

# Current Political Situation in Bulgaria and the Risk of Constitutional Crisis - facts and prognoses

# I. INTRODUCTION

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Bulgaria has fallen into an unprecedented situation unknown to the country's modern history, due to the two parliamentary elections held until July 2021 and the potential for third snap elections in the same year or in the beginning of 2022. What is problematic in this case is not only the inability of the parties represented in parliament to form a majority so that they can guarantee a stable government, but also the less obvious risk, which is likely to happen: the fragmented 46th National Assembly (NA) and the lack of predictable long-term majority in it (the perspectives in front of a future National Assembly after potential snap elections seem pretty similar) might become an overall challenge to maintain the balance between the most important institutions of Bulgaria - the constitutionally regulated ones.

In the case of Bulgaria, under normal conditions, the term of the collective body of the Executive – the Council of Ministers (CM) is 4 years. It is in a direct functional dependence on the NA's mandate, which has the same length. On the other hand, the mandate of the governing authority of the Judiciary - the Supreme Justice Council (SJC), constructed partially by the National Assembly and the other judicial bodies, is 5 years. The same length is implied also for the appointed by the NA Chief Inspector of the SJC's Inspectorate, while the regular inspectors (also elected by the NA) have 4 years term in service. The mandates of the President of the Supreme Court of Cassation (SCC) and the President of the Supreme Administrative Court (SAC) both appointed by the President of the Republic of Bulgaria upon the proposal from the SJC, is 7 years.

The Constitution of the Republic of Bulgaria, adopted in 1991, implies two main instruments in ensuring the balance between the three branches of power when it comes to their cadre constitution. First, the Constitution sets different mandates length for the various bodies in order to establish institutional continuity independent from the electoral cycles. Second, the Constitution guarantees the principle of checks and balances by empowering different authorities to elect and control the collective bodies.

Seven years is also the mandate of the Prosecutor General, who is also appointed by the Bulgarian President, while the mandate of the President himself is 5 years. The judges of the Constitutional Court (CC) have the longest term of office - 9 years. However, the CC's composition is a function of the NA, the President and the supreme courts of Bulgaria, as each of these bodies has its quota of judges to choose and appoint. In addition, the CC judges coming from the different quotas are not elected simultaneously, but every 3 years according to the respective law.

The balance between the key institutions in Bulgaria is getting even more complex in the situation of political parliamentary crisis i.e., when the NA is unable to form a stable majority and appoint a working cabinet, the President has the right, related to the Executive branch, to appoint a caretaker government. The President schedules the NA's elections and he/ she also participates in the process of forming the regular Council of Ministers as he/ she is the one officially handing over the mandate to the political parties. On the other hand, the National Assembly is the only body having the right to set the date for the presidential elections.

**What could happen in case of a chronic political crisis? Is the briefly described complex mechanism that must guarantee stability, independence and in addition to that, maintain the balance between the various national supreme bodies, stable enough? Is it possible that the vacuum in the legislative body, if it continues for too long, to affect the assembling of some of the key institutions in the state? Could it happen that the mandates of several institutions expire at the same time thus, leading to a mutual blocking? If such hypothesis is possible, how would this affect the legitimacy of the bodies in question?**

To answer all these questions, we have to dwell in more detail on some of these authorities and how their personnel constitution looks like in the light of the current creeping crisis (early August 2021).

## II. PRESIDENT OF THE SUPREME COURT OF CASSATION - MANDATE, ELECTION AND THE ELECTION OF PRESIDENT OF REPUBLIC OF BULGARIA

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### II.1. Supreme Court of Cassation (SCC)

The SCC is the highest judicial instance in Bulgaria exercising supreme supervision over the decisions of the district and appellate courts. Its core task is to ensure the equal application of the law and the legality of the judicial decisions. The SCC judges are divided into 3 colleges - criminal, civil and commercial. Each college has its chair, who is also a Deputy chair of the SCC. The term of office of the SCC's President is 7 years and he/ she is appointed by the President of the Republic of Bulgaria, upon proposal from the Supreme Judicial Council.

