ANALYSIS

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

Summary

This analysis proposes a concept for addressing some of the main problems of Bulgaria' criminal justice system through the powers of the prosecutorial institution, by:

- **abolishing the factual manifestations of the "general review of legality" function of the Prosecutor's Office as obsolete, dating from the totalitarian state period;**
- **envisaging forms of external procedural control over the currently completely uncontrolled conduct of the criminal proceedings – the decision whether, against whom, when, and for what to press charges of a general nature crime.**

This control must be exercised by the court and should concern both the cases in which the holder of the power to accuse – the Prosecutor's Office, exercises it and those in which it does not.

The court's procedural opportunities for control and influence on the conduct of the criminal proceedings would create better conditions for developing a well-functioning Prosecutor's Office and hence a better functioning and fairer criminal justice, than only relying on the creation of, even a perfect, mechanism for institutional control over the Prosecutor's Office.

In the past months, the topic of reforming the Prosecutor's Office has increasingly gained traction in the public discourse as a necessary precondition for establishing the rule of law in Bulgaria and, ultimately, for ensuring the well-being of Bulgarian citizens. This should undoubtedly be considered as a positive phenomenon, as more and more people are beginning to discuss the problems of the criminal justice system — not just emotionally, under the impact of the latest public scandal that has hit the surface, but also analytically, looking at the genesis of the existing problems, stemming from the current criminal justice model, and searching for potential solutions. Even this can be seen as a great achievement for the Bulgarian civil society, since publicity in itself can limit the possibilities for unrestrained use of the criminal repression levers. At the same time, it is more difficult to remain passive and refuse to pull those levers in cases where a considerable portion of the public understands the situation and expects a reaction.

The purpose of the present analysis is to support the development of the public discourse on the stated topic by putting forward one point of view on the core problems of the Prosecutor's Office and their potential solutions. It should be stated at the outset that, unfortunately, there are no normative regulations that can objectively bolster the rule of law in the country (even if they look ideal on paper or have already worked perfectly somewhere else) and that can magically heal society of its flaws. Such hopes should least of all be placed on the criminal justice system, as it simply does not have the capacity to deliver on them.

Before proceeding to the substance of the analysis, it is important to provide some background to the existing Prosecutor's Office and criminal justice model in Bulgaria, which in turn requires a brief overview of the development of the criminal prosecution function in Europe, and specifically in Bulgaria.

I. The development of public prosecution offices in different legal systems

The legal systems currently in operation around the globe can be broadly divided into two main groups: civil law systems (France, Germany, Spain, the Netherlands, etc.) and common law systems (England, Wales, Northern Ireland, Ireland, the US, Canada, etc.).

In civil law systems, prosecutors were introduced following the decline of feudalism, first in France, in order to carry out prosecution functions on behalf of the State.[1] At the beginning, the criminal justice system in continental Europe was inquisitorial, whereby the investigative and prosecution functions were conducted by the same body. Later, the Napoleonic Code of Criminal Instruction of 1808 created the institution *ministère public*, tasked with performing the prosecution duties. In the following years, similar structures were created in the other countries under French rule, which chose to preserve them even after declaring their independence. On the other hand, in Germany the Prosecutor's Office (*Staatsanwaltschaft*) was not introduced until the middle of the 19th century when the judicial powers of the inquisitorial judge were separated from his investigative powers. The separation of the judicial and prosecution functions in Germany was not completed until the end of the 19th and a considerable part of the 20th century. In this period, pre-trial proceedings fell within the purview of both the prosecutor and the German version of the investigating judge, until the latter was abolished in 1975 and the prosecutor took full control of investigations at the pre-trial phase. By contrast, in France the investigating judge (*juge d'instruction*) continued to play an important role in pre-trial proceedings, albeit only in cases of great complexity or involving serious crimes.[2]

Public prosecution offices were introduced much later in common law systems than on the Continent. Traditionally, criminal proceedings were instigated by private parties, not by public institutions. Even in England and Wales a version of a prosecution office was created only in the 1980s, and the current model of the Crown Prosecution Service was not solidified until the enactment of the *Criminal Justice Act* in 2003.[3]

II. European prosecution offices nowadays

There are different structural models of the judiciary in Europe, some of which include prosecution offices in their composition, while others do not. However, this distinction is of a rather formal nature nowadays as far as the position and functions of prosecutors are concerned. Even in countries where the prosecution office is officially within the structure of the executive (Germany, Austria, the Netherlands, Denmark), and where representatives of the executive in theory have the power to give instructions to prosecutors regarding particular cases, this hardly ever happens in practice.[4] There is a clear trend in European democratic societies to reduce and eventually eliminate political influence on prosecutors, as the danger of using criminal repression tools for political advancement is apparent.[5]

