

Yellow Light for Disciplining Inconvenient Judges?

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The ECtHR's Ambivalent Judgment in *Todorova v Bulgaria*

The case of the disciplinary proceedings against the Bulgarian judge Miroslava Todorova ([Requête no 40072/13](#)) which has recently been examined by the European Court of Human Rights (ECtHR) caught the eye of those following the rule of law decay in the European Union. This is not surprising because the disciplinary regime for judges in Poland has been deemed incompatible with EU law by the Court of Justice of the European Union (CJEU). The Polish practice has made experts better aware of the fact that disciplinary proceedings could be a mere façade of political repression against judges with opinions diverging from the views of the government.

On the surface, it appears that the recent ECtHR judgment on Todorova's case is a mere example of the 'Justice delayed is justice denied' legal maxim – after all, the application was submitted in 2013 and the Court ruled against Bulgaria only in 2021. However, a closer look reveals that the ECtHR found in favor of Bulgaria on the two most worrisome questions – compatibility of the disciplinary proceedings against Todorova with Article 6 (fair trial) and Article 8 (right to private life) of the European Convention on Human Rights (ECHR). By contrast, the ECtHR established violations of Article 10 (freedom of expression) and Article 18 in combination with Article 10 (limitation on use of restrictions on rights granted by the ECHR). This leads to the sad conclusion that unless a judge picks up a public fight with the government, she cannot defend herself before the ECtHR against bogus disciplinary proceedings. While judge Todorova tried to highlight some systemic issues of Bulgaria's justice system in her application, the ECtHR treated her case as an exception intimately tied to her role as president of a professional organization, and thus may have limited access to relief for other judges in similar circumstances.

Some Hard Truths

Bogus disciplinary proceedings were not invented in Poland. They have been an inherent feature of Bulgarian legal life for decades and, surely, they exist in many other former-communist countries. Bulgarian civil society is aware of diverse cases in which magistrates have been singled out and subjected to disciplinary proceedings by the heavily politicized Supreme Judicial Council (SJC) in suspicious circumstances (see, for instance, the case of investigator [Boyko Atanassov](#)). There have been concerns that Bulgaria's Supreme Bar Council also abuses disciplinary proceedings against inconvenient attorneys.

Meanwhile, since entering the European Union, Bulgaria has been under a special mechanism which was supposed to help it to fulfill its accession criteria pertaining to the rule of law – the Cooperation and Verification Mechanism (CVM). One of the six benchmarks, which Bulgaria has to fulfill, is judicial independence. As early as 2018, the European Commission declared this benchmark provisionally closed even though there was ample evidence that judicial independence in Bulgaria was a mirage. In 2019, the European Commission declared all CVM benchmarks provisionally closed and recommended that the mechanism be lifted for Bulgaria despite concerns that these sugar-coated conclusions did not match reality.

The European Commission undertook an obligation to promote judicial independence in Bulgaria through the CVM, but in practice it left judges to defend judicial independence by themselves. This is the reason why the European Commission has refrained from initiating any infringement proceedings against Bulgaria in the area of EU values despite the fact that the situation in the country is easily comparable to the dire state of affairs in Poland. Evidence to this end is provided by reputable indexes such as the Rule of Law Index by the World Justice Project, a resolution on the rule of law in Bulgaria by the European Parliament, and mass protests against the corruption of Boyko Borissov and General Prosecutor Ivan Geshev which dominated the year 2020.

Todorova's Case

The case of judge Todorova is well-known. She became the President of the Bulgarian Judges Association (BJA), the largest professional organization of the judiciary in Bulgaria, in October 2009, the same year in which Boyko Borissov became Bulgaria's Prime Minister for the first time. Whereas Borissov and his close circle embarked on a journey towards capturing the various institutions in Bulgaria, including the courts, their attempts to undermine the country's rule of law were either underestimated or miraculously marked as 'progress' by the European Commission in Bulgaria's CVM reports.

