Implementation of the Pan-European General Principles of Good Administration in Bulgaria? It would be a really good idea

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I. Country Background and Relationship with the CoE

19.01 Bulgaria joined the CoE in May 1992. This was part and parcel of the process of democratization of the country and the first step on its 'road to Europe' taken after the Soviet bloc collapsed. Having adopted a new Constitution of the Republic of Bulgaria (*Конституция на Република България*) in 1991[1] the country was struggling to establish the rule of law, protect fundamental rights and build administration that could work effectively and efficiently in the entirely new political and economic environment. Thus, accession to the CoE as well as to the ECHR and submission to the ECtHR was part of a 'wholesale package'[2] and enjoyed the support of all major political parties and public opinion. Throughout the 1990s successive governments strived to democratise and Europeanise public administration and their efforts were amply supported – with knowledge and money – by the CoE, the EU and a number of their Member States. The CoE was considered the first (and the easiest) step and was to be followed by accession to the EU (application 1995, accession 2007), and, not so un-controversially, NATO (application 1997, accession 2004).

1. Status of International Law

19.02 Bulgaria, today, is a monist country.[3] According to Article 5 (4) of the Constitution of 1991:

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1 On the 1991 Constitution see E. Tanchev/M. Belov, "Republic of Bulgaria" in L. F. M. Besselink/P. Bovend'Ert/H. Broeksteeg/R. de Lange/W. Voermans (eds.), *Constitutional Law of the EU Member States* (2014), pp. 121 – 190; on the subsequent amendments see V. Paskalev, "Bulgarian Constitutionalism: Challenges, Reform, Resistance and ... Frustration", (2016) 22 *EPL*, pp. 203 – 223; E. Tanchev/M. Belov, "The Bulgarian Constitutional Order, Supranational Constitutionalism and European Governance" in A. Albi/S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019), pp. 1097 – 1138.

2 As Timothy Garton Ash noted, the countries from the Eastern bloc did not attempt to find their own model of governance but were happy to copy the one established in the West: T.G. Ash, *The Uses of Adversity* (1999).

3 This was not the case under previous constitutions, although upon the ratification of the Vienna Convention on the Law of Treaties Bulgaria confirmed its adherence to the principle of monism, see KS Decision No. 8/1992.

> "International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation".

Thus, CoE conventions which are signed and ratified by Bulgaria enjoy what can be called 'infraconstitutional' status.[4] One important consequence of the higher status of international conventions is that the *lex posteriori* rule does not apply, and subsequent legislation cannot supersede the conventions.

19.03 However, the constitutional priority of international conventions over conflicting legislation may be more apparent than real as ordinary courts cannot review and annul legislation. As in most continental countries, if a statute appears to contradict the Constitution the matter is to be decided by the Constitutional Court (*Конституционен Съд – KS*), which alone can set aside acts of Parliament or parts thereof. The KS may also review legislation for compliance with the generally accepted norms of international law and with the treaties to which Bulgaria is a party (Article 149 (4) of the Constitution). Nevertheless, access to constitutional review is quite limited. Only the top courts – the Supreme Court of Cassation (*Върховен Касационен Съд – VKS*) and the Supreme Administrative Court (*Върховен Административен Съд – VAS*) – are empowered to make references to pending cases.[5]

19.04 Thus, the ordinary courts can neither review legislation themselves, nor can they refer the issue to the KS, which is the only forum for constitutional review. Yet, when ordinary courts come across legislation that conflicts with an international treaty, they are in position to choose which of these to apply. As the Constitution states that international treaties are a part of the domestic law which has priority the ordinary courts should apply the treaties to the case at their docket even though they do not have the power to make a general pronouncement about the law

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[4] They cannot override the Constitution. If the government wishes to sign a treaty which contradicts the Constitution the latter needs to be amended beforehand (Article 85 (4) of the Constitution). See generally, B. Vidin (Б. Видин), "Съотношение на вътрешно и международно право съгласно българското законодателство (Relationship between domestic and international law in Bulgarian law)", (2015) *Годишник на Нов Български Университет, Департамент Право* (Yearbook of New Bulgarian University, Law Department), pp. 9 – 17.

[5] The other institutions which can initiate proceedings in the KS – i.e. abstract constitutionality review – are the President of the Republic, the Council of Ministers, the Prosecutor in Chief, the Ombudsman and one fifth of the members of Parliament. Since 2015 the Supreme Bar Council has also been empowered to initiate proceedings for the protection of citizens' rights and freedoms (cf. Article 150 of the Constitution). Pursuant to Article 15 of the Judiciary Act the ordinary courts must notify the VKS or VAS respectively but it is unclear how this would affect the pending cases.

that they have disapplied.[6] For administrative cases this is explicitly stated in Article 5 (2) of the Administrative Procedure Code (*Административно-процесуален кодекс - АПК*) and obliges not only the courts but also the administration.[7] Nevertheless, it may be difficult to do this in practice as the provisions of international law instruments are usually quite general while the domestic statutes which may go against them are likely to be much more specific. This allows the courts to explain the contradiction away and apply the statutes.[8] Therefore, examples of courts applying CoE conventions other than the ECHR are rare.[9] In the same vein, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of the UN Economic Commission for Europe, exemplifies the difficulties of the reception of any international treaties into domestic law.[10]

2. In the Shadow of EU Accession

19.05 With CoE membership secured early on, in the late 1990s a general consensus was formed that accession to the EU was the top national priority. Bulgaria was lagging behind in terms of both 'Europeanisation' – most other Central and Eastern European countries already had 'accession country' status when it became merely a 'candidate' – and its 'transition' to a market

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6 This view is also supported by R. Tashev (Р. Ташев), *Обща Теория На Правото* (General Theory of Law) (4th edition 2010), p. 94. It also seems to be supported by E. Drumeva (Е. Друмева), *Конституционно Право* (Constitutional Law) (3rd edition 2008), p. 43. However, neither of these authors offers any evidence from the actual judicial practice. Amongst the rare examples are provided by VAS. In almost identical Decisions No 11100/2011, No 4234/2012, No 490/2012 the court stated that Protocol 4 to ECHR has precedence over domestic law and relied on it to limit the scope of an overbroad provision of the Foreigners Act (Art 43 (1) 2, repealed in 2013).

7 See K. Penchev/I. Todorov/G. Angelov/B. Yordanov (К. Пенчев/И. Тодоров/Г. Ангелов/Б. Йорданов), *Администретивнопроцесуален Кодекс - Коментар* (Commentary of the АКР) (2006), pp. 26 et seq.

8 An example of this is provided by the KS in KS Decision No. 3/2014: when confronted with an apparent violation of Article 56 TFEU by a provision in the Waste Management Act the KS stated that the latter must be interpreted in conformity with the former and held that there was no violation at all, notwithstanding the clarity of the text of the offending provision to the contrary.

9 The Varna District Court relied, *inter alia*, on the Civil Law Convention on Corruption (ETS No. 174) to confirm the acquittal of a whistle-blower: Varna District Court Decision No. 122 of 4 May 2012.

10 In a nutshell, the Aarhus convention provides that environmental organisations should have a broad right to appeal administrative acts that may concern the environment. On the other hand, the Spatial Development Act (*Закон за Устройство на Територията*) provides that zoning regulations and construction permits can be appealed only by those immediately concerned, e.g., neighbours. When NGOs try to appeal the latter the cases are routinely dismissed on the ground that the zoning and construction acts are not environmental, and the requirements of the convention are satisfied by the statutory opportunity for NGOs to appeal against the environmental impact assessments which precede these acts. This interpretation of the Convention has been dismissed by the Aarhus Convention Compliance Committee (Findings and Recommendations on Communications No. ACCC/C/2011/58 and No. ACCC/C/2012/76*)* but the courts remain unperturbed (e.g., VAS Order No 13757/2017; VAS Order No. 5257/2017; VAS Order No 1517/2015; VAS Order No 990/2015; VAS Order No 13002/2012).

economy, so the administration invested immense efforts in catching up.[11] This involved reinvigorated efforts to build administrative capacity, following what appeared to be the best European models, and introducing the *acquis communautaire* into the national law. In this hectic process most of the existing body of law was Europeanised (even the post-1989 acts were replaced or overhauled once again) with little reflection or public debate. The administration proved to be very efficient at copy-pasting EU legislation and 'so asks Brussels' was the trump card for winning any debate and getting any decision quickly adopted.[12] For its part, the European Commission skilfully used the conditionality of membership[13] to press for a number of reforms, and its *Regular Reports on Bulgaria's Progress towards Accession* became the common yardstick for successful governance.

19.06 Due to the strong association of the EU with the CoE and especially with the ECHR (cf. MN. 0.07 et seq.) relationships with the CoE weathered well in the shadow of the EU.[14] While technically neither the CoE conventions nor the principles of good administration are part of the *acquis*, these were considered part of the 'political criteria' for membership of the Union[15] and benefited from this attitude too. The opinions of the Venice Commission for Justice through Law were judiciously followed. The trouble with this fast-track implementation of 'things European' was that in many instances they remained a dead letter of the law, while administrative practice remained unchanged. For example, notwithstanding the Protection from Discrimination Act (*Закон за защита от дисриминацията*), which is fully compliant with the best EU and CoE requirements, minorities are discriminated against at all levels of administration; in the same vein detainees are routinely subject to violence, etc.

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11 As Smilov notes, this was 'a complex copying exercise' where the primary sources were from Western Europe but an equally important stimulus came from peer examples, see D. M. Smilov, "Constitutionalism of Shallow Foundations The Case of Bulgaria" in D. J. Galligan/M. Versteeg (eds.), *Social and political foundations of constitutions* (2015), pp. 611 – 636.

12 In a grotesque example witnessed by the present author while working as expert advisor in the Parliament, when confronted with some inaccuracies in the draft of an amendment to the Constitution, a senior member of the government replied, "it does not matter, in English it makes more sense".

13 K. E. Smith, "The Evolution and Application of EU Membership Conditionality" in M. Cremona (ed.), *The Enlargement of the European Union* (2003), pp. 105 – 140.

14 This is evidenced by the numerous references to the CoE and commitments that in the process of harmonization of Bulgarian law certain conventions and recommendations would be introduced. See for example the Supplementary Information to Negotiation Position on Chapter 24 "Cooperation in the Fields of Justice in Home Affairs" provided by the Bulgaria to the Conference on Accession to the EU on 29 October 2002 (ConF-BG 55/02).

15 European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency SN 180/1/93 REV 1.

With accession to the EU in 2007 the effect of the conditionality of membership waned. Within a few years the regular reports of the European Commission ceased to be the accepted yardstick for success of reforms and now their appearance is barely taken notice of in the media.[16] The earlier commitments to reforms – of the judiciary or to fight corruption - have been politely ignored by recent governments. With a number of successive crises in the EU, and its tense relationships with Poland and Hungary (cf. MN. 2.23 et seq.), the European Commission itself does not show much of an appetite to press for reforms in Bulgaria either. There are a number of signs of a decline in democracy and deterioration of the rule of law in the country,[17] which seem to be part of a regional[18] or even global trend.[19] In the circumstances of a growing negligence of commitments to and the relationship with the EU, the CoE is even more marginalized. Just as it benefited from the shadow of the EU in the earlier period, in the changed circumstances CoE law is neglected even more than the EU.

19.08 In the context of the democratic backlash in Bulgaria, and hybrid wars against 'Europe', one CoE Convention – the CoE Convention on preventing and combating violence against women and domestic violence ('Istanbul Convention', cf. MN. 1.56)[20] – was recently taken as a proxy in orchestrated attacks against the 'gender ideology' allegedly being peddled by 'Europe'. While the present author is yet to see a criticism which does not show gross ignorance of the actual content of this Convention,[21] the campaign succeeded in persuading a large segment of the public, and both the main opposition party (Bulgarian Socialist Party) and the junior partner in the governing coalition (the Patriotic Front), and forced the prime minister to withdraw the ratification proposal.

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16 While the progress towards accession reports series were discontinued, Bulgaria and Romania were uniquely subject to post-accession monitoring of their judiciary reform which continues to this day. Smilov pertinently explains the decline of constitutionalism in Bulgaria in terms of the shallowness of its foundations in society, see Smilov (fn. 11).

