ANDREY YANKULOV

March 2023

WHAT NEEDS TO CHANGE IN CRIMINAL JUSTICE?

ANTI CORRUPTION FUND

ANTI
CORRUPTION
FUND

Author: © Andrey Yankulov

AMERICA FOR
BULGARIA
FOUNDATION
us4bg.org

Support for the Anti-Corruption Fund Foundation (ACF) is provided by the America for Bulgaria Foundation. The statements and opinions expressed herein are solely those of ACF and do not necessarily reflect the views of the America for Bulgaria Foundation or its affiliates.

CONTENTS

INTRODUCTION 3

PART 1. MAIN PROBLEMS STEMMING FROM THE ARCHITECTURE OF THE JUDICIARY AND IMPACTING THE CRIMINAL JUSTICE SYSTEM 4

1. Courts 4

2. The public prosecution 5

3. . Investigative authorities 7

PART 2. PROPOSALS TO CHANGE THE ARCHITECTURE OF THE JUDICIARY 10

1. Need to amend the Constitution 10

2. Change in the distribution of quotas between the chambers of the SJC and in selection criteria and establishment of an anti-deadlock mechanism for cases in which seats cannot be filled 10

3. Retaining the plenary of the SJC, albeit with drastically limited powers that include the selection and dismissal of the Prosecutor-General 12

PART 3. MAIN PROBLEMS POSED BY PROSECUTORS' POWERS 14

1. Complete monopoly over indictments, which makes even 14

2. *De facto* review of legality 19

PART 4. PROPOSALS TO CHANGE PROSECUTORS' POWERS BY ESTABLISHING MORE CHECKS AND BALANCES IN RESPECT OF CASES WHERE A PROSECUTOR OPTS (NOT) TO INDICT 20

1. Need for amendments to the Constitution to secure real change 20

2. Judicial review where prosecutors do not bring charges 22

3. Judicial review where prosecutors bring charges 25

4. Ensuring that the prosecution confines itself to the powers vested in it by the Constitution vis-a-vis the general review of legality 26

PART 5. PROPOSALS TO RECONSIDER CERTAIN RULES OF CRIMINAL PROCEDURE AND LEGAL CONCEPTS WITH A VIEW TO IMPROVING THE EFFICIENCY OF PROCEEDINGS 27

1. The need for a holistic approach 27

2. Ineffective investigations in the context of the ECtHR's findings and the measures the Bulgarian authorities envisage to remedy these 27

3. Further proposals 28

PART 6. MAJOR SUBSTANTIVE LAW PROBLEMS AND PROPOSALS 35

1. Changes to the Criminal Code (CC) during the period following democratic change: between populism in the sphere of criminal law and international instruments 34

2. Do we need a new CC? 36

3. Guidelines on the most pressing changes 36

CONCLUDING REMARKS 39

INTRODUCTION

Where reforming the criminal justice system is concerned, problems are generally not viewed in their totality, nor are their purely practical aspects considered. Accordingly, the solutions put forward cannot but suffer the shortcomings of this approach. This does not go to say that problems should not be ranked according to their importance or that, where it is objectively impossible to solve them all (for instance, where political agreement is lacking), no steps should be taken. Indeed, it is beyond doubt that steps need to be taken even where the risk mentioned, i.e. that the reform will remain only partial, is in place.

The purpose of this text is to attempt to map out the bigger picture, setting out the most pressing problems resulting in the systemic deficiencies plaguing criminal justice instead of focusing exclusively on any one of these. Effort will be made to verify to what extent the system in place in Bulgaria meets basic European standards. The solutions proposed will capitalise on our attempt to forecast the practical outcomes of change, including the expected benefits and how these relate to potential risks.

Part of the proposed solutions for certain issues will appear particularly contentious or even foreign to the Bulgarian context due to the conservative nature of the subject-matter at hand. These will always be accompanied by justifications stemming from comparisons between legal frameworks.

This text concerns criminal justice, but criminal justice clearly constitutes just one cog in the overarching system of justice. Indeed, even if the best regulatory solutions are found, it stands beyond doubt that these cannot serve as a substitute for the need for the very understanding of how public power in Bulgaria is exercised to evolve, i.e. for the 'professional ethos and political culture', as defined by the Venice Commission[1], to develop. These are necessary to ensure that any legislative reform yields tangible results.[2]

In general, the problems themselves can be classified into several groups: problems concerning entities in the system, their respective powers and the safeguards to ensure checks and balances, and ones having to do with the procedures in criminal cases and substantive criminal law.

1 More generally, the Venice Commission stresses that the problem identified in *Kolevi* cannot be solved by one single amendment but will rather require a combination of institutional changes, new procedural and substantive rules, and the evolution of professional ethos and political culture,' paragraph 70 of *Bulgaria: Opinion on Draft Amendments to the Criminal Procedure Code and the Judicial System Act Concerning Criminal Investigations against Top Magistrates (2019)* — European Commission for Democracy through Law (Venice Commission)

2 In a 2013 interview for the Kapital, constitutional judge and Vice-President of the Supreme Court of Cassation Blagovest Punev, a renowned legal professional, suggested that 'There is a regulatory fetishism of sorts doing the rounds in Bulgaria. There is this understanding that problems can be solved by passing new rules, but that is a myth. Anything can be emulated, even the most forward-looking regulatory standards coming from the West, but how will these operate on Bulgarian soil? The Constitution of the United States was emulated by all Latin American republics, but compare the USA and Latin America and you will have sufficient illustration that mere imitation comes up short.' https://www.capital.bg/politika_i_ikonomika/bulgaria/2013/10/18/2163617_blagovest_punev_v_obshtestvoto_ima_useshtane_za/

Part 1
MAIN PROBLEMS STEMMING FROM THE ARCHITECTURE OF THE JUDICIARY AND IMPACTING THE CRIMINAL JUSTICE SYSTEM

1. Courts

The 1991 Constitution enshrined the integrity and independence of a judiciary that comprises courts, the public prosecution and investigative authorities. The architecture of the public prosecution mirrors that of the court system. The Supreme Judicial Council (SJC), whose remit covers all magistrates, is vested with the main functions pertaining to governing the judiciary, including the most important ones, namely the appointment, promotion and dismissal of magistrates and the designation of the administrative heads of the magistracy. The SJC comprises both ex officio members (the presidents of Bulgaria's supreme courts and its Prosecutor-General) and 22 members that need to be chosen. Half of the latter are chosen by the magistracy, and the other half are chosen by Parliament.

The Constitution was amended in 2015.[3] As a result, the SJC was divided into two chambers: a Judges' Chamber and a Prosecutors' Chamber. The former was tasked with handling business pertaining to judges, and the latter — business pertaining to prosecutors and investigators. The Plenary of the SCJ was left with reduced powers, some of these of great importance, such as the designation of supreme court presidents and the Prosecutor-General. The principal objective of this reform was to ensure the independence of courts as the hallmark of principle of the rule of law, effectively stripping prosecutors of the chance to exert influence over matters relating to the careers of judges, and to curb the political influence on courts on the part of members of the SJC chosen by Parliament.

This was precisely the vision set out in the Updated Strategy for Continued Reform of the Judiciary adopted in Parliament on 21 January 2015. It was this document that informed the amendments to the Constitution. According to the Strategy, decisions relating to the careers of judges and any disciplinary measures against them should be taken by a chamber the majority of whose members are judges chosen by their peers.[4] Nevertheless, the 2015 reform did not bring such a majority about. Indeed, the Judges' Chamber comprises 14 members, 6 of whom are chosen by their peers.

The fundamental elements of the relevant European standard on these matters are to be found in Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe. This concerns the independence, efficiency and responsibilities of judges and stipulates that 'Not less than half the members of [judicial] councils should be judges chosen by their peers from all levels of the judiciary'.[5]

Similarly, the Venice Commission expressly recommends that the court system should be governed by judicial councils in the case of new democracies. It is driven by the understanding that 'In older democracies, the executive power has sometimes a decisive influence on judicial appointment,' but that is not problematic since 'Such systems [...] work well in practice' because of 'legal culture and traditions which have grown over a long time' and serve as natural safeguards against the desire to have courts serve political ends. Conversely, in new

3 *State Gazette* (SG) No 100/2015

4 Milestone 1: Elimination of the institutional causes of undue influence on and by means of the Supreme Judicial Council: 1.1.1 Changing the structure of the Supreme Judicial Council (SJC) to ensure that decisions relating to the careers of judges and any disciplinary measures against them are taken by a chamber the majority of whose members are judges chosen by their peers and, where such decisions concern prosecutors and investigators, that a chamber comprising prosecutors and investigators makes these.'

5 Paragraph 27 of Recommendation Rec(2010)12

democracies, which 'did not yet have a chance to develop these traditions', more explicit safeguards are needed 'to prevent political abuse in the appointment of judges'. For instance, 'Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because of the danger that political considerations prevail over' professional ones.[6]

That said, the strive to ensure that courts are managed by a council independent of those holding political office has been plagued by a set of practical shortcomings, particularly during the years immediately after democratic change in countries that used to form part of the Communist Bloc. For instance, cases of corruption have been identified in such councils. These have had to do with undue influence on the part of council members on judges hearing specific cases, with promises being made of career advancement. Essentially, the independence of the judiciary is turned against its purpose to protect corrupt councils.[7] To overcome the problems stemming from a concept of independence that is being perverted into arbitrariness, it is recommended to foster a culture of greater public accountability on the part of judicial councils.[8]

How courts are governed and their independence ensured are matters that have been identified clearly at a European level and, given political will, the relevant European standard can easily be attained. When it comes to the public prosecution, however, the situation is more complex.

2. The public prosecution

The complex nature of the situation with the public prosecution stems from the fact that there are a multitude of criminal justice systems that have been accepted to meet the rule-of-law standard. These can be placed in several distinct groups depending on where the public prosecution fits in the overarching architecture and what its main features are:[9]

- systems in which the public prosecution forms part of the judiciary and systems where it does not, including where it constitutes a sui generis authority that does not form part of the judiciary or the executive, or where it is 'part of or subordinate to the government';[10]
- systems in which the public prosecution is under an obligation to prosecute whenever the relevant statutory requirements are in place (the principle of legality, or mandatory prosecution) and systems in which the public prosecution enjoys discretion and can decide whether it is appropriate to bring charges on the basis of specific criteria (the principle of opportunity);[11]
- systems in which the prosecution is in charge of investigative activities and systems in which the police or an officer of the court is in charge of these.[12]

6 See European Commission for Democracy through Law (Venice Commission) — *European Standards on the Independence of the Judiciary: A Systematic Overview* (pp. 3-4).

7 See Sterk, K. *Some Reflections on the Selection and Appointment of Judges in European Law. Five Next Steps in Defence of Independent Justice* (pp. 21-22).

8 See *Office for Democratic Institutions and Human Rights — Report: Towards a Culture of Accountability of Councils for the Judiciary.*

9 The principal document introducing the European standard vis-a-vis the public prosecution in member states of the Council of Europe is Recommendation Rec(2000)19 of the Committee of Ministers on the role of the public prosecution in the criminal justice system.

10 Paragraph 13 of Recommendation Rec(2000)19 sets out a set of six specific requirements that relations between the government and the public prosecution must meet in case the latter forms part of or is subordinate to the former.

11 Historically speaking, civil law systems rely on the principle of legality, while common law systems rely on that of opportunity. See Kyprianou, D. *Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies* (pp. 13 et seq.). Nowadays, however, many of the various types of systems borrow increasingly from other systems.

12 At the end of the 20th century, there was a Europe-wide trend for investigations to be carried out by the police or other agencies but with the public prosecution in charge. Investigating judges stopped being used first in Germany (1974), then in Italy (1989), Austria (2008) and Croatia (2011) among others, and specialised judges were tasked with the judicial review of any actions and decisions that could result in a restriction of rights at the pre-trial stage. Investigating judges have continued to be used in France, but their remit concerns a very limited range of cases. In the Netherlands and Luxembourg, their role has been limited significantly. They may conduct investigations only at the request of a prosecutor (see Durdevic, Z. *Judicial Control in Pre-trial Criminal Procedure Conducted by the EPPO*).

The differences in the types of systems notwithstanding, the requirements to be met by public prosecutors are always more stringent than the ones parties to civil proceeds must satisfy. Prosecutors are also required to abide by high professional standards and remain independent and impartial. According to the Venice Commission, 'Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner' and 'a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone'.[13]

Where the public prosecution forms part of the executive and has to report to the Ministry of Justice[14], representatives of the executive have the power to give instructions to prosecutors, including with regard to specific cases, in theory. In practical terms, however, this never happens or happens very rarely. A clear trend towards greater independence of public prosecutors from political influence is observable in European democracies. That is because they are cognizant of the danger of the toolbox available to criminal justice being used for political ends. A telling example in this respect is the judicial reform in Poland, which was condemned by the European institutions. This entailed not only creating mechanisms to exert political influence over courts, but also transferring the public prosecution to the executive.[15]

That said, it stands beyond doubt that the independence of a prosecutor does not entail the same as the independence of a judge. The hierarchical organisation of work at the public prosecution is a legitimate way of ensuring the attainment of its principal objective, i.e. to prosecute criminal offences. In this sense, giving general or specific instructions to prosecutors and having higher-ranking prosecutors reverse the decisions of lower-ranking ones does not run counter to the established European standard.[16, 17, 18]

The modern-day public prosecution is mainly engaged in the prosecution of criminal offences. Entrusting additional functions that go beyond criminal justice to prosecutors poses a serious risk to the rule of law because it means vesting them with a vast amount of power without providing for the necessary checks and balances. This broader array of powers that spills over the confines of criminal proceedings can be observed in countries in the former Soviet Bloc and it harkens back to the status of prosecutors at the time of totalitarianism.[19]

The public accountability of the prosecution is of considerable importance to meeting European standards on the quality of criminal justice. The most common ways to meet these include direct control on the part of the government or Parliament, or a dedicated prosecutorial council some of whose members are chosen by Parliament.

The Venice Commission notes a trend toward more and more prosecutorial councils or prosecutors' chambers being established in member states of the Council of Europe. That said, it does not appear that a single standard is being followed. Where a prosecutorial council exists, it should include prosecutors from all levels but also other legal practitioners and academics. The Venice Commission recommends procedures allowing academic and non-governmental organisations to table proposals and minimising the risk of individuals susceptible to political influence being appointed. If the members of such a council are to be elected by Parliament, it is recommended this should be done by qualified majority. If prosecutorial and judicial councils are to form part of a single body, it should be ensured that judges and prosecutors cannot

13 See European Commission for Democracy through Law (Venice Commission) — *European Standards as Regards the Independence of the Judicial System: Part II — The Prosecution Service* (paragraphs 14 to 19).

14 Germany, Austria, the Netherlands, Denmark.

15 See *Exercising Control over the Prosecution Function — The Necessary Criminal Justice Reform* [„Контролът върху наказателното преследване — необходимата реформа на наказателното правосъдие"] (p. 2) and the references there.