In this regard, it should be noted that the European institutions have strongly condemned the recent judicial reforms in Poland that not only created mechanisms for exerting political influence on courts, but also transferred the Prosecutor's Office within the structure of the executive.[6]

1 See "The effect of legal culture and proof in decisions to prosecute" – John D. Jackson, School of Law, Queen's University Belfast, UK; Law, Probability and Risk (2004) – p. 110

2 See „Comparative Analysis of Prosecution Systems (Part I): Origins, Constitutional position and Organization of Prosecution Services" – Dr Despina Kyprianou – p. 23 and the following

3 See „Comparative Analysis of Prosecution Systems (Part I): Origins, Constitutional position and Organization of Prosecution Services" – Dr Despina Kyprianou – p. 3 and the following

4 Nevertheless, in its first report on the rule of law the European Commission criticizes this power – see for instance the Germany report, p. 3.

5 See „European Standards As Regards The Independence Of The Judicial System: Part Ii – The Prosecution Service" – European Commission For Democracy Through Law (Venice Commission) – par. 20 – 26

6 For more details on the concerning aspects of the prosecution office reforms in Poland see „Poland: Opinion on the Act on the Public Prosecutor's Office as amended" – European Commission For Democracy Through Law (Venice Commission)

Modern prosecution offices primarily engage in prosecution services, and entrusting them with additional functions outside the criminal justice domain poses serious risks to the rule of law, as it leads to over-empowerment in the absence of deterrence and control mechanisms. Such extensions in the scope of power of prosecutors are observed in ex-Soviet states, reminiscent of the status of prosecutors under the communist regime.[7]

III. Principles of criminal prosecution in different legal systems

As stated above, civil law systems traditionally have an inquisitorial nature. However, the contemporary inquisitorial model of criminal proceedings is very different from its archetype, in part due to the introduction of adversarial elements, as well as owing to developments in the understanding of the notion of fair trial. This new type of proceedings may be defined as a formal, unified investigation of certain circumstances on the part of the State, aimed at identifying exactly what happened in reality. Its pre-trial phase is well-developed, the idea being to establish the truth even before the trial and prevent innocent people from being sent to court. Moreover, the judge is not just a passive observer of the parties' conduct, but plays an active role in the most important part of the proceedings — assembling the body of evidence — as he has an obligation to collect evidence in order to ascertain the objective truth, even when the parties remain passive.

By contrast, common law legal systems traditionally follow an adversarial model of criminal proceedings, whereby the judge is merely an arbiter in the dispute between the prosecution and the defense, he does not collect evidence, the pre-trial phase of the proceedings is not very developed, and the truth is confined to what has been established in the course of the trial.

Civil law systems have historically endorsed the principle of mandatory prosecution, i.e., the prosecutor is obliged to press charges in all cases where there is sufficient evidence that a crime has been committed, without having any discretion on the matter. By contrast, common law systems uphold the principle of opportunity, whereby law enforcement authorities can decide whether to open criminal proceedings on the basis of the affected rights.[8]

Furthermore, civil law systems do not make a clear distinction between investigation and prosecution, which is a logical consequence of the inquisitorial model. Historically, prosecution offices existed before police services, and following the establishment of the latter, their investigative functions were placed under the control of prosecutors. On the other hand, in common law systems police services preceded prosecution offices, and a more defined separation between the police investigation and prosecution activities has continued to exist even after the introduction of prosecution offices.[9]

At present, many legislative frameworks include concepts borrowed from foreign systems. For instance, the principle of mandatory prosecution cannot be found in its pure form in modern societies; prosecutors always have a degree of discretion with regards to pressing charges under specific circumstances. Moreover, the original version of the inquisitorial criminal justice model, in which the functions of investigation, prosecution, and adjudication are conflated, has also become obsolete. However, some aspects of these concepts have remained to this day. Taking heed of this state of affairs is crucial for understanding the substantive part of the present analysis.

7 See „European Standards As Regards The Independence Of The Judicial System: Part Ii – The Prosecution Service" – European Commission For Democracy Through Law (Venice Commission) – par. 72 and the following

8 See „Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies" – Dr Despina Kyprianou – p. 13 and the following

9 See „Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies" – Dr Despina Kyprianou – p. 2 and the following

IV. Where we are

After the Liberation of Bulgaria in 1878, the country adopted the Russian criminal procedure rules that were modelled on the French civil law system and its traditional criminal justice aspects described above.[10] Investigations were carried out by judicial investigators (members of regional courts, called investigating judges after 1935) with the assistance of the police services; cases were brought to court by the prosecutor, and the court was the only authority competent to terminate the investigation. Therefore, there was a shared responsibility between the courts and the Prosecutor's Office at the pre-trial phase of proceedings, which is typical of the French model.

