have been pressed and to cases where they have not.

The important points in this regard are the following:

- **it is essential to ensure access to court for the resolution of important issues;** this is not the ultimate solution to all problems, but should be a set objective in every country upholding the rule of law;
- **the unchecked/monopolistic conduct of criminal proceedings by the Prosecutor’s Office is a luxury that does not exist even in countries with much more stable legal and political systems;** by contrast, this setting not only exists in Bulgaria, but is considered a cornerstone of the criminal justice system by many legal professionals;
- **the concern that criminal courts may be overflowed with work cannot be an argument in principle against facilitating access to justice, especially given the clear and significant reduction in the registered criminal activity since the beginning of the century,** which naturally leads to fewer criminal cases for courts to decide. The reasonable allocation of the existing resources of the judicial system is a matter of flexibility and good management. Moreover, the overflow problem should be tackled by devising sensible and adequate mechanisms at the legislative level;
- **procedural opportunities for courts to exercise control over the conduct of criminal proceedings would create better conditions for developing a well-functioning Prosecutor’s Office** than the reliance on some supposedly perfect mechanism for institutional control of the prosecution;
- **a better-functioning Prosecutor’s Office will ensure a better criminal justice system overall,** which should be the main objective of the reforms; the criminal justice system cannot work to the satisfaction of the public — from which it gets its funding — unless the reform is aimed at improving the output of one of its major components, the Prosecutors’ Office.

As stated above, every legislative amendment should take into account the state of affairs in the public space that it aims to regulate. **Therefore, the hopes placed on courts should be in accordance with their current capabilities.** It should be borne in mind that despite their inherent flaws and the setbacks resulting from the difficult institutional environment, **in recent years the Bulgarian courts have proven to be the only real guardian of the rule of law in the country. For this reason it makes sense to entrust them with bigger responsibilities in the process of developing a more democratic state.**

Reducing the political influence on courts is undoubtedly a necessary step towards their improvement, which will be achieved sooner or later as a result of the (so far soft) pressure from European institutions and the growing awareness of the Bulgarian civil society in this regard.

However, this measure is not sufficient if the expectations are for criminal courts to have a proactive role in altering the decay of the political system, and if that role is to be carried out non-selectively. In order to achieve such results, the envisaged reform should be built upon by giving courts a more decisive role in the management of the unified judicial system.

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