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THE ILLUSION OF THE BULGARIAN LEGISLATOR – creating a mechanism for effective investigation of the Prosecutor General

In its well-known judgment on the 2009 case of *Kolevi v. Bulgaria*, the European Court of Human Rights (ECHR) identified a violation of the European Convention on Human Rights and Fundamental Freedoms (ECHRFF) with respect to the investigation of the murder of the prosecutor in the Supreme Prosecutor's Office of Cassation (SPOC), Nikolay Kolev, which took place in 2002. In particular, the Court found that **the investigation did not satisfy the standard of effectiveness, as it is virtually impossible to investigate the Prosecutor General in an independent manner.**

The apparent obstacles to ensuring such an investigation are connected with, on the one hand, the **exclusive power of the Prosecutor's Office to decide whether, on what grounds, whom, and when to prosecute in cases of committed crimes** (this concerns crimes prosecuted by the state, as opposed to at the discretion of the victim), **having in mind that this decision is not subject to any external control.** On the other hand, **the hierarchical structure of the institution, with the Prosecutor General standing at the top,** is in itself problematic. In addition, **the Prosecutor General is a very influential figure in the Bulgarian public life** owing to certain additional factors.

Following a ten-year-long absence of any actions aimed at complying with the ECHR judgment, and a one-year-long protraction of preceding ideas, in December 2020, MPs of the ruling majority in Bulgaria **tabled a fast-track bill in Parliament** (already approved at first reading), whose purpose is to end this source of constant criticism towards the country on the part of various international organizations. The bill provides for the creation of a special figure — “a prosecutor for investigating the Prosecutor General” — that would be nominated by the Prosecutors' College of the Supreme Judicial Council, but would be elected by the Plenum, and would only work on preliminary inspections and investigations against the Prosecutor General during its term. Furthermore, the bill stipulates that investigations would be conducted single-handedly by the special prosecutor, and the latter's decisions would not be subject to internal control within the Prosecutor's Office.

The desire to quickly approve the most recent bill is also questionable in light of the statement of the Head of the Human Rights Directorate of the Council of Europe, issued on 15 December 2020 and addressed to the Bulgarian authorities, which expresses his evaluation that the new bill does not provide for sufficient measures to meet the requirements for independence of investigations against the Prosecutor General and other high-ranking officials connected with him, specifically other prosecutors. Moreover, it should be recalled that the Prime Minister has declared on multiple occasions that Bulgaria is willing and ready to comply with all recommendations on the matter.

The figure of the special prosecutor responsible for investigating the Prosecutor General, put forward with the mentioned bill, **does not satisfy the criteria for independence** because:

- 1) even after the constitutional reform of the SJC in 2015, the Prosecutor General undoubtedly has a palpable influence in the body that will ultimately nominate/ elect the specified figure;
- 2) for this exact reason, the Prosecutor General will be able to impact not only the election, but also the removal from office of the party tasked with investigating him, as this decision would also be taken by the PC or the SJC Plenum;

- 3) the Prosecutor General will be able to influence the career of the party tasked with investigating him;
- 4) the Prosecutor General will not formally possess the power to exert control over specific decisions of the special prosecutor investigating him in the course of the investigation, but the decision whether to investigate/prosecute the Prosecutor General will remain locked within the Prosecutor's Office, and under the current bill — in the hands of the special prosecutor alone.

The establishment of a successful approach for effective criminal investigation of the Prosecutor General requires the sacrifice of the cornerstone of the Bulgarian criminal justice system, i.e., the Prosecutor's Office's monopoly over the prosecution function. It is necessary to first accept the idea of overcoming this monopoly through specific opportunities for external procedural control by the courts over the exercise of the prosecution function, or the lack thereof. In turn, this will automatically lead to the understanding that investigations against the Prosecutor General/senior heads on the Prosecutor's Office need not be overseen by another prosecutor at all costs, nor is it necessary that another prosecutor press the charges against them.

However, the real problem is that the Bulgarian politicians do not want to revisit the concept of having a monopoly over the prosecution function, as this allows a single institution (with a single head) to apply the full arsenal of repressive measures in the country against certain individuals, while remaining inactive against others.

If the concept put forward in this analysis is adopted, the Prosecutor's Office will not lead investigations against the Prosecutor General/ other high-ranking prosecutors, nor will it decide on the outcome of such investigations. For that purpose it would be appropriate to set up an ad hoc body that could for instance be composed of three randomly selected appellate, supreme and/or constitutional acting and/or retired judges, while the investigation itself will be conducted by investigative authorities within the MoI system or by other executive bodies.

The offered approach ensures a real possibility to achieve the following results that the current bill absolutely cannot hope to provide:

- **independence of the parties conducting/overseeing investigations and deciding whether to press charges;**
- **professionalism of the parties conducting/overseeing investigations and deciding whether to press charges** – one of the main practical shortcomings of the idea to have a single prosecutor competent to investigate the Prosecutor General is the fact that this person will have to single-handedly conduct the entire investigation, in addition to a preliminary inspection, if such is required, and will have to be an operative agent, an investigative authority, and a prosecutor at the same time, which poses risks related to the work quality and creates considerable practical difficulties;
- **eliminating the scenario where a single person decides all matters pertaining to the potential criminal investigation of the Prosecutor General, which can be turned either into a tool for covering criminal behavior, or into a tool for repression of opponents through charging them with in-existent crimes;**
- avoiding the creation of yet another expensive administration despite the fact that the system possesses sufficient resources to deal with the issue at hand.

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