THE BULGARIAN SPECIALIZED CRIMINAL COURT AFTER ONE YEAR: A MISPLACED TRANSPLANT, AN INSTRUMENT OF JUSTICE, OR A TOOL OF EXECUTIVE POWER?

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ABSTRACT

The EU, as a regulatory superpower, has sought to spread its legal clout well beyond its core treaty-based priorities, and into aspects of governance traditionally treated as member states' prerogatives, such as criminal justice and corruption control. In doing so, the EU has engaged in a large-scale legal development project designed to integrate its post-communist members' legal systems and ensure the development of the EU's fledgling legal traditions. This Note examines one aspect of Bulgaria's judiciary reform - the creation of a Specialized Criminal Court - and assesses the new court as an institutional product of the Cooperation and Verification Mechanism of the EU Commission. This Note concludes that, to date, the Specialized Criminal Court cannot be considered a successful undertaking in legal reform. Its activity in the coming years will help shape its legacy in two possible ways: either it will prove to be a transplant of foreign-conceived models of justice, or an autochthonous product of dysfunctions internal to the Bulgarian system at the level of political deliberation and institutional capability.

I. INTRODUCTION TO THE PREDICAMENT

This Note discusses a new specialized criminal court in the Bulgarian judicial system in the context of the country's European Union ("EU") membership.[1] The EU, as a regulatory superpower, has sought to spread its legal clout well beyond its core treaty-based priorities, and into aspects of governance traditionally treated as member states' prerogatives, such as criminal justice and corruption control.[2] In doing so, the EU has engaged in a large-scale legal development project designed to integrate its post-communist members' legal systems and ensure the development of the EU's fledgling legal traditions.[3]

This Note operates upon the premise that Bulgaria is the member state with the least favorable Corruption Perception Index ("CPI")[4] within the

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[1] Bulgaria joined the European Union ("EU") in 2007 and is one of the newest members from the group of post-socialist states to join the EU.

[2] *See generally*, PATRYCJA SZAREK-MASON, THE EUROPEAN UNION'S FIGHT AGAINST CORRUPTION : THE EVOLVING POLICY TOWARDS MEMBER STATES AND CANDIDATE COUNTRIES, 43-44 (2010).

[3] MICHAEL J. TREBILCOCK & R.J. DANIELS, RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS, 342-49 (2008) (discussing the EU's unique experience as a pioneer in law and development projects through trade agreements and enlargement conditionality).

[4] TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION BAROMETER, 4, 6, 17, 28, 33

EU and current candidate states, and that the CPI is a credible measure of a state's ability to control illegitimate abuse of public funds and institutions. It also assumes that the EU Commission ("EC") has accurately identified organized crime as a central challenge for the Bulgarian judiciary and society as a whole. Further, these two broad and unwieldy concepts (corruption and organized crime) are assumed to pose an internal security risk for the European Union as a nearly borderless supranational system.[5] Thus, from a security perspective, the EU's predicament is how to manage this risk by containing it and limiting and/or conditioning Bulgaria's rights as a member. Because concepts such as "corruption" and "organized crime" are overbroad and only amenable to legal analysis within strictly controlled conditions, the operational definitions behind these terms for present purposes are the ones found in the Bulgarian Penal Code and in international treaties that Bulgaria has ratified.[6] This Note further relies on

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(2009) (indexing data on corruption perception in Bulgaria); TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, 13 (2007) (reporting that over 70% of respondents view Bulgaria's judiciary as corrupt, the highest percentage among EU countries); *European Commission, Supporting Document Accompanying the Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism: Technical Update*, at 14, SEC (2008) 2350 final (Jul. 23, 2008) (remarking on the observed stagnation in anti-corruption measures and on the low level of Bulgaria's CPI since 2002).

[5] For two approaches to the concepts of public corruption, compare the work of Susan Rose-Ackerman, e.g. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM, 177 (1999) (espousing corruption metrics that correspond to the measurement methodologies of Transparency International), and the work of David Kennedy, e.g. David Kennedy, *The International Anti-Corruption Campaign,* 14 U. CONN. J. OF INT'L LAW, 455 (1999) (making a case against the "international anti-corruption campaign"), or the work of Bulgarian political scientist Ivan Krastev, e.g., Ivan Krastev, *Corruption, Anti-Corruption Sentiments and the Rule of Law*, *in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 323, 335 (Adam Czarnota et al. eds. 2006) (arguing that the social functions that corruption serves mediate public perceptions of corruption, and that, in itself, the rise in public corruption after the end of communism does not account for the dramatic change in societal perception to corrupt acts).

[6] For a proxy definition for organized crime, this Note uses NAKAZATELEN KODEKS [CRIMINAL CODE], art. 321a, (Bul.) *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE] 17 (2013) (Article 321a defines organized criminal group as any "organization or group that uses force or intimidation to enter into transactions or derive benefits").One such definition is found in Article 2 of the Council of Europe's Civil Law Convention on Corruption, which defines corruption as: "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behavior required of the recipient of the bribe, the undue advantage or the prospect thereof." Civil Law Convention on Corruption, Art. 2, Nov. 4, 1999, E.T.S. No. 174.

Another relevant and not incompatible definition of "organized crime" can be found in the United Nations Convention against Transnational Organized Crime ("UNTOC"). Bulgaria is party to UNTOC. The Convention defines "organized criminal group" as a "structured group

the Council of Europe's policy reports, which have described a mutually enabling relationship between corruption and organized crime.[7]

In Part I, this Note showcases how accession to the EU has had a profound organizing effect on the Bulgarian legal system by tracking the impact of Europeanization on the institutional history of the Bulgarian judiciary. Bulgaria's pre-accession reforms demonstrate how political integration generates upheaval and constructive introspection within traditionally self-contained and insular systems, such as a sovereign nation's criminal justice system.

Part I goes on to describe the European Union's latest instrument for communicating and implementing its risk containment measures regarding Bulgaria to the Bulgarian government, and the rest of the member states - the Cooperation & Verification Mechanism ("CVM") - and finds the origins of the idea for a specialized criminal court in the EC's precepts communicated through the CVM.[8]

Part II first considers examples of specialized courts in other EU member states – Spain and Slovakia – as possible blueprints for the Bulgarian reform on the basis of the "twinning mechanisms" framework of the EU.[9] This Note then introduces certain features of the Bulgarian judiciary and constitutional system so as to illustrate the opportunities and limitations to specialization and set the stage for the legislative framework for the Court and the sources of legal and political opposition to its creation.

This Note concludes with a preliminary assessment of the reform's implementation: what the Court is right now, how it compares to its conceptual framework in 2010, and what, if any, value the Court and the legislative texts behind it add to the legitimacy of the Bulgarian judiciary.

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of *three or more persons, existing for a period of time and acting in concert* with the aim of committing one or more crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit." United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, art. 2, Nov. 15, 2000, 2225 U.N.T.S. 209 ("UNTOC") (emphasis added).

[7] In a report on organized crime in European countries, the Council of Europe describes corruption as a supporting factor of organized crime, and a "tool for facilitating economic crime throughout Europe." *Council of Europe: Octopus Program*, Organised Crime Situation Report 2005: Focus on the Threat of Economic Crime, 6, 9, 11, Dec. 2005, *available at* http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/Report2005E.pdf.

For analytical purposes, I distinguish the notion of corruption as an extralegal social contract of sorts. *See* Scott A. Moore, Note, *In the Shadow of the Law: An Examination of Corruption and the Rule of Law in Armenia*, 31 B.U. Int'l L.J. 199, 216 (2013).

[8] The European Commission executed and implemented the CVM as a monitoring mechanism. Since EC functionaries are primarily invested with the design and implementation of the program, the EC is the institutional actor behind the reports issued twice a year.

[9] *See infra* pp. 21-22 and note 74 (defining "twinning mechanism").

Normative benchmarks used in this evaluation are the independence, accountability and legitimacy of the new court and its creation,[10] in addition to the CVM's feedback on the new Court from July 2012.[11] Ultimately, this Note concludes that the legislative and public-discourse mechanics of the introduction of the specialized court failed to implement several lessons[12] available to the Bulgarian government *and* to the CVM rapporteurs at the time the specialized Court was conceived. To paraphrase Daniel Smilov, a Bulgarian legal scholar who has written extensively on Bulgarian legal reform, the government chose to implement radical reforms only to the extent that it could ensure they did not change anything at all.[13]

II: BULGARIA'S LEGAL REFORMS & ACCESSION TO THE EUROPEAN UNION

To understand the issues surrounding the emergence of the first Bulgarian Specialized Criminal Court against Organized Crime, and its adjoining prosecutor and state investigator offices, it is useful to first discuss the country's years of transition to a market economy and its relationship with the European Union and the Council of Europe.

For the first seventeen years of its post-socialist history, Bulgaria's legal transformation proceeded under the unifying banner of European Union candidacy.[14] The broad social consensus around the ideal of integration into

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[10] *See* TREBILCOCK, *supra* note 3, at 58-66 (analyzing Eastern European judicial reforms after 1990 on the basis of the three normative benchmark of independence, accountability and legitimacy).

[11] *European Commission, Supporting Document Accompanying the Report From the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism: Technical Update*, at 32-33, SEC (2012) 411 final (Jul. 18, 2012) [hereinafter, "Technical Update 2012"].

[12] *See* Wade Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Post-Communist Countries*, 8-11, CARNEGIE PAPERS (May 2005), *available at* http://carnegieendowment.org/2005/04/26/lessons-not-learned-problems-with-western-aid-for-law-reform-in-postcommunist-countries/cgx. Channell considers four assumptions observable in legal development work in Eastern Europe: (1) "new laws are the answer;" (2) "governments are the key to achieving legal reform;" (3) "cultural issues are peripheral to legal reform;" and (4) the processes of legal changes are well understood." *Id.*

[13] Daniel Smilov, *GERB promenia taka, che da ostane sushtoto [GERB reforms so that everything can stay the same]*, TRUD.BG, Apr. 9, 2013, *available at* http://www.trud.bg/Article.asp?ArticleId=1905902.

[14] *See* Council of Europe Parliamentary Session, *Opinion on the Application of the Republic of Bulgaria for Membership of the Council of Europe*, at para. 6, 44th Sess. Doc. No. 6597 (1992) (recommending acceptance of Bulgaria's application for membership in the Council of Europe). Bulgaria submitted its official application for EU membership in December 1995. *See* European Commission, *Opinion on Bulgaria's application for membership of the European Union: Introduction and Conclusion*, at 2, COM (1997) 97 final (Jul. 15, 1997).

Western European political alliances led to a "quasi-constitutionalization"[15] of the accession criteria articulated by the EU.[16] As a result, legislative and constitutional changes were invariably produced in consultation with, and in aspiration for, "European standards."[17] Political elites were oriented and constrained by the ultimate goals of integration in devising their social and economic platforms. The 1995 socialist government's strategy asserted that "Bulgarian society will be formed in accordance with modern European standards and norms of social justice and security."[18] In its 2001 platform, the centrist government, led by former heir to the throne Simeon Saxe Coburg-Gotha, set out "to spare no efforts in laying the foundations for Bulgaria's accession to the European Union."[19]

The internal transformations of Bulgaria's legal order began with Chapter Six of the 1991 Constitution, which laid out conditions for the separation of the judiciary from the legislative and executive branches.[20] This separation became a mission statement for the upcoming overhaul of the former socialist state's judiciary, and soon found a general implementation map in a sequence of guidelines from Brussels, a notable example of which was the Commission's Accession White Paper from 1995.[21] Over its years of EU

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[15] Daniel Smilov, *The Rule of Law and the Rise of Populism: A Case Study of Post-Accession Bulgaria, in* CONSTITUTIONAL EVOLUTION IN CENTRAL AND EASTERN EUROPE 253-62 (Kyriaki Topidi & Alexander H.E. Morawa eds. 2011). Smilov argues that the Copenhagen criteria became deeply embedded in the platforms of all major Bulgarian political parties, leading to a relative rigidity of political platforms concerning reforms of the judiciary (because the only workable platform was adherence to the EU's agenda for Bulgaria), and a relative strengthening of the Bulgarian Constitutional Court, which, in Smilov's analysis, effectively limited the scope of any significant proposals for reform of the judiciary holding them to be in derogation of the independence of the judiciary. *Id.*

[16] Presidency Conclusions, Copenhagen European Council (Jun. 21-22, 1993) [hereinafter, "the Copenhagen Criteria"]. These criteria include: respect for human rights, the rule of law, and a functioning market economy. *Id.*

[17] Smilov, *supra* note 15, *at* 261.

[18] Georgi Pirinski et al., eds., PROGRAMNO RAZVITIE NA BSP SBORNIK DOKUMENTI (1990-2005) [PROGRAMMATIC DEVELOPMENT OF THE BULGARIAN SOCIALIST PARTY COLLECTED DOCUMENTS (1990-2005)], 706 (2008), http://npibg.com/ (follow "Публикации" hyperlink; click on "Програмно Развитие на БСП").