16 According to paragraph 10 of Recommendation Rec(2000)19, instructions addressed to prosecutors should be done in writing, and adequate internal procedures should be available to replace a prosecutor where they believe that an instruction is either illegal or runs counter to their conscience.

17 According to paragraph 92 of the Rule of Law Checklist of the Venice Commission, 'Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.'

18 See *European Commission for Democracy through Law (Venice Commission) — European Standards as Regards the Independence of the Judicial System: Part II — The Prosecution Service* (paragraph 53 et seq.).

19 See *Exercising Control over the Prosecution Function — The Necessary Criminal Justice Reform* (p. 3), as well as European Commission for Democracy through Law (Venice Commission) — *European Standards as Regards the Independence of the Judicial System: Part II — The Prosecution Service* (paragraph 72 et seq.).

outvote the other group in each other's appointment and disciplinary proceedings. This could be done by having the council sit in two chambers, as it does in France.[20]

Taken together, the position of the Bulgarian public prosecution within the architecture of the judiciary, the membership in the magistracy afforded to prosecutors, which is similar to that of judges, the mandatory nature of criminal prosecution based on the principle of legality and the public prosecution's control over investigative measures do not make the Bulgarian public prosecution anything exotic in Europe. Quite the contrary, they position it closer to its counterparts in Italy and Romania, for instance.[21]

In Bulgaria there is often talk suggesting that the structure of the public prosecution is 'of a Soviet type' and needs a complete overhaul if the prosecution — and, by extension, criminal justice — is to become truly democratic. Nevertheless, as observed above, the hierarchical nature of the public prosecution is attested in many European legal systems. European standards do not in any way reject the concept of a prosecutor-general[22] even if reformist circles in Bulgaria tend to often associate the misfortunes of the prosecution precisely with this concept and propose that it should be rethought completely or, according to some, abolished.[23]

The major problem plaguing the public prosecution is not rooted in its structure but in the all too limited set of checks and balances and the little external control over the extent to which the institution discharges its main function, namely the prosecution of criminal offences, in the context of an overly powerful Prosecutor-General sitting in the SJC and the prosecution's *de facto* exercise of general supervisory powers over the administration (even though it has no constitutional grounds to do so) coupled with the fact that this practice runs counter to contemporary European standards concerning the prosecution.

3. Investigative authorities

The 1991 Constitution enshrined the position of investigative authorities in the judiciary and tasked these with the investigation of criminal cases where this is provided for in a law. The 2009 amendments to the Judiciary Act[24] resulted in investigative authorities being incorporated into the public prosecution and the head of the National Investigation Service (NIS) becoming the Prosecutor-General's deputy.

In addition, the Criminal Procedure Code (CPC) currently in force became effective in 2006 and this allowed public prosecutors to be in charge of investigations[25] in line with the contemporary German model, which gained traction after the figure of the investigating judge was abolished in Germany in 1974. At present, investigative authorities do not enjoy procedural autonomy and instead report to prosecutors. They may only act of their own motion in a highly restricted range of circumstances, i.e. in urgent cases or where a manifest criminal offence has been committed. They enjoy limited operational discretion in that they do not have to receive instruction from a prosecutor for all the measures they need to take. It is for prosecutors to instruct an investigation and review the work of investigating authorities at all stages, starting from the very beginning of the pre-trial stage. Only prosecutors may initiate said stage unless a case is urgent or a manifest criminal offence has been committed. Investigative authorities are required to regularly report to prosecutors on the progress on a case. They cannot challenge the latter's instructions as to what evidence gathering mea-

20 See European Commission for Democracy through Law (Venice Commission) — *European Standards as Regards the Independence of the Judicial System: Part II — The Prosecution Service* (paragraph 66).

21 The Criminal Procedure Code of Romania additionally rests on the principle of opportunity.

22 See European Commission for Democracy through Law (Venice Commission) — *European Standards as Regards the Independence of the Judicial System: Part II — The Prosecution Service* (paragraphs 34-40).

23 The civic organisation Justice for All [„Правосъдие за всеки"] has expressed such sentiments, for instance.

24 SG No 33/2009

25 The fact that public prosecutors should be in charge of investigations was stipulated in the now repealed version of the CPC that used to be effective until 2006, but there was nothing to ensure that this was the case. In practical terms, investigations were conducted solely by investigative authorities at their discretion. It was investigative authorities that decided what evidence gathering measures to put in place, whom to charge, when to do so and on what counts, when to conclude the investigation and at what point to send it to the relevant prosecutor. It was only at that stage that prosecutors actually took charge of investigations by assessing the quality of the investigative authorities' work.

sures are needed, nor can they exercise discretion on whether to bring charges against an individual or petition a court to authorise the secret or mandatory collection of evidence. Indeed, prosecutors may exclude them from a case at any given point and conduct the entirety of the investigation on their own without the need for an investigative authority. The list goes on.

The fact that investigating officers lack any procedural autonomy completely voids their constitutional status as magistrates forming part of the judiciary of meaning. This status is essentially relevant only to investigating officers themselves in that personal privileges go with it. Thus, potential changes to this status would also be of concern to them alone and would not have a significant impact on criminal justice, be that positive or negative.

Since 2006 the fact that prosecutors are in charge of investigations has been a facet of the architecture of the judiciary[26]. In this sense, any revision of the concept of investigation that entails limiting this role of prosecutors and affording investigative authorities autonomy would require not just changes in procedural law but also, and quite probably, constitutional changes.

3.1. Would going back to investigative authorities having more autonomy be a good solution?

The matter of whether stepping up the powers of investigative authorities would ensure democratic checks and balances vis-a-vis public prosecutors' power that are suited to the Bulgarian context seems contentious at best. It stands beyond doubt that, in systems where investigative authorities enjoy more autonomy, prosecutors have less power. Nevertheless, such systems should seek to strike a balance between the consideration above and the need to review the lawfulness of measures taken by investigative authorities. At the end of the day, prosecutors should be able to engage in such review since they make the final decision of whether to indict and on the basis of what evidence.[27] In Bulgaria, the lack of sufficient levers allowing prosecutors to steer the work of investigative authorities prior to the entry into force of the new CPC in 2006 was one of the most evident reasons behind the backlogs in criminal justice. Case-files would be sent back and forth between investigative authorities and the public prosecution in an endless flurry of instructions being given by prosecutors but then not acted upon and objected to by investigating officers.

Lately, there have been more and more calls to afford investigative authorities greater autonomy in Bulgaria. These have mostly been informed by the push to vest the reformed Anti-Corruption Commission with investigative functions, particularly where high-level corruption is concerned[28]. There have also been calls to give the authorities under the Ministry of Interior more room for manoeuvre during investigations so that they are not required to receive approval by a prosecutor so often.[29] The long-standing lack of any progress in securing convictions in cases of high-level corruption has been noted repeatedly by many foreign and international institutions[30] and Bulgarian non-governmental organisations[31]. This has spurred experts, civil society and political groupings wishing to engage in reform efforts to seek solutions that involve expanding the powers of investigative authorities, which is probably due to them not mustering enough support to effect change in the public prosecution.

---

26 SG No 27/2006

27 See paragraph 21 of Recommendation Rec(2000)19.

28 The Recovery and Resilience Plan provides for reforming the Anti-Corruption Commission and vesting it with investigative powers. A draft document to this effect was tabled by a group of MPs when the term of the 47th National Assembly was starting, and two draft documents were tabled during the term of the 48th National Assembly (one by the Council of Ministers and another by a group of MPs).

29 Such ideas were put forward by Mr Boyko Rashkov, former Minister of Interior, and a group of MPs tabled a bill to amend the CPC to introduce these changes during the term of the 47th National Assembly.

30 For instance, the European Commission's 2021 Rule of Law Report states that Bulgaria continues to lack a solid track record of final convictions in high-level corruption cases. For its part, the 2021 US Department of State's Report on Human Rights Practices informs that government actions to prosecute and punish those involved in corruption and human rights abuses are insufficient and that impunity remains a problem.

31 See, for instance, the annual monitoring reports of the Anti-Corruption Fund Foundation concerning investigations of high-level corruption in public authorities.

However, it bears highlighting again that affording investigative authorities autonomy would, in the first place, require a complete overhaul (one that would probably require amendments to the Constitution) of the concept of prosecutors being in charge of investigations, which is already well established in Bulgaria. This concept is not at all foreign to European legal systems. If such an overhaul does not take place, investigative authorities will not be in a position to offset the power prosecutors enjoy. Thus, it would not make sense to expect that, even if investigative authorities themselves underwent serious structural reform (for instance, if an entirely new investigative agency was set up to take over the investigation of offences of particularly high public interest), this would result in drastic changes to the status quo when it comes to efforts to combat high-level corruption, for instance. Secondly, affording autonomy to investigative authorities will inevitably lead to other problems to solve, such as how to regulate their interaction with the public prosecution and how to ensure control over their work. Indeed, it is all too naive to think that reducing the control exercised by the prosecution does not entail a risk of investigative authorities abusing their powers.

Part 2
PROPOSALS TO CHANGE THE ARCHITECTURE OF THE JUDICIARY

1. Need to amend the Constitution

The changes proposed will inevitably require amendments to the Constitution, which entails broad political agreement. That said, passing these changes will meet the recommendations on the architecture of the judiciary and ensure conformity to the relevant European standard, which can lead to long-term resilience. On multiple occasions, politicians from all leading forces in Parliament that support Bulgaria's European future have stated their wish to have this standard implemented. In this sense, having a constitutional majority unite around a set of points that do not breed contention should not prove impossible to achieve, unless such statements are empty words.

Changes to the architecture of the judiciary that are not accompanied by amendments to the Constitution can only serve as a temporary, palliative measure.[32] Proposals for votes at the SJC on the early dismissal or temporary suspension of the Prosecutor-General to require a smaller majority offer a telling example.[33]

2. Change in the distribution of quotas between the chambers of the SJC and in selection criteria and establishment of an anti-deadlock mechanism for cases in which seats cannot be filled

At present the Judges' Chamber comprises 14 members, 6 of whom are elected by judges by direct suffrage, another 6 of whom are chosen by Parliament, and 2 *ex officio* members, namely the presidents of Bulgaria's 2 supreme courts. As already pointed out, according to the European standard 'Not less than half the members of [judicial] councils should be judges chosen by their peers'. Hence, there should be at least 7 judges chosen by their peers if the total number of members of the Judges' Chamber remains 14. In case the total number of members of the Chamber increases, so should the number of these judges.

In addition, the authority should be well-balanced and feature a broad range of members who work at different levels of the judiciary and in different areas of law, as well as other legal practitioners (among the members chosen by Parliament).[34] If Parliament was to choose exclusively and mostly judges, this would lead to a serious risk of the SJC becoming hermetic.

The criteria for choosing members of the SJC are enshrined in Article 130(2) of the Constitution, which only makes mention of a track record of professional excellence and ethical character, as well as 15 years of experience as a legal practitioner. Yet, to ensure a balanced composition of the chambers, these criteria need to be developed further (either by amending the Constitution

32 See European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Opinion on the Judicial System Act* (2017), paragraphs 22 et seq. As early as six years ago, the Venice Commission recommended putting in place intermediate measures pending the amendments to the Constitution, yet such measures were never introduced.

33 These were put forward as part of the set of proposed amendments to the CPC and the Judiciary Act aimed at improving the quality of investigations and creating a mechanism for the independent investigation of the Prosecutor-General tabled by Mr Galab Donev's caretaker government. This set was a recast of the original bill drafted by Mr Kiril Petkov's government and took account of the opinion of the Venice Commission on said bill..

34 See European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Urgent Interim Opinion on the Draft New Constitution* (2020), paragraphs 46 and 55.

or by removing them from it and providing for criteria in a law).[35]

As regards the Prosecutors' Chamber in specific, the European standard does not introduce an explicit requirement for the minimum number of prosecutors to be chosen by their peers or of members to be chosen by Parliament. In its opinions, the Consultative Council of European Prosecutors has advocated that it is necessary for the share of prosecutors chosen by their peers to be similar to that of judges, but there is no general agreement on that. For its part, the Venice Commission believes that there are risks involved both where the Prosecutors' Chamber is dominated by prosecutors and where it is predominantly made up of members chosen by Parliament.[36]

In addition, in its opinions the Venice Commission has consistently recommended that the members of the Prosecutors' Chamber chosen by Parliament should not have any present or future hierarchical subordination links to the Prosecutor-General, be these *de facto* or *de jure* ones, i.e. that these members should, as a minimum, not be public prosecutors at the time when they are chosen. Since the Prosecutor-General was their superior prior to them being chosen and will again be once they return to their duties, there is a danger that they may vote in the way the head of the prosecution does. If the requirement above was introduced, this would eliminate such siding with the Prosecutor-General, which is to be expected even for reasons of career advancement, and would reduce the head of the prosecution's significant power in the SJC.[37]

All 11 members of the current Prosecutors' Chamber used to be active as prosecutors or investigating officers prior to being chosen. This includes all 5 members chosen by Parliament. The majority, if not all of them, probably aim to return to their duties in the public prosecution and continue their career advancement after they have served their respective terms at the SJC. Thus, practically speaking, the Prosecutor-General currently chairs the meetings of a chamber fully comprised of his current or future subordinates, which borders on the absurd, taking into account the hierarchical nature of the public prosecution. The Prosecutor-General might as well start taking decisions on his own, with the Chamber dissolved.

To enable the Prosecutors' Chamber to check the power of the Prosecutor-General within the public prosecution, it would be suitable to reduce the number of prosecutors and investigating officers chosen by their peers to 3 (in case the total number of members in the Chamber remains 11) and have the remaining 7 members (the Prosecutor-General enjoys *ex officio* membership) be chosen by Parliament on the basis of explicit criteria ensuring that these members have no professional ties to the Prosecutor-General. In addition, the nomination procedure should allow individuals external to the prosecution to be chosen to avoid politicisation. Choosing judges to sit in the Prosecutors' Chamber may also be considered an apt solution even if having judges in prosecutors' chambers/prosecutorial councils is not necessarily in line with a European standard on the composition of such entities.

Additionally, there may be cases where Parliament cannot reach the necessary broad majority to choose the members of the SJC that it needs to select. In such cases there should be a mechanism allowing for the right to appoint the minimum number of members necessary to ensure the proper functioning of chambers to be delegated temporarily to another entity until the majority needed is reached.[38] The situation at present demonstrates the urgent practical need for an anti-deadlock mechanism of this sort. That is because the term in office of the members of the SJC (including of its Inspection Service) has expired, but Parliament has failed to choose new members, which means that the membership of the SJC cannot be renewed. In practical terms, this results in an indefinite extension of the term in office of current members, which evidently runs counter to the notion that public power should be held for a fixed term.

---

35 The current wording of Article 130(2) of the Constitution makes it very doubtful that additional criteria for choosing members of the SJC not mentioned in the Constitution itself are possible. Yet, the Venice Commission has recommended that the members of the Prosecutors' Chamber chosen by Parliament should not be prosecutors.

