Title:
Applying the Principles of Procedural Justice to Protect the Rule of Law from Within: The Case of High-Ranking Judicial Appointments in Bulgaria

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Abstract:
The purpose of this paper is to analyze the application of procedural fairness in high-ranking judicial appointments in Bulgaria and their alignment with the rule of law. The analysis takes into account the work of Tom R. Tyler, Professor of Law and Professor of Psychology at Yale Law School, who has written extensively on procedural justice. The theory of procedural justice will therefore be interpreted through a case from the senior judicial appointments practice of the Supreme Judicial Council of the Republic of Bulgaria. The author proposes that in young and evolving democracies institutional decision-makers (e.g. Supreme Judicial Council) may be committed to the rule of law by virtue of their very creation but nevertheless fail to uphold it on a daily basis. Such institutional decision-makers can realize their potential for positive transformation when, *inter alia*, they begin to apply the key principles of procedural justice, especially in the exercise of their authority to appoint magistrates in leadership positions in the judiciary.

I. When the system compromises itself: a highly illustrative example.

Operating in a hostile environment, the Supreme Judicial Council (SJC) had another key decision to make.[1] After two unsuccessful attempts, the Council—the high body called on to defend judicial independence in Bulgaria—launched a third procedure for the election of a President the Sofia Court of Appeals (SCA). The SCA is the biggest and busiest second-instance (appellate) court in Bulgaria, handling the highest caseload of civil, commercial and criminal cases[2] and overseeing eight trial and thirty-two district courts.

On April 30, 2015, the task of the Council was to consider only one application for the office of SCA President, which has been vacant for more than a year. The applicant was a judge with more than thirty years of experience on the bench who had already served in a variety of senior roles and was well-known to both magistrates and civil society. She was also a former Deputy Minister of Justice in a caretaker government (1997), one of the founders and former chairs of the Bulgarian Judges Association – the oldest judicial association in Bulgaria, a member of the SJC in the period between 1998 and 2003, as well as its spokesperson. Even more relevant is the fact that she had an excellent reputation and there was no evidence whatsoever that eroded her professional merit and integrity. On the contrary, Justice Koutzkova is considered an autonomous judicial figure and is frequently singled out by younger colleagues as a role model. Furthermore, according to the conclusions of the Ethics Committee of the SJC '*her integrity and ethical conduct were unblemished, and she had the necessary character to be appointed President of the Sofia Court of Appeal.*' Overall, the procedural rules for senior judicial appointments in Bulgaria require in-depth vetting and a great deal of public transparency in terms of nominee selection, not to mention ongoing scrutiny by civil society and the media. In the case at hand, the nominated magistrate had convincingly and consistently demonstrated professional excellence and conformed to the highest integrity standard. In addition to having a long list of documented achievements to her credit, Justice Koutzkova's nomination had received explicit support from forty out of her fifty-eight fellow justices on the Court of Appeals who proactively submitted a reasoned statement to the SJC in support of her application. It seemed that the vacant office of Court President had finally found a decent applicant and that the judiciary had found its voice.

On April 30, 2015, the Council had a solid application to consider. During the hearing no negative opinions or evidence of professional misconduct were brought up. In other words, there was no reason to expect a negative vote. Eventually, nine out of nineteen Council

[1] In 2015 the SJC voted in plenary, i.e. the election was conducted via a collective vote of the judges and prosecutors on the Council. At present, there are judicial and prosecutorial chambers conducting election procedures separately for court presidents and heads of prosecution offices. See State Gazette, Issue 28 as of April 8, 2016, available at: https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=102488 (July 16, 2019) [BG].

[2] For example, according to the Court's annual report for 2018, judges have closed a total of 1 694 criminal cases and 6 350 civil and commercial cases compared to 1 623 criminal cases and 6 335 civil and commercial cases in 2017.

members voted in support of Justice Koutzkova by secret ballot (nine votes in favor, four against, and six abstentions). According to the provisions of the Bulgarian Judiciary Act and the Administrative Procedure Code, all decisions of the Council must be reasoned as the SJC is effectively a body established and operating under public law.[3] According to the basic principles of judicial independence the promotion of judges must be based on objective criteria, and more specifically ability, integrity and experience.[4] In the case at hand, the articulation of objective criteria does not present a challenge. Even a negative vote or an abstention would require a justification. Given the mission of the collective body, which is to represent and uphold the independence of the judiciary, the lack of fairness in adopting the decision went a long way to compromise the integrity of the Council. According to the minutes at the end of the session a Council member rhetorically shouted: '*Tell me who are we waiting for!!!*'[5]