With the imposition of the communist regime, the Prosecutor's Office was centralized and the prosecutor became the virtual "master" of pre-trial proceedings, whereas investigators were first moved from the organizational structure of courts to that of the Prosecutor's Office, and later to the Ministry of Interior (MoI). More importantly, the main function of the prosecutor was amended from carrying out criminal proceedings to exercising a general review of legality with respect to the conduct of citizens and the administration.

Following the transition to democracy, a unified judicial system was introduced in Bulgaria which included the courts, the Prosecutor's Office, and the investigation service. The prosecutor continued to play a central role at the pre-trial phase of proceedings, but certain forms of judicial control were gradually established, for instance in the context of performing coercive or secret investigative actions, adopting pre-trial detention measures, terminating the proceedings, etc. Even though the new Constitution of 1991 abolished the general review of legality function, the Prosecutor's Office has continued to exercise it in practice in the past decades.[11]

Following the conferral of a number of significant control functions on courts, the prosecutor is no longer the "master" of pre-trial proceedings (*dominus litis*), but still remains such with regards to proceedings on crimes prosecuted by the State (as opposed to crimes prosecuted on the initiative of private parties).[12] To elaborate, the prosecutor still has full discretion to decide, in the absence of any external procedural influence, whether, against whom, when, and on what grounds to bring a case to court, **i.e., he has absolute monopoly over the prosecution function. In addition, the prosecutor bears the entire responsibility for the investigative proceedings, as the investigative bodies function under his authority** (which is in line with the modern German model and represents a departure from the French one).

The Bulgarian criminal procedure model, like the models in all contemporary legal orders, promotes the adversarial system and the central position of the court in the legal proceedings (Art. 7 and Art. 12 of the CPC), but at the same time preserves the inquisitorial system approach with regards to ascertaining the objective truth (Art. 13 of the CPC), assembling the body of evidence at the pre-trial phase (Art. 226, par. 1 and Art. 246, par. 1 of the CPC), and the court's involvement in the collection of evidence (Art. 107, par. 2 of the CPC). **Therefore, the court assumes an active role in fulfilling the burden of proof, which is characteristic of the civil law systems, and cannot be defined as a mere arbiter in the dispute between the parties in accordance with the common law model. The principal objective of the proceedings is the detection of crimes, the identification of the culpable parties, and the correct application of the law (Art. 1, par. 1 of the CPC), which is to be achieved through the cooperation of all public institutions involved.**

Moreover, **the active role of the court that is in line with the civil law model can also be seen from the fact that the prosecutor relinquishes control of the case once it has been brought before a court** – the prosecutor can neither retract the charges (he can choose not to uphold them during the closing arguments, but that does not prevent the judge from issuing a conviction), nor can he amend them without the approval of the court.

Furthermore, **Bulgaria has adopted the principle of mandatory prosecution,** even though some aspects of the common law model have also been borrowed in this respect. For instance, the prosecutor has the discretion to decide whether to take a minor perpetrator of a less serious

10 For further details on the historical development of the Bulgarian criminal procedure, and specifically the investigation function, see „Досъдебното производство в България (1878 – 2007 г.)" – published by the Bulgarian National Investigative Service

11 For further details, see „Защо упражняването на всеобхватен прокурорски надзор е противоконституционно"

12 See „Новите положения на досъдебното производство по НПК", Сиела 2007 г. – Маргарита Чинова – p. 171 – 172

offence to court or terminate the proceedings, and the court can decide whether to issue a conviction against one or not (Art. 61 of the CPC). The general lack of discretion, however, implies that the prosecution function should not succumb to priorities (i.e., prosecuting the perpetrators of certain categories of crime at the expense of others that are not of high public interest at the specific time). **Therefore, the statement that the Prosecutor's Office can carry out a "penal policy", consisting in the selection of specific crimes for prosecution and the manner of their prosecution, is in clear contravention of the principle of mandatory prosecution.**

