Bulgaria's Controversial Prosecutor General

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06.12.2024 doi: 10.59704/3ad7bd8649b34dc8

The ongoing nomination of Bulgaria's next Prosecutor General, scheduled for January 16, 2025, has sparked significant constitutional and political debate. Concerns over the legitimacy of the Supreme Judicial Council (SJC), whose members' mandates expired nearly two years ago, responsible for nominating the candidate, and the sole candidacy of Borislav Sarafov, have highlighted significant shortcomings in Bulgaria's judicial and political systems.

Despite the Constitutional Court's ruling that the expiration of the SJC's elected members does not dissolve the institution or suspend its functions, this decision is grounded narrowly in legal technicality. It neglects a teleological interpretation of the Constitution that would focus on establishing a strong rule of law instead of a technical approach which allows nepotism and corrupted practice through the use of legal loopholes. This lack of perspective from the legal function and its role in interpreting the law instead of applying its letter leads to a general erosion of public trust in the judiciary and weakens Bulgaria's credibility within European institutions. The persistent critiques from bodies such as the European Court of Human Rights (ECtHR), the Venice Commission, and the Council of Europe's Committee of Ministers underscore Bulgaria's ongoing failure to reconcile domestic practices with the rule of law, further deepening the divide between formal legality and substantive democratic commitments.

Understanding the concentration of power in the Prosecutor General's Office

The concentration of power in Bulgaria's Prosecutor General's Office highlights the high stakes in the ongoing nomination process, as the individual who assumes this role wields extensive authority with limited accountability. Bulgaria's Prosecutor General's Office has been compared to the "Russian Stalinist model" due to its highly centralized nature. In this system, the Prosecutor General exercises unchecked authority over the entire prosecutorial hierarchy, controlling all prosecutorial decisions, including the initiation and termination of cases. This vertical system creates a structure prone to abuse.

The ECtHR, notably in the case of *Kolevi v. Bulgaria* (Application no. 1108/02), criticized Bulgaria's legal framework for failing to provide adequate guarantees for the independence of investigations involving the Prosecutor General. The Court emphasized the hierarchical structure of the prosecution service.

In addition to these criticisms, the Council of Europe's Committee of Ministers has repeatedly urged Bulgaria to adopt legislative or constitutional amendments to reduce the Prosecutor General's influence within the SJC and the judiciary. To this effect the Committee encouraged procedural and institutional reforms, including a full reform of the composition of the SJC. However, these recommendations have been entirely disregarded, as the current SJC, operating beyond its mandate, continues to nominate the next Prosecutor General.

The Venice Commission, in its 2017 and 2019 opinions, similarly criticized the Prosecutor General's disproportionate influence over judicial governance structures, particularly emphasizing the lack of robust mechanisms to ensure accountability and independently investigate the Prosecutor General's actions.

Compounding these issues, constitutional amendments enacted in December 2023 introduced changes affecting the SJC and the reduction of powers and term limits for the Prosecutor General. However, these amendments were declared unconstitutional by the Bulgarian Constitutional Court as such changes can only be adopted by the Grand National Assembly, and not trough a normal session of the Assembly. This

highlights the difficulties that the institutions in Bulgaria are facing in the absence of a parliamentary majority capable of reforming Bulgaria.

Political deadlock and the Prosecutor General's nomination

The appointment of the Prosecutor General in Bulgaria is governed by Article 129, paragraph 2 of the Constitution and Article 173 of the Judiciary Act. The process requires the President of the Republic to appoint the Prosecutor General upon a proposal by the plenum of the SJC for a term of seven years. The SJC is the highest governing body of Bulgaria's judiciary, representing the system as a whole and overseeing the composition, organization, and administration of courts, prosecutor's offices, and investigative bodies. Its role is crucial for maintaining the judiciary's independence, efficiency, and integrity.

The SJC is composed of 25 members, including 3 ex officio members (the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court, and the Prosecutor General), 11 members nominated by the National Assembly, and 11 members nominated by the judiciary. The term of office for SJC members is five years, and it can only be renewed as a full group.

However, the SJC's ability to fulfil its role has been significantly hindered by political and institutional challenges. Chief among these is the expired mandate of its members, due to the fact that the National Assembly has been unable to carry out this constitutional responsibility due to ongoing political instability. Over the past four years, Bulgaria has held seven parliamentary elections, the most recent on October 27, 2024. No political party has managed to secure a working majority, preventing the formation of a stable government. This prolonged political deadlock has stalled key reforms, slowed Bulgaria's progress toward eurozone membership, and deepened public disillusionment with state institutions. Among its many consequences is the inability to renew the SJC's membership, further undermining the judiciary's credibility and raising questions about the SJC legitimacy as a nominating body (cf. infra) and the procedural integrity of the current election process, at a time when all of its members' mandates are expired.

The legitimacy crisis of the Supreme Judicial Council

The Bulgarian Constitutional Court, in its ruling of July 24, 2023, recently addressed critical issues surrounding the legitimacy and operations of the SJC in light of the expired mandates of its members. The Court ruled that the expiration of the SJC's elected members does not dissolve the institution or suspend its functions. As a permanently operating body, the SJC retains its constitutional authority, even when the parliamentary quota of new members remains unfilled due to political deadlock.