17 In 2019 Bulgaria dropped to number 54 in the *Rule of Law Index of the World Justice Project* (from 45 in 2015). Following the country profile of Bulgaria of the *Nations in Transit Index of Freedom House*, rule of law in Bulgaria peaked in 2008 and has dropped to 2003 levels today.

18 I. Krastev, "Eastern Europe's Illiberal Revolution: The Long Road to Democratic Decline", (2018) 97 *Foreign Affairs*, pp. 49 – 56.

19 R. S. Foa/Y. Mounk, "The Signs of Deconsolidation", (2017) 28 *Journal of Democracy*, pp. 5 – 16.

20 Bulgaria signed this convention in 2016 but has not ratified it yet. On 27 July 2018 the KS ruled that its ratification would be against the Constitution (KS Decision No. 3/2018).

21 For a critical review of the KS Decision see A. Pamporov (А. Пампоров), "The consensual cuckolding of the Constitutional Court (Те ти булка Конституционен съд)", *Mediapool*, of 2 August 2018 (https://www.mediapool.bg/te-ti-bulka-konstitutsionen-sad-news282237.html).

Thus, although all of the major parties are mostly pro-European and the nation remains amongst the most pro-European in the EU, at present there is essentially no driver of any pro-European reforms. The only promoters of Europeanisation, human rights or the principles of good administration come from the not too strong civic sector,[22] which itself is often under attack – not only from the government but also from the opposition and mainstream media.[23]

3. Anti-Corruption and Judiciary Reform

19.10 Notwithstanding the above, there are three interrelated 'European' issues that remain on the agenda. These are the fight against corruption, reform of the judiciary and entry into the Schengen system. If democratisation and building a market economy were the focus of all reforms in the 1990s, the first decade of the new century was dominated by (the narrative of) the fight against corruption, organised crime and judiciary reform. In 2007 Bulgaria was admitted to the EU with acknowledgement of its limited success on this front and with a commitment to redoubling its efforts in the future. As the European Commission was aware that it would lose the carrots provided by the conditionality of membership it tried to ensure that it would retain a stick in the form of a Cooperation and Verification Mechanism (CVM) which allows it to monitor the country's progress and issue critical reports on a regular basis.[24]

19.11 This is relevant for the present theme as this remains the dominant narrative for any administrative reforms. The fight against crime and corruption is related to reform of the judiciary in two ways. On one hand, the judiciary is both inefficient and ineffective, thus hampering efforts to investigate corruption or to bring perpetrators to justice. On the other hand, the judiciary – public prosecution and the courts – are themselves corrupt and there are a number of high-profile scandals within them each year.[25] Moreover, all three issues are subtly related to the country's accession to the Schengen System. Although the government insists that Bulgaria has met all the 'technical' criteria for accession to the space with no internal borders actual admission remains elusive because many EU Members remain reluctant to let the EU lose the last

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22 The most prominent example is the Bulgarian Helsinki Committee which has brought many cases to the ECtHR and is branded as a bunch of traitors by papers and people from left and right.

23 Most of the national media is pro-governmental and over the last 10 years Bulgaria has dropped from 35th place in 2006 down to 111th (2019) in the *World Press Freedom Index* by Reporters Without Borders.

24 The last report is from October 2019, see Report from the Commission to the EP and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism {SWD(2019) 392 final}, COM(2019) 498 final. The Commission is now set to discontinue the CVM and to develop a new monitoring mechanism for all Member States.

25 Some of them make their way into the Commission's reports (fn. 24).

carrot it has for a country which still has a long way to go to gain their trust. Indeed, if the EU is to be an area of *freedom, justice and security* an internal border cannot be removed merely because certain technologies for information sharing and border control are introduced; what matters more is the integrity of the law enforcement system of the relevant country.

19.12 Both the 'Schengen carrot' and the 'CVM stick' proved to be too small and after accession to the EU reform efforts stalled. The last sustained efforts at judiciary reform ended in 2015 when a reform bill was watered down and the reform-minded minister of justice Hristo Ivanov handed in his resignation. The current prime minister Boyko Borissov – who has led three governments since 2009 and completely dominates political life – demonstrates quite a cavalier attitude to the fight against corruption and on occasions boasts that the battle has been won and corruption is over. This coexists – somewhat paradoxically – with his government's pose of a no-nonsense stance towards crime. There have been a number of highly publicised (and sometimes televised) arrests of alleged gangsters or corrupt officials accompanied by excessive use of force or humiliation of the suspects. Many of these cases were subsequently dismissed by the courts and quite a few of the alleged perpetrators are now winning cases for abuse in the ECtHR (cf. MN. 19.80).

19.13 This all may seem unrelated to administrative law *sensu stricto* but in view of the author it is important part of the picture because it is so antithetical to good governance. Against this background the discussion of such 'niceties' of the administrative process like access to information or compulsory publication of internal guidelines may be superfluous. Moreover, the principles of good administration, as part of the more general concept of rule of law, are meant to prevent abuses of human rights, and there is one sense of the word corruption which means failure of good administration (cf. MN. 0.24).

19.14 Thus, after decades of Europeanisation, administrative capacity-building and fight against crime and corruption the integrity of the administration, and of the judiciary, is questionable.[26] However, unlike the early 2000s, when the political elite and society as a whole demonstrated political will for change, today the former seems too comfortable with the status quo while the latter may possibly have become accustomed to it. A recent study shows that an increasing

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[26] As opposed to other countries from Central and Eastern Europe, where rule of law is giving way, in Bulgaria there is no apparent attack and takeover of the judiciary by the executive. Instead, the branches remain fairly independent and seem to collaborate in sharing the spoils of the corrupt status quo.

number of Bulgarians are not interested in politics at all and, in the words of Harlan Alexandrov, an anthropologist, have learned to like their life as it is.[27]

II. State of the Research and Awareness of CoE and its law

19.15 It is fair to say that the state of academic research on the CoE and its effect on Bulgarian law, let alone administrative law, is very poor. In conducting research for this project the present author struggled to find *any* publications on the CoE by Bulgarian scholars (with the notable exception of those on the ECHR and the ECtHR). The only specialised journal – *Европейски Правен Преглед* (European Law Review) – has not published a single article on the CoE. A keyword-search on its website does not return any hits. Similarly, *Административно Правосъдие* (Administrative Justice) – the journal published by the VAS since 1998 – contains very few articles relevant to any of the issues addressed in the present article. The major text-books on administrative or constitutional law rarely mention them either, and a voluminous (c. 500-page) monograph on 'Interaction between European and Bulgarian Administrative Law' mentions the CoE – in passing – only once.[28] Obviously, given the CoE's almost complete absence from both academic research and textbooks, knowledge thereof in the legal profession is bound to be severely limited; only those fluent in English and willing to travel quite a few extra miles in their research are able to relate the pan-European principles of good administration to legal practice in the country.

19.16 It is important to acknowledge that the dearth of previous research was a major methodological problem for the present study as well. Paradoxically, awareness of the CoE outside academia may be higher. As will be seen below, there are programmes for vocational training of magistrates and advocates, which could possibly make up for some of the failings of the standard legal education. There may be pockets of expertise on the CoE among civil servants working on the Europeanisation of legislation in various sectors; as will be seen below the explanatory memoranda of many bills introduced in the National Assembly make references to CM recommendations.

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27 H. Alexandrov (Х. Александров), "Масовият българин живурка в охолна бедност и вече се харесва такъв какъвто е (The common Bulgarian makes do in complacent meagreness)", *24 Chasa Daily* of 25 June 2018 (https://www.24chasa.bg/mnenia/article/6928775).

28 R. Baltadjieva/I. Todorov (Р. Балтаджиева/И. Тодоров), *Взаимодействие Между Европейското и Българското Административно Право* (Interaction Between European and Bulgarian Administrative Law) (2008). The ECHR is mentioned 6 times, all in quotations from rulings of the CJEU. There is one reference to Resolution (77) 31 on the Protection of the Individual in Relation to Acts of Administrative Authorities (cf. MN. 1.64) too.

19.17 Notwithstanding this, the CoE is often mistaken for the Council of the EU even in official texts, e.g., court decisions.[29] The frequency of the appearance of the latter makes keyword searches in databases almost impossible and this was the second major methodological problem for the present study.

19.18 The reason for the obscurity of the CoE is, of course, the large and strong shadow of the EU that has already been discussed. However, in the view of the present author there is also another reason, which is the softer regulatory approach of the CoE (cf. MN. 1.07 et seq.). Although its conventions are just as binding as any act of EU law, like all international organisations the CoE lacks an effective enforcement mechanism within the country and this *de facto* softens its law. The relative generality of the obligations created by the CoE conventions – and all international treaties – has a similar effect too. In the tradition of legal formalism that reigns in Bulgaria (cf. MN. 19.82 et seq.) detailed rules written in black letters are guaranteed to prevail over general principles expressed in equivocal phrases.[30] It is then small wonder that any rules whose generality invites discretion will not find a hearty welcome in a legal environment where judges are the mouthpieces of the law.[31]

19.19 The major exception is the ECHR and the case law of the ECtHR. The frequency of judgements ordering compensation to be paid with taxpayers' money to not always popular applicants (e.g., convicted criminals) have quickly made it a household name, and not a very loved one. The hardness of 'sanctions' notwithstanding, the influence of the ECtHR also has some limits and the protection of human rights is yet to grow deep roots in domestic administrative and judicial practice. As will be seen below (cf. MN. 19.48), the ECtHR has ruled against Bulgaria time and again on certain issues – e.g., Roma detainees being beaten, sometimes to death, by the police and the public prosecutor failing to conduct proper investigations – without any serious efforts by successive administrations to change their ways.

19.20 Furthermore, there are two establishments for vocational training of the legal profession. For magistrates – that is judges, public prosecutors and investigators – there is the National Institute of Justice (*Национален институт на правосъдието – NIJ*). Operational since 2004, it is a

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29 See, for example, VKS Decision 225/2015.

30 An excellent illustration of the prevalence of rules over principles is provided by the way the Aarhus Convention falls to the national Spatial Development Act, see in fn. 10.

31 See, for example, K. Lazarov (К. Лазаров), *Обвързана компетентност и оперативна самостоятелност* (Bounded competency and operational independence) (2000), p. 58 (asserting that judges cannot review the *exercise* of administrative discretion, but only the availability and scope of this discretion). It is remarkable that writing in 2000 Lazarov refers back 'for more details' to an article written by himself as far back as 1968!

public body governed by the Judiciary Act (*Закон за съдебната власт*), which governs the structure and functioning of the Bulgarian judicial system. The NIJ succeeded the Magistrates Training Centre, a nongovernmental organization established in 1999 and funded by various European programmes. It provides compulsory legal education for junior magistrates, and continuous education for acting magistrates which is instrumental for their career development. The NIJ's website notes that it is pursuing a project to enhance the capacity of the judiciary system and to improve education in the jurisprudence of the ECtHR.[32] The other project it is working on is within the Good Governance Operational Programme, which aims at modernising public administration and improving the quality, independence and efficiency of the judiciary. Indeed, the various training courses that are provided for in 2018 include some on EU law and a precious few on human rights and the ECHR. It is difficult to see whether the case law of the ECtHR or any other part of CoE law is featured in the non-specialised courses (i.e., civil procedure, criminal procedure) which are also provided by the NIJ. In any event, and *faute de mieux*, the NIJ is supposed to be the main conduit of pan-European principles of law into the Bulgarian judiciary.

19.21 In the same vein, for practitioners there is the Centre for Education of Advocates, set up by the Bar Council as an NGO that organizes courses on various legal subjects, including EU law and the ECHR. At the time of writing there is no specialized course on administrative law.[33]

III. Reception of the Pan-European General Principles of Good Administration Through Ratification of CoE Conventions

19.22 According to Rossen Tashev the prevailing understanding in the Bulgarian legal scholarship is that principles, including legal principles, are to be derived from written sources.[34] Technically, the CoE conventions – as part of domestic law – are sources which are as good as any and they can provide both legal rules (wherever their text is sufficiently specific) and principles guiding the interpretation and application of domestic law.

19.23 As of today Bulgaria has ratified 84 of the CoE conventions; it has signed but not ratified 16 others, and has denounced two. It is unclear why some are signed but not ratified. Beside the aforementioned controversy on the Istanbul Convention (cf. MN. 19.08) the only ratification

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32 See http://humanrights.bg/bg/about/nij.