[19] NATSIONALNA STRATEGIA ZA PRISYEDINIAVANE NA REPUBLIKA BULGARIYA KUM EVROPEYSKIA SUYUZ 1997 – 2001 [NATIONAL STRATEGY FOR BULGRIA'S INTEGRATION WITH THE EUROPEAN UNION 1997 – 2001] (1997), *available at* http://sun450.government.bg/old/bg/oficial_docs/index.html (from the menu on the left click on "Стратегии" then select "Национална Стратегия За Присъединяване На Република България Към Европейския Съюз.").

[20] KONSTITUTSIA NA REPUBLIKA BULGARIA [BULG. CONST.] Jul. 12, 1991, ch. six. ("The judiciary shall be independent. In the performance of their functions, all judges, court assessors, prosecutors and investigating magistrates shall be subservient only to the law.").

[21] *Commission White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union*, 6, COM (1995)

accession preparation, Bulgaria made credible efforts to follow the White Paper's advice and model its judicial system after those of other EU member states.[22]

Alongside these efforts, the parallel projects of curbing public corruption and organized crime established themselves as the elusive keys to reviving public trust in the judiciary and achieving European legal integration.[23] The socialist state's legal and institutional framework could not be re-shaped quickly enough to escape exploitation by opportunistic entrepreneurs, while the antiquated Penal Code[24] often left the state defenseless against white collar and financial crimes and quasi-legitimate undertakings.[25]

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163 final (March 5, 1995) ("Without the necessary institutional changes, the adoption of internal market legislation could result in a merely formal transposition of rules.").

[22] *See* European Commission, *2003 Regular Report on Bulgaria's Progress Towards Accession*, at 99-103, SEC (2003) 1210 final (Nov. 5, 2003) (taking stock of Bulgaria's legislative amendments designed to address corruption and organized crime) EVGENI TANCHEV, ET AL., CONSTITUTIONAL LAW OF TWO EU MEMBER STATES: BULGARIA AND ROMANIA (Constantijn Kortmann et al. eds. 2008) at I-77 – I-82 (tracking the introduction of relevant new laws such as the Judicial System Act); Adam Lazowski & Svetla Yosifova, *Learning the Hard Way: Bulgaria and EU Law, in* THE APPLICATION OF EU LAW IN THE NEW MEMBER STATES: BRAVE NEW WORLD at 550-557, 570 (Adam Lazowski ed. 2010) (describing in detail the four amendments to the Bulgarian Constitution prior to accession). *Compare* NAKAZATELEN KODEKS [CRIMINAL CODE] *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE] 197 (1996) *with* NAKAZATELEN KODEKS [CRIMINAL CODE] *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE] 62 (1997) (the latter amended version of the Criminal Code included for the first time a definition of "organized crime group").

[23] *See*, *e.g.*, Stanimir Alexandrov & Latchezar Petkov, Paving the Way for Bulgaria's Accession to the European Union, 21 FORDHAM INT'L L.J. 587, 594 (1998) (expounding on Bulgaria-EU relations until 1998 and asserting the importance of tackling corruption and organized crime as measures needed to achieve full integration); Council of Ministers, *Decision to Adopt National Anti-Corruption Strategy for Bulgaria*, No. 671 (Oct. 1, 2001), *available at* http://europe.bg/upload/docs/Strategy_Corruption.pdf (taking note of the fact that for years, the country's Corruption Perception Index had been the lowest in Europe, and committed to legislative changes that would adopt European legal standards regulating lobbying; the ethical standards of conduct for public officials; and an electronic system for random assignment of cases to magistrates).

[24] *Compare* NAKAZATELEN KODEKS [CRIMINAL CODE] *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE] 26 (1968) *with* NAKAZATELEN KODEKS [CRIMINAL CODE] *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE] 17 (2013). The Criminal Code, a remnant of communist-era penal policy, was first introduced in 1968. Its refashioning remained a work-in-progress throughout the 1990s, and the Code lacked a definition of "organized crime group" until 1997.

[25] On the problems of Eastern European judiciaries, see generally, Venelin Ganev, *The Rule of Law as an Institutionalized Wager*, 1 HAGUE J. ON RULE OF LAW 263, 267 (2009) (". . . [I]n every East European country the autonomous and institutionally insulated regular courts have become a chronically dysfunctional and strikingly inefficient component of the democratic regime. It is this institutional pattern – strong Courts, erratic judiciaries – that has by now become a permanent feature of post-communist polities.").

By the eve of Bulgaria's accession, the EU's stated imperative was to guarantee that the new member state was equipped with a judicial system robust enough to apply the *acquis communautaire* and protect the internal market from economic and financial crime.[26] There was concern, however, that once the EU were to grant Bulgaria full membership, the "transition consensus" in favor of the Europeanization of the Bulgarian legal system[27] would be deflated and political will for further judicial reforms would wane.[28]

Until 2007 (the year Bulgaria became a member of the EU), a country's accession to the EU as a full member marked the end of formal institutionalized EU conditionality,[29] after which only very limited venues

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[26] Commission Decision 929/06, 2006 O.J. (L 354) 58, preamble para 2-3 ("The area of freedom, security and justice and the internal market . . . are based on the mutual confidence that the administrative and judicial decisions and practices of all Member States fully respect the rule of law. . . . This implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia,* to fight corruption and organised crime.").

The term *acquis communautaire* is concisely defined by the European industrial relations dictionary as "the cumulative body of European Community laws, comprising the EC's objectives, substantive rules, policies and, in particular, the primary and secondary legislation and case law – all of which form part of the legal order of the European Union (EU)." *Acquis Communautaire*, EUROFUND.EUROPA.EU, http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/acquiscommunautaire.htm (last accessed on Dec. 5, 2013).

[27] *See* Smilov *supra* note 15 at 261.

[28] *See* Gergana Noutcheva, *Bulgaria and Romania's Accession to the EU: Postponement, Safeguards and the Rule of Law*, 2 (Ctr. for Eur. Policy Studies, CEPS Policy Brief No. 102, 2006) (describing deficiencies in the preparedness of Bulgaria and Romania for full-fledged membership in the Union and the options the EU has to maintain post-accession compliance with EU reform agenda for the judiciary).

[29] DAVID PHINNEMORE & LEE MCGOWAN, DICTIONARY OF THE EUROPEAN UNION, 73-74 (2002) (The term "conditionality" is "[w]idely used in the context of European Union external relations and enlargement, with the EU making closer ties conditional on non-member states meeting certain political if not economic conditions"). The authors of the dictionary go on to add that since the Treaty of Amsterdam, conditionality may be extended after accession such that member states that show disregard for "principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law" may suffer suspension of certain benefits of membership in the EU. *Id.* In practice, however, neither of the ten countries that joined in 2004 were formally subjected to post-accession political conditionality and monitoring. *See* SZAREK-MASON, *supra* note 2, at 206, 217 (tracing the impact of accession on the 2004 EU entrants' corruption policies, and remarking that EU monitoring ended in 2004). In fact, the suspension option has never been triggered. *See* JAN-WERNER MÜLLER, TRANSATLANTIC ACAD., SAFEGUARDING DEMOCRACY INSIDE THE EU: BRUSSELS AND THE FUTURE OF LIBERAL ORDER 17 (2013), *available at* http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf (discussing the fact that Art. 7 has yet to be applied and suggesting its inoperability as an effective legal provision).

remained for direct monitoring of domestic reforms in areas outside the reach of the EU *acquis*.[30] After accession, a member state could still be informally criticized for deficiencies in its judiciary, or subjected to politically costly scrutiny within the Council.[31] Under certain circumstances, a member state could also be challenged through infringement litigation in the Court of Justice of the European Union ("CJEU"), such as in the recent case of *Commission v. Hungary*.[32] Since matters such as organized crime and domestic corruption fall, for the most part, outside of the EU's conferred powers, the EU's post-accession powers are much less clearly articulated and compelling compared to its pre-accession powers.[33]

In December 2006, a month prior to Bulgaria's entry to the European Union, the Commission added a new tool for post-accession conditionality to the EU Member State compliance system. To ensure continuing and credible commitment to internal reforms from Bulgaria and Romania, the Commission established the Cooperation and Verification Mechanism ("CVM") to monitor the two new member states.[34] The EC expressed the

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[30] *See* Martina Spernbauer, *Benchmarking, Safeguard Clauses, and Verification Mechanisms-What's in a Name? Recent Developments in pre- and post-Accession Conditionality and Compliance with EU Law,* 3 CYELP 273, 287-89 (2007) (Bulgaria and Romania's delayed accession drove the development of a EU-strategy for post-accession monitoring).

[31] Treaty on the European Union, Art. 7. The dire consequences of Art. 7 procedures have never materialized in the history of the EU. MÜLLER, *supra* note 29, at 17.

[32] Case C-286/12, Comm'n v. Hungary, 2012 E.C.R. 000 (Nov. 6, 2012) (applying Council Directive 2000/78/EC on employment discrimination to strike an arguably politically motivated amendment in Hungarian law which forced the majority of Hungary's constitutional court to retire prematurely following a series of rulings that were unpopular with the increasingly authoritarian government); Stephen Castle, *European Union Acts to Halt Hungarian Laws*, N.Y. TIMES, Jan. 17, 2012, *available at* http://www.nytimes.com/2012/01/18/world/europe/hungary-is-pressed-on-democracy.html?_r=1& (tracing the core of the infringement litigation against Hungary to a frustrated attempt to constrain the overreach of member states' authoritarian, yet democratically elected governments).

Instances of infringement litigation such as Comm'n v. Hungary, and soft-law-based mechanisms like CVM are in contrast to the European Commission's light anti-corruption and monitoring efforts prior to the 2007 EU enlargement. *See generally* SZAREK-MASON, *supra* note 2, at 47-86.

[33] SZAREK-MASON, *supra* note 2, at 47-86 (reviewing anti-corruption guidelines issued by the Commission and Parliament prior to the 2004 enlargement and remarking on their non-binding nature).

[34] Commission Decision 929/06, 2006 O.J. (L 354) 58-60. The benchmarks, included as an appendix to the Decision are: "(1) Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system. (2) Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of

CVM's purpose to be a mechanism meant to "address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime." While all six of the benchmarks and their collective political force have been analyzed extensively,[35] this Note is concerned primarily with the interaction of Benchmarks Three (continuation of judiciary reform) and Six (implementation of a successful strategy to fight organized crime).

Technical update memoranda, prepared for Bulgarian government and public administration (members of which are responsible for internalizing the Commission's feedback), accompany the Commission's reports to the

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the penal and administrative procedure codes, notably on the pre-trial phase. (*3) Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually*. (4) Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials. (5) Take further measures to prevent and fight corruption, in particular at the borders and within local government. *(6) Implement a strategy to fight organized crime, focusing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas*" (certain benchmarks are italicized for emphasis due to their particular relevance to the topic of this note, the Specialized Criminal Court).

The legal basis for the CVM is Art. 4 of the Bulgarian and Romanian Accession agreement. *Protocol Concerning the conditions and arrangements for admission of the republic of Bulgaria and Romania to the European Union* (2005 O.J. (L 157) 18), as well as articles 37 and 38 of the two countries' accession acts. *Council of the European Union, Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded*, Art. 37, 38 (2005 O.J. (L 157) 203). Articles 37 and 38 outline the measures the Commission has the right to undertake should either of the two acceding countries fail to implement EU policies or fall short of its pre-accession commitments. *Id.*

[35] *See, e.g.*, Lazowski & Yosifova, *supra* note 22, at 550 (introducing the CVM as a "*par excellence* political mechanism" designed to exert continuous pressure on Bulgarian and Romanian authorities and without precedent in its scope, since matters of home and justice affairs fall more squarely within the competence of the Council of Europe); Lara Appicciafuoco, *The Promotion of the Rule of Law in the Western Balkans: The European Union's Role*, 11 GERMAN L.J. 741, 751 (2010) ("The establishment of this *ad hoc* mechanism, and the conditionality that it entails . . . reveals the EU's necessity and willingness to intensify the protection of the rule of law in its internal dimension . . . . Moreover . . . the pattern established with the [CVM] with regard to Romania and Bulgaria could serve as a model that could be replicated with respect to possible new member States, particularly those in the Western Balkans area."); Ivanka Ivanova, Open Soc'y Inst., Pet Godini Mehanizum za Sytrudnichestvo i Proverka – Vreme za Razmisul [Five years of Cooperation and Verification Mechanism: Time for Reflection] 19 (2012) (taking stock of reforms linked to Commission reports through CVM, arguing that the formulation of the benchmarks suggests intentional imprecision on part of their drafters, while the inconsistent metrics used in the regular reports make it impossible to reliably record progress – or lack thereof).

