

Bulgaria's Constitutional Drama and the EU Commission's Rose-Colored Glasses

Dr Radosveta Vassileva¹

On 26 July 2024, Bulgaria's Constitutional Court declared a significant part of constitutional amendments enacted in a rush in December 2023 unconstitutional. These amendments were allegedly aimed at the depoliticization of the Supreme Judicial Council and the decentralization of the Prosecutor's Office, and had been praised as progress in the country's latest Rule of Law report by the EU Commission. Yet, a closer look shows that the amendments do not comply with key recommendations by the Venice Commission and could worsen an already dire situation. Sadly, in the case of Bulgaria, the EU Commission has a long history of seeing progress when the rule of law is under assault.

Published on the *Verfassungsblog* on 30 July 2024

SUGGESTED CITATION: Radosveta Vassileva, 'Bulgaria's Constitutional Drama and the EU Commission's Rose-Colored Glasses' (*Verfassungsblog*, 30 July 2024), <https://verfassungsblog.de/bulgarias-constitutional-drama-and-the-eu-commissions-rose-colored-glasses/>

On 26 July 2024, Bulgaria's Constitutional Court [declared](#) a significant part of constitutional amendments enacted in December 2023 unconstitutional. These amendments were part of a rushed constitutional reform which was supposed to address persistent rule of law challenges in the country, such as the excessive powers of the Prosecutor's Office and the politicization of the Supreme Judicial Council. The judgment was handed down only two days after the EU Commission commended Bulgaria for this reform in the country's annual [Rule of Law report](#). Some politicians behind the reform quickly launched a campaign against the majority which delivered the judgment, leveraging the Rule of Law report. Hristo Ivanov, former leader of the 'Yes, Bulgaria' party, [accused](#) the court of protecting the 'prosecutorial republic'. Atanas Slavov, minister of justice (2023-2024), [claims](#) that the court has engaged in 'constitutional esotericism'. Kiril Petkov, former prime minister and co-leader of the 'We'll Continue the Change' party, declared on social media that 'the captured state wants the lack of justice to continue' and named and shamed the nine judges who voted in favor of this decision, implying that they were servants of the establishment.

¹ <https://orcid.org/0000-0001-7118-3949>.

Despite the political uproar, a close reading of the actual text of the legal reasoning in [Decision 13 of 26 July 2024 on constitutional case 1/2024](#) shows that the majority had serious concerns about pathways for political meddling in the justice system introduced by the reform, the removal of checks and balances ensuring the protection of human rights, and the poor quality of drafting, which could lead to legal uncertainty. Moreover, in passing, the majority has subtly indicated what could be changed in legislation to achieve the desired results without long-term constitutional damage. Overall, the drama in Bulgaria, including its timing, raises concerns about why the EU Commission recognizes half-baked, ill-written constitutional reforms as progress without analysis of their substantive merit in context.

Bulgaria’s Prosecutorial Republic and the Good Intentions behind the Reform

For those following Bulgaria’s rule of law crisis and the case law of the European Court of Human Rights on Bulgaria, there is hardly any doubt that the key threat to the rule of law is the particular status of the Prosecutor’s Office, which lacks proper checks and balances and has a vertical structure where all decisions depend on the General Prosecutor whose influence extends to the judiciary. This state of affairs stems from the communist era when the court acted as a mere rubber stamp for the prosecution. Moreover, the Prosecutor’s Office is technically a political puppet due to the behind-the-scenes dependencies at the Supreme Judicial Council (SJC), which is responsible for the appointment and promotion of all magistrates (judges, prosecutors, and investigators). (See [here](#), [here](#) and [here](#)).

There is also little doubt that the main intention behind the December 2023 constitutional reform was to decentralize the Prosecutor’s Office through reforms of the institution itself and the SJC. However, in the fall of 2023, the drafters ignored critics pinpointing [key flaws](#) of the reform and failed to consult jurists with in-depth expertise in criminal law. To this end, the outcome in Decision 13 is unsurprising: it may even have prevented further galvanization and politicization of the ‘prosecutorial republic’.

Key Flaws of the Reform Identified by the Constitutional Court

While the Constitution is the supreme law of Bulgaria (Article 5(1) of the Constitution) and the Constitutional Court does not need to resort to international law and persuasive reports to substantiate its arguments, it is certainly notable that some of the key flaws identified by the court have already been flagged by the Venice Commission:

The Reform Formalized the Political Meddling in the Prosecutor’s Office

One major change introduced by the December 2023 amendments was dividing the SJC into two separate, independent bodies – the Supreme Judicial Council and the Supreme Prosecutorial Council. Prior to the amendments, the SJC had two colleges – a Prosecutorial College and a Judicial College. The Prosecutorial College was composed of eleven members: the General Prosecutor (*ex officio*), four prosecutors and one investigator elected by their respective general assemblies, and five members elected by parliament. In this setup, the General Prosecutor technically controls the majority in the college and the so-called prosecutorial quota usually votes

en bloc. However, the sad reality is that political influence behind-the-scenes was channeled through both quotas.

Following the December 2023 amendments, the Supreme Prosecutorial Council has ten members: the General Prosecutor (*ex officio*), two prosecutors and one investigator elected by their respective general assemblies, and six members elected by parliament (see Article 130 and subsequent of the amended Constitution). In this setup, the so-called political quota holds the majority. These seemingly cosmetic changes exacerbate a long-standing threat to the rule of law by formalizing political meddling in the council's work, giving precedence to the quota elected by the current political majority.

Bulgaria's Constitutional Court held that the 2023 amendment placed 'the administration of the "prosecution system" under the direct control of a situational political majority that formed the council', which violated the separation of powers (p. 71 of the judgment).