While the ruling provides legal grounds for the SJC to continue operating, it raises serious concerns about the legitimacy of its decisions. Critics argue that an SJC composed of members whose mandates expired nearly two years ago lacks moral and political legitimacy, even if its legal authority remains technically valid.

The principle that "justice must not only be done but must also be seen to be done" is particularly significant in this context, even though the SJC is not a jurisdictional body in itself. Public perception of fairness, impartiality, and transparency is integral to upholding the rule of law and goes hand in hand with the formal legality of procedures. This principle extends to the SJC, as a key institution overseeing the judiciary, since its legitimacy directly affects public confidence in the judicial system as a whole. The continued operation of the SJC with members serving beyond their expired mandates erodes trust in its decisions, fuels international criticism, and casts doubt on the transparency and fairness of its actions.

Indeed, Advocate General Priit Pikamäe of the European Court of Justice recently criticized Bulgaria's Inspectorate to the SJC for continuing operations with members serving on expired mandates, arguing that such practices undermine judicial independence and violate EU rule-of-law principles:

> *"The second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union,*

must be interpreted as precluding legislation, as interpreted by national case-law, which authorises members of a body who are elected by Parliament for terms of office of a predetermined duration, which may not be renewed consecutively, and who are empowered to scrutinise the activities and integrity of judges and public prosecutors and to propose the initiation of disciplinary proceedings against them, de facto to continue to exercise their functions indefinitely after their term of office has expired, without efforts being made in the short term to break the deadlock in electing new members of that body, where that legislation has not been designed in such a way that there can be no reasonable doubt, in the minds of individuals, as to the use of the powers and functions of that body as an instrument to exert pressure on, or political control over, the activity of those judges and public prosecutors."

The role of the President of the Republic in appointing the Prosecutor General

Adding to the complexities is the constitutional role of Bulgaria's President in appointing the Prosecutor General. Under Article 129(2) of the Constitution, the President can either appoint the candidate proposed by the SJC or refuse to do so. However, if the SJC re-submits the same nomination following a second vote, the President is constitutionally obliged to appoint the candidate.

President Rumen Radev has publicly opposed Borislav Sarafov's candidacy, citing concerns over the lack of competition in the nomination process. If the President exercises his right to reject the nomination, significant procedural questions arise: Can the re-submission of the same candidate, coupled with the President's inability to reject the proposal a second time, reduce his role to a mere procedural formality? These dynamics risk undermining the President's constitutional authority by making it easy for the SJC to bypass substantive objections, potentially marginalizing the President's role as a safeguard for transparency and fairness in the judicial appointment process.

These issues are compounded by a fundamental conflict between Article 173(3) of the Judiciary Act and Article 129(2) of the Constitution. Article 173(3) delegates the nomination power to the SJC's Prosecutors' Committee, a subset of the Council, while Article 129(2) explicitly requires the entire SJC to propose the candidate. This discrepancy highlights inconsistencies between statutory delegation and the Constitution.

These questions highlight potential conflicts between statutory provisions and constitutional principles, emphasizing the need for clarity and reform. Resolving these issues is essential to safeguarding the legitimacy, transparency, and fairness of Bulgaria's judicial appointment process.

A call for reform: upholding Bulgaria's democratic integrity

While key institutions remain largely silent, civil society and professional organizations have raised their voices. The Union of Judges in Bulgaria, all the Bars of attorneys-at-law across the country, and NGOs like "Justice for All" have openly criticized the "contest with one candidate" and joined in organized protests. Additionally, some Bulgarian lawyers have addressed petitions to EU institutions, challenging the nomination process for conflicting with EU principles of transparency and legitimacy.

A crucial step forward to address these legitimate democratic concerns would be for empowered institutions to submit a new request to the Constitutional Court. Previous questions raised before the Court failed to adequately address the critical distinction between the continuation of the SJC as a permanent body and the existence of an adequate legal basis for decisions taken by its members whose mandates have expired. A properly framed request should focus on this fundamental issue, ensuring a thorough examination of the legal basis for the nomination of the Prosecutor General.

However, even the best-formulated request will fail to deliver meaningful change if the underlying obstacle remains unaddressed: the lacklustre complacency of the political class. Call for change and promises have been the leading platform for the recent elec-

tions. The inability of the successive governments to bring any meaningful improvement in terms of rule of law and elimination of corruption has led to the current chronic instability and inability to generate a stable government. The reliance on institutions with weak or absent democratic legitimacy such as the SJC to bring the needed changes can only bring an uncomfortable status quo without a real political will to bring a change.

This is why the political class must take a collective responsibility and commit to actions that will ensure a judiciary that is independent, transparent, and aligned with the aspirations of the Bulgarian people. A critical step in this process is addressing the deeply flawed nomination of the General Prosecutor, which has long symbolized the problematic entanglement of political power and judicial governance. Now is the time for decisive action to reform these practices, restore public trust, and set Bulgaria firmly on a path toward a just and democratic future, fully integrated into the European family of nations.

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SUGGESTED CITATION

Thavard, Blaga; Slavov, Peter: Bulgaria's Controversial Prosecutor General, Verfassungsblog, 06.12.2024, doi: 10.59704/3ad7bd8649b34dc8.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20241206-225551-0.