Council and Parliament every six months. Additionally, the reports call for various bodies within the Bulgarian judiciary and executive to provide analyses of the judiciary's progress on each benchmark. The Supreme Judicial Council ("SJC"), as the administrative core of the judiciary, along with the Supreme Court of Cassation ("SC") and the Prosecutor's office associated with the SC have produced such reports,[36] while the cabinet has been responsible for the design and implementation of an overall political strategy of judicial system reform.[37] In theory, the Commission decision establishing the CVM provides for the possibility of regular fact-finding or consultative visits to Bulgaria by EU officials, or a Brussels-Sofia review of the benchmarks' viability.[38] By its nature and name, however, CVM presupposes an emphasis on peer group socialization of Bulgarian officials with other member states' public administrations.[39] As discussed in Part II, one of these training initiatives exposed members of the Bulgarian Supreme Judicial Council to the practices of specialization within the Spanish judiciary, and could have motivated, at least in part, the Specialized Criminal Court project.[40]

The CVM and the results of its monitoring of Bulgaria have been tacitly linked to the Schengen Treaty member states' decision to keep Bulgaria

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[36] *See, e.g.*, Tsvetanka Tabanjova, Supreme Judicial Council, Analitichen Doklad na Statisticheskite Danni za Natovarenosta na Sydilishtata na Republika Bulgaria za 2011 g. [Analysis of Statistical Data on Bulgarian Courts' Caseload in 2011] 2012; Boris Velchev, Bulgarian Prosecutor's Office, Doklad za prilaganeto na zakona I dejnosta na prokuraturata I razsledvashtite organi prez 2010 g. [Report on the enforcement of the law and the activities of the prosecution and investigative organs during 2010], 2011 [hereinafter "Prosecution Report 2010]; Simeon Chanachev, Supreme Court of Cassation, Doklad za dejnosta na Vyrhovnia Kasacionnen Syd na Republika Bulgaria prez 2010 g. [Report on the Activity of the Supreme Court of Cassation of Bulgaria in 2010] [hereinafter, "Court of Cassation Report 2010"].

[37] *See, e.g.*, Council of Ministers, Plan za dejstvie za prevencia i protivodejstvie na organiziranata prestypnost prez 2010 g. [Agenda for Prevention and Counteraction of Organized Crime in 2010], 2011.

[38] *Commission Decision Establishing a Mechanism for Cooperation and Verification of Progress in Bulgaria to Address Specific Benchmarks in the Areas of Judicial Reform and the Fight Against Corruption and Organised Crime*, art. 1, 929/06, 2006 O.J. (L 354) 58 (Dec. 13, 2006).

[39] *See European Commission, Questions and Answers on the Adoption by the European Commission of Reports on Bulgaria's and Romania's Progress on Accompanying Measures Following Accession*, 3, (COM 377/2007 and COM 378/2007) (2007); DAVID PHINNEMORE & LEE MCGOWAN, DICTIONARY OF THE EUROPEAN UNION, 79 (2002) (within EU jargon, "cooperation" must be read as *"*intergovernmental cooperation," defined by the dictionary as "a process of collaboration by the Member States, with the intention of securing agreement on objectives and strategies without the involvement of supranational institutions. It is the opposite of the community method.").

[40] *See infra* Part II.

out of the Schengen Zone for the first five years of membership.[41] Schengen membership is widely viewed as the last political, pre-accession-type lever that the older Member States could use against Bulgaria in compelling the country to pursue CVM benchmarks.[42] Nonetheless, the CVM does not explicitly mention Schengen entry as a reward for satisfaction of the benchmarks, since unanimous endorsement by all Schengen members ultimately determines which countries will be extended an invitation to join the treaty.[43] The formal and contracted-for goal in pursuing reform through the CVM is for the country to 'shape up' and avoid the threat of having its rights as an EU member suspended. Both the older EU member states and Bulgaria have expressed the understanding, however, that 'shaping up' is not quite an end in itself, and rather that benchmark-oriented reform is tacitly bound to the promise of making Bulgaria an eligible candidate for Schengen membership.[44]

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[41] At a recent discussion of the efficacy of the CVM in the European Parliament, Commissioner Füle highlighted that such linkages are also illegitimate and not supported by the EC because the CVM benchmarks are not formally bound to the Schengen *acquis*. Remarks of Commissioner Füle, Cooperation and Verification Mechanism: Methodology, Current Application and its Future, EUR. PARL. DEB. (___) 168 (Mar. 13, 2013), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20130313+ITEMS+DOC+XML+V0//EN&language=EN#creitem30 (European Parliament debates) [Hereinafter "Füle Remarks on CVM, 03/13/2013"]; *see also* SZAREK-MASON, *supra* note 2, at 235-36 (noting the complaints that various EU member states had levied against Bulgaria's corruption problems, and the demand on behalf of the same member states that Bulgaria's Schengen entry be delayed); Antoinette Primatarova, *On High Stakes, Stakeholders and Bulgaria's EU Membership* 4, 7-8 (Eur. Policy Inst Network, Working Paper No. 27, 2010) (analyzing in depth the connection between the existence of the CVM and Bulgaria's joining of the Schengen treaty); *see also* Council Decision 266/98, 1998 O.J. (L 85) 36, 39 (indicating that Bulgaria's medium-term priorities in the field of justice and home affairs should involve, among other goals, "the fight against organized crime . . . and corruption, notably in view of the Schengen *acquis*").

[42] *See infra* Part I.

[43] *See France, Germany Stop Bulgaria, Romania Joining Schengen*, RADIO FREE EUR. RADIO LIBERTY (Dec. 21, 2010), http://www.rferl.org/content/bulgaria_romania_schengen/2255326.html (despite the significant strides Bulgaria and Romania had made towards addressing all six benchmarks and meeting the formal requirements of the Schengen *acquis*, the countries' membership was still blocked by France and Germany, whose governments insisted that more had to be done to tackle corruption in the two latest members).

This Note relies on the trope of the CVM as a 'personal trainer' for Bulgaria's judiciary and public administration reforms. Bulgaria invests in the CVM for the sake of having CVM reports alternatingly disparage Bulgaria's lack of stamina, constructively criticize imperfect forays into drastic reforms, and offer much needed 'tough love' when the national government exhibits reform fatigue and tolerance toward the flaws identified by the CVM reports.

[44] Ivanka Ivanova, Open Soc'y Inst., *Pet Godini Mehanizm za Sytrudnichestwo i Proverka: Vreme za Razmisyl [Five years of Cooperation and Verification Mechanism: time*

Another major impetus for the Specialized Criminal Court was the ascent to power of a new center-right political party called GERB (the Bulgarian acronym for "Citizens for European Development of Bulgaria"). GERB gained parliamentary majority through the elections of June 2009, and its platform placed the fight against organized crime and corruption as a top priority.[45] That priority was to be pursued through a comprehensive reform of the judiciary, guided by tenets that paraphrased the CVM's six benchmarks.[46] In 2009, the government planned and held a roundtable discussion with stakeholders from the judiciary and civil society, where the idea for a specialized criminal court was first presented.[47]

An alternative, somewhat cynical conjecture as to the conceptual origin of the Specialized Criminal Court implicates GERB's pronounced and popular interest in strengthening the police and criminal justice system as a populist reaction to public outcry against corruption.[48] Indeed, a recent

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for reflection] 21 (July 2012), http://osi.bg/downloads/File/2012/CVM_OSI_s_report_final.pdf (describing how the older member states, through statements made in 2010, expressly linked Bulgaria's limited progress on the benchmarks as cause mandating a delay of its Schengen membership).

[45] GRAZHDANI ZA EVROPEISKO RAZVITIE NA BULGARIA [CITIZENS FOR THE EUROPEAN DEVELOPMENT OF BULGARIA] [GERB], PROGRAMA NA POLITICHESKA PARTIA GERB ZA EVROPEISKO RAZVITIE NA BULGARIA [GERB PLATFORM FOR THE EUROPEAN DEVELOPMENT OF BULGARIA], at 8-9, (2009) *available at* http://www.gerb.bg/uf/pages/upr_programa_gerb_1June.pdf.

[46] *See id*. at 12-14 (introducing reform of the judiciary as the necessary foundation for further economic and administrative reforms, efficient use of European funds, fight against organized crime and internal security). The priorities that are formulated later on in the strategy document appear to be transposed nearly verbatim from CVM reports. *See, e.g.*, *European Commission, Supporting Document Accompanying the Report From the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism: Technical Update*, at 10-12,19-22, SEC(2008) 2350 final (Jul. 23, 2008) [hereinafter, "*Technical Update 2008*"].

[47] Ministry of Justice, *Strategy to Continue the Judicial Reform in the Conditions of Full European Union Membership* (2009) (formally adopted by the Council of Ministers through Council of Ministers Decision No. 441/June 26, 2010) [hereinafter, "Judicial Reform Strategy 2009"] (Section 2.2 titled "Optimization of the system and structure of judicial bodies" contemplates "debates about the creation of specialized courts by areas of specialization: for example, organized crime, underage offenders, insolvency, etc."). It is worth noting that this strategy was not officially adopted by the Cabinet until July 2010, after the Specialized Criminal Court was already past the debate stage and well into becoming subject to legislative deliberations.

[48] Rossen Bossev, *Koito ne e suglasen, da mulchi! S rezhisirana diskusia upravliavashtite pokazaha che specializiran sud shte ima na vsiaka tsena* [*If you are not with us – shut up! Through a staged public debate the government let us know that the specialized court will be a reality at any cost]*, KAПИТАЛ, May 5, 2010, *available at* www.capital.bg/printversion.php?storyid=897077 (providing a commentary on the government's introduction of the idea of a specialized court and noting the absence of an actual discussion on the rationale behind the planned court); *The Top-Secret Project for the*

study among magistrates examining their attitude towards reform of the judiciary noted that many of the officials who implement the reforms in their daily work as prosecutors or judges believe that the GERB government successfully "planted" data in its reports to the Commission so as to justify particular recommendations.[49] Thus, the realization of the idea of a criminal court of special expertise could be explained by its ability to respond to several demands often treated as incompatible: the expectations created under the CVM, the government's political agenda, and public opinion.[50]

III: THE EVOLUTION OF THE PROJECT FOR A SPECIALIZED CRIMINAL COURT AND PROSECUTOR'S OFFICE

Selected Background on Specialized Tribunals in the European Union Member States

Judicial system structures specializing in particular crimes or other highly specific subject matter are not new or unusual among European Union member states. Various European advisory bodies (e.g., Consultative Council of European Prosecutors), EU agencies (e.g., Eurojust), and non-profit organizations focused on the administration of justice (e.g., the European Network of Councils for the Judiciary) have stressed the role of specialization within judiciaries as a tool for ensuring efficient and competent administration of the laws.[51] Conventional wisdom behind the practice of dedicating courts and prosecutor's offices to particular criminal offenses is that magistrates with expertise in a given field are able to process caseload faster and more properly than their "generalist"

Specialized Court, KAPITAL, Jul.,19 2010, *available at* www.capital.bg/printversion.php?storyid=934658.

[49] JUSTICE DEVELOPMENT FOUNDATION [hereinafter JDF], THE REFORM EXPERIMENT: A GLANCE AT THE HUMAN IN THE JUDICIARY, 31 (May 2012) *available at* http://justicedevelopment.org/test/wordpress/wp-content/uploads/2012/05/the_Reform_Experiment_a_Glance_at_the_Human_in_the_Judiciary_JDF_2012.pdf (chapter five of the study examines survey responses regarding magistrates' attitudes toward the EC's regular reports under CVM; approximately a fifth of all surveyed see in the proposals of the Commission notions of reform that must have been suggested by the Bulgarian government). *But see*, *Technical Update 2008*, at 21(raising the topic of specialization within courts, under the discussion of the 6th benchmark). The latter report was issued a year before GERB won the elections.

[50] The use of 'public opinion' here denotes the opinion of the general electoral body, not professional, academic, or media circles alone. One expression of the public opinion, for example, are Bulgarians' perceptions of corruption in the public administration as captured by the CPI. *See* GLOBAL CORRUPTION REPORT 2007, *supra* note 4.