The President of the SCC is a member of the SJC by right and his main functions are managing the sessions of the SCC plenary as well as supervising the organizational management of the court's work. The President can also request the issuing of interpretive decisions in the cases of contradictory case law. The first chairman of the SCC was Sergey Lukyanov (1878-1879), who was a main actor in the establishment of the court system in Bulgaria.

### II.2. Present President of the SCC

**The present President of the SCC is judge Lozan Panov, who took office on February 10th 2015. He was nominated by 5 SJC members:**

- Georgi Kolev – President of the Supreme Administrative Court at that time
- Dimitar Uzunov
- Galya Georgieva
- Milka Itova
- Svetla Petkova

During the election procedure judge Panov received the required 17 votes to legitimate his election. After submitting the proposal to the then President of Bulgaria - Rosen Plevneliev, he appointed judge Panov for the position with Decree No. 10/ 2015, promulgated in S.G., issue 10 on February 6<sup>th</sup>, 2015.

**His mandate expires on February 10<sup>th</sup>, 2022.**

## II.3. Rules for the election of SCC's President

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The current rules for the election of the SCC President are regulated by SJC Decision under Protocol No. 48 / 08.11.2012; amended and supplemented with decision Protocol No. 32 / 10.07.2014 and Protocol No. 10 / 16.03.2017). According to art. 173 from the Judicial System Act (JSA) some of the more important accents in this procedure are:

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- The procedure for electing candidates for the position of the SCC President is initiated by the SJC plenary not earlier than 6 months and not later than 4 months before the mandate's expiration.
- Nominations can be made by not less than 3 members of a respective SJC college (in this case the college of the Judges), by the Minister of Justice as well as by the plenary of the SCC.
- The proposals are submitted in writing accompanied by detailed reasons for the election of the nominated candidate and with attached personnel reference. The stated reasons indicate considerations on the candidate's personal and professional qualities.
- The candidates have to submit a written concept about their work within 14 days after the expiration of the deadline for the nominations. The concept paper must include: personal motivation, analysis and assessment of the SCC's state, outlining the achievements and problems of the SCC's work to date, setting development goals and describing the measures to achieve them.
- Candidates must have at least 12 years of legal experience.
- After the submission of the required papers, candidates are admitted to a hearing in the SJC.

- Each member of the SJC can make a statement on the candidate's presentation.
- The SJC plenary elects a candidate by a majority of no less than 17 votes.
- The SJC plenary drafts and submits the proposal to the President of the Republic of Bulgaria for the appointment of the elected candidate on the grounds of Art. 129, para. 2 of the Constitution. Submitting the decision for the election of the candidate with a majority to the President must be performed immediately, according to the changes in art. 173, para. 11 in JSA from 2019.

The President can refuse to appoint the candidate, proposed with the decision by the SJC's plenary

- In that case, a new procedure is being conducted, following the same rules, unless the newly made proposal of the SJC's plenary is for the same candidate.
- **The President cannot refuse the appointment in the event of a repeated proposal. It is important to note that the President doesn't have a time limit to sign the Decree for appointing the SCC's chairman.**

## II.4. The role of the SCC President in the SJC

The SJC is comprised of 25 members who organize and exercise the administrative management of the Judiciary. Their distribution is as follows - 11 members are elected by the National Assembly or the so called parliamentary quota. These members are elected by a majority of  $\frac{2}{3}$  of the members of the parliament. The assemblies of all judges, prosecutors and investigators directly elect the other 11 members. The remaining 3 members are members by right - the President of the SCC, the President of the SAC and the prosecutor general. The mandate of the elected members is 5 years, while the term of the *ex officio* members is 7 years. The current SJC commenced its service on October 3<sup>rd</sup>, 2017. For the sake of completeness, it's worth noting that the Minister of Justice also participates in the SJC's activities by calling off and chairing the meetings of the SJC's Plenary and setting the SJC's agenda. However, he does not have the right to vote.