33 See the course programme (http://advocenter-bg.com/obucheniya/) of the Centre for Education of Advocates "Krastew Tzonchev" (Фондация „Център за обучение на адвокати „Кръстю Цончев").

34 Tashev (fn. 6), p. 211

which raised some debate in the public sphere was the Framework Convention for the Protection of National Minorities[35] (cf. MN. 1.56). Based on the subordinate role of CoE law to EU integration it is plausible to assume that in most cases the conventions that were ratified were somehow related to the integration agenda. Others may have been required by sectoral bodies with regard to their priorities.[36] It is also difficult to identify a pattern from the list of the instruments which are ratified and those which are not, except that most conventions concerning legal cooperation are ratified, and so are those on the protection of animals, the environment or cultural heritage. Most conventions on social issues are not ratified, although the revised European Social Charter (cf. MN. 1.56) is. Bulgaria is not a party to most conventions concerning health, family or nationality (though it is party to the European Convention on Nationality).

19.24 Among the CoE conventions that are of particular interest for administrative law Bulgaria signed (1994) and ratified (1995) the European Charter of Local Self-Government (cf. MN. 1.58) relatively early. However, this has had precious little influence on jurisprudence. A few decisions list it[37] in their motives but the charter does not seem to have been pivotal for any of them.

19.25 Bulgaria also signed the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority in 2012 and ratified it in 2016 (the 4 years' time lag is not unusual). The explanatory memorandum accompanying the ratification bill states that full compatibility of the relevant domestic law with this protocol has been achieved already,[38] so ratification will not entail any need for legislative changes. This phrase – full compatibility (*пълно съответствие*) has been achieved – is quite a common statement accompanying the ratification of a number of other CoE conventions. This memorandum goes on to explain that the right to participate in the affairs of the local administration is implemented

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35 The status of minorities – *de jure* or in practice – does not seem to have changed since.

36 According to the International Treaties Act every minister can take the initiative, although the decision usually rests with the Council of Ministers.

37 VAS Order 7819/2003; VAS Decision 1679/2018; VAS Decision 2584/2011; VAS Decision 6282/2014; VAS Decision 7903/2017; VAS Decision 7950/2015; VAS Decision 8609/2010; VAS Decision 8641/2015; VAS Decision 9098/2015; VAS Decision 9259/2017; AS Sofia Decision from 30 May 2008 on case 2051/2008; Sofia Regional Court Decision from 3 December 2014 on case 9958/2013.

38 The list includes the Constitution, the APK, the Electoral Code, the Local Self-Government and Local Administration Act, the Direct Participation of Citizens in State and Local Administration Act, the Access to Public Information Act, the Public Finances Act, Municipal Debt Act and the Territorial Administration Act.

in practice, and many municipalities have also introduced special ordinances for their territories or rules for participation in particular policies.[39]

19.26 Furthermore, Bulgaria signed (1998) and ratified (2002) the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (cf. MN. 1.60 et seq.). The Additional Protocol thereto, regarding supervisory authorities and transborder data flows, was signed and ratified in 2010. The ratification of the latter provides a neat illustration of how EU integration is still driving the introduction of CoE law: the explanatory memorandum notes that ratification is necessary because the introduction of the Schengen Information System (SIS) requires that Member States have adopted national rules providing a level of data protection at least equal to that resulting from the CoE Convention and CM Recommendation No. R. (87) 15 regulating the use of personal data in the police sector.[40]

19.27 However, Bulgaria neither signed nor ratified the Convention on Access to Official Documents (cf. MN. 1.59) and it is unclear if it will accede to it in the future. The matter is already addressed by the Access to Public Information Act (*Закон за достъпа до обществена информация*) from 2000, which is in conformity with the relevant EU laws. Redundancy by itself does not always prevent ratification. It is common for international instruments to be formally ratified after the relevant domestic legislation is already in conformity.[41]

19.28 Overall, a significant number of the CoE conventions are part of domestic law, perhaps just a little below the average for all CoE Member States. However, it is difficult to track their impact beyond the law books. As the CoE has refrained from harmonizing the core structures of the administrative law of its Member States through conventions (cf. MN. 1.62) the Bulgarian administrative law literature can be 'forgiven' for ignoring them completely.

IV. Reception of the Pan-European General Principles of Good Administration Through the National Legislator

19.29 As elaborated already, the CoE rules and principles that are being introduced into domestic law – even if their sources apply directly via Article 5 (4) of the Constitution (cf. MN. 19.02) –

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[39] The careful reader would not fail to notice how the introduction of a highly generalized right from the Protocol is 'implemented' by the introduction of a hierarchy of ever more specific domestic regulations.

[40] See Communication (COM/2010/0385 final) of 20 July 2010 from the Commission to the European Parliament and the Council "Overview of information management in the area of freedom, security and justice" at [2.1].

[41] Such ratifications may be intended to produce expressive effect, see C. R. Sunstein, "On the Expressive Function of Law", (1996) 144 *University of Pennsylvania Law Review*, pp. 2021 – 2053.

are often implemented through amendments to the existing domestic legislation. It was also argued that in the prevailing formalist legal culture (cf. MN. 19.82 et seq.), notwithstanding the superior legal force of CoE rules and principles, in order to be effective in practice they *must* be implemented in this way (cf. MN. 19.18). Thus, the legislative route is the main way for CoE law, and for the pan-European general principles of good administration, to enter the Bulgarian legal order.

19.30 The legislator's main sources of inspiration are the CM recommendations but also the CoE conventions, as will be seen below. Further to these, on a number of occasions the Parliament has amended the law in response to ECtHR rulings against Bulgaria but this source will be discussed in the next section. It is important to note that as the CM recommendations are not recognised as a source of law – not even an indirect one – they are not included in the existing legal databases ("Apis" and "Ciela"). Half a dozen are published in translation on the website of the Ministry of Justice, the last one from 2010,[42] so the only way for them to be used is through the CoE's own website, in its official languages.

19.31 Notwithstanding their non-binding status, the CM recommendations seem to be invoked fairly often by the relevant state administration when drafting legislative acts. Perhaps this is a habit of mind that has carried over from the period of EU accession talks, when the negotiation 'chapters' were peppered with references to CoE documents and commitments to introduce them in national legislation. Apparently, after a decade of full membership the imprimatur of 'CoE compliance' is still appreciated.

19.32 More interestingly, this practice seems to have spread beyond the administration – CoE recommendations are occasionally referenced in the debates in the Supreme Judicial Council (*Висш Съдебен Съвет – VSS*), for example, to support claims that a proposal will strengthen the integrity of the judiciary. Candidates for top posts also occasionally make such references to show knowledgeability and that they are on the side of the 'righteous'.[43] The VSS for its part occasionally uses the documents of the CM and the Venice Commission instrumentally, e. g., to challenge its budget allocation.

19.33 Thus, the explanatory memoranda of most draft administrative laws that are introduced in the Parliament contain at least a passing reference that the bill is compatible either with "the

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42 http://www.justice.government.bg/56/.

43 See for example VSS, Stenographic protocol from 29 September 2011; VSS, Stenographic protocol from 28 January 2016; VSS, Stenographic protocol from 20 December 2012.

relevant CoE recommendations" or with a few recommendations which are specifically cited. Even constitutional amendments have been screened for compatibility with the recommendations.[44] It is beyond the scope of this paper to verify whether the recommendations were actually followed in the drafts but at least lip service was duly paid. Keywords searches in the stenographic records of parliamentary debates on the adoption of relevant bills show that occasional references were made in the plenary too but there were no debates on the substance (i.e., whether there is a need to heed a particular recommendation in the statute under discussion or what is the most appropriate way to do so).

19.34 Very often these references are coupled with (often more specific) references to the relevant EU rules, and it is difficult to discern the specific impact of the CoE's recommendations by themselves. Still it might have been strong on some occasions when EU rules were less specific or absent, e. g., in the adoption of the APK (cf. MN. 19.35 et seq.), the Mediation Act (*Закон за медиацията*) and, most clearly, in the Ombudsman Act (*Закон за Омбудсмана*) (cf. MN. 19.40).

1. Administrative Procedure Code

19.35 The aforementioned APK (cf. MN. 19.04) was adopted in 2006 after several years of elaboration as part of the efforts towards administrative reform and 'capacity building' and with the support of European experts.[45] These were commitments Bulgaria undertook even though administrative procedure is not within the competences of the EU. Its title notwithstanding the APK contains not only rules on administrative procedure in a narrow sense but also some substantive law provisions, most importantly, the grounds for judicial review and the general principles of administrative law. It does *not* introduce a general right to good administration and shows greater continuity with the preceding legislation than the present author is happy to see, yet it did introduce a number of novelties.

19.36 Its explanatory memorandum states that Recommendation Rec(2003) 16 on the execution of administrative and judicial decisions in the field of administrative law and Recommendation Rec(2004) 20 on judicial review of administrative acts (cf. MN. 1.65) were taken into account

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44 See National Assembly, Stenographic protocol from 25 July 2003.

45 D. Bilak/D. Galligan (Д. Билак/Д. Галиган), *Реформа на Административното Правосъдие: Необходимост и Перспективи* (Administrative Justice Reform: Necessity and Opportunity) (2003). It seems that the experts drew on the theoretical literature of administrative law and comparative literature from selected European countries rather than any pan-European sources.

in the drafting.[46] Although the APK was amended half a dozen times from 2006 on none of these occasions did the drafters pay any tribute to the later Recommendation CM/Rec(2007)7 on good administration (cf. MN. 1.67 et seq.).

19.37 The space constraints of this volume do not allow for a full analysis of the APK and the question of to what extent its provisions actually *conform* to these CM recommendations or to the other pan-European general principles of good administration. However, it should be noted that the APK starts with a list of half a dozen principles which are elaborated in a way that is not common for Bulgarian legislation.[47] It makes an attempt to define these principles in considerable detail so that they can actually be applied by the administration and the courts. In the view of Kino Lazarov – probably the most respected academic expert in administrative law and consultant to the drafters of the APK – in this way violations of any of these principles would constitute a ground for annulment.[48] Other experts agree that non-compliance with any of the principles specified explicitly in the APK constitutes a breach of procedural law.[49]

19.38 Space precludes elaboration of the individual principles but it suffices to say that they demonstrate significant *correspondence* with most of the pan-European principles of good administration. This does not necessarily mean conformity with them. As explained earlier, the purpose of this section was *not* to analyse the conformity of the principles of the new APK with the pan-European general principles of good administration – it would take a monograph to do so adequately. It was merely to map any correspondence of the recent reforms of Bulgarian administrative law with the existing pan-European principles. There is little evidence that the latter exerted any direct influence on the former. If there was any it must have been at a fairly low level, resting in certain anonymous experts in the relevant departments rather than in any reform-minded ministers or activist judges.

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46 The rules that were borrowed were the requirement that the executory measures must be chosen in conformity with the proportionality principle and that the measures that are applied must assure the most effective execution, see National Assembly, Draft Administrative Procedure Code and explanatory memorandum, introduced on 10 August 2005 (502-01-12), available at http://www.parliament.bg/bg/bills/ID/9342. This is perhaps the most substantive discussion of a CoE document one can find.

47 K. Lazarov (К. Лазаров), "Основни Принципи на Административния Процес (Fundamental Principles of the Administrative Process)", (2007) *Административно правосъдие* (Administrative Justice), pp. 7 – 13.

48 Lazarov (fn. 47), p. 8.

49 See Penchev/Todorov/Angelov/Yordanov (fn. 7), p. 300. They go on further to note that such principles may be established either by the positive law or may be generally known and generally acceptable empirical rules or rules of logic (p. 301).

It bears repeating that some of these principles had been part of national administrative law since the late socialist era while the introduction of many others may have come through different channels, and the correspondence seems to be more a matter of coincidence than of direct influence from the CoE. Notwithstanding the overall positive outlook of the law on the book, it is important to note that the impact of some key principles on actual *judicial* practice is still to be seen. As will be discussed below (cf. MN. 19.82 et seq.), the existing legal culture is not very susceptible to application of principles. As far as *administrative* practice is concerned, in Bulgaria, much more than in many other European countries, actual practice may deviate from the law on the book and the context of corruption, clientelism, mismanagement and general negligence should not be forgotten. Furthermore, even though the Europeanisation of Bulgarian administrative law over the last three decades is clear, some tendencies in the opposite direction have been identified with regard to the availability of and access to judicial review (cf. MN. 19.58 et seq).