V. The hidden snags surrounding the Prosecutor's Office after the transition to democracy

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 (Art. 126, par. 1 of the Constitution). However, contrary to that logic, the figure of the Prosecutor General of the communist constitutions has been preserved (Art. 126, par. 2 of the Constitution), even though it does not have a counterpart in the court system. In particular, there is no "judge general" positioned above the presidents of the Supreme Court of Cassation and the Supreme Administrative Court in the same way as the Prosecutor General stands at the lead of the administrative heads of the Supreme Prosecutor's Office of Cassation and the Supreme Administrative Prosecutor's Office who are his deputies.[13]

The Prosecutor's Office continues to exist as a centralized and hierarchical structure with the Prosecutor General at the top. However, it should be admitted that this subordination model does not in fact stem from the new Constitution, but is rather the result of the inherited institutional culture, the Judiciary Act (JA) and the CPC.[14]

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 cultivated environment of subordination;
- **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.** At the same time, the pressing of charges has serious negative effects on the rights of the accused party that can last for a long time and are not confined to the scope of the criminal proceedings. In other words, the implications of exercising the prosecution function without any form of control can be severe. For instance, in many cases the alleged perpetrator is targeted by a number of regulatory institutions that initiate inspections for potential violations within their scope of power — these include the National Revenue Agency, the Commission for Anti-corruption and the Forfeiture of Illegally Acquired Property, the Labor Inspectorate, etc. In consequence, even if the court decides that the charges put forward by the Prosecutor's Office are unfounded and acquits the defendant, the damages resulting from the prosecution cannot be undone. The only available remedy is to seek compensation from the State. In recent years, with the gradual development of civil society, and the help of several media outlets and a handful of politicians, **the double standards in the exercise of criminal repression** have been exposed in many cases of high public interest; it has transpired that some cases are handled swiftly, both through procedural and extra-procedural means, while others are left forgotten and no one ever finds out what happened with them;[15]

13 For further details on the organization of the judiciary in the new Constitution, see the interview of Petar Obretenov, MP in the Grand National Assembly, for the Capital newspaper

14 For further details on the topic, see „Пречи ли Конституцията на реформата в прокуратурата?"

15 The development of the 40 most significant criminal proceedings on high-level corruption crimes in the past five years and their results have been analysed in ACF's 2019 Annual Monitoring Report: "Anti-corruption institutions: activity without visible results"

- **The Prosecutor's Office has continued to exercise the so-called general review of legality** over the work of the administrative institutions, which has allowed it to assume the role of the *de facto* regulator of public relations that do not even fall within its area of competence. The institution has leveraged this position to exercise power at its own discretion, gain a favorable reputation with the public by demonstrating engagement with popular issues, and instill respect in the administration. At the same time, there is no mechanism for controlling these manifestations of power.[16] Administrative functions span many different fields overseen by regulators with relevant special knowledge and expertise; when the Prosecutor's Office interferes, it essentially duplicates their work. On the other hand, when the Prosecutor's Office remains passive with respect to a given issue, the competent authorities also stay inactive, waiting for instructions from a prosecutor;

- **The Prosecutor's Office exerts a tangible influence on courts through the governing body of the unified judicial system – the Supreme Judicial Council.** As a result of the **normative monopoly of the Prosecutor's Office** over the prosecution function and the unfettered authority of the Prosecutor General within that office, established through regulations and the inherited institutional culture, it has become apparent that **the Prosecutor General is immune from undergoing any criminal investigation during his seven-year-long term**.[17] At the same time, the **monopoly** over the prosecution function has discouraged the majority of the political quota representatives in the Supreme Judicial Council – SJC (which constitute half of its elected members – 11) from entering into a confrontation with the person at the top of the organ tasked with issuing indictments in the country. It should be borne in mind that the SJC is the body responsible for governing magistrates and holding them accountable for their actions. However, taking into account that no one can come out clean from the squabbles of the dawning democracy, and that there will always be some blemish that can be used for the purposes of an indictment, the SJC members prefer to keep that blemish out of sight.[18] When adding the representatives from the prosecutors' and the investigators' quotas (totaling five of the 11 representatives from the professional quota, the remaining six being elected by judges), one can easily realize that **the Prosecutor General is immune not just from criminal, but from any kind of responsibility.**[19]

To summarize, it can be argued that 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** (it would not be appropriate to use the term "powers" in this context, as it presupposes a constitutional basis, and such does not exist with respect to the so-called "general review of legality").

VI. The reform of the judicial system to date

Only the fourth of the issues described in the previous section has been addressed so far — the influence of the Prosecutor's Office on courts with regards to matters related to personnel, disciplinary proceedings, and other topics of judges' concern. As it is known, this happened with the constitutional amendments of 2015, by virtue of which the SJC was divided into two colleges — Judges' College and Prosecutors' College — with the idea that each one will independently deal with the matters concerning the respective category of magistrates, thus eliminating the problematic influence.[20] However, such influence can still be exerted by the prosecutors' quota in the SJC plenum (for instance when electing the presidents of the supreme courts), especially given the excessive weight of the political quota.

