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OPINION

ON CONSTITUTIONAL ASPECTS OF CERTAIN AMENDMENTS TO THE CODE OF PENAL PROCEDURE OF BULGARIA

based on comments by

Mr James HAMILTON (Member, Ireland)
Mr Franz MATSCHER (Member, Austria)

Adopted by the Commission at its 42nd Plenary Meeting
In Venice (31 March-1 April 2000)

A. INTRODUCTION

1. The Bulgarian delegation to the Parliamentary Assembly of the Council of Europe requested the Venice Commission to give an opinion on constitutional aspects concerning certain amendments to the Code of Penal Procedure of Bulgaria, which were subject of disagreement between the members of the delegation. The Commission appointed Messrs. Hamilton and Matscher as rapporteurs who prepared written comments (CDL (2000) 13 and 18).

2. The Code of Penal Procedure was promulgated in the State Gazette, No. 89 of 1974, and the amendments in question are contained in the Law amending the Code of Penal Procedure promulgated in the State Gazette No. 70 of 6 August 1999. The amending Law is a substantial document containing 255 sections. The Code of Penal Procedure itself runs to some 466 articles many of which have been amended by the 1999 amending law (copies can be obtained from the Secretariat upon request). The Venice Commission therefore sought clarification from the Bulgarian delegation as to the precise constitutional issue which arises and which is in dispute. It was made clear that the Commission could not examine the Code as a whole.

   The Delegation informed the Commission that the issue, which was in dispute, was whether the amending law infringed upon the independence of the judiciary by giving to the police powers to investigate a large part of criminal cases. Subsequently, Ms. Milenkova clarified that there were three objections to the amendments (CDL (2000) 12):

   (1) that an inequality was created between citizens in the stage before the intervention of the Court in various penal cases
   (2) that investigation during the period of police instruction is carried out by the executive who has an interest in the result
   (3) that the rights of the suspect are limited in comparison to those of the accused

B. THE AMENDMENTS TO THE LAW

3. Under the Code of Penal Procedure in operation prior to the amendments the procedure regarding investigations was as follows:

   (i) Preliminary investigation was to be carried out by examining magistrates and assistant examining magistrates, in co-operation with the respective bodies of the Ministry of Interior (Article 48 (1)).
   (ii) These enquiries were “under the guidance and supervision of the prosecutor” (Article 48 (3)).

(iii) In exercising guidance and supervision the prosecutor had extensive powers, including power to give instructions, to request, study and verify all materials collected, to demand the case file, to take part in the preliminary inquiry, to remove the persons conducting the inquiry, to transfer the case file to another body of inquiry, and to revoke unlawful and unjustified decisions (Article 176). His instructions to the magistrate were mandatory (Article 178), subject to an appeal to the superior prosecutor.

(iv) Separate investigations could also be carried out by the prosecutor after completion of proceedings by the examining magistrate (Articles 48 (2) and 177).

(v) In Bulgaria the prosecutors are an integral part of the judicial branch of government (Article 117 of the Constitution of Bulgaria).

4. The Amendments to the Code of Penal Procedure include the following changes:

(i) In cases where preliminary proceedings are to be carried out, the examining magistrates continue to act as the investigating bodies (Article 48 (1)), and remain under the guidance and supervision of the prosecutor (Article 48 (3)). The prosecutor's powers over the activities of the examining magistrate are undiminished (Articles 176 and 178).

(ii) The prosecutor may now conduct a separate enquiry at the preliminary proceedings, not merely after their completion (Article 177).

(iii) The cases in which preliminary proceedings are mandatory are set out in Article 171 of the Code.

(iv) In addition, preliminary proceedings shall be instituted where there is a legal occasion and sufficient information about a perpetrated crime. "Legal occasion" include information to the prosecutor or examining magistrate about a crime, press articles, the making a confession or direct discovery of signs. Anonymous complaints are not admissible (Articles 186, 187 and 188).

(v) Preliminary proceedings may also be instituted where it is necessary to carry out urgent investigative actions. (Article 186(2)).

(vi) Under the amended Code, where no preliminary proceedings are carried out, the investigating bodies are to be the inquest officers in the Ministry of Interior (Article 48 (1)). Inquest officers are employees of the Ministry of Interior designated by order of the Minister and, for crimes under Articles 242 and 251 of the Penal Code, may be the customs employees designated by common order of the Minister of the Interior and the Minister of Finance.

(vii) Under Article 48 (3), the investigating bodies continue to be under the guidance and supervision of the prosecutor.

(viii) Notwithstanding their appointment by the Minister and their status as his employees, Article 9 of the amended Code provides that the investigating bodies "shall be independent in implementing their functions and shall obey only the law".

(ix) Article 191 deals with the situation where there are no sufficient data for institution of preliminary proceedings and no urgent investigative actions are necessary. In such cases

> "the examining magistrates, the respective bodies of the Ministry of Interior and other administrative bodies, as provided by law, shall conduct preliminary inspection and shall notify the prosecutor thereof. Preliminary inspection may be carried out as well by order of the prosecutor. In all cases the respective bodies shall perform the inspection under the supervision and guidance of the prosecutor and they shall be obliged to notify him of its results within a time limit set by him."
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> Furthermore:
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> "In the course of preliminary inspection no investigative actions, provided in the Code, shall be allowed, except inspection on the site of the incident and the relevant search and appropriation and interrogation of eye-witnesses, where the immediate conduct of such actions is the only way to collect and preserve evidence. The examining magistrate shall notify forthwith the prosecutor about any such actions."