2. Other Legislation

19.40 Several other pieces of legislation may have been subject to some influence from CoE law. The strongest example of direct influence is the establishment of an ombudsman in 2003. CM Recommendation No. R (85) 13 on the institution of the ombudsman (cf. MN. 1.65) and CM Resolution (85) 8 on cooperation between ombudsmen of the member states and between them and the CoE are duly mentioned in the *travail préparatoire* of the bill alongside the recommendations addressed to Bulgaria contained in PACE's Resolution 1211 (2000). The drafters also took note of the fact that out of all of the CoE members only Bulgaria, Turkey and Slovakia did not have such an institution.[50] On the other hand, there are no EU rules or recommendations on this matter (though the EU has had an ombudsman for its own administration since the Treaty of Maastricht, cf. MN. 2.51 et seq.) so it could not possibly provide any model rules. Yet in the EU accession negotiations Bulgaria found it opportune to make a commitment to introduce the institution and there can hardly be any doubt that from that moment on this was a decisive driver.

19.41 Such examples are very common but it is unclear if the frequent references to the CoE's recommendations in the *travaux préparatoires* are anything more than a ritual, and certainly

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[50] This is not entirely correct, as there are other CoE members without one, but they were not mentioned in the memorandum.

the Parliament has not seen many debates on whether Bulgaria should follow a certain recommendation or whether a bill actually follows it. Only two instances of reliance on 'CoE documents' in plenary debates could be identified.[51] In one of them a member of Parliament from the opposition argued that a proposed amendment to Judiciary Act (cf. MN. 19.20) violated a number of international instruments, including Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, the European Charter on the statute for judges and a few opinions of the Consultative Council of European Judges. This was to counter a claim by the government that the amendments were 'required by Europe'.[52] In the same vein, upon the adoption of the Public Procurement Act (*Закон за обществените поръчки*) the opposition proposed an amendment providing for voluntary settlements and arbitrage[53] because this was recommended by Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties (cf. MN. 1.65).

V. Reception of the Pan-European General Principles of Good Administration Through Application of the ECHR

1. General Considerations

19.42 Bulgaria is a party to the ECHR and all of the protocols to it except for No. 12 and No. 16. There are no issues about being a party to the ECHR, even though many of the ECtHR decisions are very unpopular because of the amount of money the country is ordered to disburse (cf. MN. 19.19). Still, public opinion tends to (correctly) blame the national judiciary, which is perceived as corrupt and inefficient, rather than turning against the ECtHR.[54] Generally there is a consensus among all political parties and the major institutions supporting the ECtHR so it is rarely subject to criticism in public. Even if the government and the judiciary are not always quick to remedy the violations they find they have never challenged it openly.[55]

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51 That is, besides the references in explanatory memoranda or committee reports which are read aloud in the plenary.

52 National Assembly, Stenographic Protocol from 10 September 2010, Kornelia Ninova, MP.

53 National Assembly, Stenographic Protocol from 20 February 2006, Dimitar Yordanov, MP.

54 The Bulgarian Helsinki Committee and other organisations specializing in bringing cases to Strasbourg do not benefit from this attitude and are often accused of treasonous behaviour.

55 The only significant public outcry came when it delivered its opinion in the *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v Bulgaria* (412/03 and 35677/04) 22 January 2009 ECtHR.

The effect of ECtHR decisions in domestic law is less clear. In principle the national courts have the duty to know the law and to apply it *ex officio*. This also includes the ECHR because of Article 5 (4) of the Constitution (cf. MN. 19.02). While this clause refers only to treaties and not to judgements of international courts, according to the continental tradition these judgements do not create new law but only elucidate the true meaning of the instrument they apply. Thus, in theory Article 5 (4) of the Constitution should open the domestic order to the ECHR *as interpreted* by the ECtHR.

19.44 This view is supported by the KS, which held early on that the ECHR is part of the domestic law and the decisions of the ECtHR that interpret it are binding on all national authorities.[56] It also held that even the norms of the Constitution which concern human rights should be interpreted as far as possible in conformity with the interpretation of the ECHR.[57] The more interesting question, however, is whether national judges have sufficient capacity to apply the relevant case law or whether the practitioners are able and willing to travel the extra mile in searching for the 'odd' ECtHR case which may help their clients. In view of Yonko Grozev – a prominent human rights lawyer, now judge at the ECtHR – national judges have been through a significant amount of vocational training on human rights and their awareness is rising.[58]

19.45 The two most popular commercial legal databases provide translations of a number of ECtHR cases. In June 2018 "Apis" (cf. MN. 19.30) – which was used for this research – contained 363 but these were not all Bulgarian cases. By the same date the website of the Ministry of Justice provided some 660 Bulgarian cases and the ECtHR's own database "Hudoc" held even more. Both the Ministry of Justice and "Hudoc" provide a number of cases in translation, courtesy of the Ministry of Justice. The Ministry of Justice's website provides also summaries of some 50 key cases and a bulletin with news from the ECtHR.

19.46 The "Apis" database also contains quite a few cases from other countries (405) but it is unclear how are they selected. This is important because key cases in the area of good administration are not translated and this could explain why they do not feature in Bulgarian case law. For example, the *Beyeler* case,[59] where the ECtHR recognised the duty of public authorities "to

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56 KS Decision No 29/1998.

57 KS Decision No 2/1998.

58 Y. Grozev, "Political Opposition and Judicial Resistance to Strasbourg Case Law Regarding Minorities in Bulgaria" in D. Anagnostou (ed.), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (2013), pp. 122 – 142 (p. 128)

59 *Beyeler v Italy* (33202/96) 5 January 2000 ECtHR [GC].

act in good time, in an appropriate manner and with utmost consistency" (cf. MN. 1.19), is almost unknown to Bulgarian courts. The *only* two references to it that can be found in the "Apis" database are indirect,[60] when courts cited from a 'Bulgarian' case where the ECtHR referenced *Beyeler*.[61] This is ironic because, as will be seen below, a significant number of the judgements against Bulgaria concern lengthy proceedings.

19.47 Even when the domestic courts refer to ECtHR case law it does not seem to be pivotal for their decisions but more a source of additional support. There are also cases of obvious reluctance among the top courts to engage seriously with the ECHR. For example, in a currently ongoing scandal over the bankruptcy of the Corporate Trade Bank (CTB) the KS declined a request to consider whether certain provisions of the Banking Bankruptcy Act (*Закон за банковата несъстоятелност*) violate the ECHR.[62] In a follow-up case the VKS relied on the evasion of the KS and held that:

> "these rules were not found to be unconstitutional, and as long as the conclusion of the KS is that they do not violate the equality of the parties and their right to defence, they cannot possibly violate the Convention".[63]

By this 'baroque' construction the VKS eschewed the opportunity to apply the ECHR directly and applied a questionable provision of national law instead. Thus, even though Bulgarian courts do refer to the ECtHR's case law, the *direct* effect of the latter remains limited. Legislative amendments remain key for any meaningful change in domestic law and even this is not always sufficient.

19.48 Therefore, adequate protection of basic human rights in Bulgaria is still problematic and many of the cases that reach the ECtHR concern excessive use of force by the police,[64] failure

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60 VAS Order No 9234/2015 and VAS Decision No 827/2018.

61 *Kirilova and Others v Bulgaria* (42908/98, 44038/98, 44816/98 and 7319/02) 9 June 2005 ECtHR.

62 KS Decision No 6/2016. See also KS Order from 4 February 2016 on this case.

63 VKS Order No 172/2016.

64 Amongst those of prominence is *Dimov and others v Bulgaria* (30086/05) 6 February 2012 ECtHR, where the ECtHR ruled that the excessive use of force upon the arrest of the suspect amounted to murder. Interestingly, the officer responsible for the 'operation' was the current prime minister Boyko Borissov, then the general secretary of the Ministry of the Interior.

of the public prosecutor to investigate them,[65] especially when minorities are concerned,[66] failure to respect the presumption of innocence,[67] lengthy judicial proceedings (cf. MN. 19.70),[68] and other matters which are beyond administrative law. The cases of violations committed by administrative or judicial authorities within proceedings governed by the APK are rare,[69] and most of them involve the right to a fair trial, often with implications for the right to property. Below we shall focus on three issues of special relevance to administrative law – legality, access to (administrative) justice and timeliness of processes.

2. Legality

19.49 The principle of legality now enshrined in Article 4 APK has a fairly long history in Bulgarian administrative law. Despite the predominant formalist understanding of the term (cf. MN. 19.82 et seq.) it is a broad concept that includes the duty of the administrative bodies to act within their competence, a ban on retroactivity,[70] judicial review, etc.[71] Lazarov and Todorov also include legal certainty and the notion of legitimate expectations within this term.[72]

19.50 Although legality has been accepted as a principle of Bulgarian administrative law since at least the 1970s 'socialist legality' fell short of what a European lawyer would understand by the term.[73] Early post-1989 legislation also showed significant deficiencies in this respect, often

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65 In *Gutsanovi v Bulgaria* (34529/10) 15 October 2013 the ECtHR found systematic violations of Article 3 ECHR in the form of inhumane and humiliating treatment of suspects upon their arrest and failure of the public prosecutor to conduct proper investigation.

66 *Assenov and others v Bulgaria* (24760/94) 28 October 1998 ECtHR; *Anguelova v Bulgaria* (38361/97) 13 June 2002 ECtHR; *Velikova v Bulgaria* (41488/98) 18 May 2000 ECtHR; *Nachova v Bulgaria* (43577/98) 6 July 2005 ECtHR [GC].

67 *Popovi v Bulgaria* (39651/11) 9 June 2016 ECtHR.

68 Concerning the length *Finger v Bulgaria* (37346/05) 10 May 2011 ECtHR; *Dimitrov and Hamanov v Bulgaria* (48059/06 and 2708/09) 10 May 2011 ECtHR; *Kitov v Bulgaria* (37104/97) 3 April 2003 ECtHR; *Djangozov v Bulgaria* (45950/99) 8 July 2004 ECtHR.

69 K. Lazarov/I. Todorov (К. Лазаров/И. Тодоров), *Административен Процес* (Administrative Process) (6th edition 2016), p. 385.

70 For example, VAS Decision No. 2261/2016 confirming the annulment of a tariff which increased certain court fees retroactively. Article 14 (1) of the Statutory Instruments Act contains a general ban on retroactivity, and this provision has been recognized as having a 'constitutional status' by the KS, see KS Decision No. 11/1996. The ban is not absolute and can be overridden by overwhelming public interest, see KS Decision No 7/2001. For more details see Baltajieva/Todorov (fn. 28), pp. 196 – 198.

71 See Baltajieva/Todorov (fn. 28), p. 190. According to the authors there is full correspondence between the content of the principle of legality in EU and in Bulgarian law.

72 Lazarov/Todorov (fn. 69), pp. 44 et seq.

73 For the differences between socialist legality and rule of law see D. Marcheva (Д. Марчева), "Що е То Социалистическа Правова Държава? (What Is Socialist Rule of Law?)", (2018) *Годишник на Нов*

granting broad discretionary powers to the administration unchecked by the possibility of judicial review. As Grozev aptly puts it, in this period:

> "the judgements of ECtHR substituted for the lack of domestic human rights tradition […] and brought up the structural defects of the domestic legal system".[74]

19.51 Thus, in a number of early cases against Bulgaria the ECtHR found violations of the ECHR in the 'prescribed by law' part (cf. MN. 1.44), which is usually not difficult for countries to meet. Thus, in the *Varbanov* case[75] a person with alleged mental health issues was forcefully institutionalised by the public prosecutor and without appropriate medical assessment. The ECtHR found that the Public Health Act (*Закон за народното здраве*) did not grant the prosecutor the power they actually exercised in this case, and that the possibility of exercising it without appropriate medical assessment made it arbitrary.[76] The law was amended in 2004, which was a significant but not unusual time lag.

19.52 Arbitrary exercising of power was also the issue in the *Hasan and Chaush* case[77] where the ECtHR found a failure by the authorities to remain neutral in the exercising of their powers with respect to administrative registration of religious communities.[78] The same issue recurred in the *Holy Synod* case, although it was eventually decided on proportionality grounds.[79]

19.53 The general power of prosecutors to restore public order (by administrative acts) came under the scrutiny of ECtHR in another case – *Zlínsat*.[80] The case concerned a privatization deal with a Czech company for a hotel near Sofia. The Sofia City Prosecutor alleged that the deal went against the public interest and evicted the new owner. He relied on Article 185 (1) of the old Criminal Procedure Code (*Наказателно-процесуален кодекс*), which provided that he must take "the necessary measures" to prevent a criminal offence that he had reason to believe was

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Български Университет, Департамент Право (Yearbook of New Bulgarian University, Law Department) (forthcomming).

