LET law RULE

From formally independent judiciary to a „captured state”

Since the anti-government protests of the summer of 2020 Bulgaria has been in a deep political crisis. The stumbling block at the heart of the political crisis is the rule of law crisis in the country – and in particular the corruption problems the country has been struggling with since long before its EU accession, which are due to the incomplete process of judicial reform in Bulgaria.

- **At the end of the 1990s, even before the start of negotiations on Bulgaria’s accession to the European Union, the European Commission began monitoring the rule of law in Bulgaria, supporting reforms leading to the independence of the judiciary and the fight against corruption. The judicial system has undergone major institutional and legislative reforms.**
- **From a legalistic point of view, the main principles of the rule of law are well-established in Bulgaria. The 1991 constitution included legal guarantees of the independence of the judiciary and the independence of the prosecution from power.**
- **Despite these legal guarantees, the fight against corruption remains ineffective. Public prosecutors do not pursue the most important politicians and magnates, but instead punish businessmen and other people who do not favour the government. It is known as a baseball bat against enemies and an umbrella against friends.**
- **Formally, prosecutors have constitutional guarantees of independence from the authorities. However, the attorney general can intervene in virtually any case and thus abuse power on a large scale.**
- **A theoretically well-designed judicial system works badly in practice because populist governments demand “results” from it, as well as ever tougher convictions, and more investigations. Despite institutional independence, most judicial authorities are submissive to politicians. One of the reasons is the way in which the members of the Supreme Council of the Judiciary are appointed. The law requires a two-thirds majority in parliament. To achieve this, an agreement of various parties, including populists, is required and as such,**

> **they have played a key role in the appointment of supreme judges, heads of audit institutions, and the prosecution service.**

Since the anti-government protests of the summer of 2020 against the ruling party's GERB 'mode of government', Bulgaria has been in a deep political crisis. After the regular (April 2021) and early elections (July 2021), the anti-GERB majority in Parliament failed to form government. Indeed, it could not even agree on the minimal task of appointing a government that would simply run the country, leaving behind the promise for radical change to 'the mode of government' that a majority of Bulgarians voted for. The country is now preparing for a third round of parliamentary elections (expected in November 2021) – a prece dent in the post-war European history. But even after a third attempt, there are no guarantees for success in forming a cabinet.

Incomplete process of judicial reform

The stumbling block at the heart of the political crisis is the rule of law crisis in the country – and in particular the corruption problems the country has been struggling with since long before its EU accession, which are due to the incomplete process of judicial reform in Bulgaria. It is telling that along with PM's resignation, one of the key demands of anti-government protesters in the summer and autumn of 2020 was the resignation of the strongman of the judiciary – the Prosecutor General Ivan Geshev. Changing 'Borissov's mode of government' and the reform of the judiciary – especially putting limits to the uncontrolled power of the Prosecutor General, and the cessation of the practices of using law enforcement and judicial institutions as 'tools of those in power' – were the most prominent priorities in the election platforms of all the "protest parties". Despite this 'overlapping consensus', a 'cabinet for change' could not be formed. Thus, the shared priority of overcoming the rule-of-law crisis has as yet failed to materialise.

Law guarantee the independence of the judiciary

'Judicial reform' is a somewhat surprising unifying cause, as after more than 20 years of attempts at such a reform, it has turned into an almost meaningless mantra. Even before the start of negotiations for Bulgaria's EU accession in the late 1990s, the European Commission identified rule of law as a serious weakness in the consolidation of democracy in the country. It has, therefore, begun monitoring the policies in this area and has supported reforms aimed at strengthening the independence of the judiciary and combating corruption. This constant oversight has been performed on the basis of a peer-review method, as a result of which the Bulgarian judicial and law enforcement systems have gone through numerous rounds of major institutional and legislative reforms. Thus, from a strictly