[51] *See* Consultative Council of European Prosecutors, *Framework Overall Action Plan for the Work of the CCPE* 4, 7, CCPE (2006) 05 Rev. final; Working Party of the Consultative Council Of European Judges, 23rd Meeting Report, at 11-13, CCJE-GT(2012)6; Eurojust, Annual Report 2005, at 94-95 (2006).

colleagues.[52]

The two examples explored here, the *Audiencia Nacional* of Spain ("AN"), and the Specialized Criminal Court of Slovakia ("SCC-S"), illustrate two related types of specialization within criminal courts of EU member states, which bear relevance to the Bulgarian project. The two present an apt comparative landscape to the Bulgarian phenomenon because they too emerged in countries that underwent dramatic political transformations: the end of the Franco regime in Spain, and independence and democratization in the Slovakia. Further, both Spain and Slovakia's courts deal with subject matters of concern to the Bulgarian legislators behind the SCC bill: organized crime with high social impact, such as drug-trafficking, currency falsification, money laundering, and high-level public corruption.[53] One difference, however, is that unlike the Bulgarian project, the court in Spain appears to have been largely motivated from within, and not directly linked to, the country's membership negotiations with the European Union.[54]

The history of, and issues that arose during, the implementation and development of the Spanish institution highlight some of the issues that arose in the process of implementing a specialized court in younger EU members, such as Slovakia and Bulgaria. The *Audiencia Nacional* was set up in 1977 and given national jurisdiction over, among other matters, criminal cases involving activity that touches more than one of Spain's autonomous communities.[55] Despite its functional specialization in crimes affecting more than one autonomous community, the AN is classified as an "ordinary," rather than specialized court.[56] The Criminal Chamber ("*Sala de lo Penal*") considers a wide range of criminal offenses, including any crime against the Crown, Successor, the Spanish nation or the government, crimes involving drug-trafficking, money laundering, currency falsification,

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[52] Chad M. Oldfather, *Judging, Expertise, and the Rule Of Law*, 89 WASH U. L. REV. 847, 850, 854 (2012).

[53] Katarína Staroňová, *Anti-Corruption Measures in Slovak Judiciary: Case of Court Management and Special Court*, 5, 2008 NISPAcee Ann. Conf. "Public Policy and Administration: Challenges and Synergies," *available at http://www.nispa.org/conf_paper_detail.php?cid=16&p=1312&pid=291;* Royal Decree of 1977 for the Creation of the Audiencia Nacional (B.O.E. 1977, 172) (Spain) [hereinafter "Audiencia Nacional Decree"].

[54] *See Audiencia Nacional Decree, supra note 53*.

[55] *Id.*

[56] The class of "specialized courts" in Spain consists of administrative courts, labor courts, commercial courts, juvenile courts, etc. As such, the AN is roughly analogous to the federal courts in the United States in that its Criminal Chamber (*Sala de lo Penal*) deals with crimes that reach across the borders of autonomous communities, either because of the nature of the criminal activity, or because of the origin and association of the defendants. *See* LEY ORGÁNICA DEL PODER JUDICIAL (Law on the Judiciary) art. 65 (B.O.E. 1985, 157) [hereinafter, "LOPD"].

and other crimes of high social impact committed by organized crime groups.[57] Along with the establishment of the court, the government created an adjacent prosecutor's office with parallel specializations. In 1988, the AN prosecutor's office began sharing its workload with a newly minted Special Prosecutor's Office against Drug Trafficking, which has the power to investigate drug-trafficking offenses.[58] The increasing complexity of modern life, and the attendant need for the state to enhance the effectiveness of criminal justice across the newly created autonomous communities motivated the creation of a specialized criminal court.[59] Nevertheless, the constitutionality and legitimacy of the AN, as a de-facto specialization (or federalization) within the Spanish court system, has been subject to some criticism.[60] One source of controversy is that the AN grew out of a "decree-law" – a legislative instrument intended to be used only in an "extraordinary and urgent need" to create temporary provisions which in no way may impact the basic state institutions.[61] Added to this concern was a suspicion that, because of the appointment mechanism of magistrate judges, the AN could easily be converted into a court controlled by the executive.[62]

The parameters of AN's competence are rather broadly defined by the Law on Judicial Power,[63] potentially allowing for a great number of offenses and offenders to be brought before the National Court. opponents to creating the specialized criminal structures objected during the legislative drafting stage to similar broad formulations for the Bulgarian SCC, and argued that structures such as the AN were in effect "extraordinary" tribunals set up to be used as an instrument of the political majority of the day.[64]

Despite domestic criticisms of its legal basis, the AN and its Criminal Chamber have not undergone any EU scrutiny, in part because at the time of Spain's EU entry, the EU's treaty basis did not authorize such scrutiny of

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[57] *Id.*

[58] Organic Statute on the Prosecution Service Art. 19 (B.O.E. 1982, 11) (Spain).

[59] Audiencia Nacional Decree, *supra* note 53, at Preamble, § 1.

[60] Juan Manuel Olarieta Alberdi, *El Origen de la Audiencia Nacional* [The Origin of the National Court] 6, JUECES PARA LA DEMOCRACIA INFORMACIÓN Y DEBATE, July 1997, *available at* http://www.ucm.es/info/uepei/audi.html (the main criticisms against the Audiencia Nacional since its inception have focused on its conceptual ties to criminal courts of extraordinary jurisdiction under Franco, as well as on its democratic deficit and its departure from the local jurisdiction principle).

[61] C.E. B.O.E. art. 86(1), Dec. 29, 1978 (Spain).

[62] Olarieta Alberdi, *supra* note 60.

[63] *See* LOPD, *supra* note 56, Art. 65, § 7. Section Seven of the AN statute explicitly gives the Legislature the option to add to the national jurisdiction of AN new competences, other than the ones enumerated in Art. 65, § 1 (a) – (e), as the need arises.

[64] See Part III, *infra*.

a member state's home affairs. Meanwhile, Slovakia relied on the example of the AN's Criminal Chamber as a template for the policy innovations that the EU Commission encouraged it to undertake as part of its of pre-accession reforms.[65]

The policy goal pursued by the Commission, and taken up by Slovakia, was to create a centralized criminal court and prosecution that would help sever the corrupt ties between local magistrates and organized crime groups.[66] The Slovak court was set up in 2003 as a tribunal with national jurisdiction over a diverse set of crimes under the common denominator of "offenses of high social impact" - acceptance of a bribe, creation and promotion of criminal or terrorist groups, extremely serious crimes committed by criminal or terrorist groups, serious economic crimes and crimes against property, and abuse of the European Union's financial interests.[67]

Although statistics of case outcomes between 2005 and 2010 indicate a marked increase in prosecutions and convictions within the competence of the court, the new specialized bodies faced serious resistance from members of the judiciary who viewed their establishment as a breach of the judiciary's autonomy.[68] In 2009, the Slovak Constitutional Court ruled that the specialized court (originally established as "Special Criminal Court") was unconstitutional because its judges received higher salaries than judges in the rest of Slovak courts of the same rank.[69] Soon after the Slovak Constitutional Court's decision was announced, the Slovak legislature established a Specialized Criminal court with a similar legal mandate whose judges would not benefit from a pay-grade difference.[70]

Despite its unpopularity within the Slovak judiciary and political circles, the Slovak public applauded the specialized tribunal, as shown by a popular petition titled "Verejnost proti mafii" [The Public against Mafia] demanding that the government preserve the institution.[71]

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[65] Staroňová, *supra* note 53, at 3; *Report of the European Commission on the Progress of Slovakia on its Integration*, 110-11, SEC (2002)1410/2 final (Oct. 9, 2002) (enumerating measures to be taken with respect to corruption and organized crime).

[66] Staroňová, *supra* note 53, at 3, 5.

[67] Statute, No. 458/2003 Coll. on the Establishment of the Special Court and the Special Prosecutor's Office, §15, at 3538.

[68] MATEJ KURIAN, TRANSPARENCY INTERNATIONAL SLOVAKIA, RECENT SLOVAK ANTI-CORRUPTION MEASURES 19-20 (2012).

[69] Pl. ÚS 4/09 *available at* http://portal.concourt.sk/Zbierka/2009a/4_09a.pdf. Please bluebook this citation.

[70] Council of Europe: GRECO, *Compliance Report on the Slovak Republic: Incriminations (ETS 173 and 191, GPC 2), Transparency of Party Funding*, 3, n.1, Greco RC-III (2010) 3E, Adopted by GRECO at its 46th Plenary Meeting (Strasbourg, Mar. 22-26 2010).

[71] Staroňová, *supra* note 53, at 12.

As discussed above in Part I,[72] the "Europeanization" of the Bulgarian judiciary was an unfinished project by the date of accession, and required the creation of the CVM as a soft-law accountability measure aimed at ensuring the post-accession completion of judicial reforms. No such measure had accompanied any of the previous waves of EU enlargement, but the implementation strategies outlined under the CVM benchmarks[73] resemble the approach taken by the EU with the judicial reform of Slovakia, in so far as they emphasize consultation with member states, and appear to encourage "twinning mechanisms."[74] Among the twinning mechanisms was a judicial training initiative through PHARE,[75] which exposed Bulgarian judges to the practice and training of Spanish colleagues from the Spanish national magistrate training school.[76] EU social funds also paid for a twinning project in which Spanish jurists and magistrates were consulted on specialized courts for the benefit of the Bulgarian judiciary.[77] It is certainly possible that by gaining exposure to the practice of concentrating efforts against organized crime and corruption in one set of specialized state bodies, the groundwork was laid for the government to launch the controversial project. It is worth emphasizing that such a conclusion, however, is ultimately conjectural since the practical implementation of the CVM has remained largely unpublicized.

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[72] *See infra* Part I, at 8-10.

[73] Commission Decision 929/06, 2006 O.J. (L 354) 5. The sixth benchmark reads: "Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas."

The first stipulated implementation tactic for this benchmark is: "Associate Member States' experts to provide guidance and assistance as regards improving the quality of investigations and reporting on this." *Report from the Commission to the European Parliament and the Council on Bulgaria's Progress on Accompanying Measures Following Accession,* at 19, COM(2007) 377 final (June 26, 2007).

[74] *European Commission, Twinning: Building Europe Together* 4, 17 (2006). The Commission, in an informational booklet, defines twinning project as a Commission initiative for institution building assistance for candidate member states, meant to produce "targeted projects" for "development of modern and efficient administrations . . . needed to implement the *acquis communautaire*."

[75] PHARE is the "program of Community aid to the countries of Central and Eastern Europe." *PHARE Programme*, EUROPA.EU, http://europa.eu/legislation_summaries/enlargement/2004_and_2007_enlargement/e50004_en.htm. The PHARE programme was originally established as a grant aid program to aid the economies of Hungary and Poland in 1989. *See* Council Regulation (EEC) No. 3960/89 1989 O.J. (L 375).

[76] Survey Response for Bulgaria, European Commission for the Efficiency of Justice (CEPEJ), Scheme for Evaluating Judicial Systems 39 (Oct. 20, 2010), *http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Bulgaria.pdf*.

[77] Court of Cassation Report, *supra* note 36, at 17.

IV. THE BULGARIAN JUDICIARY AND THE BASIS FOR SPECIALIZATION IN THE CRIMINAL JUSTICE SYSTEM

Before considering the social and political circumstances around the introduction of the specialized court and prosecution office, it is useful to briefly lay out the Bulgarian judiciary's structure and the extent to which it has adopted elements of specialization within the courts, prosecutor's offices, and other organs over the course of preparing for EU accession.

Bulgaria is a parliamentary republic, whose constitution, passed immediately after the dismantling of the socialist regime in 1991, guarantees the separation of the three branches of power.[78] An administrative governing body called the Supreme Judicial Council ("SJC") guarantees the independence of the judiciary.[79] Bulgarian courts are "ordinary" or "specialized," but the Constitution prohibits "extraordinary" courts, created on an ad-hoc basis to prosecute particular groups of people.[80] Sole authority to interpret the Bulgarian constitution is vested with the Constitutional Court ("CC"), whose decisions are binding on the legislature and judiciary, and whose mandate may not be altered without an amendment to the Constitution.[81] The CC is an independent institution, outside of the Bulgarian judiciary, with the power to render judgments on the constitutionality of legislation and acts of the president.[82]

The prosecution is a structure within the judiciary, whose composition and organization follows that of the courts.[83] The prosecution aspires to operate on four main principles: legality, unity, centralization, and

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[78] TANCHEV ET AL., *supra* note 22, at I-77; NATIONAL ASSEMBLY OF THE REPUBLIC OF BULGARIA, http://parliament.bg/en (last visited Nov. 7, 2013) (the Bulgarian parliament is called "Narodno Sybranie" which means "National Assembly"). Throughout this Note, I refer to interchangeably to the Bulgarian "National Assembly" and "Parliament," but refer to the same body.

[79] *Id*; BULG. CONST. art. 128(1). It is worth noting that the SJC's capacity to fulfill its function of guarding judicial independence has been widely questioned by both internal analysts and EU CVM reports. The doubts arise from the composition and election of the SJC – a set number of its members are elected by the Parliament, while others are appointed by the National Prosecution and Investigation bodies.

[80] BULG. CONST. art. 119. Ordinary courts are: "the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, regional courts, courts-martial and district courts."

[81] BULG. CONST. art. 149.

[82] *See* TANCHEV, *supra* note 22, at I-83; Hristo D. Dimitrov, Note, *The Bulgarian Constitutional Court and Its Interpretive Jurisdiction*, 37 COLUM. J. TRANSNAT'L L. 459, 468 (1998-1999) ("[The Constitution] give[s] the Court a formidable list of jurisdictional powers, which, in the East European context, is comparable only to that of the Hungarian Constitutional Court . . . "); *Id.* at 465, n. 23 ("The distinction between the Constitutional Court and the regular judiciary is highlighted in the Bulgarian Constitution by the fact that the Court's organization and jurisdiction are defined in a separate chapter.").