74 Grozev (fn. 58), p. 122.

75 *Varbanov v Bulgaria* (31365/96) 5 October 2000 ECtHR.

76 At [53] of *Varbanov* case (fn. 76), the ECtHR found that the power of the prosecutor had "no basis in domestic law" and that the law did not "provide the required protection against arbitrariness".

77 *Hasan and Chaush v Bulgaria* (30985/96) 26 October 2000 ECtHR [GC].

78 In the 1990s it was common amongst many organizations – the sizeable Muslim community and the Bulgarian Orthodox Church included – to split into 'communists' and 'democrats'. Then the factions would fight for registration (and recognition) as the one true representative of their respective communities. While the authorities tended to stay out (thus allowing the splits to continue), in a couple of cases they intervened quite clumsily.

79 *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy)* case (fn. 55) at [140].

80 *Zlínsat, spol. s r.o. v Bulgaria* (57785/00) 15 June 2006 ECtHR at [97] et seq.

imminent. Furthermore, he relied on Article 119 (1) and (6) of the old Judiciary Act (cf. MN. 1.23), which provided that prosecutors:

> "may take all measures provided for by law, if they have information that a publicly prosecutable criminal offence or other illegal act may be committed".[81]

The ECtHR found that:

> "these rules, which appear to be of general application, serve as a catchall, giving the Prosecutor's Office unfettered discretion to act in any manner it sees fit. […] This discretion and the concomitant lack of adequate procedural safeguards, such as elemental rules of procedure and, […] review by an independent body, and the resulting obscurity and uncertainty surrounding the powers of the Prosecutor's Office in this domain, lead the Court to conclude that the [interference was not prescribed by law]".[82]

19.54 In 2005, as part of the ongoing judiciary reform and under the European Commission's watch, a new Criminal Procedure Code was adopted. It does not contain similar provisions. The new Judiciary Act is also more circumscribed on the power of the prosecutors, its Article 145 (2) stating that (emphasis added):

> "[…] the orders of the prosecution, *which are issued within his competence and the law*, are obligatory for the state organs, officials, the legal persons and the citizens".

19.55 The public prosecutor is not the only public authority whose discretion violates the legality principle as developed by the ECtHR. The powers of the Bulgarian National Bank used to be similarly unchecked and this came to the fore in the *Capital Bank AD* case.[83] As this case also raised access to justice issues it will be addressed in more detail below (cf. MN. 19.64).

19.56 Another example of overly broad discretion granted to public authorities is the Special Surveillance Means Act (*Закон за специалните разузнавателни средства – ZSRS*) of 1997.[84] In the *Association for European Integration and Human Rights and Ekimdzhiev* case the ECtHR, after elaboration of its common criteria for the required quality of the law, found that:

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81 This text in the Judiciary Act of 1994 was a very clear example of a carryover from the legislation of the previous era, Article 7 (1) of the Public Prosecution Act (*Закон за прокуратурата*) of 1980 with almost identical text. The ECtHR did not fail to notice this: *Zlínsat, spol. s r.o. v Bulgaria* (fn. 79) at [38].

82 *Zlínsat, spol. s r.o.* case (fn. 79) at [99].

83 *Capital Bank AD v Bulgaria* (49429/99) 24 November 2005 ECtHR.

84 In contrast, the KS did not find any problems with this law, see KS Decision 1/98.

> "[…] during the initial stage, when surveillance is being authorised, the [ZSRS], if strictly adhered to […] provides substantial safeguards against arbitrary or indiscriminate surveillance". [85]

Apparently, the drafters of the new legislation have become more cautious about the case law of the ECtHR. It was the latter stages of surveillance that were problematic:

> "Under the [ZSRS], no one outside the services actually deploying special means of surveillance verifies such matters as whether these services in fact comply with the warrants authorising the use of such means, or whether they faithfully reproduce the original data in the written record".[86]

It is perhaps even more interesting that the ECtHR found a problem in that there were no guidelines to structure the discretion of the officers using the authorised surveillance means or that of the minister who was controlling them.[87] It was on the basis of these omissions – lack of guidelines and lack of independent control – that the ECtHR found that the legality principle was not complied with.

19.57 In response to this judgement, in 2008 the Parliament amended the ZSRS. The explanatory memorandum of the draft bill referred to the *Association for European Integration and Human Rights and Ekimdzhiev* case explicitly.[88] It created a National Bureau for Supervision of the Special Surveillance Means, consisting of three members elected by the Parliament with the qualifications and salary of a supreme court judge. Alas, compliance with human rights and the good administrative practices easily fell victim to party politics. Only a year later a new government led by the current prime minister Boyko Borisov was elected to power and was quick to repeal the amendments and close down the bureau. In 2013, when Borissov briefly lost power to the Socialist Party, the latter restored the bureau (and also moved all surveillance activities from the Ministry of the Interior to an independent agency). When Borissov returned to power in 2014 the bureau was spared but it does not seem to be able to exercise any significant control.[89] The human rights lawyers who brought this case to the ECtHR are now working on a new challenge.

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85 *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria* (62540/00) 28 June 2007 ECtHR at [84].

86 *Association for European Integration and Human Rights and Ekimdzhiev* case (fn. 85) at [86].

87 *Association for European Integration and Human Rights and Ekimdzhiev* case (fn. 85) at [88].

88 Explanatory memorandum to the draft amendments to the ZSRS (National Assembly, 802-01-74 from 14 October 2008).

89 According to its latest report to the Parliament (http://www.parliament.bg/bills/44/809-00-1_Doklad_na_NBKSRS_za_izvarshenata_deynost_2017.PDF) the three attempted reviews were

3. Access to Justice

19.58 The other administrative law issue that is often scrutinised by the ECtHR is access to justice. This may appear surprising because, as a matter of principle, since the 1970s all administrative acts (including failures to issue one) have been subject to judicial review unless explicitly exempted by an act of the Parliament. In 1991 the principle was enshrined in Article 120 of the Constitution and on a number of occasions the KS has considered whether and to what extent the law may provide for such exemptions and quashed several legislative attempts at curbing it.[90]

19.59 However, even though the KS recognised that the right to judicial review is instrumental for the protection of a number of other rights, as well as having intrinsic value as related to human dignity, it allowed too broad a scope for its statutory limitation for the benefit of other important public interests.[91] Thus, it gave its imprimatur to what, in view of the present author, is an increasingly common bad administrative practice.[92]

19.60 In the *Al-Nashif* case[93] the applicant obtained a permanent residence permit in Bulgaria in 1995 but in 1999 he was deported on the ground of alleged links with fundamentalist organisations. In the view of the ECtHR there were several violations of the ECHR. First, the legislation did not contain any guarantees against arbitrary action; the deportation order did not even have to provide reasons. Second, deportation orders on national security grounds were not subject to any form of review. On this ground the domestic courts rejected Mr. Al-Nashif's appeals, thus failing to apply the ECHR directly. This decision attracted significant public attention in Bulgaria. The VAS was prompted to change its case law to allow for judicial review[94] even though there was no immediate legislative change.

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thwarted, and the Darjavna Agentzia Natzionalna Sigurnost (State Agency for National Security) stated that the representatives of the bureau shall not have access to the materials on the basis of which requests for special surveillance are made.

90 For example, KS Decision 1/2012 quashing a provision in the Road Traffic Act excluding judicial review of any acts imposing fines below 50 BGN (25 EUR). Cf. *Fartunova v Bulgaria* (34525/08) 29 March 2018 ECtHR; *Gyoshev and others v Bulgaria* (46257/11) 21 June 2018 ECtHR.

91 See KS Decision No. 14/2014 and the criticism of Lazarov/Todorov (fn. 69), p. 67.

92 Beside the explicit preclusion of judicial review, access to justice is also hindered by the wide availability of 'preliminary execution', that is the possibility of the issuing authority ordering that an act be executed while its appeal is still pending. The other way that the right to defence has been gradually eroded is increases in court fees, often done with the explicit motive of making the life of the administration easier.

93 *Al-Nashif v Bulgaria* (50963/99) 20 June 2002 ECtHR.

94 VAS Order No 4883/2004, VAS Decision No 8079/2014, VAS Decision No 7769/2006; VAS Decision No 5000/2011; VAS Order No 4168/2005.

19.61 The latter came only in 2007 as part of a general overhaul of the Foreigners Act (*Закон за Чужденците*). According to Grozev the scope of the review and the other measures that were introduced then still fell short of the ECtHR's standards and "did not circumscribe the unfettered discretionary powers of the administration".[95] As the prevailing administrative law doctrine limits the review of discretionary acts mostly to formal compliance with the law (cf. MN. 19.89 et seq.) such amendments are certain to result in perfunctory review unless they very explicitly call for departure from the established practice.[96]

19.62 Indeed, in the similar circumstances of the *CG* case[97] the domestic courts did allow the appeal of the applicant but failed to collect and review any evidence in support of the government's claim and yet they confirmed the deportation order. Ironically, while a couple of Russian oligarchs expelled earlier could re-enter Bulgaria as a result of the *Al-Nashif* judgement, Mr. Al-Nashif could not. It is not certain if this was because of the administration's determination to keep the latter out or merely a failure of the judicial system. On the basis of the ECtHR judgement Al-Nashif had to go to the domestic courts and ask them to quash the revocation of his residence permit, his expulsion order and the ban on re-entry – in three separate cases. He was successful in the first two but failed in the third so he is still unable to re-enter the country. As will be seen below, such failures of the judicial or administrative system to implement some ECtHR judgements are not uncommon and do not necessarily indicate intent. This one in particular might have been, however, rather wilful as it was repeated in the similar case of *Musa*.[98]

19.63 The Foreigners Act was amended again in 2009 and 2011 and now requires that the authorities take into account the foreigner's personal and family situation and their genuine links with

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95 Grozev (fn. 58), p. 132.

96 This is officially recognized by the Ministry of Justice in its *Fifth annual report of the Ministry of Justice for the implementation of the decisions of ECtHR against Bulgaria* (adopted by the Bulgarian Council of Ministers on 20. July 2018): "National courts take a formal approach to the requirement for judicial review and do not oblige the administration issuing a deportation order on national security grounds to provide any evidence as its basis. In this way the courts cannot review the merits of the claim that there is a risk for the national security, nor to verify the balance between it and the right to family life".

97 *CG and others v Bulgaria* (1365/07) 24 April 2008 ECtHR.

98 *Musa and others v Bulgaria* (61259/00) 11 January 2007 ECtHR. For more recent examples see Bulgarian Helsinki Committee, "Extradition of Threatened Turk Reveals a Systematic Problem in Bulgaria" 30 August 2016 (https://www.liberties.eu/en/news/case-of-abdullah-buyuk-reveals-a-systematic-problem-for-bulgaria/9598).

both Bulgaria and their country of origin. Notwithstanding this, the CoE enhanced supervision for the implementation of this group of cases continues.[99]

19.64 It is not only foreigners whose access to justice may be restricted by sectoral legislation. In 1997, in the wake of an unfolding financial crisis, the then new Banking Act (*Закон за банките*) limited the jurisdiction of the courts to review the acts of the Bulgarian National Bank (BNB). Thus, the directors and the shareholders of several banks whose licences were revoked by the BNB found themselves unable to appeal these acts. In the *Capital Bank AD* case the ECtHR predictably found this to be in violation of the ECHR.[100] It also found that the domestic courts had taken an inappropriately deferential position and refused to consider the evidence that the bank was solvent and reiterated that the reviewing courts could not consider themselves bound by the decisions of the administration, making this also a legality case. Although the relevant legislation was changed, and a brand new Banking Insolvency Act and Credit Institutions Act was adopted, the problem persists.[101] In 2014 another bank went into bankruptcy – the Corporate Trade Bank – and the VKS found the appeal by its former directors and the principle shareholders inadmissible.[102] The case is pending in the ECtHR.