It is important to note that in its October 2023 Opinion on the Draft Amendments to the Constitution, the Venice Commission recommended regarding the Supreme Prosecutorial Council '...reconsidering the composition of the Prosecutorial Council, so as to ensure the accountability and the effectiveness of the prosecution service while at the same time excluding the control of this institution by the political majority of the day' ([CDL-AD\(2023\)039](#), paras 71, 125 and 126). Moreover, in view of the requirement for election of the political quota in both the Supreme Judicial Council and the Supreme Prosecutorial Council with a 2/3 majority in parliament, the Venice Commission called for the establishment of an anti-deadlock mechanism for both elections ([CDL-AD\(2023\)039](#), paras 50, 123 and 130).

This serious criticism was ignored by the drafters of the amendments. Even more disappointing is the fact that the EU Commission, in its [2024 Rule of Law Report on Bulgaria](#), asserted right after commenting on the composition of the Supreme Prosecutorial Council: 'Before adopting the reform, the authorities consulted the Venice Commission, which confirmed that this composition of the SJC is in line with previous Venice Commission recommendations and with the established standard' (Rule of Law Report, p. 8). A reader who has not read the Venice Commission's opinion may be misled to believe that Bulgaria has followed all its recommendations, while this is clearly not the case. Moreover, in a small footnote, the EU Commission expresses satisfaction that an anti-deadlock mechanism will allegedly be introduced in legislation in the future (footnote 55, page 8), disregarding the possibility that it could easily be struck down as anti-constitutional if it is not in the text of the Constitution itself or that it may not be enacted at all.

Promoting Prosecutorial Arbitrariness

A second major change introduced by the 2023 constitutional reform is an attempt to decentralize the Prosecutor's Office. Before the reform, Article 126(2) stated: 'The General Prosecutor exercises supervision over the control of legality and methodological guidance over the activity of all prosecutors'. Following the amendments, Article 126(2) stipulated: 'The General Prosecutor represents the prosecution and administers the Supreme Prosecution'. Article 126(3) stated: 'Upon the proposal of the Supreme Prosecution, the General Prosecutor approves general methodological guidance for pre-trial investigations by prosecutors, investigators and other investigative bodies

which can be appealed before the Supreme Administrative Court according to a procedure established by law’.

The majority at the Constitutional Court struck out both provisions on the grounds that the country’s general assembly (parliament) had exceeded its competence, citing its own case law discussing the difference between a simple national assembly and a grand national assembly (on the difference, see [here](#); see pages 51-54 of judgment). However, in passing, they made important findings highlighting the poor quality of drafting and some practical implications of the amendments.

First, the majority concurred: ‘Without the oversight of legality exercised by the General Prosecutor, many of the prosecutorial acts would remain without any control, considering that the majority of them are not subject to judicial review’ (p 52 of judgment). In a diplomatic way, the judges remind politicians where the main rule of law challenge lies. Removing the General Prosecutor’s control of legality would further reduce checks and balances in an already deficient system. This makes one wonder why no other form of review was introduced by the drafters. Needless to say, the main pieces of legislation strengthening the already palpable prosecutorial arbitrariness are the Code of Criminal Procedure and the Law on the Judiciary.

Second, regarding the methodological guidance, the majority stresses that since the General Prosecutor has been designated as the administrator of only the Supreme Prosecution, his guidance can only be binding on them. Hence, ‘[t]he lack of general commitment of all prosecutors to fulfill the methodological instructions of the General Prosecutor is a prerequisite for contradictory prosecutorial practice...’ (p 53 of judgment). Considering that all of this would be happening in the absence of judicial review, this promotes prosecutorial arbitrariness.

In this light, in its Opinion on the Draft Amendments to the Constitution of October 2023, the Venice Commission similarly highlighted the potential consequences of insufficient guidance: ‘The absence of methodological guidance would create a situation where prosecutors behave inconsistently with one another and where different prosecutors argue for opposing interpretations of the law...’ ([CDL-AD\(2023\)039, para 82](#)).

From this perspective, it is surprising why the EU Commission did not see how these amendments are, in fact, a ticking bomb, given the context and its extensive experience of monitoring Bulgaria, including under the Cooperation and Verification Mechanism (see page 4-5 of [Bulgaria’s 2024 Rule of Law Report](#)).

The Future of Bulgaria’s Rule of Law and the EU Commission’s Rose-Colored Glasses

The outcome in Decision 13 of 26 July 2024 may seem disappointing to those hoping to address the fifteen-year-long rule of law crisis in Bulgaria. However, it is important to remember that a poorly conceived reform can be as detrimental as no reform at all. Numerous comments made by the majority in passing suggest that some long-standing issues could be resolved through changes in legislation rather than constitutional amendments. A good start may be a reform of the Code of Criminal Procedure, which is the true yet ignored source and anchor of all excessive powers of the Prosecutor’s Office and which fails to respect the principle of equality of arms in criminal

proceedings. Moreover, some comments may be used to strengthen future proposals for constitutional reform.

Finally, according to [Dictionary.com](#), ‘rose-colored glasses’ refers to ‘a cheerful or optimistic view of things, usually without valid basis’. With regard to Bulgaria, the EU Commission has a long history of seeing progress when the rule of law was under assault or when efforts were made irrespective of the substantive quality of reform via the Cooperation and Verification Mechanism (see [here](#) and [here](#)). Sadly, in the Rule of Law reports, the EU Commission continues to make seemingly politically motivated decisions and to display dual standards, thus fueling rather than curtailing the rule of law crisis in Bulgaria.