Miroslava Todorova, in her capacity as President of the BJA, had the courage to publicly express her opinion about pressing matters for the judiciary, such as questionable policies and judicial appointments by the SJC or inappropriate statements by Borissov's government. One notable example given in the ECtHR judgment in Todorova's case is a public stance following a statement by Borissov's Minister of Interior, Tsvetan Tsvetanov, that Bulgarian courts were 'co-responsible for all murders in the past years' (para 11). Another example mentioned in the judgment is BJA's public stance against the nomination of Vladimira Yaneva, family friend of the same Tsvetan Tsvetanov, as President of the Sofia City Court in 2011 (para 15). The same Yaneva was subsequently involved in the infamous YanevaGate scandal which revolved around leaked recordings of conversations between Yaneva and another judge in which they discuss how politicians and General Prosecutor Sotir Tsatsarov instruct them how to decide cases.

Following Todorova's public statements on these matters, the SJC initiated disciplinary proceedings against her. Todorova and other judges were found guilty of 'slow justice' – rendering verdicts but taking their time to produce the legal reasoning (*motivi*) behind them – and their remunerations were reduced. For clarity, it should be noted that in the Bulgarian legal tradition the verdict and the legal argumentation supporting it may be handed down separately. Article 308 of the Code of Criminal Procedure prescribes strict deadlines regarding the delivery of the legal reasoning. There is, of course, a catch – some judges have bigger workloads than others which often means that delay cannot be entirely attributed to them. In fact, delay in Bulgaria seems to be quite common as visible from the facts established by the ECtHR.

In parallel, the Minister of Interior Tsvetan Tsvetanov publicly insinuated that Todorova was serving the 'interests of organized crime' (para 26). Shortly after, Todorova was subjected to three additional disciplinary proceedings because of which the SJC took the decision to dismiss her (paras 28-32). Todorova unsuccessfully attempted to sue Tsvetanov for defamation. She also challenged all decisions by the SJC before Bulgaria's Supreme Administrative Court (SAC). The SAC delivered partial justice, but one may wonder if this did not happen because they knew they were being watched: the proceedings against judge Todorova were observed by the International Commission for Jurists, MEDEL, and Judges for Judges. The SAC annulled the dismissal and asked the SJC for new proceedings. The SJC ordered the demotion of Todorova for two years – a sanction which the SAC reduced to one year.

A Lesson in Having the Cake and Eating It Too

The decision by the ECtHR in Todorova's case is an illustration of how to have the cake and eat it too – some violations have been established, so that Todorova can claim to have successfully sued Bulgaria, but the key issues pertaining to the dysfunctionality of Bulgaria's justice system, which Todorova tried to expose, have been ignored by the Court.

The leading factor based on which the ECtHR developed its argument that there was a violation of Article 10 of the ECHR seems to be the 'causal link' between Todorova's public statements and the disciplinary sanctions against her (para 163). Here, the Court specifically refers to paragraph 34 of its judgment where it established that colleagues of Todorova, media, and international organizations claimed such a link existed. In layman's terms, the Court sees such a link because other people said it existed. While it is commendable that the Court listened to civil society, one should remember that Todorova was the president of the most important professional organization of the judiciary, so this surely motivated at least some of the public support she received. What about other judges who cannot receive such support because they are not as recognizable and cannot employ the connections of the Bulgarian Judges Association? Likewise, there are magistrates who would not receive media coverage even if they would like to be vocal because they are not in the governing bodies of professional organizations or do not occupy an important position in the justice system.

