

Bulgaria's Failed Specialized Criminal Justice Experiment

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On 14 April 2022 Bulgaria's Parliament adopted legislative amendments, which finally put an end to the Specialized Criminal Court, acting as a first and second instance, and its mirroring Specialized Prosecutor's Office. Both institutions were set up during Boyko Borissov's first term as Prime Minister in 2011 and severely undermined the rule of law in Bulgaria. Sadly and frustratingly, the creation and development of these structures was encouraged and marked as progress in the reports under the European Union's (EU) Cooperation and Verification Mechanism (CVM) on Bulgaria. This inconsistency calls into question the European Commission's ability to objectively monitor the rule of law in its Member States, to recognize threats, and to give adequate recommendations.

A Step in the Right Direction

The explanatory memorandum accompanying the latest amendments to the Law on the Judiciary and related legislation, such as the Code of Criminal Procedure, stipulates that the key motivation behind these legislative changes is 'guaranteeing the constitutional principle of the independence of the judiciary and defending the constitutional rights of citizens'. Indeed, the closure of the Specialized Criminal Court, which was essentially a parallel court system defying basic principles of criminal law, is an important milestone on the journey towards restoring Bulgaria's rule of law after Borissov's three governments (2009-2013; 2014-2016; 2017-2021).

According to a definition on Dictionary.com, an experiment is 'an act or operation for the purpose of discovering something unknown or of testing a principle'. Bulgaria's specialized criminal justice 'experiment' went wrong since its hypothesis was flawed. The specialized criminal courts were originally established to fight organized crime and corruption without convincing arguments that they would be successful at the task. Not only did they fail, but, in the words of constitutional lawyer and current Member of Parliament Atanas Slavov, they were transformed into bodies 'for the inquisition of those who express a different political opinion or interfere with the business interests of those in power'.

The Origins of the Specialized Criminal Justice Experiment and the CVM

At the time of their entry to the EU in 2007, Bulgaria and Romania did not fully fulfill the accession criteria. To this end, there were special safeguard clauses in the Bulgaria-Romania Accession Treaty. One of them even allowed the postponement of accession if the countries were 'manifestly unprepared to meet the requirements of membership' by their planned accession date of 1 January 2007. However, the European Commission decided to be generous for political reasons: it put the countries under a special monitoring mechanism, the CVM, to help them catch up in the area of the rule of law. Bulgaria had to fulfill six benchmarks: judicial independence, legal framework, continued judicial reform, high-level corruption, general corruption, and organized crime.

In the case of Bulgaria's CVM, the European Commission underestimated long-standing structural issues in the justice system which are remnants from the communist era, and which are considered sources of corruption by experts and civil society. The Prosecutor's Office, for instance, is modelled after the Soviet *prokuratura* and has excessive powers that overshadow the courts. The politicized Supreme Judicial Council (SJC) is responsible for the appointment and promotion of all magistrates and the monitoring of their ethical values. The European Commission did not pay much attention to any of these institutions. Instead, it focused on innovative recommendations – in the July 2009 CVM report, it 'invited' Bulgaria to 'set up specialised structures for prosecuting and judging high level corruption and organised crime cases with appropriate functional and political independence'. This is a copy/paste recommendation for a panacea against corruption that the European Commission has prescribed to other East European candidate countries – Slovakia, for example, set up a specialized court in 2003 after a similar invitation from the Commission. It has been argued that Slovakia sought inspiration in the Criminal Chamber of *Audiencia Nacional* in Spain, which was established in 1977.

Borissov's first government addressed the Commission's recommendation via a reform of the Law on the Judiciary and the Code of Criminal Procedure in 2011, which established a Specialized Criminal Court acting as a first and second instance as well as a mirroring Specialized Prosecutor's Office, subordinate to Bulgaria's already highly controversial Prosecutor's Office. Even then, both the opposition and civil society alike were concerned about the potential for 'institutional capture and instrumentalization' of this structure which could easily become a 'political court'. The model of the structure seemed to be a creative transplant of the Spanish and Slovak institutions mentioned above.

Going Frankenstein and the CVM

Unfortunately, it did not take long for the prophecy of critics to materialize. This specialized structure was quickly weaponized against Bulgarian citizens who were inconvenient for

Borissov's regime. It became one of the key institutions in Borissov's FrankenState dominated by the Prosecutor's Office. This was possible for two main reasons: 1) the politicization of the SJC allowed for the appointment and promotion of magistrates without proper professional qualities and experience and with questionable ethical values in the Specialized Criminal Court and the Specialized Prosecutor's Office; 2) further controversial substantive reforms of the Code of Criminal Procedure of 2017 increased the already excessive powers of the Prosecutor's Office and widened the jurisdiction of these specialized structures. Sadly, the European Commission not only remained blind for these threats to the rule of law but saw them as progress. The last CVM report on Bulgaria in 2019 provisionally closed all benchmarks set for the country at the time of accession.