The Judges college at the SJC is presided by the President of the SCC. The college consists of the 6 members, elected by the National Assembly, 6 elected by the judges, as well as of the SAC President.

During his time in office, judge Panov has repeatedly criticized the work of the SJC. In his opinion, the SJC's structure has an inherent corruption potential and the majority of the members are unwilling to work for the actual protection of the judiciary and its guaranteed independence, as this is the SJC's core calling set in the Constitution and in the JSA.

## II. 5. Presidential elections and the forthcoming election of the SCC President.

As the term of office of the Chairman of the Supreme Court of Cassation expires on February 10<sup>th</sup>, 2022, the opening of the new election procedure for the next one should start at the earliest on August 10<sup>th</sup>, 2021 (at the time of the preparation of the current analysis, this date has already passed and the SJC has not opened the procedure), and not later than October 10<sup>th</sup>, 2021. At the same time, the term of the President of Republic of Bulgaria is expiring on January 22<sup>nd</sup>, 2022, and the Presidential elections should be held in the autumn of 2021. Their date is set by the NA (until now the elections are usually held in late October or in early November).



There is still no scheduled date for the Presidential elections, but they are expected to be held in October 2021. [1] In addition to that, according to art. 93 para. 5 of the Constitution, the Presidential elections should be held not earlier than 3 months and not later than 2 months before the expiring of the current President's mandate. On that note, the Presidential elections of 2021 are to be held between October 22<sup>nd</sup> and November 22<sup>nd</sup>. The various procedural deadlines are shown in the attached timeline (see Appendix 2).

It can be concluded that the procedure for the election of the SCC President has relatively clear development and deadlines. Usually the SJC prepares an infographic, determining the time windows of the procedure's various stages. The unknown aspects of the procedure are the lack of information for what/who and how many the candidates will be and what the President's reaction will be at the final stage of the procedure, namely the issuance of a decree for the appointment of the SCC President elected by the plenary of the SJC.

It could be possible, in theory, to have an overlap of the procedure for the election of the SCC President and the forthcoming Presidential elections. However, this should not have a negative impact and lead to a Constitutional crisis. The SJC cannot delay the process to inform the President for the elected candidate after the vote, as according to Art. 173 para. 11 of the JSA the President must be immediately notified about the elected candidate. Thus the hypothesis that the SJC would use various procedural techniques to wait for the end of the Presidential elections, in case the current President disapproves the elected candidate, drops out.

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[1] <https://bntnews.bg/news/prof-kirov-ako-parlamentat-ne-glasuva-data-za-prezidentski-izbori-mozhe-da-se-stigne-do-konstitucionna-kriza-1162367news.html>



It's possible, in the course of the procedure, to shorten or respectively to prolong the term for submissions of nominations, as according to Art. 173, Para. 3 of the JSA, the nominations are made in 4 consecutive sessions, following the one at which the decision to start the election procedure has been taken. The JSA does not tell, however, whether these should be regular or extraordinary sessions, thus, leaving some flexibility at this stage of the procedure. Now, the main ambiguity is the voting date for the candidates, nominated by the SJC's plenary, as the law does not provide for a deadline. As it was mentioned earlier in the analysis, the ambiguity can be eliminated with the infographic, published by the SJC.

Due to the lack of clarity on the formation of a regular cabinet and the length of existence of the current parliament, when the mandate-holder is one of the parliamentary presented parties, **it must be indicated that there shouldn't be any impact on the procedure for the election of the SCC President. There will be an exception if a working National Assembly submits and adopts changes in the JSA, affecting the procedure for the election for the SCC President by the SJC's plenary.**

This hypothesis should also be considered in the context of the possibility of third parliamentary elections within one year - 2021. According to Art. 99, para. 7 of the Constitution, the President cannot dissolve the National Assembly in the last three months of his term, but can only appoint a caretaker government. In such a scenario, there is a possibility for a working National Assembly even after October 22<sup>nd</sup>, 2021, which can submit changes in the JSA that might influence the election of a SCC President. These changes can be related to the parliamentary quota of the SJC and can potentially lead to the election of 11 new members from this quota, so that they finish the term of the current SJC and participate in the election procedure for new SCC President.