In its 2016 Report on Bulgaria's progress under the Cooperation and Verification Mechanism the European Commission did not neglect to highlight the case, along with the overall lack of objectivity in the model of SJC decision-making, pointing out that '*clear criteria for assessing appointments do not exist, opening the door to doubts about the objectivity of appointment procedures*.'[6] One of the recommendations for Bulgaria set out in the cited report was to build '*a track record within the SJC of transparent and consistent decision-making with regard to appointment decisions, applying clear standards of merit and integrity, while making such decisions in a timely manner*.'[7] Or, in simpler terms, to develop and put in place fair decision-making policies.

The reason why the case stands out among other senior judicial appointments (at least in Southeastern Europe) is that Justice Koutzkova challenged the Council's decision before the Supreme Administrative Court (SAC). The SAC bench ruled in her favor and revoked the Council decision on the grounds of a breach of substantive and procedural rules, more precisely stating that '*the failure to justify the decision constitutes a material breach of procedural rules*.'[8] The SJC had to put the nomination to the vote for the second time, rejecting it again on the strength of dubious arguments. Both Council decisions elicited strong reactions within the professional community, in civil society and among international observers. Still, the rich body of scandal in Bulgaria quickly made sure that the case became one of many, once again burying justice deep into the ground meant to nourish it.

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[3] Article 34, par.3 of the Judiciary System Act in relation with article 59 of the Administrative-Procedural Act.
[4] Article 13 of the *United Nations Basic Principles on the Independence of the Judiciary*, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[5] See pg. 44 of the Complete Stenographic Protocol No. 22 of the Supreme Judicial Council's Meeting held on April 30, 2015, available at http://www.vss.justice.bg/root/f/upload/7/protokol22-30_04_2015.pdf (July 16, 2019) [BG].
[6] European Commission (27.1.2016) *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under The Co-Operation and Verification Mechanism*, (pg.4; pg.11) available at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-40-EN-F1-1.PDF (July 16, 2019).
[7] *See supra* note 6.
[8] Supreme Administrative Court of the Republic of Bulgaria, Division VI (2015), Decision No. 10782 as of October 16, 2015, Case No. 5663/2015.

I find the case fascinating from a research perspective but equally a necessary introduction to my thesis. I argue that young and immature democratic institutions have an innate talent to simulate progress. Highly detailed procedural rules for senior judicial appointments are used as a loophole to erode the rule of law from within. By this I do not mean the introduction of procedures and rules leading to data overproduction, but the skillful introduction of the principles of procedural justice (or procedural fairness), which may be the tool needed to demand accountability from extractive institutions with decision-making authority. I posit that in a country where the rule of law is fragile by default, the process of enhancing it may require tangible procedural candor and simplicity.

II. Procedural justice and the rule of law: judicial appointments as an intersecting point

The negative pattern of a long string of similar cases in Bulgaria, within and outside the judiciary, is disheartening. The public perception of '*procedural despair*' (by which I refer to the disillusionment of the general public) is a strong incentive for seeking fair and authentic solutions that are, at the same time, sufficiently simple to preclude the possibility of being bypassed by the opaque will of decision-makers and noxious legislators.

The theory of procedural justice may be relatively new, but it has nevertheless drawn the attention of numerous researchers. In 1975, John Thibaut (social psychologist) and Laurens Walker (professor of law) paved the way for future multidisciplinary contributions with their book *Procedural Justice: A Psychological Analysis*. The authors compared people's perceptions of court outcomes within the adversarial and the inquisitorial systems and discussed the importance of the impression of what could be qualified as a fair procedure, along with the fairness of the outcomes of legal procedures. It is worth noting that prior to that John Rawls in his work *A Theory of Justice* (1971) also discussed '*pure procedural justice*' and '*imperfect procedural justice*', noting that the former is obtained '*when there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed*.'[9]

However, procedural justice may be interrelated with, but should be differentiated from, restorative justice, which seeks to repair the damages of criminal behavior, allowing the victim and the offender (and possibly community members) to resolve *ex post* issues of crime. The UNODC handbook on restorative justice programs points out that restorative processes are also applicable within correctional institutions. They can support overcoming the more negative attributes of life inside these institutions, also providing a peaceful arena for inmates to resolve their differences and create an alternative means of conflict resolution.[10]

Professor Tom R. Tyler (Yale Law School) is one of the leading minds in the field of procedural justice. I will share my understanding of the theory based on some of his work.