19.65 Another example of sectoral law inappropriately restricting the right to appeal administrative acts is provided by the Protection of Classified Information Act (*Закон за защита на класифицираната информация*). In an apparent departure from good administrative practice Article 57 of that act stipulates that decisions of the State Commission on Information Security to allow or withdraw access to classified information to individuals must only indicate the legal ground for denial of access and do not have to state reasons. Another clause of the same article provided that the decisions are not subject to judicial review.[103] In the *Miryana Petrova* case[104] the ECtHR found that the latter clause violated Article 6 (1) ECHR. As soon as the ECtHR's

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99 In the summer of 2016 a Turkish businessman who applied for asylum in Bulgaria was delivered to the Turkish authorities by the Bulgarian police based on an allegation of being Gulenist in defiance of the decisions of national courts. His case (*Büyük v Bulgaria* [23843/17]) in the ECtHR is pending.

100 *Capital Bank AD* case (fn. 83). By contrast, the KS did not find a violation of Article 120 of the Constitution which guarantees the right to judicial review. See KS Decision 18/1997.

101 See also *International Bank for Commerce and Development AD and others v Bulgaria* (7031/05) 2 June 2016 ECtHR. The CoE enhanced supervision for this case is still ongoing.

102 VKS Order No. 172/2016. The Banking Act states that the bank is represented by the court or BNB-appointed liquidators and that only they and the public prosecutor have a right to appeal (see Article 11 (3) and Article 16). The KS found this constitutional (and evaded the request to consider compatibility with ECtHR, KS Order from 4 Feb 2016 on const case 1/2016.

103 The constitutionality of this was reviewed by the KS, which found no problem with the Constitution and declined to consider conformity with the ECHR on technical grounds, KS Decision No 3/2002.

104 *Miryana Petrova v Bulgaria* (57148/08) 21 July 2016 ECtHR at [40] et seq.

judgment was adopted the act was amended but only the latter clause was repealed, and a provision allowing judicial review in VAS was introduced.

19.66 This is a typically 'minimalist' response to the ECtHR ruling. As a statement of reasons is essential for any court to exercise meaningful control over the act, and this is recognised in the established practice of the ECtHR, the retention of the provision of Article 57 of the Protection of Classified Information Act made the introduction of judicial review redundant. The formalist culture (cf. MN. 19.82 et seq.) made sure that VAS would not venture any bold reinterpretation and would exercise only very perfunctory review. Indeed, in the summer of 2018, in the *Alexander Sabev* case,[105] the ECtHR held that the review exercised by the VAS was not adequate to the requirements of Article 6 ECHR. The example is telling in two ways. First, it shows that intentional loopholes in the statutes are easier to amend, at least when there are no strong contrarian interests (this may be the case with banking regulations) or prejudices (as in *Al-Nashif* and a number of minority rights cases). Second, it shows how the legislator will adopt the most limited amendment to respond to ECtHR findings, and how the effect of a statutory change may be further reduced by other doctrines of Bulgarian administrative law tradition.[106] The last point will be revisited (cf. MN. 19.89 et seq.).

4. Lengthy Process

19.67 The principle of speed and procedural economy (Article 11 APK) is 'traditional', and has also been proclaimed in previous legislation the length of proceedings remains a serious problem for Bulgarian administrative justice. This is one of the main rationales for all reforms, and also provides a very good excuse for governments to deviate from other principles of administrative justice, e.g., access to justice. Thus, cases of lengthy proceedings have taken a significant share of the ECtHR 'Bulgarian' business.

19.68 Furthermore, on many occasions applicants have to launch multiple cases to protect their rights, potentially leading to inconsistent rulings or multiple dead-ends. Thus, in the *Stoyanov and Tabakov* case[107] the municipal administration failed to comply with a decision of a domestic court. The applicants used a number of pathways available under the law to get the court order implemented but for various reasons they were unsuccessful every time. The ECtHR held

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105 *Alexandar Sabev v Bulgaria* (43503/08) 19 July 2018 ECtHR.

106 Perhaps the biggest limitation is the overall ban on judicial review for expediency (see MN. 19.89). *Cf* M. Ekimjiev (М. Екимджиев), *Тука е Така* (This is the way we do it here) (2008), p. 54.

107 *Stoyanov and Tabakov v Bulgaria* (34130/04) 26 November 2013 ECtHR.

that execution should be carried out within a reasonable amount of time (to be determined with regard to the complexity of the case). More interestingly, it went on to analyse the available statutory remedies[108] and stated that they were adequate in principle but were not sufficient as applied in the particular case.[109]

19.69 The *Stoyanov and Tabakov* case is typical of the state of the administration in Bulgaria, which often fails to function as a coherent system that delivers results, and gains under one procedure are rendered useless by the inadequacy of another. The government seems unable (or unwilling) to overcome this problem. In 2017 the ECtHR decided yet another very similar case, ordering compensation of 462,000 EUR to applicants who could not make the Plovdiv Municipal Council deliver their property for 24 years.[110]

19.70 The problem with lengthy court proceedings is systemic. The ECtHR recognised this in two pilot judgements from May 2011 – *Finger*[111] and *Dimitrov and Hamanov*.[112] The ECtHR held that Bulgaria must introduce effective legal remedies for excessively lengthy civil, administrative and criminal proceedings. In the following year the authorities responded to this by introducing two statutory pathways for compensation in 2012 (cf. MN. 19.75 et seq.).

5. Institutional Response: Remedying Violations or Cementing the Pathology?

19.71 During the first decade of the new century the number of cases where the ECtHR ruled against Bulgaria skyrocketed and this raised significant public concern, so the government started making some serious efforts to find ways to reverse this trend. In 2009 it adopted a 'Conception for overcoming the causes for judgements of the ECtHR against Bulgaria and for solving the problems arising from them'.[113] It put forward a number of specific proposals as well as discussion topics.[114] While it acknowledged that a long-term solution requires changes

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108 These are Article 304 APK providing for execution of judicial decisions on administrative cases, the Liability Act and the special 'complaint of tardiness' available under the Civil Procedure Act.

109 Similarly, *Yanakiev v Bulgaria* (40476/98) 10 August 2006 ECtHR.

110 *Chengelyan and others v Bulgaria* (47405/07) 21 April 2016 ECtHR (judgement on merits) and 23 November 2017 ECtHR (judgment on just satisfaction).

111 *Finger* case (fn. 68).

112 *Dimitrov and Hamanov case* (fn. 68).

113 Adopted with a decision of the Bulgarian Council of Ministers 144/9 March 2009 (http://www.justice.government.bg/Files/DM-ESPCH-KONCEPCIA.doc).

114 The Conception also proposed a number of changes in the relevant procedural codes to remove bottlenecks and speed up proceedings, many of which were implemented. It also proposed limiting prosecutorial discretion (*Zlínsat, spol. s r.o.* case [fn. 79]), removing military prosecutions and courts, and creating an independent body to investigate police brutality, deaths in custody, etc., most of these to no avail.

in the laws and in the practice of the administration and of the courts, it also proposed some measures that could work in the short term.

19.72 One of these measures was the creation of a "Representation of the Republic of Bulgaria in the ECtHR" directorate in the Ministry of Justice. Thus, government agents who are responsible for defence in pending cases are also invested with the responsibility of disseminating judgements, analysing violations and proposing ameliorative measures. As Grozev notes, this unit is quite low in the system of governance to be able to push through significant reforms and its limited resources are focused on defence.[115] Writing in 2013, he acknowledges some progress in terms of dissemination of judgements, legislative changes and revision of some policy documents but argues that implementation, even when new laws are adopted, is 'minimalist.'[116] Six years later the present author could not agree more with him.

19.73 More recently an attempt has been made to mainstream compliance with the ECHR. Since 2016 the Statutory Instruments Act (*Закон за нормативните актове*) has required that all bills which originate in the executive are accompanied by an assessment of their compatibility with the ECHR and the ECtHR case law, conducted by the Ministry of Justice. However, a 2009 proposal that the aforementioned directorate (cf. MN. 19.72) be moved from the Ministry of Justice to the Council of Ministers to boost its status was abandoned. Unlike the case of compliance with EU law, there is no specialised body in the Parliament to consider compliance with the ECHR. So far there is no evidence as to how effective the new requirement has been in practice. While it is unlikely that a text will be adopted if the compliance assessments are strongly negative, it is unclear if the Ministry of Justice's directorate has the resources for meaningful evaluation of all legislation.[117] Moreover, the required assessment is easily bypassed if the bill is introduced by a member of Parliament rather than the Council of Ministers.[118]

19.74 Another reform proposed by the government's conception of 2009 was the establishment of an 'administrative-judicial' process whereby potential victims of ECHR violations may apply for compensation to the domestic authorities (as an alternative to filing an application to the

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115 Grozev (fn. 58), p. 128.

116 Grozev (fn. 58), p. 136.

117 In 2017 it had delivered 69 such assessments. See Fifth annual report of the Ministry of Justice (fn. 96).

118 Private members bills are fairly often used to bypass other requirements of the Statutory Instruments Act such as public consultations. This is the way some major amendments, departing from the principles of good administrative practice, were introduced in the APK in the summer of 2018, see A. Kashamov (А. Кашъмов), "Как омразата към жалбоподателя се превръща в закон (How the contempt of the complainant becomes law)" *Capital Weekly* of 2 July 2018 (https://www.capital.bg/politika_i_ikonomika/bulgaria/2018/07/02/3209775_kak_omrazata_kum_jalbopodatelia_se_prevrushta_v_zakon/)

ECtHR). If their claim is found to be meritorious the authorities will offer a friendly settlement. Deciding on the merits of the claim is vested in the Inspectorate to the VSS (hereafter 'Inspectorate'), which has been recently established as a system for internal accountability of the judiciary.[119] As a second step the Ministry of Justice's directorate – following ECtHR practice – will determine the amount of compensation with regard to ECtHR practice and propose an out of court settlement. It was recognised that this mechanism would be best suited for claims for lengthy proceedings but it would be difficult for the Inspectorate to find a violation where a final decision of a court or law held otherwise. It took some time for the proposals to be implemented and the relevant changes in the Judiciary Act entered into force only in 2012. The decisions in *Finger* and in *Dimitrov and Hamanov* (cf. MN. 19.70) which were delivered in the meantime (2011) may have been instrumental in pushing them through.

19.75 The second pathway for engaging state liability as alternative to ECtHR complaints, introduced in 2012, was changes to the State and Municipal Liabilities Act (*Закон за отговорността на държавата и общините за вреди*). Its new Article 2b stipulates that the state is liable for any damage as a result of a violation of the right to a fair trial within a reasonable time. It is noteworthy that the statutory provision makes a direct reference to the ECHR and lists the criteria for reasonable time developed by the ECtHR. According to the explanatory memorandum of the 2012 amendments the direct reference to the ECHR aims to avoid any restrictive application of the law that is limited to what is explicitly stated in the legislative text while also trying to enable the courts to consider the actions under review in light of ECtHR practice, as possible violations may vary.[120] This route is available only after a claim for compensation to the Inspectorate/Ministry of Justice has been tried without reaching a settlement.

19.76 The 2012 reform was welcomed by the CM. It concluded that the administrative measure (the application for compensation for delay) was a very positive step in implementing the relevant pilot decisions of the ECtHR (*Finger* and *Dimitrov and Hamanov*, cf. MN. 19.70) and although it, by itself, would not satisfy all the requirements of the ECHR most of the remaining issues could be solved by the judicial measure (the liability for damages).[121] The ECtHR also

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119 Note that the findings of the Inspectorate – as an administrative body – are in turn subject to judicial review.

120 Explanatory memorandum to the amendment to State and Municipal Liabilities Act (National Assembly, No. 202-01-49 from 23 July 2012).