## **II. 6. Date of the Presidential elections and the hypothesis for a constitutional crisis**

The last hypothesis that could lead to the most significant procedural problem and an actual constitutional crisis is the impossibility for scheduling a date for presidential elections on behalf of the National Assembly. In such a case, the candidate for the SCC President, elected by the SJC plenary couldn't be appointed by the incumbent President.

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This hypothesis would be possible in the following situation:

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1. Impossibility for the current 46<sup>th</sup> National Assembly to work after the procedures for handing over of a mandate to 3 parliamentary represented parties.

2. Lack of a scheduled date for the Presidential elections from the National Assembly before the President dissolves it.

3. Appointing a caretaker government by the President. Inability of the National

4. Assembly to schedule a date for the Presidential elections up to 60 days before election day, as required by Art. 4, para. 4 of the Election Code. The last possible day for scheduling a date for the Presidential elections is September 22<sup>nd</sup> , 2021.

Eventually, the lack of clarity for the date of the Presidential elections after September 22<sup>nd</sup>, 2021 can lead to a constitutional crisis, because the Constitution itself did not foresee such a scenario. To avoid this hypothesis, the 46<sup>th</sup> National Assembly must schedule a date for the Presidential elections!

### III. CONSTITUTIONAL COURT OF THE REPUBLIC OF BULGARIA AND THE APPOINTMENT OF THE NEXT 4 CONSTITUTIONAL JUDGES

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#### III.1. The Constitutional Court (The CC) of the Republic of Bulgaria

The work of the Constitutional Court of the Republic of Bulgaria is described in detail and regulated by several sources of our national law - the Constitution of the Republic of Bulgaria, the Constitutional Court Act, the Regulation on the organization and activity of the Constitutional Court, as well as in other normative acts.

The CC is comprised of 12 judges. One third of them are elected by the National Assembly, one third - by the President and one third by the General Assembly of the judges from the SCC and the SAC. The appointed judges elect among themselves a chairman of the CC for a term of 3 years. He/ She can be reelected. For members of the CC can be elected, respectively appointed Bulgarian citizens, with no other citizenship who are fulfilling the requirements of **art. 147 Para. 3 of the Constitution** - they have to be individuals with legal education and high professional and personal qualities, and with at least 15 years of legal experience.

Their mandate is 9 years and they are not limited by their age. The judges cannot be reelected. The **Constitutional Court composition is renewed every 3 years** from each quota. During the first mandate, after the expiration of the third and after that of the sixth year, the composition is renewed by drawing lots. By each next renewal, 4 judges are leaving the court and 4 new ones are being elected/nominated.

#### III.2. Organisation and mandates

Until the end of 2021 and early 2022, 4 new constitutional judges should be appointed, as their mandates are expiring. Two of them were elected by the 41<sup>st</sup> National Assembly - Anastas Anastasov and Grozdan Iliev, one was elected by the General Assembly of the judges of the SCC and the SAC - Georgi Angelov, and the fourth - Boris Velchev, who is also the chairman of the Constitutional Court, was appointed by the President in 2012.

Quota of the 41st NA - Anastas Anastasov, elected in November, 2012 (elected with regular procedure - S.G., issue 85, p. 4 from November 6<sup>th</sup>, 2012)

Quota of the 41st NA - Grozdan Iliev, elected on February 22<sup>nd</sup>, 2013 (he is elected later - S.G., issue 19, p. 4 from February 26<sup>th</sup>, 2013 - due to a case for trading in influence and money laundering, related to the nominated and almost appointed before him Veneta Markovska, whose oath was spoiled in the Constitutional Court with an unprecedented act of the Head of state)

Quota of the General Assembly of the judges of the SCC and the SAC - Georgi Angelov, (before that he was a judge at the SAC) appointed in November 2012 - Decision № 2 from September 24<sup>th</sup>, 2012 and S.G. issue 75, p. 61 from October 2<sup>nd</sup>, 2012.