[9] Rawls, J., 1921-2002. *A Theory of Justice*. Cambridge, Mass.: Belknap Press of Harvard University Press, 1971.
[10] United Nations Office on Drugs and Crime (2006), *Handbook on Restorative justice programmes*, CRIMINAL JUSTICE HANDBOOK SERIES.

Referring to courts and giving priority, but not exclusively to community courts, law enforcement and alternative dispute resolution in general, Tyler makes an important distinction between the actual outcomes of court proceedings and the willingness of parties to accept those outcomes, even if they are not eventually satisfying. He notes that '*people are more likely to continue to abide by a decision if that decision is made through a fair procedure*.'[11] Tyler does not argue that procedural outcomes are irrelevant to the parties involved. There would not be a procedural beginning if they have not come to seek an effective tool towards a just outcome. Regardless of the result, people are highly concerned if the outcome, whether or not wanted, is reached (or the dispute is resolved) through a fair process. As Tyler notes, this perception is equally important both for the winner and the loser in the process.[12] Higher positive perception of procedural fairness will create positive attitudes towards the authority carrying out the procedure. For instance, court rulings even when they find against a party, will be well accepted and abided by.

Core Principles

Tyler describes four key principles of normative procedural justice: *voice*, *neutrality*, *respect* and *trust*. I am obviously unable to define and explain these principles better than Tyler himself. I will therefore make use of his conduct sheet as described in his work *Procedural Justice and the Courts* (2007) to analyze the introductory case through the lens of this theory.[13] Some researchers add other pillars for greater understanding and clarity. Nonetheless, for the purpose of this analysis, I consider these irrelevant. In the case at hand, it is evident that the judge understood the formality of various judicial procedures and that she failed to find an objective rationale in the decision adopted by the SJC. I look at *understanding* as being a function of neutrality. Helpfulness is another sub-principle that tends to apply to a greater degree to court proceeding, particularly where litigants do not have the same level of experience and understanding of the law as attorneys and magistrates. Since Justice Koutzkova used to be a member of the Council, it can be argued that she was familiar with the *modus operandi* of that body. For this reason, I will refer to the primary four principles of procedural justice:

- **Voice.** Communication between citizens as court users and judges should provide the first group with the opportunity to express their opinions and share their perspectives on a case and requires the other party (the judge) to listen, and then adjudicate the matter brought before them. For instance, Tyler points that one of the reasons why mediation is considered successful is because the mediator allows the parties to express their opinions, which creates a sense of involvement and contribution to the process of finding a solution. If we all need to be heard and understood, could we say that this particular principle was applied during the public hearing of

[11] Tyler, Tom R. *Procedural Justice and the Courts.* Court Review 44, no. 1 2 (2007): 26-31. Available here http://www.proceduralfairness.org/~/media/Microsites/Files/procedural-fairness/Tyler.ashx (July 16, 2019).
[12] See this comprehensive interview with Prof. Tyler: https://courses2.cit.cornell.edu/sociallaw/videos/tyler/index.html# (July 16, 2019).
[13] *See supra* note 12.

Justice Koutzkova? I would answer the question in the affirmative because procedural rules require all applicants for leadership positions in the judiciary (both courts and prosecution offices) to present, prior to the hearing, a concept detailing the work they intend to do as President/Head of the respective institution. In the case of Justice Koutzkova this happened, and the concept was presented in advance and discussed during the session with Council members. Moreover, non-governmental organizations, professional associations, universities and institutions where the applicant has served may also pose questions or submit statements during the early stages of the procedure. This extensive range of opportunities for communication assuredly allows candidates to express their opinions within the overall timeline of the process. This means that this principle was properly applied during the election.