16 For further details on the topic, see „Защо упражняването на всеобхватен прокурорски надзор е противоконституционно"

17 This issue has been examined in details by the European Court of Human Rights in its Judgment on the case of Kolevi v. Bulgaria

18 For more details on the abilities of the Prosecutor General to exert influence informally, see Bulgaria Opinion On The Judicial System Act (6-7 October 2017) – European Commission For Democracy Through Law (Venice Commission) – par. 34 and 35

19 See article in the Sega newspaper from 2003

20 The amendments to the Constitution were prom. in SG Issue 100 of 2015

Additional amendments to the JA[21] and the CPC[22] constituted another attempt to limit the official powers of the Prosecutor General in the Prosecutor's Office. In particular, the amendments included a provision stipulating that only administrative heads of units shall be subordinated to the Prosecutor General, as well as the adoption of formal guarantees that prosecutors will decide cases independently and in the absence of intervention. However, as has already been stated, the special position of the Prosecutor General in the current organizational framework of public institutions in Bulgaria does not stem only from his codified powers in relation to the other prosecutors.

VII. The two main ideas for a future reform of the judicial system expressed thus far: 1) removing the figure of the Prosecutor General, and; 2) strengthening the political control over the Prosecutor's Office

The complete removal of the figure of the Prosecutor General is a logical proposition, insofar as it directly addresses the first issue described in section V, namely his indisputable authority within the institution. Such a radical measure might in fact have a positive effect on the criminal justice system, as it will undoubtedly lead to the dispersal of currently centralized power between different units of the Prosecutor's Office. It is reasonable to expect that even if the prosecution function is not affected positively (in fact, it might suffer to some extent owing to the reduction in subordination), at least the danger of abusing the institution's repressive functions will be averted, as the separate unit heads would be able to conduct checks and balances on one another.

The ideas for strengthening the political control over the Prosecutor's Office range from transferring it from the judiciary to the executive, to separating it as an independent structure outside both the judiciary and the executive, to leaving it within the scope of the judiciary, while introducing mechanisms for parliamentary oversight.

The common ground between all these ideas is, on the one hand, the validation of the concept that **the Prosecutor's Office and the courts should be set wide apart in the name of justice** (even if kept as separate units under the umbrella of the judiciary, this would be a mere formality, since Parliament would exercise control over the Prosecutor's Office, as it does with respect to the executive, whereas the courts would be self-governed), because the Prosecutor's Office is one of the parties in criminal proceedings, whereas the court is the adjudicator of the dispute between the parties. On the other hand, the abovementioned ideas express the view that **the Prosecutor's Office carries out the penal policy of the country together with the executive, for which reason it is more closely related to the latter, rather than to the courts.**

The concept that the court is the arbiter and the prosecutor is a party in the proceedings is flawed at its core, as it does not reflect the court's position in the civil-law model of the criminal justice system, which has its roots in the inquisitorial, and not in the adversarial system. Moreover, it does not accurately represent the nature of the "dispute" between the prosecution and the defense, as unlike the traditional common-law adversarial model, the civil law systems assign great importance to the pre-trial phase of proceedings (before the case is brought before a court) where there are no parties (which come into play in the trial phase), but the prosecutor plays the role of an adjudicator, alone or in combination with the court.

The functions of the prosecutor at the pre-trial phase of the proceedings can undoubtedly be defined as "quasi-judicial", since he is making key decisions at his own discretion at that stage in accordance with the principles of independence, impartiality, and professionalism, both in the interests of the prosecution and the accused parties.[23, 24] By contrast, at the trial phase of

21 The amendments to the JA were prom. in SG Issue 62 of 2916

22 The amendments to the CPC were prom. in SG Issue 42 of 2015 and Issue 62 of 2016

23 See „European Standards As Regards The Independence Of The Judicial System: Part Ii – The Prosecution Service" – European Commission For Democracy Through Law (Venice Commission) – par. 14 – 19; several citations from the position paper: "The prosecutor, because he or she acts on behalf of society as a whole and because of the serious consequences of criminal conviction, must act to a higher standard than a litigant in a civil matter."; "The prosecutor must act fairly and impartially. **Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner.** It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits."; **"It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone."**

24 See "The effect of legal culture and proof in decisions to prosecute" – John D. Jackson, School of Law, Queen's University Belfast, UK; Law, Probability and Risk (2004) – pp. 112-114

the proceedings the defending party must always act in the best interests of the defendant and never to his detriment, i.e., it has to be partial to the defendant in order to realize the right to defense successfully.