36 See European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Urgent Interim Opinion on the Draft New Constitution* (2020), paragraphs 47 and 48.

37 For instance, see European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Urgent Interim Opinion on the Draft New Constitution* (2020), paragraphs 53 and the references there.

38 The Venice Commission suggests the figures of the President or the Ombudsperson as a possible solution. See European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Urgent Interim Opinion on the Draft New Constitution* (2020), paragraph 56.

3. Retaining the plenary of the SJC, albeit with drastically limited powers that include the selection and dismissal of the Prosecutor-General

The proposal to split the SJC into two parts by doing away with its plenary and establishing the two chambers we have at present as self-standing councils (a judicial and a prosecutorial one) is often cited by experts and politicians seeking to reform the governing body of the judiciary. The 2015 amendments to the Constitution clearly went in this direction. Indeed, if this process was completed, this would satisfy the spirit of the reform sought.

A decision to do so would be in line with the recommendations of the Venice Commission. According to these, the model of a judicial council where judges and prosecutors sit together in a plenary formation is not unknown (it exists, for example, in France). However, 'in former socialist countries, there is a legacy of too powerful prosecution systems, which endanger the independence of the judges'.[39]

This would do away with concerns over prosecutors meddling in decisions concerning courts and would reduce the overly strong influence of the Prosecutor-General over the governing body of the judiciary, an influence they exercise not just as an ex officio member of the SJC, but also through other prosecutors sitting in it.

On the other hand, the model involving a common body responsible for decisions on appointments entails judges being able to mitigate the control of prosecutors over the prosecution to some extent, which can be claimed to be a positive development. The very role of criminal judges is to assess the work of public prosecutors. Reform-minded judges in Bulgaria have often taken adequate public stances vis-a-vis the problems plaguing the prosecution, which is commendable. As was already mentioned, the participation of judges in governing the prosecution can also be ensured by selecting judges, for instance ones chosen by Parliament, to sit in the Prosecutors' Chamber.

All that said, it should be noted that a prosecutorial council would not be the body best placed to elect or dismiss the Prosecutor-General. No matter what the ratio of members chosen by Parliament to prosecutors in a prosecutorial council may be, the composition of this council will inevitably feature both members chosen by politicians and ones chosen by prosecutors. Irrespective of what formal safeguards are introduced as regards the selection of these members, the concerns already voiced will persist. There is still a risk that the members chosen by prosecutors will vote together and bend before the tacit influence of their superiors in the public prosecution. For their part, those chosen by Parliament could serve as vehicle for misguided political or oligarchic interests. Given the Bulgarian reality, such interests can be advanced by means of candidates that appear to be independent 'on paper' and to lack previous ties to parties and/or groups of economic actors.

In this sense, having key decisions concerning the public prosecution like the election and dismissal of the Prosecutor-General be made by the plenary is a suitable way to ensure that judges (as a blocking minority, at minimum) also have a say in these.[40]

The plenary will not handle any career-related matters concerning judges, nor will it deal with the selection/dismissal of the presidents of supreme courts or the dismissal of members of the Judges' Chamber. Tasking the plenary with selecting the Prosecutor-General and, if necessary, deciding on the need for their early dismissal or suspension will at least ensure that the members taking these important decisions represent a greater range of actors and are better qualified.

39 For instance, see European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Opinion on the Judicial System Act* (2017), paragraph 18.

40 In 2021 the legal team of the Institute for Market Economics, a non-governmental organisation, also proposed to have the Prosecutor-General be elected by the plenary of the SJC even if the SJC is reshuffled as a result of constitutional change (see Baksanova E. and Bregov I. *Grounds to Resume Constitutional Debate on the Judiciary in Bulgaria* [„Основания за възобновяване на конституционния дебат относно съдебната власт в България"], p. 12). In their most recent public statements, members of the Bulgarian Judges' Association submit that merely splitting the SJC in two is not an apt solution (for instance, see: https://bnr.bg/horizont/post/101587805/tatana-jilova).

The influence of the Prosecutor-General within the SJC and beyond it could be reduced by reshuffling quotas and introducing the requirement for Parliament not to choose active prosecutors among the members it chooses to join the Prosecutors' Chamber, but this is not the only way. Completely revising the notion that prosecutors enjoy exclusive control over the prosecution of criminal offences and confining the work of prosecutors solely to the field of criminal justice is also worth pursuing (we expand on this in section IV[41]). The Venice Commission considers that, if this is achieved, making the Prosecutor-General accountable before the plenary of the SJC, including by way of the procedure for dismissing them early, will not seem as distant a prospect as it does at present.[42]

On the other hand, the option of making the Prosecutor-General accountable to Parliament, which entails direct participation of the legislature in the selection and dismissal of said figure (as opposed to its choosing a number of members of the SJC), presupposes too great a risk of politicisation.[43]

If Parliament and the government are not viable options on account of the arguments above, then the only remaining realistic option is to task the prosecutorial council/the plenary of the SJC with the functions outlined. It is more justified to consider that the latter would be the best choice.

41 *Exercising Control over the Prosecution Function — The Necessary Criminal Justice Reform* also expands on this argument.

42 See European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Opinion on the Judicial System Act* (2017), paragraphs 26-40.

43 The Venice Commission does not recommend votes of no confidence in Parliament or subordination to the government as an option for ensuring the accountability of the Prosecutor-General in Bulgaria either (see European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Opinion on the Judicial System Act (2017), paragraphs 27-28, and Exercising Control over the Prosecution Function — The Necessary Criminal Justice Reform,* pp. 7-8).

Part 3
MAIN PROBLEMS POSED BY PROSECUTORS' POWERS

1. Complete monopoly over indictments, which makes even judicial review impossible

1.1. Historical context and nature

Two major functions can be said to exist at the pre-trial stage, which concerns publicly actionable offences, i.e. offences against whose perpetrators the State is under an obligation to secure convictions: investigation and indictment. As already mentioned, at present prosecutors have a very substantial set of powers related to their being in charge of investigations. This results from the multiple safeguards protecting said powers in procedural law. When it comes to indictments, the prosecution is not just in charge. It actually exercises complete monopoly.

Historical data indicate that the Law on Criminal Proceedings was adopted in 1897, shortly after Bulgaria's liberation. This instrument enshrined the power of public prosecutors to initiate the prosecution, but not in all cases. In other words, prosecutors did not enjoy complete monopoly over indictment. Various checks and balances used to exist: investigating judges participated in preliminary investigations and courts played a greater part overall. For instance, the prosecution of publicly actionable offences could be launched both by an investigating judge and by a judge sitting in a single-person formation at first instance.[44] Prosecutors were not the only ones who could decide what would become of an investigation. Preliminary investigations, for instance, could be discontinued by a court decision following a proposal by a prosecutor. Where a court found that the proposal by the prosecutor to discontinue the investigation was unfounded, it would hand down an order of its own motion to proceed with charging the suspect. This order would be used in lieu of the bill of indictment otherwise issued by the prosecutor.[45]

As the totalitarian State cemented itself with the adoption of the 1947 Constitution, the role of public prosecutors grew much more prominent. Indeed, both legal theory and the case-law on criminal procedure in Bulgaria came to define them as being 'fully in charge of the pre-trial stage'. A caveat is in order though: investigative authorities at the time enjoyed more autonomy than they do now. The wording above stems from the fact that, at that point in time, the actions and decisions of prosecutors at the pre-trial stage were not subject to any control from outside the prosecution.

Following democratic change and Bulgaria becoming party to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1992, a series of reforms made their way into Bulgarian national law. These aimed chiefly at aligning it with the case-law of the European Court of Human Rights (ECtHR) and introduced judicial review at the pre-trial stage in an effort to meet European standards vis-a-vis many supervision measures, coercive and secret means of gathering evidence and, to some extent, the discontinuation of investigations, etc. This same process has continued following Bulgaria's accession to the European Union (EU), but with reference to judgments handed down by the Court of Justice of the European Union (CJEU). A case in point is the need to introduce judicial review of the European arrest warrants[46] and European investigation orders[47] issued at the pre-trial stage.

44 See Velchev, S. *Prosecutorial Supervision. Origin, Development. Functions* [„Прокурорският надзор. Произход, развитие, функции"], NBU, 2021 (pp. 178-179).

45 *Ibid*., pp. 190-191.

46 See the CJEU's judgment in case C-648/20 PPU.

47 See the CJEU's judgment in case C-852/19.

After the powers of courts to exercise this judicial review were introduced, legal theory stopped subscribing to the notion of prosecutors being 'in charge of the pre-trial stage' and backed the idea that they only remained in charge of indictment in respect of publicly actionable offences (the so-called prosecution function), not the pre-trial stage in its entirety.[48]

In both historical and comparative terms, investigations and being in charge of these have not always been the purview of prosecutors. Thus, the most important decisions prosecutors make when discharging their quintessential function, i.e. prosecuting criminal offences, are as follows:

- the decision to indict an individual. This entails: i. charging the individual during the investigation and ii. arraigning them before a court after the investigation has concluded;
- or the decision not to indict an individual. This entails: i. not opening an investigation in the first place, ii. issuing a final decision to close an open investigation, either staying it or discontinuing it, and iii. not taking any action under an open investigation and desisting from issuing a final decision.

The external checks and balances available vis-a-vis the key decisions by prosecutors above are extremely limited (or lacking altogether), which suggests that the public prosecution exercises complete monopoly over indictments. These external checks and balances are as follows:

- Under limited circumstances set out in Bulgarian procedural law, investigative authorities could, in theory, bring initial charges during an investigation without needing approval from the prosecution. That said, the relevant provision is not used or, where it is used, this happens only very rarely and without due regard for its intended purpose;[49]
- There is no way to exercise [effective] judicial review over the initial charge(s). Courts do review the initial charge(s), for instance when deciding on matters pertaining to pre-trial detention or house arrest. However, if a court rules that an action does not constitute an offence or that there is not sufficient evidence of the alleged offence, this does not result in the charges being dropped. It merely leads to the individual being released. The charges remain in place and the individual continues to suffer injury on account of the criminal proceedings against them;
- Courts do, of course, review the final charges brought in the bill of indictment because then they are called upon to rule on the merits of the case. However, they cannot even dismiss charges in respect of acts that manifestly do not constitute an offence (where such are stipulated in the bill of indictment) or charges that are not supported by a single piece of (valid) evidence. Indeed, courts are forced to proceed with the trial (and proceedings may involve several instances);
- It is impossible to exercise judicial review of a prosecutor's decision not to open an investigation (i.e. to refuse to launch it). Review is only exercised internally, within the public prosecution. An investigative authority can open an investigation of its own motion, but only where a case is urgent/an offence has manifestly been committed. In any case, the investigative authority is under an obligation to notify the prosecution of this without delay (or within 24 hours).
- A decision by a prosecutor to discontinue or stay an open investigation is subject to limited judicial review. This may be requested solely by the victim of an offence (or the injured legal person, but only where the decision concerns discontinuation). However, in the case of many offences, no specific individual can be identified as the victim. What is more, case-law has resulted in a narrow definition of this legal concept. In other words, external review is limited in terms of the entity that may apply for it (where a victim/injured legal person cannot be identified, the court cannot be seised) and in terms of its scope (courts can exercise review inasmuch as they can revoke such decisions, but they cannot hand down instructions as to the investigative measures to be taken or the exercise of the power to indict);[50]

48 See Chinova, M. *The Pre-Trial Stage under the Criminal Procedure Code. Theory and Practice* [„Досъдебното производство по НПК. Теория и практика"], Ciela, 2013 (p. 92).

49 See Article 219(2) of the CPC and point 3.3.1 of section VI below.

50 See point III of judgment No 7 of 16 December 2004 of the Constitutional Court in case No 6/2004.

- Provision has been made for judicial review in cases where the prosecution desists from opening an investigation. However, this review is all too limited and is not at all a prototypical example of adequate external review;[51]
- There is nothing to balance a prosecutor's decision not to indict where a publicly actionable offence is concerned. It is not possible to have the right to press charges transferred to a different entity, i.e. what is known as private prosecution where the interested party was a victim of the offence, or as actio popularis where said party was not, in other European legal systems. The private prosecution is only admitted in addition to the public prosecution at the trial stage. The option of a court instructing the prosecution to bring a bill of indictment or to adopt a decision in lieu of that, which exists in other legal systems and used to form part of Bulgarian law prior to the communist period, is not available either.

Taken together, these circumstances betray an unequivocal lack of conformity not just with the European standard, but also with the very idea that there should not be powers that are not subject to review in a country governed by the rule of law.[52]

This problem is particularly acute when it comes to decisions not to indict individuals[53]. That is because, for all the dangers that the lack of sufficiently adequate and timely ways to review decisions to indict individuals may entail, at the end of the day courts do get to exercise judicial review when they hear a case on the merits. However, where a prosecutor does not wish to press charges and there are no external checks or balances to offset this, there is an obvious risk of proceedings ending up fully blocked and the rights of victims and the public interest in sanctioning the perpetrator not being protected. In highly hierarchical and centralised[54] institutions such as the public prosecution (mostly due to cultural considerations as opposed to regulatory ones), the lack of external checks and balances vis-a-vis decisions not to indict provides fertile ground for double standards, i.e. for prosecution to take place in certain cases, but not in similar ones.

1.2. European standard

The European standard on checks and balances was set in Recommendation Rec(2000)19 of the Committee of Ministers on the role of the public prosecution in the criminal justice system cited above:

- in paragraph 31 — judicial review in cases where the work of prosecutors interferes with the fundamental rights and freedoms of the suspect;
- in paragraph 34 — challenge of decisions by public prosecutors not to prosecute. This may be done in one of two ways:

---

51 See Chapter 26 of the CPC.

52 Chinova, M. The Pre-Trial Stage under the Criminal Procedure Code. Theory and Practice, Ciela, 2013:
'The prosecutor has exclusive competence to decide whether to bring an individual up on charges for an offence and, in this sense, they are 'in charge' of doing so.
The extent to which this demonstrates an appropriate approach to legislating and whether it might not be necessary for the lawfulness of indictment to be subject to judicial review is a different matter. Indictment, unlike bringing or refusing to bring proceedings, can be subject to judicial review, albeit indirectly. Where a court is seised of an application to keep the individual accused in pre-trial detention or under house arrest, this court has to conduct checks, including as to whether there is sufficient evidence to suggest that the individual did commit the offence of which have been charged. Where it establishes that there is no such evidence, it has the option of either not handing down the bail order sought or handing down one that provides for less restrictive measures (Article 64(4) of the CPC). However, the court cannot revoke the bill of indictment itself. The judicial review outlined above is merely a palliative measure since the individual's procedural capacity continues to be that of an accused and they continue to suffer all the restrictions related to this capacity. It is true that indictment is an exclusive constitutional competence of the public prosecution. However, in a country governed by the rule of law, no power can be effectively absolute and therefore untouchable by anything or anyone, or subject to no checks by any other public power.' (pp. 93-94).