(x) The respective bodies of the Ministry of the Interior are conferred with functions where preliminary proceedings against unknown perpetrators are instituted. The prosecutor or examining magistrate is to assign to them the search for the perpetrator (Article 192a). They are to deliver the materials collected to the magistrate where they consider they have collected sufficient data incriminating a certain person.

(xi) The examining magistrate, under Article 201, independently decides what investigative actions must be carried out. He may require the bodies of the Ministry of Interior to assist him in carrying out separate investigative actions (Article 201a).

C. CONLUSIONS

The following conclusions refer to the issues of the independence of the judiciary, the compatibility with the European Convention of Human Rights and equality but do not provide an opinion on the compatibility of the amendments with the Constitution in general.

1. The independence of the judiciary

5. The complaint made by certain members of the Bulgarian Delegation to the Parliamentary Assembly of the Council of Europe is that the amendment to the

Code of Penal Procedure infringes upon the independence of the judiciary by giving to the police powers to investigate a large part of criminal cases.

6. Even if, following the concept of Bulgarian law, both the public prosecutor and the examining magistrate are part of the judiciary, the question raised seems to be misleading. While it is true that the amendments provide that for a considerable number of cases the investigation should be carried out by the police rather than by the judiciary, this may have an impact on the competencies of the judiciary regarding the investigation of crimes but this does not infringe upon the independence of the latter. The question of the independence of a body can be at stake only regarding matters, which, in accordance with the law, are within its competence and further, if there are possibilities of interference by other authorities.

7. It is, therefore, difficult to conclude that the text of the proposed amendments provides a factual basis for the complaint. In the first instance, as can be seen from the analysis of the new provisions in paragraph 4 above, the transfer of investigative functions relates solely to the cases in which preliminary proceedings are not to be carried out; that is to say, to less serious cases or to cases in which a perpetrator has not yet been identified, as well as to cases in which the examining magistrate requests assistance. Secondly, the powers of the relevant bodies are in all cases to be exercised under the supervision and guidance of the prosecutor who has the status of a judicial officer.

8. Moreover, it should be noted that there is no legal principle according to which preliminary investigative functions must be carried out by or subject to the control of a prosecutor or judicial officer. Neither the rule of law nor the European Convention of Human Rights provide for a certain distribution of competencies among the different bodies, which are investigating crimes. Hence, this distribution of competencies is a question of legal policy left to the discretion of the states. A comparative review of legislation in this field shows that states indeed follow various approaches. In many countries the function of investigating crime is considered as an executive act.

9. In the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations congress on the Prevention of Crime and the Treatment of Offenders adopted at Havana, Cuba, in 1990 (“the Havana Guidelines”) it is provided as follows

> “10. The office of prosecutors shall be strictly separated from judicial functions.
> 11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, *where authorised by law or consistent with local practice*, in the investigation of crime, supervision over the legality of these investigations, supervision

> of the execution of court decisions and the exercise of other functions as representatives of the public interest."
> (emphasis added).

The Prosecution Standards of the International Association of Prosecutors adopted on 23 April 1999 also make reference to this variety in practice between jurisdictions. The preamble contains the following recital:

> "WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another"
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> In paragraph 4 it is stated as follows:
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> "prosecutors shall perform an active role in criminal proceedings as follows:
> (a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally."

10. There are two possible abuses, which should be avoided in relation to investigatory powers. The first is that the powers will be used to prevent the institution of investigations, which ought to be carried out; the second is that the powers will be used to carry out investigations for the purpose of harassment or intimidation where there is no justification for an investigation. Under Article 192 of the revised Bulgarian Code of Penal Procedure the prosecutor and examining magistrate retain the power to institute preliminary proceedings. The bodies of the Ministry of Interior have no power to prevent them doing so. Where those bodies carry out investigation outside the scope of preliminary proceedings they do so under the supervision and guidance of the prosecutor (Articles 48 (3) and 191). The text of the code, therefore, contains guarantees against such abuses, which could not take place solely on the initiative of the investigating bodies designated by the Ministry of Interior.

11. It can, therefore, be concluded that the amendments to the Code of Penal Procedure of Bulgaria, which give powers to investigate crimes to officers of the Ministry of Interior do not infringe upon the independence of the judiciary.

2. Compatibility with the European Convention of Human Rights

12. Whatever investigative system is applied, from the viewpoint if the European Convention of Human Rights, it is important that the rights of the accused person are guaranteed.

13. According to the case-law of the European Court of Human Rights, a criminal accusation within the meaning of Article 6 of the Convention starts at the very moment when the first investigative steps are undertaken and the investigating authorities for the first time contact the "accused". This is the moment, which triggers the applicability of the procedural guarantees of Article 6 of the Convention (and of Article 5 for persons, who have been arrested).

14. When examined in the light of these guarantees, the amendments to the Code of Penal Procedure of Bulgaria do not seem to be incompatible with the Convention.

3. Equality

15. Concerning the issue of equality, this principle requires equality between persons, that is, that two persons similarly placed should not be differently treated. It does not, however, prevent different procedures being applied to different types of cases. The adoption of procedures relating to the investigation of certain categories of crime, which differ from those applied in the case of other categories is not an infringement of the principle of equality. Nor is it an infringement of the principle of equality that the options open to an accused person are different at different stages of the penal procedure provided that the rights of the accused person are guaranteed.