121 Final Resolution CM/ResDH(2015)154; Information documents CM/Inf/DH(2012)36 27 November 2012, Excessive length of civil and criminal proceedings in Bulgaria – Groups of cases *Djangozov*, *Finger*, *Kitov*, *Dimitrov* and *Hamanov*.

had an opportunity to opine on these two measures, and found that at the current stage there are no reasons to conclude that these new remedies will not be satisfactory, so it dismissed two applications which had not exhausted them beforehand.[122]

19.77 In a recent evaluation of the effectiveness of the system Bulgarian Lawyers for Human Rights – a charity prominent for bringing a number of cases to Strasburg – concluded that the established mechanism works generally well notwithstanding some difficulties.[123] They found also that 'good cooperation' between the Inspectorate/Ministry of Justice and the ECtHR's Registry has been established. Between 2012 and 2015 there were 1561 claims for compensation, of which the Inspectorate found 570 to be meritorious and proposed settlements. The report acknowledged, however, the remaining problem that the national courts are still not empowered to consider all legal and factual circumstances of cases due to the traditional (for Bulgarian administrative law) division between review for legality and review for expediency, with the latter still a 'no-go zone' for the courts (cf. MN. 19.89). Another identified problem was that, notwithstanding the clear statutory text, some national courts dismissed claims for compensation because they could not identify 'wrongdoing' by the relevant judiciary authorities.[124] This is yet another example of how tradition – and in this case some inertia of mind – thwarts reform efforts. Indeed, the pre-2012 version of the State and Municipal Liabilities Act provided for compensation only in cases where the authorities had acted illegally but the legislative amendment should have made it clear that the liability of the state is now vicarious. The ECHR may have infraconstitutional status in Bulgarian law but the legal tradition seems to have a supra-constitutional one.

19.78 Notwithstanding this there are signs that the 2012 reform has achieved its overt purpose of reducing the number of negative rulings by the ECtHR. According to a recent report of the Ministry of Justice[125] since 2012 the country has been permanently out of the 'top ten' countries

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122 See *Valcheva and Abrashev v Bulgaria* (6194/11 and 34887/11) 18 June 2013 ECtHR [dec]; *Balakchiev and Others v Bulgaria* (65187/10) 18 June 2013 ECtHR [dec].

123 See Bulgarian Lawyers for Human Rights Foundation (upon commission by the Ministry of Justice), *Analysis of Efficiency of the Administrative Mechanism for Compensation under Chapter 3a of the Judiciary System Act* (2015).

124 This applies mostly to another major amendment of the Liability Act, not directly relevant to administrative law: according to the new version of Article 2 the state is liable to compensate all inappropriate detentions, unsubstantiated accusations and a number of similar acts and omissions within the criminal process. Previously this provision was limited only to the detention of an individual 'without legal ground' and this limitation had come under the criticism of the ECtHR in the *Dimitrov and Hamanov* case (fn. 68) so the liability of the state had to be broadened.

125 See *Sixth annual report of the Ministry of Justice for the implementation of the decisions of ECtHR against Bulgaria* (adopted by the Bulgarian Council of Ministers on 17.07.2019).

in terms of pending cases, where it used to be; in 2018 it was ranking 17th by cases per capita. In absolute terms there has also been a steady decline in applications considered by the ECtHR, from 3850 in 2012 to 514 in 2018. Out of the latter 58 were considered on their merits and the ECtHR found violations in 31. The Ministry of Justice's Report attributes this to the 'active measures taken by the state to implement the decisions of the ECtHR', although it acknowledges that the reforms of the ECtHR system have helped too. Furthermore, it notes that in 2017 the enhanced supervision by the CM for compliance in a significant number of case groups was closed, most notably the *Kitov*[126] and *Djangozov*[127] groups, concerning length of proceedings, and the *Velikovi*[128] group, concerning failure of (mostly) the administration to restore ownership of previously nationalised property. The groups which are still open include orders pursuant to the Foreigners Act and decisions concerning banks, as well as issues concerning special surveillance means (cf. MN. 19.61 et seq.) – in these areas access to justice and the quality of judicial review remain a problem.

19.79 Thus, most of the administrative law issues that have kept the ECtHR busy seem to be resolved, at least to an extent that has allowed the CoE to close the formal procedure. Internally, the latest report of the Inspectorate identified only one case concerning issues of administrative law, all the other claims they received were criminal. However, the present author remains unconvinced that there is no broader problem with the effectiveness of justice delivery which is here to stay. Although the lengthy procedures groups have been closed (*Finger* and *Dimitrov* and *Hamanov* groups in 2015 and *Kitov* and *Djangozov* in 2017), as recently as 20 July 2018 the ECtHR delivered a ruling in the *Yordanova* case,[129] which concerned failure of an administrative authority – the Ministry of Education – to implement its own order for 15 years. Similar ECtHR decisions were delivered earlier that year.[130]

19.80 While the Ministry of Justice may have good reasons to cheer the decrease in the number of rulings against Bulgaria this is not necessarily good news for its citizens. Apparently, the compensatory mechanism that is credited for this success is not a remedy for the pathologies of the legal system, but rather normalises them. It is ironic that the best example of the influence of

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126 *Kitov* case (fn. 68).

127 *Djangozov* case (fn. 68).

128 *Velikova* case (fn. 66).

129 *Yordanova and Others v Bulgaria* (61432/11 and 64318/11) 19 July 2018 ECtHR.

130 *Gavrilov v Bulgaria* (44452/10) 18 January 2018 ECtHR; *Shehova v Bulgaria* (68185/11) 18 January 2018 ECtHR.

the ECtHR is not in remedying certain violations but in managing their consequences. In extremis, this means that one can very well be maltreated and humiliated in a televised arrest with the approving nods of high-ranking officials and rest assured that in a few years' time one will be compensated for one's part in the 'circus' (if, of course, one has the resources and the nerve to pursue it).[131]

VI. Direct application of the Pan-European General Principles of Good Administration 'faute de mieux' – Utopia or Impossibility?[132]

19.81 To the extent that some violations of the ECHR in the area of administrative law have been fixed after a decision of the ECtHR, as was seen in the previous section, it seems that legislative ill will is easier to remedy than systemic failures of the judiciary to deliver justice on time or to exercise a meaningful review.[133] Reflecting upon the impact of the case law of the ECtHR on the national judiciary directly, experience so far suggests that while there are precious few examples where the ECtHR has been relied upon in judicial decisions of various courts, and more often than not they refer to the ECtHR's case law, for any significant change an amendment of legislation is necessary. We have already seen examples where even clear text in a statute does not guarantee a change in the relevant judicial practice and how the practice is likely to restrict the change's scope and effect (cf. MN. 19.77).

19.82 In fact, we have already had a number of occasions to mention that the legal culture in Bulgaria is formalist (cf. MN. 19.18; 19.29; 19.49; 19.66). Thus far in the paper the term has been used loosely, and the characterisation of jurisprudence, administrative practice and academia as formalist by the present author has had to be taken on trust. This section will zoom in on this matter because in the view of the author it is this culture – more than language, incompetence, special interests or ill will – that thwarts the transfer of the principles of good administration into the national administrative space. While a detailed study of the Bulgarian legal tradition is

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131 This is not an exaggerated hypothesis but the actual circumstances of the arrest of the mayor of the Sofia district 'Mladost' on allegations of corruption, see 'Sofia district mayor arrested in bribery investigation', *The Sofia Globe* of 18 April 2018 (https://sofiaglobe.com/2018/04/18/sofia-district-mayor-arrested-in-bribery-investigation-prosecutors/).

132 The author wishes to acknowledge the help of Dr Diana Marcheva (New Bulgarian University) for this section. Beyond the three very insightful articles which are referenced she shared many valuable thoughts in an oral interview (November 2018).

133 In the same vein, Grozev's conclusion on the effects of ECtHR rulings notes that most of the changes that became necessary were fairly uncontroversial – access to justice, fair trial, detention – and concerned multiple cases, so the government acted fairly quickly. In contrast, when minorities are concerned, so it has to act against common prejudices, it still drags its feet. See Grozev (fn. 58), p. 130.

still to be written its formalism is recognised by many academics and here we shall consider some of the evidence that justifies this characterisation (or indeed, accusation).

19.83 Formalism (or hyperpositivism) can be defined as application of the law in a manner in which the rules are applied in conformity with formal logic but with disregard to their legal content, so that decisions are issued in ostensible compliance with legal rules but the outcomes depart from the principles that animate these rules.[134] As Boštjan Zalar explains it:

> "Based on this experience, I can say that textual positivism is a problematic issue in cases where judges involved in complex disputes choose not to apply the general principles of constitutional law, international law, EU law and ECtHR case law. […] This problem has been acknowledged already in 2006 in the Opinion no 9 of the Consultative Council of European Judges (CCJE) for the attention of the [CM] on the role of national judges in ensuring an effective application of international and European law (Strasbourg, 10 November 2006). The opinion was not limited to the situation in the Central and East European countries".[135]

This shows that legal formalism is by no means unique to Bulgaria but quite common throughout the countries of Central and Eastern Europe[136] and many authors explain it in terms of the socialist/Soviet legacy.[137]

19.84 Where does legal formalism come from? In the Bulgarian legal profession it seems to be almost a century old and has successfully outlived two regime changes. Smilov traces it back to the interwar period, when legal academia (as well as much of public life) was strongly influenced by Germany.[138] After the communist takeover in 1944 this was temporarily suppressed

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134 S. Groisman (С. Гройсман), "Относно Понятието 'Правен Формализъм' (On the concept of 'Legal formalism')", (2015) 2 *Ius Romanum*, pp. 1 – 13 (p. 1) with reference to H. L. A. Hart, "Positivism and the Separation of Law and Morals", (1958) 71 *Harvard Law Review*, pp. 593 – 629. Groisman notes that decisions which contradict legal principles are void on the ground of 'breach of material law' (Article 281 (3) of the Civil Procedure Code) and that we face formalism when decision-makers are *empowered* to exercise judgement but prefer 'strict' (literal) interpretation instead.

135 B. Zalar, "From a Discourse on 'Communist Legacy' – Towards Capacity Building to Better Manage the Rule of Law" in M. Bobek (ed.), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (2015), pp. 149 – 164 (p. 154).

136 See for example A. Jakab/M. Hollán, "Socialism's Legacy in Contemporary Law and Legal Scholarship: The Case of Hungary" (2004) *Journal of East European Law* pp. 95 – 122; R. Mańko, "Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome" (2013) 7 *Pólemos*, pp. 207 – 233. See also MN. 17.xxx.

137 Jakab/Hollán (fn. 136, p. 96) note that in the socialist era the standard methods of legal interpretation were grammatical, logical, systematic and historical, with a proscription of the teleological one which "detaches a law from the will of the legislator and elevates a purpose, which was not determined by the legislator but simply assumed".

138 D. M. Smilov, "Constitutional Culture and the Theory of Adjudication: Ulysses as a Constitutional Justice" in A. Febbrajo/W. Sadurski (eds.), *Central and Eastern Europe After Transition: Towards a New Socio-legal Semantics* (2016), pp. 119 – 146 (pp. 120 et seq.).

by revolutionary justice but in the 1960s and 1970s formalism emerged again as a way for the legal profession to assert a degree of autonomy.[139] After communism collapsed in 1989 the easiest way to fill the intellectual vacuum was to look back to the pre-war years, thus bringing a very outdated tradition back to life. Before translations of any contemporary legal scholars could be made the books of canonical pre-war authors were reprinted.

19.85 Another reason for the embracing of formalism was that while society was going through revolutionary changes the Bulgarian legal profession remained almost untouched. Indeed, one of the first achievements of the transition was the establishment of a strong and independent judiciary which stabilized the position of the judges and prosecutors whose training and professional experience took place during communism.[140] While this did not mean much for their political orientation – if anything, in the 1990s it appeared that a significant part of the profession was strongly opposed to governments then dominated by the former communist party – it was an important way for the established legal culture to perpetuate itself.

19.86 Furthermore, the process of democratization and Europeanisation was understood as a need to copy the rulebooks of the established democracies, which was another way of prioritizing text over its aims and meaning. Thus, despite the EU-led (and sometimes CoE-led) efforts to reform the judiciary and educate new generations of judges, change has yet to materialise. Thus, in the case law there are few references to legal principles or to foreign law and any soft law is ignored.

19.87 Other reasons for embracing legal formalism in Bulgaria go deeper into a specifically Bulgarian mode of 'legal thinking'. They may be found in specific 'publication formats' Bulgarian lawyers have borrowed from Germany. It is very common for the most authoritative treatises on a given branch of law to take the form of a 'commentary' on the relevant statute. Thus, the text of the law determines the structure of the book, and to a significant extent the scope of the analysis. While such a form does not necessarily cultivate formalism it certainly does not invite the authors to find space for any principles or practices which are not already reflected in the legislative text. Nor does it invite the readers (and judges) to look for other sources beyond

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139 Smilov (fn. 138), p. 121. For a critical discussion of formalism as 'sheltering' judges from political pressure see P. Cserne, "Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case" in M. Bobek (ed), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (2015), pp. 23–42 and the literature referenced there.