53 In 2016, Associate Professor Kristiyan Takov, an eminent Bulgarian legal practitioner, was the first to bring awareness to the need for de-monopolising (which he dubbed 'privatising' to grab public attention) the process of indictment. This was precisely due to the lack of a democratic system of checks and balances *vis-a-vis* prosecutors' decisions not to indict individuals.

54 While the regulatory changes introduced in 2017 did away with centralisation on paper, this did not translate into any real change. This much was confirmed in judgment No 7 of 11 May 2021 of the Constitutional Court in case No 4/2021. In the judgment, the Court specified that 'the provisions of Articles 126 and 127 of the Constitution stipulate that the architecture of the public prosecution is shaped like a pyramid and each prosecutor reports to the prosecutor immediately above them, with all prosecutors reporting to the Prosecutor-General'.

i. either by way of judicial review of such decisions (this may also be exercised following hierarchical review within the public prosecution), i.e. external review;

ii. or by providing for the option to engage private prosecution, i.e. a balancing option.

The explanatory memorandum to the Recommendation states that the right to challenge should be enjoyed not just by victims, but also by a wider range of parties of identifiable status (for instance, the person who reported information about the offence to the authorities) in case there is no specific victim of a crime but public interest is severely impacted (for instance, where corruption offences are concerned) and there needs to be a party capable of challenging the decision.

1.3. Comparative law arguments

The vast majority of legal systems in Europe have a far wider range of options than their Bulgarian counterpart to ensure external checks and balances in case the prosecution decides not to indict an individual.[55]

1.3.1. An example from civil law systems

While, much like their Bulgarian counterparts, German public prosecutors wield a lot of power during the pre-trial stage, the German system provides for a procedure whereby a victim may request judicial review in case a prosecutor desists from indicting an individual (*Klageerzwingungsverfahren*).

German criminal proceedings are inquisitorial in line with the civil law tradition[56], with the principle of legality/mandatory prosecution being in place. In this sense, courts also play an active part in the process of furnishing proof. This is a departure from adversarial proceedings, which have their roots in common law. In such proceedings, courts are merely arbiters of disputes between the prosecution and the defence. Prosecutors are in charge of investigations and determine what becomes of these by either lodging a bill of indictment before a court (Sections 152(1) and 170(1) of the German Code of Criminal Procedure) or discontinuing proceedings (Section 170(2)). The principle of legality/mandatory prosecution has been laid down explicitly in Section 152(2): unless otherwise provided for by law, prosecutors are obliged to prosecute in all cases where sufficient factual indications are in evidence.

The philosophy underlying Bulgarian criminal proceedings is similar to that on which their German counterparts are founded in that all the points listed above also apply in the Bulgarian context. It is true that these characteristics are typical of civil law at large. That said, the Bulgarian system bears particular similarity to the German one because of the great amount of power prosecutors wield during the pre-trial stage. There is no investigating judge with decision-making powers, nor do police authorities tasked with investigations enjoy procedural autonomy. In this sense, this power of prosecutors goes unchecked.

[In the German system] judicial review proceeds along the following basic lines: In the event that a prosecutor discontinues proceedings, the victim may lodge a complaint against their decision before the immediate superior of said prosecutor (Section 172(1)). If that other prosecutor dismisses the complaint, the victim is entitled to lodge an application before a court (Section 172(2)). Such an application must meet stricter requirements. It has to be signed by a lawyer and cite the facts and the evidence intended to substantiate the need to indict (Section

55 Based on the criteria in paragraph 34 of Recommendation Rec(2000)19:
i. systems boasting procedures allowing courts to review prosecutors' decisions not to indict and to hand down instructions to proceed with indictment: England and Wales, Germany, Italy, the Netherlands, Romania, Turkey, Malta (with conditions attached), Scotland (in theory);
ii. systems boasting procedures allowing private entities to bring charges in case a prosecutor refuses to indict: England and Wales, Spain, Luxembourg, Norway, Hungary, France, Croatia, Sweden.
In addition, in countries that have retained investigating judges in charge of investigations, control is exercised by allowing injured parties to be admitted as parties in the proceedings before said judges: Spain (the investigating judge is in charge of an investigation but order that a bill of indictment is lodged; however, this is offset by provisions allowing for private prosecution and actio popularis), France, Portugal (with certain limitations), Luxembourg.

56 This term does, of course, come with some caveats. Across modern-day Europe, proceedings are greatly impacted by imperatives such as the need to respect fundamental rights and guarantee exercise of the right to an independent and impartial court or tribunal and the right to a fair trial. These have substantially changed such proceedings, removing them from what they used to be like.

172(3)). To ensure that it fully understands the facts of the case, the court may order investigative and evidence gathering measures, which it may entrust to a judge (Section 173(3)). Where the application against discontinuation is dismissed, indictment can take place only on the basis of new facts or evidence (Section 174(2)). If the court considers that the application has merit, it will order the prosecution to proceed with the indictment. The prosecution is under an obligation to comply with this order (Section 175).

In practice judicial review covers:

i. situations in which a prosecutor refuses to deal with a case in the first place because they consider that the elements of a criminal offence are not in place;

ii. situations in which an investigation has been conducted but a prosecutor considers that there are no grounds to bring charges before a court.

Where a prosecutor refuses to launch an investigation in the first place, the court verifies whether the information in the alert gives rise to reasonable doubt that a criminal offence has been committed. If the court finds that it does, at this stage of the procedure said court cannot order that charges should be pressed. Instead it issues an order instructing the authorities to conduct an investigation. The prosecution is under an obligation to comply with this order. The court cannot take charge of the overall investigation in lieu of the prosecutor. After the prosecutor has conducted the investigation, they may opt not to proceed with indictment. At this stage, the victim may seise a court so that it reviews the decision not to indict the individual issued following the completion of the investigation. Where the court considers that further evidence gathering measures are needed to ensure that it fully understands the facts of the case, it may order these pursuant to Section 173(3).

When the court is satisfied that it understands the facts of the case following the investigation, but deems that the prosecutor erred in their assessment that there were no grounds to proceed with indictment, the court hands down an order setting out the facts pertaining to, and the legal classification of, the offence of which the prosecutor is to charge an individual, whom the court also specifies in its order.

The legal basis for this judicial review is Article 19(4) of the German Basic Law, which provides for recourse to courts where an individual's rights (in this case, we have the rights of victims of offences prosecuted by the State) have been infringed by a public authority (in this case, by the prosecutor since they refused to open an investigation or opted not to proceed with indictment). The procedure pursuant to Section 172 et seq. of the German Code of Criminal Procedure tasks courts with reviewing whether the prosecution acted in line with the principle of legality/mandatory prosecution, taking into account that it is in charge of investigations.

1.3.2. An example from common law systems

The judicial review of decisions not to indict is not unheard of even in the English system (a prime example of a common law system), which is founded on the principle of discretionary prosecution (the principle of opportunity) and which has, more importantly, historically relied on adversarial proceedings, with courts serving as arbiters in the most fundamental sense.[57] This is the case even though recourse to private prosecution, which may be used in lieu of the public prosecution in order to offset the cases where the public prosecution decides not to indict, comes with a very robust tradition in both England and Wales and is used quite often to this day.[58]

In general, in England and Wales the decision on whether to indict an individual depends on whether two cumulative criteria have been met:

i. evidential stage: the prosecutor has to assess whether there is sufficient evidence that is of such a nature (for instance, it will not be excluded by a court owing to it being inadmissible) as to realistically allow to secure a conviction against an accused. This standard of proof is less stringent than the one to be met before an actual jury or court to enable it to convict a defendant.

57 See the ECtHR's judgment in *Armani da Silva v. the United Kingdom.*

58 See Edmonds, T. and Jugnarain, D. *Private Prosecutions: A Potential Anticorruption Tool in English Law.*

ii. public interest stage: where a case passes the evidential stage successfully, the prosecutor has to assess the public interest in prosecuting the alleged offence, i.e. the gravity of the offence, the culpability of the suspect (for instance, the extent to which they were involved, whether there was premeditation, etc.), the injury caused to the victim, the age and maturity of the suspect at the time of the offending act, the impact of the act on the public and whether criminal proceedings constitute an adequate way to address the alleged offence.

A dedicated Code has been published for prosecutors to follow. This is a public document which, in essence, constitutes an internal instruction on the general lines to be followed by prosecutors when making decisions on cases.[59]

It is precisely because prosecutors in England and Wales enjoy wide discretion on whether to indict in line with the principle of opportunity that judicial review of decisions not to indict is more limited, but still possible. In such cases the court assesses whether a prosecutor did not act irrationally when they decided not to indict an individual. The court stepping in is considered an internal remedy protecting injured parties from a prosecutor's decision not to indict.

2. *De facto* review of legality

Although the Bulgarian public prosecution was not vested with such powers under the 1991 Constitution, it has continued to exercise the so-called general review of legality vis-a-vis the work of administrative authorities. This has allowed the prosecution to not merely position itself as a de facto body regulating public relations in which it has no right to meddle, but also to assert itself with ease where it sees fit, score points before the public by demonstrating concern over this problem or that and instil fear in the administration, with no mechanism in place to review such displays of excessive power. Administrative work extends to many different areas covered by regulatory bodies that have specific competences. By deciding to intervene, the prosecution essentially does the same work as such bodies even though it should not. When it does not take action on a matter on which another public body is competent, the latter often sits idly by and waits until a prosecutor instructs it to act in a specific way.[60]

59 See The Code for Crown Prosecutors: https://www.cps.gov.uk/publication/code-crown-prosecutors.

60 For further details on this issue, see *Why the Exercise of General Review Powers by the Prosecution is Unconstitutional* [„Защо упражняването на всеобхватен прокурорски надзор е противоконституционно"] and *Exercising Control over the Prosecution Function — The Necessary Criminal Justice Reform*.

Part 4
PROPOSALS TO CHANGE PROSECUTORS' POWERS BY ESTABLISHING MORE CHECKS AND BALANCES IN RESPECT OF CASES WHERE A PROSECUTOR OPTS (NOT) TO INDICT

1. Need for amendments to the Constitution to secure real change

1.1. Doing away with the complete monopoly of the prosecution over the power to indict

The by now traditional view in both legal theory and case-law in Bulgaria is that prosecutors enjoy complete monopoly over making decisions as to whether to indict individuals in cases concerning publicly actionable offences, that this monopoly is beyond anyone's reach and that it is even enshrined in the Constitution.[61] In this sense, doing away with said monopoly and bringing the procedure for (not) exercising the power to indict in line with a basic rule-of-law standard, namely ensuring adequate checks and balances, would require either a radical change to this view as a result of reinterpreting the relevant provisions of the Constitution[62], or amending these provisions.

Only the second option is realistic. This is due to a decades-long tradition of interpreting provisions in the Constitution in light of legal solutions that gained currency in the period before democratic change, essentially having the interpretation conform to these solutions.

The 'hands' of judicial review need 'to be untied' in both quantitative and qualitative terms by amending the Constitution. In other words, explicit provisions should first be put in place allowing all decisions by prosecutors provided for by law to be appealed before a court as a matter of principle. Specific rules as to which decisions are subject to appeal should be provided for in instruments other than the Constitution, and the need to amend said instruments and the effects of any amendments should be monitored. The second step entails ensuring that courts have the power to hand down binding instructions and instructions concerning the assessment of evidence and the measures to be taken to ensure the lawful conduct or closure of an investigation.

Unless the role and functions of courts are reconsidered, extended judicial review will remain a wish that never bears fruit much like the judicial review currently in place with respect to discontinuing criminal proceedings, for instance. Since courts have no say in the assessment of evidence by prosecutors and since there is no agreement on the option to allow courts to instruct prosecutors on the investigative or other procedural measures needed, in practice judicial review often results in cases where prosecutors issue decisions to discontinue proceedings only to have these decisions revoked by courts, starting a vicious cycle of decisions being issued and then revoked.

Of course, the possible concerns over introducing wider judicial review of the substantive powers of prosecutors should not be downplayed. Nonetheless, it should be pointed out that there are sufficiently legitimate grounds for introducing such review. These can be found in

61 See *Does the Constitution Stand in the Way of Reforming the Public Prosecution?* [„Пречи ли Конституцията на реформата в прокуратурата?"].

62 The Constitution does not, in fact, contain so much as a single provision that leads to the inevitable conclusion that, say, the power to indict cannot be subject to judicial review.

Bulgarian criminal procedural law, the comparative law arguments put forward and the European standard presented. In addition, there are also solutions minimising and precluding the risks entailed by the power to exercise such judicial review.

Bulgarian criminal proceedings, much like their counterparts in modern legal systems, are adversarial and trials are central to them (Articles 7 and 12 of the CPC respectively). That said, they are also consonant with the philosophy underlying inquisitorial proceedings when it comes to discovering the objective truth (Article 13 of the CPC), gathering the full body of evidence as early as the pre-trial stage (Articles 226(1) and 246(1) of the CPC) and courts' evidence gathering obligations (Article 107(2) of the CPC). In this sense, courts are active in furnishing proof, a role typical of courts in civil law systems. Hence, they cannot be defined as mere arbiters in disputes between parties to criminal proceedings, as the common law model would have it. The principal objective of proceedings is still to detect crimes, expose culprits and have legislation applied properly (Article 1(1) of the CPC). All public authorities involved in proceedings are obliged to work towards that.

Moreover, the active role of courts stemming from the civil law model is also evident in the fact that prosecutors relinquish control of charges once they have brought them. From that point on, prosecutors cannot make decisions on indictment. They can neither retract the charges (they can choose not to uphold them during hearing(s), but that does not prevent courts from handing down a conviction), nor can they amend these without prior approval by courts.[63]

In this sense, concerns that courts could potentially take a side as regards indictment and breach their impartiality by reviewing prosecutors' decisions on indictment lose sight of the fact that, if we follow this same line of thinking, courts can be said to currently have a duty that arguably poses the greatest risk to their impartiality, namely to not just assess the sufficiency of the evidence gathered or hand down orders requiring further evidence-gathering, but also to gather evidence substantiating the charges brought themselves at the trial stage.

Indeed, for a long time criminal proceedings in Bulgaria were governed by the postulate that the impartiality of a court would be considered breached if this court voiced an explicit position on evidence while a case was pending, i.e. prior to said court handing down a judgment. A previous wording of Article 270(2) of the CPC explicitly stated that courts are not at liberty to discuss the extent to which allegations that a person has committed an offence are founded when deciding on a bail order at the trial stage, i.e. courts were not allowed to assess the evidence gathered up to that point to avoid demonstrating partiality. This provision was in breach of a requirement laid down in the ECHR, namely that lawful detention is ordered or extended where reasonable suspicion that the individual has committed the offence is in place, with courts being under an obligation to review whether this is indeed the case. To bring Bulgarian law into conformity with the ECHR following numerous ECtHR judgments against Bulgaria, in 2017 the CPC had to be amended.[64]

A further point is that the principle of mandatory prosecution dictates that the prosecutor should decide whether to indict an individual in accordance with the law, and not at their discretion. In other words, by reviewing a decision not to proceed with prosecuting an individual, the court will merely be ensuring that prosecutors exercise their powers in accordance with the law. It will not be meddling with rights exclusive to prosecutors that the latter may exercise or desist from exercising at their discretion.[65] As mentioned above, good examples of similar judicial review can be found even in systems built on the principle of opportunity boasting exclusively adversarial criminal proceedings.