It is already revealing that on 13 July 2016, the SJC's prosecutorial college almost unanimously appointed Ivan Geshev as head of the Specialized Prosecutor's Office. The same magistrate was subsequently promoted to Deputy General Prosecutor in 2018 and then to General Prosecutor in 2019 despite protests by civil society. His unlawful behavior and deliberate violations of the Constitution and the European Convention on Human Rights (ECHR) sparked mass protests, which lasted for months, against him and Borissov's government in 2020, ultimately leading to Borissov's demise in 2021. Two ministers of justice, a caretaking one as well as the current one, Nadezhda Yordanova, have demanded Geshev's dismissal as General Prosecutor before the SJC for actions and omissions undermining the prestige of the judiciary, such as law violations which have already incurred condemning judgments by the ECtHR.

The specialized courts themselves have been marred into an array of scandals and became known for disregarding basic principles of criminal law. In many cases, people accused before these courts heard court decisions concerning them on national TV or read them in the media before they were heard in the courtroom. Throughout the years, more and more direct and indirect evidence emerged that the judges in these courts were taking instructions by prosecutors, too. In 2018, for example, the Prosecutor's Office publicly instructed the specialized courts to not cooperate with an administrative inquiry by Bulgaria's Supreme Court of Cassation. The reason for the inquiry was that the second instance of the specialized court had quashed a decision by the first instance before it was even drafted. More recently, the Anti-Corruption Fund, a Bulgarian initiative exposing corruption, has released a series of investigations allegedly showing how some members of these courts act as an organized criminal group with prosecutors – the courts kept people in custody based on obscure charges raised by the specialized prosecution and demanded bribes through intermediaries to release them. Current Minister of Justice Nadezhda Yordanova has also emphasized on numerous occasions that coercive measures seem to be used for political repression. The latter often include pre-trial detention in custody.

While the silhouette of the Frankenstein structure that Borissov's regime was building was visible even in 2011, it was the 2017 reform of the Code of Criminal Procedure that added

the final touches. This reform further undermined the already barely existing principle of equality of arms in criminal proceedings. For instance, it created the concept of an 'eternally accused person', meaning that a person could be investigated and constituted as an accused party in perpetuity without having an indictment, thus being unable to defend themselves in court. This was a severe blow to the right to a fair trial as, in Bulgaria, the Prosecutor's Office has a complete monopoly on the investigative process and none of its decisions apart from those on coercive measures are subjected to judicial oversight. Considering the practices of the specialized courts highlighted above, the objectivity of this limited oversight is questionable. Moreover, through the 2017 reform, the specialized criminal courts acquired the exclusive competence to examine cases concerning persons exercising certain professions (magistrates, politicians, etc. were targets), developing even more features of an extraordinary tribunal.

In view of the above, the CVM reports on Bulgaria appear completely detached from the reality on the ground. In the July 2012 CVM report, shortly after the specialized structures were introduced, the European Commission noted that 'these new structures and reforms are a clear demonstration of Bulgaria's interest to achieve a step-change in the fight against organised crime'. Even though by 2017 the specialized courts were already shaken by numerous scandals, in the November 2017 CVM report the Commission was pleased that they were building a 'coherent track record'. In the 2018 CVM report, after describing the 2017 controversial reform of the Code of Criminal Procedure, the Commission identified 'significant progress' and closed the 'legal framework' benchmark. Overall, what appeared as progress to the Commission was perceived as an assault on the rule of law by those following the solidification of Borissov's autocracy.

The End of an Experiment with a Flawed Hypothesis

The closure of the Specialized Criminal Court and the Specialized Prosecutor's Office puts an end to an experiment with a flawed hypothesis. Somebody in Brussels had the naïve and irresponsible idea that setting up specialized structures, without consideration for well-known unresolved structural problems in the justice system and the specifics of the local legal culture, was the philosopher's stone of transforming countries torn by corruption into states governed by the rule of law. Not only was there no evidence that this proposed solution would work, but to those knowing Bulgaria well it was obvious how these specialized institutions would become one more special tool for harassment by the omnipotent Prosecutor's Office. Throughout the years, the Commission refused to acknowledge its mistakes and listen to critics. The more Bulgaria's rule of law was undermined, the more progress the Commission saw leading to its absurd conclusion in the 2019 CVM report that Bulgaria had fulfilled its commitments at the time of accession. What is even more worrisome is that when confronted by members of the LIBE Committee at the European Parliament after the rise of mass protests against Borissov in 2020, Commissioner Vera

Jourova said that the Commission would not reconsider its conclusions in the CVM.

After a long, painful journey and a political crisis following a spiral of three parliamentary elections in 2021, Bulgaria finally has a new coalition government which seems committed to restoring the rule of law. The good news is that it is expected that many assaults against the rule of law, which the Commission saw as progress in the CVM, will be reversed. The bad news is that Bulgaria's case of 15 years of failed CVM and irresponsible experiments with the justice system encouraged by the Commission show that the Guardian of the Treaties either lacks the capacity or the willingness for sober judgment, which is essential for monitoring the rule of law not only in Bulgaria but in other EU member states. Now that Bulgaria and Romania are not the only ones under the radar of monitoring after the rise of the Rule of Law report mechanism, this issue is even more serious.

References

↑1 see Y. Kuzmova, 'The Bulgarian Specialized Criminal Court after One Year: A Misplaced Transplant, an Instrument of Justice, or a Tool of Executive Power?' (2014) 32 *Boston U. Int'l L. J.* 228, 243.

↑2 see Y. Kuzmova, above, p. 248.

References

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