140 Smilov (fn. 11), p. 618.

what is already in the articles that are expounded within.[141] Further, this approach often shapes the content of concepts.

19.88 To take an example from the leading textbook for law faculties,[142] 'administrative process' is defined as the array of all proceedings regulated by the relevant legislation (i.e., the APK since 2006). To the best of the author's knowledge Marcheva is the only academic who has taken notice of the narrowness of this definition, which unduly excludes all informal activities conducted by the administration. Marcheva further emphasises that the national administrative law doctrine recognises only formal administrative acts as such, remaining oblivious to all informal practices, new modes of governance, soft law, etc. The term 'governance', which in 2019 has very wide currency across the world, has yet to be translated into Bulgarian legal literature. The 'soft law' concept has a standardised translation (courtesy of DG Translation of the EU) but the Bulgarian term '*оптативно право*' is not recognizable for the average administrative lawyer. A keyword search in "Apis" (cf. MN. 19.30) returned only two judicial decisions that mention the phrase. In Marcheva's view, given that the Bulgarian concept of administration is still focused on hierarchy and 'good administration' as a concept remains alien, the idea of adopting the principles of good administration appears doomed. She further notes that even though the concepts of effectiveness and efficiency are formally recognized by administrative law (and in principle not unamenable to judicial review) they are marginal in academic analyses.[143] Although effectiveness is now a matter of law (an argument from articles 11 and 272 APK, cf. MN. 19.67) we are still to see a decision being annulled on this ground.

19.89 Below the conceptual level the formalist tradition is exemplified by certain specificities of Bulgarian administrative law itself. For reasons of space only two of them will be briefly discussed here. The first is the pervasive dichotomy between 'legality' and 'expediency' (fitness

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141 According to D. Marcheva (Д. Марчева), "Граници На Прокурорския Надзор Върху Администрацията в Правовата Държава (Limits of the Prosecutorial Oversight over the Administration in a Rule of Law Country)" in *Национална конференция 'Законът на правото или правото на закона* (*National Conference 'The law of the right or the right of the law'), 20 November 2015* (2016), pp. 211 – 231 , this is one of the reasons why a debate on the balance between the public interest and human rights in relationships with public authorities has never happened in Bulgarian administrative doctrine.

142 I. Dermendjiev/D. Kostov/D. Hrusanov (И. Дерменджиев/Д. Костов/Д. Хрусанов), *Административно Право На Република България: Обща Част* (Administrative law of the Republic of Bulgaria) (1999). See the discussion in D. Marcheva (Д. Марчева), "Към Понятието За Административна Процедура (Towards the Concept of Administrative Procedure)", (2013) 2 *Годишник на Нов Български Университет, Департамент Право* (Yearbook of New Bulgarian University, Law Department), pp. 315 – 335.

143 Oral interview with the author (November 2018).

for purpose) of any given act of the administration.[144] As a rule courts can review the latter only with regard to their expediency. This division is another carry-over from socialism[145] and here is not the place to discuss its merits or demerits. What is important for the present discussion is that if expediency is a 'no-go zone' for the courts it becomes difficult to see what they can consider beyond mere compliance with the letter of the law. It does not seem to be the purpose of this law or the actual effect of the act if its fitness for purpose is explicitly taken off the table. While the strength of this dichotomy may have slightly eroded now it was recently confirmed by the KS that "expediency is outside of the scope of constitutional review" and that:

> "[the Constitution] empowers the court to review only the legality of the acts and activities of the administration, but *not to evaluate the exercise of its discretion* when [the administration] is so empowered".[146]

19.90 While most administrative scholars would insist that discretionary acts are subject to review they would hasten to add that the review is limited to assessing whether the decision-maker was acting within the bounds of its discretion rather than *how* it exercised it. A good example of how a proponent of rigorous review struggles with the common formalist understanding can be seen in an article on judicial control by Emilia Kandeva.[147] While she emphasizes that exercise of discretion must be structured by rules, when elaborating on the possible grounds for review she hardly mentions anything other than the applicable statutes. She recognizes that compliance with internal guidelines (as per Article 13 APK) is a matter of legality. However, out of the principles listed in the APK she mentions only proportionality as a ground for review. Considerations of conformity with any soft law are not even contemplated as a possibility. While she duly recognizes that the APK requires the court to consider whether the administration has chosen the most efficient or most favourable measure, she is worried about the courts second-guessing and recommends that they only *consider whether the administration has considered* the efficiency of the alternatives. In the same vein, while Article 8 (2) AKP provides that the administration must decide similar cases similarly, she challenges the wisdom and the very possibility of introducing such a 'precedent' in Bulgarian administrative law.[148] Paradoxically,

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144 'Законосъобразност' and 'целесъобразност' respectively in Bulgarian.

145 This is not unrelated to the uneasiness of socialist legal doctrine with teleological interpretation discussed by Jakab/Hollán (fn. 136).

146 KS Decision No 14/2014 (emphasis added).

147 E. Kandeva (Е. Кындева), "Оперативна Самостоятелност и Съдебен Контрол (Operational Independence and Judicial Review)", (2006) 7 *Административно правосъдие* (Administrative Justice), pp. 7 – 22.

148 Kandeva (fn. 147), p. 21.

formalist culture seems to trump even its most cherished authority – the statutory text – when the latter is intended to change it.

19.91 The second specific feature of Bulgarian administrative law is perhaps not all that relevant for the present study but is worth mentioning as it highlights and reinforces the legality/expediency dichotomy. This is prosecutorial oversight of the administration. This is yet another leftover from the socialist era.[149] Notwithstanding the involvement of distinguished Anglo-Saxon administrative consultants in its drafting, the institute was reintroduced in the new APK of 2006 and its *raison d'être* was never questioned. Thus, the public prosecutor is allowed (and sometimes required) to step into any administrative proceedings 'to safeguard the public interest'. This is odd as it is for the administration itself to protect the public interest, and obviously the *прокурамура* has neither any specialized knowledge of the area nor any better understanding of what the 'public interest' is; certainly it is not any better than the courts on either. On the contrary, in all likelihood it would be in a weaker epistemic position than both the administration and the citizen-stakeholder participants. Thus, the best thing that it can do is to watch to see if the letter of the law is meticulously obeyed. In modern administrative law systems one may seek to consult stakeholders, involve the general public, and network with other national or international organisations who will bring in knowledge, examples, good practices, new perspectives and so on. In Bulgaria we are all too concerned that nothing will escape the eye of the public prosecutor.

19.92 In such circumstances it is small wonder that the courts tend to stick to black-letter law. It would take significant nerve for a judge to justify a decision with fuzzy (and alien) principles when clear law is missing. Hence, in the view of the author, the existing legal culture is not favourable for the *faute de mieux* pathway of the pan-European principles of good administration (cf. MN. 2.58 et seq.). Indeed, this pathway presupposes that a court failing to justify a certain outcome on the basis of clear legal rules looks for inspiration beyond them. This is difficult to do in a tradition where the point of departure is the text of the law and where other potential sources are not recognised (and even principles enshrined in statutes are questioned, as we have seen). Given the remarkable success of the legal culture in reproducing itself in successive generations of practitioners (law graduates from the early 1990s are already sitting in the appellate and supreme courts today) the prospects for change are bleak.

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[149] Marcheva (fn. 141), pp. 195-197 traces the origin of this institute back to the creation of the modern Bulgarian state in the late 19th century when the administrative bodies were very undeveloped. After 1945 it was reinforced in line with Leninist doctrines.

19.93 Yet we should not fail to recognise the herculean efforts of certain individual judges to bring about change. Also, if we wish to end on a positive note, we can look – again – at the example of the reception of EU law (where statistics and systematic monitoring exist). In Kornezov's analysis[150] the influence of EU law on domestic law by way of requests for preliminary references has been significant. He notes that 89% of all requests have been made by first instance courts as a way for the lower courts to challenge the practices of their superiors.[151] While the supreme courts routinely reject requests for referral without much justification some lower courts seem to indulge in this opportunity. It is even more striking that the great majority of these requests are made by a handful of courts (notably in Sofia and Varna) and by about a dozen judges.[152]

19.94 Indeed, judicial practice offers precious few signs that things may be changing. Mladenov[153] references several cases where administrative courts have considered whether the administration has acted arbitrarily which is, in the view of the present author, a significant departure from formalism. In particular, the courts have recognized that internal guidelines may bind and that compliance with them may be a matter of legality.[154] They have also held that the lack of such guidelines in some circumstances may result in arbitrariness and this violates the principle of legal certainty (articles 8 and 13 APK) and therefore the law.[155] Thus, if one looks hard enough one can see that some principles of good administration (incorporated in domestic statutes) are very slowly making their way into domestic administrative practice. This development, however, is driven by the efforts of certain individual judges rather than any systemic factors. If this is to be scaled up an enormous effort to educate a new generation of scholars and judges will be needed, and the present volume is but a tiny step in this direction.

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150 A. Kornezov (А. Корнезов), "Десет Години Преюдициални Запитвания – Критичен Преглед и Равносметка ('Ten Years Preliminary References – Critical Review)", (2017) XVIII *Европейски правен преглед* (European Legal Review), available at http://evropeiskipravenpregled.eu/t182/, last accessed on 22 November 2019. This is an updated Bulgarian version of A. Kornezov, "When David Teaches EU Law to Goliath: A Generational Upheavel in the Making" in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (2015).

151 Notably, four-fifths of all Bulgarian referrals were made by administrative courts.

152 Apparently, this tactic pays off and Kornezov references quite a few decisions where the CJEU held that lower courts must disregard the established hierarchies where these would result in violations of EU law.

153 M. Mladenov (М. Младенов), "Последователност и Предвидимост (Consistency and Predictability)", (2015) *Административно правосъдие* (Administrative Justice), pp. 30 – 37.

154 VAS, Interpretative Decision No2/2012.

155 VAS Decision No 4164/2009, VAS Decision No 1485/2008, VAS Decision No 5211/2009.

VII. Conclusion

19.95 If we wish to see the glass as half full we can conclude that while *general* administrative law sought to implement the principles of good administration in Bulgaria in the first two decades of democratisation there were still too many provisions in the specialised laws giving the authorities wide discretionary powers. Some of these were simply outdated laws from the socialist era, and some were newer but carried over the old ways that the civil service and the legal profession were used to. The ECtHR's rulings helped the country to overcome such legacies and adopt more precise legislation, tailored to reduce arbitrary actions and protect fundamental rights and thus uphold certain principles of good administration in national law.

19.96 If we are inclined to see the glass as half empty we cannot help noticing that such amendments took longer than necessary, were often partial, and even the amended laws are too often not applied adequately, either because of political resistance as in the case of minority rights (or police brutality) or simply because of the administration's inability to reform. What is worse, in many brand-new specialised laws, such as those for special surveillance devices, the legislator wilfully introduces bad administrative practices, broad and uncontrolled discretion or exceptions from judicial review (or even does not shy away from removing existing protection, as was done in 2009).

19.97 Overall the influence of the CoE seems to have been limited, and the reception of the pan-European principles of good administration too shallow to fully counter the tendencies of the Bulgarian administration to go the other way. Moreover, even when the authorities and office-holders do rely on CoE documents this rings hollow. Certain mistakes and omissions that can be found everywhere – in court decisions, legislative history, academic articles – suggest that this reliance is '*inter alia*' at best and mass hypocrisy at worse. When forced to act – as in the case of ECtHR judgements – they do only the bare minimum that seems necessary.

19.98 Yet the administration – in all branches and at all levels – has never openly defied the CoE. On the contrary, it is prepared to go a long way to maintain the appearance of conformity and progress in its 'Europeanisation.' Thus, even if the trajectory of Bulgarian administrative law does not intersect with the pan-European general principles of good administration, they still travel in parallel and in the same direction.

Annexes

Bulgarian Abbreviations Used in this Article

APK	*Административно-процесуален кодекс* (Administrative Procedure Code)
AS	*Административен съд* (Administrative Court)
KS	*Конституционен Съд* (Constitutional Court)
VAS	*Върховен Административен Съд* (Supreme Administrative Court)
VKS	*Върховен Касационен Съд* (Supreme Court of Cassation)
VSS	*Висш Съдебен Съвет* (Supreme Judicial Council)
ZSRS	*Закон за специалните разузнавателни средства* (Special Surveillance Means Act)

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