Quota of the President of the Republic of Bulgaria (President at the time - Rossen Plevneliev)- Boris Velchev - current chairman of The Constitutional Court, appointed in November, 2012, Decree №384 and S.G., issue 85, p. 6 from November 6<sup>th</sup>, 2012.

The inauguration of the constitutional judges happens after taking an oath **within a week of their appointment or election**, in the presence of the Head of the NA, the President of the Republic and the Presidents of the SCC and the SAC. The act of election and appointment is promulgated in the State Gazette **within 15 days**.

The first session of the CC, at which the judges elect their chairman, is moderated by the oldest judge. The chairman is elected in accordance with art. 147, Para. 4 of the Constitution and for him to be elected, he must have received the support of more than half of all the judges.

In case none of the candidates has received the necessary majority after the first ballot, a second one must be held between the two candidates who have received the most votes. After the second ballot, the elected candidate is the one who has received the majority of the votes. If there is a tie - the one with the longer professional experience, and in case of equal experience - the older candidate should be elected. The CC cannot function without a chairperson. For this reason art. 8 Para. 2 of the Constitutional Court Act explicitly clarifies that during the absence of a chairman, the oldest judge is serving as a substitute.

### III.3. Chairman and work of the Constitutional Court

The CC chairman has lots of responsibilities, part of which are to:

- Represent the CC;
- Chair the court hearings;
- Manage the budget;
- Delegate the work among the judges;
- Appoint the principal secretary and the court's staff;
- Manage the administrative activities of the court;
- Promulgate the acts of the court, etc.

The Constitutional Court sits in the presence of at least  $\frac{2}{3}$  of the constitutional judges. The CC hears a case in a panel of at least  $\frac{3}{4}$  of all of its members. The CC decisions and rulings are taken by a majority of more than half of all the constitutional judges.

The mandate of the judges can be terminated in accordance with art. 148 of the Constitution. The mandate termination according to Para. 1, item 1 – expiring of the term, which is the case with the four CC judges, is announced by the Chairman of the court. In this case, **when the newly elected or newly appointed judge takes the oath, the process of the mandate termination is completed.** The CC's decisions and rulings for the mandate termination of a judge are being promulgated in the State Gazette within 15 days.

After the expiration of the 3-year-term of the judges, the CC composition is renewed with two representatives from the NA's quota and with one representative from the quota of the President and the Judiciary.

### III. 5. Prognosis in the absence of a working National Assembly

The above has to be taken into consideration in the current uncertain political reality - diverse political representation and instability when it comes to the mandatory forming of a cabinet. Without a functioning National Assembly, the two constitutional judges who should take the place of Anastas Anastasov and Grozdan Iliev can neither be elected, nor inaugurated, because the swearing-in ceremony should be attended not only by the President, but also by the Head of the NA and by the Presidents of the SCC and the SAC. At the moment of the expiration of their term, the National Assembly should function, but this depends strictly on the existence of a functioning parliament per se. Furthermore, the existence of a working parliament depends on the forming of a stable government, not a caretaker one, as it is the situation now.

In addition, unlike other positions where it is possible to extend the term of office until the election of new persons, this is not the case for the judges of the CC, because the relevant text of the Constitutional Court Act has been declared unconstitutional by Decision № 1 of the CC from 2006.

In addition, compliance with the mandates is important, as 3 months before their expiration, the CC chairman suggests to the Head of the NS, the President of the Republic and the Presidents of the SCC and the SAC to elect and respectively appoint new judges. As it was already stated, the first mandates of the constitutional judges expire in October and November 2021, therefore this 3-month deadline starts from August 1st, 2021. The fate of the 46<sup>th</sup> NA is still unclear.