In the same paragraph 34, the ECtHR refers to a comment by the European Commission in Bulgaria's CVM report of 2012 expressing concern about Todorova's dismissal from the justice system. One should underline that such an explicit mention of harassment against a judge in the CVM is an extremely rare find. The Commission has ignored many other cases of notable abuse. The most obvious example is the case of the President of the Supreme Court of Cassation Lozan Panov. In the year in which he complained that the abuse had transferred onto his family because he refused to comply with political orders, the Commission closed the judicial independence benchmark in Bulgaria's CVM. In the year in which he said the rule of law in Bulgaria was about to die under the Commission's nose, the Commission said Bulgaria fulfilled all benchmarks of the CVM. In other words, not every judge has the rare luck of judge Todorova.

In this light, it is regrettable that the ECtHR dismissed Todorova's compelling arguments about violations of Article 6 and Article 8 based on a purely formal approach. This is where the ECtHR could have made a real difference in Bulgaria because there are many magistrates who are afraid to speak in public, but who resist political orders and can easily become targets of politically flavored disciplinary action in a politics-dominated SJC and a compromised SAC whose judges are appointed and promoted by the same SJC.

Todorova unmasked systemic problems of Bulgaria's justice system which were visible in the proceedings against her – the partiality of the disciplinary committee at the SJC composed of two prosecutors and an investigator (para 95), the panels at the SAC which examined her case were personally composed by SAC's President who was in a conflict of interest (paras 96 and 99), conflict of interest in the disciplinary committee (para 97), the composition of the SJC dominated by the Prosecutor's Office (para 98), etc. In a nutshell, to this day in Bulgaria, the careers of judges depend on the whims of the Prosecutor's Office and the political quota which dominate the SJC.

Yet, the ECtHR dismissed Todorova's complaint about the numerous procedural violations in the proceedings before the SJC on the ground that the SJC's decision was subjected to 'subsequent control of a judicial body' (para 109). In this way, the ECtHR turned a blind eye to all serious problems in this body flagged by the proceedings against Todorova. It is also questionable to what extent a review of a partial decision by a seemingly partial court whose judges are appointed by the same partial body constitutes a remedy.

Meanwhile, the ECtHR rejected Todorova's arguments about the partiality of SAC's panels which were personally composed by the SAC's President whose suspicious appointment by the SJC Todorova had criticized in the past. In the eyes of the Court, it was important that Todorova did not attempt to recuse the judges (para 121) and their conclusions did not seem 'arbitrary' or 'manifestly unreasonable' (para 117). The Court also noticed that Todorova did not allege that the judges were instructed how to decide by the court president (para 121). Here, the ECtHR seems to be walking on thin ice – Todorova most probably did not make such allegations because such instructions are impossible to prove as they are given orally and in the dark. Also, considering the setup and functioning of the SAC, recusal would have been impossible in practice – Todorova

surely knew this. One may wonder if the conclusions by the ECtHR about the lack of arbitrariness do not contradict its opinion that the proceedings against Todorova violated her freedom of speech.

Finally, Todorova also argued violations of her right to private life because she did not receive any salary for one year (the period between the decision on dismissal and the decision to annul the dismissal) and because the proceedings against her tarnished her reputation (paras 131-132). One of the arguments advanced by the ECtHR to reject Todorova's claims leaves a bitter taste – namely the Court argues that 'nothing prevented the applicant' from exercising another paid job while she was dismissed (para 140). Given the circumstances, it is important to be realistic – what type of job can a dismissed criminal judge exercise when the executive has presented them as a judge protecting organized crime and the SJC has imposed the heaviest penalty for such disciplinary violations delivering a severe blow to the person's reputation? My humble view is that it was close to impossible to find a job in the legal profession at the material time.

Yellow Light for Abuse of Inconvenient Judges

The *Todorova* judgment is eloquently written and certainly delivered partial justice for judge Todorova who has remained outspoken about the dire state of Bulgaria's justice system. However, my impression is that the Court ignored Todorova's strongest arguments, thus missing an opportunity to shed light on systemic flaws (an opportunity it has taken in the past; see for instance, *Kolevi*). The sad takeaway is that to obtain justice in disciplinary proceedings, one should be a vocal, recognizable judge that has built a reputation in professional organizations.

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