legalistic point of view, the major principles of the rule of law have been well entrenched in Bulgaria. There were already quite a few legal guarantees for the independence of the Bulgarian judiciary in the 1991 Constitution; Chapter 6 is devoted to the judiciary (which also includes the prosecutors and investigators in order to insulate them from pressures from the executive). Bulgaria follows the so-called Mediterranean model of judicial regulation (Italy is the primary example in this instance), which is supposed to ensure a very high level of independence from political power. Accordingly, the Constitution contains the necessary guarantees: an independent Supreme Judicial Council (SJC), which solely responsible for the appointment and promotion of magistrates, irremovability (until reaching retirement age) of magistrates after 3 years of work, a guaranteed budget for the judiciary, etc… It is difficult to amend the Bulgarian constitution, especially with regard to separation of powers (in order to remove the Prosecutors' Office from the judiciary and move it to the executive, for example). According to a decision of the Bulgarian constitutional court from 2003 for such a change a Grant National Assembly (quite difficult to convene) is required. The status of the Supreme Administrative and the Supreme Court of Cassation and the Prosecutor's Office, as well as the election of their leaders – appointed by the President of the Republic on the proposal of the SJC for a seven-year-term (longer than the term of the legislature and the executive) – are regulated by the Constitution. The with its power to annul unconstitutional legislation and to interpret the Constitution, the Constitutional Court adopted a number of decisions on, inter alia, the budget of the judiciary, the appointments of senior magistrates, the powers of the Ministry of Justice and the Council of Ministers vis-à-vis the judiciary, etc. All of these strengthened the principle of judicial independence. Finally, the dialogue between the Bulgarian authorities and the European Commission led to the establishment of another (super) independent body, attached to the SJC – the Inspectorate empowered to assess the individual performance of magistrates – which also has a role in protecting judicial independence.



Thus, although there are some remaining flaws in the institutional and legislative set-up, the formal guarantees for the independence of the Bulgarian judiciary are significant. From an international perspective, the Bulgarian constitutional model contains most of the legal instruments guaranteeing the independence of the judiciary: a stable constitution, constitutional review, independent bodies that manage the system, an independent budget, fixed terms of office, and many others.

The prosecution does not pursue corruption

Despite all these legal guarantees however, the judiciary has been inefficient in tackling some of the major problems of the country – most notably high-profile corruption cases. The 2021 US Global Magnitsky sanctions against the high-ranking BG politician Delyan Peevski and other public officials for serious corruption only conspicuously confirmed what was well known to both the Bulgarian public and the country's international partners: that the prosecutorial office in BG does not target high level corruption. For example, the prosecutorial office had systematically refused to investigate Delyan Peevski despite the various corruption cases in which he has been implicated.

Reports prepared by a leading Bulgarian anti-corruption think-tank also testify to the low efficiency of the Specialised prosecutorial office (established in 2012) in prosecuting high-level corruption – which was the reason for its initial establishment – as well as that of the Commission for anti-corruption and illegal assets forfeiture (CACIAF), established in 2018 to replace multiple existing bodies and endowed with extensive powers and generous funding .The record of the Commission's achievements is weak: while having extensive prerogatives, further boosted at the end of 2018 (now even acquittal by court does not stop seizure of 'illicit' assets by CACIAF , some of its flagship cases have been overturned in court (as they violate EU law). Others raise serious concerns of being politically motivated and ultimately also they finnish in the courts. A scandal involving irregularities with assets of the Director of CACIAF led to his resignation, which further undermined the authority of this anti-corruption body.

The fact that rather than targeting high-level corruption and thus protect the public interest the Prosecutorial office, as well as some regulatory and other agencies with significant powers (CACIAF, the Anti-trust commission and the Financial supervision commission, are not infrequently used as weapons to punish businessmen and others who are not friendly to the government or fell out of favour tells us a lot about the state of rule of law in the country. The statement of the Chair of the Supreme Court of Cassation, Lozan Panov – who has been under constant attack by the Prosecutor General – that the Prosecutor's Office under its current leader Ivan Geshev has been turned into "a bat (baseball) against enemies and an umbrella for friends" did not produce a scandal as it was voicing a widespread sentiment. Indeed, as already mentioned, the 2020 anti-government protests specifically demanded the resignation of the Prosecutor General Ivan Geshev precisely because of this wide spread opinion about the Prosecutor's Office under his leadership.

Judiciary's weak performance

Thus, a considerable puzzle is why the strong institutional insulation of the judiciary from the political branches of power, including its generous financial endowment, as well as the strong powers granted to anti-corruption bodies, has not led to independence in practice and to better performance.