[83] BULG. CONST. art. 126, 127.

subordination.[84] The second principle, unity, has been interpreted as a constitutional bar to specialization within the prosecution.[85] Under Art. 126(1) of the Constitution the structure of prosecutor's offices in Bulgaria must parallel the structure of the courts.[86] Therefore, even though specialized courts are permitted under Art. 119 of the Constitution, prosecutor's offices may not have sub-specializations that do not parallel the court's specialization.[87]

Beginning in 2009, after it was revealed that prominent Bulgarian officials, including the minister of agriculture, had misused EU funds, the new GERB government responded by creating a specialized joint team of state investigators and prosecutors whose task was to investigate cases of abuse and misappropriation of EU funds.[88] This measure, while praised in the CVM reports, was on dubious constitutional footing, given that they were created in the absence of a specialized court whose competence would correspond to theirs.[89]

A. The Political Case for a Specialized Criminal Court

Having won the 2009 parliamentary elections, GERB formed a coalition with the Bulgarian nationalist party called ATAKA, and formed a new

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[84] *See* ZAKON ZA SYDEBNATA VLAST [JUDICIAL SYSTEM ACT] *reprinted in* Durzhaven Vestnik [State Gazette] 71 (2013), Ch. VI, Art. 136. TANCHEV, *supra* note 22, at I-80.

[85] *See* TANCHEV, *supra* note 22, at I-80. Unity means that no prosecutors' offices may specialize in certain types of crimes.

[86] BULG. CONST. art. 126(1).

[87] To illustrate, if the Prosecutor General wanted to create a specially trained cadre of prosecutors within each district court that would only be responsible for particular kinds of offenses or categories of offenders, then such specialization would, on its face, violate the constitution. The author has been unable to locate any substantive analysis on the basis or justification for the existence of this clause of the Constitution, even though its implementation inevitably creates aberrant consequences, and seems to stifle the development of the prosecutor's offices.

[88] Velchev, Prosecution Report 2010, *supra* note 36, at 45.

On the misuse of EU funds by Bulgarian government officials, see *European Parliament, Department D: Budgetary Affairs, How does organised crime misuse EU funds?* [Study], 43, IP/D/ALL/FWC/2009 – 56 (Sept. 12, 2009), *available at* http://www.europarl.europa.eu/document/activities/cont/201207/20120717ATT49041/20120717ATT49041EN.pdf.

[89] During the first discussion of the GERB draft laws in committee, one secondary justification for the new court was a potential constitutional problem with establishing special teams within the prosecutor's offices of ordinary courts. 41-vo Narodno Sybranie na Republika Bulgaria, Komisia po Pravni Vyprosi [41st National Assembly of the Republic of Bulgaria, Judiciary Committee], Transcript from a Judiciary Committee Meeting on July 23, 2010, at 23, 25, Protocol No. 42, *available at* www.parliament.bg/bg/parliamentarycommittees/members/226/steno/ID/1778 [hereinafter, "Judiciary Committee Transcript 07/23/10"].

cabinet with former mayor of Sofia, Boiko Borisov as Prime Minister. As anticipated by the harshly critical CVM report that the Commission issued in June 2009, the Ministry of Justice formulated a new strategy on the continuation of the judiciary reform, in keeping with the six benchmarks laid out by the EC.[90]

In early December 2009, the Borisov cabinet signaled the future direction of judicial reforms by urging parliament to pass an amendment that would grant a special status to an investigative unit focusing on organized crime – the General Directorate for the Fight against Organized Crime (abbreviated "GDBOP" in Bulgarian).[91] This unit, within the Ministry of Internal Affairs ("MIA"), was first formed in 1991 by restructuring the former "Political Police" of the Socialist National Security Agency, from which GDBOP inherited a reputation for extralegal investigations.[92] Over the years, the General Directorate had been restructured and aligned with the rest of the functional units of the Police Agency by former governments, removing any remnants of the "extraordinary" or "political" powers that it previously held. GERB opted to raise GDBOP above the other specialized units of the Ministry of Internal Affairs and to give it broader functions as an autonomous directorate within the ministry.[93] To observers, this step was indicative of the great extent to which the new government would prioritize

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[90] Ministry of Justice, *Strategy to Continue the Judicial Reform in the Conditions of Full European Union Membership*, May 5, 2010, a*vailable at* http://www.bili-bg.org/cdir/bili-bg.org/files/Strategy_EN_FINAL_25.06.2010.pdf. The strategy proceeds in five directions: improving the judicial system's management, strengthening of the institutions of the judiciary, magistrate training initiatives, strengthening the supremacy of law, and dialogue between the judiciary and the citizens. Within the scope of strengthening the judiciary, an item of the strategy indicates that the government intends to initiate a "public debate" regarding the possible creation of specialized courts and prosecutor's offices. *See id.* at 18.

[91] ZAKON ZA IZMENENIE I DOPUNENIE NA ZAKONA ZA MINISTERSTVO NA VUTRESHNITE RABOTI [ACT AMENDING AND SUPPLEMENTING THE ACT ON THE MINISTRY OF THE INTERIOR], § 24, *reprinted in* Durzhaven Vestnik [State Gazette] 93 (2009), *available at* http://www.parliament.bg/bg/laws/ID/9689 [hereinafter "AASAMI"].

[92] Iovo Nikolov, *Bivshata politicheska politsia ot Shesto Upravlenie na DS se prevrushta v antimafiotska slujba [The Former Political Police of the Sixth Directorate becomes an anti-mafia unit]*, КАПИТАЛ, Dec. 14, 2012, *available at* www.capital.bg/printversion.php?storyid=1968342.

Media and criminal courts have scrutinized the activity of this unit owing to its institutional heritage and cadre preserved from the years when GDBOP functioned as a "political police." Recently, the long tenured chief of GDBOP was arrested and charged with accepting bribes to facilitate drug trafficking and linkages with organized crime groups, but by the Sofia District Court, rather than the Specialized Criminal Court. *See Bulgarian Anti-Mafia Unit Head Dismissed Temporarily,* NOVINITE.COM, Apr. 19, 2013, *available at* http://www.novinite.com/view_news.php?id=149716.

[93] AASAMI, *supra* note 91, at § 24, Art. 51(a).

executive measures for combating organized crime.[94] In keeping with this initial measure, the government consented to the establishment of new specialized interdepartmental teams, made up of prosecutors, investigators, and officers of GDBOP to focus on high-profile corruption cases and abuses of EU funds.[95] Perhaps because this measure was met with some enthusiasm by the Commission's report of February 2010, the government summoned a "National Round Table Discussion" in early May 2010 to discuss the possibility of creating specialized structures dealing with organized crime and corruption within the judiciary.[96]

The voices of opposition to the new specialized court came from three main directions: the opposition parties (including the former so-called Triple Coalition which had governed the country until June 2009), members of the Bulgarian bar, and various non-profit organizations and NGOs engaged in monitoring Bulgaria's adherence to the European Charter of Human Rights.[97]

The political opposition's critiques of the draft legislation focused on the inclusion of anti-corruption competences for the new court and on the potential for institutional capture and instrumentalization.[98] Arguably, the deputies representing the party of the former government feared the creation

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[94] *See* Rossen Bossev, *Pravilnik na Wutreshnia Red: dva ot kliuchovite resori – pravosudie i pravoohranitelna dejnost popadat v rucete na eksperti [Interior Regulations: two of the key ministries - judiciary and law enforcement assigned to experts],* КАПИТАЛ, July 30, 2009, *available at* http://www.capital.bg/politika_i_ikonomika/bulgaria/2009/07/30/764403_pravilnik_na_vutreshniia_red/; Petia Vladimirova, *Promenite v dva zakona: Ovlastiavane na GDBOP, oriazvane na DANS [Changes in two laws: more power to GDBOP, trimming of DANS],* DNEVNIK, NOV. 11, 2011, *available at* http://www.dnevnik.bg/bulgaria/2009/11/11/814511_promenite_v_dva_zakona_ovlastiavane_na_gdbop_oriazvane/.

[95] Velchev, Prosecution Report 2010, *supra* note 36, at 45.

[96] *Supporting Document Accompanying the Report From the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism: Technical Update*, at 15, SEC (2010) 948 final (July 20, 2010) [hereinafter, "Technical Update 2010"].

[97] The nature of the political critiques is discussed below. Among the non-profit organizations which submitted amicus briefs to the Constitutional Court in the case challenging the constitutionality of the SCC were the Bulgarian Helsinki Committee ("BHC"). BULGARIAN HELSINKI COMMITTEE, BHC OPINION TO THE CONSTITUTIONAL COURT ON THE UNCONSTITUTIONALITY OF THE SPECIALIZED CRIMINAL COURT (2011) *available at* http://www.bghelsinki.org/bg/novini/bg/single/stanovishe-na-bhk-do-konstitucionniya-sd-za-protivokonstitucionnostta-na-specializiraniya-nakazatelen-sd/. The critiques of another non-profit organization, the Open Society Institute are discussed below, see *infra* p. 28 and note 100.

[98] Judiciary Committee Transcript 07/23/10, *supra* note 89, at 11-12, 34, 35 (including statements by opposition member Yanaki Stoilov summarizing the opposition's reasons for distrusting the proposed court and the motivations behind the draft bills).

of a "political court" before which their members could be tried for abuses of public office during previous terms in office.[99] Alongside this concern, the opposition raised a point that all members of the national assembly surely understood: no member of the Bulgarian political elite who had won significant electoral victories since the 1990s had done so without first enlisting the support of big businesses.[100] As such, no political party or figure nowadays could boast an unimpeachable path to power, and potentially risked being brought as a defendant before the proposed court.

Much like in the case of Slovakia, one strong criticism by members of the bar and non-profit organizations was that the new court would interfere with the independence of the judiciary.[101] The jealously guarded principle of judicial independence, hard won in the early 1990s, was now being deployed, somewhat counter-intuitively, to forestall any significant reform within the Bulgarian judiciary.[102] Such internal resistance to reform is not an uncommon feature of top-down, large-scale reforms introduced through legal transplantation.[103] Indeed, even before GERB took power, it was clear that the judiciary system's administration, along with its rank and file, did not exhibit a sense of ownership towards the reforms and regularly sought to block executive-imposed innovations by asserting judicial independence.[104]

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[99] *Id.* at 27 (statement of Veselin Metodiev); 41-vo Narodno Sybranie na Republika Bulgaria [41st National Assembly of the Republic of Bulgaria], 154th Session Transcript (Oct. 14, 2010), at 22, *available at* http://www.parliament.bg/bg/plenaryst/ns/7/ID/764 (statement by Liuben Kornezov, Coalition for Bulgaria) [hereinafter, "Parliament Debate Transcript 10/14/10"].

[100] Judiciary Committee Transcript 07/23/10, *supra* note 89, at 34 (statement by Ianaki Stoilov). At its essence this claim was as pragmatic as it was cynical, and it drew on the widespread belief that high-profile businesses in Bulgaria often operate in conjunction or even affiliation with businesses in the gray economy.

[101] *See, e.g.*, MARIA YORDANOVA & DIMITAR MARKOV, CTR FOR STUDY OF DEMOCRACY, COUNTERING ORGANIZED CRIME IN BULGARIA: STUDY ON THE LEGAL FRAMEWORK, 123, 130-31 (2012). In this report, the authors focused on the politicization of the new court and the procedure for appointing judges, prosecutors, and 'lay judges,' or citizens appointed to assist the judge in certain proceedings, akin to the jury in the common law process.

[102] *See* Smilov *supra* note 15, at 263 (illustrating the extent to which the Bulgarian Constitutional Court asserted itself in Bulgarian politics during the period of Bulgaria's *transition consensus*); Dimitrov, *supra* note 82, at 472-43 (commenting on the breadth and depth of the constitutional court's reach in the first decade after the fall of Bulgaria's socialist regime).

[103] TREBILCOCK & DANIELS, *supra* note 3, at 104 (2008) (summarizing widespread impediments to judicial reforms introduced through rule of law development aid).

[104] This tendency was recognized in the conclusion of a 2008 Report by the World Bank, prepared almost exclusively in consultation with the government that preceded GERB in power. World Bank, *Bulgaria - Resourcing the Judiciary for Performance and Accountability: A Judicial Public Expenditure and Institutional Review* 65, (2008), *available*

It is unclear if policy makers within GERB had taken into account scholarship or custom-tailored research on judiciary reforms in Bulgaria at the time they took action. Amidst public reactions ranging from skepticism to outrage, all deputies from GERB introduced two draft bills in July 2010, one amending the Judicial System Act ("JSA"),[105] and one amending the Criminal Procedure Code ("CPC")[106], because both substantive and procedural additions to the statutory framework of the judiciary were needed to set up the new court. Jointly, the amendment proposals would create a new Specialized Criminal Court and accompanying prosecutor's and investigator's offices.