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## There is another hypothesis.

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It is possible for the 46<sup>th</sup> NA to function long enough, but with low levels of productive communication among the various political parties. In this case, can the parliament secure a  $\frac{2}{3}$  majority to elect constitutional judges, as it is required by the Constitution of the Republic of Bulgaria? This can be the first very serious test of the current parliament, in case the parties, despite their differences, manage to form a cabinet.

The situation gets even more complicated to predict if we add the forthcoming Presidential elections, since the President also elects a constitutional judge, and along with that, he can appoint and dissolve every newly formed National Assembly, and attends the swearing-in ceremony when the new constitutional judges come into office. This cluster of so many constitutionally regulated and mutually conditioned deadlines in the present political situation naturally raises the question of a potential constitutional crisis linked to them.

Given the current situation, a scenario without a functioning National Assembly and an expiring deadline for the election of the CC judges from the parliamentary quota, seems completely realistic.



**Some of the possible future developments are:** Currently, Bulgaria is governed by a caretaker government. It has to resign at the 46<sup>th</sup> NA (Para. 111 of the Constitution of the Republic of Bulgaria) when there is a regular cabinet formed. In case we face the same situation as it was after the April 2021 parliamentary elections, namely after the presentation of all three terms by the President, the National Assembly again fails to form a government, then with a new decree, the President of the Republic will form a new caretaker government or will keep the current caretaker government working until the holding of a potential third for 2021 parliamentary elections. If all the three attempts to form a government are unsuccessful, according to the Constitution of the Republic of Bulgaria, the date for the next elections (third election procedure for the year) would depend solely on the President. The President is not limited by a deadline to hand in the mandate for forming a government to the two biggest political parties. However, he is limited by his own mandate.

At the same time, he can find himself in a situation where there is a functioning parliament and a caretaker government, appointed by him, which from a purely pre-election point of view is not the tactic for him.

In case of new parliamentary elections, realistically they will be held not sooner than early October 2021. According to the Constitution of the Republic of Bulgaria and the mandate of the current President - Rumen Radev, the presidential elections should be held between October 22<sup>nd</sup> and November 22<sup>nd</sup>. **As a result, it can happen that the new snap parliamentary elections can be on the same date as the presidential ones. The latter will not lead to a constitutional crisis, but it will make for sure the political reality even more complicated.** Whether such coincidence of the two elections has the potential to reformat the political picture is a matter of another type of analysis. There is one important detail in this equation - the National assembly sets the date for the Presidential elections. Will the current 46<sup>th</sup> NA have the political willpower to set the date in case of its too early dissolution?

In order to avoid the deepening of such a type of political crisis, there is an exit mechanism in the Constitution. Three months before the expiration of the President's term, the functioning NA cannot be dissolved. Therefore, the NA cannot be dissolved between October 22<sup>nd</sup> and January 22<sup>nd</sup>, 2022, when the term of President Rumen Radev expires. As stated above, in such case, the state may enter into the hypothetical situation, where the President governs the executive branch of power through the caretaker government, appointed by him, but we also have a functioning National Assembly. The constitutional crisis could happen if the 46<sup>th</sup> NA or the newly elected one, for some reason, does not set a date for the Presidential elections. Such a development does not seem realistic, but if it somehow becomes more visible, the reason for this would be mostly malicious.

How could the crisis in the NA affect the Constitutional Court, in case there is no functioning National Assembly when the deadlines for the election of constitutional judges expire?