In explaining judiciary's weak performance, the serious pressure placed on it from political actors should be pointed out. In the 1990s this pressure was exerted by strong ideological parties, and since the early 2000s by a more diverse group of actors, including populist politicians, the tabloid press and even some businesses. This pressure often results in populist policies advertised as a stepping up of the fight against corruption and organised crime, but often boil down to an attack against a political opponent or an inconvenient

media group. Governments have begun to demand “results” from the judiciary, including more and heavier convictions, more investigations, and so on. Paradoxically, against this background the on-going monitoring by the European Commission has occasionally helped to increase the pressure coming from politicians. Thus some key figures from the ruling majority, and also from the Prosecutor General’s office, have often criticised the judiciary (some of the courts and the chairman of the Supreme Court of Cassation Lozan Panov in particular), accusing them of inefficiency.

In such circumstances, the judiciary had two options. The first was to succumb to popular political demands, which, however, raises concerns about judicial independence and the impartiality of magistrates. The current Prosecutor General Ivan Geshev, for example, has openly vowed to turn the prosecutorial office into instrument of “divine” justice. In the first months in office he has been impressively active, opening numerous proceedings against so-called “oligarchs” and promising to “revise the whole transition process”, especially the privatisation of state-owned assets from the 1990s and the early 2000s. These activities, which at the time had significant popular appeal, raise very serious rule of law issues – selective bias in the targeting of people and violation of statutes of limitations for activities which took place more than 20 years ago. All such cases have been abandoned or the courts found them illegal. The second possible strategy for the judiciary is to openly oppose the pressure and to come into direct conflict with the political elite and the tabloid press, thus risking a further decline in general confidence in the judiciary. The lack of trust in an institution – and the Bulgarian judiciary does not enjoy much trust in general – undermines its authority and raises questions about its ability to work effectively.

The judiciary and the magistrates have faced this unpleasant dilemma in different ways through the years. There have been moments in which the judiciary, together with civil society, has actively defended itself against political interference. Currently, however, it seems that despite its institutional insulation, the governing bodies and persons of the judiciary (with a very few exceptions) have taken a very pro-governmental or at least deferential stance to the ruling majority. This may be explained by the way members of the Supreme Judicial Council – the governing body of the judiciary – are appointed. Its Parliamentary-selected quota requires 2/3 majority approval and to reach this, the support of the king-maker party, DPS is often required. Support from DPS, the party representing the Ethnic Turks in Bulgaria, has been crucial for the survival of a series of governments in Bulgaria, both during the transition and after country’s EU accession, even when DPS is not formally part of the government: it was only part of coalition governments in the period 2001 – 2009 and 2013-2014. Even when not part of government, the ruling majorities often promote DPS’s agenda and vote accordingly, prompting analysts to ask who is *de facto*

ruling the country.

As DPS's support is crucial for appointing many key figures in the judiciary as well as in regulatory bodies, which are critically important for the functioning of the market and of the whole state, this party's influence has only grown stronger by introducing requirements for a supermajority, meant to curb the political influence on magistrates of the government and a majority in Parliament. This allowed DPS to play a central role in the careful selection and appointment of top magistrates and heads of regulators; people, who would be ready to cooperate with influential politicians and government-friendly businessmen. Through this appointment mechanism a gradual conquering of the judiciary – and indeed 'the capturing' of the state – has been achieved. For example, Delyan Peevski, a former MP from DPS, and powerful businessman and media mogul, is believed to have been the broker of many deals involving the appointment of high-ranking magistrates – members of SJC, heads of the High Courts and the Prosecutorial Office – through whom control over the judiciary is exerted. The media empire built by Mr. Peevski has further streamlined this process – a problem long noted by the country's partners, including the European Commission. It has been involved in trading in influence, in heavily promoting such figures and, crucially, was the central vehicle for discrediting their opponents and silencing voices critical of government and its business and political friends. In 2021 the US Treasury Department, by putting Peevski under the Global Magnitsky sanctions, confirmed what was known all along – Mr. Peevski is a main power broker, indeed a conduit through which corruption in Bulgaria has spread. And even though after 2001 the country was swept by the victory of a series of populists, elected on a similar ticket – bring back morality to politics, establish rule of law, effectively fight endemic corruption. To almost universal dismay, in 2013/2014 Mr. Peevski was appointed head of State Agency for National Security, the main anti-corruption body of the country at the time. This provoked mass anti-government protests that continued for a year. In the summer of 2014 Corporate Commercial Bank, known as "the bank of the power", went bankrupt after a run on it provoked by rumors of a feud between its owner and Mr. Peevski, an attack by the prosecutorial office against the owner Tzvetan Vassilev and a raid on the bank offices. Mr. Peevski had been close to Mr. Vassilev – using the latter's political and business connections to establish himself as power broker and become an influential businessman, yet turned against his patron when CCB became a liability. The Prosecutor's Office pressed charges against the bank owner for criminal dealings, yet despite Mr. Peevski's close links to CCB, charges were never pressed against him. Instead, Mr. Peevski's media empire provided support for the Prosecutor's Office, including an ample platform to launch smear campaigns against its critics. the The actions of the Office and the investigators are often directed at opposition figures and thus this part of the judiciary has often become subservient to those in power and has at times ceased to function as a check

