How an EU Directive on Access to a Lawyer Became a Weapon for Secret Arrests

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Directive 2013/48/EU of 22 October 2013 'on the right of access to a lawyer in criminal proceedings' had an unfortunate fate in Bulgaria. Not only has the country been persistently violating its provisions since its entry into force, but it also made efforts to transpose it only in 2018, two years after the deadline. The transposition, however, is troublesome because the government used the Directive as a pretext to revive a totalitarian practice – secret arrests. Bulgaria's Prosecutor's Office can now detain adults in secret for 48 hours and children for 24 hours. Bulgaria has been systemically breaching the Directive for 6 years without any consequences: the European Commission's bureaucracy has become a fig leaf for human rights abuses.

Goals of Directive 2013/48/EU

While the Directive 2013/48/EU has a broad scope, in this paper I focus on two procedural rights which it is supposed to enhance. Its Article 3 enumerates the circumstances in which a lawyer should be present in criminal proceedings. Article 5 enshrines the right to inform a third party of one's arrest without undue delay. Article 12 requires Member States to provide effective remedies for breaches of rights granted by the Directive. These procedural rights are intimately linked to the right to a fair trial and the right to defense – Articles 47 and 48(2) of the EU Charter of Fundamental Rights.

Deliberate Breaches

Bulgaria's deliberate breaches of the right to a lawyer and the right to inform a third party of one's arrest are visible in reports by international organizations and media coverage.

According to the latest report on Bulgaria by the United Nations Committee against Torture from December 2017, 'more than 70 percent of detained persons do not have access to a lawyer from the very outset of criminal proceedings...some do not have legal representation throughout the criminal proceedings against them'. The Committee is concerned that meetings with a lawyer take place in the presence of a police officer and that public defenders on call selected from the national legal aid registry are not independent from the police.

The latest report by the Committee for the Prevention of Torture of the Council of Europe of May 2018 on Bulgaria, notes 'the absence of any real progress' in the application of the right to notify one's detention to a third party, the right of access to a lawyer, and the right to be informed of one's rights.

In Bulgaria, people could be detained without legal grounds, especially if they are government opponents. In 2018, investigative journalists Dimitar Stoyanov and Attila Biro learned that documents evidencing misuse of EU funds were being burned in the countryside. After informing the competent authorities, they went on site to cover the story. However, they were arrested by the police although they showed their press cards. They were kept in custody, without being able to contact a lawyer or inform close ones of their detention. The incident drew the attention of the Council of Europe and the Bulgarian court subsequently established that the arrest was illegal.

Bulgaria's Prosecutor's Office relies on detention to influence trials. Under Article 64(2) of the Code of Criminal Procedure, the Prosecutor's Office can order 72-hour arrests which are not subject to judicial oversight – a violation of the ECHR as established in *Zvezdev v Bulgaria*. The Prosecutor's Office often uses

this prerogative to attempt to force people to make statements which can be used against them or to make false testimonies. In the well-known Ivancheva and Petrova case, Petrova was told that she would become 'a corpse' if she did not testify against Ivancheva. It should be noted that there is no legislation which forbids the admissibility of evidence procured through torture/ill-treatment.

Finally, authorities may appoint public defenders to comply with the requirement for access to a lawyer only on the surface. It is not uncommon for public defenders to violate attorney-client privilege and/or synchronize the defense of accused people with the prosecution, which, essentially, deprives the notion of defense in criminal proceedings of its purpose. In the Ivancheva and Petrova case, the backup public defender of Petrova who was appointed by the Prosecutor's Office complained to the same Prosecutor's Office that she was not invited to observe investigation activities unlike the defenders authorized by Petrova herself. The backup defender said she 'represent[ed] the Prosecutor's Office' in the proceedings and in light of the long process of proof of guilt, which was on the horizon, 'weaknesses could not be tolerated', thus implying she worked to protect the prosecution's interests.

Another Frankenstein

Bulgaria took measures to transpose Directive 2013/48/EU only after the European Commission published a reasoned opinion pursuant to Article 258 TFEU in January 2018. Under the guise of transposing the Directive, the country increased the already excessive repressive arsenal of Bulgaria's Prosecutor's Office.

Bulgaria transposed Article 3 on the right to a lawyer only partially even though there are no provisions in national legislation which ensure the same effect as the entire article. For instance, Bulgarian law does not explicitly enshrine the right to a lawyer for suspects. Moreover, Bulgaria transformed Article 5(3)(a) and 5(3)(b) which allow temporary derogations from the right to inform a third party of detention into a rule on secret arrests which can be applied arbitrarily, considering Bulgaria's longstanding problems.

Legislators patched this exception to the infamous Article 64(2) of the Code of Criminal Procedure discussed above: the person could be detained for three days before taken to court to determine if a mandatory measure is necessary and for the first 48 hours their close ones will not know of the detention.