- Here we address a situation in which the National Assembly is not dissolved, because if it is, there is no way for the newly appointed constitutional judges to take the oath. If we follow the Constitutional Court Act, the CC judges will be able to exercise power, but limited, as they need at least 7 people to attend the sessions and issue decisions, but at least 8 to hear cases.
- Another important detail, worth mentioning, is that without its chairman the CC cannot function. The current chair is Boris Velchev, whose term also expires, and he has been appointed by the President. **In the event of a hypothetical absence of the chair, the oldest judge on the panel, who is currently Mariana Karagiozova-Finkova,** will replace him (Grozdan Iliev is older than her, but his term ends in early 2022). Therefore, the Constitutional Court will be able to become operational only after the election of a new chairperson.
- In order to sit, the Constitutional Court needs the presence of 2/3 of its members, which is equal to at least 8 people out of 12.
- For the sake of completeness, it should be mentioned that in charges against the President or Vice-President of the Republic, the CC should be in a panel of at least  $\frac{3}{4}$  of all of its members, which is equal to at least 9 members (art. 24 CCA). This is also possible, taking into account the later deadlines concerning Grozdan Iliev (he has been appointed almost 4 months later).
- Decisions and rulings are taken by a majority of more than half of all judges, which means a minimum of 6 people majority, and under the hypothetical conditions that are addressed, this is also possible.
- The future of the Constitutional Court's work seems to become unclear, as it strictly depends on its composition and the lack of judges and of a chairperson of the court may affect it to such an extent that the CC will not be able to function.

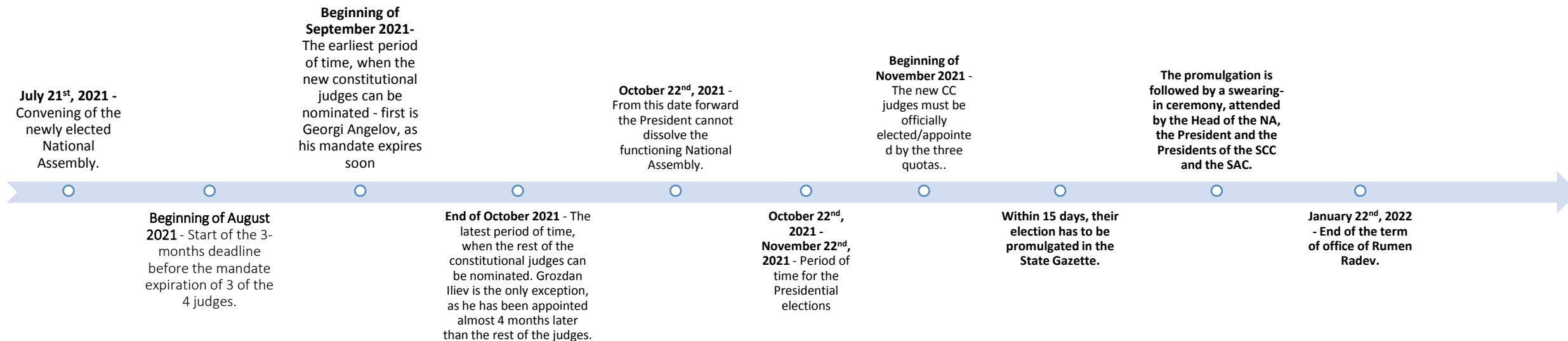
## IV. CONCLUSION

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The considerations proposed in the current analysis reflect the political mood at the beginning of August 2021. They do not in any way foretell that the political subjects, as well as the current bodies of the various authorities in Bulgaria are purposefully leading the country to a crisis, much less to a constitutional one. However, the approaching of many constitutionally set deadlines in a short period of time, when the most important institution in the country - the National Assembly, shows a weakness in the formation of a clear and lasting majority, give food for thought.

The loudly proclaimed "restoration of parliamentarism" currently remains only in words and it leads to disappointment among voters, which in the third parliamentary elections in one year will most likely result in an even lower turnout. **This will lead to a low legitimacy of the newly elected institutions and a weak political will for the constructing of multiple key bodies for the judiciary and society, which in turn, will have a negative impact on the overall functioning of the democratic processes.**

## Appendix 1



# Appendix 2