In principle, the "proximity" between the courts and the Prosecutor's Office is a serious issue when the latter can avail of mechanisms for control over the former, but, on the other hand, can have a positive impact on the administration of justice if the influence flows in the opposite direction, i.e. if the courts exercise control over the Prosecutor's Office.

As regards the "proximity" between the Prosecutor's Office and the executive, it has already been stated above that the idea of carrying out a "penal policy" is rather controversial, given the principle of mandatory prosecution that has been established in Bulgaria and has never been the subject of any proposals for reforms.

In conclusion, it is important to note that **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,[25] **especially if this control is expected to be only institutional, and not an integrated element of the proceedings.** Furthermore, there are many real examples of regulators that are formally subjected to parliamentary control in accordance with a seemingly democratic procedure, yet do not exercise their functions independently or effectively. In fact, any competences they possess to issue repressive measures end up being used for personal gain and retribution. Therefore, there is a very real concern that the envisaged remedy for the lack of control over the prosecution function — political oversight — might actually render the "patient" terminally ill.

It is not realistic to expect that Parliament will in one go overcome all the mistakes made in the process of developing Bulgaria's young democracy, especially given that in the past decade the institution has been gradually dismantled and turned into a façade of governance, while the real power is exercised elsewhere.[26]

VIII. 1) Complete abolishment of the "general review of legality" function, and 2) establishing mechanisms for external procedural control over the prosecution function — necessary and possible aspects of the future reform

First, **the general review of legality function that the Prosecutor's Office has continued to exercise in practice even after the transition to democracy** (despite its inconsistency with the new constitutional order) **has to be abolished completely.** This would serve to address the third of the issues identified in section V, while the institution would continue to operate within the scope of criminal proceedings, just like its counterparts in all other civil law systems.[27]

Second, there are two main aspects to focus on when discussing the execution of the prosecution function:

25 A vote of no confidence in the Prosecutor General or the latter's subordination to the Government are not recommended as appropriate mechanisms for accountability in the Bulgarian context by the Venice Commission – see Bulgaria Opinion On The Judicial System Act (6-7 October 2017) – European Commission For Democracy Through Law (Venice Commission) – par. 27 – 28

26 In its first report on the rule of law, the European Commission expresses concerns even with respect to how Parliament conducts its principal function — adopting legislation – see Section IV of the report on Bulgaria

27 Similar recommendations have already been given by many international experts, see for instance Bulgaria Opinion On The Judicial System Act (6-7 October 2017) – European Commission For Democracy Through Law (Venice Commission) – par. 41 – 43

1. When the empowered actor exercises the authority to press charges

In accordance with the Bulgarian rules of criminal procedure, charges are pressed formally at two stages of the proceedings: first, alleged perpetrators are charged at the investigation phase, either by order of the investigative body issued after a consultation with the prosecutor, or with the drafting of the record for the first investigative action affecting the alleged perpetrator (Art. 219, par. 1 and 2 of the CPC), or by order of the prosecutor (Art. 46, par. 2, item 2 of the CPC), and; second, following the completion of the investigation, when the prosecutor can issue an indictment (Art. 246, par. 1 of the CPC), marking the end of the pre-trial proceedings and bringing the case before a court. While the court does exercise control with respect to the indictment, **the decision to press/not press charges at the investigation stage is entirely at the discretion of the prosecutor and is subject to no external review.**

When the pressing of charges is accompanied by a request to the court to issue a pre-trial detention measure (taking the accused into custody or enforcing house arrest), or by the direct adoption of such a measure that is subject to judicial control (bail), **the court practically rules on the merit of the charges at that stage of the investigation,** insofar as it decides whether enough evidence has been collected to conclude that the accused committed the crime. However, if the court finds that the evidence is insufficient, or even that the accused was charged on account of conduct that cannot be deemed criminal in the first place, these conclusions only matter with respect to the detention measure that will not be enforced or will be repealed, respectively. To elaborate, **the charges will not be dropped even if the court has proclaimed them unfounded.**

This would result in a logical fallacy, particularly in the case where the court has stated the absence of any criminal conduct, as this finding would not have any impact outside of the proceedings pertaining to the pre-trial detention measure at issue. Therefore, the prosecutor would be free to continue the investigation, and **the accused party would remain as such, forced to bear the negative consequences of being charged on account of conduct that the court has declared non-criminal.**