- **Neutrality.** Tyler posits that people entrust their cases to the courts because judges are perceived as neutral and impartial decision-makers, and that *'[t]o emphasize this aspect of the court experience, judges should be transparent and open about how the rules are being applied and how decisions are being made*.'[14] In the same way, Justice Koutzkova put forth her application for consideration by the Council for a particular reason, which required an objective outcome based on clear criteria. This is the key principle that the Council breached. Neutrality and impartiality are core values for an independent judicial system. As the highest administrative body of the judiciary, the SJC is expected to be neutral and ensure accountability across the decisions it makes. Regardless of whether a decision concerns an appraisal or an appointment, disciplinary proceedings or a dismissal, this capstone institution has a duty to present substantial arguments. It cannot be expected that a vote without proper justification would translate into a positive experience for the other party. Proper reasoning is the shield of impartiality. Eventually, a series of decisions in the same vein will create a biased track record of unfairness. On the other hand, the ruling of the Supreme Administrative Court, which contained sufficiently clear arguments, would not have been viewed as legitimate had it not been properly reasoned. Meanwhile, detailed procedural rules leading to unnecessary data overproduction on the part of applicants continue to exist without adding real value to the decision-making process. As stated earlier, immature democratic institutions are masters of imitating progress towards the achievement of the goal of rule of law. The negative outcomes of this parroting process have implications for both individual cases and the State as they cast a shadow on the prospects for future development in a number of key areas, including opportunities for economic development and foreign investment. The broader impact of the lack of neutrality at one level can be clearly perceived in one specific procedure, in a single election handled by just one administrative body. As noted above, all Council decisions must be properly reasoned. In addition, laws must clearly describe the imperative objective scope of merit-based criteria for nominees applying for high-rank judicial positions. What erodes the rule of law in this and in other similar cases is that adopting corrupted decisions is a practice that effectively perpetuates itself. The disregard for the achievements, integrity and professional merit of promising or—let us say—unblemished magistrates will have a strongly discouraging effect on

[14] *See supra* note 11.

others. For as long as an accepted mechanism hindering the rule of law from within by choosing *convenient* applicants (or simply passing over good applicants) continues to operate, it will be difficult to initiate a meaningful reform from within. Such biased behavior will discourage potential reformers from becoming actual agents of change.

- **Respect.** Respect is another fundamental feature of procedural justice. It is not merely a matter of courtesy to respect the rights of people in general. Tyler describes respect as a component that is important at all stages of communication with the respective authority. '*It includes both treating people well, that is, with courtesy and politeness, and showing respect for people's rights*.'[15] In keeping with the fair interpretation and application of the law by judges in the courtroom, the SJC is also expected to uphold the rule of law when applying its own rules and deciding on the governance of courts and prosecution offices. In other words, making a decision that disregards the rule of law irreparably erodes the level of professional appreciation and public trust that the institution would otherwise enjoy. This, in and of itself, is a long-term consequence, which will be hard to overcome. The election of new members of the SJC, or other similar bodies, might provide a fresh start for the institution on its path to upholding the rule of law. In order to build trust, a new election must conform to the requirements for transparency, accountability and procedural justice. Returning to the case presented at the beginning, these are important details to be considered while investigating the impact of procedural justice on high-ranking judicial appointments. Otherwise, the vicious cycle will remain unbreakable. The only way for Justice Koutzkova to achieve the necessary level of respect for the rule of law in her case, including as a professional, was to bring her case before another supreme institution. And she did indeed teach her fellow magistrates a most elegant lesson by putting the legal conundrum into the hands of the Supreme Administrative Court. Ultimately, the case shows that disregard for the integrity, professional merit and reputation of a member of the judiciary dishonors the entire legal community as it demonstrates contempt for the rule of law.

- **Trust.** Last but not least trust — a rather peculiar concept — should be mentioned. The most common definition of trust in psychology is the '*willingness to be vulnerable*' to the will and actions of another party (Mayer & Davis, 1999; Schoorman et al., 1996). So how could an appointing body encourage vulnerability within the cumbersome process of a judicial election? Confidence in institutions is essential when appraising the reliability of public bodies. I would suggest that in the case at hand the matter is even more complex, particularly in light of Tyler's summary of the '*assessment of the character of the decision maker*' and in the context of court proceedings, adding also the behavior of court personnel, and more specifically whether they are '*acting in the interests of the parties, not out of personal prejudices*'. In the context of high-ranking judicial appointments trust is not literally understood as and related to '*sincerity and caring*' (Tyler). It rather relates to genuinely doing the right thing based on a foundation of objective criteria set. There is an intricate link between trust and respect. The fact that two-thirds of the Council members did not speak up during the debates on the application of Justice Koutzkova once again pushes trust to the top of the agenda. The Council did hide behind silence,