Of course, if amendments to the Constitution are indeed made to allow for judicial review of decisions on indictment, a judge that orders that a bill of indictment is lodged should not

63 See *Exercising Control over the Prosecution Function — The Necessary Criminal Justice Reform* (p. 4).

64 See Panova, P. *Standards on the Line between Reasonable Suspicion and Guilt* [„Стандартите за вододела между „обоснованото подозрение" и „виновността"] and the ECtHR judgments cited there:
'*Bochev v. Bulgaria* is also a well-known case, this time a 2009 one. [The judgment in] it makes reference to [that in] *Ilijkov v. Bulgaria*, which states that the Bulgarian authorities' concern to effectively protect the principle of impartiality rests on an erroneous understanding and could not justify the limitation imposed on rights that persons in pre-trial detention enjoy under Article 5(4) [of the ECHR]. In this sense, it is incumbent on the respondent State to devise the procedural means most appropriate for securing the enjoyment of all ECHR rights, including the right under Article 5(4) to judicial control on all aspects of the lawfulness of pre-trial detention.'

65 See *Exercising Control over the Prosecution Function — The Necessary Criminal Justice Reform* (p. 11).

subsequently be called upon to hear the case on the merits. Such orders by individual judges seised of appeals against decisions by prosecutors cannot result in breaches of the impartiality of courts as a whole.

1.2. Creating a mechanism to investigate the Prosecutor-General that does not risk being held unconstitutional

Apart from the amendments to the Constitution in whose favour we argued above, further amendments are needed to establish an adequate mechanism allowing the Prosecutor-General to be investigated independently.[66] This mechanism should not have to resort to legal acrobatics such as 'a judge temporarily appointed prosecutor'[67]. To allow it to be put in place, one (and preferably both) of the following postulates should be reconsidered: i. that only a prosecutor can be in charge of prosecuting the top tier of the public prosecution; ii. that the Prosecutor-General holds a position of vast formal and de facto power (this matter already received discussion).

Allowing publicly actionable offences to be prosecuted by an entity that does not form part of the public prosecution in only limited cases (where an offence was allegedly perpetrated by someone in the top tier of the prosecution) would make it possible to ensure that the party in charge of the prosecution is independent from the defendant-to-be. It will also serve as an appropriate balance for the power of prosecutors and will not entail a serious risk of abuse.

Such changes can only be introduced by amending the Constitution owing to Bulgarian case-law, which stipulates that the monopoly prosecutors have over the power to indict is enshrined in the Constitution.

2. Judicial review where prosecutors do not bring charges

It is necessary to introduce/strengthen judicial review of each of the three actions listed below: i. refusing to open an investigation; ii. suspending or closing an investigation by way of an official decision; and iii. desisting from taking investigative measures without issuing an official decision.[68]

Refusals to open an investigation should not be the sole focus. Glossing over the other ways in which proceedings may be blocked could easily lead to judicial review being circumvented by opening an investigation which is either discontinued immediately after or is never pursued unless the option to exercise external review over such actions exists.

Judicial review is a necessary safeguard. It should build on internal review within the public prosecution, complementing it rather than being exercised in lieu of it. As mentioned above, for judicial review to be effective and of practical use, it needs to go hand in hand with amendments to the Constitution. These should ensure that it is not merely confined to establishing if a prosecutor acted unlawfully, and that it is instead capable of remedying that by ordering the measures that must be taken to open, continue and conclude investigations in line with legal requirements.

66 This is a long-standing obligation on the part of Bulgaria following the ECtHR's judgment in *Kolevi v. Bulgaria*. See *The Illusion of the Bulgarian Legislator — Creating a Mechanism for Effective Investigation of the Prosecutor General* [„Химерата на българския законотворец — създаване на механизъм за независимо разследване на главния прокурор"].

67 Given the limitations in place in the Constitution, this proposal sponsored by three consecutive governments (two of these being caretaker governments) is all but the only way to satisfy the requirement for the investigation and, most importantly, control over it to be entrusted to an independent entity while still remaining within the narrow confines of the Constitution.

68 Generally speaking, while some caveats are in order, it should be noted that several good proposals to this effect were made in the two sets of proposed amendments to the CPC and the Judiciary Act, which aim to improve the quality of investigations and come up with a mechanism for investigating the Prosecutor-General independently (the set originally drafted by Kiril Petkov's government and its recast under Galab Donev's caretaker government). Nevertheless, such initiatives are limited by the current provisions of the Constitution. The author of this text took part in the working party that drafted the initial set of proposed amendments, so there is a chance that the assessment above might be biased.

2.1. Refusals to open an investigation

Following years of denial of the very need to introduce judicial review of decisions refusing to bring criminal proceedings[69], it was chiefly pressure on the part of European institutions[70] that led to both politicians and experts finally agreeing that a proposal to introduce such review should be made.

In other words, the question at present is not whether judicial review should be introduced in the first place, but what its scope should be and at what instance it should be exercised.

Judicial review of all refusals should be possible. Efforts to limit the scope of this review have generally been justified by referring to the risk of courts becoming overburdened.[71]

Nevertheless, based on the data available it does not seem that such a risk will materialise. The statistics of the public prosecution on the number of decisions refusing to launch the pre-trial stage issued and appealed within the prosecution between 2019 and 2021 reveal that there were a little over 120 000 decisions issued a year. Of these, each year between 7 000 and 8 000 were appealed before higher-instance prosecutions. If judicial review is introduced as a step following review within the public prosecution, which is retained (making the expected number of applications reaching courts even smaller), regional courts may review internal-review decisions by the prosecution and appellate courts — the orders handed down by regional courts. Thus, even if the number of applications increases as a result of the new recourse to courts, this cannot be expected to result in a drastic increase in the case-load of regional or appellate courts under any circumstances. These courts handle fewer cases than district courts anyway.[72]

According to 2021 SJC data[73], the above is coupled with a decrease in the number of new criminal cases (of all types) registered with regional courts over the course of the preceding 5 years. These went from 32 695 to 28 403. The number of new criminal cases registered with appellate courts over the same period also decreased, going from 3 852 to 3 670. The greatest decrease could be observed in district courts even if their case-load remained the biggest. In provincial capitals such cases went from 93 042 to 74 420 and outside these there was a drop from 47 644 to 35 323.

Overall, the burden on the system of criminal justice has been on the decrease, the main reason for this being the substantial drop in the number of registered criminal offences since the start of this century. The fact that the police register fewer criminal offences correlates directly with the prosecution opening fewer case-files and launching fewer pre-trial proceedings, which is reflected in the fewer cases and hearings before courts. The Ministry of Interior publishes annual law enforcement statistics releases. According to these, in 2001 the total number of offences registered in Bulgaria was 147 022, i.e. 1 843.8 offences per 100 000 inhabitants. By 2019 this had dropped to 89 742, i.e. 1 282 offences per 100 000 inhabitants.[74]

---

69 It should be noted that during his term in office Prosecutor-General Boris Velchev made statements citing a need to strengthen the judicial review of final decisions by prosecutors: 'Judicial review of all decisions refusing to launch the pre-trial stage and in all cases where pre-trial proceedings are discontinued, not some (as is the case now), [needs to be introduced]. I believe that, when courts are given the power to verify that criminal proceedings were discontinued or not brought on valid grounds, this will have an impact on trust in the public prosecution.' The statement is from 2009: https://bntnews.bg/bg/a/14528-sydeben_kontrol_nad_prokuraturata.

70 For years now, Bulgaria has received recommendations to introduce judicial review of decisions refusing to launch pre-trial proceedings from the Committee of Ministers of the Council of Europe and the Venice Commission. See, for instance, the recommendation of the Committee of Ministers of the Council of Europe on executing the ECtHR's judgments in *S.Z. v. Bulgaria and Kolevi v. Bulgaria*, which identify systemic deficiencies compromising the effectiveness of investigations (the recommendation was reiterated in an interim resolution from 5 December 2019); European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Opinion on Draft Amendments to the Criminal Procedure Code and the Judicial System Act Concerning Criminal Investigations against Top Magistrates* (2019), paragraphs 51 and 52; and European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Urgent Interim Opinion on the Draft New Constitution* (2020), paragraph 72. In the last text, the Venice Commission explicitly mentions decisions not to open an investigation or decisions not to indict.

71 Both sets of proposed amendments to the CPC and the Judiciary Act sought to establish filters limiting the scope of judicial review. We do not consider pursuing such avenues appropriate.

72 In spite of these observations, both sets of proposed amendments to the CPC and the Judiciary Act provide for the review of decisions refusing to open an investigation to be exercised precisely by district courts. We do not consider this appropriate either.

73 See the annual reports on the website of the SJC.

74 See the annual releases on the website of the Ministry of Interior. 2020 and 2021 marked an even greater rate of decrease in the number of registered offences. However, this is probably largely due to the pandemic and the resulting lockdowns. In this sense, data on these two years should be assessed with caution when analysing the overall trend.

A report by the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) based on 2020 data reveals the following:[75]

i. The GDP share allocated to justice in Bulgaria was twice as high as the Council of Europe (CoE) median, with Bulgaria spending 0.61 % of GDP where the CoE median was 0.30 %.

ii. Bulgaria's population was said to be 6.9 million. Against that background, the number of judges per 100 000 inhabitants stood at 31.58 where the CoE median was 17.60, while the number of prosecutors was estimated at 21.98 where the CoE median was 11.10. Differences were even greater when it comes to non-judge and non-prosecutor staff.

iii. In Bulgaria the salaries of judges and prosecutors at the start of their respective careers were 2.9 times the average gross salary, where the median ratio in the CoE was 2.2 times in the case of judges and 1.8 in that of prosecutors. By the end of their careers, Bulgarian judges and prosecutors earned 5.2 times the average gross salary, where the median ratio in the CoE stood at 4.5 times in the case of judges and 3.6 in that of prosecutors.

iv. In 2020 the total number of criminal cases at first instance per 100 inhabitants in Bulgaria stood at 1.45, where the CoE median was 2.61. This marked a decrease when compared to data from 2012, when the number of criminal cases per 100 inhabitants in Bulgaria stood at 1.99 against a CoE median of 3.07.

Hence, in view of the statistics on appeals available to-date, the steady decrease in the case-load of judges and the increasing allocations to justice, the risk of courts being overburdened as a result of the introduction comprehensive judicial review of the three types of decisions above cannot be claimed to be a real one. In fact, introducing filters (such as assessing the gravity of the offence in formal terms by taking into account the sanctions provided for it) that complement the central filter, namely the retained internal review mechanism, in order to re-strict the scope of judicial review poses at least three much more substantial risks: i. offences that are of high public interest and therefore merit checking externally could be left out of the scope of review because they do not meet a formal gravity criterion[76]; ii. given the very early stage of collecting information about the offence, it may be objectively impossible to settle on a legal classification; iii. there is also a danger that the filters laid down in law will then be interpreted broadly in the relevant case-law.

Paragraph 34 of Recommendation Rec(2000)19 does not provide for explicit criteria (related to the type of offence or otherwise) to limit the scope of judicial review. In some of its opin-ions, the Venice Commission recommended that Bulgaria introduces judicial review only as regards 'serious crimes' as a possible filter to avoid overburdening courts.[77] That said, the latest opinion of the Venice Commission explicitly states that such recommendations are to be understood as the desirable minimum, but that domestic authorities are in a better position to decide on the scope of judicial review.[78]

As mentioned already, the concern that the system of criminal justice might end up swamped constantly being voiced by the Bulgarian authorities is not supported by their own data, which indicate a decrease in workload, nor is it backed by comparisons of the number of judges, prosecutors, non-judge/non-prosecutor staff and criminal cases in Bulgaria and the CoE me-dian. If significant differences in workload are in place between different parts of the system, if magistrates discharge duties outside their terms of reference in spite of the huge number of non-judge and non-prosecutor staff and if, *inter alia*, Bulgaria lacks effective e-justice at the start of the 2020s, these problems can only be put down to mismanagement.

75 See *European Judicial Systems — CEPEJ Evaluation Report — 2022 evaluation cycle (2020 data).*

76 For instance, minor injury caused by a police authority, forgery of documents (where the elements of the offence do not include corruption as an underlying motive), arbitrary disposal of high-value assets, etc.

77 See European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Opinion on Draft Amend-ments to the Criminal Procedure Code and the Judicial System Act Concerning Criminal Investigations against Top Magistrates* (2019), paragraph 51.

78 See European Commission for Democracy through Law (Venice Commission) — *Bulgaria: Opinion on Draft Amend-ments to the Criminal Procedure Code and the Judicial System Act* (2022), paragraph 41.

2.2. Stay/Discontinuation of investigations

Expanding the scope of judicial review to include cases where an investigation is either suspended or discontinued following an official decision requires affording both the victim and the injured legal person locus standi to appeal final decisions issued by prosecutors. The legal concept of 'individual who submitted an alert about the offence' (the one who originally informed the authorities about it) should be recognised, too. To ensure conformity with paragraph 34 of Recommendation Rec(2000)19, this individual should be afforded locus standi so they can appeal final decisions by prosecutors in cases involving offences with no identifiable victim/injured legal person[79].

2.3. The prosecution desisting from investigative measures

Cases where the prosecution desists from taking investigative measures may be balanced by expanding the scope of Chapter 26 of the CPC.[80] Safeguards against the prosecution desisting from such measures should be ensured to protect the accused (where an individual has been accused but, in the absence of grounds for this, proceedings have neither been instituted, nor discontinued) and to protect the victim and the public interest (where an individual has not been accused in the first place, where a particular individual has not been accused, or where an individual has not been accused of a particular offence, i.e. where a particular line of investigation is ignored in the absence of grounds for this; and where proceedings are not instituted in such cases). The victim/injured legal person/individual who submitted the alert should have the right to petition the court to assess the timeliness and quality of work at the pre-trial stage even where no individual has been accused.

3. Judicial review where prosecutors bring charges

If the procedure under Chapter 26 of the CPC was fit for purpose, introducing judicial review of decisions to formally indict individuals would not be key. In any case, it is necessary to have some form of judicial review of the merits of charges prior to a court rendering a judgment so that it is possible for manifestly unfounded charges to be dismissed. The current procedural arrangements stipulate that, where decisions to press charges are concerned, judicial review only covers whether essential procedural requirements have been breached during the pre-trial stage. It is the prosecutor that decides whether to press formal charges against an individual.