The initial proposal for the new Article 63(9) of Bulgaria's Code of Criminal Procedure stipulated:

> *Where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or to prevent a situation in which criminal proceedings could be jeopardized, jeopardy to criminal proceedings, [informing a third party of the deprivation of liberty] could be delayed by 48 hours.*

The initial proposal for the new Article 386(5), which concerns the arrests of children, resonated the same idea, but delayed informing third parties by 24 hours. Regarding both adults and children, the decision is taken by Bulgaria's Prosecutor's Office pursuant to the new Article 63(10) of the Code of Criminal Procedure.

The initial proposal for law amendments completely ignored the strict requirements on derogations imposed by Article 8 of the Directive. After public uproar, the following sentence was added to the final versions of Article 63(9) and Article 386(5):

> *Suspension of [notification of a third party] shall be applied in the particular circumstances of each case and shall not go beyond what is necessary and is not based solely on the nature or gravity of the crime committed.*

A Question of Context

Those familiar with the Bulgarian context immediately see how the above provisions are problematic despite the last-minute addition, which *a priori* does not cover all restrictions on derogations stipulated in Article 8 of Directive 2013/48/EU.

Bulgaria's Prosecutor's Office has a vertical structure, also known as a Soviet model, which does not

have proper checks and balances. All decisions depend on the General Prosecutor who acts with impunity. The dysfunctionality of this institution may explain why Bulgaria has already been found to be in 291 violations of Article 6 (right to a fair trial) and 270 violations of Article 5 (right to liberty) by the ECtHR. Bulgaria stubbornly refuses to ensure checks and balances in the prosecution even though it is required to do so under *Kolevi v Bulgaria*, which was rendered in 2009, and it is reminded of these obligations twice per year by the Council of Europe. In light of bogus criminal proceedings which the prosecution has initiated in the past and its record of human rights abuses, these new powers can easily be misused. This secrecy entails opportunities for psychological pressure (at best) and prevents third parties from helping to find an appropriate lawyer.

Finally, it is important to note that Bulgaria has failed to transpose Article 12 of Directive 2013/48/EU, which requires Member States to provide effective remedies for breaches of rights granted by the Directive. Under Bulgarian law, which was amended in 2017 as part of a major crackdown on human rights (Article 248(3) of the Code of Criminal Procedure), one can currently contest procedural violations before the court only when there is an indictment in court and only at the first pre-hearing following indictment. Moreover, Bulgarian law allows the prosecution to constitute someone as an accused party but postpone indictment indefinitely (Chapter 26 of the Code of Criminal Procedure). Hence, accused people have no effective remedies for breaches of rights granted by Directive 2013/48/EU or the fundamental rights enshrined in Articles 47 and 48 of the EU Charter.

The EU's Inertia

Bulgaria has breached Directive 2013/48/EU in at least three ways – late transposition, violating its provisions, and incorrect/partial transposition. The Commission's laid-back approach regarding these developments, which surely provide further evidence of the assault on the rule of law and human rights in the country, is worrisome.

The Commission published a reasoned opinion with which it invited Bulgaria to inform it about how it has transposed the Directive only in January 2018, 14 months after the deadline for transposition.

After Bulgaria's government put forward the Bill on secret arrests, which allegedly purported to transpose the Directive, there was a wave of criticism by civil society. Bulgaria's President attempted to veto the Bill to no avail. While one may understand why the Commission did not address the debate in Bulgaria in a public statement, its reaction to a formal infringement claim I submitted after the Bill passed the first reading in Parliament in 2018 truly puzzled me. In the complaint, I provided evidence of the breaches of the Directive since its entry into force as well as the incorrect transposition. The Commission informed me it intended to close the file because the arguments I had raised fell within the scope of compliance assessment it planned to carry out within the next 12 months. Almost a year later, the Commission does not seem to have taken further action to force Bulgaria to comply with its obligations.

The Commission's relentless patience shows through in other cases of violations of Directives concerning fundamental rights. Bulgaria still has not transposed Directive 2016/343 on the presumption of innocence although it was required to do so by April 2018. In an infringement claim I submitted in May 2018, I highlighted how Bulgaria had deliberately violated the provisions of this Directive since its entry into force. I still have not received a response to my complaint. The Commission has not published a reasoned opinion on this matter either.

When the EU's Patience is Not a Virtue

Bulgaria's disrespect for EU Directives concerning fundamental rights adds one more shade to the grim picture of the state of its rule of law. Instead of reforming its Prosecutor's Office, Bulgaria increased its already excessive powers through perverse creativity – limiting fundamental rights by pretending to comply with CVM recommendations, complying with ECtHR case law only on the surface, etc. Using an EU Directive supposed to enhance fundamental rights to revive a

totalitarian practice takes the assault on human rights to a new orbit of legislative hooliganism.

The Commission's inertia has contributed to many of these problems. In prior articles, I have raised concern about the Commission's lenience *vis-à-vis* CVM recommendations. In this article, I hope to have illustrated why it is problematic when the Commission relies on its usual assessment delays when it comes to Directives concerning fundamental rights. One can reasonably predict that suspects and accused people will continue to be deprived of their right to a lawyer while the Prosecutor's Office has added one more tool for harassment to its arsenal, which can be misused against inconvenient government opponents and their children – secret arrests.

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