on government. The attentiveness to the agenda and the interest of the government is most visible in the performance of the SJC and the Prosecutor's Office, from where it starts to permeate the entire judicial system. It is a worrying sign that independent associations such as the Union of Judges are under considerable political pressure and constant media attacks in the tabloid press. Thus, although there is no overt and formal politicisation of Bulgarian magistrates (they cannot be members of parties or trade associations), the judiciary has nonetheless become involved in the partisan politics of the country. As a result of all these developments, experts have increasingly begun to refer to Bulgaria as "a captured state".

To sum up, despite the progress made in defending judicial independence, in practice serious issues remain unresolved. They are not essentially a matter of legislative change, but rather they require a change in formal and informal practices, especially with regard to personnel policy and the assessment of the individual performance of judges and prosecutors. Magistrates must continue to build a culture and ethics of independence that is applicable to all and not influenced by political biases.

The issue of judicial accountability has come to the fore in discussions on judicial reform. There is a widespread perception that the formal insulation of the judiciary vis-à-vis the political branches of power has made it professionally unaccountable to society. This particularly applies to the Prosecutor's Office – it is not by chance that its performance remains the focus of intense public debates. It is true that prosecutors in Bulgaria are bound only by law and cannot receive instructions from the executive or other authorities – they enjoy Constitutional and legal guarantees against such interference. However, the Prosecutor's Office is organised hierarchically and the internal autonomy of prosecutors is somewhat limited. The Prosecutor General is at the top of the pyramid and although formally he is entitled only to "methodological guidance" of the work of prosecutors, there are practically no ways to limit his interference in given cases. In essence, the current arrangement both allows for the Prosecutor General to have enough control over the concrete work of prosecutors, but at the same time he is not formally accountable for any individual case. This creates ample space for abuse of power by this most powerful office in Bulgaria. It is no incident that the first Prosecutor General in Bulgaria under the 1991 Constitution (which granted the office its extensive powers) Mr. Ivan Tatarchev declared frankly: "Above me is only God!". Lack of accountability and effective control mechanisms over this most powerful office have long been recognised as the central problems with rule of law in Bulgaria, repeatedly stressed in critical reports by the Venice Commission, the European Commission , the European parliament, among others.

Introducing effective accountability mechanisms for the judiciary, particularly with regard to the Prosecutor's office, as well as appointing members of SJC ready to implement better

personnel policies, are prime tasks for improving the state of rule of law in Bulgaria. Whether there will be political will to do so remains a moot point. Against the background of high public demand for improved rule of law in the country, the failure to introduce and implement necessary reforms would further erode Bulgarians' trust in their political parties and other key structures of representative democracy. In turn, this would deepen the crisis of governability and would further worsen the quality of democracy in the country.

Ruzha Smilova PhD

Centre for Liberal Strategies

* *Photo: Bulgarian protests next to the Party House, the office house of the National Assembly (Sofia, Bulgaria), 2020, author: Cheep. Source: Wikimedia Commons (CC BY-SA 4.0).*