The judicial control at the pre-trial phase of the criminal proceedings is the strongest possible guarantee against the arbitrary infringement of individual rights; the pressing of charges itself has a serious negative effect on the rights of the accused party, even when it is not accompanied by any coercive measures within the scope of the criminal proceedings. In addition to the adverse consequences of emotional and social nature, a number of legal provisions stipulate further negative implications, **explicitly connected with the status of "accused" in criminal proceedings.**[28]

Therefore, **providing an opportunity for the accused party to appeal the pressing of charges before a court** would definitely constitute an additional guarantee against the potential for abusing the levers of criminal repression. Moreover, deciding on the merits of the charges is anyway the main function of the criminal court, which is why it cannot be argued that the latter will thus be given unnatural powers in this regard.

2. When the empowered actor does not exercise the authority to press charges

In accordance with the Bulgarian criminal procedure, investigative proceedings can be initiated in two ways: a) by official order of a prosecutor to this effect (subject to the existence of specific legal grounds and sufficient evidence to conclude that a crime has been committed – Art. 212, par. 1 of the CPC), or; b) by an investigative body, upon execution of the first investigative action when time is of essence and the collection of evidence concerning the committed crime has to begin immediately (Art. 212, par. 2 of the CPC), or when there can be no doubt that a crime has been committed (Art. 356, par. 1 of the CPC).

28 For instance, proceedings for the forfeiture of illegally acquired property are only initiated after the party has been charged with one or more explicitly enumerated crimes – see Art. 108, par. 1 of the Anti-corruption and the Forfeiture of Illegally Acquired Property Act; whenever a magistrate has been charged with intentionally committing a crime prosecuted by the State, the magistrate may be temporarily removed from office – see Art. 230, par. 1 of the JA; persons charged with intentionally committing a crime prosecuted by the State are subject to registration with the police services – see Art. 68, par. 1 of the MOIA; persons charged with committing a crime cannot assume public office in the MoI – see Art. 155, par. 1-3 of MOIA, or in the SANS – see Art. 53, par. 1, item 6 of the SANSA, and many others

Therefore, the prosecutor can prevent the pressing of charges at a very early stage by simply refusing to instigate pre-trial investigative proceedings — this usually happens when the prosecutor decides that there is not enough evidence that a crime prosecuted by the State has been committed, and such evidence has also not been collected in the course of the so-called preliminary investigation in accordance with the provisions of the JA. **The prosecutor's decision is not subject to any control outside of the Prosecutor's Office, a state of affairs that has been criticized on numerous occasions by different international organizations and experts.**[29]

Once criminal proceedings **have been initiated, their temporary suspension or permanent termination are subject to judicial control** (Art. 243 and Art. 244 of the CPC), and the court can revoke the prosecutor's decisions in this regard and resume the investigation. Consequently, it can be argued that **there is little logic in empowering the court to monitor the legality of decisions to terminate investigations, but not the legality of refusals to initiate investigations.** Furthermore, this approach makes access to court contingent on the decision of police services to directly initiate an investigation, or conversely, to wait for the prosecutor's assessment on whether pre-trial investigative proceedings should be instigated. In the first case, the ensuing potential termination of proceedings would be subject to judicial control, while in the second case, the refusal to initiate an investigation would not.

Therefore, the smallest step towards creating an additional guarantee against the unlawful refusal to exercise investigative and, later on, prosecution functions would be to **enforce judicial control with respect to the refusal to instigate pre-trial investigative proceedings, similar to the control over the ensuing suspension and termination of such proceedings.**

At the same time, the Prosecutor's Office can prevent the administration of justice not only by issuing official orders to suspend, terminate, or refuse the instigation of proceedings, **but also by remaining idle and failing to adopt any procedural measures.** This idleness can harm both the accused party — which is incurring the negative consequences of the charges, and is also effectively denied access to a court assessment of the merit of the charges — and the victims of the committed crime. The new amendments to Chapter 26 of the CPC[30] provided for an opportunity to request the court to expedite the pre-trial proceedings if a certain time period has passed since the pressing of charges. Under the previous provisions of the law, the expiration of a specified time period resulted in the termination of the criminal proceedings if no indictment was brought in court. This disproportionate sanction that was applied indiscriminately in contravention of the public interest and the interests of the victims has now been revisited. However, the legislators went from one extreme to the other, as now there are no sanctions whatsoever, meaning that the urge to expedite proceedings is of a merely advisory nature under the current order. It would be appropriate to introduce a non-fixed term (as the factual and legal complexity of cases can vary), in which the prosecutor would have to decide whether to suspend/terminate the pre-trial proceedings, or bring an indictment in court.