These days the extreme understanding that even internal review of the decisions of prosecutors to indict constitutes an unacceptable breach of prosecutors' right to be guided by their own convictions is gaining ground. In practical terms, this could lead to proceedings being instituted on the grounds of bills of indictment in respect of actions that do not constitute an offence or bills of indictment that remain unsupported by any evidence at two court instances solely because of the erroneous convictions of a single prosecutor (who draws up the original bill of indictment and subsequently appeals the judgment rendered at first instance). Some safeguards need to be put in place to avoid such outcomes with a view to protecting the rights of the accused and taking into account the lack of public interest in a long and costly prosecution that ends up being dismissed as unfounded by courts years down the line.

It would be appropriate to introduce at least some form of preliminary judicial review of the merits of a bill of indictment that is indeed limited in terms of scope (such review is a feature of many legal systems[81]) and takes place prior to a case is brought before a court and court pro-

79 A proposal in this same vein was made in the two sets of proposed amendments to the CPC and the Judiciary Act.

80 This is also reflected in the sets of proposed amendments.

81 In historical terms, the well-known 'grand jury' comprised of citizens and tasked with taking decisions as to whether there are reasonable grounds (i.e. whether the indictment is supported by sufficient evidence) to formally bring the accused up on charges before a court has its origins in the common law system of England. Many jurisdictions emulated this, but nowadays it only persists in the USA. It has, however, come to be replaced by a procedure that has a similar objective, i.e. the preliminary hearing. Procedures allowing courts to make preliminary assessments on the sufficiency of evidence for proceeding with trial are in place in a number of countries whose systems are based on civil law, for instance in Germany, Italy, Luxembourg, Poland and Romania.

ceedings are instituted. This review should allow for the termination of criminal proceedings in respect of actions that do not constitute offences[82] or actions that are not backed by prima facie evidence gathered at the pre-trial stage to support what the prosecution claims.

The assessment of a first-instance court should always be subject to review by an appellate court since it can preclude proceedings progressing further.

4. Ensuring that the prosecution confines itself to the powers vested in it by the Constitution vis-a-vis the general review of legality

Taking the radical step to do away with the constitutional power of the prosecution to revoke unlawful decisions and to be admitted as a party to civil and administrative proceedings where this is provided for by law would probably not be appropriate for purely logistical reasons, even if this is exactly what the Venice Commission recommends and what trends in Europe suggest. That said, the Judiciary Act has to explicitly set out the functions to be discharged by prosecutors outside the area of criminal justice in order to dispel all doubts that the constitutional powers of the prosecution have been extended by means of a law, something that cannot happen.

82 Both sets of proposed amendments to the CPC and the Judiciary Act contain proposals to re-introduce the provision of the CPC obligating courts to terminate criminal proceedings where the action specified in a bill of indictment does not constitute an offence.

Part 5
PROPOSALS TO RECONSIDER CERTAIN RULES OF CRIMINAL PROCEDURE AND LEGAL CONCEPTS WITH A VIEW TO IMPROVING THE EFFICIENCY OF PROCEEDINGS

1. The need for a holistic approach

Focusing solely on the efficiency of criminal proceedings or substantive criminal law without paying due attention to the problems plaguing the structure of the SJC or the powers of the authorities tasked with prosecuting offences, which are not offset by the relevant checks or balances, poses risks to the rule of law that are easy to recognise. Sufficient safeguards have to be put in place to ensure that the Prosecutor-General is not allowed to act completely arbitrarily due to it being impossible to investigate them or dismiss them prior to the expiry of their term on account of any offences, criminal or otherwise, during said term. Unless such safeguards are put in place, giving further powers to the prosecution, which the Prosecutor-General will be fully in charge of with nothing to balance this, will logically risk these powers being misused or abused.

Indeed, compared to other criminal justice systems (particularly ones from Western Europe), the Bulgarian system is characterised by more arduous procedures and a more formalistic approach. The top tier of the prosecution, certain experts aligned with them and political figures generally prone to agreeing with their positions conveniently emphasise this point particularly often. These, however, fail to adopt a holistic view of criminal justice systems in Bulgaria and Western Europe and take due account of the checks and balances in place (not just in terms of legal provisions, but also in terms of legal tradition) and the context in which the systems function, i.e. the distinctions in terms of the democratic traditions and the political culture of different societies, which account for distinctions in the behaviour of those wielding power. In this sense, claiming acute awareness of the objective problems plaguing procedural and substantive criminal law yet adamantly refusing to acknowledge all other problems of criminal justice discredits any such line of reasoning from the get-go. That said, claiming awareness of the latter yet refusing to acknowledge the former has the same effect.

2. Ineffective investigations in the context of the ECtHR's findings and the measures the Bulgarian authorities envisage to remedy these

The ECtHR has ruled that investigations must be effective mainly in the context of Article 2 (right to life) and Article 3 (prohibition of torture) of the ECHR. Apart from the well-known judgments in *Velikova v. Bulgaria* (violence on the part of State officials that was not investigated), *S.Z. v. Bulgaria* (trafficking in human beings and rape; some of the individuals involved cited by the victim were not even investigated) and *Kolevi v. Bulgaria* (practical impossibility to investigate the Prosecutor-General), there are about 70 more that have identified systemic issues with criminal proceedings in Bulgaria.[83] These issues are due not just to the legal framework, but also to the way in which public authorities forming part of the system of criminal justice act.

83 These concern different cases: unwarranted use of weapons or force by law enforcement authorities, murder, rape, physical injury, solicitation, neglect of children in care facilities, negligence resulting in life-threatening accidents, etc.

The majority of the issues involving the legal framework and their proposed solutions were already covered in the previous sections. Addressing these will inevitably create objective prerequisites for a reduction in the number of ineffective investigations as a minimum.

Both sets of proposed amendments to the CPC and the Judiciary Act — the one drafted by teams within the Ministry of Justice when Mr Kiril Petkov was Prime Minister and its recast by Mr Galab Donev's caretaker governments — offer a range of adequate proposals for amending certain rules of criminal procedure and legal concepts with a view to boosting the effectiveness of proceedings and bringing these into conformity with European standards.[84]

In addition to the proposals already discussed, the following legislative proposals merit putting forward:

- Clear rules allowing courts to revoke decisions by prosecutors to discontinue work at the pre-trial stage should be proposed. These should seek to balance the need for a mechanism to reopen closed investigations against legal certainty.
- Splitting a case at the trial stage should be made possible. In this way, a case can proceed against some defendants, but not others, thus avoiding the entire proceedings grinding to a standstill.
- The option to conclude out-of-court settlements for criminal offences whose penalties are less severe should be put in place. In such cases, the criminal liability of the accused should not be sought and an administrative sanction should be imposed.
- New forms of judicial review of decisions by prosecutors on the execution of criminal penalties and the disclosure of details about investigations should be introduced.

3. Further proposals

In 2020 the top tier of the prosecution presented its Expert Proposal to Amend the CPC [„Експертно предложение за изменения в НПК"][85] before the community of legal professionals. It was assisted in developing this by renowned Bulgarian experts in procedural law and claims that the proposal rests on a comparative legal study (sadly, access to this was denied to the Bulgarian Helsinki Committee, a non-governmental organisation, for unspecified reasons, rendering the study apocryphal)[86]. Keeping in mind the caveat about the need for a holistic approach to potential changes in procedural law aimed at making this less formalistic in point 1 of section VI, it should be mentioned that this proposal contains ideas on a number of conceptual points that are doubtless appropriate and that will improve the effectiveness of criminal proceedings if implemented.

3.1. Reducing the very formalistic character of provisions concerning proof

Bulgarian criminal law makes an explicit distinction between evidence and items of evidence. This distinction is not in place in [other] European systems. Under Bulgarian criminal law, only facts of significance to a case reproduced using a limited set of items of evidence set out in law (Articles 104 and 105 of the CPC) are considered evidence. Where the terms and procedure for collecting items of evidence are not followed, the evidence becomes inadmissible. For its part, furnishing proof can only be done in a limited set of ways, which have also been listed explicitly (Articles 106). The above inevitably leads to the conclusion that the CPC imposes very strict requirements as to the admissibility of evidence.

84 Again we are compelled to highlight that we took part in the working party that drafted the initial set of proposed amendments, so there is a chance that the assessment above might be biased.

85 See the full text of the proposal. This is available at: https://news.lex.bg/wp-content/uploads/2020/10/%D1%82%D1%83%D0%BA-4.pdf?fbclid=IwAR0jJnQu5bg-f_-g8Kd_bvAIRpn_Z0EU3Cpvdjc1Ib4u7B4RoNzgQXbnZNE0

86 https://defakto.bg/2020/11/16/%D0%B1%D1%85%D0%BA-%D0%BF%D1%80%D0%BE%D0%BA%D1%83%D1%80%D0%B0%D1%82%D1%83%D1%80%D0%B0%D1%82%D0%B0-%D0%BE%D1%82%D0%BA%D0%B0%D0%B7%D0-%B2%D0%B0-%D0%B4%D0%B0-%D0%BF%D1%80%D0%B5%D0%B4%D0%BE%D1%81%D1%82/

In comparison, in Romanian procedural law, for instance, all facts that help to ascertain matters of significance to a case constitute evidence (Article 97(1) of the Romanian Criminal Procedure Code). Only unlawfully gathered facts, by means of violence, for instance, are excluded (Article 102 of the Romanian Criminal Procedure Code). The regulatory framework does not provide for the concept of 'items of evidence'. The ways in which proof can be furnished do not form part of a closed list, but are merely given as examples, with all other ways to furnish proof not listed in the relevant law being possible (Article 97(2)(f) of the Romanian Criminal Procedure Code).[87]

Where evidence has been collected in breach of or at a risk of breaching fundamental rights — the right to life, the prohibition of torture, the right of individuals to not incriminate themselves (including in the event of deception, entrapment or incitement), the right to liberty and security, *inter alia* — this should be excluded on formal grounds, but in all other cases it should be the adjudicating court that assesses the lack of compliance with procedural rules and decides whether to exclude evidence.[88] A similar approach can be observed in the case-law of the ECtHR, which considers the admissibility of evidence in the context of safeguarding the right to a fair trial.[89]

If the regulatory framework is amended to provide for greater flexibility in the admissibility assessment of evidence, the provisions concerning this assessment should specify potential infringements in the course of evidence gathering. Such infringements may, for instance, concern the use of witnesses representing the law enforcement authorities or failure to observe the absolute time-limits laid down in Article 234 of the CPC.

Putting the strictly formalistic approach that adjudicating courts must follow in assessing the admissibility of evidence on a sort of procedural pedestal also poses a risk that goes in the opposite direction, even if it would make no logical sense if said risk materialised, i.e. the danger of exculpatory evidence, too, being excluded owing to small breaches of procedural rules in the course of gathering it[90] or, alternatively, following the letter of the required way of gathering evidence, which automatically leads to its validity, but committing a serious infringement nonetheless. Following only the letter of the way of gathering evidence without considering whether the actions taken are adequate to the objectives pursued is without a doubt insufficient to ensure the validity of the evidence gathered.[91]

---

87 See T*he Romanian Model: It Is Not Just about Structure, but also Procedure* [„Румънският модел: не е само структурата, но и процесът"].

88 See *Expert Proposal to Amend the CPC,* pp. 4-5.

89 See *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb),* pp. 42 et seq. The following excerpt contains highlights only:
'While [the ECHR] guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is [...] a matter for regulation under national law (*Schenk v. Switzerland; Moreira Ferreira v. Portugal; Heglas v. the Czech Republic*).
[...] It is not, therefore, the role of the [ECtHR] to determine, as a matter of principle, whether particular types of evidence — for example, evidence obtained unlawfully in terms of domestic law — may be admissible. The question which must be answered is whether [the right to a fair trial has or has not been breached as a result of that] (*Ayetullah Ay v. Turkey; (Khan v. the United Kingdom*, etc.).
[...] In determining whether the proceedings as a whole were fair, [...] it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. [...] The quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained [....]. [The ECtHR] also examines whether the evidence [collected in breach of national law] was or was not decisive for the outcome of the criminal proceedings (*Gäfgen v. Germany*).
[... Where evidence has been collected in breach of Article 3 of the ECHR (prohibition of torture), for instance, the matter of whether the right to a fair trial has been breached is considered separately. The right is usually considered to have been breached automatically regardless of whether the evidence in question was decisive in securing a conviction] (*Jalloh v. Germany; Harutyunyan v. Armenia)'*

90 For instance, in the case of exculpatory evidence gathered after the absolute time-limit laid down in Article 234 of the CPC. If the text of the provision is interpreted grammatically, the court will have to exclude this from the evidence considered.

91 For instance, one measure may be said to be performed while another takes place in parallel in an attempt to circumvent the legal safeguards that need to be in place when the second measure is carried out. For instance, what appears to be an inspection on the site of an accident could entail a search in an attempt to circumvent the judicial review required in the event of searches. What appears to be an arrangement allowing different parties involved in an offence to meet could actually entail a live identification exercise. Such parties could be an eye witness and the alleged perpetrator, the latter participating in witness capacity. In such cases, the eye witness essentially identifies the perpetrator in the absence of the procedural safeguards that should be in place to protect the individual subject to identification: the presence of individuals whose appearance is similar, of a defence counsel (since the alleged perpetrator is being subjected to an investigative measure) and of witnesses representing the law enforcement authorities.

3.2. Making the standard of proof for bringing charges before a court less stringent

The standard of proof that charges need to meet before they are brought using a bill of indictment is practically identical to the standard to be met to secure a conviction. It is indeed true that Bulgarian law uses different terms. Prosecutors need to have 'assurance' that 'the evidence required to discover the objective truth and bring charges before a court has been gathered', while courts need to be satisfied that 'the charges brought have been proven beyond any doubt'. However, the 'assurance' prosecutors need to obtain is interpreted as being absolute, which precludes any doubt as to the guilt of the accused, i.e. the requirement is the same as the one in respect of courts. What is more, prosecutors need to obtain assurance not just when it comes to the alleged offence, who perpetrated it and who is guilty, but also when it comes to all other circumstances subject to proof[92]. The fact that the standard for bringing charges and the one for securing a conviction are the same is the principal objective reason for the unrealistically high rate of convictions in Bulgaria, which has consistently stood at 95 % of all judgments in criminal cases.

When it comes to what is necessary to charge an individual, the Bulgarian system stands objectively apart from similar civil law systems whose proceedings have historically been inquisitorial and whose pre-trial stage is prominent.[93] In such systems, the standard that prosecutors have to meet to press charges is less stringent than the standard courts have to see satisfied to render a conviction.[94]

The excessively stringent standard of proof coupled with the limited mechanisms for external review of decisions by prosecutors not to indict individuals results in it being all too difficult for less than straightforward, or factually and/or legally complex, cases to reach courts. If the mechanisms for scrutinising and externally reviewing a refusal to continue an investigation, for instance, are limited, this will logically lead to a smaller chance of complex cases reaching courts. Such cases will generally be stopped from reaching courts more often even if prosecutors have grounds to bring charges before a court in case prosecutors are required to not to have 'assurance' that the alleged perpetrator is guilty and that, hence, a conviction can be secured, but to consider these sufficiently likely. In addition, it is often the case that, when initial information about distinct criminal offences and persons involved is received, prosecutors focus solely on those that are the most straightforward to prove, which doubtless goes to the detriment of the administration of justice.