B. The Draft Bills Creating a Specialized Criminal Court

The parallel legislative history of the bills amending the Judicial System Act (JSA) and the Criminal Procedure Code ("CPC") illustrates the power of coordinated majority party action in the Bulgarian parliament. The two draft bills were discussed and passed through the Judiciary Committee in just one reading, fulfilling the media prophecy that the Specialized Court would zip right through the deliberation stage and be swiftly implemented by the government.[107] The process of the bills' passage illustrates the expediency of the legislative process when a bill of great importance to the executive is in question, as well as the opposition's feeble use of procedural checks to ensure careful examination of the draft statutes. These characteristics of the Bulgarian legislative process simultaneously reinforce and undermine the EU's agenda within the CVM. They reinforce the benchmarks' implementation in an uncritical manner in situations where the executive cooperates with Brussels and seeks to expedite its agenda by merely paying lip-service to the legislative process. At the same time, the CVM also seeks to encourage reform of the judiciary which is transparent, democratic, and acceptable to all relevant stakeholders. The approach of the GERB government in passing the SCC bills effectively shut out non-

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at http://documents.worldbank.org/curated/en/2008/06/9727447/bulgaria-resourcing-judiciary-performance-accountability-judicial-public-expenditure-institutional-review ("[A]n exclusive focus on judicial independence could risk diverting attention from concrete measures needed to ensure that the judiciary is adequately resourced and that mechanisms to ensure the efficient use of resources and improved performance are in place.").

[105] *See infra* p. 31 and note 110.

[106] The amendments to the CPC described the crimes over which the court had jurisdiction and other procedural aspects of the new court's functioning. PROEKTOZAKON ZA IZMENENIE I DOPYLNENIE NA NAKAZATELNO-PROCESUALNIA KODEKS [DRAFT BILL AMENDING AND SUPPLEMENTING THE CRIMINAL PROCEDURE CODE], at § 4 (Jul. 15, 2010), *available at* http://parliament.bg/bills/41/054-01-61.pdf [hereinafter, "CPC Amendment"].

[107] *See* Bossev, *supra* note 48, at 4, 5 (analyzing the secrecy and expediency of the procedures undertaken to create the specialized court despite skepticism towards it expressed by all levels of the judiciary).

governmental stakeholders and advisory bodies, and circumvented the stage of deliberation over the proposed court by moving straight from the proposal stage to the implementation stage.[108]

The bills were drafted and presented by the majority party on July 15, 2010, just two months after the idea for the creation of a specialized criminal court was first publicly aired at the National Roundtable meeting. The "Motivations"[109] appended to these first drafts cite the CVM's unsatisfactory evaluations of Bulgaria's reform of the judiciary in the preceding three years as reasons for proposing the creation of a specialized court to address organized crime and "corruption at the highest level of government."[110] The drafters asserted that specialization within the court system would ensure more effective administration of justice in the cases of organized crime and corruption.[111]

The JSA amendment established a specialized criminal court, an appellate division, specialized prosecutors' and investigators' offices, the manner in which magistrates working for these institutions would be appointed, and placed the new court at the level of district tribunals.[112] The CPC amendments, on the other hand, contained the specific competences (crimes falling within the court's jurisdiction) and procedural arrangements of the court and its accompanying prosecutor's and investigator's offices.[113] A key aspect of the CPC changes was the insertion of Art. 411a(1), which set out that the new court would have jurisdiction over all persons accused of the following crimes: treason, defection, giving away of a state secret,[114]

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[108] *Id.* The proposal for SCC was first aired before media and civil society at the national roundtable in May 2010. *Id.* There are no sources known to the author that indicate that any further debates took place between May 2010 and July 15, 2010 when the project legislation was introduced in the Judiciary Committee. In fact, the media reports on the acceleration of the project between May and July indicate that no further public discussion was contemplated by the government.

[109] The "Motivations" are explanatory memoranda or statements of the legislative intent behind a proposed law or amendment of an existing law. *See* Rules Of Organisation And Procedure Of The National Assembly Art. 72(2), *available at* http://parliament.bg/en/rulesoftheorganisations ("In the explanatory memorandum the mover of the bill shall state his opinion about the expected consequences of the bill's implementation, including financial ones.").

[110] PROEKTOZAKON ZA IZMENENIE I DOPYLNENIE NA ZAKONA ZA SYDEBNATA VLAST [DRAFT BILL AMENDING AND SUPPLEMENTING THE JUDICIAL SYSTEM ACT], at 10 (Jul. 15, 2010), *available at* http://parliament.bg/bills/41/054-01-60.pdf [hereinafter, "JSA Amendment"]; CPC Amendment, *supra* note 106, at 5 ["Мотиви"] ("The proposal for the creation of these specialized organs is a response to the unsatisfactory results in fighting organized crime and corruption, noted in the reports by the EC under the CVM").

[111] *Id.*

[112] JSA Amendment, *supra* note 110, at §§ 2- 41.

[113] CPC Amendment, *supra* note 106, at § 4.

[114] NAKAZATELEN KODEKS [CRIMINAL CODE] *reprinted in* Durzhaven Vestnik [State

various forms of kidnapping,[115] human trafficking,[116] and certain types of money laundering.[117] Under the next provision, Art. 411a(2), the court would also hear cases involving certain crimes committed by persons with immunity: members of the SJC and its inspectorate, administrative heads of judicial bodies and their deputies, judges, prosecutors, investigators, persons having certain other administrative functions, deputy ministers, and secretaries general of ministries.[118]

Since the Bulgarian Constitution already provides for the establishment of specialized courts,[119] and thus poses no impediment to the creation of a specialized court *per se*, the Judiciary Committee began its hearings on the draft laws with consideration of the CPC amendments on July 23, 2010.[120]

In light of the jurisdictional framework of Art. 411a(2), it is perhaps unsurprising that this provision generated the greatest resistance among the opposition members of the Judiciary Committee, and among members of the Bar and SJC who were invited to express their positions on the draft laws.[121] Criticism focused on both the categories of persons that would be tried (officials with immunity) and the nature of the listed crimes (including crimes ranging from kidnapping to treason and giving away of a state secret). The representative of the Council of the Bar and the opposition also raised concern over the broader context within which this specialized court would emerge, and questioned the need for it, pointing out statistics on the number of crimes that would fall within its jurisdiction.[122]

The drafters scrambled to address skepticism towards the need for such a court with quotes from CVM reports, which were meant to speak for themselves as sources of authority for the creation of specialized courts against organized crime and corruption. However, the SJC and the new

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Gazette] 61 (2013), Ch. I, art. 95 – 110.

[115] *Id.* at arts. 142, 143a.

[116] *Id.* at arts. 159b, 159d.

[117] *Id.* at art. 253(3), (5).

[118] CPC Amendment, *supra* note 106, at § 4. The crimes include misappropriation in public office, fraud, the use of forged documents to obtain property, negligence in handling public property, deliberately concluding an unprofitable transaction, money laundering, providing untrue information to obtain credit, violation of official duties, the abuse of an official position to obtain an unlawful benefit, as well as taking or offering a bribe.

[119] BULG. CONST. Art. 119(2) ("Specialized courts may be set up by virtue of law") (this translation is obtained from the Bulgarian Parliament's website: http://parliament.bg/en/const).

[120] Judiciary Committee Transcript 07/23/10, *supra* note 89, at 1.

[121] *Id.* (statements by Kapka Kostova, member of SJC, at 22; Emilia Nedeva, representative of the Bar Council, at 16; and Liuben Kornezov, member of the opposition party Coalition for Bulgaria, at 37).

[122] *Id.* at 16 (in her statement Emilia Nedeva noted that under 2% of the full criminal case load of all courts dealt with offenses listed under the competence of the proposed specialized court).

government departed in their respective notions of what reforms were truly necessary. For example, a representative of the SJC found the very notions of "organized crime group" and "corruption crimes" outmoded and excessively vague.[123] Without directly responding to these criticisms, members of the majority pressed for the creation of the court by invoking statistics, such as the finding that a "staggering" 42 % of all sentences issued by district courts in criminal cases were being overturned on appeal.[124]

No further discussion followed on whether specialization to address broad categories such as "organized crime" and "corruption crimes" presented a paradox and risked producing an ill-informed and counterproductive redistribution of resources within the Bulgarian judiciary. Such absence of critical assessment of the need for a SCC showcased the resignation of the judiciary and opposition to the will of the executive in this situation.

An additional logistical problem in the design of the new court concerned the transfer of cases from other courts. Oftentimes, criminal prosecutions begin as prosecutions of an individual's crimes, which may not emerge as acts of an "organized criminal group" until relatively late in the course of the investigation.[125] A determination that a murder or a kidnapping was committed by an organized criminal group would have to be reached before a case could fall under the competence of the SCC, but such findings are often the product of extensive pre-trial investigations.

Despite these concerns, the project was not re-examined after the first reading, and the Judiciary Committee agreed to vote on the draft bills after a single discussion on the text. While the majority and its coalition partners dominated the Judiciary Committee[126] (fourteen votes out of a total of

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[123] *Id.* at (in her statement Kapka Kostova cited to recent texts by the Council of Europe and the European Union which indicate a move away from the use of generic and overbroad terms such as "organized crime" and "corruption").

[124] *See* Judiciary Committee Transcript 07/23/10, *supra* note 89, at 25 (statement by Dimitur Lazarov).

[125] While this concern was not voiced in the preliminary discussions, Nikoleta Kuzmanova, an assistant professor in the Criminal Law Studies Center of Sofia University, and former legal advisor to the Minister of the Interior between 2006 and 2009, discussed this structural problem in an interview with the author in January 2013.

[126] Out of the committee's 25 members, 12 belong to the majority party (GERB), 2 belong to ATAKA, a nationalist party aligned with the majority, 4 to the Movement for Rights and Freedoms ("MRF") an opposition party traditionally viewed as the voice of ethnic Turks in Bulgaria, 4 to the Coalition for Bulgaria ("CB"), former members of the Bulgarian Socialist Party;, 2 belong to the "Blue Coalition" – a remnant of the United Democratic Forces (UDF); one is a member of "Order, Legality, Justice" (OLJ), another nationalist party. This information can be obtained from the website of the Bulgarian Parliament. *Narodno Subranie na Republika Bulgaria – Parlamentarni Komisii,* PARLIAMENT.BG, www.parliament.bg/bg/parliamentarycommittees/members/226.

twenty-five) to begin with, the prevailing party's position was further reinforced by the presence of the Minister of Justice, Maria Popova, who actively participated in the initial deliberations. Notably, Minister Popova helped bridge the opposition and majority's positions by asserting that the new specialized court's competence should not extend to public corruption offenses, and in general, to the offenses committed by officials protected by immunity, because that would dilute the specialization of the court.[127] Minister Popova's assurance that a troublesome provision of the proposed legislation for the specialized court would be reconsidered appears to have assuaged the opposition, given that the two draft bills were adopted and reported out of committee without incident in September 2010.[128] The next steps in passing the laws were two readings by the Parliament, one during which the deputies vote on the general idea, or the "philosophy" behind the bill, and a second during which specific parts of the bill are discussed.[129] Unless deputies outside of the Judiciary Committee make objections and propose amendments that the parliament then explicitly approves, the Parliament automatically adopts each provision supported by the Judiciary Committee's report.[130]

The order in which the first readings of the two draft bills happened was the opposite of their discussion in committee, with the JSA amendments passing through the Parliament the day before the amendments of the CPC were voted on.[131] This procedural order did not allow for a reasoned

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[127] Judiciary Committee Transcript 07/23/10, *supra* note 89, at 40 – 45 (statement by Minister Popova). The minister's position on the proposed amendments to the CPC was by a large margin the longest statement made in committee, a significant fact given that the draft legislation was not, nominally at least, proposed by the cabinet.

[128] 41-vo Narodno Sybranie na Republika Bulgaria, Komisia po Pravni Vyprosi [41st Bulgarian National Assembly, Judiciary Committee], Transcript from a Judiciary Committee Meeting on Sept. 1, 2010, at 15, Protocol No. 44, *available at* http://parliament.bg/bg/parliamentarycommittees/members/226/steno/ID/1787 (14 out of 24 members of the committee present voted for the report on CPC, the amendments to JSA were passed with the same number of affirming votes) [hereinafter, "Judiciary Committee Transcript 09/01/10"].

[129] Summary of the Bulgarian legislative procedure is available at: National Assembly of the Republic of Bulgaria, *How Does a Bill Become an Act?*, http://parliament.bg/en/billbecomeact.

[130] *Id*.