When the Prosecutor's Office chooses not to exercise the prosecution function, there are no mechanisms under the current legal regime for exerting external control with respect to this inaction. Therefore, there are no criminal procedure tools for protecting the interests of the victims of the committed crime, or for fulfilling the public interest in punishing the perpetrator. For instance, when the court repeals the prosecutor's order to terminate the pre-trial proceedings, there is no possibility to compel the prosecutor to issue an indictment, even if the court is convinced that the evidence on the case is sufficient for issuing an indictment.[31]

The potential solution to this problem is **to either empower the court to be able to order the prosecutor to take specific prosecution measures, or to entrust the interested parties with the power to press charges on their own** (the so-called (subsidiary) private prosecution, if the interested party is a victim of the crime, or *actio popularis*, if it is not), having in mind that both options (judicial control and (subsidiary) private prosecution) exist in many of the European legal systems at present.[32] As has been shown above, the role of the court in the civil-law model of the criminal justice system does not prevent it from taking part in the process of ascertaining the objective truth, neither at the trial, nor at the pre-trial phase of the proceedings. Moreover,

29 For further details on the topic and on the recommendations of various international institutions and experts to introduce judicial control at this stage of the proceedings, see . „Пречи ли Конституцията на реформата в прокуратурата?"

30 Prom. in SG Issue 63 of 2017

31 See par. III of Judgment No. 7 of 16 December 2004 of the Constitutional Court of the Republic of Bulgaria on const. case No. 6/2004

32 For further details regarding the identified solutions to this issue in different European jurisdictions, see „Пречи ли Конституцията на реформата в прокуратурата?"

the judicial control option would be more practical, taking into account Bulgaria's criminal procedure model which places high formal requirements on the prosecution. In addition, **the principle of mandatory prosecution dictates that the prosecutor should decide whether to press charges in accordance with the law, and not at his unrestricted discretion.** Therefore, by ordering the prosecutor to take prosecution actions, the court would only be ensuring that the latter is exercising his powers in accordance with the law, and would not be interfering with the prosecutor's sovereign authority the can be exercised at his own discretion.[33]

With regards to the scenario where the prosecutor fails to exercise his authority to press charges, **it is of paramount importance to correctly identify the parties that will have legitimate standing to enforce the mechanisms for control over his inaction.** While the legal standing to enforce control over the active exercise of the authority to press charges can be logically matched to the party incurring the negative consequences of being accused, in the case where it is the idleness of the prosecutor that requires monitoring, it is not so easy to identify the parties that should be empowered to request it. **It is safe to assume that any natural or legal person that has suffered harm as a result of the investigated crime should have legitimate standing to request an inquiry into the prosecutor's inaction.** The problem is that there are many cases in which direct harm is not caused to a particular natural or legal person, but the public interest in monitoring the decision of the prosecutor to not press charges remains.[34] In these cases, an appropriate solution would be to introduce institutional control over a limited scope of actions, which would be carried out in accordance with specified criteria regarding the nature and degree of the danger to the public order resulting from the investigated alleged crime, having regard to the capacity of the perpetrator and/or the affected rights.[35]

To summarize the proposed ideas for mechanisms of control over the prosecution function, the following important points can be put forward:

- **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 overflown 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[36], which naturally leads to fewer criminal cases for courts to decide.** The reasonable allocation of the **sufficient available resources** of the judicial system is a matter of flexibility and good management — of avoiding the situation where certain magistrates are struggling with the workload, while others are hardly occupied. 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 latter;**
- **a better-functioning Prosecutor's Office will ensure a better criminal justice system overall,** which should be the main objective of the reform; 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.**

33 For instance, according to the German criminal procedure, as a result of the victim's successful appeal of the order to terminate the criminal proceedings, the prosecutor is instructed by the court to press charges – Art. 175 of the GCPC, the entire procedure is codified in Articles 171 – 177 of the GCPC

34 For instance, in the case where an official abuses his position of power in order to procure an unlawful benefit for another

35 Similar criteria for filtering out the investigations on corruption cases with a view to identifying those of high public interest has been employed, for instance, by ACF in their 2019 Annual Monitoring Report: "Anti-corruption institutions: activity without visible results"

36 From a total of 147, 022 crimes or 1843.8 crimes per 100, 000 people in 2001 to 89, 742 or 1282 crimes per 100, 000 people in 2019 – see the annual bulletin of the police crime statistics published by MoI

IX. Conclusion — in order to ensure the effectiveness of the proposed mechanisms, the court must be in its rightful place

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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