Making the standard of proof required in order to bring charges less stringent, but reasonably so, would make for speedier proceedings and ensure compliance with the principle according to which the pre-trial stage must be of a preparatory nature.

3.3. Making the procedure for bringing and amending charges less cumbersome

3.3.1. Bringing charges when measures to investigate an individual are taken

Charges (statements by a competent public authority to the effect that an individual committed a criminal offence) are brought twice in the course of Bulgarian criminal proceedings. This first takes place during the investigation. After the investigation has concluded, charges are formally brought before a court. In both cases, this must be done in writing. At the first stage a decision to indict/a statement concerning the first investigative measures vis-a-vis the individual is issued, and at the second stage — a bill of indictment, both containing specific required information.

92 See *Expert Proposal to Amend the CPC,* p. 8.

93 For instance, the German Code of Criminal Procedure requires that prosecutors have 'sufficient reason' to charge an individual in view of the investigation (Section 170(1) of the German Code of Criminal Procedure), its Austrian counterpart stipulates that the facts of the case need to have been ascertained to a sufficient degree, making a conviction likely (Article 210(1) of the Austrian Code of Criminal Procedure), and the Swiss one states that charging can take place if, based on the results of the investigation, prosecutors regard the grounds for suspicion as sufficient (Article 324(1) of the Swiss Criminal Procedure Code), etc.

94 The standard of proof to be met to secure a conviction in Romania, for instance, means that courts must not have reason to suspect lack of guilt after they have assessed the evidence (Article 103(2) of the Romanian Criminal Procedure Code).

The general statutory requirement for bringing the first charges (during the investigation) is for sufficient evidence to have been gathered to suggest that an individual is guilty of a publicly actionable offence and for there to be no grounds to discontinue the criminal proceedings. According to legal theory 'sufficient evidence' means that the evidence gathered should not be contradictory and that it should unequivocally suggest that an individual did commit an offence as at the relevant point in the investigation.[95]

Although Bulgarian law lays down an explicit requirement to present an individual with the charges against them as soon as they become the subject of an investigation (even where there is not sufficient evidence; still, there have to be grounds to take the investigation measure — if not, this would amount to abuse of power and arbitrariness), this is not done in practice since a strictly formalistic approach requiring the issuance of a dedicated decision to indict the individual is followed. This is the case despite the fact that the relevant European standard makes it necessary to inform the individual of their charges using the less onerous procedure, which does not provide for coordinating with a prosecutor or the latter issuing a dedicated decision. Under this procedure, the initial charges are to be incorporated into the statement concerning the first investigative measure taken.[96]

Where measures to investigate an individual are taken, this amounts to a 'criminal charge' against them within the meaning of Article 6(1) of the ECHR. Hence, the individual's rights stemming from the fact that public authorities suspect them of having committed an offence and have practically focused their investigation on them, with the individual learning about this due to the nature of the measures taken, need to be protected.[97] Where measures to investigate an individual are taken, a 'criminal charge' within the meaning of the ECHR is always in place, too, regardless of whether the formal procedure for indicting an individual laid down in national law has been followed. Thus, in its judgment in *S.H.K. v. Bulgaria*, the ECtHR held that a 'criminal charge' within the meaning of Article 6(1) of the ECHR is in place as from the moment an individual subject to an investigation is questioned in their capacity as a witness.

The aim of the less onerous procedure is to allow an individual to exercise the rights stemming from their capacity as an accused person at the time when an investigative measure to which they are subjected is taken, not afterwards. In practical terms, this means the following when considered in the context of Article 55 of the CPC (rights of accused persons), Article 6 of the ECHR, Article 3 of Directive 2012/13/EU on the right to information in criminal proceedings and Article 3 of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty:

- The individual is entitled to learn what offence they are suspected of (what the action consisted in, when and where it took place and what the legal classification is) and why this necessitates taking measures to investigate them.
- The individual has the right to a defence counsel at the time of the measure.
- The individual has the right to remain silent/not incriminate themselves.

The principal problem stemming from the practice of always bringing charges against individuals by way of formal dedicated decisions (including where an expedited procedure is concerned), which has gained currency, has to do precisely with the tactics employed by the investigative authorities. As a result of these, charges may end up being brought at a later stage, meaning that measures to investigate an individual may be taken without said individual being able to exercise their rights as an accused person. Usually, only individuals subject to the execution of a bail order or individuals against whom a bail order is going to be sought before a court are charged at a fairly early stage. That is because these steps can only be taken against accused persons. Where individuals are asked to cooperate in an investigation in a different capacity, this is done as late in the investigation as possible since

95 See Chinova, M. *The Pre-Trial Stage under the Criminal Procedure Code. Theory and Practice*, Ciela, 2013 (p. 321).

96 See Chinova, M. *The Pre-Trial Stage under the Criminal Procedure Code. Theory and Practice,* Ciela, 2013 (pp. 325-330).

97 For instance, where they are part of a live identification exercise but have been included as a person to be recognised; where their home is searched; where a physical search is performed, etc.

charging an individual only makes an investigation more challenging. This is an obvious tactic used to circumvent the provisions safeguarding the rights of the individuals being investigated. It also goes manifestly against the ECHR, Directive 2012/13/EU, Directive 2013/48/EU and the CPC.

After an individual is charged not by way a dedicated decision to indict but as a result of measures to investigate them being taken, a prosecutor may find that the suspicion of guilt *vis-a-vis* the individual prior to the measures, which also serves as grounds for these, is not borne by the measures taken.[98] In such cases, there is nothing to stop the prosecutor from dropping the charges, thus discontinuing the criminal proceedings against the individual.

In any case, the de facto charging of an individual resulting from the first measures taken to investigate them needs to be adequately incorporated into Bulgarian law in order to start being used in practice and not persist as a mere theoretical possibility.

3.3.2. Making the requirements for the information contained in a bill of indictment less stringent

Making the standard of proof for bringing charges before a court (discussed in point 3.2 of section VI) less stringent should go in parallel with a certain lowering of requirements as regards bills of indictment. This is not devoid of procedural logic, particularly when the requirements set out in the Bulgarian rules of criminal procedure are compared with those in rules whose philosophy is similar to that of their Bulgarian counterparts. This is why we will not be reproducing the specific proposals put forward in the Expert Proposal to Amend the CPC (pp. 7-13[99] and the detailed reasoning underlying these and will instead support them.

3.3.3. Making the amendment of charges at the trial stage more flexible

On the one hand, courts have very extensive powers to review charges during the trial stage of criminal proceedings. A prosecutor can neither withdraw charges and petition the court to not adjudicate on the guilt of a defendant, nor can they amend said charges without the court giving its approval.[100] Prosecutors are the sole figures 'in charge' of indictment at the pre-trial stage, but this ends there.

On the other hand, charges cannot be amended unless a prosecutor expressly petitions the court: the court cannot amend them *ex officio*, neither can the private prosecution. This means that there is no mechanism whatsoever to balance cases in which a prosecutor desists from taking steps during the pre-trial stage and fails to amend the charges despite the investigation findings conclusively pointing to the need to amend these (where specific facts have been established or the law requires that the individual is charged of an offence carrying a more severe penalty). Where a balancing mechanism is not in place, the prosecutor in charge can single-handedly make it impossible for a court to render an adequate judgment in light of the newly established facts.

This leads us to the conclusion that the options to amend charges have been restricted in a way that goes against the European standard.

According the case-law of the ECtHR, which considers this matter, too, in the context of safeguarding the right to a fair trial, a court seised of a bill of indictment can amend the facts on which charges rest and the legal classification of the alleged offence(s) at the trial stage even

98 For instance, no material evidence inculpating the individual was found during a search or the individual was not identified during a live identification exercise.

99 https://news.lex.bg/wp-content/uploads/2020/10/%D1%82%D1%83%D0%BA-4.pdf

100 For instance, if a prosecutor wishes to class an offence as a less serious one but the facts of the case remain the same, courts are not at liberty to allow that since such a step would be superfluous in procedural terms. If the charges concern serious physical injury and a prosecutor wishes to amend these to cite moderately serious physical injury in view of the same facts, the court hearing the case should not allow this precisely because the amendment would be superfluous in procedural terms, i.e. there is nothing to stop the court from ruling that the individual is guilty of the less serious offence, and also because the amendment precludes the court from ruling on the initial charge, which would cease to exist if amended.

if a prosecutor has not petitioned it to do so.[101] To safeguard the rights of the defendant, the following must be in place:

i. They must be duly and fully informed of the amendment (see, for instance, *Mattoccia v. Italy*).

ii. They must be afforded sufficient time and resources to prepare in view of the new charges and mount their defence in light of new information *(Drassich v. Italy)*.

What matters here is that courts cannot base their judgments on facts underlying charges or legal classifications in said charges that were not examined during the proceedings because there is no way for the defence to adequately prepare for these *(Pereira Cruz and others v. Portugal)*. It is of decisive importance whether a party was caught unprepared by a court basing its judgment on charges that it amended *ex officio (Čepek v. The Czech Republic)*.

According to settled case-law in Bulgaria, charges may only be amended in cases pending before first-instance courts insofar as defendants are entitled to argue their case on the merits before two instances. Where amendments are made in cases pending before an appellate court (a second first-instance court), this rule does not apply.

The case-law of the ECtHR does not provide for such a requirement. Indeed, amending the charges at any point during the trial stage would not go against the ECHR provided that the basic criteria safeguarding the right to a fair trial above have been met.

101 For instance, Section 265 of the German Code of Criminal Procedure regulates the procedure for amending the facts on which charges rest or the legal classification of an alleged offence at the trial stage. Courts are entitled to amend these provided that the defence is notified and afforded the opportunity to adequately prepare. Where a prosecutor wishes to add charges related to further offences, they need to state that explicitly and the defence needs to consent to this (Section 266 of the German Code of Criminal Procedure).

Part 6
MAJOR SUBSTANTIVE LAW PROBLEMS AND PROPOSALS

1. Changes to the Criminal Code (CC) during the period following democratic change: between populism in the sphere of criminal law and international instruments

The clearest and most succinct way to summarise the changes to the CC over the past few years is as follows: i. changes stemming from Bulgaria's membership in international organisations, the EU being chief among these, and the resulting need to transpose the instruments of EU law[102] and other international instruments into domestic substantive criminal law, as well as changes resulting from judgments of the ECtHR against Bulgaria[103]; ii. changes stemming from populism in the sphere of criminal law, i.e. the unceasing attempts to establish new constituent elements of criminal offences and step up penalties for existing ones (most often in the context of specific offences that have garnered widespread public attention) chiefly on the part of members of the executive and the legislatur[104].

The first set of changes are inevitable. This is not just because they stem from Bulgaria's international commitments to align its criminal law system with those of countries whose values relating to the rule of law are similar, but also because said changes primarily have to do with new public relations that the CC never regulated in the past but needs to regulate now. The problems accompanying these changes mainly concern the legislative technique used since this often betrays an effort to build on tried and tested legal concepts, which is not always possible in objective terms.[105]

The second set of changes are superfluous and often produce adverse effects. These are introduced not so much because many politicians truly believe that more work in the sphere of criminal prosecution will amount to less crime, but because they consider that in introducing these changes they are giving voters what they want, thus scoring points with ease.

It is indeed easy to criminalise behaviour. It is even easier to make a penalty provided for by law more severe. Unfortunately, in and of itself, changing 'between one and six' to 'between two and eight' (years in prison) cannot have the effect presented before the public. It could only serve as an excuse to fall back on: 'There, we passed stricter provisions. Our job is now done.'

Indeed, as early as 1764 one of the founding fathers of criminology, Cesare Beccaria, penned his treatise *On Crimes and Punishments*, in which he argued that a punishment should not serve as revenge, but instead be timely and proportionate to the crime committed because prevention efforts depend not on the severity of a punishment, but on the likelihood of it being imposed.

Going back to the point in the previous paragraph, changes in criminal law introducing more severe penalties are never made on the basis of criminological research into the causes of a particular type of crime. In this sense, they never take into account whether said type is on the increase and, if so, in what way a more severe penalty will contribute to curbing it, whether it

102 See Article 83 of the Treaty on the Functioning of the European Union.

103 For instance, as regards organised crime, money laundering, corruption, terrorism, trafficking in human beings, financial fraud, cybercrime, the so-called 'company theft', etc.

104 The current Prosecutor-General recently joined the ranks of those constantly calling for a wider range of offences to be recognised and for more severe penalties to be introduced. He seems to be there to stay.

105 For instance, the constituent elements of 'computer fraud' laid down in Article 212a(1) of the CC are modelled on those of an offence that is a staple of Bulgarian criminal law, namely 'document fraud', but the requirement for an individual to have been deceived as a result of the alleged offender tampering with computer data makes it difficult to ascertain whether the constituent elements of the offence are actually in place.

is to be accompanied by other measures and what the nature of these measures should be.[106] In general, the explanatory memoranda accompanying bills cite the 'increase and growing severity of crime' as grounds for the relevant changes, but no data whatsoever are adduced to support this. It is as if crime rate is always on the rise and there is no need at all to prove that this is the case.[107]

It would take a whole new text to cover the heaps of completely pointless changes to the CC aimed at introducing more severe penalties. For the purposes of this text, however, we will only examine the most telling case since it concerns the offence resulting in the greatest number of penalties in Bulgaria based on statistics, namely drunk driving where no road accident is caused.[108]

In 2015[109] legislation was amended, doing away with the option for an offender to confess to committing an offence and thus benefit from a less onerous procedure (the type generally used for such cases lacking factual and legal complexity) and be put on full-fledged probation. Thus, the only option left available now is to sentence such individuals to imprisonment. Probation has long since been a recognised European standard offering an alternative to deprivation of liberty and allowing the perpetrators of less serious offences to avoid being isolated from their social setting against their will while still engaging in correctional work by meeting with probation officers, participating in various programmes, engaging in community service, etc. Since the only option available in Bulgaria in such cases is deprivation of liberty, when settlements are reached or when courts order penalties the period chosen is usually between 3 and 4 months in the case of first-time offenders, but serving the actual time is deferred indefinitely citing their hitherto clean criminal record (the so-called conditional sentence). In the event that an individual re-offends during their 'probationary period', they have to do time. They are imposed a new penalty, which they have to serve together with their original one. This makes for a maximum of about a year in prison, though the period is usually between 8 and 9 months, i.e. the sum total of the duration of the two penalties.

Penitentiary research[110] suggests that short stays at penitentiary facilities are not useful on account of the following principal reasons: i. social workers at prisons do not have sufficient time to engage with offenders; ii. offenders get cut off from their usual setting, which is not usually criminogenic in their case, and placed in a criminogenic one of all places; iii. having an offender serve time costs far more money in public funds.