[131] *Cf.* Judiciary Committee Transcript 07/23/10, *supra* note 89, at 1 (showing the order in which the draft acts were discussed) *with* 41-vo Narodno Sybranie na Republika Bulgaria [41st National Assembly of the Republic of Bulgaria], 153th Session Transcript (Oct. 13, 2010), at 65, *available at* http://www.parliament.bg/bg/plenaryst/ns/7/ID/765 (passage of JSA amendments on first reading on October 13, 2010) [hereinafter, "Parliament Debate Transcript 10/13/10"] *and* Parliament Debate Transcript 10/14/10, *supra* note 99, at 37 (The amendments of the CPC regulating the existence and competence of the SCC were passed on the first reading, 100

discussion of the project because the provisions of the JSA merely communicate the relative positioning of the new specialized criminal organs among other courts and prosecutor's offices and the manner in which magistrates would be appointed to staff them.[132] As a result, the Bulgarian Parliament gave its general approval to the creation of a new set of specialized institutions within the Bulgarian criminal justice system without having considered these new institutions' specific jurisdiction, and the procedural rules they would follow. The rhetoric on the floor once again focused on issues related to the CVM reports, such as the voice of EC criticism, governmental commitments, and the need to protect the European image of Bulgaria.[133] As of October 2010, the opposition appeared to have withdrawn from any previous intentions to keep the parliamentary majority from passing the draft laws, thus effectively acquiescing to the creation of a court with jurisdiction over a variety of offenses, including serious organized crime, and crimes committed by officials with immunity.[134]

One additional informal check on the ability of a controlling parliamentary majority to pass legislation of importance is the Venice Commission for Democracy through Law ("VC"), whose opinions have been sought in connection with sensitive draft legislation containing provisions that could be relevant to Bulgaria's commitments under the European Charter of Human Rights ("ECHR").[135] Almost as soon as the initial CPC and JSA amendment bills were submitted to the Bulgarian Parliament, members of the majority submitted them for evaluation by the VC.[136] While in theory the role of these evaluations is to ensure that the

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out of 156 votes in favor on Oct. 14, 2010).

[132] *See supra* notes 106 – 114 and accompanying text on the nature of the amendments in each draft bill.

[133] Parliament Debate Transcript 10/13/10, *supra* note 131, at 29, 30, 44, 62 (statements by majority member Dimitur Lazarov, majority member Krasimir Tsipov, and Minister of the Interior, Tsvetan Tsvetanov).

[134] Both CPC and JSA draft bills were subject to significant criticism by the opposition. When the verbal onslaught on the draft bills subsided it did so with expressions of resignation that the prevailing party could easily adopt the texts it had drafted without any meaningful input by the rest of the political parties or stakeholders from the judiciary. *Id.* at 47, 52-53, 65 (statement by Maia Manolova, Coalition for Bulgaria, statement by Chetin Kazak, Movement for Rights and Freedoms).

[135] The Venice Commission for Democracy through Law ("VC") is an advisory body on project legislation by the Council of Europe whose opinions are relied upon and considered authoritative by the European Commission. In fact the EC repeatedly cited VC's recommendations in Bulgaria's CVM reports. *See* Technical Update 2010, *supra* note 96, at 16; Technical Update 2012, *supra* note 11, at 4 (restating conclusions made by the VC on Bulgarian legislation prior to accession).

[136] Eur Comm'n for Democracy Through Law (Venice Commission), *Opinion on the Draft Law Amending the Law on Judicial Power & the Draft Law Amending the Criminal Procedure Code of Bulgaria,* 3, 85th Sess., Doc. No. 591 (Dec. 20, 2010) (stating the date of

draft legislation meets the standards of ECHR, in considering documents sent by the Bulgarian Parliament, the VC has passed judgment on various loosely related matters of general legislative drafting integrity.[137] As a result, members of the opposition and the Supreme Judicial Council relied on the opinion of the VC and insisted that the report be presented to the Parliament prior to the final voting of the bills.[138] The final report, had it been available at the time of the first reading of the bills,[139] would not have served the opposition because it endorsed the creation of the specialized court, adding several technical considerations to be addressed by the law makers.[140]

Following the bills' first reading by the parliament, the Venice Commission visited with the drafters of the bills, the Minister of Justice, and members of Parliament while researching its opinion on the draft legislation. Statements by members of the organizations that they met indicated that the envoys, while having seen evidence that no pressing need existed for the creation of such a court, were simply called upon to evaluate the legal feasibility of the proposal, not its contextual appropriateness given the state of the judiciary as a whole.[141]

While the Venice Commission was considering the compatibility between a specialized criminal court and the principles of the ECHR, the draft of the CPC was quietly amended in a significant and unexpected way. The drafters of the SCC bills introduced a number of material alterations in

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receipt of the drafts as July 19, 2010) [hereinafter, "Venice Commission Opinion 12/2010"].

[137] *See, e.g.*, Eur Comm'n for Democracy Through Law (Venice Commission), *Opinion on the Concept Paper for a New Law on Statutory Instruments of Bulgaria*, para 23-25 & 30-32, 78th Sess., Doc. No. 501 (Mar. 15, 2009) (providing the drafters with advice on how to ensure the inculcation of sound legislative drafting practices in the Bulgarian parliament going forward).

[138] A number of statements were made in Committee and on the floor demanding a report from the Venice Commission giving the specialized court its "seal of approval" before any deliberations even began. Parliament Debate Transcript 10/14/10, *supra* note 99, at 5, 18 (Statement by Liuben Kornezov, Yanaki Stoilov); Judiciary Committee Transcript 07/23/10, *supra* note 89, at 10 (statement by Hristo Biserov).

[139] The report was not made available until December 20, 2010. Venice Commission Opinion 12/2010, *supra* note 136, at 1.

[140] *Id.* at para 9 & 12. One easily overlooked aspect of the overall positive VC report was paragraph 12, which contained a grim diagnosis in the form of dicta: this may well be a fine project, but the systemic troubles on the level of the judiciary as a whole will remain unaffected by it. *Id.* at para 12 ("It should, however, be pointed out that the proposed reforms leave the court system as it is and that there are no current proposals for a more general overhaul of the system.")

[141] *See* Mirela Veselinova, *Emisari na Venetsianskata komisia doidoha da prouchat proekta za specializiran syd [Envoys of the Venice Commission Arrived to Research the Project for a Specialized Court],* LEGALWORLD.BG, Nov. 8, 2010, *available at* www.legalworld.bg/print.php?storyid=21704.

the drafts, effectively limiting the new court's specialization to crimes committed by "organized criminal groups" as defined in the Bulgarian Criminal Code.[142] Perhaps yielding to pressure from the opposition, the drafters eliminated all aspects of the Specialized Court's competence that fell outside the realm of organized crime offenses from the CPC draft bill.[143] With the threat of public corruption cases coming before the SCC eliminated, practically all opposition to the SCC and its accompanying organs lost its greatest pseudo-legal argument against the SCC – that it was a thinly veiled political court for former cabinet members and officials inconvenient to the new government.

In sum, the CPC draft bill at the time of the Parliament approved it during its first reading in October 2010 described a SCC with competence to try both perpetrators of organized crime offenses and high-level public officials with immunity for certain corruption crimes; the CPC bill that the Parliament eventually adopted on in January 2011, however, had been redrafted to exclude from the SCC competence to hear cases against individuals with immunity charged with corruption-related crimes.[144] The disappearance of this portion of the text was praised by the opposition during debates on the floor on second reading, and acquiesced to uncritically in the committee discussions.[145]

Despite the contraction of the scope of the reform between first and second reading, opposition members continued to be opposed to the very idea of the SCC and declared their intention to bring a constitutional challenge to the newly approved JSA amendments, hoping that the Constitutional Court ("CC") would credit their argument that the SCC violated several constitutional norms.[146]

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[142] *See* NAKAZATELEN KODEKS [CRIMINAL CODE], *supra* note 6, at art. 321a.

[143] In its second version, which mirrors the final art. 411a(1) and (2) currently found in the CPC, the offenses that the SCC has competence to hear are limited to: creating an organized criminal group, with the object to commit murder and/or for causing bodily harm committed in relation with an organized criminal group, kidnapping committed in relation with organized crime, crimes related to prostitution in connection with organized crime and pornography involving minors. Robbery and crimes against public property and customs and taxes, when committed in relation to organized crime; money laundering when committed by two or more persons who have conspired in advance or when acting in relation with organized crime as well as certain offenses committed in a generally dangerous way or by generally dangerous means, if committed in relation with organized crime and drug trafficking for large amounts. NAKAZATELNO-PROCESUALEN KODEKS [CRIMINAL PROCEDURE CODE], Art. 411a, *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE] 71, (Aug. 13, 2013).

[144] *Cf. id.* at § 4 *with* CPC Amendment, *supra* note 106, at § 4.

[145] 41-vo Narodno Sybranie na Republika Bulgaria, Komisia po Pravni Vyprosi [41st Bulgarian National Assembly, Judiciary Committee], Transcript from a Judiciary Committee Meeting on Dec. 15, 2010, at 1, Protocol No. 64, *available at* http://parliament.bg/bg/parliamentarycommittees/members/226/steno/ID/1938

[146] *See, e.g.*, 41-vo Narodno Sybranie na Republika Bulgaria [41st National Assembly

C. Constitutional Challenges to the Specialized Criminal Court

Immediately following the publication of the passed amendment of the JSA, a quarter of all deputies petitioned the CC to consider the constitutionality of the specialized criminal organs, and the manner in which their staff would be appointed.[147]

Nine separate allegations of unconstitutionality were brought before the Court with respect to the creation of the SCC, SCC's appellate division, and the specialized prosecutors' and investigators' offices. The main charge was that under the guise of specialization, the new court would operate as an extraordinary tribunal.[148] The Court agreed with two of the allegations and found the rest unfounded, effectively giving a green light to the SCC.[149]

The Court approached this question by acknowledging that nowhere in the Constitution or in the Court's practice is there an explicit distinction between specialized and extraordinary courts. Without citing to any authority, the Court conjured up the following definition of an extraordinary tribunal:

By default, an extraordinary tribunal operates outside the system of general and specialist courts; it tries cases according to dedicated sets of rules with a view to achieving a specific objective and does not follow the general rules of procedure; such a tribunal is not composed of judges appointed according to the established rules and procedure; it is set up in exigent circumstances arising from social realities; and it operates on a temporary basis.[150]

With this in mind, the Court removed the extraordinary tribunal charge by finding that the project legislation requires the SCC to follow the common procedural rules and substantive law applicable to the rest of the court system, while narrowly specifying the set of crimes that the court may

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of the Republic of Bulgaria], 191st Session Transcript (Jan. 27, 2011), at 93, *available at* http://www.parliament.bg/bg/plenaryst/ns/7/ID/2560 (containing a statement by Maia Manolova, an opposition member from the Coalition for Bulgaria).

[147] Decision 10/11, Durjaven Vestnik [State Gazette] 93 (2011). Unofficial translation of the decision is available on the website of the Constitutional Court at: http://www.constcourt.bg/Pages/Document/Default.aspx?ID=1640. It should be noted that the English translation found above is incomplete when compared to the Bulgarian version of the opinion promulgated in the State Gazette.

[148] *Id.*

[149] *Id.* The CC found unconstitutional CPC Art. 411a(4), which allowed the joinder of all criminal prosecutions against the same defendant - if one of the cases against a SCC defendant falls within the competence of the SCC, then all other criminal prosecutions against that defendant are immediately transferred to the SCC. The CC also found unconstitutional JSA art. 164(3) & (6), which required that judges and prosecutors appointed to the SCC held a position within the Bulgarian judiciary immediately prior to their appointment, and that the judges had been "criminal law judges."

[150] *Id.*

hear.[151] Perhaps forgetting about the existence of military courts within the Bulgarian judiciary, whose competence is determined by the persons that may be indicted before them, the CC announced in its decision that another hallmark of a specialized court, distinguishing it from the extraordinary one, is that it tries cases "in a specific area depending on the matter to be adjudicated and the parties to the trial."[152] There is no source cited for the principle of subject-matter jurisdiction anywhere in the decision. Nevertheless, reasoning that a specialized court must, by definition, be constituted on the basis of the set of crimes it may try, rather than the set of persons that may be tried before it, the Court held Art. 411a(4) of the CPC unconstitutional.[153]

In other words, the Court found that bringing before the SCC all existing criminal cases against a particular SCC defendant, regardless of whether they are within the subject matter jurisdiction of the court, unconstitutional because it would illegitimately broaden the jurisdiction of the court.[154] Such a conclusion appears to rely on common sense, more than anything else, which casts further doubts on the purely legal quality of the analysis and holdings of the Constitutional Court. The integrity of the decision's constitutional analysis, even if dubious, ultimately made little difference, due to the limited precedential value of the CC's holdings and specific analysis under the Bulgarian civil law system.[155]

In response to this ruling by the CC, the proponents of the amended CPC drafted a new provision to Article 411a.[156] It replicated the one struck down

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[151] *Id.*

[152] *Id.*

[153] The following is the extent of the CC's analysis on Art. 411a(4):

> [The] contested provision entails an objective possibility for unlimited expansion of the competence of the specialist criminal court. . . . [T]he Constitutional Court finds that Article 411a(4) should be declared anti-constitutional [sic.] as it is contrary to the idea of setting up a specialist criminal court to be distinguished from ordinary courts on the basis of its material competence only and not on the basis of the subject of law. The contested provision effectively means that the specialist criminal court will have material competence to try all cases under the Penal Code even where there is no link between them other than the identity of the perpetrator on trial.