[15] *See supra* note 11.

possibly without predicting that the applicant would take her case to the Supreme Administrative Court or anticipating the ruling that was eventually delivered by said court. However, as the SJC is a collective body, it may be argued that the matter of trust merits discussion on a case-by-case basis (member by member and vote by vote) or in the context of the entire body *per se*. I suggest that a dual perspective is appropriate in this case. Firstly, the final decision is delivered by the collective body in its entirety, and as such was appealed by the judge. Secondly, some Council members voiced opinions that properly justified their vote. These opinions are the building blocks of any appointment decision. One of the goals of the requirement for transparency in procedural justice, as applied in the judicial election process, is to demand an explanation of the reasons for the decisions underlying rulings and votes in proceedings that affect the public at large. Reasoning must become a healthy institutional habit. This would create expectations for the members of appointing bodies to do the right thing by candidly stating the reasons for their decision, whether in favor or against an applicant or nominee. It will also preclude them from bypassing the requirement for impartiality and objectivity so that if/when they do, they would clearly expose their bias.

III. Conclusions

Having discussed the introductory case through the lens of the core principles of procedural justice, we have established that the election failed to comply with three of the principles in question, notably neutrality, respect and trust. We have further seen that an impression of fairness cannot be achieved where those principles fail to be applied in their holistic entirety. In the case at hand, the lack of reasoning on the part of Council members had direct implications for the application of the principles of procedural justice. I believe that these can be successfully modified and adapted to the context of judicial appointments as an internal mechanism to safeguard the rule of law. Nevertheless, the application of this mechanism will require voluntary compliance and recognition by all members of the respective body. Procedural justice does not require significant financial resources or formality, but it does call for proper understanding. If such a basic level of understanding is achieved so that both the participants in and observers of appointment procedures, acting in good faith, are able to understand the reasons why institutions are expected to act in a particular way, we will come one step closer to establishing rule of law and engendering positive institutional transformation.

Corrupted decisions open huge gaps between the rule of law and the institutions with a mission to uphold and protect it. They thus widen the distance between people and the courts, and in this case — between magistrates as members of a professional community and the highest body responsible for governing the judiciary. Procedural justice illustrates how subjective experience corresponds to the levels of fairness demonstrated by a decision-maker. Here, the Council manifestly failed to ensure compliance by making an unfair decision and concealing itself behind the camouflage of superfluous procedural detail. This *modus operandi* clearly erodes the rule of law. Although beyond the scope of this paper, a further question that arises concerns the levels of self-governance of the judiciary. The SJC essentially showed complete disregard for the opinion of the majority of the professional community that expressed

unprecedented support for a fellow judge — yet another indication of internal erosion of the rule of law. Tyler notes that a particular advantage of procedural justice is that it leads to compliance over time.[16] If the SJC invests in measuring the deference of its decisions (not only for the sake of empirical evidence), followed by implementation, it will send a strong positive message to the community of magistrates.

I do not argue here that detailed procedures are bad in general. They do ensure publicity. However, publicity does not equate transparency and performs better in strong and predictable democracies. If detailed procedures are aligned with the principles of procedural justice, they will provide an alternative in favor of the rule of law. After all, we all want to be heard, understood and respected and this is the behavioral pattern institutions should follow to uphold the rule of law on a daily basis.

For future consideration

The introduction of procedural justice at the highest level of authority in a conservative and closed system such as the judiciary must be handled with great delicacy. Firstly, the concept is more likely to be met with acceptance, if proposed by a leading member of the community drawing on international good practices. Secondly, although the principles of procedural justice as relevant to appointment procedures are embedded in legal texts, institutions cannot transform these fundamentals into behavioral legislative imperatives. The protection of the rule of law by seeking to imbue the decisions on high-ranking appointments with genuine legitimacy is a matter of institutional will. However, the four key principles could be methodologically incorporated and used for conducting external assessments of judicial election' processes. Finally, the amalgam of fairness, trust and rule of law is work in progress: the boundary between procedural justice and the rule of law will become even thinner as other measures and mechanisms prove ineffective over time.

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