In the context of the above, steady efforts to replace deprivation of liberty with alternative penalties that preclude offenders being cut off from their social setting can be observed in Europe. Against this background, a step in the exact opposite direction was taken in Bulgaria. What is more, it concerns the offence for which the most penalties are imposed. The sole logical outcome of this has been an increase in the number of inmates serving brief periods in prisons on account of transport offences. Nothing else has changed.

The most worrying part is that this change and others similar to it were introduced in the context of already adopted strategic documents. Said documents provide for criminal policies that go in the exact opposite direction. This demonstrates the complete absence of a vision for the development of substantive criminal law in the long run. [111]

---

106 We can only hope that the Criminological Research Council with the Ministry of Justice, which was recently reinstated by Minister Krum Zarkov, will not just exist for the sake of keeping up appearances, but will truly be active and, more importantly, that it will actually produce results.

107 As discussed in point 2.1 of section V, this is in the context of available data, which actually indicate that there is a consistent overall trend towards a reduction in crime rate, albeit with a few exceptions concerning specific offences and specific offences during individual periods.

108 Article 343b(1) and (2) of the CC

109 SG No 74/2015

110 See, for instance, Eaton, G. and Mews, A. *The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Reoffending.* The authors conclude that the reoffending rate following short-term custodial sentences (of less than one year) is higher than that after the offender has completed a penalty used as an alternative to serving time (according to data about England and Wales).

111 For instance, the very first objective of the 2020—2025 Criminal Policy Blueprint is to step up the effectiveness of prosecuting criminal offences, including through wider use of penalties that offer an alternative to deprivation of liberty. The text of the objective reads as follows: 'The ever-increasing severity of penalties makes it impossible for these to adequately reflect the nature of criminal behaviour and the threat to the public it poses. Statistical data clearly demonstrate that increasing the severity of penalties does not result in a reduction in crime rate. In addition, it should be noted that the system of penalties under the Criminal Code centres around

2. Do we need a new CC?

In the context of the above, every so often the issue of whether it might not be necessary to adopt a new CC in view of the changes in the socio-political context and the economic circumstances since 1968, when the current CC was adopted, makes its way into public debate.

In 2014 a draft that had been four years in the making was endorsed by the government, but this was never tabled for consideration by Parliament.[112]

That said, there is nothing particularly revolutionary in the way public relations have developed in post-communist Bulgaria that would call for the considerable investment of effort and resources on the part of experts and the public alike needed to adopt an entirely new Code, which is bound to repeat advances in substantive criminal law that have taken an inordinate amount of time to arrive at and that already form part of the existing one, specifically its core concepts (the definition of a criminal offence, the objectives of punishments, the individuals bearing criminal liability, guilt, complicity, self-defence, etc.). The necessary changes can easily be introduced by amending the existing CC.[113]

3. Guidelines on the most pressing changes

3.1. Streamlining penalties

Contrary to popular belief, according to which the crime rate is increasing, objective data indicate that the clear trend toward a steady decrease in crime rate, which has been observed for almost 25 years, i.e. since the start of the 21st century, in Bulgaria, is unprecedented, or at least there are no data to suggest anything similar at the time of the Third Bulgarian State.[114] In contrast, during the last quarter of the 20th century there was a steady trend going in the opposite direction, i.e. toward an increase in crime rate. This started much before the sky-rocketing of the 1990s, though it should be pointed out that the absolute figures and the rate per 100 000 inhabitants were both lower in the 1980s than they are today.[115]

On principle, defending the increase of penalties before the modern-day public is difficult given criminological research, and it is made even more difficult by data indicating a decrease in crime.

Experts in criminal law have discussed the need to remove whole life sentences from the system of penalties, yet it would understandably be difficult to take this step due to the relevant actors' fear of massive public outcry.[116] Nevertheless, it stands beyond doubt that the severity of this penalty is excessive and the benefits of this response to the gravest attacks on personal integrity are particularly doubtful. What is more, in recent years the ECtHR has held that

severe penalties, which entail significant restriction of individuals' fundamental rights. This stands as a testament to the markedly punitive nature of the Bulgarian system of penalties.'
The question of why the Blueprint is dedicated almost exclusively to problems pertaining to substantive law is an altogether different matter.

112 The draft can be found at: https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=1139. The draft doubtless contains many valuable proposals of a purely conceptual nature. These include streamlining the system of penalties, removing matters beyond the scope of substantive criminal law from the CC, introducing new provisions on reoffending, ensuring that the constituent elements of a number of offences run with the times, etc.

113 For instance, the German Criminal Code was adopted in 1871 and has only ever been amended since.

114 See Kanushev, M. *A Historical Sociology of Criminal Policies in Bulgaria. Criminal Policy Blueprints in a Democratic Society (vol. 3)* [„Историческа социология на наказателните политики в България. Наказателните стратегии в демократичното общество (том трети)"], NBU, 2020 (the tables on pp. 144-145 and 162-163), and the annual law enforcement statistics releases on the website of the Ministry of Interior.

115 Of course, everyone is free to question the veracity of the data on registered offences. It is true that there have always been filters to determine which offences are to be registered. The actual (or total) number of crimes/crime rate can never be equal to its registered counterpart. Yet, there is no reason why it should not be possible to use the trends relating to registered crimes to capture those characterising the development of the total number of crimes/crime rate, provided that there are no significant deviations when it comes to unregistered crimes.

116 Even though doing away with whole life sentences is one of the objectives of the 2020—2025 Criminal Policy Blueprint cited above, which has yet to materialise.

having an individual serve a whole life sentence in the absence of the possibility to resort to a procedure realistically allowing for the review and change of this penalty goes against Article 3 of the ECHR.[117]

As we mentioned earlier, serving a brief custodial sentence is counter-productive, which is why the scope of application of probation should be broadened to enable this to serve as an alternative to brief custodial sentences. In addition, the probationary measures during at least a part of the so-called probationary period under conditional sentences should be implemented more widely since offenders are often left with the wrong sense that they have not been convicted at all, which leads to breaches of probationary periods that have a good chance of being avoided if correctional work is done.

We also support broadening the scope of application of the well-established measure of not seeking criminal liability and imposing an administrative sanction instead where the offence or offender do not pose a great danger to society.[118] This should, however, go hand in hand with considering a streamlining of the system of administrative sanctions.

3.2. Less ambiguous wordings of the constituent elements of offences to avoid any doubt as to the offending acts and the penalties these carry

One of the most obvious problems relating to ambiguity in substantive criminal law concerns the all too frequent overlap of the constituent elements of administrative offences under the various sectoral acts and those of criminal offences under the CC.[119] In other words, the same behaviour can qualify as involving both the constituent elements of an administrative offence and those of a criminal one. The single criterion that allows a dividing line to be drawn between the two types of liability, whose nature and consequences for the offender are worlds apart, concerns the danger to the public resulting from the offending act in each particular case. This, however, is left to law enforcement authorities to assess. This assessment cannot always be based on objective criteria (or is not based on such even where it can be). This, in turn, practically paves the way for arbitrariness on the part of public authorities and entails a significant risk of corruption. The fact that it is possible for two individuals to engage in two identical actions, but for one of them to be imposed an administrative sanction under the less onerous administrative procedure while the other is imposed a criminal penalty following criminal proceedings culminating in a conviction and is henceforth treated as a person with a criminal record (with all the adverse consequences stemming from this status), clearly attests to a breach of the constitutional principle according to which citizens must enjoy equality before the law. To avoid this in the future, it is simply necessary to decide which constituent elements also in place in sectoral law are to be decriminalised, which will result in only administrative infringements being recognised based on these, and which constituent elements are to be kept in the CC only.[120]

An analogous, though less pronounced, problem plagues the constituent elements of various other criminal offences under the CC. These are often all too similar to one another, which results in practical difficulties in determining which one to cite.[121]

A similar problem concerns the criminalisation of actions using vague blanket references (in cases where provisions of criminal law refer to other instruments) owing to the ever-changing provisions of the instrument to which these blanket references are made.

---

117 See Harkins and Edwards v. the United Kingdom, Babar Ahmad and others v. the United Kingdom, etc.

118 Also proposed in the 2020—2025 Criminal Policy Blueprint.

119 See Yordanova, R. *Not Seeking Criminal Liability and Imposing Administrative Sanctions under Bulgarian Criminal Law* [„Освобождаване от наказателна отговорност и административно наказване по българското наказателно право“], Sibi, 2021 (pp. 141 et seq.), which details the constituent elements of administrative infringements under 17 sectoral laws that match the constituent elements of criminal offences under the CC.

120 Avoiding identical constituent elements of criminal offences and of administrative infringements also features as a dedicated measure aimed at increasing the effectiveness of criminal policy in the 2020—2025 Criminal Policy Blueprint.

121 For instance, the constituent elements of extortion under Articles 213a and 214 of the CC respectively; of obtaining EU funding as a result of fraudulent conduct under Article 212(3) read in conjunction with Article 212(1) and (2), and Article 248a(5) read in conjunction with Article 248a(2) of the CC respectively.

For instance, during the state of emergency declared owing to the pandemic the completely unsuitable wording of Article 355 of the CC[122] paved the way for a myriad of interpretations as regards the plethora of emerging, ever-changing, often unclear and sometimes even contradictory instructions to the public about how it was to behave in the context of the pandemic. Specifically, these interpretations had to do with establishing which breaches of which of the instructions should or should not be considered criminal offences. That is because the article cited practically criminalised all such behaviour. This was coupled with vagueness. The constituent elements of an administrative infringement under the Health Act, i.e. breach of the measures against the pandemic introduced by decisions of the Minister of Health or a regional health inspection service, were identical to those of the criminal offence referred to in Article 355 of the CC. In practical terms, this led to glaring cases of double standards where penalties/sanctions for breaches of measures against the pandemic were concerned.[123]

Convicting individuals based on vaguely worded criminal law provisions, regardless of whether this vagueness stems from reference to a wide array of ever-changing rules or from (partly) identical constituent elements, runs counter to another fundamental principle of law, namely that of criminalisation (*nullum crimen, nulla poena sine lege*).[124]

3.3. Continuing the modernisation of the Special Part of the CC in view of the need to introduce new and adequate safeguards to protect modern-day public relations

It is doubtless necessary to recognise a dedicated set of constituent elements as regards torture. This necessity stems from the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the numerous recommendations of the European Committee for the Prevention of Torture and the Committee of Ministers of the Council of Europe.[125] Where violent crime is motivated by the perceived sexual orientation of the victim, said motivation should be recognised as an aggravating circumstance.[126] The establishment of the European Public Prosecutor's Office and the start of its work in Bulgaria brought into focus the extent to which the protection of EU funds under criminal law (specifically the CC) can be considered adequate. This protection merits significant rethinking if it is to be practically applicable. The same goes for the more general problem with regard to offences relating to public procurement. These are also prosecuted by seeking to establish whether constituent elements that are difficult to ascertain due to the nature of the offence are in place. Introducing the concept of 'criminal liability of legal persons' should be considered. It may be worthwhile using constituent elements that do not carry severe penalties more widely with regard to corruption offences. The list goes on.

---

122 Article 355

(1) Individuals in breach of a regulation, rules or measures against the spread or outbreak of an infectious disease in humans shall be imposed a custodial sentence of up to three years and a fine of up to BGN 10 000.

(2) Where the offending act takes place in the context of an epidemic, a pandemic or a state of emergency, with cases of death attested, said individual shall be imposed a custodial sentence of up to five years and a fine of between BGN 10 000 and BGN 50 000.

123 See *Identified Problems with Prosecution Proceedings during the State of Emergency* [„Констатирани проблеми при наказателно преследване в условия на извънредно положение"].

124 Enshrined in Article 7(1) of the ECHR and Article 5(3) of the Constitution. See the ECtHR's judgment in *S.W. v. the United Kingdom:* '[Article 7(1)] should be construed and applied [...] in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. [...] Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. [...] this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. [...] Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.'

125 Also taking into account the judgments of the ECtHR against Bulgaria in the *Velikova v. Bulgaria* group of cases.

126 Proposals for both were made in the sets of proposed amendments to the CPC and the Judiciary Act aiming to improve the quality of investigations and come up with a mechanism for investigating the Prosecutor-General independently (the set originally drafted by Kiril Petkov's government and its recast under Galab Donev's caretaker government).

CONCLUDING REMARKS

The litmus test showing if criminal justice, but also justice at large, functions well has to do with the response to cases involving significant political and/or economic interest or cases subject to serious public scrutiny for other reasons. Granted, all cases are important. However, the Bulgarian public, independent observers and Bulgaria's international partners, which also rely on Bulgarian criminal justice in an increasingly connected world, assess this mainly based on the outcomes of the so-called 'cases of high public interest'. This is where Bulgarian criminal justice undoubtedly fails miserably. This failure starts with the double standards and the discretion with respect to (not) opening and (not) conducting investigations when it comes to a whole host of well-known, influential political and business figures, it continues with the excessive duration of the trial stage (if cases make it to court at all) and ends with the utter failure to secure the results promised to the public at the start.

In this sense, no matter how tired some experts and members of the judiciary are of reform, which they may see as perpetual yet incapable of yielding results, no matter how hard the political, judicial and prosecutorial establishment tries to report that this is complete (chiefly before international partners) every once in a while or how hard it tries to attribute non-existent achievements to it, no matter the fact that the parameters of reform are constantly blurred beyond recognition in the context of the complex public and media environment, the need for reform will inevitably continue to crop up on the agenda time and again. This will be the case until there is actual change in the most prominent part of work in the sphere of criminal justice, namely the response to high-level corruption involving (political) power, regardless of which of the three branches is concerned, and the related abuses of public funds, erosion of free market competition, media capture and poor environment for investment.

Of course, there is no clear, precise recipe to follow when it comes to such change. There is nothing to guarantee that change will take place regardless of what reforms are introduced either.

Indeed, there is no doubt that both various political forces and different experts see what needs to change differently. Often they diverge on fundamental matters, and all the more so when it comes to subtler ones. There are some that do not want any reform at all, but are perfectly content with things staying as they are. These do, however, spread all manner of supposedly reformist smokescreen proposals putting forward all manner of ideas.

This is precisely why we should use the principles and basic requirements that have long since become standard among the core members of the entities whose peripheries we recently joined as guidance. While criminal justice may be conservative, if we are to make progress and develop, we need to show a little more out-of-the-box thinking and give moving beyond clichés and dogmas a try. We also need to realise that others have already considered our problems... and come up with solutions.

Ourselves, our doctrine, case-law and practices are not the be-all and end-all. We do not stand apart from the rest of the world. Quite the contrary, we form part of international communities with rich traditions when it comes to the rule of law and democracy.

The Anti-Corruption Fund is an independent, expert-led non-governmental organization, which investigates cases of alleged corruption, misuse of public funds, and conflict of interest among public officials in Bulgaria. Our research adheres to the highest legal, professional, and ethical standards. We aim to assist public authorities and journalists in investigating and prosecuting corruption-related violations. The goal of our work is to help address systemic factors leading to high corruption levels, and to raise public awareness about the existing mechanisms to counteract corruption.

Find us at **www.acf.bg**
or email us at **acf@acf.bg**