Id.

[154] *Id.*

[155] *Dimitrov, supra* note 82, at 480-82 (discussing an ongoing academic debate on the extent to which CC decisions finding a provision of a law unconstitutional are sources of prescriptive law to be applied in future cases and followed by the legislature when drafting law; noting several instances where the Bulgarian parliament has easily re-enacted practically identical provisions after they had been declared unconstitutional by the CC).

[156] ZAKON ZA IZMENENIE I DOPULNENIE NA NAKAZATELNO PROCESUALNIA KODEKS [ACT AMENDING AND SUPPLEMENTING THE CRIMINAL PROCEDURE CODE], at § 8, *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE] 13 (2011), *available at* http://parliament.bg/bg/laws/ID/9866/.

by the CC, adding the qualifying phrase that any additional cases against an SCC defendant could be joined in the SCC on the condition that there is a "connection between" them and the SCC indictments. After this amendment, the SCC project entered its implementation stage. The SCC and its appellate division began work on January 1, 2012.

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The preceding account of the pre- and post-enactment legislative history of the SCC laws illustrates the limited involvement of members of the judiciary and members of civil society as a whole in reforming the judiciary in Bulgaria. This goes against the aspirations of the CVM, and illustrates the perverse logic used by leaders of the parliamentary majority in spearheading institutional reform within the judiciary. Despite a number of well-reasoned objections to the effectiveness of the new court that SJC and opposition members made during preliminary Judiciary Committee hearings, these objections were never distilled to constructive criticism that recognized the potential utility of specialization. Above all, the perfunctory nature of the laws' motivations and their treatment by the parliament and the CC contrast with the detailed and analytical view taken by the Venice Commission, showing the apparent disinterest of Bulgarian legislators towards careful consultation during drafting.

Another aspect of the story of the SCC is that it began as an institutional innovation, driven by the EU and its CVM. This Note has tried to show that somewhere en route, the SCC became an end in itself, not a tool for the enactment of benchmark recommendations, or for addressing a set of law-enforcement priorities. This transformation signaled an important break from the tradition of pre-accession consensus and from the "quasi-constitutionalization" of the EU's rules and standards.[157] The amount of scrutiny and criticism (despite the meager outcomes of such scrutiny) that the SCC project attracted indicate the difficulty of implementing normatively-justified reforms from above, in the absence of a common orienting goal, such as EU accession. Now that Bulgaria is an EU member, there are few remaining clear-cut precepts to follow. As a result, the Bulgarian legislature and policy makers can be seen as experiencing an existential crisis – having worked for years to ensure Bulgaria's entry in the EU at almost any cost, they face the need to re-fashion themselves as independent drafters and policy makers without the guiding light of the Copenhagen Criteria. Instead, they must work with the CVM's six over-broad benchmarks, and many more stakeholder perspectives[158] to reshape

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[157] *See Smilov, supra* note 15, at 261 (discussing the pre-accession quasi-constitutionalization of the Copenhagen Criteria and its effects on political platforms in Bulgaria).

[158] Stakeholders in the reform of the judiciary span numerous categories, but the list includes at least the following: magistrates, prosecutors, police investigators, constitutional court judges, members of the bar, civil society organizations, business circles. *See* Judicial

the Bulgarian Judiciary.

V. CONCLUSION: THE SPECIALIZED CRIMINAL COURT AFTER A YEAR OF WORK

A. What became of the SCC?

In March 2013, the chief judge of the SCC authored the first annual report on the functioning of the court.[159] The report compiled the numbers of cases opened, dismissed, and closed by the SCC and the SCCA. The SJC elected eleven judges to sit on the SCC but one of them remained on maternity leave for the whole first year.[160] In June and October 2012, two judges were transferred temporarily from Sofia City Court (one of the busiest in the country) and Plovdiv Regional Court.[161] The total number of cases that were introduced or transferred was 2294.[162] In comparison, the Sofia Regional Court heard over 15,000 cases falling within similar sections of the Criminal Code in 2012.[163] The report boasted that 125 out of 185 cases (69.19%) opened under the 'common' procedure, were closed during 2012.[164] The court issued 22 sentences, 15 of which were convictions, and 7 acquittals. The remaining 2109 cases were transferred or opened under the "individual" procedure. Over 1600 of the total cases heard by the Court had been transferred to the Court in January 2012 after their lengthy pre-trial phase had been completed, in part accounting for the efficiency of the SCC. This detail skews any early analyses of the relative efficiency (and hence, utility) of the court and specialized prosecutor's office, but suggests that the court's specialization has so far failed to free it from the vexing delays that

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Reform Strategy 2009, *supra* note 47, at 36.

[159] Georgi Ushev, Doklad za Deinosta na Specializirania Nakazatelen Sud prez 2012 godina [Report on the Activity of the Specialized Criminal Court in 2012], March 22, 2013, *available at* http://spcc.bg/news/%D0%BD%D0%BE%D0%B2%D0%B8%D0%BD%D0%B0-36/.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] Metodi Lalov, Doklad za Deinosta na Sofiiskia Raionen Sud prez 2012 godina [Report on the Activity of the Sofia Regional Court in 2012], 2013, at 2, *available at* http://www.srs.justice.bg/srs/images/DOKLAD2012final.pdf.

[164] "Delo ot Obsht Harakter" is a case opened under the so-called "common" procedure and involves both a prosecutor and a private claimant. These cases generally concern more complex and grave offenses, whereas non-violent and petty offenses are often tried under the "individual" or "private" procedure. While "delo ot obsht harakter" is not defined exhaustively in any one provision of the Criminal Procedure Code, the definition above is based on the following provisions of the Criminal Procedure Code: Arts. 46(1), 56(1), 103(1), 191, 268. NAKAZATELNO-PROCESUALEN KODEKS [CRIMINAL PROCEDURE CODE], *reprinted in* DURZHAVEN VESTNIK [STATE GAZETTE], Arts. 46(1), 56(1), 103(1), 191, 268 (Aug. 6, 2012).

plague the Bulgarian judiciary as a whole.

A prevalent theme throughout the report is the court's dismal underfunding. The court's building was fully refurbished to accommodate its needs, and yet it proved insufficient to house all staff and was ill-equipped for the volume of hearings that must be scheduled daily.[165] Such ambivalent conclusions cast doubts on the future of the Court, especially in light of the GERB government's resignation in February 2012.[166]

B. An Alternative Assessment

The evidence laid out in Parts I and II above offer several mutually-accommodating accounts of the phenomenon of the SCC. One available interpretation of the SCC phenomenon treats the court and its accouterments as a full-fledged EU transplant without the necessary predicates in the institutional and legal structure of the Bulgarian judiciary. Such an account could draw on the significant borrowing that Bulgarian policymakers engaged in while preparing the draft laws for the SCC. Any benefits derived from specialization that the CVM suggested were voided by the excision of key provisions of the CPC in the final passage of the law.[167]

Furthermore, the parliamentary struggle and disapproval of the members of the bar arguably led to significant reform fatigue. One reflection of this was the decision of the SJC, in a new composition since its term ended in October 2012, to abandon a committee existing in the previous composition of the council dedicated to monitoring and reporting to the EU Commission on a list of open cases deemed to be of high public interest. In accounting for the elimination of the committee, the new SJC members cited to the fact

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[165] Georgi Ushev, Doklad za Deinosta na Specializirania Nakazatelen Sud prez 2012 godina [Report on the Activity of the Specialized Criminal Court in 2012], March 22, 2013, *available at* http://spcc.bg/news/%D0%BD%D0%BE%D0%B2%D0%B8%D0%BD%D0%B0-36/.

[166] Amidst wide-spread protests against unexpected hikes in the price of utilities such as gas and electricity, the GERB government disbanded its cabinet four months before the regularly scheduled parliamentary elections in June 2013. *See* Matthew Brunwasser, *Resignation Fails to Soothe Bulgarians*, N.Y. TIMES, Feb. 22, 2013, *available at* http://www.nytimes.com/2013/02/22/world/europe/22iht-bulgaria22.html?_r=0&pagewanted=print.

[167] *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism,* at 16-17, COM (2012) 411 final (Jul. 18, 2012) (pointing out the interconnectedness between organized crime and corruption, and the need for organs focused on addressing the two phenomena to operate jointly) [hereinafter, "Commission Report July 2012"]; Technical Update 2012, *supra* note 10, at 32 (pointing out the mixed results of the work of the specialized structures to date, and flagging the potential structural barriers to the effectiveness of the court).

that all cases of high public interest had been transferred to the SCC, which removed the need to specifically track their development or the legitimacy of court- and counsel-imposed delays.[168] Under this model, the limitations on the SCC's independence crucially compromise its overall contribution to the legitimacy of the judiciary: a model court alone and in isolation from the legal system as a whole can not create trust in the court system of a nation.

An alternative view of the SCC is as a defective tool of executive power. As indicated in non-governmental commentaries,[169] the SCC demonstrated the government's power to manipulate the CVM, by freely interpreting recommendations, and distorted the results of the reforms. A recent debate at the European Parliament on the continuation of the CVM signaled that MEPs from all Bulgarian political parties viewed the CVM as an imperfect monitoring tool, which was at best outdated, and at worst manipulated by the national government.[170] In the meantime, the most recent CVM technical update from the July 2012 report conveyed the EC's disappointment that the new court is not focusing on public corruption, but rather only deals with organized crime.[171] The ultimate gold standard of reform success remained the number of convictions, which "remains too low," according to the report.[172]

Bulgarian magistrates' reactions to CVM and the SCC show overall ambivalence coupled with hope that the reports may incentivize the

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[168] MEDIAPOOL, Noviat VSS Svali ot Specialen Otchet Obshtestveno Znachimite Dela [The New SJC no Longer to Report on Criminal Cases of High Social Significance] (Oct. 10, 2012), www.mediapool.bg/news/print_p/198273.

[169] *See, e.g.*, YORDANOVA & MARKOV, *supra* note 97, at 121 (evaluating issues with the new court that the Constitutional Court considered and disposed of).

[170] Remarks by Adrian Severin & Ioan Mircea Paşcu, Cooperation and verification mechanism: methodology, current application and its future, EUR. PARL. DEB. (____) 169, 171, 178, (March, 13, 2013).

[171] Technical Update 2012, *supra* note 10, at 32 (pointing out the exclusion of corruption crimes from the competence of the new court and suggesting that perhaps that could be changed by amending the Criminal Code). The Commission also remarked in the political portion of the July 2012 report that:

> [The] new specialised structures at the level of . . . prosecution and court illustrate a commitment to adapting structures to tackle organised crime. However, so far, they have not yet been able to prove their effectiveness in the successful investigation, prosecution and trial of important cases. With very few exceptions, the specialised court has decided so far only minor cases as the underlying legislation does not allow the court to prioritise on the most important cases. [footnote omitted] This is accentuated by the staffing constraints on both the prosecution and the court. *Another important weakness of the law is that it does not allow the court to pursue corruption offences which are in reality often linked to organised crime*.

Commission Report July 2012, *supra* note 163, at 12 (emphasis added).

[172] *Id*.

government to continue with the reforms.[173] Of note, however, is the attitude prevalent among the justices on the Supreme Court of Cassation and other magistrates higher up in the system who responded in a recent survey by the Justice Development Foundation, that the Commission reports simply rephrased the political reports fed to them by the cabinet. The implication there is that the influence of the Bulgarian government was, once again, undue, and that certain members of the executive "plant[ed] ideas," which were then taken up in the CVM reports. The report's authors remark that very few of the magistrates surveyed were familiar with the technical reports issued by the Commission.[174]

Neither of these two alternative assessments arrives at a positive evaluation of judiciary reforms mediated by the Brussels-led CVM. The net value added by the SCC is not yet quantifiable, but the process of its creation should lead to several insights on the risks and promises of outside developmental aid of a country's rule of law, such as the regular reports provided by the CVM. One insight, which replicates abundant empirical and theoretical reports on legal developmental aid,[175] is that legal transplants in the judiciary and legislative arenas are rarely unproblematic, and cannot be evaluated until years after their assimilation by the receiving legal system. The second, and more specific insight, is that the EU's post-accession conditionality mechanisms can be appropriated by national governments, such as that of Bulgaria, to serve political ends that differ from or conflict with the ideal of an independent, accountable and legitimate judiciary system.

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[173] JDF, *supra* note 49, at 31.

[174] *Id.*

[175] *See, e.g.*, STEPHEN HUMPHREYS, THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE, at 188, 197-199 (2010); Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L.J. 209, 239 (2011).